# STATE OF MICHIGAN

# COURT OF APPEALS

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BRIAN M. COHEN,

Plaintiff/Counter-
Defendant-Appellant,

and

MR. ALAN'S MEN'S BOOTERY,

Plaintiff-Appellant,

v

NEW YORK LIFE INSURANCE COMPANY,

Defendant/Counter-
Plaintiff-Appellee.

UNPUBLISHED

No. 171064
LC No. 92446702 CZ

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BRIAN COHEN,

Plaintiff/Counter-
Defendant-Appellee,

and

MR. ALAN'S MEN'S BOOTERY,

Plaintiff-Appellee,

v

NEW YORK LIFE INSURANCE COMPANY,

Defendant/Counter-
Plaintiff-Appellant.

No. 173296
LC No. 92446702 CZ

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Before: Wahls, P.J., and Reilly and O'Connell, JJ.

O'CONNELL, J. (dissenting.)

I respectfully dissent. Defendant presented evidence that plaintiff failed to disclose 136 consultations with psychologist Dr. Paul Jacobs for psychotherapy purposes, and failed to disclose consultations with psychologist Dr. Alicia Tisdale for other purposes. Plaintiff presented no competent countervailing evidence.[1] Given a proper presentation of the policy language, I believe the average person, see *New York Life Ins Co v Modzelewski*, 267 Mich 293, 296; 255 NW 299 (1934), would conclude that repeated treatment by a psychologist for purposes of psychotherapy constitutes consultations with a medical practitioner "for any reason." Therefore, summary disposition pursuant to MCR 2.116(C)(10) was appropriate.

The trial court, in granting defendant's motion, reasoned as follows:

> I think the big issue is whether or not there was some failure to actually disclose and there was some, I don't want to call it fraud, maybe we'll call it something else here, just failure to actually disclose and we deal with semantics in a lot of ways, but I think a man, an adult individual, he knows what he is doing on these insurance applications. I see them not daily but almost daily here in my work and some folks tend to try to skate around them one way of the other and I think this was the case sir and I appreciate your concern for your client and the work you put in this matter, but I am going to grant the relief that has been prayed for in this matter.

I agree with the trial court's deft summation of the issue and the trial court's conclusion.

I would affirm the trial court in both Docket Nos. 171064 and 173296.

/s/ Peter D. O'Connell

[1] Jean Casagrande, in the letter upon which plaintiff relies, assumes hypothetical facts not presented by the insurance policy. In paragraph D, Casagrande writes "Excluded [from the meaning of the word practitioner], therefore, is the stamp collecting practitioner and the psychologist – neither of whom would be considered the right practitioner for a *physical*, *even a routine physical*, by any reasonable patient" (emphasis supplied). However, the policy language makes absolutely no mention of a *physical* examination. Rather, the policy uses much broader language, providing that all *consultations* "for any reason" must be disclosed, "including routine or checkup examinations." Clearly, there is no requirement that the consultation be a physical examination. Because Casagrande's paragraph D rests only upon hypothetical facts as opposed to evidentiary material, Casagrande's conclusion, resting only

upon hypothetical facts, may not properly be considered by the court in a motion for summary disposition brought pursuant to MCR 2.116(C)(10).