

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 & PALAZZO, PC,

Defendants-Appellees.

UNPUBLISHED

March 18, 2004

No. 244228

Wayne Circuit Court

LC No. 00-005306-NM

Before: Neff, P.J., and Wilder and Kelly, 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 affirm in part and reverse in part, and remand for further proceedings.

I

This case is before this Court for a second time¹ and the underlying action on which the claims of legal malpractice are based was also the subject of an earlier appeal.² The facts of both cases are pertinent to the decision here and are set out in the earlier unpublished opinions of this Court as follows.

¹ Summary disposition was entered on defendants' motion before discovery. This Court reversed and remanded the case to the trial court for further proceedings. *Vitale v Bufalino*, unpublished opinion per curiam of the Court of Appeals, issued 5/17/2002 (Docket No. 230560). Discovery was conducted and defendant again moved for summary disposition and the trial court again granted the motion. The current appeal followed.

² Russell Vitale, Sr. and Deborah Vitale, as defendants, successfully challenged a ruling of the probate court. *In re Russ Anthony Vitale, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued 2/8/2002 (Docket Nos. 220024, 220025).

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. 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. *Vitale v Bufalino*, unpublished opinion per curiam of the Court of Appeals, issued 5/17/2002 (Docket No. 230560), slip op p 1 (footnote omitted).

* * *

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[.]" 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. *Id.*, slip op p 2 (citation omitted).

Docket Nos. 220024, 220025

Respondents Russell Vitale, Sr., Deborah Vitale, Joseph Vitale, and Mae Vitale appeal as of right from an order of summary disposition requiring payment of damages of \$1,323,000. We vacate that order and remand.

In 1981, Kim McIntosh gave birth to Russell Vitale, Jr. Russell, Jr. suffered from hydrocephalus. Russell Vitale, Sr., and McIntosh divorced in 1982. Russell, Sr., took custody of Russell, Jr., and provided him care and support. Russell, Sr., brought a medical malpractice action against his son's doctors. In 1987, that suit was settled for \$615,000. An estate was created for Russell, Jr., and Russell, Sr., was named conservator.

In 1990, McIntosh filed a petition to remove Russell, Sr., as conservator based on his failure to file reports detailing his care for the child. A guardian ad litem was appointed to review Russell, Sr.'s handling of the estate. The guardian ad litem determined that, after filing one inventory, Russell, Sr., filed no accounts for the estate. It was also determined that Russell, Sr., used money belonging to the estate to purchase a home, two rental properties, and a van. The home was purchased from Russell, Sr.'s parents. There were no other assets of the estate and no separate estate bank account. The guardian ad litem concluded that

Russell, Sr.'s actions "may have been well-intentioned [but] his conduct as fiduciary in this matter falls below acceptable standards." It was recommended that Russell, Sr., be removed as fiduciary and a successor appointed. Thereafter, attorney James McCarthy was appointed successor conservator.

McCarthy filed a petition to surcharge Russell, Sr., or Auto-Owners Insurance, the company that issued his surety bond, for the funds belonging to the estate. McCarthy later amended the petition to include Russell, Sr.'s wife, Deborah, for aiding and abetting him in misappropriating funds, and Russell, Sr.'s parents, Joseph and Mae Vitale, on the theory that they should have known their house was purchased with misappropriated money.

In 1994, Russell, Jr., died. The conservatorship was terminated and a decedent's estate was opened, with the above referenced claims against the Vitales as the estate's only assets. McCarthy was appointed personal representative of the decedent's estate. Eventually, the parties stipulated to the terms of an order of surcharge, thereby settling any claims against the Vitales.

On June 23, 1997, the probate court entered a stipulated amended order of surcharge. As part of that stipulation, McCarthy was to receive \$50,000 in attorney fees. Russell Vitale, Sr., and Deborah Vitale were to pay McCarthy \$35,000 and the bonding company was to pay him \$15,000. The stipulation provided that the \$35,000 amount owed to McCarthy by Russell and Deborah Vitale was to be paid through proceeds of the sale of the rental property located in Pontiac. When it came to light that the Pontiac property had been sold at a prior tax sale, McCarthy claimed the Vitales perpetrated a fraud with respect to the terms of the order of surcharge and petitioned to have the order set aside. The probate court set aside the order of surcharge and eventually granted summary disposition for the estate.^[3] *In re Russ Anthony Vitale, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued 2/8/2002 (Docket Nos. 220024, 220025) (footnote omitted).

This Case – Docket No. 244228

After remand, discovery proceeded. Depositions of the three individual defendants were taken⁴ and documents from the probate court proceedings were produced. Defendants renewed their motion for summary disposition, and plaintiffs filed the affidavits of a proposed expert witness and plaintiff Russell Vitale, Sr. in opposition. The motion proceeded to a hearing at which counsel for both sides offered argument, but no witness testimony. The trial court later issued a written opinion and order granting defendants' motion.

³ The net result was that Russell Vitale, Sr. and his wife Deborah Vitale were ordered to pay \$35,000 of a \$50,000 attorney fee in accord with the stipulated order of surcharge and the remainder of the ordered damages of \$1,323,000, was set aside.

⁴ Only two of the depositions were transcribed and included in the lower court file.

II

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

III

The complaint in this case was filed after the entry of summary disposition against plaintiffs in the surcharge matter, which required them to pay an amount in excess of one million dollars. It is clear from the complaint that plaintiffs' challenge to defendants' representation related exclusively to proceedings in the surcharge matter *after* they entered into the stipulation settling that case.⁵ It was plaintiffs' failure to pay \$35,000 of the settlement agreement that resulted in further proceedings in the surcharge matter and in the entry of summary disposition against them. As noted, the summary disposition order was vacated on appeal when this Court held that the settlement reached by the parties in the surcharge matter was a contract and setting aside the settlement was an improper means of enforcement of the contract. The matter was remanded to the probate court for the enforcement of the remaining amount due under the contract, \$35,000. We read the complaint to allege that malpractice occurred during the probate proceedings to enforce the settlement agreement, which resulted in the million dollar-plus summary disposition order, which was later vacated. In our view, the complaint does not allege that the settlement itself or the plaintiffs' agreement to it were the result of defendants' malpractice.

The trial court's opinion in this case on remand after discovery made two essential holdings. First, the court held that plaintiffs failed to establish the existence of an attorney-client relationship with defendant, Frank J. Palazzolo. Second, the court held that plaintiffs failed to overcome the allegations of defendants' motion for summary disposition along with the

⁵ Plaintiffs' relatively brief complaint makes mention only of the \$1,000,000 summary disposition order amount and prays for relief in that amount. It does not mention the settlement amount of \$165,000. Indeed, the settlement was reached in 1997 and this malpractice case was not filed until 2000 after plaintiffs failed to fully pay the settlement amount and they were faced with the much larger amount after summary disposition.

documentary evidence in support of the motion, i.e., that plaintiffs failed to show that there are genuine issues of material fact in dispute.

As to Mr. Palazzolo, individually, we agree that summary disposition was properly entered. Mr. Palazzolo's un rebutted affidavit indicates, in pertinent part that, (1) he never represented Debora Vitale; (2) he represented Russ Vitale, Sr. prior to 1988 and that he referred Mr. Vitale to a malpractice attorney; (3) he did not represent Mr. Vitale after 1988, and; (4) he did not represent Mr. Vitale in any probate court matter dealing with the estate of Russ Vitale, Jr., the conservatorship or the decedent's estate and that he had no contact with either plaintiff with regard to these matters.⁶

After de novo review of the evidence produced in the trial court, we agree with plaintiffs that there are genuine issues of material fact as to the defendants other than Mr. Palazzolo individually based on the affidavit of their proposed expert. As noted in the previous opinion of this Court: "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" [*Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).].

The elements of a claim for legal malpractice are set out in *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993):

- (1) the existence of an attorney-client relationship;
 - (2) negligence in the legal representation of the plaintiff; (footnote omitted)
 - (3) that the negligence was a proximate cause of an injury; (footnote omitted)
- and
- (4) the fact and extent of the injury alleged.

There is no dispute that defendants (except Frank J. Palazzolo) represented plaintiffs in the surcharge matter up to the hearing on the motion for summary disposition. The affidavit of plaintiff's proposed expert asserts that defendants were negligent (breached the standard of care) in their representation of plaintiffs in a number of particulars throughout the surcharge proceedings and even before then and that the negligence was the proximate cause of injury to plaintiffs. The affidavit asserts that plaintiffs were damaged in the amount of the settlement paid pursuant to the settlement of the surcharge matter. Defendants, of course, deny any negligence and claim that their representation of plaintiffs was within the bounds of the applicable standard of care.

Viewing the record in the light most favorable to the nonmoving party, plaintiffs, we conclude that plaintiffs have met their burden to come forth with evidence, the affidavit of the proposed expert, sufficient to establish the existence of genuine issues of material fact. *Quinto, supra* at 363.

⁶ In any event, we note that Plaintiffs did not even bother to have a transcript made of Mr. Palazzolo's deposition and do not challenge on appeal summary disposition in favor of Mr. Palazzolo. Any claim as to Mr. Palazzolo is therefore deemed abandoned. *Yea v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Summary disposition is affirmed with regard to defendant, Frank J. Palazzolo, and reversed with regard to the remaining defendants and we remand to the trial court for further proceedings. In remanding for further proceedings, we note that after this Court's previous remand of this case for discovery and further proceedings, plaintiffs' focus in the discovery depositions, affidavits and in the argument was almost exclusively on defendants' representation in the surcharge matter *leading to* the settlement. It seems obvious that the focus changed after remand because, after the successful appeal of the summary disposition in the surcharge matter, plaintiffs were in the same legal position they held after they entered the settlement agreement. That is, plaintiffs' malpractice claim arising out of the order for summary disposition was essentially moot. Accordingly, on remand plaintiffs shall be afforded the opportunity to seek to amend their complaint.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Kurtis T. Wilder

/s/ Kirsten Frank Kelly