STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM TRAYNOR and PATRICIA TRAYNOR, Plaintiffs-Appellants, v JOSEPH C. MCMILLEN, Defendant-Appellee.	UNPUBLISHED August 5, 2010 No. 289284 Oakland Circuit Court LC No. 07-085355-NM

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendant's two motions for summary disposition and dismissing the case. We affirm.

Plaintiffs first argue that the trial court erred in finding that count one of their two-count complaint was barred by the statute of limitations. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) (claim is barred by statute of limitations). *DiPonio Construction Co v Rosati Masonry Co*, 246 Mich App 43, 46; 631 NW2d 59 (2001). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties; however, the moving party is not required to file supportive material. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Until this lawsuit, defendant had been plaintiffs' long-time family attorney, specializing in real estate for about 25 years. Plaintiffs, husband and wife, allege that defendant committed

legal malpractice with regard to two separate real estate matters: one involving plaintiffs' purchase of a condominium (the Berryman matter), another involving plaintiff William Traynor's investment in a real estate development at defendant's behest (the Deer Run matter).[1]

In March 2002, plaintiffs, represented by defendant, filed suit against the Berrymans alleging various acts of fraud in connection with a 1995 real estate transaction. In November 2002, plaintiffs received a case evaluation award of $4,000. The Berrymans accepted the award, but plaintiffs, by virtue of not submitting an acceptance, rejected it. In April 2003, the trial court granted the Berrymans' motion for summary disposition, finding that plaintiffs' claims were barred by the six-year statute of limitations. The trial court granted the Berrymans' post-judgment motion for case evaluation sanctions in the amount of $5,695. Plaintiffs allege that defendant never notified them of the case evaluation award. Plaintiffs indicate that they did not learn of the case evaluation award or the sanctions levied upon them until their bank account was garnished in November or December 2003 to satisfy the sanctions judgment. Count one of plaintiffs' complaint alleges that defendant failed to file suit against the Berrymans within the time permitted by the statute of limitations and failed to notify plaintiffs of the case evaluation award, which they would have accepted had they been aware of it.

The statute of limitations for a legal malpractice claim expires at the later of the following two time periods: two years after the attorney discontinues serving the plaintiff in a professional capacity as to the matters out of which the claim for malpractice arose, or six months after the plaintiff discovers or should have discovered the existence of the malpractice claim. MCL 600.5805(6); MCL 600.5838. A lawyer discontinues serving a client upon completion of the specific legal service from which the malpractice claim arose that the lawyer was retained to perform. MCL 600.5838(1); *Kloian v Schwartz*, 272 Mich App 232, 238; 725 NW2d 671 (2006).

The critical issue here is determining the date upon which defendant discontinued serving plaintiffs in the Berryman matter. Plaintiffs filed this action on January 19, 2006. In April 2003, the Berryman defendants' motion for summary disposition was granted, and an order was entered dismissing all of plaintiffs' claims with prejudice. Defendant also represented plaintiffs in post-judgment proceedings for case evaluation sanctions. On June 11, 2003, the trial court entered an order awarding case evaluation sanctions to the Berrymans. The 21-day period of appeal for this order expired on July 2, 2003. No appeal was pursued, and defendant did no further work for plaintiffs after the order granting the case evaluation sanctions was entered.

MCR 2.117(C)(1) proves helpful in ascertaining the date of defendant's last day of legal services. It provides, in pertinent part:

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[1] Count one of plaintiffs' complaint is brought by both plaintiffs, while count two is brought by plaintiff William only. All references to "plaintiff," individually, refer to William.

> Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. [MCR 2.117(C)(1).]

In light of MCR 2.117(C)(1), we agree with defendant's position that he discontinued serving plaintiffs regarding the Berryman matter, at the latest, in July 2003, after the appeal period regarding the post-judgment order of sanctions expired. Plaintiffs' arguments to the contrary are unpersuasive. The fact that neither the trial court nor plaintiffs formally announced that defendant's legal representation had ceased as of July 2003 is not dispositive. Neither is the fact that plaintiffs did not fully satisfy the sanctions judgment until February or March 2004, or that docket entries continued to be made in September 2004. What matters is the point at which the lawyer discontinues serving the client. MCL 600.5838(1). That occurs when the lawyer completes the specific legal service that he was retained to perform. *Kloian*, 272 Mich App at 238. Here, defendant was retained to file suit against the Berrymans for alleged fraud in connection with the real estate transaction. After the case was dismissed in April 2003, and the post-judgment sanctions order was entered in June 2003 (and the appeals period expired in July 2003), defendant had completed the specific service that he was hired to perform. There was no further legal work for him to do regarding the Berryman matter. Because defendant discontinued serving plaintiffs in July 2003, at the latest, and plaintiffs did not file suit until January 2006, this part of plaintiffs' malpractice action is barred by the statute of limitations.[2] Accordingly, the trial court did not err in granting summary disposition on this ground.

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition regarding count two of the complaint on the basis that plaintiff failed to demonstrate that he suffered compensable damages. We disagree.

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 118. A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 120. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 118, 120.

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[2] Plaintiffs do not benefit from the 6-month discovery period of MCL 600.5838(2) because they discovered, or should have discovered, their claim by November or December 2003, at the latest. This is the date that plaintiffs discovered that a judgment of case evaluation sanctions was entered against them in the Berryman litigation.

Count two involves the Deer Run matter. In March 2002, defendant asked plaintiff to invest in a three-parcel residential development named Deer Run Estates. Plaintiff agreed to loan $100,000, which was secured by a mortgage. Defendant received an $8,000 finder's fee from Deer Run for procuring plaintiff as a lender. This $100,000 loan is not at issue on appeal.

Subsequently, defendant again approached plaintiff in 2002 regarding investing in Deer Run Estates. Defendant encouraged plaintiff to loan $350,000 to Deer Run at a rate of 11 percent interest. Plaintiff agreed. In December 2002, the loan was secured by mortgages on three parcels in the Deer Run development. Defendant drafted the promissory note and mortgage documents and charged plaintiff an hourly rate for his legal services. Unknown to plaintiff, defendant also received a $12,000 finder's fee from Deer Run for procuring this loan. After Deer Run stopped making payments on the loan, plaintiff filed suit against Deer Run. Defendant did not represent plaintiff in that litigation.

At the conclusion of a bench trial in Oakland Circuit Court, plaintiff received a judgment in his favor in the amount of $546,387.03, broken down as follows: $131,036.37 due under the March 2002 mortgage note, including interest and court costs, and $415,350.66 due under the December 2002 mortgage note, including interest. A judgment of foreclosure was entered with regard to the Deer Run properties. The judgment provided for the recovery of plaintiff's miscellaneous expenses, including, insurance premiums, property and transfer taxes, and attorney fees associated with the foreclosure. Including all of these miscellaneous expenses, plaintiff's judgment totaled $591,456.74. At an auction for the Deer Run property in August 2006, plaintiff acquired the property after bidding the entire amount of his judgment, $591,456.74. In count two of the instant complaint, plaintiff alleges that defendant committed legal malpractice by failing to determine, before plaintiff's making the $350,000 loan, that the property used to secure the loan was already encumbered by a higher priority mortgage.

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The trial court granted defendant's motion for summary disposition regarding count two on the ground that plaintiff failed to demonstrate that he suffered compensable damages.

Plaintiff claims that he is entitled to recover economic damages under either of two alternative theories. First, under the "no loan" theory, plaintiff proposes that he would not have loaned the $350,000, but would have instead invested it at a rate of eight percent interest. He would now have $518,000, and he also would have avoided $57,374.20 in costs associated with maintaining the Deer Run property. Assuming that plaintiff would have made more money had he invested his $350,000 at eight percent interest rather than investing it in Deer Run, defendant makes a valid point in arguing that plaintiff's claim is speculative. Plaintiff does not identify an investment that would have guaranteed him eight percent interest. If plaintiff could show that he did suffer damages, and it was only the amount of damages that was in question, summary disposition under MCR 2.116(C)(10) would be inappropriate. However, plaintiff presents no evidence under this theory to support his claim that he was damaged. "[T]he nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a

motion for summary disposition under [MCR 2.116(C)(10)]." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Plaintiff presents no authority for the proposition that he can survive summary disposition simply by alleging that he suffered damages, without some admissible evidence substantiating that allegation. *Maiden*, 461 Mich at 121. So, plaintiff's "no loan" theory fails for lack of adequate substantiation. "A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

The second theory of damages contemplates what actually occurred: plaintiff loaned the money to Deer Run and incurs costs in maintaining it. The Deer Run property that plaintiff now owns was appraised in March 2008 at $575,000. The judgment that plaintiff was entitled to receive, however, was $591,456.74. Thus, claims plaintiff, he has lost $16,456.74. As defendant points out, plaintiff's theory fails under the "full credit bid" principle. The "full credit bid" principle bars a claim for economic damages in cases like the instant one where the lender has made a bid equal to the full value of the judgment or loan which secures the property, and wins the property as the highest bidder. See *New Freedom Mortg Corp v Globe Mortg Corp*, 281 Mich App 63, 68-74; 761 NW2d 832 (2008), and *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217 (1989). When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. *New Freedom Mortgage Corp*, 281 Mich App at 68. Here, plaintiff made a bid equal to the full value of the judgment at the foreclosure sale of the Deer Run property. Plaintiff was the highest bidder, and thus, now owns the property. Plaintiff offers no argument proposing that the full credit bid principle does not apply to the instant case. Accordingly, plaintiff's second theory of economic damages also fails.

Additionally, plaintiff claims an entitlement to noneconomic damages because he has endured worry, mental anguish and emotional distress associated with his retirement funds being at risk. Noneconomic damages may be awarded in a legal malpractice case. *Gore v Rains & Block*, 189 Mich App 729, 740-741; 473 NW2d 813 (1991).

Plaintiff does not present much in the way of noneconomic damages. The majority of plaintiff's damages argument focuses on economic damages. In plaintiffs' response to defendant's motion for summary disposition and plaintiffs' appellate brief, plaintiff dedicates a few sentences to noneconomic damages, stating that he suffered noneconomic damages because he has endured worry, mental anguish and emotional distress associated with his "retirement funds being at such risk." Plaintiff provides no further elaboration. It is reasonable to assume that it would be stressful and worrisome to discover that one's retirement funds are in jeopardy. Nevertheless, plaintiff's noneconomic damages claim falls short. Mental anguish damages may be described in terms of "shame, mortification, humiliation and indignity." *Veselenak v Smith*, 414 Mich 567, 576; 327 NW2d 261 (1982). Mental distress attendant to pecuniary loss is typically insufficient to warrant noneconomic damages, even if the plaintiff is not made whole without them. *Valentine v General American Credit, Inc*, 420 Mich 256, 259-261; 362 NW2d 628 (1984). We are not suggesting that noneconomic damages are never allowable if they are based on distress stemming from pecuniary loss, only that the instant plaintiff's minimal showing—which lacked details or evidentiary substantiation—is insufficient to establish a claim for noneconomic damages. Accordingly, the trial court did not err in granting defendant's

motion for summary disposition regarding count two, finding that plaintiff did not produce evidence to support his claim that he suffered compensable damages.

Finally, plaintiffs argue that the trial court erred in granting defendant's motion in limine to exclude evidence that the Deer Run attorney paid defendant a total of $20,000 in finder's fees for procuring plaintiff as a lender. In light of the resolution of the above two issues, we decline to address this issue because it is moot.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR. 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra

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GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with two aspects of the majority's analysis regarding the Deer Run matter.

The majority concludes that because plaintiff William Traynor neglected to "identify an investment that would have guaranteed … eight percent interest," his "no loan" damages theory "fails for lack of adequate substantiation." *Ante* at 6-7. In my view, plaintiff's "no loan" damage hypothesis should be rejected because it bears no relationship to the acts of negligence alleged by plaintiff and is precluded by the full credit bid rule. Contrary to the majority's analysis, the evidence otherwise substantiated the reasonableness of an eight percent interest figure.

The "no loan" theory proffered by plaintiff asserts that had he kept his money rather than investing in Deer Run, he would have $350,000 in hand for alternate investments. According to plaintiff, the money could have been invested "at even 8% per year using simple interest," which would have yielded a significantly larger cash sum. But regardless of any alternative investment opportunities available to plaintiff when he opted to loan money to Deer Run, defendant's legal malpractice did not proximately cause plaintiff to suffer any damages. Plaintiff testified at his deposition that he loaned Deer Run $350,000 because he believed the investment would "enhance [his] monetary position." Plaintiff explained that the attractiveness of the investment included a 10% interest rate.[1] When plaintiff made the loan, he believed that he had a first-

[1] Had defendant's negligence actually caused plaintiff damages, evidence of the loan's 10% interest rate would have sufficed to reasonably support plaintiff's claim that he could have made
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priority mortgage on the land that secured the investment and reduced his risk. Plaintiff further averred at his deposition that the $350,000 loan "was a guaranteed investment. It was guaranteed . . . by the property." Thus, plaintiff's testimony reflects his clear understanding that if the borrower defaulted, the value of the property would suffice to cover the amount of his loan. This bargain envisioned that in the foreseeable event the loan was not repaid, plaintiff would be made whole through an interest in the property, instead of through principal and interest payments.

Although defendant negligently failed to advise plaintiff that other secured creditors stood in higher priority, plaintiff eventually obtained title to the land, precisely the same satisfaction of the borrower's indebtedness as contemplated in the original bargain. In other words, defendant's failure to perform a title search did not proximately cause any damages because plaintiff received one of the alternatives for which he had bargained. Regardless whether defendant neglected to reveal that other secured creditors had higher priority interests in the land, plaintiff ultimately obtained it. Consequently, the evidence reveals no causal link between defendant's negligence and any damages attributable to the foreclosure.

The full credit bid rule also supports summary disposition in defendant's favor. The full credit bid rule envisions that a lender who makes a full credit bid at a foreclosure sale takes title to the property in full satisfaction of the underlying debt. *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008). In *New Freedom*, this Court applied the full credit bid rule to bar the plaintiff's action against a nonborrower third party. *Id.* at 74-75. Plaintiff's brief does not address the full credit bid rule, and I can discern no reason to forbear its application against a nonborrower third party under the circumstances presented here.

I also respectfully disagree with the majority's analysis of plaintiff's claim for noneconomic damages. I would hold that the circuit court correctly granted summary disposition of plaintiff's noneconomic damages claim because he did not put forward *any* evidence of emotional or mental injury. Plaintiff's complaint does not set forth a claim for noneconomic damages. Plaintiff's answers to interrogatories relating to damages include no mention of noneconomic injuries, but instead assert that $350,000 represents "the exact amount of damage

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an investment yielding 8% interest. MCR 2.116(C)(10) permits summary disposition when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). The majority's criticism of plaintiff's failure to "identify an investment that would have guaranteed him eight percent interest" is entirely misplaced, given that the parties agreed that the $350,000 investment at issue would have guaranteed an even higher interest rate. Had plaintiff shown any link between defendant's negligence and his alleged damages, this circumstantial evidence and the inferences it supports would have sufficiently substantiated the reasonableness of an eight percent interest yardstick and defeated summary disposition. Furthermore, "[i]t is well established that, where the fact of liability is proven, difficulty in determining damages will not bar recovery." *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 542; 470 NW2d 678 (1991).

you claim to have sustained." Plaintiff's deposition likewise made no mention that he had suffered emotional or mental distress. Had plaintiff pleaded and put forward some facts supporting even a reasonable inference of noneconomic injury, he would have survived defendant's summary disposition motion. However, because the record is entirely devoid of any evidence of this late-raised claim, I agree with its summary dismissal.

/s/ Elizabeth L. Gleicher