

STATE OF MICHIGAN
COURT OF APPEALS

JEROME H. WARREN,

Plaintiff-Appellant,

V

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

November 30, 1999

No. 209335

Oakland Circuit Court

LC No. 96-519651 NO

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

In this action for breach of a disability insurance contract, plaintiff appeals as of right from a judgment of no cause of action following a special jury verdict finding that plaintiff was not disabled from his occupation at the time of his disability claim. We affirm.

Plaintiff began running a small roofing business in 1971 and became the sole owner in the early 1980s. Through growth, experience, and the acquisition of several other roofing companies, plaintiff's company came to specialize in large commercial roofing projects. Plaintiff never did the roofing himself, but he engaged in every other aspect of the business, including estimating, re-engineering roof structures, and reviewing customer requests or complaints. At some point, plaintiff purchased a disability policy and, in 1987, replaced that policy with an income disability insurance policy issued by defendant. This policy included coverage for both total and residual (i.e., partial) occupational disability. The application for the policy, which was filled out by plaintiff's insurance agent and reviewed by plaintiff, described plaintiff's occupation as the president and owner of a roofing company, and it listed plaintiff's duties as management and administration.

In 1992, plaintiff experienced some pain in his right knee and sought treatment from Dr. Goldman. Dr. Goldman believed plaintiff may have sustained a small tear in his "medial meniscus", instructed plaintiff to perform exercises, and told plaintiff that he need not return unless he experienced recurrent disabling symptoms.¹ According to plaintiff, in the fall of 1993, he began experiencing pain in both knees. Plaintiff consulted Dr. Wiater, who concluded that plaintiff's knees were undergoing early osteoarthritic changes and ultimately diagnosed him with chondromalacia, a softening or fissuring of knee

cartilage. Plaintiff testified that his inability to climb onto roofs significantly reduced his effectiveness as the owner of a roofing company, which led to a steady decline in his income and eventually caused him to sell the company in 1995. Plaintiff filed a claim with defendant, alleging that he was totally disabled from his occupation. This action followed defendant's denial of the claim.

Plaintiff first argues that the trial court erred in denying his motion for partial summary disposition on his claim for residual disability benefits under the insurance policy. Plaintiff contends that it was undisputed that he suffered from a "sickness or injury" (a degenerative knee condition) which prevented him from climbing roofs to perform his material business duties and caused his monthly income to decrease more than twenty-percent. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Insurance Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). On a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

The residual disability section of the policy provides the following definitions:

Residual Disability or *residually disabled*, during the Elimination Period, means that "due to Injuries or Sickness":

1. you are not able to do one or more of your substantial and material daily business duties or you are not able to do your usual daily business duties for as much time as it would normally take you to do them;
2. you have a Loss of Monthly Income in your occupation of at least 20%; and
3. you are receiving care by a Physician which is appropriate for the condition causing the disability.

After the Elimination Period has been satisfied, you are no longer required to have a loss of duties or time. *Residual Disability* or *residually disabled* then means that "due to Injuries or Sickness":

1. you have a Loss of Monthly Income in your occupation of at least 20%; and
2. you are receiving care by a Physician which is appropriate for the condition causing the disability. [Emphasis in original.]

The record before the trial court indicates that while defendant's in-house physician reviewed plaintiff's records and opined that the condition "looks to be genuine," he did not concede that the condition was disabling. A subsequent independent evaluation in 1997 by plaintiff's former physician revealed that plaintiff's condition had not changed since 1992 and that he had no orthopedic problem relating to his knees "that would preclude him from working full time in a job that requires going up and down ladders and walking on roofs." Moreover, while plaintiff testified that he suffered a twenty

percent reduction in income due to his condition, he presented no evidence to refute defendant's claim that he was in a position to manipulate his own salary or to demonstrate that the reduction was causally related to his alleged condition. This evidence shows that there were unresolved issues of fact as to (1) whether plaintiff was suffering from a disabling condition, (2) if so, whether that condition kept plaintiff from performing a substantial duty of his occupation, (3) whether plaintiff suffered a loss of income, and (4) if so, whether that loss was causally related to his alleged condition. Determinations of fact are questions for the jury, and are not appropriately resolved by summary disposition. See *Ireland v Edwards*, 230 Mich App 607, 621-622; 584 NW2d 632 (1998). Consequently, viewing the evidence in a light most favorable to defendant, we conclude that the trial court properly denied plaintiff's motion for partial summary disposition.

Plaintiff next contends that the court erred by excluding testimony from owners of other roofing companies regarding the duties of a roofing company owner, and by excluding the testimony of a witness who could have testified as to what plaintiff's duties were between the years 1983 and 1990. Again, we disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997).

The income disability insurance policy at issue unambiguously provides that benefits are payable when an insured becomes totally or partially disabled. Total and partial disability are defined in terms of whether the insured can perform the substantial and material duties of his occupation. Moreover, an insured's occupation is defined as: "the occupation (or occupations, if more than one) *in which [the insured is] regularly engaged at the time [the insured] become[s] disabled*" (emphasis added). Thus, the trial court was correct when it determined that the issue was not whether going on roofs was a material duty for other owners of roofing companies, but whether it was a material duty for plaintiff at the time he allegedly became disabled.

While the testimony of other roofing company owners might have been marginally relevant to what plaintiff's duties were, the necessity of such speculative testimony was substantially diminished by the fact that there were two witnesses available to testify as to what plaintiff's duties actually were at the time he allegedly became disabled in 1993 or 1994. In addition, given plaintiff's testimony that the company underwent continuous growth, evidence regarding plaintiff's duties ten to three years before he ostensibly became disabled, was marginally relevant, but entirely unnecessary, in light of the witnesses who were presented. We therefore hold that the trial court properly excluded the proffered testimony based on the danger of "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. See also *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-363; 533 NW2d 373 (1995).

Finally, plaintiff argues that the trial court abused its discretion in denying his motion for a mistrial because defense counsel improperly questioned plaintiff regarding the gross receipts and net income of plaintiff's roofing company and engaged in the prejudicial use of "speaking objections." "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). In determining whether defense counsel's conduct warranted a mistrial, we must first decide "whether or not the claimed error was in fact error, and whether it was

harmless.” *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982); *Szymanski v Brown*, 221 Mich App 423, 426-427; 562 NW2d 212 (1997).

Contrary to plaintiff’s contention, the trial court only precluded defense counsel from exploring, in the jury’s presence, plaintiff’s overall wealth, his income from sources other than his roofing company, and the amount of the benefits being claimed under the insurance contract. The court specifically ruled that defense counsel could explore plaintiff’s claim regarding the reduction of his income from his roofing company, which was a central issue in the case. It was defendant’s well-presented theory that plaintiff was in a position to manipulate the salary he was paid by his wholly owned corporation and, therefore, his salary figures could not be relied on to demonstrate whether plaintiff actually suffered a loss of income due to his claimed disability. Plaintiff’s counsel had elicited testimony that plaintiff drew salaries of \$108,439 in 1992, \$55,242 in 1993, \$11,770 in 1994, and no salary in 1995. Consequently, defense counsel attempted to put these numbers in perspective by revealing the company’s gross revenues and net income over the same period. Because the trial court had not prohibited defense counsel from questioning plaintiff regarding the gross revenues of his company and because this information was highly relevant to an issue in the case, defense counsel’s alleged misconduct was not grounds for a mistrial.

As for plaintiff’s general challenge to unspecified “speaking objections”, our review of the record reveals that the trial court exercised appropriate control over the trial as it occurred and that the contested comments were not prejudicial. *Schutte, supra* at 142. Therefore, the trial court did not abuse its discretion in denying plaintiff’s motion for a mistrial.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

¹ According to plaintiff’s insurance agent, during a June 1993 meeting, plaintiff claimed to be suffering from anxiety or depression and inquired how his mental condition would be handled under his disability policy. When the agent explained that such claims were closely scrutinized, plaintiff added that he was having trouble with one of his knees.