STATE OF MICHIGAN

COURT OF APPEALS

CLEMENTS FUR FARM, INC.,

Plaintiff,

and

PHILIP CLEMENTS and SHIRLEY CLEMENTS,

Plaintiffs-Appellants,

v

JOSEPH C. COX, DAVID L. CONKLIN, JAMES H. SULLIVAN, KOOISTRA, HOOGEBOOM & SULLIVAN, LAW OFFICES OF KOOISTRA & SULLIVAN and THOMAS J. PLACHTA,

Defendants-Appellees,

and

LAW OFFICES OF STEIN AND PLACHTA,

Defendant.

UNPUBLISHED
September 22, 2000

No. 216466
Kent Circuit Court
LC No. 95-003728-NM

Before: Meter, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs, who operated a mink farm that became subject to foreclosure and who hired various attorneys throughout protracted legal proceedings, appeal by right

from orders granting summary disposition to defendants Plachta, Conklin, Sullivan, and the Sullivan law offices.[1] We affirm in part and remand in part.

Standards of Review

We review a trial court's decision on a motion for summary disposition de novo. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 219; 600 NW2d 427 (1999). Here, the trial court granted summary disposition to defendants Thomas Plachta and David Conklin under MCR 2.116(C)(10).[2] When reviewing a motion under MCR 2.116(C)(10), a reviewing court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Id*. at 219-220.

The court apparently granted summary disposition to defendant James Sullivan and his offices on the basis of MCR 2.116(C)(7), since the motion was based on the running of the applicable statute of limitations. In deciding a motion under MCR 2.116(C)(7), a court must consider the pleadings as well as any affidavits and documentary evidence submitted by the parties. MCR 2.116(G)(5); *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998).

Moreover, as stated in *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999):

> In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage).

Defendant Plachta

Plaintiffs sued defendant Thomas Plachta regarding his handling of three separate cases. With regard to the first case, plaintiffs alleged that Plachta did not timely challenge a temporary restraining order (TRO) that a court had put in place regarding the sale of plaintiffs' mink pelts. Plaintiffs contended that Plachta's failure to make a timely challenge caused the pelts to rot, thereby destroying their value and causing plaintiffs financial loss. The trial court concluded that there was no genuine issue of material fact regarding a causal connection between the alleged negligence by Plachta and plaintiffs' alleged damages. We agree. Any negligence stemming from Plachta's delay in filing a motion to amend or alter the TRO did not rise to the level of actionable misconduct, since the documentary evidence establishes that the mink pelts were already ruined before Plachta had a *reasonable opportunity to*

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[1] We note that defendant Cox is not involved in this appeal.

[2] Plaintiffs suggest that Conklin did not file a motion under MCR 2.116(C)(10). Plaintiffs are incorrect. The lower court file contains a document dated January 3, 1997, in which Conklin requests that the case be dismissed pursuant to MCR 2.116(C)(10).

challenge the TRO. See Barrow, *supra* at 483-484 (setting forth the necessary elements of a legal malpractice claim).

With regard to the second case, plaintiffs alleged that Plachta negligently failed to allege fraud in a Mecosta County Circuit Court case against Thomas Winkel, who owed plaintiffs money and who later filed for bankruptcy. Plaintiffs contend that if Plachta had alleged fraud in the Mecosta case, plaintiffs would have prevailed on the issue of the nondischargeability of Winkel's debt in the bankruptcy proceedings, since Winkel defaulted in the Mecosta case (thereby making any claims made against him in the case subject to collateral estoppel). In other words, plaintiffs contend that if Plachta had alleged fraud in the Mecosta case and Winkel subsequently defaulted, the bankruptcy court, under collateral estoppel, would have had to accept the fraud claim as valid and deem the debt nondischargeable. However, it is pure speculation that Winkel would have defaulted in the Mecosta case even if fraud had been alleged.

Plaintiffs alternatively contend that if Plachta had raised the issue of fraud in the Mecosta case, the fraud issue would have been easier for plaintiffs to litigate in the bankruptcy court. Again, this is pure speculation. The fact remains that plaintiffs *concede* that they could allege fraud in the bankruptcy court even though it had not been specifically alleged in the underlying case, and plaintiffs therefore cannot establish that they suffered damages as a result of Plachta's failure to allege fraud in the underlying case. The trial court did not err in dismissing plaintiffs' claim regarding Plachta's handling of the case against Thomas Winkel. See *Barrow, supra* at 483-484.

With regard to the third case involving Plachta, plaintiffs alleged that Plachta failed to timely file a motion for reconsideration in a suit involving the plaintiffs' eviction from their farm by the federal government. When Plachta did eventually file the motion, the federal court denied it on the basis of untimeliness. The court additionally stated, in *obiter dicta*, that the motion would not have been meritorious even if it had been timely filed. This *obiter dicta* was sufficient to establish that the motion for reconsideration was not meritorious and that even if Plachta had acted diligently in filing it, the outcome would not have changed. See *Page v Asplundh Tree Expert Co*, 172 Mich App 636, 643-644; 432 NW2d 384 (1988), and *Bauer v Garden City*, 163 Mich App 562, 569-571; 414 NW2d 891 (1987). Accordingly, the instant trial court correctly found that there was no genuine issue of material fact as to whether plaintiffs could establish a cause of action for legal malpractice with regard to the timeliness of the motion for reconsideration.[3] See *Barrow, supra* at 483-484.

Plaintiffs additionally contend that regardless of the timeliness issue, Plachta committed malpractice in the eviction case by failing to take three different actions with respect to the case: filing for reorganization and raising two particular defenses to the eviction proceedings. Plaintiffs contend that

[3] Plaintiffs contend that even if the *obiter dicta* in question established that plaintiffs would not have won on the merits in that particular court, there still remained the question of whether they would have succeeded on an appeal from the decision on the merits. Plaintiffs contend that Plachta's negligence precluded such an appeal on the merits. However, plaintiffs' appellate brief *does not set forth any basis for why an appeal would be successful* and their argument is therefore unavailing.

the federal court, in ruling on the motion for reconsideration and setting forth its *obiter dicta*, did not pass upon these arguments and therefore created no basis for their dismissal by the instant trial court. Plaintiffs argue that the instant trial court did not even address these arguments and instead focused solely on whether the timeliness issue warranted relief. After reviewing plaintiffs' complaint against Plachta, their response to Plachta's motion for summary disposition and affidavits in support, and the trial court's opinion, we conclude that plaintiffs adequately raised the issue of the two possible defenses to the eviction proceedings (set forth in the affidavit of Lynn Hayes) and that the trial court failed to address whether they created a prima facie case of legal malpractice.[4] Accordingly, a remand is necessary so that the trial court may properly address this issue. With regard to whether Plachta should have filed for reorganization, we conclude that this issue was not adequately pleaded in the complaint and that the trial court therefore did not err in failing to address it.

Defendant Conklin

In their suit against defendant David Conklin, plaintiffs alleged that Conklin committed malpractice by failing to adequately challenge the seizure of their mink, by abruptly abandoning them, by not properly petitioning the court for permission to withdraw, and by failing to request an extension of time for plaintiffs to secure new counsel. The trial court based its grant of summary disposition, in part, on the fact that plaintiffs had not supported their claims against Conklin with expert testimony.

The trial court correctly ruled that plaintiffs' malpractice claim against Conklin was dependent upon expert testimony establishing the appropriate standard of care, breach of the standard, and causation. See *Bass v Combs*, 238 Mich App 16, 34; 604 NW2d 727 (1999). This was not a situation in which the attorney's alleged violation of professional conduct was so obvious that expert testimony was unnecessary. See *Beattie v Firnschild*, 152 Mich App 785, 792-793; 394 NW2d 107 (1986) (expert testimony required in legal malpractice action "unless the violation was so obvious that such testimony was not required"), and *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994) ("In professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation."). Accordingly, in order to sustain a prima facie case, plaintiff was required to have an expert who could testify to the alleged malpractice.

Here, although plaintiffs submitted names of potential experts, they failed to provide any specific facts about which those experts would testify, contrary to MCR 2.116(G)(4). See also *Bass, supra* at 34-35. Under these circumstances, the trial court did not err in concluding that plaintiffs failed to state a prima facie case of legal malpractice against Conklin and that summary disposition was appropriate.

Defendant Sullivan

[4]We note that the record does not make entirely clear whether Plachta did indeed raise these two defenses in his late motion for reconsideration (thereby making the federal court's *obiter dicta* dispositive with respect to them). However, plaintiffs' argument on appeal essentially indicates that Plachta did *not* raise these issues in the late motion for reconsideration, and Plachta does not attempt to contradict this in his appellate brief.

Plaintiffs contended that defendant James Sullivan and his law offices committed various acts of malpractice while representing them during bankruptcy proceedings. The trial court ruled that plaintiffs' claims were barred by the applicable two-year statute of limitations, since Sullivan's representation of plaintiffs ended in 1989, and plaintiffs did not file the instant suit until 1994. We agree.

Plaintiffs concede that their suit did not fall within the two-year statute of limitations contained in MCL 600.5805(4); MSA 27A.5805(4). Nevertheless, they argue that the exception found in MCL 600.5838(2); MSA 27A.5838(2) applied. This statute provides that "an action . . . may be commenced . . . within 6 months after the plaintiff discovers or should have discovered the existence of the claim . . . ." Plaintiffs contend that they had no knowledge of Sullivan's negligence until shortly before filing the instant lawsuit and that MCL 600.5838; MSA 27A.5838 therefore allowed their claim.

In the brief supporting his summary disposition motion, Sullivan cited plaintiff Philip Clements' deposition testimony in which Clements reveals that, shortly after the bankruptcy proceedings were completed in 1989, he knew about problems with the proceedings. Contrary to plaintiffs' contention, this deposition testimony was sufficient to refute plaintiffs' allegations that they had no basis for discovering Sullivan's alleged malpractice until 1994. Moreover, our review of the available deposition testimony shows that plaintiffs did indeed acknowledge problems with the bankruptcy proceedings more than six months before filing the instant suit. Accordingly, plaintiffs should have discovered the alleged malpractice sooner, and they therefore did not meet their burden under MCL 600.5838(2); MSA 27A.5838(2). The trial court properly granted Sullivan and his law offices summary disposition.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski