

STATE OF MICHIGAN
COURT OF APPEALS

RUSS VITALE and DEBORAH VITALE,

Plaintiffs-Appellants,

v

WILLIAM E. BUFALINO, II, FRANK J.
PALAZZOLO, NUNZIO G. PROVENZANO,
AND BUFALINO AND PALAZZOLO, P.C.,

Defendants-Appellees.

UNPUBLISHED

May 17, 2002

No. 230560

Wayne Circuit Court

LC No. 00-005306-NM

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiffs' allegations of legal malpractice concern defendants' representation of plaintiffs in an underlying action to surcharge them for misappropriating funds from a probate estate. In that action, an order granting summary disposition was entered against plaintiffs, and punitive damages were awarded.¹ Plaintiffs brought the instant case alleging various acts of legal malpractice. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs opposed the motion, arguing that genuine issues of material fact exist and that summary disposition was premature because discovery had not begun. In a written opinion, the trial court granted summary disposition for defendants.

We review a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d

¹ The underlying action was the subject of an appeal to this Court, *In re Russ Anthony Vitale, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued 2/8/2002, (Docket Nos. 220024, 220025).

314 (1996). Summary disposition is appropriate if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Quinto, supra* at 362.

On appeal, plaintiffs argue: (1) that the trial court erred in finding no genuine issue of material fact, and (2) that the grant of summary disposition was premature. We agree that summary disposition was prematurely granted.

“Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed.” *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). Summary disposition may be proper before the close of discovery if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id.* at 537-538; *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

In the instant case, the trial court granted summary disposition before discovery had begun. Defendants’ well-supported motion for summary disposition shifted the burden to plaintiffs “to present documentary evidence establishing the existence of a material factual dispute[.]” *Quinto, supra* at 363. In the absence of discovery, we conclude that it was premature to grant summary disposition for plaintiffs’ failure to carry this burden. Plaintiffs are entitled to at least a modicum of discovery to attempt to oppose summary disposition.

We note the significant burden on plaintiffs in light of the evidence submitted by defendants, and that summary disposition may ultimately be appropriate after further development of the record. However, at this early stage of proceedings where plaintiffs have not been afforded any opportunity for discovery, we are not satisfied that discovery stands no chance of uncovering factual support for plaintiffs’ position. *Colista, supra* at 537-538.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra