STATE OF MICHIGAN

COURT OF APPEALS

JOEL R. WILLIAMSON,

Plaintiff-Appellee,

V

BARRIE R. BRATT,

Defendant,

and

LAW OFFICES OF LEVINE, BENJAMIN, TUSHMAN, BRATT, JERRIS, and STEIN, P.C.,

Defendants,

and

HAROLD DUNNE,

Defendant-Appellant.

.

UNPUBLISHED
October 19, 2010

No. 285682
Oakland Circuit Court
LC No. 2005-063518-NM

JOEL R. WILLIAMSON,

Plaintiff-Appellee,

V

BARRIE R. BRATT,

Defendant,

and

LAW OFFICES OF LEVINE, BENJAMIN, TUSHMAN, BRATT, JERRIS, and STEIN, P.C.,

No. 286391
Oakland Circuit Court
LC No. 2005-063518-NM

Defendants,

and

HAROLD DUNNE,

Defendant-Appellant.

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this legal malpractice action, defendant, Harold Dunne,[1] appeals as of right the final judgment entered following a jury trial verdict in favor of plaintiff in the amount of $525,000. Because plaintiff presented sufficient evidence on which a jury could conclude that defendant committed legal malpractice and that plaintiff is totally and permanently disabled, we affirm.

This is the second time this matter is before this Court. The substantive facts relevant to this appeal are not in dispute and they are set out in this Court's previous decision. *Williamson v City of Livonia*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket No. 260274), rev'd 477 Mich 853 (2006).

> In January 2000, plaintiff, who was employed by the City of Livonia Fire Department, filed a petition for workers' compensation benefits alleging a psychological disability arising out of adverse employment actions and a hostile work environment. The alleged injury date was October 18, 1999. Trial on plaintiff's psychological disability claim was held on January 17, 2002. On February 25, 2002, the magistrate granted plaintiff a closed award of benefits for a temporary psychological disability.[1] Defendants appealed the decision to the WCAC, which affirmed the magistrate's finding of a work-related injury, but remanded for further findings on the issue of disability. On remand, the magistrate again determined an award of benefits to be proper, and that determination was later affirmed by the WCAC.
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> [FN 1] The closed award pertained to the period of October 20, 1999 to June 11, 2000.
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> On January 26, 2002, plaintiff filed the instant petition for benefits. This second petition alleged a disability due to hypertension. The alleged injury date

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[1] While initially parties below, defendants Barrie R. Bratt and the Law Offices of Levine, Benjamin, Tushman, Bratt, Jerris, and Stein, P.C., were dismissed by the trial court and are not parties to this appeal. Defendant Dunne is the remaining defendant and thus all references to defendant refer to defendant Dunne.

was November 21, 2000, and the petition contended that plaintiff was permanently and totally disabled as a result of the condition.[2]

> [FN 2] The petition was amended in September 2002 to add "coronary heart disease" as a disabling condition.

Defendants moved to dismiss the instant petition for benefits on res judicata grounds. Essentially, defendants contended that plaintiff had been aware, even before the filing of the initial petition for benefits, that he suffered from hypertension and that it might be work related, and therefore, the doctrine of res judicata required plaintiff to bring a claim based on hypertension in the initial proceedings. In response, plaintiff argued that he could not have alleged a hypertension claim in his initial petition because he lacked sufficient medical evidence of such a condition before January 2002.

In granting defendants' motion for dismissal, the magistrate found that plaintiff had knowledge of the conditions asserted in this petition at least one year before the filing of the initial petition, and had suspected that the conditions were related to his employment.[3] The magistrate went on to find that plaintiff had ample opportunity to add the instant claims to those raised in the first petition, but failed to do so. In light of these findings, the magistrate concluded that res judicata applies, and the instant petition was barred.

> [FN 3] The magistrate also noted that plaintiff should have been aware that, pursuant to MCL 418.405, his heart disease was presumed to be related to his employment with the fire department.

Plaintiff appealed the magistrate's dismissal to the WCAC. Plaintiff argued that res judicata was inapplicable because: (1) there was no final decision of his first claim at the time he filed his second claim, (2) the second claim could not have been litigated in the first proceeding, (3) the two claims did not arise out of the same transaction, and (4) the magistrate's factual findings were not supported by competent evidence.

The WCAC found plaintiff's arguments to be without merit and affirmed the dismissal. The WCAC concluded that even though at the time of the filing of the second petition, "the original decision was clearly not final," because the proofs in the first matter had been closed and the case submitted to the magistrate for a decision, and plaintiff offered "no compelling explanation why his heart disease claim could not have been presented in the original proceeding," plaintiff's "second claim is barred, despite the absence of an absolutely final decision." *Williamson v City of Livonia*, 2004 Mich ACO 398, 5-6. The WCAC also opined that applying res judicata was proper because worker's compensation proceedings were required to be "as summary as reasonably may be." *Id*. at 6. In regard to plaintiff's argument that res judicata was inapplicable because his two claims are separate and distinct and rely upon different proofs and facts, the WCAC concluded that the "distinct nature of the claims is not critical", instead "[t]he essential question is whether the cardiovascular condition could have been

> litigated at the time of the first claim." *Id*. The WCAC then went on to conclude that the magistrate's affirmative answer to that "essential question" was supported by competent evidence. *Id*. at 6-7.
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> This Court granted plaintiff's application for leave to appeal. In this appeal, plaintiff claims, as he did below, that res judicata does not bar the instant petition for benefits based on hypertension and coronary heart disease. [*Id*., slip op at pp 1-2.]

This Court agreed with plaintiff and held that res judicata was inapplicable to plaintiff's second petition for benefits based on hypertension and coronary heart disease and reversed the decisions of the WCAC and the magistrate. *Id*., slip op at p 3.

The defendant City of Livonia appealed and our Supreme Court reversed, holding that:

> The Court of Appeals erred by finding res judicata inapplicable because plaintiff's first petition pertained to a psychological condition and his second petition pertained to cardiovascular disease. A worker's compensation award is an adjudication as to the condition of the injured employee at the time it is entered, and conclusive of all matters adjudicable at that time. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-161; 294 NW2d 165 (1980). [*Williamson v City of Livonia*, 477 Mich 853; 720 NW2d 749 (2006).]

As a result of our Supreme Court's reversal and reinstatement of the WCAC's dismissal of the claim, plaintiff received no worker's compensation benefits on his second petition for benefits based on hypertension and coronary heart disease.

Plaintiff had different counsel for each of his two worker's compensation petitions. Barrie R. Bratt and the Law Offices of Levine, Benjamin, Tushman, Bratt, Jerris, and Stein, P.C. were plaintiff's counsel for the first petition that was successful. Defendant was plaintiff's counsel for the second petition that was barred as a result of the application of res judicata. Plaintiff filed the instant lawsuit against defendant, asserting that defendant was negligent in his representation of plaintiff because defendant recommended against promptly filing the second worker's compensation case and/or consolidating it with the first worker's compensation case.

In his complaint, plaintiff specifically alleged that defendant "failed to advise Plaintiff of the risk of res judicata or to consider that risk [himself] in advising him not to raise the issues of work-related hypertension and coronary artery disease while his 1st comp case [was] still pending, perhaps even as a part of that 1st case." Plaintiff claimed defendant's professional negligence was the direct and proximate cause of the loss of plaintiff's second worker's compensation claim. Defendant argued in response that he was not negligent in his opinion that res judicata did not apply to plaintiff's second worker's compensation claim because the law of res judicata with regard to worker's compensation claims was unsettled at the time and open to various interpretations as evidenced by the differing opinions of the WCAC, this Court, and our Supreme Court.

The matter proceeded to jury trial. Defendant testified on his own behalf at trial. Defendant testified that plaintiff specifically asked him about the application of res judicata

because plaintiff's first attorney, Bratt, had advised plaintiff that his second claim would have to be merged with his first claim to avoid res judicata. Defendant testified that he told plaintiff that he "did not agree with Mr. Bratt at all" and advised him against filing the second worker's compensation claim before the first claim was adjudicated. Defendant testified that he had read substantial case law with regard to the res judicata issue and he was comfortable that he was giving plaintiff the correct legal advice. He testified that he "was convinced that [he] was right" and did not perceive any risk of being wrong.

Plaintiff provided expert testimony at trial on the issue of legal malpractice by attorney Thomas Geil. Geil stated that he had formed the following opinion:

> After looking at various documents and reviewing depositions it's my opinion that [defendant] was negligent in failing to either advise [plaintiff] that if he didn't file a petition seeking benefits for his heart condition prior to the trial date of his first claim he stood the possibility of forever being barred from pursuing that claim and/or in failing to have [plaintiff] file what we call an in pro per petition during the time he was investigating it. So it's my opinion that negligence did occur here.

Geil further testified that in his opinion, defendant's representation of plaintiff fell below the standard of care and resulted in negligence that resulted in damages to plaintiff because "he'll never be entitled to whatever benefits a court might find him to be entitled to under the comp act. He'll never be able to bring that claim, never be able to have a hearing, never be able to get any of those benefits."

At the close of the testimony, plaintiff moved for a directed verdict on the issues of breach and causation. The trial court denied the motion stating that the issues would go to the jury. After closing argument, the jury returned a verdict in favor of plaintiff finding specifically that defendant had been negligent and was the proximate cause of plaintiff's damages. The jury awarded plaintiff damages in the amount of $525,000. The trial court reduced the jury verdict to a final judgment on March 20, 2008 "in the amount of $525,000, plus interest and costs (including any applicable Case Evaluation sanctions and costs) to be taxed."

Thereafter, defendant filed a motion for JNOV arguing mainly that his understanding of the law, as well as the advice he gave plaintiff, was validated by this Court's previous decision with regard to res judicata and thus he could not have been negligent. Plaintiff responded that the issue had already been raised and testimony presented to the jury that defendant never advised plaintiff that there was a possibility that res judicata might apply in order for plaintiff himself to make an informed decision if he wanted to run the risk with his own case. The trial court found no new issues and denied defendant's motion for JNOV letting the jury determination stand. Defendant now appeals as of right.

On appeal, defendant raises a single substantive issue. Defendant argues that the trial court erred in denying his motion for JNOV where the jury's verdict was against the great weight of the evidence on plaintiff's claim that defendant committed legal malpractice. In particular, he asserts that he was not negligent in his opinion that res judicata did not apply to plaintiff's second worker's compensation claim and that plaintiff failed to offer proof of an injury leading to total and permanent disability. Plaintiff responds that he presented sufficient evidence on

which a jury could conclude, as it did, that defendant committed legal malpractice and that plaintiff is totally and permanently disabled.

We review a trial court's decision on a motion for JNOV de novo. *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli*, 242 Mich App at 260-261. "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). Moreover, "a case should not be submitted to the jury where a verdict must rest upon conjecture or guess." *Scott v Boyne City, G & A R Co*, 169 Mich 265, 272; 135 NW 110 (1912).

"A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Sciotti v 36th Dist Court*, 482 Mich 1143; 758 NW2d 289 (2008). "If the evidence conflicts, the issue of credibility ordinarily should be left with the trier of fact." *Id*.

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld . . . "'[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [*Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (citations omitted).]

The elements of a legal malpractice claim 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 & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Here, defendant only challenges the element of negligence. He admits the existence of an attorney-client relationship and makes no argument with regard to proximate cause or the extent of the injury alleged.

An attorney owes a duty to exercise reasonable skill, care, discretion, and judgment in representing a client, but is not a guarantor of the most favorable possible outcome. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). An attorney who acts in good faith and with an honest belief that his acts and omissions are well founded in law and in the best interest of the client, is not answerable for mere judgments in error. *Id*. A bad result, in and of itself, is not sufficient to raise an issue for the jury in a professional negligence action. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005) (citation omitted). The general rule in legal malpractice actions is that expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation. *Law Ofices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989).

Defendant argued below and now in his brief on appeal as follows:

> At trial Defendant testified that he relied on *Gose v Monroe Auto Equipment Co*, 409 Mich 147; 294 NW2d 165 (1980), which was a case where the plaintiff's second WC claim arose out of the same transaction as his first claim. In *Gose*, the plaintiff sought total and permanent disability in his first claim and then sought total and permanent disability in his second claim on the same set of facts as in his first claim.
>
> It was Defendant's opinion that since Plaintiff, in the present case, sought total and permanent disability in his second WC claim, due to a coronary heart condition, those facts arose out of a different set of facts from his first WC claim of emotion[al] distress for a closed period of eight months.

For this reason, defendant contends that his reasoning was based in the law. Defendant further maintains that his legal opinion was rational because of the obvious discord between the holdings of the WCAC, this Court, and our Supreme Court with regard to the application of res judicata in this worker's compensation case.

But defendant also states explicitly in his brief on appeal that "*the law of res judicata as it applied to WC claims was open to various interpretations*, particularly regarding Plaintiff's second claim for total and permanent disability due to a coronary heart condition as opposed to his first claim for a closed eight month period due to emotional distress." (Emphasis added.) Undoubtedly, defendant was aware, and even stated so, that the law about which he was providing specific legal advice to plaintiff was "open to various interpretations." That being the case, not informing his client of that fact and instead concretely advising him to wait to file—without advising him of the state of the law, the risks involved, and affording him an opportunity to make an educated decision about when to file the second worker's compensation claim—was clearly a violation of his duty to exercise reasonable skill, care, discretion, and judgment. *Mitchell*, 249 Mich App 677.

Indeed, an attorney who acts in good faith and with an honest belief that his acts and omissions are well founded in law and in the best interest of the client, is not answerable for mere judgments in error. *Mitchell*, 249 Mich App 677. While defendant may have believed that his legal advice to plaintiff was well founded in law, defendant failed to act in his client's best interests. Defendant did not advise his client of the possible pitfalls of his proposed legal strategy and did not allow his client the opportunity to assess the risks involved with waiting to file. This is especially true when plaintiff specifically informed defendant that his previous attorney, Bratt, advised plaintiff that his second claim would have to be merged with his first claim to avoid res judicata. Defendant admitted that faced with plaintiff's inquiry he told plaintiff that he "did not agree with Mr. Bratt at all" and unequivocally advised him against filing the second worker's compensation claim before the first claim was adjudicated. Defendant was certainly on notice that at least one other attorney disagreed with his legal reasoning, yet defendant was emphatic about his course of action and did not properly counsel his client about possible risks. Plaintiff testified at trial that had defendant advised him that there was any risk associated with waiting to file his second claim, he would not have waited to file and instead would have proceeded with his heart disability claim immediately.

In addition, plaintiff provided expert testimony at trial that defendant breached the standard of care and was negligent "in failing to either advise [plaintiff] that if he didn't file a

petition seeking benefits for his heart condition prior to the trial date of his first claim he stood the possibility of forever being barred from pursuing that claim."

On this record, viewing the evidence in a light most favorable to plaintiff and granting every reasonable inference to plaintiff, defendant has failed to establish a right to relief with regard to the element of negligence in the legal representation of the plaintiff. *Manzo*, 261 Mich App 712. Plaintiff presented sufficient evidence on which a jury could conclude that defendant was negligent when he failed to advise plaintiff that if he chose not to file a petition seeking worker's compensation benefits for his heart condition prior to the trial date of his first worker's compensation claim, there was a significant risk that he would be barred by operation of res judicata from pursuing that claim. Because plaintiff presented sufficient evidence presented to create an issue for the jury, defendant is not entitled to JNOV on the negligence issue. *Attard*, 237 Mich App at 321. And because there exists competent evidence on this record to support the jury's finding of negligence, defendant has not established that it is against the great weight of the evidence. *Allard*, 271 Mich App at 406-407.

Defendant's argument that plaintiff failed to offer proof of an injury leading to total and permanent disability in the underlying case also fails. Defendant somehow ignores the plain language of a letter dated July 28, 2003, authored by Dr. Alan Kravitz, a cardiologist, that was admitted into evidence at trial. The letter is addressed to defendant and states as follows:

> At your request, I have reviewed certain documents including Dr. Miller's report of April 4th, 2003, the outline of [plaintiff's] duties as a fire inspector. Dr. Miller's report of [plaintiff's] catheterization and Dr. Miller's diagram of [plaintiff's] heart the day of his operation.
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> Based on the enclosed documents, [plaintiff] is permanently and totally disabled from doing the duties of a fire inspector as outline. He cannot specifically return to duties of shoveling debris, lifting weights, moving equipment and handling dust particles. You should note that although the area of 80% is stented, there are three additional areas of 50% blockage as well as a very strong history of coronary artery disease and a likelihood that the 50% blockage will increase.
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> To be clear, in the strongest language I know, [plaintiff] **SHOULD NOT RETURN TO DUTIES OF A FIRE INSPECTOR.** Should you have any additional questions, do not hesitate to contact me. [Emphasis in original.]

Defendant also ignores the plain language of MCL 418.405 in the Worker's Compensation Act that specifically applies to plaintiff as a fire inspector. The statute states as follows in pertinent part:

> (1) In the case of a member of a full paid fire department of an airport run by a county road commission in counties of 1,000,000 population or more or by a state university or college or of a full paid fire or police department of a city, township, or incorporated village employed and compensated upon a full-time basis, a county sheriff and the deputies of the county sheriff, members of the state police, conservation officers, and motor carrier inspectors of the Michigan public service

> commission, "personal injury" shall be construed to include respiratory and heart diseases or illnesses resulting therefrom which develop or manifest themselves during a period while the member of the department is in the active service of the department and result from the performance of duties for the department.
>
> (2) Such respiratory and heart diseases or illnesses resulting therefrom are deemed to arise out of and in the course of employment in the absence of evidence to the contrary. [MCL 418.405(1) and (2).]

Again, a jury verdict should not be overturned if there is an interpretation of the evidence that provides a logical explanation for the jury's findings. Here, the evidence can be interpreted so as to uphold the jury's findings and is not against the great weight of the evidence. Considering plaintiff's profession, the presumption present in MCL 418.405, and the substance of Dr. Kravitz's letter, defendant's argument that plaintiff failed to offer proof of an injury leading to total and permanent disability is wholly without merit.

Finally, defendant states that because the trial court erred in denying his motion for JNOV, the trial court also erred when it granted costs in the amount of $25,788.54 pursuant to MCR 2.403. Contrary to defendant's assertion, the trial court properly denied defendant's motion for JNOV and therefore, defendant has not established any error with regard to the award of costs pursuant to MCR 2.403.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio