STATE OF MICHIGAN

COURT OF APPEALS

SANDRA BROWN,

Plaintiff-Appellant,

v

NORTH AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 21, 1997

No. 199907
Genesse Circuit Court
LC No. 95-038086-CK

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a March 20, 1996 order granting partial summary disposition to defendant pursuant to MCR 2.116(C)(10) and a July 29, 1996 order granting summary disposition for the remainder of plaintiff's claim. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff purchased an automobile on June 18, 1991. At the same time, she purchased credit disability insurance, which would cover the automobile payments in the event that plaintiff became disabled. The policy provided:

> TOTAL DISABILITY - For the first 12 months from the time Total Disability begins, such Disability means that as a result of bodily injury or sickness, you are prevented from performing the principal duties of your occupation at the time such disability began. After that it means any occupation for which you are reasonably suited by education, training or experience. Disability must start during the term of this Certificate and result from bodily injury or sickness for which you are being treated by a licensed physician other than yourself . . .

An insurance policy must be enforced in accordance with its terms. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. If, however, a provision in an insurance policy

is ambiguous, the ambiguity must be construed against the insurer and in favor of the insured. *Id.* Courts must be careful not to read an ambiguity into a policy where none exists. *Id.*

The provision in the policy contains two distinct standards; one for the first 12 months and another for the remaining period. For the first 12 months, disability is defined as being disabled "from performing the principal duties of your occupation at the time such disability began." Plaintiff presented evidence that she was prevented from performing the principal duties of her occupation at the time her disability began. She testified that her normal occupation included building and installing hood latches and horns on vehicles. She further testified that she needed to use a torque gun and a table press in order to do her job. After complaining about her hand on July 10, 1991, she was restricted in her duties until her employer informed her that it had no more work available for her. On this record, we find that there is a question of fact as to whether plaintiff was disabled from performing the principal duties of her occupation such that she was entitled to benefits in the first twelve months. Therefore, the trial court erred in granting summary disposition in favor of defendants on plaintiff's claim for benefits in the first twelve months.

With regard to the remaining period, the policy was clear that plaintiff would not be entitled to benefits unless she was disabled from performing "any occupation for which" she was "reasonably suited by education, training or experience." Defendant offered evidence that plaintiff could work in a job for which she was reasonably suited by education, training or experience. It offered the company doctor's written statement that indicated that plaintiff was able to engage in employment with restrictions. It further offered evidence that plaintiff had attended vocational rehabilitation and was qualified for numerous office or clerical type positions. Defendant also offered evidence that plaintiff believed that she was capable of working if given the opportunity or if there was restricted work available.

However, plaintiff offered contradictory evidence that one physician had declared that she was "wholly and permanently prevented from engaging in any occupation or employment for wage or profit as a result of bodily injury or disease, either occupational or non-occupational in cause." Although the physician had evaluated plaintiff in the context of her appeal with regard to General Motors disability pension and retirement, his report was relevant to plaintiff's physical condition. His findings were not limited to her ability to work at General Motors. Moreover, we disagree with defendant that the physician's report and ultimate determination that plaintiff was disabled for purposes of General Motors pension plan were not relevant to this case. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In this case, the physician's report and ultimate determination is relevant to whether plaintiff is able to engage in any occupation or employment which is suited to her education, training and experience. The fact that General Motor's found her to be disabled is not dispositive and defendant is not bound by that determination. However, the report upon which the determination was made creates a question of fact as to whether plaintiff was disabled from all employment.

In order to survive summary disposition, plaintiff was required, by affidavits or other documentary evidence, to set forth facts showing that there was a genuine issue for trial. *Fulton v*

Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). She did so by providing a physician's report and ultimate determination that plaintiff was disabled from all gainful employment. At trial, plaintiff could present the report and call the physician, who is listed on her witness list, to testify that plaintiff could not engage in any gainful employment. Giving the benefit of reasonable doubt to plaintiff, a record could be developed which would leave open an issue upon which reasonable minds may differ. *Id.* Therefore, summary disposition was not appropriate.

Plaintiff also argues that the trial court erred in failing to grant her motion for reconsideration. In light of our resolution, we need not address the issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff