

STATE OF MICHIGAN  
COURT OF APPEALS

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CONSTANCE LONGHI,

Plaintiff-Appellant,

v

ALEX BERMAN and ALEX BERMAN, P.C.,

Defendants-Appellees.

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UNPUBLISHED

November 17, 2005

No. 256427

Oakland Circuit Court

LC No. 2003-048844-NM

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and denying plaintiff's cross-motion for summary disposition. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo by this Court. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 278. When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether the proffered evidence establishes a genuine issue of material fact. *Id.*

The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Manzo v Petrella & Petrella & Associates, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). To establish proximate cause, a plaintiff must show that the defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff in a legal malpractice case must show that but for the attorney's malpractice, the plaintiff would have been successful in the underlying suit. *Id.* Whether a plaintiff would have been successful in the underlying action is a question of law, which is reviewed de novo. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592; 513 NW2d 773 (1994).

Plaintiff argues that defendant Alex Berman negligently advised her to sign a sweeping release in connection with the redemption of her worker's compensation claim against her former employer, Northwest Airlines, which resulted in her inability to pursue disability pension

benefits under Northwest's plan. After plaintiff's claim for disability benefits was denied, she filed a federal lawsuit challenging Northwest's plan, which was dismissed because of operation of the release. In count I of her federal action, plaintiff challenged the independent medical examination fee-sharing requirement of Northwest's plan.<sup>1</sup> When plaintiff appealed her initial denial of benefits, she was required to submit to an independent medical examination (IME), the results of which were final and binding on both plaintiff and Northwest, and plaintiff was required to pay half the cost of the IME. Because plaintiff challenged the plan's procedures, it presented a question of law that would have been subject to de novo review by the federal court.<sup>2</sup> *Marks v Newcourt Credit Group, Inc*, 342 F3d 444, 459 (CA 6, 2003).

29 USC 1133(2) provides that every employee benefit plan covered by the Employee Retirement Income Security Act (ERISA),<sup>3</sup> 29 USC 1001 *et seq.*, shall "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." At the time plaintiff filed her claim for disability pension benefits, a review procedure violated ERISA if it unduly inhibited or hampered the initiation or processing of plan claims. *Bond v Twin Cities Carpenters Pension Fund*, 307 F3d 704, 706 (CA 8, 2002), citing 29 CFR 2560.503-1(b)(1)(iii) (1999). The issue in *Bond* was whether a plan procedure for appealing an adverse decision to an arbitrator, which required the participant to bear half the arbitrator's cost, unless the arbitrator decided otherwise, violated ERISA. *Bond, supra* at 705. The court held that such a fee-splitting arrangement violated ERISA because "[t]he threat of having to pay the arbitrator's expenses no doubt discourages the pursuit of many legitimate claims by those who cannot afford such costs. A claims system such as this is unduly burdensome, and not permitted by ERISA." *Id.* at 706. The court also noted that its decision was supported by amendments to the regulations that interpret 29 UCS 1133. *Id.* at 706 n 2.

Currently, the regulations state that "a provision or practice that requires payment of a fee or costs as a condition to making a claim or to appealing an adverse benefit determination would be considered to unduly inhibit the initiation and processing of claims for benefits" and, therefore, is an unreasonable claims procedure. 29 CFR 2560.503-1(b)(3). We therefore conclude that plaintiff could have successfully shown that Northwest's pension procedure for appeal, which required that she pay half the cost of an IME, violated ERISA. However, simply because plaintiff could have shown that the claims procedure was unreasonable does not mean that plaintiff was entitled to summary disposition in her legal malpractice action wherein she

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<sup>1</sup> In her federal lawsuit, plaintiff challenged the plan on other bases as well, but because she made no argument in her motion for summary disposition regarding her chances of success with respect to these other bases, we decline to address them here. This Court is not required to make a party's argument and then search for authority to support or reject the argument. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

<sup>2</sup> Plaintiff asserts that the trial court relied on the wrong standard of review in determining whether she could prove causation. However, the record discloses that the trial court did not articulate what it believed the federal court's standard of review of should have been.

<sup>3</sup> The parties do not dispute that Northwest's pension plan is governed by ERISA.

sought damages in the amount of her disability pension benefits. In her federal action, plaintiff requested, as relief, that she receive her disability pension benefits. If plaintiff would not have been entitled to that relief, she ultimately would not have been successful in the federal action.

In general, a plan participant may bring a civil action to recover benefits due under the plan or enforce rights under the terms of the plan. 29 UCS 1132(a)(1)(B). However, the remedy for a procedural violation of ERISA is not necessarily an award of benefits. *Camarda v Pan American World Airways, Inc*, 956 F Supp 299, 311 (ED NY, 1997). Typically, a procedural violation requires a procedural remedy, such as a remand for a full and fair review. *Russell v The Paul Revere Life Ins Co*, 148 F Supp 2d 392, 410 (DC Del, 2001). The reason for addressing procedural violations is to ensure that the beneficiary receives a full and fair review. *Camarda, supra* at 311. A remand would not ensure that plaintiff received disability benefits.

Further, a remand would not be warranted in two instances. The first instance is if the federal court determined that the plan's procedures substantially complied with the statutory requirements of 29 USC 1133 and plaintiff received a full and fair review, despite having to pay a share of the IME. *Russell, supra* at 410 (substantial compliance with procedures sufficient). In such a case, plaintiff's remedy would be reimbursement of her portion of the IME. The other instance in which a remand could be avoided is where the evidence clearly showed that the administrator abused his discretion. *Id.*

If the trial court reviewed plaintiff's denial of her benefits claim itself, we conclude that plaintiff would not have been entitled to receive disability benefits. Contrary to plaintiff's contention, the federal court's standard of review of this issue would not be de novo. The citation on which plaintiff relies, 63 Fed Reg 48390 (1998), refers only to a set of proposed rule changes to the interpretive regulation of 29 USC 1133. The specific portion denoting that a standard of review should be less than highly deferential was not adopted when the regulation, 29 CFR 2560.530-1, was amended in 2001. Other proposed changes were adopted and are reflected in the amended version of the regulation.

Where, as in this case, an independent medical examiner's decision is final and binding on both parties, the arbitrary and capricious standard of review is used, and the physician's medical findings would not be subject to review by the federal court. *Brooks v General Motors Corp*, 203 F Supp 2d 818, 824 (ED Mich, 2002). A decision is arbitrary and capricious if it is not rational in light of the plan's provisions. *Id.* The plan administrator's decision to deny plaintiff's claim on appeal was not arbitrary and capricious in light of the independent medical examiner's medical findings, which were arrived at after a thorough examination of plaintiff and her history. Therefore, we conclude that even if the federal court had reviewed plaintiff's action on its merits, she would not have been entitled to the relief requested.

Because plaintiff cannot prove that she would have been entitled to disability benefits, plaintiff cannot establish that, but for defendants' alleged negligence, she would have been

successful in the underlying matter. Accordingly, the trial court properly granted summary disposition in favor of defendants.<sup>4</sup>

Affirmed.

/s/ Kathleen Jansen  
/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood

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<sup>4</sup> Because plaintiff cannot prove the causation element of her legal malpractice claim, it is unnecessary to address whether there is a genuine issue of material fact concerning defendants' alleged negligence.