UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Barbara Hoekenga,	:	Case No. 1:06-cv-458
Plaintiff,	:	
vs.	:	
Continental Casualty Company,	:	
Defendant.	:	

ORDER

Before the Court are the parties' motions for summary judgment. Plaintiff seeks a judgment that she is entitled to coverage under an insurance policy issued to her by Defendant. (Doc. 23) Defendant seeks a judgment that the policy does not cover Plaintiff's claim. (Doc. 25) Both parties have filed responses and replies in support of their motion.

Also pending is Defendant's motion to strike the affidavit of Valerie Heine, filed by Plaintiff in support of her summary judgment motion. (Doc. 27) Plaintiff has also filed a motion to strike Exhibits A and B attached to Defendant's opposition to Plaintiff's motion. (Doc. 33)

FACTUAL BACKGROUND

The facts giving rise to this case are largely undisputed. Barbara Hoekenga bought a "Long Term Care" insurance policy from Continental Casualty in 1991. Her premiums have been timely paid. The complete policy as authenticated by Continental

Casualty is Exhibit 6 to Doc. 16, pages bates-stamped as CCC160 to CCC202.

Mrs. Hoekenga, who is now 83 years old, suffers from dementia and requires substantial daily assistance. She entered Maple Knoll Village Breese Manor on September 2, 2004. Continental Casualty paid Mrs. Hoekenga the applicable daily benefit under her policy after she satisfied the policy's required elimination period. Mrs. Hoekenga lived at Maple Knoll almost thirteen months. That facility re-certified her eligibility for policy coverage to Continental, at Continental's request, on a monthly basis. Mrs. Hoekenga had a brief hospital stay in July 2005, and was discharged to Maple Knoll's skilled nursing unit for five days. She then moved back to the Breese Manor assisted living facility, where she had lived before her hospitalization.

According to Plaintiff's motion, Mrs. Hoekenga was found wandering in the parking lot at Maple Knoll sometime after she returned to Breese Manor. The facility asked her to transfer back to the skilled nursing unit, which provides a more restrictive environment than that provided by Breese Manor. Mrs. Hoekenga's daughter, Barbara Taber, her attorney-in-fact who brings this case on Mrs. Hoekenga's behalf, observed her mother's alertness decline during her skilled nursing stay in the summer of 2005, and did not want her mother to move to that level of

care. Mrs. Taber decided to move her mother to Sunrise Assisted Living because, according to Taber's uncontradicted affidavit, it provides the same level and type of care in a smaller, more secure environment. (Doc. 18, Taber Affidavit, ¶¶7-9.)

Continental Casualty asked Sunrise to complete the insurer's "facility profile" to determine if coverage was available to Hoekenga for her stay at Sunrise. Continental eventually denied coverage because Sunrise does not have an RN, LPN, or LVN physically on site 24 hours a day. Ms. Taber requested reconsideration of that decision, and later sought coverage under a different section of the policy, called "Alternate Plan of Care." Continental denied these requests, leading to the complaint in this case.

DISCUSSION

1. Summary Judgment Standards.

The standards for summary judgment are well established. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party opposing a properly supported summary judgment motion "'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine

issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968)). The Court is not duty bound to search the entire record in an effort to establish a lack of material facts. Guarino v. Brookfield Township Trs., 980 F.2d 399, 404 (6th Cir. 1992); InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), cert. den., Superior Roll Forming Co. v. InterRoyal Corp., 494 U.S. 1091 (1990). Rather, the burden is on the non-moving party to "present affirmative evidence to defeat a properly supported motion for summary judgment...," Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989), and to designate specific facts in dispute. Anderson, 477 U.S. at 250. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The court construes the evidence presented in the light most favorable to the non-movant and draws all justifiable inferences in the non-movant's favor. United States v. Diebold Inc., 369 U.S. 654, 655 (1962).

The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. The court must assess "whether there is the need for trial — whether, in other words, there are any genuine factual issues that

properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. "If the evidence is merely colorable, . . . , or is not significantly probative, . . . , the court may grant judgment." Anderson, 477 U.S. at 249-50 (citations omitted).

Although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir. 1979), cert. dismissed, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted).

2. Continental's Denial of Coverage.

An insurance policy is a contract, and under Ohio law the insured-insurer relationship is contractual. Unambiguous policy language must be given its plain and ordinary meaning, absent a contrary requirement of the policy. Construction of unambiguous policy terms is unnecessary and impermissible, unless the application of the plain and ordinary meaning leads to absurd results. See, e.g., Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm, 73 Ohio St.3d 107, 108 (Ohio 1995). Ohio courts liberally

construe policy language to resolve any ambiguities in favor of the insured. See generally, White v. Lawler, 2005 Ohio 3835 (Ohio 8th Dist. App. 2005).

Neither party argues that the policy terms in dispute are ambiguous. They disagree on whether the plain terms of the policy require an eligible facility to have a nurse physically present on site for 24 hours each and every day. The Court agrees that the applicable policy terms are not ambiguous. The disputed policy section defines "Long-Term Care Facility" as:

> A place primarily providing Long-Term Care and related services on an inpatient basis, which:
>
> 1. is licensed by the state where it is located; and
>
> 2. provides skilled, intermediate, or custodial nursing care under the supervision of a physician; and
>
> 3. has 24-hour-a-day nursing services provided by or under the supervision of a registered nurse (R.N.), licensed vocational nurse (L.V.N.), or licensed practical nurse (L.P.N.), and
>
> 4. keeps a daily medical record of each patient; and
>
> 5. may be either a freestanding facility or a distinct part of a facility such as a ward, wing, unit, or swing-bed of a hospital or other institution.
>
> A Long-Term Care Facility does not mean a hospital or clinic, boarding home, home for the aged or mentally ill, rest home, community living center, place that provides domiciliary, residential, or retirement care,

> place which operates primarily for the treatment of alcoholics or drug addicts, or a hospice. However, care or services provided in these facilities may be covered subject to the conditions of the Alternate Plan of Care Benefit provision.

Doc. 16, Exhibit 6, at CCC181.

Capitalized words used in this section are specifically defined by the policy. "Long-Term Care" is defined as:

> Care required and provided in a Long-Term Care Facility which is: (1) Medically Necessary; or (2) Due to the inability to Perform Two or More Activities of Daily Living; or (3) Due to Cognitive Impairment.

Doc. 16, Exhibit 6 at CCC179. The parties do not dispute that Mrs. Hoekenga qualifies for "Long-Term Care" as defined. The only dispute raised by the pending motions is whether the policy requires on-site registered or licensed nurses 24 hours per day, or whether those services may be on-call at times. (Doc. 26, Stipulations at ¶31)

Sunrise Assisted Living does not have a licensed nurse on site for 24 hours every day. Its executive director, Valerie Heine, states that Sunrise has nursing services available 24 hours per day, under the supervision of a licensed practical nurse or a registered nurse. Some of those services are directly provided by registered, licensed nurses, and some are provided by a home health aide under the supervision of a nurse. (Doc. 19, Heine Affidavit at ¶¶ 12 and 16.) A letter from Sunrise's prior Executive Director, Nancy Phillips, to Continental Casualty,

states that Mrs. Hoekenga "receives 24 hour assistance from nursing and care staff. An LPN is available/or on call 24 hours a day, RN is available two days a week and for consultative purposes at all other times." (Doc. 17, Stipulations at ¶14)

Defendant's representative, Linda Hickok, testified that "supervision" as used in subpart (3) of the policy quoted above means "that there is direct oversight of the care staff by a nurse, . . . so that they are in a position to witness the care, to do their direct, to be on-site. . . . If something happened, for instance, they are just a quick shout away, where they can come and assist. There has to be an immediate ability to be there on the scene." (Doc. 20, Hickok Deposition at 25.) Continental argues that nursing care cannot be provided or supervised if the registered nurse is not physically present. It points to subpart 2 of the policy's LTC definition which requires that all nursing care be provided "under the supervision of a physician." That subpart makes no reference to 24 hours a day because, according to Continental, the policy does not require round the clock physician presence. Continental argues that the nursing care provision in subpart 3 obviously means something different because of the inclusion of the phrase "24 hour a day."

Continental also cites the Medicare requirements for a skilled nursing facility. The statute, 42 U.S.C. §1395i-3(b)(4)(c), requires an SNF to "provide 24-hour licensed nursing

service." As that phrase covers round the clock on-site nursing, Continental argues that its policy language should be applied in the same fashion.

"Skilled nursing" for Medicare coverage purposes is not equivalent to the policy's description of a covered facility's nursing care, which includes not only skilled, but also intermediate or custodial nursing care. The Congressional determination that the necessarily higher levels of care provided by skilled nursing requires round the clock licensed nursing staff does not control the determination of coverage provided by Continental's policy.

Similarly, Continental's arguments concerning federal and state nursing home statutes are misplaced. Sunrise is apparently not a "nursing home." But the parties have stipulated that the issues concerning state licensing of facilities, and whether certain types of licenses may disqualify facilities from policy coverage, cannot be resolved by summary judgment. See Doc. 26, Stipulations ¶30. Continental's expressed desire to secure the highest quality of care for its insureds is admirable, but that desire does not supplant the words Continental chose to describe its policy's coverage.

"Supervise" as defined by Webster's II New Riverside University Edition means: "To direct and watch over the work and performance of others." There is nothing in the term that

requires a "supervisor" to be physically present at all times in order to "direct and watch over" the work performed by the Sunrise staff. The policy requires that 24-hour nursing services be provided by **or under the supervision of** a registered nurse. The facility profile completed by Sunrise (Doc. CCC088) states that Sunrise has an RN or LPN on staff to "direct & supervise care," and has an RN or LPN on call. That is all the policy terms require for provision of "24-hour-a-day nursing services provided by or under the supervision of a registered nurse." The Court agrees that if Continental intended its policy to cover only facilities in which an RN or LPN is physically present on-site 24 hours every day, it was required to plainly state that requirement in its policy.

Plaintiff's motion for summary judgment on this issue is therefore granted, and Defendant's motion is denied.

3. The Policy's Alternate Plan of Care Benefit.

Continental's motion argues that Mrs. Hoekenga's stay at Sunrise is not covered under her policy's "Alternate Plan of Care" provision. This coverage generally applies to special circumstances that may face an insured who is otherwise eligible for "long term care." The policy gives examples of this coverage as building a ramp for wheelchair access, modifying a kitchen or bathroom, or care provided in Alzheimer's Centers or similar arrangements. Any alternate plan of care that could qualify for

this coverage must be agreed to by the insured, the insured's physician, and Continental. (Doc. CCC 184-185) Mrs. Hoekenga responds that disputed issues of fact exist concerning this portion of the policy.

The Court concludes that Continental's motion with respect to this alternate coverage is moot, insofar as Mrs. Hoekenga's claim was apparently made only after Continental denied regular LTC coverage based on the 24-hour nursing issue. That question has been resolved favorably to Mrs. Hoekenga. If there is a different basis upon which this coverage remains or becomes relevant to this dispute, the parties are free to raise it in future proceedings.

4. Continental's Motion to Strike the Heine Affidavit.

Continental moves to strike the affidavit of Valerie Heine, Executive Director of Sunrise Assisted Living. Heine's affidavit (Doc. 19) was filed in support of Mrs. Hoekenga's motion for summary judgment. Continental argues the affidavit contains unsupported conclusions, and Heine's own "interpretation" of the meaning of Continental's insurance policy.

The Court agrees that portions of Ms. Heine's affidavit state her opinions on what the Continental policy means and how it should be interpreted, opinions which are irrelevant to the Court's resolution of the policy dispute. The Court has not considered those paragraphs of her affidavit, specifically

paragraphs 9, 10, 11, 13,and 19. Paragraphs 1 through 8, 12, and 14 through 18 (and presumably 20) are statements based on Ms. Heine's personal knowledge, are not objectionable, and are clearly relevant.

Continental's motion to strike is granted only with respect to paragraphs 9, 10, 11, 13, and 19 of Ms. Heine's affidavit.

5. Plaintiff's Motion to Strike Continental's Exhibits.

Mrs. Hoekenga filed a motion to strike two exhibits attached to Continental's opposition memorandum. The exhibits (see Doc. 28, Exhibits A and B) are two newspaper articles reporting on the tragic death of a resident at Sunrise Assisted Living last winter. Continental suggests the facts surrounding this incident, as reported in the newspaper, illustrate the sincerity of Continental's position on the desirability of round-the-clock nursing staff. Continental also contends that the newspaper articles contain facts of which the Court may take judicial notice under Fed R. Evid. 201(b).

The fact that a Sunrise resident died last winter is not relevant to the Court's resolution of the disputed policy language. As noted above, Continental's desire to obtain "high quality care" for its insureds is admirable but irrelevant to policy language. And the fact that newspaper articles may be self-authenticating, as discussed in the cases Continental cites, does not make them relevant. The Court has not considered the

articles in reaching its decision. The motion to strike the two articles is therefore granted. This result does not bar Continental from presenting evidence concerning facilities and the care provided by facilities, should such evidence become relevant to any issues yet to be determined in this case.

CONCLUSION

For all the foregoing reasons, Plaintiff's motion for summary judgment (Doc. 23) with respect to the question of "24-hour on-site nursing care" is granted. Defendant's motion (Doc. 25) on that question is denied. The parties' other coverage disputes and Plaintiff's "bad faith" claim remain for trial. Defendant's motion to strike (Doc. 27) is granted in part and denied in part. Plaintiff's motion to strike (Doc. 33) is granted.

SO ORDERED.

DATED: April 18, 2007

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court