COURT OF APPEALS DECISION DATED AND FILED

March 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP575

Cir. Ct. No. 2012CV3621

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DAVID MACLEISH, HAYDEN MACLEISH,
KAY MACLEISH AND ROBIN MACLEISH,

PLAINTIFFS-APPELLANTS,

V.

BOARDMAN & CLARK LLP, QUALE HARTMANN, S.C.,
CONTINENTAL CASUALTY COMPANY AND
ONEBEACON INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. David MacLeish, Hayden MacLeish, Kay MacLeish, and Robin MacLeish (the siblings) appeal an order granting summary judgment dismissing this legal malpractice action against Boardman & Clark, LLP, Quale Hartmann, S.C., Continental Casualty Company, and OneBeacon Insurance Company (Hartmann).[1] The siblings claim that attorney Forrest Hartmann was negligent in probating the estate of their father, Charles MacLeish, following his death in 1984, most notably by failing to advise his widow and personal representative, Thelma MacLeish, that Charles's estate should claim a particular type of partial marital property deduction on Charles's federal estate taxes. The siblings allege that this negligence resulted in monetary losses to the siblings, as beneficiaries of Thelma's estate, upon her death in 2008. For purposes of summary judgment, Hartmann conceded negligence, but argued that the action must be dismissed because the siblings could not prove damages resulting from Hartmann's conduct.

¶2 The circuit court granted summary judgment for Hartmann on the grounds that the summary judgment materials did not contain evidence of damages to the siblings sufficient to raise a genuine issue of material fact on this element of their negligence claim. We conclude, however, that there is a factual dispute on damages based on the summary judgment materials submitted to the circuit court. Accordingly, we reverse the order granting summary judgment and remand for further proceedings.

[1] For the most part, we use "Hartmann" to refer both to the individual, attorney Forrest Hartmann, formerly of Quale Hartmann, S.C., and to the defendants collectively. We use first names to refer to the siblings and their parents, who share a surname.

BACKGROUND

¶3 The following undisputed facts are drawn from the circuit court's summary judgment decision. For the sake of clarity and context, we supplement this background with references to legal authority not disputed by the parties.

¶4 In a will executed in 1967, Charles left his property to Thelma for her support during her lifetime. Charles directed that, upon Thelma's death, the remainder of his estate be placed in trust until the youngest of their children completed college, at which time the trust would terminate and the remainder of his estate was to be "divided equally" among the children. Charles died in 1984, leaving a substantial estate that included stocks. Thelma died in 2008, leaving the siblings as beneficiaries of her estate.

¶5 Pertinent federal tax law changes occurred before Charles died, involving deductions allowed to the estates of married decedents under the Internal Revenue Code. The following overview is consistent with the pertinent tax law summarized by the circuit court and with the arguments now made by the parties.

¶6 Under federal law prior to 1976, the estate of a married decedent could claim a marital deduction on estate taxes. DALE S. ADAMS & ROBERT B. SMITH, FEDERAL ESTATE & GIFT TAXATION ¶5.06[10], *41 (2015). However, this marital deduction was generally limited to one-half of the decedent's adjusted gross estate. ***Id.*** In the Tax Reform Act of 1976, Congress "liberalized the deduction limit": "The limitation on the deduction was expanded to the greater of $250,000 and one-half of the decedent's adjusted gross estate to allow free interspousal transfers in small and moderate estates." ***Id.*** In the Economic Recovery Tax Act of 1981, Congress "abolished the limit on the amount of the marital deduction entirely, allowing unlimited interspousal transfers of deductible property interests." ***Id.***

¶7 One topic addressed in the 1981 Act involved a traditional rule to the following effect that had existed under the Internal Revenue Code: any property of the first-to-die spouse that passed untaxed to the surviving spouse would generally be taxed in the estate of the surviving spouse. *See* ***Estate of Shelfer v. Commissioner of Internal Revenue***, 86 F.3d 1045, 1048 (11th Cir. 1996). Under this traditional rule, marital deductions for "terminable property interests" in the estate of the first-to-die spouse were generally barred. ***Id.*** at 1048-49. "Terminable property interests are those interests that will terminate upon the occurrence of an event, the failure of an event to take place, or after a certain time period." ***Id.*** at 1049. The treatment of terminal property interests under the traditional rule was based on the concern that, because some terminable interests might terminate before the death of the surviving spouse, there was "a risk that the assets would escape taxation in the [surviving] spouse's estate tax return." ***Id.***

¶8 In the 1981 Act, Congress created the qualified terminable interest property trust (QTIP) exception to the rule that generally prohibited deductions for terminable property interests. ***Id.*** Under the 1981 change, trust instruments that are designated to provide "ongoing income support for the surviving spouse while retaining the corpus for the children or other beneficiaries" are entitled to a marital deduction. ***Id.*** As explained by an expert who testified in this case, as quoted by the circuit court in its decision, "[T]he purpose [of the 1981 change creating QTIP] was to give the first spouse to die ultimate control of disposition of the assets and still get the marital deduction in the first estate." The siblings assert, and Hartmann does not disagree, that a QTIP election in 1984 could have been partial, addressing only some portion of an estate. *See* ***Estate of Clayton v.***

Commissioner of Internal Revenue, 976 F.2d 1486, 1497 (5th Cir. 1992) (discussing partial election).

¶9 With that background, we turn to the facts. The siblings allege that in 1984 Hartmann was negligent in failing to take advantage of the QTIP in advising Thelma, as personal representative of Charles's estate, and that this resulted in unnecessary estate taxes after Thelma's death in 2008. More specifically, the allegation is that, after Charles died, Hartmann negligently advised Thelma not to use a partial QTIP, but instead advised her "to claim full use of the marital deduction" on the federal estate tax return for Charles's estate. Under the approach recommended by Hartmann and followed by Thelma, Thelma treated the assets in Charles's estate for estate tax purposes as though all passed to her, and claimed a marital deduction for all, effectively "sheltering" Charles's estate from the estate tax in 1984 under the marital deduction. There being no limits on the federal marital deduction, no federal estate tax was due in 1984. However, upon Thelma's death, the assets passing from Charles's estate to Thelma were taxable to her estate, which resulted in a tax to Thelma's estate of $261,343, to the detriment of the siblings as beneficiaries of her estate. The siblings' complaint alleges that this estate tax that came due following Thelma's death "was entirely avoidable" had the partial QTIP been used in 1984.

¶10 However, there is no dispute that, because Charles's assets were brought into Thelma's estate based on Hartmann's advice in 1984, the siblings, as beneficiaries of Thelma's estate, enjoyed a stepped-up basis in the value of the stocks they inherited upon Thelma's death, avoiding capital gains taxes.[2] The court stated in its decision that the siblings "acknowledge that they did get a stepped-up basis worth approximately $2,400,000, but dispute [Hartmann's] calculations of the actual dollars saved as 'all over the map' and 'nonsense.'"

¶11 Based on the income tax savings due to reduced capital gains enjoyed by the siblings, due in part to the challenged 1984 advice provided by Hartmann, the circuit court granted summary judgment to Hartmann. The court reasoned that, even assuming negligence by Hartmann, a jury at trial "would be left to speculate as to what harm" the siblings suffered due to any negligence of Hartmann, because the siblings "cannot show that if Hartmann had handled matters differently, [the siblings] would be better off."

DISCUSSION

¶12 In granting summary judgment, the circuit court effectively concluded that (1) Hartmann made a prima facie case for summary judgment that the siblings lacked sufficient proof of damages to satisfy that element of their negligence claim, in light of the capital gains taxes avoided due in part to Thelma's following Hartmann's advice; and (2) the siblings failed to present evidence showing that there was a genuine issue of material fact on the damages element. The siblings do not dispute that damages are an element of their claim. However, they argue in part that the court erred because it failed to consider expert testimony that the siblings offered in opposing summary judgment. The siblings

[2] When a step up in basis is allowed, this means that an asset is given, for tax purposes, its fair market value at the time designated for the step up, rather than its value at the time it was acquired, thus reducing capital gains that would otherwise be taxable as income.

contend that this testimony, when considered together with other summary judgment materials, provides a basis to find that a non-negligent approach to probating Charles's estate, involving a partial QTIP election, would have saved the siblings money, even taking into account the capital gains taxes savings. In response, Hartmann does not contest any calculation or principle of tax law underlying the siblings' argument. Instead, Hartmann suggests that the inferences of damages arising from the testimony cited by the siblings are unduly speculative. We disagree, and on this basis reverse.

¶13 Our review of the circuit court's grant of summary judgment is de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Under that familiar methodology, which we will not repeat in detail, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; *see also* WIS. STAT. § 802.08(2) (2013-14).[3] "In reviewing a summary judgment, we are, like the [circuit] court, limited to consideration of the pleadings and evidentiary facts submitted in support of and in opposition to the motions." ***Hannigan v. Sundby Pharmacy, Inc.***, 224 Wis. 2d 910, 916, 593 N.W.2d 52 (Ct. App. 1999). "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶14 We first address two threshold issues: whether the "suit within a suit" framework that generally applies in analyzing legal malpractice cases is appropriate here; and the relevance to this action of evidence regarding income taxes on capital gains.

I. "SUIT WITHIN A SUIT" FRAMEWORK

¶15 The siblings argue that the circuit court "got sidetracked" in applying the "suit within a suit" framework in addressing causation and damages in this case. We disagree on this question of law, which we review de novo.[4]

¶16 Our supreme court has described the rule as follows:

> To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." This entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'"

Glamann v. St. Paul Fire & Marine Ins. Co., 144 Wis. 2d 865, 870, 424 N.W.2d 924 (1988) (quoted sources omitted).

¶17 The siblings acknowledge that the "suit within a suit" rule applies to some legal malpractice actions, but argue that its application is not appropriate here for various reasons. These reasons appear to boil down to the idea that the alleged negligence and damages here, unlike in some other legal malpractice cases, can be measured "to an arithmetical certainty." The siblings assert that "in

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[4] We could pass over this issue in light of our discussion below reversing the summary judgment order. However, we choose to address the issue in the interests of judicial efficiency, out of concern that it might resurface in this case following remand.

this case the facts are the numbers, and the law is the tax code." (Emphasis omitted.)

¶18 It is true that the language in ***Glamann*** appears to allow for the possibility that the "but for" standard is not necessarily applicable to all legal malpractice actions. However, ***Glamann*** describes a general rule, and we are not persuaded by the siblings that, because the proof of alleged negligence and damages here involves much evidence based on numerical calculations, this case should fall outside that general rule. The siblings cite a number of cases, but none limit or qualify the general rule in ***Glamann***.

¶19 Some of the arguments made by the siblings appear to be based on a view that the general rule is inappropriate because it singles out attorneys among all tortfeasors for special treatment, or that we should carve out an exception to the rule for this type of case. However, it would be for our supreme court to consider altering the general rule on policy grounds or to establish exceptions to it.

¶20 For these reasons, we conclude that the "suit within a suit" framework is appropriate here.

II. RELEVANCE OF CAPITAL GAINS TAXES AVOIDED BY THE SIBLINGS IN 2008

¶21 As referenced above and discussed further below, the court rested its summary judgment decision on the existence of evidence that the challenged decisions Hartmann made in probating Charles's estate resulted in benefits that the siblings received under federal tax law, after Thelma's death, in the form of stepped-up bases in assets the siblings sold, avoiding capital gains taxes. We will call this the capital gains evidence. The circuit court rejected arguments by the siblings that this capital gains evidence is irrelevant in this case.

¶22 On appeal, the siblings renew their relevance objection to the capital gains evidence. We disagree with the siblings, and conclude that this evidence is relevant to the damages issue and therefore can be considered as part of the summary judgment decision. This again presents a legal issue that we decide de novo.

¶23 The siblings divide their argument into three parts: (1) the capital gains evidence is prohibited "collateral source" evidence; (2) the evidence is barred under an exception to the general rule that allows, as mitigation of damages evidence, evidence of a benefit conferred by a tortfeasor's conduct, under the reasoning of cases that include ***Marciniak v. Lundborg***, 153 Wis. 2d 59, 450 N.W.2d 243 (1990); and (3) the evidence is speculative.

¶24 As we now explain, we reject each of these arguments, in part because Hartmann makes persuasive arguments on each topic to which the siblings do not reply. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶25 The collateral source rule is a rule of evidence that generally precludes "introduction of evidence regarding benefits a plaintiff obtained from sources collateral to the tortfeasor," and also "a rule of damages" "designed to protect plaintiffs." ***Leitinger v. DBart, Inc.***, 2007 WI 84, ¶¶28-34, 302 Wis. 2d 110, 736 N.W.2d 1. Under this rule, a "tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses." ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶7, 235 Wis. 2d 678, 611 N.W.2d 764. The collateral source rule applies where the plaintiff receives a benefit "from sources that have nothing to do with the tortfeasor." ***Leitinger***, 302 Wis. 2d 110, ¶26.

¶26 In their principal brief, the siblings argue that the collateral source rule applies here and precludes the introduction of the capital gains evidence because the stepped-up basis benefit they received was not a benefit received from Hartmann, but, rather, a benefit obtained due to rules of the Internal Revenue Service. In response, Hartmann argues that the collateral source rule has no application here because there is no dispute that the stepped-up basis in the stock at issue resulted from "specific recommendations from Hartmann as to the manner of probating Charles's estate."

¶27 To support their argument, the siblings cite a combination of Wisconsin and persuasive authority. However that authority appears to stand only for general propositions regarding the purpose and function of the collateral source rule, and none of this authority appears to line up with the facts of this case in any meaningful way that we can discern, at least as far as the siblings explain it. For example, the siblings cite case law holding that the collateral source rule precludes admission of evidence of the amount an injured plaintiff's insurer paid for medical treatment. *See* ***id.*** at ¶¶3-4, 7. However, the siblings do not explain how the reasoning of ***Leitinger*** applies here. We are persuaded that the role of the capital gains benefit in this case bears no resemblance to an insurance benefit or a fortuitous advantage of the type addressed under the collateral source rule.

¶28 The siblings' second argument to exclude the capital gains evidence, which involves reference to ***Marciniak***, is somewhat complicated, but we address the salient features of this argument as best we understand them. The siblings acknowledge the existence of the following general damages rule, which *favors* inclusion of evidence of benefits received by plaintiffs under certain circumstances:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1979). However, the siblings contend, this benefit rule does not apply here based on two exceptions recognized in ***Marciniak***: (1) the particular interest of the siblings that was allegedly harmed involving the estate taxes is not the same interest of theirs involved in the capital gains issue, and (2) it would be inequitable to allow this form of damages mitigation on the facts of this case.

¶29 We find persuasive Hartmann's argument that the discussion in ***Marciniak*** is entirely distinguishable from this case, and the siblings make no reply. In ***Marciniak***, the parents of a child conceived after an allegedly negligent sterilization operation sought to recover as damages the costs of child rearing. ***Marciniak***, 153 Wis. 2d at 61-63. The question in ***Marciniak*** to which the siblings draw our attention is whether the defendants were entitled to the benefit of an offset equal to the value of "benefits conferred by the presence of the child in their lives." ***Id.*** at 63. The supreme court concluded that "it is not equitable to apply the benefit rule in the context of the tort of negligent sterilization," given that the parents affirmatively sought to avoid having a child by seeking sterilization, and therefore the child-rearing costs could not be offset by the benefits of parenthood. ***Id.*** at 72-74. Contrary to the siblings' argument, the court in ***Marciniak*** explicitly relied on this equitable basis alone, and declined to do what the siblings now assert that the court did: "draw[] the line using the 'same interest' test." *See **id.*** Separately, as to equities, there is no resemblance between the negligent sterilization context and the equities in play in this case. Additional authority cited by the siblings on this topic is limited to cases that involve allegations of fraud or other readily distinguishable features.

¶30 As their third argument regarding this capital gains issue, the siblings briefly argue that Hartmann would necessarily be asking the jury to speculate about benefits to the siblings from the stepped-up bases of the stocks they inherited, because of uncertain variables that include the tax rate on the date on which particular shares were sold, the identity of the sibling who sold particular shares, and the basis for each share when sold. However, Hartmann cites extensive record evidence on these topics that purportedly supports an argument for a fact finder that capital gains savings totaled "at least $350,000." The siblings concede the point by failing to reply to any aspect of these arguments.

¶31 For these reasons, we conclude that the capital gains evidence is relevant to the calculation of damages in this case.

III. SUMMARY JUDGMENT

¶32 As pertinent here, in opposing summary judgment, the siblings relied on an affidavit of attorney Hartmann and its attachments, submitted by Hartmann, and on an affidavit of attorney Michael Wilcox. Attorney Wilcox averred in part as follows:

> [A] partial QTIP election should have been made pursuant to the instructions for the federal estate tax return. By making that partial election, a share of the trust equal to $325,000 would qualify for Charles' estate's exemption from the federal estate tax. The balance would be subject to the QTIP rules and not be subject to federal estate tax in Charles' estate. Said balance would qualify for the marital deduction and be subject to estate tax in the surviving

> spouse's, Thelma's, estate. There would be no estate tax in Charles' estate due to use of the $325,000 exemption and the balance qualifying for marital deduction. The trust would have two shares: Share A equal to $325,000 and Share B equal to the balance.
>
> Charles's gross estate was (excluding non-probate property) $607,852.23. Share A would be $325,000. Share B would be approximately $283,852.23 less expenses of administration. Charles' entire estate would have received a basis adjustment equal to its fair market value on Charles's date of death in 1984. Share B would have received a second basis adjustment to fair market value on the date Thelma died.
>
> When Charles died, Share A would have comprised approximately 53% of the trust and Share B would have comprised approximately 47% of the trust.
>
> The effect of the basis adjustment on the assets in Share B would be that the recipients of Share B would receive a new basis equal to fair market value on Thelma's death. The assets in Share A would have the basis equal to their value on Charles's date of death in 1984 unless one or more assets had been sold in the meantime. If an asset had been sold, it would have a basis equal to the purchase price.

¶33 Based on this affidavit, together with averments in the attorney Hartmann affidavit and its attachments, the siblings presented the following among their arguments to the circuit court in opposing summary judgment:

> Charlie's estate should have been taxed on the first $325,000 (resulting in zero tax) and the balance shielded by Thelma's marital exemption. If that had been done, each [sibling] would have a stock "basis" at the value on the date of death of the person through whom he or she inherited it. As to 53% of the portfolio, it would have the 1984 value as a basis. As to the remaining 47% of the portfolio, it would have the 2008 basis.
>
> …. Had the estate been properly probated, about 53% of … Charles's wealth would have gotten basis from Charles's date of death value, and about 47% from Thelma's.
>
> …. Half of Charlie's estate (well, 53% to be precise) should have been subjected to tax (totaling zero

> dollars) in a "by-pass" mechanism. The other half should have been taxed in Thelma's estate.

(Emphasis omitted.)

¶34 Consistent with the above argument, the siblings now argue that the summary judgment record establishes the following specific calculations. If Thelma, acting as personal representative, had taken the approach now described by attorney Wilcox, based on the numbers regarding asset values supplied in the affidavit of attorney Hartmann and its attachments, then she could have apportioned Charles's estate into a trust with a Share A and a Share B. Share A could have claimed an estate tax "unified credit" of $325,000 on behalf of Charles's estate and the balance, Share B, could have been taxed as if it passed to Thelma. After Thelma died, the siblings could have first sold $1,178,261 in stock that they inherited from Thelma (47 percent of the assets, with the 2008 basis) and then sold the $279,232 in stock they inherited from Charles (53 percent of the assets, with the 1984 basis), resulting, according to the siblings, in a "worst case" total tax of $20,594.40 (using a 20 percent capital gains tax). Under these calculations, through the approach not taken by Hartmann, there is no estate tax to either estate, and the siblings would have owed far less in income taxes than the $261,343 in estate taxes they ended up owing.

¶35 In response, Hartmann does not challenge any specific calculation provided by the siblings and does not argue that the siblings have misapplied the tax rules in coming up with these numbers. Instead, Hartmann makes two, related arguments, each of which we reject.

¶36 First, Hartmann argues that the siblings' "calculations still lack a factual foundation as to what actual assets make up the hypothetical 53% trust" that would constitute Share A under the explanation of attorney Wilcox summarized above. If what Hartmann means by this argument is that the siblings could not avoid summary judgment without producing an admissible spreadsheet itemizing the stocks individually and stating how each should have been categorized and handled for sale by the siblings, this sets too high a bar. It is true, as Hartmann points out, that summary judgment is appropriate when sufficient time for discovery has passed and the party asserting a claim on which it bears the burden of proof at trial has failed to demonstrate the existence of an element essential to its case. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993). However, the siblings are obligated only to set forth specific, admissible facts showing that there is a genuine issue for trial regarding damages. This they have done.

¶37 Second, again without suggesting any error in the siblings' math or in their application of tax law, Hartmann asserts that the premises of the siblings' argument involve "substantial speculation," and in support quotes testimony given by individual siblings about factors influencing their decisions to sell some of the stock at issue. This is not a developed argument, but in any case Hartmann appears to raise only the types of concerns that might form the basis for direct or cross-examination questions that Hartmann could pose to witnesses at trial, or for arguments Hartmann might make to the fact finder, but that do not establish a basis for summary judgment.

¶38 We emphasize in closing that we do not intend for any statement we have made in this opinion to be interpreted as a conclusion regarding any element of the siblings' legal malpractice claim other than damages, nor do we intend to suggest a conclusion about the merits of any dispute that the parties might have in the future regarding the damages issue based on additional facts or legal theories not now advanced by either party. We conclude only that the summary judgment materials submitted to the circuit court, considered in the light most favorable to the non-moving party, reflect a genuine issue of fact regarding the potential to prove damages based on the legal theories now advanced by the parties and therefore summary judgment on that ground was error. *See* ***Waters v. United States Fidelity & Guar. Co.***, 124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985) ("Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy.").

¶39 For these reasons, we reverse the order dismissing the complaint and remand for further proceedings consistent with this opinion.[5]

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

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[5] We do not address the siblings' argument on appeal that the circuit court erred in not permitting them to amend the complaint. The proposed amendment involved an allegation that Hartmann failed to properly impress a trust and that as a result assets were distributed more slowly to the siblings after Thelma's death than they could have been, allegedly causing losses due to a falling stock market. The court's decision not to allow amendment was influenced by factors that are no longer pertinent in light of our reversal of summary judgment (e.g., "I have to consider as significant that this motion was filed after the summary judgment motion was filed and less than three months before trial."). We express no opinion on the merits of any arguments made by the parties regarding the amendment issue.