STATE OF MICHIGAN

COURT OF APPEALS

DALLAS FORYSTEK,

Plaintiff-Appellant,

v

JOSEPH A. GOLDEN and SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.,

Defendants-Appellees.

UNPUBLISHED
March 20, 1998

No. 202816
Oakland Circuit Court
LC No. 95-509847 NM

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right the order of the trial court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff's claim stems from defendants' representation of plaintiff in an employment and fraud claim against plaintiff's former employer. In 1987, during plaintiff's employment with Chrysler Corporation, he was injured in an automobile accident. In 1991, plaintiff was placed on medical leave status because, after knee replacement surgery, he was no longer able to perform his work. In 1992, a Chrysler doctor contacted plaintiff's doctor to change plaintiff's prognosis so that plaintiff would be able to return to work under a special position; plaintiff's doctor consented. When plaintiff returned to work, however, the personnel department told him that his special position was no longer available, and that he would be placed on layoff status. Allegedly, Chrysler never had a position for plaintiff and merely desired to remove plaintiff from his long-term disability (LTD) status.

Defendant Joseph Golden began representing plaintiff in July of 1992. Golden contacted Gregory Muzingo, an attorney for Chrysler, and began negotiations related to plaintiff's claim. On January 29, 1993, plaintiff entered into a retainer agreement with defendants concerning representation for his worker's compensation and employment/fraud claim against Chrysler. On April 13, 1993, Golden filed suit against Chrysler on behalf of plaintiff. In November of 1993, another attorney at defendant law firm settled plaintiff's worker's compensation claim for $95,000, together with a waiver

of any claim or lien on an action with regard to the automobile accident that was settled nine months earlier.

Although the record is not entirely clear, it appears that in late 1993 Muzingo and Golden orally agreed to all of the conditions of settlement regarding plaintiff's employment daim. According to plaintiff, the terms of the settlement included the following terms: plaintiff would be placed on total and permanent disability and would be entitled to back pay; Chrysler would allow plaintiff to participate in the Executive Automobile Leasing Program; and plaintiff would receive life insurance, disability benefits, and a written guarantee that he would not be subject to medical reviews by Chrysler's claims administrator, Aetna's employees or Chrysler's doctors. According to defendants, the settlement provided that plaintiff would receive $190,000 (split between the worker's compensation and employment cases), LTD benefits, medical insurance, life insurance and title to the automobile in plaintiff's possession at the time of settlement.

On December 13, 1993, plaintiff was asked to sign a release from Chrysler at Golden's office. The release provided that Chrysler would pay plaintiff $95,000 in damages for his alleged injury and would reinstate him to his proper disability leave status effective January 1, 1994. Moreover, reinstatement to the "proper" leave status was a "prerequisite to his receipt of a disability retirement consistent with the terms and conditions of the applicable disability retirement plan." The release was silent as to many of the conditions of settlement. Plaintiff initially refused to sign the release, but was "strongly advised" to do so by Golden and was told that he would get what he was "entitled" to receive under the settlement. Thereafter, plaintiff encountered difficulties in obtaining timely and accurate LTD payments from Chrysler. Moreover, plaintiff did not receive any confirmation of medical insurance, life insurance benefits, or a vested pension.

In December of 1995, plaintiff filed suit against defendants claiming professional negligence and misrepresentation. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that the problems associated with plaintiff's receipt of LTD benefits were attributable to the administration of the benefits through an insurance company (disability administrator) unconnected with Chrysler, and thus that the problems were not attributable to defendants' failure to incorporate the terms of the settlement agreement into the release. The trial court held that there was no causal relationship between the alleged negligence of defendants and the difficulties that plaintiff encountered when he subsequently attempted to get benefits from the employer. The court also held that defendants were not liable because settlement is an exercise of judgment and not a basis for malpractice.

Plaintiff argues on appeal that the trial court erred in granting summary disposition in favor of defendants. Plaintiff specifically argues that defendant Joseph Golden breached the applicable standard of care by failing to require that all terms and conditions of plaintiff's settlement be spelled out in the release/settlement agreement, and that since the adequacy of the agreement was in dispute, the questions of proximate cause and damages present questions of fact for the jury. Plaintiff also argues that since there was conflicting expert testimony concerning the reasonableness of Golden's conduct, it is for the jury to determine whether such conduct is protected by the "attorney's judgment rule." We agree with both of plaintiff's contentions.

Pursuant to MCR 2.116(C)(10), a party can move for judgment on all of a claim on the grounds that "there is no genuine issue as to material fact, and the moving party is entitled to judgment . . . as a matter of law." The party opposing the motion has the burden of

demonstrating a genuine and material issue of disputed fact. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are drawn in favor of the opposing party and courts should be liberal in finding a genuine issue of material fact. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). On appeal, we review a trial court's granting of summary disposition de novo. *Royce v Duthler*, 209 Mich App 682, 688; 531 NW2d 817 (1995). This Court considers the same documentary evidence that a trial court must consider, including pleadings, affidavits, depositions, and admissions. *Boumelhem v Bic Corp*, 211 Mich App 175, 178; 535 NW2d 574 (1995).

A cause of action for legal malpractice requires proof of the following: (1) an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) the negligence proximately caused the plaintiff's injuries; and (4) the fact and extent of injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The first issue for our resolution concerns the third prong – whether the trial court erred in granting summary disposition in favor of defendants on the issue of proximate cause. We believe that the court's determination was in error.

The issue of proximate cause is divided into two categories: (1) "causation in fact" of the injury, which is generally reserved for the jury, and (2) "foreseeability" of the injury, which is a question of law for the court. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). With regard to causation in fact, a jury cannot rely on speculation or conjecture to hold a defendant liable for negligence. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997). A plaintiff must present substantial evidence allowing a jury to conclude that it was more likely than not that the plaintiff's injuries would not have occurred but for defendant's conduct. *Id.* at 614. Although the issue is normally reserved for a jury, a trial court may review the causation in fact aspect of negligence on a motion for summary disposition if reasonable minds could not differ on the proximate cause of the plaintiff's injuries. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

In the present case, the trial court reasoned that the testimony of plaintiff's former employer's corporate counsel was proof of "the fact that it was not anything the defendant did or did not do that caused or continued to cause the delay [in receiving disability payments]. It's obvious that the problem lies with . . . [the former employer] and the insurer, not with the attorney [defendant]."[1] The trial court thus found no causation in fact for plaintiff's injuries. We believe that the trial court erred because it failed to consider the scope of plaintiff's allegations and because reasonable minds could differ on the cause of plaintiff's injuries.

First, the trial court failed to consider the fact that plaintiff's injuries were more expansive than the claim of late LTD payments. Plaintiff also claimed that as a result of defendants' negligence in failing to place all of the settlement terms into the release or into writing, plaintiff's former employer did not provide him with various insurance policies, allow him to participate in the Executive Automobile Leasing Program, provide him with a pension based on certain years of service or provide him with a guarantee that he would be free from harassment from his former employer's doctors and the employees of its disability administrator. Additionally, plaintiff has alleged damages due to the fact that he has had to hire an attorney to help him receive benefits that were not specifically provided for in the

agreement; mental anguish and distress resulting from his attempts to receive the benefits; and his "lost right" to "go to trial" on his claim against his former employer. A reasonable trier of fact could find that all of the other injuries plaintiff alleges could be attributed to defendants' failure to expressly provide for the inclusion of more specific terms.

Second, even if we accept defendants' assertion that Chrysler's disability administrator was at fault for failing to provide plaintiff with benefits in a timely fashion, and this failure could be construed as an intervening cause of plaintiff's injuries, plaintiff set forth an equally plausible set of facts that would allow reasonable minds to differ on whether the late receipt of LTD payments was more likely than not a result of defendants' alleged negligence. A jury could conclude that a more detailed release would have placed Chrysler in a position of breach of the release agreement, and given it an incentive to alleviate its disability administrator's delays. In any case, plaintiff's other claims of injuries are not necessarily connected to the disability administrator. The disability administrator did not prevent plaintiff from participating in the Executive Automobile Leasing Program because it did not supervise the program. Similarly, the disability administrator did not determine the years of service upon which the former employer would calculate plaintiff's pension.

Given these facts, we find that the trial court erroneously granted summary disposition on the issue of proximate cause because a question of fact exists concerning whether it was more likely than not that plaintiff's injuries would not have occurred but for defendants' negligence.

Plaintiff also argues on appeal that the trial court erroneously granted summary disposition on the issue of whether defendants breached a duty to plaintiff with respect to settlement of the underlying action. Where a plaintiff demonstrates an attorney-client relationship, a "duty" to avoid negligent conduct is implied as a matter of law. *Simko, supra* at 655. Once it is determined that a "duty" exists, the extent of the duty must be determined. *Id.* at 656. An attorney must use reasonable skill, care, discretion and judgment, as that of the average practitioner of law, in representing a client. *Id*. at 656-657. An attorney must fashion a strategy of representation consistent with "prevailing Michigan law." *Id*. at 656. However, an attorney does not have to insure the most favorable outcome possible to her client. *Id.* An attorney may make "mere errors in judgment" if the attorney acts in good faith and exercises reasonable skill, care, discretion and judgment as an average practitioner. *Id.* at 658. The parties refer to this as the "attorney judgment rule."

The determination of the extent of the duty owed to a client is a question of law. *Simko, supra* at 659. On the other hand, some tactical decisions or errors may constitute "negligence" where a court finds as a matter of law that those acts, if proved, demonstrate a failure to exercise reasonable care. See *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 714; 303 NW2d 702 (1981). This Court has not foreclosed the possibility that a duty may exist to a client in the context of obtaining a settlement. *Espinoza v Thomas*, 189 Mich App 110, 124; 472 NW2d 16 (1991); *Lowman v Karp*, 190 Mich App 448, 453; 476 NW2d 428 (1991). Therefore, we believe Michigan case law supports the proposition that an attorney must conduct himself with reasonable care in the course of obtaining a settlement on behalf of a client.

In the present case, the trial court found that "nothing . . . would suggest the settlement was unreasonable . . . . I think it's a question of judgment on the behalf of the attorney at that particular time, which the client accepted." However, the trial court's analysis does not account for plaintiff's argument that defendants never told him that his former employer's failure to reinstate him was a "ruse" and his counsel was not "prepared" as evidenced by his failure to conduct discovery in the trial court proceedings.[2] Plaintiff implies that both of these factors "coerced" him into signing the settlement agreement. Plaintiff further argues that defendants strongly urged plaintiff to sign the release even though plaintiff had strong reservations due to the fact that the spirit of the agreement would be upheld based on defendants' relationship with plaintiff's former employer's counsel.

Even if the trial court correctly analyzed the extent of the duty owed to plaintiff, the court erred when it concluded that defendants did not breach any duty to plaintiff because the settlement was "reasonable." It is not for this Court or the trial court to make a determination concerning whether the evidence proves the alleged conduct did in fact occur. Rather, it is a question for the trier of fact to determine whether the facts support a breach of the duty which the court determines that a defendant owes to a plaintiff. See *Smith, supra* at 714. Therefore, the trial court's holding was in error with respect to its analysis of the duty owed and with respect to its conclusion that defendants did not breach the duty owed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski

[1] The testimony cited by the court is as follows:

> The best I can explain it in that regard is simply it (the delay) had nothing to do with this lawsuit, it had nothing to do with what Mr. Golden did or didn't do. It was an internal procedural issue with Chrysler Corporation, its benefits department, and Aetna. . . .
>
> In my opinion, Mr. Golden did everything consistent with the terms and conditions of this settlement agreement. The problems that he (plaintiff) has had with the schedule of receipt of payments . . . was an internal problem peculiar to Chrysler and Aetna which Mr. Golden had nothing to do with.

[2] It appears that plaintiff's argument alleges that he was pressured into signing a release because his attorney had not yet begun discovery. According to plaintiff's expert, plaintiff had to sign the documents in the middle of December because discovery was set to close in approximately one month but discovery had not yet been conducted. Additionally, the case was scheduled to proceed to trial in April

of the following year, and defendants were not prepared to go to trial in the absence of conducting any discovery.