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July 5, 2016
Court of Appeals
Division I
State of Washington

No. 744488

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

LEXINE OTEY, *et al.*,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

GHC's insurance contract uses ambiguous terms such as "actual charge," "cost share," "portion of the cost," "copayment," and "covered services." GHC has failed to show these terms are unambiguous. If terms are susceptible to more than one reasonable interpretation, the meaning and construction most favorable to the insured must be applied. The Court should render summary judgment in favor of Otey. The Court should remand for an assessment of damages for the amounts GHC overcharged its Members.

ARGUMENT

A. GHC fails to refute that its contract term "Actual Charge" is ambiguous and must be interpreted in a light most favorable to Otey.

The undefined phrase "actual charge" is ambiguous:

Charges will be for the lesser of the Cost Shares for the Covered Service or the **actual charge** for that service. Cost Shares will not exceed **actual charge** for that service.

CP 100 (bold added). Undefined terms "are to be interpreted in accord with the understanding of the average purchaser of insurance, and the terms are to be given their plain, ordinary and popular meaning." *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994).

"Actual charge" is ambiguous because it "is fairly susceptible to two different reasonable interpretations." *Cf. Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998)

(ambiguity in insurance contract). It may mean either (a) that a Member is required to pay the actual charge of the supplier to GHC (\$3–\$5); or (b) that a Member is required to pay whatever GHC wants to charge its Members (\$13.30–\$14.75). Otey is entitled to the interpretation most favorable to her. See *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 491, 352 P.3d 790 (2015). This Court should reverse, grant summary judgment to Otey, and remand for a determination of damages.

GHC's first argument attempts to add the words "*to a Member by a provider*" to the contract:

The only reasonable interpretation of "actual charge" in the provision describing the Subscriber's Financial Responsibilities is the actual charge **to a Member by a provider** of Covered Services.

BR 21 (bold added). The words "**to a Member by a provider**" do not appear anywhere in the contract. "Courts should take care under the guise of interpretation not to rewrite the contract for the parties, or create a new one." *Grant Cty. Constructors v. E.V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969).

GHC's next argument also alters the contract:

Since the Subscriber's payment of the Cost Share for prescriptions is due at the time of **service**, the "actual charge" can only mean the charge (or the Copayment, whichever is less) **by the pharmacy to the Subscriber**.

BR 21 (bold added). The actual language of the contract is, "Prescription drug Cost Shares are payable at the time of **delivery**."

CP 108 (bold added). GHC then adds the words “**by the pharmacy to the Subscriber,**” which do not appear in the contract. By changing “*delivery*” to “*service*” and adding the words “*by the pharmacy to the Subscriber,*” GHC again improperly rewrites the contract in its favor. But the Court “must be guarded in [its] interpretation of an insurance contract as it is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.” *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910, 914 (2001) (internal quotation omitted) (quoting *Chaffee v. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244 (1943)).

Moreover, the facts that payment is due at the time of delivery and that payment is made to GHC are irrelevant to Otey’s reasonable interpretation of the contract term. The contract does not say “actual charge [unless we think it too inconvenient to figure out what that actual charge would be].”¹

GHC’s next argument is misleading:

The phrase at issue is “**the actual charge for that service.**” CP 100. Otey’s interpretation ignores that the service for which the actual charge is incurred includes more than the pills themselves, but also “**pharmacy services,**” CP 109, which includes the compounding, dispensing, safe storage

¹ To be clear, Otey does not “concede” GHC’s interpretation is “reasonable.” See BR 21.

and distribution of a prescription drug at a pharmacy by a licensed pharmacist, RCW 18.64.011(23).

BR 21 (first emphases original; second bold added). “Pharmacy services” are not Covered Services under the contract. The “Covered Service” here is “Drugs – Outpatient Prescription.” CP 107-108. This Covered Service makes no mention of pharmacy services. *Id.*

Furthermore, GHC paraphrases the full sentence, materially altering its meaning. The full sentence reads: “Charges will be for the lesser of the Cost Shares **for the Covered Service** or the actual charge **for that service.**” (bold added). The phrase “**that service**” refers back to “**the Covered Service,**” but “pharmacy services” are not a Covered Service. GHC gratuitously adds irrelevant language to the contract.

Likewise, the last sentence of GHC’s above-quoted argument attempts to import statutory language into the contract. No part of RCW 18.64.011(23) (defining “practice of pharmacy” to mean safe storage and distribution of drugs, etc.) is in this contract. *See Am. Nat’l Fire v. B&L Trucking*, 134 Wn.2d 413, 430, 951 P.2d 250 (1998). (“We will not add language to the policy that the insurer did not include.”). That statute has nothing to do with the “actual charge for that service.”

GHC also argues Otey’s interpretation is unworkable or unreasonable when applied to “Covered Services such as ‘Newborn Services,’ CP 116, ‘Urgent Care,’ which covers non-GHC providers,

CP 124, and 'Hearing Examinations and Hearing Aids,' CP 110." BR 22. But the charges for these services would undoubtedly exceed the copayment limits of \$15 and \$30, so the "actual charge" language of the policy would never be triggered. This is a red herring.

More importantly, GHC misrepresents Otey's "actual charge" claim by adding the phrase "**the provider's wholesale cost for Covered Services**" and arguing it is impossible to determine "wholesale costs." BR 22. Otey mentions only the supplier's "actual charge," which GHC has to know.²

Otey's "actual charge" definition is reasonable and workable.³ This Court should reverse.

In its final "actual charge" response, GHC dismisses as irrelevant the nine federal cases that have held that the term "actual charge" as used in health insurance policies is ambiguous. BR 23. The only "distinction" that GHC finds is that the federal cases

² With respect to "Group Health-designated pharmac[ies]" [CP 108] GHC alleges it "does not know what Rite-Aid's wholesale cost would be." BR 21. There is no proof in the record to support this allegation. GHC does not cite to the record. These are not adjudicative facts. See ER 201. "Argument of counsel does not constitute evidence." *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

³ GHC falsely claims that Otey admitted at oral argument that "there is no way to determine what the 'actual charge' to the Member should be in that case." BR 21-22. Far from a concession, Otey's counsel answered the court's question with an emphatic "No." RP 26. Moreover, GHC misleads, omitting that the court's question concerned how to determine what the "cost share" amount or "portion" should be, not how to determine what the "actual charge" should be. See RP 25-27.

involved supplemental-cancer-benefit insurance. GHC fails to explain why the *type* of health policy matters.

GHC summarizes *Ward*,⁴ but fails to distinguish it from the present case. BR 23-24. GHC concludes: “The other federal cases cited by Otey address the same issue. These cases have no application here.” *Id.* at 24. Proffering no argument to distinguish these federal cases tacitly admits that they are at least persuasive authority. This Court should reach the same conclusion as the federal courts holding the undefined term “actual charge” is susceptible to more than one meaning, and is thus ambiguous.

Courts construe ambiguities in favor of coverage. *Moeller v. Farmers Ins. Co.*, 173 Wn.2d 264, 272-76, 267 P.3d 998 (2011). Ambiguous terms must “be interpreted as broadly as is reasonably proper in order to provide the greatest coverage possible.” *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 915, 631 P.2d 947 (1981) (quoting 12 Couch at § 45:125). The “meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.” *Queen Anne Park*, 183 Wn.2d at 491.

GHC has failed to show that the term “actual charge” is unambiguous. See *Scott Galvanizing, Inc. v. Nw. EnviroServices*,

⁴ *Ward v. Dixie Nat'l Life Ins. Co.*, Nos. 06-2022, 06-2054, 257 Fed. Appx. 620, 625-27, 2007 U.S. App. LEXIS 27699 (4th Cir. Nov. 29, 2007) (unpublished).

Inc., 120 Wn.2d 573, 582, 844 P.2d 428 (1993) (when contract interpretation is decided on summary judgment as a matter of law, moving party must “demonstrate only one reasonable inference can be drawn regarding the intent of the parties”). GHC has failed to show that Otey’s interpretation is unworkable or unreasonable.

Therefore, the Court should render summary judgment in favor of Otey that she is required to pay only the drug supplier’s “actual charge” to GHC. The Court should remand for an assessment of damages for the amounts GHC overcharges its Members. See *Ellwein v. Hartford Acc. and Indem. Co.*, 142 Wn.2d 766, 782 & n. 13, 15 P.3d 640 (2001) (finding insurer bad faith as a matter of law on summary judgment, reversing dismissal and remanding for entry of summary judgment to insureds, and for determination of damages, “in the name of judicial economy”), *overruled in part on other grounds*, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003); *Pub. Sch. Employees v. Crowe*, 88 Wn. App. 161, 166, 943 P.2d 1164 (1997) (appeals court reversed summary judgment and remanded for summary judgment in favor of nonmoving party).

B. GHC fails to refute that its contract terms “Cost Share,” “Copayment” and “Portion of the Cost” are ambiguous: the average person would interpret them to mean GHC will pay a portion of drug costs.

“Cost Share,” “Copayment” and “Portion of the Cost” are ambiguous because they “are fairly susceptible to two different reasonable interpretations.” *Cf. Kitsap County*, 136 Wn.2d at 576

(ambiguity in insurance contract). The terms may mean either (a) that a Member and GHC share the costs for Covered Services, or (b) that the terms define only the specific amounts that a Member is required to pay for Covered Services. Otey is entitled to the interpretation most favorable to her. See *Queen Anne Park*, 183 Wn.2d at 491.

GHC argues that “Cost Share,” “Copayment” and “Portion of the Cost” are defined as the specific amount that *a Member is required to pay*, citing contract definitions. BR 12-13. But the average insured reasonably would interpret these *definitions* to cover only a portion of the cost. “Cost Share,” “Copayment” and “Portion of the Cost” plainly mean that GHC must share the cost, copay, and cover some portion of the cost. Reasonable insureds would believe that unless there is a reciprocal obligation, no *sharing* occurs.

Everyone learns what “sharing” means in kindergarten: “to divide and distribute in shares; apportion” or “to use, participate in, enjoy, receive, etc., jointly.”⁵ “Portion” means “the part of a whole allotted to or belonging to a person or group; share.”⁶ The prefix *co-* means “together; joint or jointly; mutual or mutually.”⁷ No reasonable insured would fail to recognize that when a GHC Member is copaying a “portion of the cost” under a cost-share mechanism, GHC is paying

⁵ DICTIONARY.COM UNABRIDGED, Random House, Inc., <http://dictionary.reference.com/browse/sharing?s=t>.

⁶ *Id.* at <http://www.dictionary.com/browse/portion?s=t>.

⁷ *Id.* at <http://www.dictionary.com/browse/co-?s=t>.

the other portion of the cost. After all, the only “purpose of insurance is to insure.” *Phil Schroeder v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

Additionally, GHC’s one-sided interpretations overlook the *coverage* issue at stake here. See BA 16-20. In this “medical coverage agreement,” GHC is providing “health care coverage.” CP 88-89. Drugs are a “covered service” for which GHC purports to provide a “benefit” to Members. CP 107-09 (Benefits Booklet - drug benefits); CP 100 (¶J) (“All benefits are limited to Covered Services that are Medically Necessary and set forth in the Benefits Booklet.”). Only if drugs are excluded from coverage can GHC claim no duty to pay any portion of the cost. Otherwise, drugs are **not covered** and GHC is providing **no benefit**. No explicit exclusion applies.

Despite the absence of any explicit exclusion, GHC has a deliberate business policy to treat inexpensive drugs as entirely **not covered**: Members are charged 100% of the cost, plus an additional 4-5 times the cost, creating a windfall to GHC at the expense of its insureds. This undisclosed practice violates the reasonable expectations of insured Members, who are led to believe their inexpensive prescription drugs are a covered benefit under the contract.

The terms “Cost Share,” “Copayment” and “Portion of the Cost” are ambiguous (at best) because they are fairly susceptible to (at least) two reasonable interpretations. GHC has failed to show that

the terms are unambiguous or that Otey's interpretations are unreasonable. This Court should reverse, grant summary judgment to Otey, and remand for a determination of damages.

C. GHC's citations to statutes and regulations are meritless.

GHC cites more than a dozen statutes and regulations in an apparent effort to establish the "only reasonable interpretation" (BR 17, 21) that is "consistent with the law" (BR 13-15). GHC proves too much. "The fact that [the insurer] has to resort to technical, statutory definitions...underscores the lack of a commonly known definition contemplated by the average purchaser of insurance." *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 693, 871 P.2d 146 (1994). GHC's argument lacks merit.

None of the laws GHC cite are mentioned in the contract. The standard for interpretation remains the "average insured," not the average insurance attorney. *Panorama*, 144 Wn.2d at 138 (what is "meaningful to the layman," not what a "learned judge or scholar" can with study comprehend); *Queen City Farms*, 126 Wn.2d at 65-66 ("the average purchaser even if the insured is a large corporation with company counsel"). And nothing in the contract indicates that *both parties* intended legal meanings (statutes or regulations) to apply to the disputed terms at issue here. See *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 882, 784 P.2d 507 (1990); *Montague v. Dixie Nat'l Life Ins. Co.*, No.: 3:09-cv-687-JFA, 2011 U.S. Dist. LEXIS 61539, at *31-48 (D.S.C. June 8, 2011) (rejecting

health insurer's "conformity with state law" defense, where no contract language expressed parties' expectation that state law might affect benefits under the ambiguous term "actual charges").

In any event, the laws cited by GHC do not make its interpretation the "only" reasonable one. These laws merely provide that generally a Member has an obligation to contribute a copay or other form of cost-sharing when accessing covered services, unless excepted. But the issue here is whether GHC covered its own "portion of the cost." CP 138. It did not.

D. Otey's Consumer Protection and Bad Faith claims are questions of fact for the jury.

GHC violated the Consumer Protection Act and engaged in Bad Faith by advising Members that Tier I & II inexpensive prescription drugs are a coverage benefit, when they are not. GHC did not provide any coverage benefit because Members could obtain these drugs for less than GHC's 3 to 5 times markup of \$13.60 to \$14.75. These claims are independent of Otey's breach of contract claim and should not have been dismissed. CP 6 at ¶23 (complaint); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001) (reversing summary judgment of dismissal, where reasonableness of insurer's actions and disclosures are at issue, trier of fact should determine claims of breach of contract, bad faith, and Consumer Protection Act); *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 175, 817 P.2d 861 (1991) ("Since the coverage issue is

remanded for trial, it is necessary to also reverse the dismissal [on summary judgment] of the bad faith claim.”).

CONCLUSION

GHC’s insurance contract uses ambiguous terms such as “actual charge,” “cost share,” “portion of the cost,” “copayment” and “covered services.” The trial court erred by not interpreting ambiguous terms in favor of the insured. GHC has failed to show that the terms are unambiguous or that Otey’s interpretations are unreasonable. The Court should render summary judgment for Otey. The Court should remand for an assessment of damages for the amounts GHC overcharged its Members. The Court should reinstate Otey’s CPA and Bad Faith claims, and remand for trial.

Dated July 2, 2016.

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I certify that on the date specified below I served the preceding **REPLY BRIEF OF APPELLANT** as follows:

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