STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0186

Jacky L. Larson,
Appellant,

vs.

The Northwestern Mutual Life Insurance Company,
Respondent,

CMInformation Specialists, Inc.,
Respondent.

Filed November 18, 2013
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27-CV-11-24103

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Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant, beneficiary of a life-insurance policy obtained by decedent from respondent insurer, challenges the district court's grant of summary judgment dismissing (1) breach-of-contract claims against respondent insurer for rescinding the policy after discovering that decedent provided false information in his application for coverage and (2) claims alleging violation of the Minnesota Health Care Act and negligent misrepresentation against a medical-records contractor that failed to provide insurer with all medical records authorized for release by decedent. Appellant also challenges the district court's order denying relief in the form of adverse inferences against insurer for alleged spoliation of evidence. We affirm.

FACTS

James Larson (decedent) was a patient at the Fairview Ridges Clinic in Burnsville (Fairview). His primary-care physician was Dr. Alfred Lounsbury. In December 2004, decedent experienced recurring chest pain that concerned him because his father and brother had died after suffering heart attacks. Decedent, without seeking a referral through Dr. Lounsbury, scheduled an appointment with cardiologist Dr. William Hession, who had previously treated decedent's wife, appellant Jacky Larson.

On December 23, 2004, Dr. Hession wrote to Dr. Lounsbury stating that he had seen decedent "in Cardiology consultation," and noting that he had previously seen decedent "several years ago at the Minnesota Heart Clinic with complaints of chest pain." Dr. Hession reported that decedent's December 23, 2004 examination was "completely

unremarkable" but noted that he was "setting [decedent] up for a CAT scan angiogram of his coronary arteries." Dr. Hession reported the results of the CAT scan angiogram to Dr. Lounsbury by letter dated January 14, 2005. Dr. Hession's letters to Dr. Lounsbury were not copied to decedent, and the record does not reflect whether decedent was aware that Dr. Hession had contacted Dr. Lounsbury.

On June 7, 2005, in preparation for surgery by a dermatologist, decedent signed a medical-records-release form authorizing Fairview to release history and physical-exam records to Twin Cities Cosmetic Surgery. On a space on the form for identifying other records to be released, "Dr. Hessian's Heart Report" appears in unidentified handwriting. The release specifies that the release is for treatment from "3/05 to 6/05."

On November 30, 2007, decedent met with an agent of respondent Northwestern Mutual Life Insurance Company (insurer) and completed an application for a life-insurance policy in the amount of $673,479, naming appellant as the sole beneficiary. During that process, decedent signed a medical-records-release form, authorizing all health-care providers to release to insurer all of decedent's medical records from the previous ten years. On December 3, 2007, decedent met with insurer's paramedical examiner to complete a medical-history questionnaire. Decedent provided the following relevant information on that questionnaire:

> Q: In the past 10 years, have you had, been told by a health practitioner you had, or been tested or treated for . . . chest pain . . . ?
> A: No.
> Q: Other than as previously stated on this application, in the last five years have you . . . consulted any other healthcare providers . . . ?

A: Yes. [Noting that he had gone to a dermatologist for treatment of a mole.]
Q: Other than as previously stated in this application, in the last five years have you . . . had any diagnostic studies (EKG, x-ray, blood tests or any other)?
A: No.

The questionnaire concludes with a declaration signed by decedent, stating that the answers given were correctly recorded and were complete and true to the best of his knowledge and belief. On the same day, decedent signed another medical-records-release form authorizing Fairview to "release all medical records [including consultations] maintained while [he] was a patient of Dr. [Lounsbury]."

On December 10, 2007, insurer's representative conducted an audio-recorded standard client-history interview over the telephone, asking decedent specific questions about his medical care and providers. The interview consisted of the representative reading standard questions from a computer screen and entering the applicant's answers into the computer exactly as they were given.[1] Appellant does not dispute the accuracy of the answers entered by the interviewer. In this interview, decedent identified Dr. Lounsbury as his "regular physician" and provided the following relevant information:

Q: Within the past 5 years, have you consulted any other health care providers or physician specialists such as chiropractors, psychologists, psychiatrists, counselors, or therapists?
A: Yes (identifying the dermatologist he had seen within the past six months).

[1] After insurer had rescinded the policy and was aware that appellant was contesting that decision, the audio recording of this interview was destroyed pursuant to insurer's policy of destroying such recordings after two years.

Q: Have you been to any outpatient clinics, emergency rooms, hospitals, or any other type of doctor within the past 5 years?
A: No.
Q: Other than blood work, have you had any diagnostic studies or tests? [This question is followed by a list of "studies" that includes "CT Scan"].
A: No.

Insurer's medical-records contractor requested decedent's records from Fairview as authorized by decedent's release. Fairview forwarded the request to its medical-records contractor, respondent CMInformation Specialists, Inc. (CMI). CMI contracts with healthcare providers to process requests for medical records, purporting to manage releases to ensure compliance with privacy laws, the limits of the authorizations received from the patient, and healthcare-providers' policies.

Although decedent had authorized the release of *all* of his medical records at Fairview, including consultations, CMI did not release Dr. Hession's letters or reports of the CAT scan angiogram. CMI later asserted that Fairview restricts release of consultations to those resulting from referral by a Fairview doctor and that Dr. Hession's letters were "outside" records, not covered by the release that decedent provided.

Insurer's underwriter received electronic copies of decedent's medical-history questionnaire, the computer record of the telephone interview, and the Fairview medical records provided through CMI. The underwriter approved decedent's application, and the policy was issued in early 2008. The policy contains the provision that "[o]missions or misstatements in the application could cause an otherwise valid claim to be

denied . . . . [T]he policy was issued on the basis that the answers to all questions and the information shown on the application are correct and complete."

In August 2008, decedent died of injuries sustained in a motorcycle accident. Appellant made a claim on the life insurance policy. Insurer's investigation of the claim revealed the discrepancies between information given by decedent and the records of his cardiologist consultation and CAT scan angiogram. Applying the standards applicable at the time that decedent's application was reviewed, the underwriter concluded that if insurer had known about decedent's heart-related medical history, decedent would not have qualified for the policy that was issued. Insurer rescinded the policy, denied appellant's claim, and returned all premium payments with interest.

Appellant sued insurer for breach of contract and sued CMI for negligent misrepresentation and violation of the Minnesota Health Records Act (MHRA). Insurer and CMI moved for summary judgment. Appellant sought a spoliation-of-evidence remedy for destruction of the audio recording of insurer's representative's interview with decedent. The district court granted both motions for summary judgment and denied appellant's motion for a spoliation remedy. This appeal followed.

D E C I S I O N

I. Standard of review

We review a district court's grant of summary judgment de novo to determine whether there are genuine issues of material fact that preclude summary judgment and whether the district court properly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The evidence is viewed in the light

most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

II. Grant of summary judgment to insurer

Minn. Stat. § 61A.11 (2012) provides that "[i]n any claim upon a policy issued in this state without previous medical examination . . . the statements made in the application as to the age, physical condition, and family history of the insured shall be valid and binding upon the company, unless willfully false or intentionally misleading."

The district court concluded that "the standard for willfully false or intentionally misleading is an objective one under Minnesota law and does not require any premeditation or subjective intent to mislead or falsify."[2] The district court concluded that "the record is sufficient to establish that [decedent] knew about the cardiology consult and test; and he failed to disclose it on multiple occasions during the application process. The willfully false and intentionally misleading standard is met."

[2] The district court cited *LeBus v. Nw. Mut. Life Ins. Co.*, 55 F.3d 1374, 1377 (8th Cir. 1995) (granting summary judgment for an insurer and stating that the willfully false, intentionally misleading standard "does not require intent to deceive").

Appellant asserts that the district court misapplied the law and essentially read "willfully false or intentionally misleading" out of the statute. Appellant argues that the supreme court has consistently considered the subjective intent of the insured to determine if the insured's statements were willfully false or intentionally misleading, and that summary judgment is precluded because decedent's intent is a jury question.

Appellant first relies on definitions of "willfully," "false," "intentionally," and "misleading" from the Oxford College Dictionary 2d ed. (2007), and on the canon of statutory interpretation at Minn. Stat. § 645.08(1) (2012), requiring that "words and phrases are construed according to rules of grammar and according to their common and approved usage," to argue that by using both "willfully false" and "intentionally misleading," the legislature "aimed broadly to capture subjective intent no matter how described." But caselaw demonstrates that, in determining if an applicant has given information that is willfully false or intentionally misleading in an insurance application, "[w]hether it is necessary to demonstrate a subjective intent to deceive depends greatly upon the specificity and nature of the questions asked in the insurance application." *Lebus v. Nw. Mut. Life Ins. Co.*, 55 F.3d 1374, 1377 (8th Cir. 1995).

Siemers v. United Benefit Life Ins. Company is an example of a case in which broad, nonspecific questions on an insurance application required examination of the applicant's intent in answering. 246 Minn. 459, 75 N.W.2d 605 (1956). In *Siemers*, the insurer moved for judgment as a matter of law after a jury returned a verdict for the beneficiary of a life-insurance policy that had been cancelled by the insurer because the insurer determined that the decedent had made willfully false and intentionally

misleading misstatements of fact on an application to reinstate life insurance. *Id*. at 460–62, 75 N.W.2d at 607. The supreme court defined a willfully false answer as "one which is consciously made" and stated that "[w]il[l]fully false denotes knowingly concealed." *Id.* at 462–663, 75 N.W.2d at 608.[3]

Rejecting the insurer's contention that statements on the application were willfully false as a matter of law, the supreme court noted that the application "does not elicit any specific information from the applicant in regard to specific illness or symptoms" but relies on "the applicant's own opinion with respect to the condition of his health." *Id.* at 465, 75 N.W.2d at 609. The supreme court found no error in an instruction to the jury that the application required the applicant "to give the names of the doctors he consulted only for treatment and did not require him to give the names of the doctors he consulted only for examination." *Id.* The supreme court concluded that the evidence in *Siemers* was sufficient to support the jury's implicit finding that the applicant's statements were made from his lack of knowledge about the actual condition of his health and were not willfully false or intentionally misleading. *Id*. at 464–66, 75 N.W.2d at 609–10; *see also Schmidt v. Prudential Ins. Co. of Am.*, 190 Minn. 239, 240, 251 N.W 683, 684 (1933) (rejecting an insurer's motion for judgment as a matter of law because the jury might have found from the evidence that the decedent did not know that he was suffering from

[3] In *Siemers*, the district court defined a "wil[l]fully false *and* intentionally misleading answer [as] one which is consciously made with a premeditated design so to [falsify] the facts as to lead the insurer to act when he otherwise would not." *Id.* at 462, 75 N.W.2d at 608 (emphasis added). We construe the "premeditated design" language to refer only to "intentionally misleading."

high blood pressure or might not have fully understood general questions about the condition of his health).

In contrast, when an applicant provides patently false answers to specific questions on an insurance application, the supreme court has affirmed summary judgment to the insurer, rejecting the assertion that materiality and willfulness are questions of fact for a jury. *See Howard v. Aid Ass'n for Lutherans*, 272 N.W.2d 910, 911–13 (Minn. 1978) (rejecting assertion that applicant's subjective intent had to be ascertained by a jury in order to determine if his false answers about chemical dependency treatment were willfully false).[4] This court recognized in *Useldinger v. Old Republic Life Ins. Co.*, that, under the facts of that case, whether an insured's misrepresentation of health on an insurance application was willful did not create a jury question but presented only a question of law. 377 N.W.2d 32, 35 at 36-37 (Minn. App. 1985) ("Resolution of this case is . . . bolstered by the fact that [insurer's] application specifically asked for knowledge" of the condition that the decedent denied, while the record disclosed a number of discussions between the decedent and a doctor about treatment for the condition).

Similarly, this case involves patently false answers given on three separate occasions to specific questions. Appellant does not dispute that decedent's answers to insurer's specific questions concerning consultations, examinations, and testing for heart-related issues were false. Rather, she asserts that the evidence that decedent authorized

[4] The primary issue in *Howard* was whether the decedent's false answers on the application were material because he died of a gunshot wound unrelated to the false answers. *Id*. at 912.

the release of all of his medical records could lead a jury to conclude that decedent did not intentionally mislead insurer. Appellant cites to no evidence, however, that could lead a jury to conclude that decedent's failure to disclose his consultation with and examination and testing by Dr. Hession was not willful. The record plainly establishes that decedent (1) had suffered chest pains; (2) was concerned about his heart due to his family medical history; (3) consulted a cardiologist on his own; and (4) underwent a CAT scan angiogram, all in the relevant time frame about which he was questioned.

The only explanation appellant offers for decedent's failure to reveal any of this information in response to unambiguous questions specifically asking for such information is that decedent "might have forgotten" his concern about his heart and the examination and testing related to that concern. But there is no evidence to support this speculation. In fact, appellant testified that decedent was keenly aware of heart-health issues because his father had died of a heart attack and that his memory was "fully intact." A party resisting summary judgment must do more than rest on mere averments. *DLH*, 556 N.W.2d at 69. On this record, decedent's answers were willfully false as a matter of law, and his intent in giving those answers is irrelevant. The district court did not err in granting summary judgment to insurer.

III. Spoliation

Because we affirm the district court's grant of summary judgment to insurer, appellant's argument that the district court abused its discretion by denying a remedy for alleged spoliation of evidence is moot.

IV. Summary judgment to CMI

A. Violation of MHRA

Appellant argues that the district court's conclusion that the MHRA provides a remedy only for releasing records and not for withholding a record that a patient authorized to be released constitutes an error of law. We disagree.

The MHRA requires disclosers of medical information to warrant that they have "complied with the limits set by the patient." Minn. Stat. § 144.293, subd. 10(c)(3) (2012). Appellant argues that the MHRA uses the plural "limits" because it contemplates compliance with both upper limits and lower limits in a medical release; that is, the legislature intended to prevent the release of too much information and the release of too little information. Because decedent authorized the release of *all* of his Fairview records, appellant argues, CMI violated the MHRA by failing to disclose Dr. Hession's correspondence with Dr. Lounsbury.

But the penalty provision in the MHRA states, in relevant part:

> A person who does any of the following is liable to the patient for compensatory damages *caused by an unauthorized release* . . . , plus costs and reasonable attorney fees:
>
> (1) Negligently or intentionally requests or *releases* a health record in violation of sections 144.291 to 144.297[.]

Minn. Stat. § 144.298, subd. 2(1) (2012) (emphasis added). We conclude that the district court correctly interpreted this language to limit any penalty to release, not to withholding, of a medical record. Even if CMI was required to warrant that the release of decedent's records included all of the records that decedent authorized to be released, the

MHRA does not impose liability for damages caused by failing to release some of those records.

Appellant relies on the legislative history of the MHRA to support her argument, but we conclude that the statute is not ambiguous and does not require an examination of legislative history. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007) ("We construe statutes to effect their essential purpose but will not disregard a statute's clear language to pursue the spirit of the law.") The district court did not err in granting summary judgment to CMI, dismissing appellant's claims for violation of the MHRA.

B. Negligent misrepresentation

Appellant's negligent-misrepresentation claim against CMI fails because she cannot establish that CMI had a duty to her or to decedent.

> To prevail on a negligent misrepresentation claim, the plaintiff must establish: (1) a duty of care owed by defendant to the plaintiff; (2) the defendant supplies false information to the plaintiff; (3) justifiable reliance upon the information by the plaintiff; and (4) failure by the defendant to exercise reasonable care in communicating the information.

William v. Smith, 820 N.W.2d 807, 815 (Minn. 2012). Without a duty of care, liability cannot attach. *Id.* at 816. And a duty of care exists only if there is a legal relationship between the parties. *Id.* Because there is no legal relationship between CMI and decedent or between CMI and appellant, CMI did not owe a duty of care to decedent or

appellant. The district court did not err in granting summary judgment to CMI dismissing appellant's claim for negligent misrepresentation.

Affirmed.