STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. BROZ and KIMBERLY BROZ, Plaintiffs-Appellants,	UNPUBLISHED May 17, 2016
v	No. 325884 Otsego Circuit Court
PLANTE & MORAN, PLLC, Defendant-Appellee.	LC No. 12-014346-NM

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

In this accounting malpractice case, plaintiffs, Robert F. Broz and Kimberly Broz (collectively, the Broz), appeal by right the trial court's order granting the motion for summary disposition by defendant, Plante & Moran, PPLC (Plante Moran), and dismissing their case without prejudice on the ground that their claim was not ripe for adjudication. Because we conclude that the Broz's claim was sufficiently ripe, we reverse and remand for further proceedings.

I. BASIC FACTS

Robert Broz operated several businesses that provide cellular telephone services, including RFB Cellular and Alpine PCS. He organized the businesses as S Corporations, which provided for pass through taxation. The IRS audited the Broz's tax returns and issued a notice of deficiency, or 90-day letter, to them. The IRS listed various deficiencies in the Broz's tax payments for tax years 1996, 1998, 1999, 2000, and 2001. Plante Moran prepared the Broz's tax returns for each of those years. The parties' professional relationship ended in February 2006.

After the end of the relationship, but before the IRS issued the notice of deficiency, the Broz filed amended tax returns for years 1998-2001, each one designated as a "protective filing" and showing a decrease in adjusted gross income of $35,675,453. Having claimed a large net operating loss for tax year 2002, they filed the amended returns in hopes of taking advantage of the 2002 enactment of the Job Creation and Worker Assistance Act, PL 107-147, § 102(a); 116 Stat 21, which allowed taxpayers to carry back net operating losses incurred in tax years 2001 and 2002 for five years instead of the normal two.

The Broz then sued the IRS in the United States Tax Court and disputed the deficiencies; they alleged in relevant part that all but a nominal amount of any tax deficiency assessed as a result of the audit would be eliminated by their 2002 net operating loss carryback. Despite raising the 2002 carryback as an issue in their petition to the Tax Court, the Broz chose not to press that matter as part of their case before that tribunal. Their trial lawyer explained at deposition that this was done for strategic reasons and with the knowledge and approval of Robert Broz.

The Broz sued Plante Moran for malpractice in 2008, but the parties entered into a series of tolling agreements pending the resolution of the case in the United States Tax Court. The Tax Court issued a decision in favor of the IRS on the deficiencies on September 1, 2011. *Broz v Comm'r of Internal Revenue*, 137 TC 46 (US Tax Ct, 2011). The Broz then filed this action on January 19, 2012. They also appealed the decision of the Tax Court to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the Broz's lawyer attempted to fight collection efforts by the IRS by asserting that the judgment could be reduced either by a favorable ruling from the Sixth Circuit, or by application of the Broz's 2002 net operating loss carryback, which they were still pursuing with the IRS. The federal appellate court affirmed the judgment of the Tax Court in August 2013. See *Broz v Comm'r of Internal Revenue*, 727 F3d 621 (CA 6, 2013). On September 16, 2014, the IRS sent the Broz a letter disallowing the Broz's carryback claims. The Broz's lawyer responded with a letter stating their disagreement and requesting an appeals conference.

Plante Moran moved for summary disposition of this case on November 5, 2014. It argued that the case must be dismissed because it was not yet ripe; specifically, it stated that the IRS's review process could yet determine that no damages existed. It also argued that, by failing to assert the carryback argument in the United States Tax Court, the Broz caused their own losses. The trial court agreed that the cause of action was not ripe. Although the Broz had been assessed a tax liability, the court explained, they had not suffered any present injury because it was possible that that liability would be offset if they prevailed in their pending actions with the IRS. On that basis, the trial court granted Plante Moran's motion for summary disposition under MCR 2.116(C)(4) and dismissed the case without prejudice.

The Broz now appeal in this Court.

II. STANDARDS OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Questions regarding ripeness are also reviewed de novo." *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013).

III. ANALYSIS

Initially, we note that, regardless of the validity of the trial court's analysis on ripeness, MCR 2.116(C)(4) was not the proper subrule for dismissal on that ground. A motion for summary disposition is properly granted under MCR 2.116(C)(4) when a trial court lacks subject matter jurisdiction. "Subject-matter jurisdiction concerns a court's abstract power to try a case

of the kind or character of the one pending and is not dependent on the particular facts of a case." *Harris v Vernier*, 242 Mich App 306, 319; 617 NW2d 764 (2000). Whether a court has subject matter jurisdiction is distinct from "constitutional jurisdiction," which concerns a court's authority to hear and decide a particular case, and such attendant justiciability doctrines as ripeness, standing, and mootness exist to confine the judiciary to its constitutional duty to adjudicate only actual cases or controversies. *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 370-372, 374 n 24; 716 NW2d 561 (2006) (opinion by YOUNG, J.), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010).[1] Because ripeness falls under constitutional jurisdiction, not subject matter jurisdiction, the trial court erred in treating MCR 2.116(C)(4) as a proper ground for granting defendant summary disposition on the issue of ripeness. However, if the trial court's ripeness analysis were otherwise correct, the error would be merely technical in nature because summary disposition on the issue of ripeness may be decided under MCR 2.116 (C)(10).

"A claim that rests on contingent future events is not ripe." *King*, 303 Mich App at 188. "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Id.* (quotation marks and citation omitted).

Plante Moran premised its claim that the Broz's malpractice claim was not ripe on the uncertainty surrounding the amount of any damages that they might have incurred. However, the relevant portions of federal tax law show that the Broz' can establish some level of damages. Under 26 USC 172(a), a taxpayer may make certain deductions in a taxable year for net operating loss carrybacks; and 26 USC 172(b)(1)(A)(i) provides that a net operating loss for any taxable year "shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss." This provision allows a net operating loss to be carried as a deduction in preceding years to offset taxable income in those years. See *United States v Forest Lumber Co*, 429 US 32; 97 S Ct 204; 50 L Ed 2d 199 (1976).

In 2002 Congress passed the Job Creation and Worker Assistance Act, one of whose provisions allowed net operating losses incurred in tax years 2001 and 2002 to be carried back five years instead of the normal two. PL 107-147, § 102(a); 116 Stat 21. Therefore, if the Broz incurred damages in the form of tax deficiencies resulting from Plante Moran's alleged malpractice in connection with tax years 1996 and 1998-2001, they might be able to carry back their losses from 2002 to reduce their taxable income and eliminate tax liability for tax years 1998-2001. In other words, the Broz might be able to take advantage of changes to the law to reduce their overall damages, if any, from the alleged malpractice.

However, even if the Broz successfully assert their 2002 carryback argument with the IRS, a net operating loss carryback from 2002 will not apply to the 1996 tax year. Additionally, whether the Broz succeed with their attempt to carryback the 2002 net operating loss, the Court of Appeals for the Sixth Circuit has already affirmed that the Broz owe certain taxes and

[1] In *Lansing Sch Ed Ass'n*, the Supreme Court overruled the standing doctrine stated in *Mich Chiropractic Council*, 487 Mich at 359-361, 371 n 18, but expressed no disagreement with the latter's differentiation between standing and ripeness.

penalties for tax years 1996 and 1998-2001 because of errors on their tax returns that they allege resulted from malpractice. See *Broz*, 727 F3d at 633. Because the Broz's tax liability for the years in which Plante Moran allegedly committed the malpractice has been definitively determined through proceedings by the IRS, United States Tax Court, and the Court of Appeals for the Sixth Circuit, the Broz have suffered an actual injury, not one contingent on any future event. What *is* contingent upon the outcome of the dispute with the IRS regarding the 2002 net operating loss carryback is whether the damages allegedly caused by the malpractice in other years may be reduced or eliminated. Nevertheless, the Broz's ability to mitigate the damages is analogous to the traditional collateral source rule, which provides that "compensation due an injured party from an independent source other than the wrongdoer does not operate to lessen damages recoverable from the wrongdoer." *Blacha v Gagnon*, 47 Mich App 168, 171; 209 NW2d 292 (1973). That is, the possible mitigation of damages does not itself obviate the existence of the established tax liabilities, or Plante Moran's responsibility for any malpractice causing those damages.[2] Because the Broz have sustained actual damages that are not contingent upon the happening of future events, their malpractice claim is ripe.

We further reject Plante Moran's argument that the Broz' cannot sue because they failed to raise their 2002 carryback argument before the United States Tax Court. The claim to certain tax benefits belonged to the Broz alone, and they were under no obligation to assert that issue with the IRS as a prerequisite to recovering for any alleged malpractice in the preparation of their 1996, and 1998-2001 tax returns. Whether their failure to earlier assert the carryback should be a factor in determining the amount of damages is a matter for the trial court and the finder-of-fact; it does not itself excuse Plante Moran from responsibility for any malpractice it may have committed. See *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998) (discussing a plaintiff's duty to take reasonable steps to mitigate his or her damages and stating that a plaintiff may not recover for damages that could have been avoided through reasonable efforts).

The trial court erred when it determined that the Broz's claim was not ripe and dismissed it.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, the Broz may tax their costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly

[2] We recognize that the collateral source rule no longer applies to personal injury actions. See MCL 600.6303. However, this case does not involve a personal injury action. Moreover, we express no opinion on whether or how any reduction in taxes or penalties might alter the applicable award of damages, if any.