1969

Myrl Wells v. Blue Shield of Utah : Brief of Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MYRL WELLS,
Plaintiff and Respondent,

vs.

BLUE SHIELD OF UTAH,
Defendant and Appellant.

Case No.

BRIFF OF APPELLANT

Appealed from the District Court of Box Elder
State of Utah
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BLUE SHIELD OF UTAH,

Defendant and Appellant.

Case No. 11871

BRIFF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Action by plaintiff to recover benefits claimed under a medical prepayment contract issued by defendant.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant seeks reversal of the Judgment in plaintiff's favor and an order of this court directing the court below to enter judgment in favor of defendant.

STATEMENT OF FACTS

The case came before the court on August 12, 1969, on a Motion for Summary Judgment filed by defendant and for trial. Defendant's Motion for Summary Judgment was denied (TR 23). Submitted with said motion and received

in evidence by the court was the medical prepayment contract issued by defendant (Exhibit "A," TR 24). On motion of the plaintiff, plaintiff's deposition was also received in evidence as part of plaintiff's case (Tr 24). Portions of this desposition were read in evidence.

Upon the denial of defendant's motion for summary judgment plaintiff made an oral motion for judgment based upon the pleadings and the evidence inasmuch as no further evidence was required for determination of the case; and defendant stipulated that said motion might be considered immediately without notice. The court granted the motion of the plaintiff and ordered that judgment be entered in favor of plaintiff for $780.00 plus costs (TR 23).

Thereafter proposed findings of fact and conclusions of law were signed and entered by the court on or about August 26, 1969, (TR 56-57). Thereupon defendant filed a motion under rules 52B, 59A and 59E to amend the findings of fact, conclusions of law and judgment, or in the alternative for a new trial (R 60). Defendant's motion to amend was heard on September 9, 1969. The court granted defendant's motion to amend the findings of fact but denied the motion to amend the conclusions of law and judgment (TR 34, 35 and 36). An order granting defendant's motion to amend the findings and amended findings were submitted after Judge Jones' sudden and unexpected death and were signed by Judge Young on September 23, 1969, (R 62, 63 and 64).

On April 16, 1968, plaintiff was injured in an accident at his home in Corinne, Utah, while he was attempting to repair a damaged fuel tank. He was using a jack on the

inside of this tank, when it slipped while under pressure and the handle or some other part of the jack struck plaintiff in the mouth (pl.'s depo. p. 3-4, TR 4-5). This accident broke plaintiff's jaw, knocked out three teeth and broke several other teeth, and forced his teeth into the back of his mouth (pl.'s depo. p. 4 and 5, TR 4).

After the accident, plaintiff was taken by his wife to the office of Dr. H. J. Griffin, where he received some emergency treatment and was then referred to Dr. White, an oral surgeon, in Tremonton, Utah, for hospitalization and treatment of the fractured jaw (TR 5, 6, 7). Plaintiff was under Dr. White's care for about seven weeks until the fracture healed (pl.'s depo. p. 7). After his discharge by Dr. White, plaintiff returned to Dr. Griffin for the dental repairs made necessary as a result of the accident (TR 6-7). Dr. Griffin performed only dental services for the plaintiff (TR 8). Plaintiff submitted to defendant the bill of Dr. White for oral surgical services performed in the treatment of the fracture which defendant paid (TR 7, pl.'s depo. p. 7). When the dental bill of Dr. Griffin was submitted to the defendant, payment was denied on the ground that the contract issued by the defendant to the plaintiff expressly excluded payment for dental services and because Dr. Griffin was not a "participating or non-participating physician" within the terms of the prepayment medical contract held by the plaintiff.

There is no dispute regarding the occurrence of the accident which plaintiff sustained on April 16, 1968, nor is there any dispute that at the time of said accident plaintiff was a subscriber to the contract issued by defendant to

plaintiff about 1965, upon which this suit was brought, or that said contract was in good standing and in full force and effect on the day of the accident (TR 9).

Plaintiff had obtained this contract from defendant through the Farmers' Union of which he was a member (TR 9). The contract was solicited by an agent of defendant (TR 10). There is no evidence and plaintiff was unable to recall the substance of any conversation between him and defendant's agent that preceded the issuance of the contract or of any representations made by said agent with regard to the benefits offered in said contract (TR 10, pl.'s depo. p. 18). He did testify that there were no discussions about the exclusion of benefits from the contract which he could recall (TR 11). Not until after the accident did plaintiff ever read the contract and discover that Article 3B excluded certain benefits and services (TR 11-12). Plaintiff had no recollection of any representations concerning the contract made by defendant's agent (pl.'s depo. p. 18-19). After the contract was delivered to plaintiff, he never read it in any detail (pl.'s depo. p. 20).

In the light of the foregoing facts, it is necessary to consider certain pertinent provisions of the contract between plaintiff and defendant. Defendant's Exhibit "A," about which there is no dispute, in the very first paragraph contains the following pertinent language:

> "This contract * * * entitles the subscriber and family dependents * * * to have, on and after the date membership becomes effective hereunder, *services from the participating physician of their choice.*" (Emphasis added)

Article IE of the contract defines the term "participating physician" in this language:

> "Participating physician shall mean any doctor licensed as a physician and surgeon to practice medicine in all its branches, who by virtue of his stock membership in the Bureau has agreed to render the services provided by this contract."

Article IIA(1) sets out the surgical services the member shall be entitled to receive in this language:

> "The following services, except as limited in Article III hereafter, shall be available to the member * * * when rendered by a participating physician of the Bureau:
>
> "A(1). Surgical services rendered by a participating physician in the treatment of diseases, illnesses or injury. The term surgical services shall mean * * * treatment of fractures and dislocations or orthopedic casting * * *"

Throughout this contract the services to be provided are required to be furnished by "participating physician." In Article IVA of the contract, it is provided that under certain circumstances the services of a "non-participating physician" may be made available. In said Article IVA a non-participating physician is defined as a physician and surgeon "licensed as a physician and surgeon to practice medicine in all its branches.*" Finally, Article IIIB of the contract contains certain exclusions not covered by the contract. Article IIIB(7) says specifically:

> "The services provided by this contract shall not include the following:

"(7). Physician's services for the extraction of teeth or other dental processes."

STATEMENT OF POINTS

POINT I

THE CONTRACT BETWEEN THE PARTIES DID NOT BY ITS TERMS ENTITLE THE PLAINTIFF TO THE BENEFITS SUED FOR IN HIS COMPLAINT AND THE CONCLUSIONS OF LAW AND JUDGMENT OF THE COURT ARE NOT SUPPORTED BY THE COURT'S FINDINGS AND ARE CONTRARY TO THE EVIDENCE.

POINT II

THE CONTRACT BETWEEN THE PARTIES WAS NOT AMBIGUOUS.

ARGUMENT

POINT I

THE CONTRACT BETWEEN THE PARTIES DID NOT BY ITS TERMS ENTITLE THE PLAINTIFF TO THE BENEFITS SUED FOR IN HIS COMPLAINT AND THE CONCLUSIONS OF LAW AND JUDGMENT OF THE COURT ARE NOT SUPPORTED BY THE COURT'S FINDINGS AND ARE CONTRARY TO THE EVIDENCE.

It is a well established principle in this State that the

lower court's findings must be supported by the evidence. *Thomas v. Clayton Piano Co.*, 47 Utah 91, 151 P. 543. The appellant contends that the trial court's findings are not supported by the evidence even when the evidence is viewed most favorably for respondent.

The defendant has never disputed the existence of a valid contract or that it was in force on April 16, 1968, so as to entitle the plaintiff to the benefits thereby provided; nor has the defendant ever asserted or claimed that the plaintiff did not sustain injuries in an accident which made necessary the services of a dentist as shown by the evidence in this record. However, defendant earnestly contends that the fact that plaintiff sustained such injuries in an accident on that date did not entitle him to the services of a dentist. It was for such services that the plaintiff instituted this action. Nowhere in the record in this case did plaintiff point out that the express provisions of the contract entitled him to the benefits of dental services; and it is only by construction, which the plaintiff contends must be applied to the contract, that the contention can be supported that the contract does provide for dental benefits. It is undisputed in the record that Dr. H. Jay Griffin, who rendered the service, for which plaintiff brought this action, was a dentist and that the only service which he performed for plaintiff was dental service (TR 6, 7-8). No contention is made that Dr. Griffin was a participating physician within the definition of Article IE of the contract and the court specifically found that he was not (R 23). Any other finding by the court would have been contrary to all the evidence in this record. Nor is there any evidence in the record to support a contention, and none was claimed by

plaintiff, that defendant ever represented that the contract sued upon included dental services or that such a representation was used to induce the plaintiff to accept the contract.

As defendant has already pointed out, the very first paragraph of the contract between the parties specifically provides that the services to be furnished to the plaintiff under the contract were those of a "participating physician" as defined in Article IE as "a doctor licensed as a physician and surgeon to practice medicine in all its branches (Defendant's Exhibit "A"). Furthermore, Article II of Exhibit "A" clearly and unequivocally states that the services to be made available to the member holding the contract shall be rendered by a participating physician whether they be surgical or medical services as set out in paragraph A of said Article. Throughout Exhibit "A" it is provided that services to be furnished shall be those of a "participating physician," the court so found in its findings of fact (R 62-63). The court further found that Article IIIB(7) of the contract provided "the services provided by this contract shall not include the following: (7) Physician services for the extraction of teeth or other dental services" (R 55). In the face of undisputed, plain, explicit and unambiguous provisions of the contract, the court rendered its judgment that plaintiff should recover for the service of Dr. Griffin, a dentist who was not a participating physician within the terms of this contract. By its conclusions and judgment, the court undertook to rewrite the contract between the parties upon the ground that it was ambiguous—the law is clear that the court was in error in so ruling.

In *Barmeier v. Oregon Physicians' Service,* (Ore.) 243

P.2d. 1053, the plaintiff sought to compel the defendant to pay certain benefits for medical and surgical services incurred by her as the result of injuries sustained by her in an automobile accident under an agreement similar to the one involved in this case. The agreement in *Barmeier* provided that defendant could not be required to pay for any expenses which resulted from the negligence of third parties unless the subscriber could show that recovery from such third party would be unsuccessful. The plaintiff had sued the third parties which caused her injuries and had compromised her claim for an amount in excess of the medical and surgical expense which she had incurred. Plaintiff then sued defendant to compel it to make payment for her medical and surgical expenses. The court denied recovery holding that by the terms of the contract plaintiff was not entitled to recover. It was held that while the contract in some particulars was ambiguous as to what plaintiff was required to do in order to recover benefits under her contract, the contract as a whole provided that if she recovered sufficient money to cover her medical and surgical expenses in a suit against the third parties causing the injury, the defendant could not be required to pay any of the benefits under the contract. The court said:

> "* * * the parties to the contract had the right to limit the liabilities of O.P.S. and place upon its obligations any conditions that they pleased * * * the rule is not otherwise although the conditions of limitation may be harsh or onerous * * *. Courts cannot ignore such conditions, for to do so would be to make a new contract for the parties."

A judgment for the plaintiff was reversed because the

trial court refused to enforce the limitations of the contract which were express provisions limiting the plaintiff's right of recovery.

In *Mutual Benefit Health and Accident Association v. Milder,* (Neb.) 41 N.W.2d. 780 at p. 795, the court held that a health and accident insurance company may limit its liabilities in any reasonable manner, such as requiring that for sickness benefit to be payable the insured must be continually within doors and have regular visits by a physician in order to recover on the policy. It further held that such a limitation was not unreasonable and did not contravene public policy. In *Group Hospital Services v. Armstrong,* (Tex.) 240 S.W.2d. 418, the plaintiff sought to compel defendant to pay certain benefits provided in a contract issued by defendant which was a group hospital association, when one of the conditions of the contract was that service would only be paid for when provided in a hospital approved by the American Medical Association. It was held in that case that the provision of the contract limiting payment to hospitals registered with the A.M.A. was valid; and that, therefore, defendant could refuse payment for services rendered to the plaintiff in a hospital not registered with the A.M.A. The court specifically held that plaintiff got that which he contracted for and that the court should not extend the coverage beyond the terms of the contract.

In *Red v. Group Medical & Surgical Services,* (Tex.) 298 S.W.2d 623, plaintiff sued defendant, a Blue Shield medical service association, to compel it to pay for a lip-reading course which plaintiff's minor son had received to teach him the art of lip reading after he was rendered

totally deaf from cerebro-spinal meningitis. The defendant had paid all the expenses for the treatment of the disease, but refused to pay for the lip-reading course on the ground that it was not covered by the terms of the contract as "expenses incurred in the treatment and care of the patient." It was held that recovery was properly denied, that the construction of the medical service contract claimed by the plaintiff would be going beyond the intent of the parties, and further that the contract was not ambiguous. In *Issacson v. Wise Casualty Association* (Wis.) 203 N.W. 918, the plaintiff sought to recover for the services of a chiropractor which he had received in treatment for rheumatism and pleurisy. Under the insurance contract which had been issued to plaintiff by defendant, defendant had agreed to pay for services rendered by a physician. The question in that case was whether a chiropractor was a physician within the meaning of the policy—it was held no. That court said:

> "It is clear that the parties to an insurance policy have a right to limit or qualify the terms of the contract in any manner not inconsistent with the conditions of the standard form or contrary to public policy."

It was, therefore, proper for the insurance company to require, as a condition of the payment of sick benefits, that the insured should be attended by a "legally qualified physician and that if the insured failed to avail himself of such services, the company would be excused from paying the sick benefit." The court held that a chiropractor "was not a physician within the traditional concept of that term and plaintiff was not entitled to recover for his services * * *." The court further said: "* * * we think the inten-

tion was so clear that a legally qualified physician should be employed in order to enable the insured to recover the sick benefit."

Also in *State Medical Society of Wisconsin v. Charles Manson, Commissioner,* (Wis.) 12 N.W.2d. 231, the court held that a podiatrist did not come within the definition of a "medical or osteopathic physician licensed to practice in Wisconsin."

In view of the uncontroverted fact that the contract in question in this case expressly provides that the only service to be provided to the subscriber is that of a participating physician, which is defined expressly to mean a doctor licensed as a physician and surgeon to practice medicine in all its branches, proper construction of the contract requires a holding that the service of a dentist is not covered and cannot be recovered by plaintiff as a benefit under the plain and unambiguous terms of the contract, even though made necessary by reason of an accident.

It is, therefore, clear that the trial court by ruling that this contract was intended to include the services of Dr. Griffin, a dentist, was erroneous, and was contrary to the findings of fact and the undisputed evidence in the record.

POINT II

THE CONTRACT BETWEEN THE PARTIES WAS NOT AMBIGUOUS.

Defendant concedes that the rule applicable in this

State, not only in cases involving insurance contracts but also in contracts generally, is that ambiguities are to be construed against the party who wrote the contract. However, this rule is only applicable where the ambiguity creates doubt or uncertainty as to the meaning and intent of the parties. This rule is exemplified in the case of *Stout v. Washington Fire & Marine Insurance Company*, 14 Utah 2d. 414, 384 P.2d. 608. However, a corollary of this rule is that in interpreting a contract, the entire instrument must be considered, and even though one provision may contain an ambiguity, if other provisions of the entire instrument clearly resolve the ambiguity, then the rule of construction against the author of the instrument is not applicable. In *Vitagraph Inc. v. American Theater Co.*, 77 Utah, 71, 291 P. 303, the court said:

> "These provisions of the assignment contract lend some support to appellant's contention. In construing a contract, however, 'the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end and all of its terms must pass in review; for one clause may modify, limit, illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be

harmonized if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions."

In *Fawcett v. Security Benefit Association*, 99 Utah, 193, 104 P.2d. 214, the court construed the language of an insurance contract and said with respect to alleged ambiguities the following:

> "Since such provision of the certificate is not so clear as to be susceptible of but one construction, we must determine which of the permissible interpretations thereof is consistent with the other provisions of the entire agreement. Even though a particular provision of a contract of insurance be susceptible of more than one meaning, the construction of such provision more favorable to the assured will not be adopted if other provisions of the entire contract clearly resolve the ambiguity in favor of the contrary construction."

Furthermore, the ambiguity, if there is one, must be determined from the instrument itself and resort may not be had for interpretation or explanation from outside sources. *Ephraim Theater Company v. Hawk*, 7 Utah 2d. 163, 321 P.2d 221:

> "In considering the controversy here it is well to keep in mind the fundamental concepts in regard to contracts: that their purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. The intent so expressed is to be found, if possible, within the four corners of the instrument itself in

accordance with the ordinary accepted meaning of the words used. Unless there is ambiguity or uncertainty in the language so that the meaning is confused, or is susceptible of more than one meaning, there is no justification for interpretation or explanation from extraneous sources. It would defeat the very purpose of formal contracts to permit a party to invoke the use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said, or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist. Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced 'in accordance with the intention as * * * manifested by the language used by the parties to the contract!"

Moreover, where the language used is plain, unequivocal and unambiguous, the rule for resolving ambiguities against the author of the instrument is not applicable. In *Moss v. Mutual Benefit Health & Accident Association,* 89 Utah, 1, 56 P. 2d 1351, this court stated:

"The language is plain, unequivocal and unambiguous. The rule contended for by appellant for a construction of an ambiguous provision most strongly against the insurer and in favor of the insured has no application here. In Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 52 S. Ct. 230, 231, 76 L. Ed. 416, Mr. Justice Sutherland, speaking for the court, said: 'It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. * * * This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes

> no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings."

Again in *Bryant v. Deseret News Publishing Company*, 120 Utah 241, 233 P.2d 355, the same rule was announced in this language:

> "Plaintiff also invokes the rule of interpretation that doubtful, ambiguous terms in a contract should be interpreted against the party who has chosen the terms * * * We agree that these rules of construction should be considered in determining what is a reasonable and fair interpretation of the intention of the parties: However, if the language is clear and is not susceptible of more than one interpretation, the ordinary plain meaning of the words must be used."

See also *Oregon Short Line Railroad Company v. Idaho Stockyards Company*, 12 Utah 2d 205, 364 P.2d 826, and *Richlands Irrigation Co. v. Westview Irrigation Company*, 96 Utah 403, 80 P.2d 458.

In other words, there must be a real ambiguity, no forced or strained construction may be employed in order to get a different meaning in accordance with the interest of one of the parties. This rule was announced by this court in *Auto Lease Company v. Central Mutual Insurance Company*, 7 Utah 2d 336, 325 P.2d 264, wherein this court said:

> "In case of uncertainty or ambiguity, the language of the policy should be construed most strongly against the company because it drew and issued it, but that rule has no application unless there is some genuine am-

> biguity, or uncertainty in the language upon which reasonable minds may differ as to the meaning. That requirement is not satisfied because a party may get a different meaning by placing a forced or strained construction upon it in accordance with his interest. The test to be applied is: Would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of words, and in the light of existing circumstances, including the purpose of the policy. If so, the special rule of construction is obviously unnecessary."

See also *Ephrain Theater Company v. Hawk, supra.* In construing the contract, the language must be given its plain, ordinary and obvious meaning. *Bonneville Lumber Company v. J. G. Peppard Seed Company,* 72 Utah 463, 271 P. 226:

> "It is a cardinal rule of construction, and the first to be applied whenever construction becomes necessary, that, unless technical terms are used, the language must be given its plain, ordinary and obvious meaning."

Bryant v. Deseret News Publishing Company, supra.

It is also the rule recognized in Utah that the fundamental and true purpose of construing the language of a contract is to arrive at the true intention of the parties. *Anderson v. Great Eastern Casualty Co.,* 51 Utah 78, 168 P. 966. In *Browning v. Equitable Life Assurance Society of the United States,* 92 Utah 532, 72 P.2d 1060, it was stated by this court that:

> "The contract of insurance should be construed so as to carry out the intention of both parties, not merely the intention of one party."

Tested by the foregoing rules, it must be clear that plaintiff was not entitled to require defendant, under his contract, to pay for the services of Dr. H. Jay Griffin. The language of the contract itself makes this apparent. From this language it is clear that there is no need to resort to any evidence outside the four corners of the contract in order to determine its meaning. As we have already pointed out, the first paragraph of this Exhibit "A" defines the kind of medical service which the defendant is required to provide and which the plaintiff shall be entitled to receive. That language is as follows:

> "This contract * * * entitles the subscriber and family dependents * * * to have * * * services from the participating physician of their choice."

We have already pointed out that Article IE states that a participating physician is a doctor licensed as a physician and surgeon to practice medicine in all its branches. Even in those instances where the contract provides that a member may be entitled to the services of a non-participating physician who is a physician not holding stock membership in the defendant association or who has not agreed to render the services provided by the contract, such service must be rendered by a physician and surgeon licensed to practice medicine in all its branches (Article IVA of Exhibit "A"). Thus from the language of the contract itself, the intention of the parties can be clearly ascertained that the service to be provided shall not include the service of a dentist.

In order to make doubly certain that the services of a dentist were not intended to be covered under this contract, Article IIIB(7) specifically excludes "physician's service

for extraction of teeth or other dental processes." The trial court specifically found that Dr. Griffin, who performed the services for which this action was brought, was a dental surgeon and was not a physician and surgeon licensed to practice medicine in all its branches at and during the time said services were performed for and on behalf of the plaintiff (R. 63). Under such a finding it is respectfully submitted that to require defendant to pay for Dr. Griffin's services on plaintiff's behalf not only flies in the face of the plain, express and unambiguous language of the contract, but furthermore enlarges and rewrites the contract to include benefits not intended or contracted for by the parties.

Plaintiff and the trial court attempted to seize upon one isolated provision of the contract defining surgical benefits to which plaintiff was entitled. Plaintiff called the trial court's attention to the provision of Article IIA (1) part of which is set out in the court's findings (R 55). The full text of this provision, paraphrased to omit unnecessary verbage, is as follows:

> "* * * services except *as limited in Article III* hereafter shall be available to the member * * * *when rendered by a participating physician of the Bureau.*" (Emphasis added)

> "A (1). * * * surgical services *rendered by a participating physician* in the treatment of diseases, illnesses or injury." (Emphasis added)

Even though it is apparent that the services of Dr. Griffin to the plaintiff were rendered in the treatment of an injury, such service was not the treatment of a fracture, dislocation or orthopedic casting. The court did not so find,

but merely recited the provision of the contract as including treatment of such conditions (R 55). The uncontradicted evidence is that plaintiff's fractured jaw was treated by Dr. White, an oral surgeon (TR 5, 6 and 7). The plaintiff remained under Dr. White's care for seven weeks or until the fracture was healed (pl.'s depo. p. 7). It was only *after* Dr. White had completed his work in the treatment of the fracture that Dr. Griffin performed the dental work made necessary by the accident. (TR 6-7). It was conceded by plaintiff that only dental services were performed by Dr. Griffin (TR 8).

The trial court seemed to labor under the misconception that because the dental services became necessary by reason of an accident and not because of the natural process of decay that plaintiff should recover for such dental services. As Appellant construes the trial court's reasoning, recovery for the plaintiff was ordered because all of plaintiff's injuries were incurred at the same time, in the same accident and because plaintiff was entitled to benefits for treatment of the jaw fracture, he should likewise be able to require defendant to pay for the dental work; and further that this was so notwithstanding the fact that Dr. Griffin's services were confined to dental work and that he was neither a participating nor even a non-participating physician within the plain meaning and language of the contract; and notwithstanding that the contract by express terms excluded physician services for extraction of teeth or other dental processes. The court seemed to reason that because the plaintiff sustained injuries, it was the intention of the parties that if treatment thereof could only be performed by a dentist then such treatment should be paid for as a

benefit under the contract. The contention of plaintiff that the language of Article IIA(1) was rendered ambiguous by reason of language of Article IIIB(7) is totally untenable.

In order that there can be no doubt as to the kind of service rendered by Dr. Griffin, the plaintiff was asked on his deposition what was done by Dr. Griffin, the plaintiff testified as follows:

Q. The dental work has all been taken care of by Dr. Griffin, is that right?

A. Yes.

Q. And did that work consist of replacing the teeth that were knocked out?

A. Yes.

Q. In the accident?

A. Yes.

Q. And repairing teeth that were damaged in the accident?

A. Yes.

Q. And also bridging?

A. Yes.

Q. And it was for the repair of your teeth?

A. Yes. (TR 14)

Also:

Q. So that Dr. White knew that Dr. Griffin was your dentist?

A. Yes.

Q. So when he said "I am through with my work, I will release you to go back now to have the dental work done" he knew that you would be going back to Dr. Griffin to have that work done?

A. Yes. (TR 15)

Dr. Griffin's statement was admitted in evidence as Exhibit "2" to plaintiff's deposition (TR 7). Plaintiff was examined about the contents of this statement as follows:

Q. It says over here as I read it, and you can correct me if necessary, a seven-tooth bridge, is that what you understand?

A. Yes.

Q. And two inlay abutments?

A. Yes.

Q. And two incisal inlays?

A. Yes.

Q. And there is something about ceramic, I suppose that is the material out of which the bridge was made?

A. Yes.

Q. And would this include the replacement of the teeth that you lost in the accident?

A. Yes.

Q. Did you lose seven teeth?

A. No.

Q. How many?

A. Well, they had to put a bridge in there and they had to grind off a bunch of my teeth.

Q. They had to anchor the bridge didn't they?

A. Yes.

Q. And actually you lost three teeth?

A. Yes.

Q. And they have been replaced?

A. (witness nodded his head)

Q. And you are wearing the partial denture that Dr. Griffin made for you following the accident.

A. Uhuh!

The fact that plaintiff was not aware that dental services were excluded from the contract is immaterial. We have already cited authorities holding that a party has a right to limit the coverage of a contract of this type, and that such a contract, as so limited, defines the services which are to be provided and by whom they are to be provided: *Barmeier v. Oregon Physician Services,* supra, *Red v. Group Medical & Surgical Services,* supra, *Isaacson v. Wisconsin Casualty Association,* supra, and *Group Hospital Services v. Armstrong,* supra.

The contract in this case was limited by its language to injuries treated by a participating surgeon and was not an agreement to pay for treatment of injuries without regard to who furnished or provided such treatment. If the construction which plaintiff would place upon this contract is correct, then the plaintiff could have claimed benefits for treatment of injuries by any practitioner of the healing arts, including chiropractor, naturopath, chiropodist, occurring in an accident. It is submitted that such construction is untenable.

CONCLUSION

The judgment of the court below is not supported either by the findings of the court or the evidence in the record for two reasons:

1. Because this contract between parties expressly excluded dental services from the benefits covered by the contract; and

2. Because the services for which recovery is sought were not furnished by a doctor licensed as a physician and surgeon to practice medicine in all its branches, which limitations the defendant was entitled to place upon the contract issued to the plaintiff.

Furthermore, the contract between the parties is not ambiguous. Its plain meaning and intent can be ascertained from the four corners of the instrument. Even if it could be successfully contended that this contract contains an ambiguity, which the defendant has expressly denied, there is no way in which the ambiguity claimed by plaintiff can be construed to include the services of a dentist or that a dentist is a participating physician within the terms of the contract. On the other hand, the contract on its face and the evidence in the record shows as a matter of law that the plaintiff is not entitled to the relief sought and, therefore, the judgment should be reversed and judgmen should be ordered in favor of the defendant.

Respectfully submitted,
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