STATE OF MICHIGAN

COURT OF APPEALS

NEIL SOLOMON, 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.

JANSEN, P.J. (*dissenting*).

I respectfully dissent. This case, stripped to its essence, is simple. The question is whether plaintiff has presented sufficient evidence to create a material factual dispute regarding whether he is entitled to disability benefits under an insurance policy issued by defendant. More specifically, the question is whether plaintiff cannot perform the "substantial and material duties of his regular occupation" because of an illness. Although the trial court correctly identified the issue, it improperly made a factual finding in concluding that defendant was entitled to summary disposition. I state the trial court's findings made on the record here:

> *The Court*: Now, the sole issue before the Court is whether Plaintiff cannot perform the substantial and material duties of his regular occupation, because of his mental illness or because he has a legal disability as a result of the loss of his license to practice medicine. An insurance company is not liable for loss of earned income that results from a license suspension or other consequences of the insured's unlawful behavior of—and that's the [case of *Massachusetts Mut Life Ins Co v Ouellette*, 159 Vt 187; 617 A2d 132 (1992).]

> In the *Ouellette* case and in [*Goomar v Centennial Life Ins Co*, 855 F Supp 319 (SD Cal, 1994), aff'd 76 F3d 1059 (CA 9, 1996)], the Courts were influenced by the fact that the insured was able to perform his duties without the legal restriction placed on him. The evidence establishes that Plaintiff suffered from bipolar disorder, which is a permanent medical disability, from at least June 19, 1993.
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> Further, although Plaintiff apparently saw patients between June and August, he did not maintain his regular practice. The parties present the testimony of various physicians who evaluated Plaintiff, either through treatment, by reviewing his records, or through a professional or social relationship with him. It's the opinion of Plaintiff's treating physician, Dr. Schmidt, that since June 25, 1993, Plaintiff was—had remained unable to practice medicine, due to his psychiatric condition, which predated his legal difficulties.
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> Dr. Sheiner reviewed Plaintiff's medical records and found Plaintiff's behavior inconsistent with a disabling conditioning [sic], and that he was not disabled. Dr[s]. Nyman, Pauker, Coller, DePaulo, and Fagan, opined that Plaintiff had bipolar disorder. Dr. Spier also testified that Plaintiff has bipolar disorder and that his sexual behavior was possibly affected by his mood disorder.
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> The expert testimony does not establish the [plaintiff] lying as to whether he became disabled in June or when he sought treatment in August, 1993. Having established that Plaintiff had a factual disability, this Court must determine if it preceded his legal disability.
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> As to the legal disability, the evidence establishes that Plaintiff surrendered his license on October 27, 1993 as a result of the Board investigation of his practice, which was initiated after several complaints and several actions were filed against him by former patients. *The problem with this case, it's difficult to determine from the evidence whether Plaintiff stopped practice because he had the civil actions filed against him and complaints had been made by patients, resulting in the loss of his license, or because he was severely depressed. Logically, however, if he stopped seeing patients only due to his disability, the question the Court would have, why wouldn't he have given up his license and just waited until his condition improved instead of foreclosing his ability to practice?*
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> I'm, therefore, going to rule in favor of the Defendants [sic] in this case and find that this was—that it was the investigation by the Medical Board and the resulting loss of his license that caused his inability to work and not his mental disability. [Emphasis added.]

Apparently, the standard for reviewing a motion brought under MCR 2.116(C)(10) bears reiteration because both the trial court and the majority have misapplied it in this situation. "A

motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), the court must consider the pleadings, depositions, affidavits, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Smith, supra,* p 454, citing *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). A motion under MCR 2.116(C)(10) may be granted if the evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Quinto, supra,* p 362. As stated by our Supreme Court:

> The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. *Zamler v Smith,* 375 Mich 675, 678-679; 135 NW2d 349 (1965). Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of any material fact exists to warrant a trial. [*Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994).]

The trial court's finding that it is difficult to determine from the evidence whether plaintiff stopped his practice because of the loss of his medical license (a legal disability) or because of his depression (a factual disability) leads to only one conclusion: namely, that there is a material factual dispute in the evidence that must be resolved by the trier of fact, here, the jury. Consequently, defendant is clearly not entitled to judgment as a matter of law. The trial court, having correctly identified the question of fact to be resolved, whether plaintiff stopped practice because of his legal disability or because of his factual disability, then incorrectly resolved this factual issue in favor of defendant. The court cannot make factual findings in ruling on a motion for summary disposition under MCR 2.116(C)(10). *Skinner, supra,* p 161; *Nesbitt v American Community Mut Ins Co,* 236 Mich App 215, 225; 600 NW2d 427 (1999).

The majority, unfortunately, compounds the error by stating that "[n]ot until plaintiff decided to voluntarily surrender his license was he unable to carry out the duties of his regular occupation." *Ante,* p ___. This, again, is a factual finding from the evidence, which actually shows that there is a factual dispute regarding whether plaintiff stopped working because of his mental illness or because he voluntarily relinquished his medical license.[1]

This appeal is not about whether plaintiff is a "good" person or a "bad" person, nor is it about Dr. Schmidt's credibility; it is about whether there is a question of fact based on the evidence presented by the parties whether plaintiff was no longer able to perform his job because of an illness. There is clearly a question of fact based on the evidence presented and that question must be resolved by a jury, not by the trial court or by this Court. Both the trial court and the majority have improperly usurped the exclusive province of the jury by determining the critical factual issue to be resolved in this case.

I would reverse and remand for trial.

/s/ Kathleen Jansen

[1] Indeed, taken in a light most favorable to plaintiff, Dr. Schmidt testified during his deposition that plaintiff's illness took place well before he lost his medical license and that plaintiff is permanently disabled from taking care of patients. Further, in letters written by Dr. Schmidt, he stated that plaintiff was disabled from at least June 19, 1993, and that he had suffered from a severe depressive episode in June 1993. It was not until July 1993 that the lawsuits were filed against plaintiff by his former patients, and it was in September 1993 that plaintiff voluntarily offered to surrender his medical license.