

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

JUDY L BELLERS,

Plaintiff-Appellant,

v

DAVID J. COOPER, COOPER & BENDER, PC,  
COOPER & BENDER & MOHR, PC, and  
COOPER & BENDER & MOHR IDDINGS, PC,

Defendants-Appellees.

---

UNPUBLISHED

August 21, 2003

No. 237162

Calhoun Circuit Court

LC No. 99-002629-NM

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

PER CURIAM.

In this legal malpractice action, plaintiff appeals by right the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). We reverse because genuine issues of material fact remain to be resolved by the factfinder.

Plaintiff claims defendants, who successfully represented her on her workers' compensation disability claim arising out of injuries sustained in a June 27, 1989 fall while working as a corrections officer, were negligent in missing the limitations period to apply for a state duty disability retirement benefit pursuant to MCL 38.21. The parties agree that to establish her malpractice claim plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of her; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the alleged injury. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 694 (2001).

The most troublesome legal malpractice element is proximate causation. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). Although defendants dispute they represented plaintiff on her potential duty disability retirement claim, the parties agree that for plaintiff to be successful on her malpractice claim she must prove that "but for" defendants' alleged breach of duty she would have prevailed on a claim for duty disability if an application for duty disability benefits had been timely filed with the civil service retirement board, MCL 38.3. Thus, plaintiff faced the "difficult task of proving two cases within a single proceeding" *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981), quoting 45 ALR2d 5, § 2, p 10. Whether the critical proximate cause issue presented in this case

should be decided by a judge or jury was raised below but the trial court did not decide it. We, therefore, do not address that question in this opinion. *Charles Reinhart Co, supra* at 584 n 5.

Before its recent amendment by 2002 PA 93, MCL 38.21 provided:

Subject to the provisions of sections 33 and 34, upon the application of a member, or his department head, or the state personnel director, a member who becomes totally incapacitated for duty in the service of the state of Michigan without willful negligence on his part, by reason of a personal injury or disease, which the retirement board finds to have occurred as the natural and proximate result of the said member's actual performance of duty in the service of the state, shall be retired: Provided, The medical advisor after a medical examination of said member shall certify in writing that said member is mentally or physically totally incapacitated for the further performance of duty in the service of the state, and that such incapacity will probably be permanent, and that said member should be retired: And provided further, That the retirement board concurs in the recommendation of the medical advisor. [MCL 38.21.]

Defendants argue that plaintiff would be unable to sustain her burden of proof on her malpractice claim because, at most, her work injury only aggravated preexisting back problems and preexisting psychological issues (all health care experts who treated, or who reviewed plaintiff's situation, concurred that plaintiff has significant psychological problems, which plaintiff's expert, Dr. Wardner opined are more than 50% of plaintiff's problems). The parties do not dispute that plaintiff was in a non-work accident in December 1987 in which she was struck by a falling tree limb. Further, the parties agree that plaintiff was being treated for back pain before her June 27, 1989 accident while working, including receiving a lumbar epidural steroid injection earlier in the same month. Aggravation of a preexisting condition will not support a duty disability retirement under MCL 38.21, *Buttleman v State Employees' Retirement System*, 178 Mich App 688, 691; 444 NW2d 538 (1989), unlike workers' compensation where work-related aggravation of a preexisting condition will support benefits. See, e.g., *Arnold v State Employees' Retirement Board*, 193 Mich App 137, 140; 483 NW2d 622 (1991) (work related aggravation of preexisting depression did not qualify for duty disability), and *Cox v Schreiber Corp*, 188 Mich App 252, 256; 469 NW2d 30 (1991) (work-related aggravation of preexisting hip condition, aseptic necrosis, supported workers' compensation benefits). Plaintiff argued that her problems before her work accident merely presented a disputed question of fact whether she was disabled as a result of aggravating a prior condition or as a result of new pathology arising from work-related injuries.

The trial court agreed with defendants, reasoning as follows:

The medical evidence and other evidence provided to the Court clearly establishes that the Plaintiff had a history of back pain going back to [a] specific event in 1987 when a tree limb fell on her. Her injuries were such that subsequent to that incident, Plaintiff filed a personal injury lawsuit seeking, among other things, damages for her back injury/pain. That lawsuit settled in 1990. She was being treated for lower back pain by Dr. Rawal both prior to and after her June, 1989 fall while working at the Department of Corrections. Prior to June 1989, Dr.

Rawal had prescribed anti-inflammatory medication and had given her an epidural steroid injection in her lower back. Dr. Rawal testified that a CAT scan showed disc herniation in July 1989, and he performed surgery thereafter. He also testified that it was possible the herniated disc was present in May, 1989 and just didn't show up on the MRI, and that her symptoms were comparable with that possibility. Dr. Rawal referred Ms. Bellers to Dr. Olejniczak in October, 1989. Dr. Olejniczak's impression stated:

Low back pain historically related to a non-work related incident on 12/8/87 with an exacerbation from a work-related injury on 6/27/89 . . .

Ms. Bellers likewise had a rather extensive history of psychological issues pre-dating June, 1989. Dr. Rawal indicated that Ms. Bellers had always chronically complained of pain. Several physicians who treated or examined Ms. Bellers after Dr. Rawal commented on a "psychological component" or a "psychological involvement" relative to her chronic pain complaints.

After reviewing all the evidence presented by the parties, it is clear that Plaintiff's chronic pain and psychological problems both pre-date her June fall at work, and that Plaintiff has not created a genuine issue of material fact that her fall at work in June, 1989 was the cause of her subsequent disability. The evidence in fact points to the opposite conclusion: that the June, 1989 incident aggravated her prior physical and psychological problems.

The trial court also concluded that plaintiff had failed to create a factual dispute whether she was "totally incapacitated" within the meaning of MCL 38.21. The trial court wrote:

Beyond the "aggravation" issue, the evidence before the Court clearly establishes that Plaintiff in fact was not "totally incapacitated" as that term is applied within the duty disability statute. The evidence presented establishes just the opposite: that Plaintiff was able to work with restrictions. Not one physician who treated the Plaintiff from 1989-1992 ever concluded that she was totally incapacitated due to her 1989 fall while on the job. Ms. Schwartz, a former Administrative Law Judge who has heard over 500 disability cases, testified at her deposition that it was her opinion based upon her experience as an Administrative Law Judge, that Ms. Bellers would not have qualified for duty disability benefits because she could not have sustained her burden of proving she was totally incapacitated.

Thus, the trial court found that plaintiff had failed "to show that there is a genuine issue of material fact regarding her eligibility for duty disability benefits," and concluded that plaintiff could not prevail on her malpractice claim. Accordingly, the trial court entered summary disposition for defendants pursuant to MCR 2.116(C)(10).

#### I. Standard of Review.

We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of plaintiff's claim. *Persinger, supra* at 502;

*Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and must carry the initial burden by supporting its position with affidavits, depositions, admissions, or documentary evidence, MCR 2.116(G)(3)(b); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine and material issue of disputed fact exists, MCR 2.116(G)(4). If the non-moving party fails to do so, summary disposition is properly granted, *Smith, supra* at 455. However, a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999) (the trial court improperly disregarded the defendant's expert's opinion that the plaintiff's condition was preexisting). Further, this Court will liberally find a genuine issue of material fact. *Lash, supra*.

## II. Analysis

A. First, we address the trial court's implied legal conclusion that "totally incapacitated for duty in the service of the state" within the meaning of MCL 38.21 requires plaintiff to establish she was unable to perform any work at all. A state employee seeking duty disability-retirement benefits need not show he is "totally incapacitated from any duty" but rather that he is "totally incapacitated for duty in service of the state" when "the person is unable to engage in employment reasonably related to the person's past experience and training." *Knauss v State Employees' Retirement System*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985). Although different standards of proof apply in workers' compensation cases, *Stoneburg v State Employees Retirement System*, 139 Mich App 794, 799-800; 362 NW2d 878 (1984), the workers' compensation magistrate found that plaintiff was disabled. On remand to determine if plaintiff had any residual earning capacity pursuant to *Sobotka v Chrysler Corp*, 198 Mich App 455; 499 NW2d 777 (1993), rev'd 447 Mich 1; 523 NW2d 454 (1994), a different hearing magistrate found that plaintiff did not.

The first workers' compensation hearing magistrate concluded:

[P]laintiff was involved in a work-related incident on June 27, 1989 when she fell injuring her upper extremities, back and knees. That work-related incident caused plaintiff to be disabled from her employment, and to that extent she has sustained the burden of proof by a preponderance of the evidence. [*Bellers v Adrian Temporary Facility and Accident Fund of Michigan*, (Docket No. 91-0705, August 7, 1991.)]

On remand, a different magistrate concluded:

In order to be hired by defendant as a correctional officer, plaintiff first earned college credits in criminal justice and then underwent a rigorous, 90-day training

session at an academy. Based on plaintiff's testimony, I find this employment to have been quite physically strenuous. Because of the limitations imposed by plaintiff's treating physicians, I find her to be, for all practical purposes, totally disabled from performing work suitable to her qualifications and training. She has not established any residual wage-earning capacity. [*Bellers v Adrian Temporary Facility and Accident Fund of Michigan (On Remand)*, (Docket No. 91-0705), aff'd Workers' Compensation Appellate Commission (Opinion No. 543, December 13, 1995).]

Further, plaintiff presented a May 22, 1990 letter from one of her treating physicians, Dr. Yousif I. Hamati, to the Department of Corrections advising that "I am not sure I really can give you a good idea if she will ever be able to go back as a correctional officer." Plaintiff also presented evidence from Dr. Jon Wardner, a physical medicine and rehabilitation specialist, who opined that plaintiff "would not have been able to work on an unrestricted basis as a corrections officer" on all relevant dates. Dr. Wardner noted he would place plaintiff on restrictions of "no lifting over 10 pounds frequently or 20 pounds infrequently, no physical restraint or subduing of prisoners, no repetitive bending or twisting and a sit/stand option." Dr. Wardner opined plaintiff's disability was permanent.

At the hearing on defendants' motion for summary disposition, defendant argued that plaintiff had never asked for work within her restrictions. Plaintiff countered that she had never been offered a position that accommodated the restrictions imposed upon her. We find that plaintiff presented evidence of being "totally incapacitated for duty in service of the state." MCL 38.21, *Knauss, supra*. Therefore, a genuine issue of a material fact was presented for resolution by the finder of fact and summary disposition on this issue was improper under MCR 2.116(C)(10). *Nesbitt, supra* at 225; *Lash, supra* at 210.

B. Next, we review the trial court's conclusion that plaintiff would only be able to prove that her June 1989 work accident "aggravated her prior physical and psychological problems;" therefore, plaintiff would be unable to prove she qualified for a duty disability under MCL 38.21. *Arnold, supra* at 140; *Buttleman, supra* at 691. We find that plaintiff fulfilled her responsibility pursuant to MCR 2.116(G)(4) to present documentary evidence that a genuine issue of material fact remained for trial on this issue. *Maiden, supra* at 121.

First, although it is undisputed that plaintiff was injured before her accident at work and was complaining of back pain, an MRI before her work injury failed to show a herniated disc. After plaintiff's work injury, however, a CAT scan and myelogram revealed a herniated disc. Both plaintiff's primary expert, Dr. Wardner, and plaintiff's treating physician at the time for her back problems, Dr. Rawal, agreed that it was possible that the herniated disc was present when the MRI was performed but (was not detected) because the then new MRI technology was still limited. However, plaintiff was not disabled by her back problems before her accident at work, and Dr. Wardner offered his opinion that "there is evidence of new pathology following the June 27, 1989 incident." According to Dr. Wardner, the MRI scan before plaintiff's fall at work "demonstrated mild L5-S1 degeneration and bulging," but tests after plaintiff's work accident "demonstrated a L5-S1 disc herniation." Dr. Wardner wrote, "it is my opinion that the L5-S1 disc herniation represented new pathology which was caused by the June 27, 1989 injury," and

“represented more than an aggravation of a preexisting condition” because “I consider a disc herniation to be a new condition.” Although defendants persuasively argue that plaintiff merely aggravated a preexisting back condition, *Arnold, supra* at 140, the physical evidence (or lack thereof) of injury before plaintiff’s work-place fall coupled with Dr. Wardner’s opinion, created a genuine question of a material fact for the factfinder, *Nesbitt, supra* at 225.

Moreover, as noted in the workers’ compensation determinations, plaintiff was disabled also as a result of injuries to her upper extremities and knees. Dr. Hamati opined in his May 22, 1990 letter that if he were taking care of plaintiff, “I would put [plaintiff] in a sitting job, using a cane and have her using the Tens unit.” Plaintiff also offered two depositions of Dr. Michael H. Dawson taken during the workers’ compensation proceedings. Dr Dawson, who treated plaintiff for a cyst on her wrist in 1984, began treating her again on the day of her fall at work. Regarding plaintiff’s knee injury, Dr Dawson opined:

[Plaintiff’s] diagnosis remains chronic patella femoral pain or irritation. Prognosis is guarded. If she were to work it would probably be only at a sit down job and then I think that any climbing, kneeling, squatting, running would produce an increase in her symptoms.

Dr. Dawson, in essence, found plaintiff to be disabled from work as a corrections officer because “I don’t think she could do a job where she had to chase people.” In addition, Dr. Dawson offered the following explanation of why plaintiff continues to experience pain despite there being no physical pathology.

I think there’s a pain syndrome part of this. In other words, she falls, injures the knee, there’s initially some damage there. We all perceive pain at different levels. As that quiets down, if the pain pathways have been established, then irregardless of what you do to make the joint itself normal, that threshold, that pathway of pain is present. And these are the people that end up in pain clinics and having other things done for them to control pain because the pathology is essentially eliminated but the pain persists. And I think she falls near this group. Some people in the severe cases label these causalgiias or reflex sympathetic dystrophy.

Dr. Dawson conceded that there was a real “psychosomatic” component to plaintiff’s problems. Thus, defendants again argue persuasively that although whatever physical injuries plaintiff suffered in her fall at work, would not have disabled an average person, they disabled plaintiff because they aggravated her preexisting psychological problems. Nevertheless, the evidence here presents a genuine question for the trier of fact, *Maiden, supra* at 121, and not a question for decision by the trial court in deciding a motion for summary disposition, *Skinner, supra* at 161; *Nesbitt, supra* at 225. Accordingly, we conclude that the trial court erred by granting summary disposition to defendants pursuant MCR 2.116(C)(10).

We reverse. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder