STATE OF MICHIGAN

COURT OF APPEALS

NEIL SOLOMON, M.D., PH.D., Plaintiff-Appellant, v ROYAL MACCABEES LIFE INSURANCE COMPANY, Defendant-Appellee.	FOR PUBLICATION November 28, 2000 9:00 a.m. No. 213969 Oakland Circuit Court LC No. 97-540616-CK Updated Copy January 19, 2001

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

O'CONNELL, J.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition, MCR 2.116(C)(10). On appeal, plaintiff argues that summary disposition was improper because he presented sufficient evidence to establish a question of fact that precluded summary disposition. Plaintiff also argues that the trial court erred in failing to address his argument that defendant's experts' opinions lacked sufficient foundation to be considered as substantive evidence. We affirm.

On March 19, 1997, plaintiff filed a complaint against defendant to recover disability insurance benefits pursuant to a disability insurance policy and a policy covering overhead expenses. Plaintiff's disability insurance policy provided benefits in the event that, because of "accident or illness," plaintiff was prevented from performing the "substantial and material duties of his regular occupation." In his complaint, plaintiff alleged that he was a medical doctor who

maintained a full-time practice in Baltimore, Maryland, until June 1993, when his severe bipolar affective disorder caused him to become totally and permanently disabled. According to plaintiff, his bipolar disorder caused him to have improper sexual relationships with his female patients. In October 1993, plaintiff voluntarily surrendered his license to practice medicine in Maryland. Plaintiff admitted that defendant paid him disability benefits and overhead expenses from November 22, 1993, to January 22, 1994, but alleged that defendant ceased paying benefits when it incorrectly determined that plaintiff was not totally and permanently disabled. Plaintiff sought to recover the amount of unpaid benefits.

On May 11, 1998, plaintiff filed a motion for partial summary disposition with regard to the issue of defendant's liability. Plaintiff asserted that, throughout his adult life, he had been afflicted with bipolar disorder, otherwise known as manic depression, and that his disorder forced him to voluntarily cease practicing medicine during the summer of 1993 and ultimately to surrender his medical license in October 1993. On that same date, defendant filed its motion for summary disposition, arguing that plaintiff was fully able to practice medicine and that only his voluntary surrender of his medical license prevented him from doing so. Defendant argued that plaintiff did not become depressed until June 1993, when one of his lovers began to blackmail him, a number of his former patients commenced legal proceedings against him, and the Maryland Board of Physician Quality Assurance (board) began to investigate him. Defendant further argued that plaintiff's inability to practice medicine was not the result of his bipolar disorder because plaintiff had practiced successfully for thirty years notwithstanding the disorder. Defendant also contended that, while plaintiff claimed to have been disabled in June 1993, he did not seek psychiatric help or discontinue treating patients until August of that year. Therefore,

defendant argued, plaintiff was not disabled in June 1993 because he was able to continue treating patients.

At the hearing on the parties' respective motions for summary disposition, the trial court recognized that the sole issue in this case was which of two possible causes, plaintiff's medical illness or the surrender of his license, prevented him from performing the substantial and material duties of his regular occupation. The trial court determined that plaintiff established the existence of a factual disability, but that his legal disability was the actual cause of his inability to practice medicine. Therefore, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion for partial summary disposition.

Plaintiff argues that trial court erred in granting defendant's motion for summary disposition. According to plaintiff, a factual question existed regarding whether he sustained a factual, versus a legal, disability, and this factual question prevented the trial court from granting defendant's motion for summary disposition. Plaintiff's position is that the uncontradicted evidence established that he had suffered from bipolar disorder since his late teens and that his condition worsened after he suffered a severe head injury in an automobile accident in 1982. After that time, plaintiff began having inappropriate sexual relationships with his patients, and because of his impaired condition, he was unable to control and prevent this inappropriate behavior.

A generally recognized principle of insurance law is that the burden of proof lies with the insured to show that the policy covered the damage suffered. 10 Couch, Insurance, 3d, § 147:29, p 147-46; *Williams v Detroit Fire & Marine Ins Co*, 280 Mich 215, 218; 273 NW 452 (1937).

We review de novo a trial court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) is proper if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Id.*

Plaintiff testified during his deposition that he became very depressed in June 1993 and decided to decrease the amount of time that he spent treating patients. The record below contained evidence that plaintiff also stopped paying blackmail money to a woman with whom he had had a sexual relationship for seven or eight years. When plaintiff refused to continue paying, the woman reported to the board that plaintiff had had inappropriate sexual relationships with his patients. Several patients, along with the woman who allegedly blackmailed plaintiff, then filed a lawsuit against him in June or July 1993, and plaintiff became severely depressed and contemplated suicide. He then visited Dr. Neil Pauker, who referred him to Dr. Chester W. Schmidt, Jr.

Dr. Schmidt, a psychiatrist, diagnosed plaintiff with bipolar disorder toward the end of 1993 or the beginning of 1994. He first treated plaintiff on August 24, 1993, and determined, at that time, that plaintiff suffered from depression. Dr. Schmidt then completed a claim form indicating that plaintiff was unable to practice medicine, and plaintiff submitted the form to defendant. The form indicated that plaintiff was partially disabled from June 19, 1993, until August 14, 1993, and that, thereafter, he was totally disabled.

Plaintiff admitted during his deposition that he had had numerous inappropriate sexual relationships with many different women, some of whom were patients, and that the board was investigating him as a result. He testified that he feared that he would again initiate sexual relationships with patients if he were to resume practicing medicine. He further testified that he signed a letter permanently surrendering his medical license only because he was horribly depressed and unable to defend himself and that signing the letter was the only way to prevent the board from releasing the information to the media. The letter read, in pertinent part:

> I understand that this letter of surrender shall be considered a PUBLIC document immediately upon its acceptance by the Board of Physician Quality Assurance (the "Board"). I also understand that this surrender of my medical license is and shall be considered IRREVOCABLE.
>
> My decision to surrender my license to practice medicine has been prompted by an investigation of my practice by the Board. The Board initiated this investigation after it received several complaints, and after it became aware of several civil actions filed against me by former patients, all of which alleged that I instigated improper sexual contact with patients during the physician/patient relationship.
>
> I admit that for at least the past 20 years, I have used my position as a physician to instigate a wide range of sexual relations with at least eight women patients. This conduct included acts of sexual intercourse, as well as other explicit sex acts. These activities took place in my medical office during patient visits, as well as in other locations. I admit that I engaged in sexual misconduct with my patients during the physician/patient relationship. I admit that I engaged in this conduct with multiple patients over the same time period. I recognize that these patients developed a sense of trust, confidence and dependence through the physician/patient relationship, and that I misused my influence as a physician and the trust my patients placed in me for my own sexual gratification. I admit that it was improper to engage in any sexual relationship with any patient.
>
> The Board's investigation resulted in charges under the Maryland Medical Practice Act (the "Act").

Dr. Schmidt testified that plaintiff had not had any inappropriate sexual relationships since his treatment began. He determined that plaintiff had suffered bipolar disorder his entire life, along with long periods of hypomania, and that a severe head injury that he suffered in an automobile accident in 1982 may have made him more susceptible to developing bipolar disorder. Dr. Schmidt testified that plaintiff would never be able to return to work because he would be at risk of again initiating inappropriate sexual relationships. Dr. Schmidt admitted that plaintiff could possibly restrict his practice to the treatment of men and children only, but that returning to the practice of medicine could destabilize plaintiff's mood. Therefore, Dr. Schmidt determined that plaintiff was permanently and completely disabled from treating patients and that his medical disability both preceded, and was a factor contributing to, his legal disability.

Dr. Gerald A. Shiener, one of defendant's experts, reviewed plaintiff's file for the purpose of advising defendant on how to proceed with plaintiff's claim, but he did not personally examine plaintiff. Dr. Shiener testified that he had no doubt that plaintiff had bipolar disorder, but that it did not appear that plaintiff was disabled. Dr. Shiener also testified that he saw no evidence of a longstanding history of bipolar disorder.

Dr. Scott A. Spier, defendant's other expert, reviewed plaintiff's file, interviewed plaintiff, and conducted a telephone conference with Dr. Schmidt regarding plaintiff's condition. Dr. Spier testified, among other things, that Dr. Schmidt informed him that if plaintiff had a medical license, he would be able to return to work. Dr. Spier concluded that plaintiff had bipolar disorder, but that the disorder did not constitute a disability.

Generally, disability insurance policies provide coverage for factual disabilities, such as illness or injury, but not for legal disabilities. 10 Couch, Insurance, 3d, § 149:9, p 146-24. If a claimant suffers from both a factual and a legal disability, however, and the factual disability is medically bona fide and genuinely arose before the legal disability, the fact that the legal disability arose later will not necessarily terminate a claimant's right to disability benefits. *Ohio Nat'l Life Assurance Corp v Crampton*, 822 F Supp 1230, 1233 (ED Va, 1993). The claimant must demonstrate that his factual disability was the cause of the claimant's inability to work. *Paul Revere Life Ins Co v Bavaro*, 957 F Supp 444, 449 (SD NY, 1997).

In *Massachusetts Mut Life Ins Co v Millstein*, 129 F3d 688, 689 (CA 2, 1997), the defendant, an attorney, filed a claim with the plaintiff insurance carrier for disability benefits, contending that he was unable to work because he suffered from attention deficit disorder (ADD), conduct disorder (CD), and a chemical dependency. The plaintiff eventually refused to pay benefits and brought an action seeking declaratory judgment, claiming that the loss of the defendant's license to practice law was the cause of his inability to work. *Id*. at 690. The Connecticut Statewide Grievance Committee suspended the defendant's license on July 6, 1994, following his diversion of funds from his employer in 1986, the fraudulent facilitation of loans from clients between 1990 and 1992, and the diversion of funds from his clients' trust fund accounts in 1993 and 1994. *Id*. The defendant was subsequently charged with criminal conduct for his misuse of client funds and was convicted and sentenced to serve six years' imprisonment. *Id*. He argued in response to the plaintiff 's motion for summary judgment, and on appeal, that his ADD, CD, and chemical dependency impaired his judgment and caused him to commit the wrongful conduct that resulted in the loss of his license. *Id*. The United States Court of Appeals

for the Second Circuit recognized that the question whether a disability caused the loss of earned income is often a jury question, but held as a matter of law that the defendant's criminal conduct was the cause of his losing his license to practice law and the resulting loss of income. *Id*. at 691. In making this determination, the court emphasized that the defendant did not seek treatment for his disorders until his license to practice law was threatened, that he practiced law successfully for many years despite the disorders, and his admission that, but for the loss of his license, he had the ability to perform legal work. *Id*. The court also stated that to impose liability on the plaintiff in that case would have been contrary to public policy in that it would have rewarded the defendant for his criminal conduct. *Id*. at 691. Therefore, the court affirmed the district court's grant of summary judgment in favor of the plaintiff. *Id*. at 692.

In *Massachusetts Mut Life Ins Co v Ouellette*, 159 Vt 187, 192; 617 A2d 132 (1992), the Vermont Supreme Court affirmed the grant of summary judgment in favor of the plaintiff insurance company. The defendant, an optometrist, was convicted of lewd and lascivious conduct with a minor and was sentenced to a term of imprisonment. *Id*. at 187. As part of the plea agreement underlying the defendant's conviction, he agreed to surrender his license to practice optometry. *Id*. at 188. The defendant did not dispute that he practiced optometry despite suffering from an atypical paraphilia for approximately ten years before his incarceration and the loss of his license. *Id*. After his conviction, he filed a claim seeking disability insurance benefits, asserting that his illness rendered him totally disabled. *Id*. The trial court granted summary judgment in favor of the plaintiff, and the Vermont Supreme Court affirmed, holding that the plaintiff presented no evidence to contradict the trial court's conclusion that the defendant's legal disability, rather than his mental illness, was the cause of his inability to work.

Id. at 189-191. The opinion emphasized testimony that the defendant was able to practice optometry for ten years after his disorder manifested itself and that the defendant would have continued to practice had he not been incarcerated and lost his license. Therefore, summary judgment in favor of the plaintiff was proper. *Id*. at 191.

In the present case, defendant does not dispute that plaintiff has bipolar disorder. However, defendant asserts that the disorder did not prevent plaintiff from performing the substantial and material duties of his regular occupation. We agree. Viewing the evidence in the light most favorable to plaintiff, as we are required to do in reviewing motions for summary disposition under MCR 2.116(C)(10), we accept as true that plaintiff has suffered from bipolar disorder for most of his life. Nevertheless, as in *Millstein* and *Ouellette, supra*, plaintiff was able to practice in his field for at least twenty years despite his disorder. Plaintiff did not become unable to work until 1993. Plaintiff 's actions, although certainly inappropriate, did not prevent him from performing his job and running a highly successful practice. Not until plaintiff decided to voluntarily surrender his license was he unable to carry out the duties of his regular occupation.[1] Further, Dr. Schmidt testified that had plaintiff not surrendered his license he would have been able to treat a significant portion of the population without risk.[2] We also note that plaintiff continued to treat patients after he claimed to be totally disabled, although he worked far fewer hours than before. Finally, we cannot ignore that plaintiff made no mention of his bipolar disorder in the letter in which he voluntarily surrendered his medical license. In fact, plaintiff admitted that he chose to surrender his license in order to quell any media exposure.

Plaintiff also argues that the trial court erred in failing to address his argument that defendant's experts' opinions lacked sufficient foundation to be considered as substantive

evidence. Because we conclude as a matter of law that the trial court properly granted defendant's motion for summary disposition, we need not address this issue. The testimony of defendant's experts was not essential to the trial court's ruling.

Affirmed.

Doctoroff, J., concurred.

/s/ Peter D. O'Connell
/s/ Martin M. Doctoroff

[1] The federal district court in *Goomar v Centennial Life Ins Co*, 855 F Supp 319, 320 (SD Cal, 1994), aff'd 76 F3d 1059 (CA 9, 1996), also granted summary judgment in favor of the plaintiff's insurance carriers. The plaintiff, a medical doctor, contended that visions of astral beings caused him to sexually molest four female patients when he was in private practice. *Id*. The plaintiff continued to practice medicine for three years without incident after the sexual assaults, but his license to practice medicine was ultimately revoked as a result of the sexual assaults. *Id*. at 321, 323. He filed claims for disability benefits in March 1992, claiming that a psychological disability led to the conduct that caused the revocation of his license. *Id*. The defendants denied the plaintiff's claims and moved for summary judgment after the plaintiff sued to recover the unpaid benefits. *Id*. The district court found that the plaintiff was trying to recover benefits for a legal disability, rather than for a factual disability, and that the plaintiff's inability to practice medicine was solely due to the revocation of his license. *Id*. at 325-326.

[2] In *Grayboyes v General American Life Ins Co*, ___ F Supp ___; 1995 WL 156040 (ED Pa, April 4, 1995), the plaintiff was an orthodontist for approximately twenty years before his license to practice dentistry was revoked on July 19, 1991, for a five-year period. *Id*. at 1-2. The plaintiff had improperly touched many young female patients in a sexual manner and was arrested on October 31, 1990, with respect to one such incident. *Id*. at 1. He pleaded guilty to the charges and received a four-year term of probation. *Id*. at 2. At about the same time that he was arrested, the plaintiff began treatment with a psychiatrist, who diagnosed the plaintiff with frotteurism, a form of paraphilia involving intense sexual urges to touch and rub against others. *Id*. On May 30, 1991, the plaintiff filed a claim for disability benefits, which the defendant denied. *Id*. at 2-3. After trial, the district court entered judgment in favor of the defendant, finding that, but for the suspension of his license, the plaintiff was able to perform the material and substantial duties of his occupation and was not totally disabled within the meaning of his insurance policy. *Id*. at 5. Particularly influential to the court were the facts that the plaintiff was able to exercise some control over his urges (as his selectivity in choosing his victims evidenced), he was able to treat a significant portion of the population (i.e., males and adult females) without risk, and he was able to practice orthodontics for twenty years with the same condition that he claimed was disabling. *Id*.