STATE OF MICHIGAN

COURT OF APPEALS

ANDREW BOSCAGLIA,

Plaintiff-Appellant,

v

RON S. KIRSCH and WORSHAM, VICTOR & AHMAD, P.C.,

Defendants-Appellees.

UNPUBLISHED
June 3, 2004

No. 245414
Oakland Circuit Court
LC No. 01-036607-NM

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing this legal malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff developed disabling cardiomyopathy during the course of his employment for Chrysler Corporation and sought worker's compensation benefits, alleging that exposure to cobalt in an automobile facility caused or contributed to his condition. Defendants, who represented plaintiff in his claim for benefits, did not seek to undertake independent air testing in the facility after earlier, normal tests were conducted by Chrysler and the Michigan Occupational Safety and Health Administration. Defendants contended that any additional normal test results would have impaired plaintiff's claim. The worker's compensation magistrate denied the claim, finding that plaintiff failed to establish that his condition was caused or aggravated by his employment.

Plaintiff filed the instant suit, primarily alleging that defendants committed legal malpractice by failing to obtain independent evidence regarding the presence of cobalt in the atmosphere at the plant. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff could not establish causation because he could not demonstrate that but for the alleged negligence, he would have prevailed in the worker's compensation case. The trial court agreed and granted the motion.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a claim of legal malpractice, a plaintiff must prove: "(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." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994) (citation and internal quotation omitted). If the alleged malpractice results from the failure to diligently pursue a claim, a plaintiff seeking to establish proximate cause and damages must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. *Id.*, 586.

Proof of causation requires both cause in fact and proximate cause. *Helmus v Dep't of Transportation*, 238 Mich App 250, 255; 604 NW2d 793 (1999).Cause in fact requires a showing that the harmful result would not have occurred but for the negligent conduct. *Id.* A plaintiff must adequately establish cause in fact in order for proximate cause to become a relevant issue. *Id.*, 255-256. To show proximate cause, a plaintiff must prove that the injury was a probable, reasonably anticipated, and natural consequence of the alleged negligence. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). Generally, proximate cause is an issue for the trier of fact. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). However, if reasonable minds could not differ, then the issue becomes one of law for the court. *Id.*, 424.

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition. We disagree and affirm. Contrary to plaintiff's assertion, a showing that but for the alleged malpractice a claimant "could" have prevailed in the underlying action is insufficient. To establish a prima facie claim of legal malpractice, plaintiff was required to show that but for defendants' failure to conduct air testing at Chrysler's plant and to present pertinent evidence at trial, he would have prevailed on his claim for worker's compensation benefits. See *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Plaintiff's expert witness stated only that had defendants engaged in such discovery, the worker's compensation case "could" have been strengthened "substantially." A causation theory premised on mere conjecture is insufficient. *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). Plaintiff presented no evidence that demonstrated that had defendants conducted air testing in Chrysler's plant, they would have obtained results that showed the presence of an abnormally high level of cobalt in the environment. The trial court correctly found that defendants were entitled to summary disposition because plaintiff could not show that, but for defendants' alleged negligence, he would have prevailed in the worker's compensation case. *Charles Reinhart Co, supra*, 586.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter