

STATE OF MICHIGAN
COURT OF APPEALS

ROGER CARL HEIKKINEN,

Plaintiff-Appellant,

UNPUBLISHED
November 10, 2009

v

MICHAEL C. GIBBONS, TIMOTHY P.
BERGLAND, and BEIER HOWLETT, P.C.,

No. 288588
Oakland Circuit Court
LC No. 2006-075366-NM

Defendants-Appellees.

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The issue underlying this case concerns plaintiff's alleged loss of disability benefits. In the main, the facts are not in dispute and are drawn from the record. Plaintiff was diagnosed with Parkinson's disease and although he continued to work, he feared his employers ("EPP") might terminate his employment, cutting off his disability benefits, which were provided by Guardian Life Insurance. In January 2003, plaintiff was given a written reprimand for having missed a deadline in making a quote to a customer. The next day, he told EPP of his disease. Fearing EPP planned to terminate his employment and was creating a paper trail, in February 2003, plaintiff hired defendants to negotiate a severance agreement, specifically with an eye to protecting his disability benefits. He told defendants that EPP might be planning on his termination for economic reasons, such as his salary or EPP's inability to add customers for the year. He did not identify his illness as a reason EPP might terminate his employment. Nonetheless, defendants advised plaintiff to file a claim for disability benefits "immediately," despite plaintiff's wish to remain at full salary as long as possible. Plaintiff continued to work full time until April 4, 2003, when EPP terminated his employment.

Plaintiff applied for short- and long-term disability benefits, listing Parkinson's disease as the basis for his disability and providing medical documentation to support his claim. Acting on defendants' advice, plaintiff contacted his neurologist, asking him to indicate on the application that plaintiff was disabled as a result of the Parkinson's disease as of March 24, 2003. However, the EPP officer indicated in the "employer" portion of the long-term benefits application that the

reason plaintiff left work was termination, rather than disability. The form was submitted on April 21, 2003. Guardian approved both applications, and plaintiff received short-term benefits for six months and long-term benefits thereafter. In July 2003, defendants advised plaintiff to sign a separation agreement and mutual release with EPP. The agreement stated that plaintiff's "final day of work was April 4, 2003," and provided that he was to be paid \$63,972.45 to fully settle his claims against EPP. It also included a provision that EPP continue his medical, dental, and life insurance coverage until June 2003 and a release by plaintiff of all claims against EPP for benefits. EPP would not agree to an earlier version defendants proposed, which included language bolstering plaintiff's assertion that he was disabled before the date of termination.

In late 2003, Guardian conducted a routine audit of plaintiff's claim. The audit turned up several questions about the claim, and Guardian asked EPP for more details. In a letter to EPP, dated May 7, 2004, and seeking more information, Guardian specifically mentioned three things:

- it had a letter from EPP dated December 16, 2003, that stated plaintiff's employment with EPP "ceased on April 4, 2003," that they had entered a severance agreement that paid plaintiff about four months' salary, and that the writer "never understood how [plaintiff] qualified for either short or long term disability benefits under these circumstances";
- during a conference call between EPP and Guardian, "it was communicated that [plaintiff] was terminated for poor performance"; and
- Guardian sought plaintiff's attendance records from his hire date to April 4, 2003.

Guardian then wrote plaintiff, asking for a copy of his "termination agreement." Plaintiff consulted with defendants, who advised him by letter, dated July 9, 2004, to send Guardian a copy of the severance agreement. He did this. In September 2004, Guardian sent plaintiff a letter terminating his benefits. It stated, "According to the 'Employment Separation Agreement And Mutual Release[,] your final day of work for EPP was April 4, 2003.'" In order to qualify for benefits, "you must be completely unable to perform the major duties of your *regular occupation* on a full-time basis and your [sic] must suffer a 20% or greater earnings loss." (Emphasis in original). Because plaintiff was working full time and receiving his full salary up to April 4, 2003, his employment was terminated before he became eligible for benefits.

Plaintiff sought advice from defendants, but they declined in a letter dated October 11, 2004, citing "present workload rather than the merits of your claim" as the reason. Defendants noted that plaintiff likely had a short appeal period and gave him the name of another lawyer who could help, as well as identifying Oakland County's and the State Bar's referral services. Plaintiff asked EPP to provide him with documentation concerning his termination, but all EPP would provide was a proposed letter that explained that his employment was terminated due to poor performance. Plaintiff hired another attorney to appeal the denial of long-term disability benefits, but Guardian again denied benefits. Guardian noted that while plaintiff did not seek benefits until April 22, 2003, EPP reported his last day of work was April 3, 2003, and would not provide verification that plaintiff qualified for benefits before that date.

Plaintiff filed suit against defendants on June 16, 2006, claiming legal malpractice based on defendants' failure to secure his long-term disability benefits through the separation agreement. Defendants moved for summary disposition based on MCR 2.116(C)(7) (expiration of statute of limitations) and (C)(10) (no genuine issue of material fact), arguing that plaintiff could not show that Guardian's decision to stop benefits was caused by the separation agreement and that his claim was barred by the two-year statute of limitations because they stopped providing services in September 2003. The trial court agreed with defendants' causation argument, finding that "there is no evidence that their malpractice in drafting the release, if any, was the cause of damages to the plaintiff in this regard." However, the court found that defendants provided services as late as October 2004, and so plaintiff's suit was not barred by the statute of limitations.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

A plaintiff seeking to bring a legal malpractice claim must establish the following elements:

- (1) the existence of an attorney-client relationship;
- (2) negligence in the legal representation of the plaintiff;
- (3) that the negligence was a proximate cause of an injury; and
- (4) the fact and extent of the injury alleged. [*Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).]

In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). That is, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Mere possibility of causation, or a conclusion that can be reached only through pure speculation and conjecture, is not enough. *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615; 563 NW2d 693 (1997) (citing *Skinner, supra* at 165). Although when the alleged malpractice involved an appeal the question of causation is one for the court to decide, if the alleged malpractice occurred during litigation or settlement negotiations, then proximate cause often is an issue of fact. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 590 n 22; 513 NW2d 774 (1994) (Riley, J.) (citing *Ignotov v Reiter*, 425 Mich 391, 399; 390 NW2d 614 (1986) (Levin, J.); *Espinoza v Thomas*, 189 Mich App 110, 124; 472 NW2d 16 (1991)).

The trial court did not err in finding plaintiff did not raise a triable issue of fact regarding causation. The policy providing disability benefits unambiguously provides that coverage ends

on the date the employee's active full time service ends for any reason unless the employee's active service ended because he or she became disabled. The policy also states: "The employee must . . . become disabled while insured by this plan." Finally, the plan defines "disability" within the first 36 months an employee is sick or injured as meaning: "he or she is completely unable to perform the major duties of his or her regular occupation on a full-time basis; and . . . the employee's current monthly earnings, if any, are less than 80% of his or her indexed prior monthly earnings."

There was no dispute that plaintiff's employment ended on April 4, 2003. EPP completed the benefit application indicating this date and indicating the reason plaintiff was no longer employed was "termination." Guardian had that document in May 2003, long before defendants were able to get EPP to agree to a separation agreement. Nor was there any dispute that, despite his illness, plaintiff was working full time and at full salary up to the time he was terminated. At that moment, he ceased being entitled to disability benefits. The only way defendants could help plaintiff regain those benefits was to get EPP to agree to a separation agreement that provided language to the effect that it erred in saying he was "terminated" in April 2003 but instead that he left because of disability.

However, once plaintiff failed to take disability before EPP terminated him, something about which defendants had warned him, defendants had little bargaining power with EPP in reaching the separation agreement. The record shows that both parties to this suit were well aware that if EPP terminated plaintiff's employment before he took disability, he would lose his benefits. Despite defendants' advice that plaintiff file his claim "immediately" in February 2003, plaintiff insisted on continuing to work full time so he could earn his full salary. By the time defendants attempted to cabin the damage done by plaintiff's delay, his injury had already occurred. While it is perhaps possible that defendants could have done something to negotiate an agreement more favorable to plaintiff, he provides no facts supporting such a theory. This is insufficient. *Pontiac Sch Dist, supra* at 615.

Because we agree with the trial court's decision on this issue, we need not review its conclusion that defendants could not raise a statute of limitations defense.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens