IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3531
Summary Calendar

MARY BALFANTZ FIORELLO
and KIM MANGERCHINE,

Plaintiffs-Appellants,

versus

FIDELITY AND GUARANTY
LIFE INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court

for the Eastern District of Louisiana
(CA 91 2199 A)

(December 18, 1992)

Before GOLDBERG, JOLLY and JONES, Circuit Judges.

PER CURIAM.[1]

Plaintiffs' decedent, Gary Fiorello, was killed in a "hit and run" accident. Benefits under an accidental death benefits policy governed by the Employee Retirement Income Security Act of 1974 ("ERISA") were denied to Fiorello's mother and to the trustee of

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, this court has determined that this opinion should not be published.

Fiorello's estate because the plan administrator determined that Fiorello's death was related to intoxication.[2] (Fiorello's accidental death policy provides that "No benefit shall be payable if the Person's loss shall directly or indirectly, wholly or partially result from...(g) any sickness or injury of the body, fatal or otherwise, which is caused from or is sustained from the Person being intoxicated....") Plaintiffs appealed pursuant to 29 U.S.C. § 1132(a)(1)(B).[3] The district court entered summary judgment on behalf of defendants. Plaintiffs appeal, claiming that the district court failed to apply the proper standard of review of the plan administrator's decision, should not have considered expert testimony on summary judgment, and erred in entering summary judgment on behalf of Fidelity and Guaranty Life Insurance Co. We affirm the district court's decision.[4]

The facts were not disputed in the court below. Gary Fiorello and several of his friends spent the evening of December 21, 1989

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[2] The district court found, and the parties agree, that the accidental death policy in question in this case is governed by ERISA, 29 U.S.C. § 1001 et seq. See also Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir.), cert. denied, 112 S. Ct. 453 (1991).

[3] This section of ERISA provides that: "A civil action may be brought (1) by a participant or beneficiary [of an ERISA plan]--...(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan...."

[4] We express no opinion on whether the district court erred in considering the testimony of certain experts. There was sufficient non-expert testimony and evidence to support the judgment.

drinking at a bar in Avondale, Louisiana. Later that night, Fiorello got behind the wheel of his truck and drove out of the bar's parking lot. His friends, passengers in the truck, soon decided he was too drunk to drive,[5] and asked him to stop the truck so that one of them could switch places with him. He agreed.

Fiorello stopped his truck at the intersection of two roads, but failed to put on the parking brake. Fiorello and the passenger who had agreed to drive got out of the truck in order to exchange places. Apparently, Fiorello had stopped his truck on an incline, and the truck began to roll because the parking brake was not in place. The passenger who had determined to exchange seats with Fiorello ran alongside the truck, following it into a ditch by the side of the road. Fiorello remained in the road and was hit and killed by a passing car. The bulk of the evidence indicates that Fiorello was struck while lying down in the middle of one of the lanes in the road.

Fiorello's mother applied for benefits under his accidental death plan. The plan administrator denied the benefits because of a provision in the plan which precluded the award of benefits in cases in which injury resulted "directly or indirectly, wholly or partially" from intoxication.

The district court decided that "factual determination of whether the deceased's actions fell within the purview of the policy's accidental death exclusion was within the plan

[5] A coroner later determined that at the time of his death, Fiorello's blood alcohol level was 0.29%.

administrator's "wide discretionary powers in making factual determinations."" [Minute Entry, Mar. 24, 1992, Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion in limine.] The district court characterized the applicable review of a plan administrator's decision as ""deferential" as opposed to de novo."" Id.

We believe that the district court correctly assessed the proper standard of review of an ERISA plan administrator's factual determination that a claim for accidental death benefits should be denied. However, even if there was error, it was harmless. Whether the district court reviewed the facts of this case de novo, or simply ascertained that the plan administrator's decision denying benefits was not arbitrary and capricious, the result would be the same. The ERISA plan administrator was called upon to determine whether Fiorello's death resulted "directly or indirectly, wholly or partially" from Fiorello's intoxication. Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir.), cert. denied, 112 S. Ct. 453 (1991). We cannot say that the ERISA plan administrator abused his discretion, nor can we say that a de novo review would have produced a different result, when the great weight of the evidence supports the contention that Fiorello's intoxication played a role in bringing about his death.

Fiorello had been drinking. His blood alcohol level at the time of death was .29% Fiorello's friends observed him driving erratically. They were concerned for Fiorello's safety and their own, and asked him to stop driving. Fiorello stopped his vehicle in

the middle of the road (rather than pulling off to the side), and failed to engage the parking brake despite having stopped the truck on an incline. Then he remained in the road in front of his truck, while it began to roll to the side of the road. He was struck by a passing car, and the damage to the car and to his person suggests that he could only have been lying down or sitting down when hit. Although the position of Fiorello's body when hit was first disputed on appeal, the district judge noted that: "There is no question but that Gary Fiorello would not have been either lying down, sitting down, standing up, stumbling or staggering "drunk" in the middle of [the road] had he not been intoxicated and without the ability to safely navigate his vehicle on the roadway at the pertinent time. There is simply no suggestion that there was any other motivation for abandoning his vehicle in the middle of the road in such a manner, which admits only utter reckless disregard for his own safety." [Minute Entry, Mar. 24, 1992, Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion in limine.] We agree.

This case bears some resemblance to Pierre, in which we held that an ERISA plan administrator did not abuse his discretion in finding that decedent's death was "not "accidental" within the terms of the policies." 932 F.2d at 1554. In that case, decedent beat his lover so severely that she shot him in self defense. The issue appealed was whether the plan administrator erred in applying the policy exclusions (for nonaccidental death or injury) to the facts of the case before him. There, as here, the policy's terms

were not ambiguous. We held that factual determinations made by administrators of ERISA plans must stand unless arbitrary and capricious. We believe that the same standard of review applies here. Applying that standard of review, we cannot say that the plan administrator's denial of benefits was arbitrary and capricious.[6]

The evidence suggests that while intoxication may or may not have been the cause of Fiorello's death, it was a contributing factor. The decedent's ERISA plan specifically excluded coverage for injury and death which "directly or indirectly, wholly or partially result[ed] from ... any sickness or injury of the body, fatal or otherwise, which is caused from or is sustained from the Person being intoxicated." While neither the district court judge nor the ERISA plan administrator specifically referred to intoxication as the proximate cause of Fiorello's death, the requisite causal connection was established. Thus, accidental death benefits were properly excluded under the decedent's accidental death benefits plan.

The decision of the district court is AFFIRMED.

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[6] The question whether the plan at issue in this case gave the plan administrator discretion to interpret the plan's terms in ambiguous cases is unclear from the record on appeal. It appears that the plan did not specifically do so. If the terms of the ERISA plan were ambiguous, de novo review would be appropriate if the ERISA plan did not specifically provide the administrator discretionary authority to determine the meaning of uncertain terms. See, e.g., Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). However, we do not consider the relevant terms of the plan in this case to be ambiguous, and we note that even if the facts of this case were reviewed de novo, the result would be no different.