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Gore v. Rains & Block
Mich.App.,1991.

Court of Appeals of Michigan.
Mark GORE, Plaintiff-Cross-Appellee-Cross-Appellant, andVirginia Gore, Plaintiff-Appellant-Cross-Appellee-Cross-Appellant,
v.
RAINS & BLOCK, Lowry A. Rains, Norman L. Block and Allan R. Gurvitz,Defendants-Appellees-Cross-Appellants-Cross-Appellees.
Docket No. 114744.

Submitted Oct. 10, 1990, at Lansing.
Decided June 17, 1991, at 9:30 a.m.
Released for Publication Sept. 19, 1991.

Husband and wife sued law firm and certain partners for legal malpractice for failing to file timely medical malpractice claim on their behalf. The Washtenaw Circuit Court, Edward D. Deake, J., granted attorneys' motion for judgment notwithstanding verdict with regard to wife's claim for loss of consortium but denied motion with regard to husband's claims, and wife appealed and attorneys cross-appealed. The Court of Appeals, Neff, J., held that: (1) evidence made question for jury whether wife was aware of medical malpractice claim when she married husband; (2) principle that jury should not be permitted to consider question of liability where it has been admitted was not violated even though attorneys admitted breach of standard of care where jury was instructed to decide only question whether client would have prevailed on his medical malpractice claim and jury was instructed not to consider question of attorneys' liability for any injuries that may have occurred because of their negligence; and (3) recovery for mental anguish arising from legal malpractice was not barred by lack of proof of physical injury.

Affirmed in part, reversed in part and remanded.

J.H. Gillis, P.J., concurred in part and dissented in part with opinion.

West Headnotes

[1] Attorney and Client 45 129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most Cited Cases
Evidence in action for legal malpractice for failure to file timely medical malpractice claim made question for jury as to whether wife was aware of cause of action for medical malpractice when she married patient so as to be precluded from pursuing claim for loss of consortium.

[2] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
Decision whether to admit evidence is within sound discretion of trial court and will not be disturbed on appeal absent abuse of discretion.

[3] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
Abuse of discretion in admission of evidence is found only if an unprejudiced person, considering facts on which trial court acted, would say there

was no justification or excuse for ruling made.

[4] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
When reviewing court's decision to admit evidence, reviewing court will not assess weight and value of evidence, but will only determine whether evidence was of kind that properly could be considered by jury.

[5] Appeal and Error 30 1050.2

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.2 k. Evidence Irrelevant to Issue. Most Cited Cases

Attorney and Client 45 129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and Evidence. Most Cited Cases
Admission of evidence of attorneys' breach of standard of care in failing to file timely medical malpractice claim did not violate principle that jury should not be permitted to consider question of liability where it has been admitted, even though attorneys admitted the breach, where jury was instructed to decide only the question whether client would have prevailed on his medical malpractice claim, and to extent that some evidence related to attorneys' admission, any error in admitting such evidence was harmless.

[6] Damages 115 192

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases
Evidence in action for legal malpractice for failing to file timely medical malpractice claim supported award of damages for mental anguish arising out of legal malpractice claim without proof of physical injury.

[7] Attorney and Client 45 129(4)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(4) k. Damages and Costs. Most Cited Cases

Damages 115 57.12

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.12 k. Particular Cases in General. Most Cited Cases
(Formerly 115k49.10)
Client suing for legal malpractice for failure to file timely medical malpractice claim is entitled to recover damages to the extent of the injury, which includes underlying physical injury caused by the medical malpractice and mental anguish caused by the legal malpractice.

[8] Attorney and Client 45 129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most

Cited Cases
Refusal to give requested jury instruction concerning client's failure to minimize his damages resulting from defendants' failure to file timely medical malpractice claim resulted in no manifest injustice where patient did not know that doctors had failed properly to diagnose his condition.

[9] Appeal and Error 30 ⚿216(6)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k216 Requests and Failure to Give Instructions
30k216(6) k. Objection to Refusal of Requested Charge. Most Cited Cases
Failure to object to instructions given precluded appellate review of failure to give requested jury instruction, absent manifest injustice.

[10] Appeal and Error 30 ⚿204(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k202 Evidence and Witnesses
30k204 Admission of Evidence
30k204(2) k. Nature of Evidence in General. Most Cited Cases

Evidence 157 ⚿268

157 Evidence
157VIII Declarations
157VIII(A) Nature, Form, and Incidents in General
157k268 k. Statements Showing Physical or Mental Condition; State of Mind. Most Cited Cases
Alleged hearsay testimony of client, in action for legal malpractice arising out of failure to file timely medical malpractice claim, concerning statements made by physician who did not testify was admissible as to client's fearful state of mind caused by his cancerous condition, and to the extent that defendants did not object, no manifest injustice occurred.

[11] Appeal and Error 30 ⚿1053(3)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1053 Error Cured by Withdrawal, Striking Out, or Instructions to Jury
30k1053(3) k. By Instructions in General. Most Cited Cases
Any prejudice from testimony of client in legal malpractice action concerning unavailability of witness was cured by trial court's instruction to jury.

[12] Evidence 157 ⚿357

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k357 k. Letters, Telegrams, and Other Correspondence. Most Cited Cases
Refusal to admit letter from legal malpractice plaintiffs' attorney to doctor in which he asked doctor for his opinion of actions of doctors who failed to diagnose client's condition was not error.

[13] Trial 388 ⚿211

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k211 k. Failure of Party to Testify or to Call Witness or Produce Evidence. Most Cited Cases
Failure to give missing witness instruction, in action for legal malpractice for failing to file timely medical malpractice claim on clients' behalf, was not error absent testimony that clients had control over the missing witness and failed to produce him

and where sufficient curative instruction was given.

****815 *731** Louis Prigioniero and Mark D. Shoup, Detroit, for plaintiff-cross-appellee-cross-appellant.
Collins, Einhorn & Farrell, P.C. by Michael J. Sullivan and Noreen L. Slank, Southfield, for defendants-appellees-cross-appellants-cross-appellees.

Before J.H. GILLIS, P.J., and MICHAEL J. KELLY and NEFF, JJ.

NEFF, Judge.
Plaintiffs, Mark and Virginia Gore, sued the law firm of Rains & Block and certain partners thereof for legal malpractice for failing to file a timely medical malpractice claim on their behalf. Following a jury trial, Mark Gore was awarded $60,000 for the underlying medical malpractice claim and $60,000 for mental anguish arising out of the legal malpractice claim, for a total of $120,000 in damages. Virginia Gore was awarded $30,000. Defendants thereafter moved for a new trial, remittitur, and a judgment notwithstanding the verdict. In part, the motion for the judgment notwithstanding the verdict was related ***732** to Virginia Gore's claim for loss of consortium. The court granted defendants' motion for a judgment notwithstanding the verdict with regard to Virginia Gore, but otherwise denied defendants' motion. Virginia Gore then filed a claim of appeal, challenging the circuit court's order granting defendants' motion for a judgment notwithstanding the verdict. Defendants filed a cross appeal with regard to the judgment entered in favor of Mark Gore and the circuit court's order denying their motion for a new trial, remittitur, or a judgment notwithstanding the verdict.

We affirm the circuit court's denial of defendants' motion for a judgment notwithstanding the verdict with regard to Mark Gore's claims. We reverse the circuit court's order granting defendants' motion for a judgment notwithstanding the verdict with regard to Virginia Gore's loss of consortium claim.

I

On October 11, 1981, Mark Gore went to Thorne Hospital's emergency room, complaining of pain associated with a swollen testicle. While initially a surgeon informed him that his testicle would have to be amputated, no operation occurred, apparently because that doctor ruled out torsion, a twisting of the testicle which would normally require amputation to prevent gangrene. Instead, the doctors who treated Gore at Thorne Hospital determined that he had an infection and proceeded to treat it. After discharge from the hospital, Gore continued to see one of the doctors who had seen him at the hospital. That doctor prescribed different antibiotics and cortisone. While the doctor believed that Gore's condition was improving, he was still concerned about the swelling, ***733** which to ****816** him appeared to be slightly decreased. At that time, Mark Gore's testicle was less than double in size.

On November 30, 1981, the sixth time Gore was treated by the doctor, the doctor changed antibiotics again and told him that he could return to work the following week. Gore believed that his condition was not improving and, therefore, did not return to the doctor's office for further treatment even though he had not been discharged from the doctor's care. We note that Mark Gore did not have medical insurance.

Mark Gore was subsequently treated for other ailments and, in fact, hospitalized for a head injury he received in an unrelated automobile accident. He did not mention that his testicle continued to be swollen. He testified that, on the basis of the information provided by the original surgeon who indicated that his testicle “wasn't any good anyway,” he believed that he had to live with the swollen testicle.

In April 1983, Mark Gore went to the emergency room of another hospital because he was unable to get out of bed. At that time, the testicle was approximately six times its normal size. Gore was referred to Dr. Chin-Ti Lin, a urologist, who removed his testicle on April 14, 1983, suspecting cancer. Malignant cancer was confirmed, and Gore was sched-

uled to undergo a second surgery on May 9, 1983. Mark Gore and Virginia Gore married on May 7, 1983. Mark Gore underwent the second surgery to remove his lymph nodes on May 9, 1983.

Sometime after Mark Gore first met with Dr. Lin, it is not clear exactly when, Gore suspected that the doctors at Thorne Hospital had missed diagnosing the cancerous tumor. However, Gore was too worried about himself to consult an attorney.***734** After the second surgery, Gore thought that he should consult an attorney because any money he recovered could be used to support his family in the event that he did not survive. At trial, Virginia Gore confirmed that, shortly after their discussion with Dr. Lin, she and Mark thought that the original doctors had committed malpractice in failing to detect Mark Gore's cancer. Virginia Gore was never questioned on direct examination or cross-examination concerning whether she first suspected medical malpractice before or after her marriage to Mark Gore.

On October 2, 1983, Mark and Virginia Gore met with defendant Block. Plaintiffs claim that thereafter their repeated telephone calls and letters went unanswered by defendants. On June 25, 1985, defendant Gurvitz wrote Mark Gore the following letter:

> My sincere apologies for the delay in responding to your earlier communications however, we have been making a thorough inquiry into the facts of your alledged [sic] complaints. We have not been able to find an expert to make the appropriate causal relationship or support our theories of possible malpractice. Accordingly, we are not going to be proceeding on your claim and will close our file.
>
> If you have any questions or want to discuss the matter further, please feel free to contact us.

Within two weeks, Mark Gore sought the advice of another attorney and on October 1, 1985, filed a legal malpractice suit against defendants. Therein, Mark Gore alleged that defendants failed to file a malpractice suit against doctors who treated him at Thorne Hospital within the applicable statute of limitations. On November 5, 1985, plaintiffs filed an amended complaint, adding Virginia Gore as a plaintiff and claiming that she had suffered a loss ***735** of consortium as the result of the legal malpractice.

Defendants filed a motion for summary disposition of Virginia Gore's loss of consortium claim, alleging that she had married Mark Gore after the removal of his testicle and, therefore, she had no loss of consortium claim. The circuit court denied defendants' motion for summary disposition.

At trial, the defendants conceded liability on the legal malpractice claim for failing to file a medical malpractice action within the statute of limitations; however, defendants ****817** claimed that medical malpractice had not occurred. Plaintiffs claimed that medical malpractice did occur. The jury found in favor of plaintiffs. As noted above, the court subsequently granted defendants' motion for a judgment notwithstanding the verdict with regard to Virginia Gore's claim.

II

On appeal, Virginia Gore claims that the trial court improperly granted defendants' motion for a judgment notwithstanding the verdict relative to her claim for loss of consortium. She contends that she was married to Mark Gore when the legal malpractice occurred and, therefore, is entitled to recover for loss of consortium on the legal malpractice claim.

[1] While Virginia Gore was aware of Mark's physical condition when they married, neither was necessarily on notice that his physical condition was attributable to the medical malpractice committed in 1981. Since reasonable minds could differ concerning when the cause of action for medical malpractice was discovered, we cannot conclude as a

matter of law that Virginia "married a cause of action" and thereby should be precluded from ***736** pursuing a claim for loss of consortium. *Furby v. Raymark Industries, Inc.*, 154 Mich.App. 339, 347-348, 397 N.W.2d 303 (1986). Rather, the issue is one for the jury. *Kermizian v. Sumcad*, 188 Mich.App. 690, 692-693, 470 N.W.2d 500 (1991); *Moss v. Pacquing*, 183 Mich.App. 574, 583, 455 N.W.2d 339 (1990). Because, however, the jury was never instructed to determine when, through the exercise of reasonable diligence, plaintiffs discovered or should have discovered they had a possible cause of action, we must reverse the trial court's order granting defendants' motion for a judgment notwithstanding the verdict with regard to Virginia Gore's loss of consortium claim and remand this case for retrial on this issue.

III

We now turn to the issues raised in defendants' cross appeal.

A

Defendants first argue that certain evidence of the details of their breach of the standard of care was inadmissible and requires reversal. We disagree. Defendants admitted at trial that they breached the applicable standard of care by failing to pursue in a timely manner plaintiff's claim of medical malpractice. However, they disputed the merit of the underlying medical malpractice claim, thereby essentially denying liability for their professional malpractice.

The trial court permitted plaintiffs to call two of the individual defendants as witnesses over the objections of the defense. Defendants argue that their admission of negligence precluded any testimony concerning violation of the applicable professional***737** standard of care. On appeal, defendants argue that the evidence was inadmissible and prejudicial.

[2][3][4] The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Watkins*, 176 Mich.App. 428, 430, 440 N.W.2d 36 (1989); *Kochoian v. Allstate Ins. Co.*, 168 Mich.App. 1, 12, 423 N.W.2d 913 (1988). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Watkins*, *supra*. When reviewing a court's decision to admit evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was of a kind which properly could be considered by the jury. *Schanz v. New Hampshire Ins. Co.*, 165 Mich.App. 395, 405, 418 N.W.2d 478 (1988).

[5] Defendants' admission that they breached the applicable professional standard of care was a judicial admission. Such an admission is generally made for the express purpose of dispensing with formal proof of a particular fact. *Macke Laundry Service Co. v. Overgaard*, 173 Mich.App. 250, 253, 433 N.W.2d 813 (1988). However, defendants cite no authority, and ****818** we find none, for the proposition that formal proof on an admitted point is forbidden, especially where the evidence is admissible for other purposes. In this case, we find that most of the testimony elicited from the individual defendants was relevant to the issue of damages.

Defendants have quoted the comment to SJI2d 17.01, which states:

> The jury should not be permitted to consider the question of liability where it has been admitted. It ***738** is reversible error to submit any issue to the jury which has not been questioned or has been admitted.

In this case, there was no violation of the principle set out in the comment to SJI2d 17.01, because the jury was not permitted to consider the question whether defendants breached their standard of care in handling the case. The court instructed the jury:

> The defendants have admitted that they are li-

> able to the plaintiff for any damages which the plaintiff might hve [sic] recovered in an action against Dr. Dickman, Dr. Carothers and Thorne Hospital. You are to decide only the question of whether plaintiff would have prevailed on his medical malpractice claim; and if so, the amount to be awarded to the plaintiff....

The court clearly limited the jury's consideration of the testimony in question and precluded the jury from considering the question of defendants' liability for any injuries which may have occurred because of their negligence.

To the extent that some of the testimony elicited from the individual defendants constituted purely evidence relating to their judicial admission, any error arising out of the admission of such evidence was clearly harmless. Defendants have failed to explain how they were prejudiced by this testimony, and we have been unable to glean any prejudice from the record. In light of the trial court's clear instruction to the jury to focus on the underlying medical malpractice claim, we find no error requiring reversal regarding the disputed testimony.

B

[6] Defendants next argue that the trial court ***739** should have granted their motion for remittitur with regard to the jury's separate award of $60,000 for Mark Gore's "emotional damages" associated with the legal malpractice claim, because he failed to prove a definite and objective physical injury was produced as a result of emotional distress proximately caused by defendants' negligent conduct. We disagree.

We first point out that defendants' assertion that plaintiffs sought "emotional distress" damages is in error.[FN1] Plaintiffs never claimed emotional distress damages, and the jury was not instructed on such damages. Rather, plaintiffs sought, and the case went to the jury on the basis of jury instructions concerning, damages based on consideration of pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyment, and embarrassment, humiliation, or mortification.

> FN1. Emotional distress damages are available in Michigan to a bystander who witnesses a negligent injury inflicted on a close family member. *May v. William Beaumont Hosp.*, 180 Mich.App. 728, 749, 448 N.W.2d 497 (1989); *Pate v. Children's Hosp. of Michigan*, 158 Mich.App. 120, 123, 404 N.W.2d 632 (1986). Actual physical harm is an element of damages for emotional distress which may also be available in other tort actions. *Ledbetter v. Brown City Savings Bank*, 141 Mich.App. 692, 703, 368 N.W.2d 257 (1985).

The jury found that medical malpractice had occurred, and damages were assessed accordingly. The jury then went on to determine, pursuant to the instructions that had been given without objection from the defense, that separate damages were attributable to defendant law firm.

Under the circumstances, there is no requirement of physical harm to plaintiff Mark Gore as a condition precedent to recovery of damages for "emotional distress." The jury was not instructed concerning any such condition of recovery, and the record is silent concerning any request for such an ***740** instruction by the defense. Moreover, on the facts of this case, physical injury was not required to establish ****819** entitlement to the "mental anguish" damages requested by plaintiffs.

The distinction between "emotional distress" damages and "mental anguish" damages is made in *Ledbetter v. Brown City Savings Bank*, 141 Mich.App. 692, 701-705, 368 N.W.2d 257 (1985). Most pertinent to the case sub judice is the definition of mental anguish damages found in *Ledbetter*, *supra*, at pp. 703-704, 368 N.W.2d 257:

> Mental anguish damages, however, are not so circumscribed. A plaintiff is not limited to recov-

ery for physical pain and anguish, but, rather, is entitled to damages for mental pain and anxiety which naturally flow from the injury, *i.e.*, for shame, mortification, and humiliation. *Beath v Rapid R Co,* 119 Mich 512, 517-518; 78 NW 537 (1899); *Grenawalt v Nyhuis,* 335 Mich 76, 87; 55 NW2d 736 (1952); *Veselenak* [*v. Smith,* 414 Mich. 567, 574, 327 N.W.2d 261 (1982)]. As the Supreme Court stated in *Veselenak:*

"[J]uries are not asked to differentiate between mental states, such as shame, mortification, humiliation and indignity. Juries are asked to compensate mental distress and anguish, which flows naturally from the alleged misconduct and may be described in such terms as shame, mortification, humiliation and indignity. In addition, if the plaintiff is being compensated for *all* mental distress and anguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred." (Emphasis in original.) 414 Mich. at 576-577, 327 N.W.2d 261.

[7] It is not necessary to prove physical injury to be entitled to recovery for mental anguish damages under the circumstances of this case. A malpractice plaintiff is entitled to recover damages to the extent of the injury, which in this case includes ***741** the underlying physical injury caused by the medical malpractice (failure to diagnose) and the mental anguish caused by the legal malpractice (failure to process the claim). *Basic Food Industries, Inc. v. Grant,* 107 Mich.App. 685, 692, 310 N.W.2d 26 (1981).

Defendants admitted liability, and because there was evidence on the record from which the jury could determine that mental anguish damages were a legal and natural consequence of defendants' negligence, the jury's award should be allowed to stand. *Law Offices of Lawrence J. Stockler, P.C. v. Rose,* 174 Mich.App. 14, 33, 436 N.W.2d 70 (1989).

C

[8] Defendants also claim that the trial court erred when it refused to give their requested jury instruction concerning Mark Gore's failure to minimize his damages. We note that discussions concerning the jury instructions occurred off the record. After the judge instructed the jury, defendants stated that they had no corrections of the instructions given, which did not include an instruction on minimizing damages. We further note that defendants requested such an instruction in their trial brief, which was filed with the clerk's office one day after the jury returned its verdict. Nonetheless, the lower court judge indicated that he would have his secretary bring him the trial briefs on the first day of trial, after defendants' attorney claimed that his trial brief was filed the Friday before trial.

[9] Given defendants' failure to object to the instructions given, appellate review is precluded absent manifest injustice. *Janda v. Detroit,* 175 Mich.App. 120, 126, 437 N.W.2d 326 (1989). We ***742** believe that a mitigation of damages instruction such as SJI2d 53.05 applies when the plaintiff fails to minimize his damages after he knows of the injury. Mark Gore did not know that the doctors who had treated him at Thorne Hospital had failed to properly diagnose his condition. In fact, he testified that he failed to obtain a second opinion, even though his condition continued to cause him pain, because of what the surgeon at Thorne Hospital told him. We further note that defendants' experts testified that it was a breach of the standard of care for the physician who was treating Mark Gore not to follow up after he did not appear for further treatment. Under these circumstances,****820** no manifest injustice resulted from the failure to give an instruction on Mark Gore's failure to mitigate his damages.

D

[10] Finally, defendants claim that they are entitled to a new trial because of Mark Gore's testimony

concerning numerous statements made by Dr. Lin, who did not testify. Defendants argue that these statements were improperly admitted hearsay. We note that defendants moved to preclude testimony concerning statements made by Dr. Lin to Mark Gore. The trial court declined to rule until confronted with the specific testimony and objection of defendants.

Gore began to testify about Dr. Lin's manner and statements made during the first visit. Defendants did not object, and plaintiff's counsel told Gore not to testify about what Dr. Lin had stated, because it was hearsay. Eventually, defendants' attorney did object, and Gore did not answer the question. Gore then testified that Dr. Lin told him that his "chances aren't too great." Defendants ***743** objected and moved to strike. Plaintiff's attorney responded that the statement was not offered to prove the truth of the matter, but to show Mark Gore's fearful state of mind. The trial court agreed. Gore subsequently testified that he would continue to be fearful of the cancer returning until Dr. Lin told him otherwise. Defendants did not object. Mark Gore later testified that Dr. Lin told him that his chances of surviving the second surgery were fifty-fifty. Defendants did not object. When plaintiff's counsel asked Gore if Dr. Lin had given him "the all clear sign," defendants' attorney objected. Plaintiffs' attorney again claimed the statement went to Mark Gore's state of mind. The trial court ruled that Gore could testify regarding his expectations. Gore did so, and then testified: "I just wish he [Dr. Lin] could be here today, but he's too busy for these kind of things...." Plaintiffs' attorney then told Gore that he should not "go into that." Gore then testified: "Well, I'm just trying to say, I wish he was here. You know, this would have been all over. This would be over." Defendants did not object.

Defendants sought to introduce a letter from plaintiffs' attorney to Dr. Lin in which plaintiffs' attorney asked Dr. Lin for his opinion of the original doctors' actions. Defendants claimed that the letter was probative to rebut the inference created by Mark Gore's testimony that Dr. Lin would have testified favorably to him. The court declined to admit the exhibit and instead stated that it would give an instruction on the matter. The trial court instructed the jury:

> Dr. Lin's name has been mentioned in connection with this matter. Dr. Lin did not appear to testify in this case. You may not consider anything said by the plaintiff as to what Dr. Lin's testimony ***744** would have been. You must assume that Dr. Lin had no opinion in this matter.

To the extent that defendants objected to Gore's testimony concerning statements made by Dr. Lin at trial, we hold that the matters were handled properly. To the extent that defendants did not object, no manifest injustice occurred.

[11] Defendants also object to Gore's testimony concerning Dr. Lin's unavailability for trial. Again, defendants did not object, and, contrary to defendants' argument, we hold that the curative instruction was sufficient to cure any prejudice.

[12] Defendants further claim that the trial court erred when it failed to admit the letter from plaintiffs' attorney to Dr. Lin. We disagree.

[13] Defendants next argue that the trial court should have instructed the jury as provided in SJI2d 6:01. We disagree. There was no testimony that plaintiffs had control over Dr. Lin and failed to produce him. Again, the curative instruction given by the trial court was sufficient.

Finally, defendants claim that the cumulative effect of these errors denied them their right to a fair trial. Having found no error, we disagree.

****821** IV

The jury's verdict in favor of Mark Gore for $60,000 on the medical malpractice claim underlying the legal malpractice claim is affirmed. The jury's separate verdict for $60,000 for Mark Gore's

mental anguish damages resulting from the legal malpractice claim is affirmed. The trial court's order granting defendants' motion for a judgment notwithstanding the verdict as to the jury's award of $30,000 to Virginia Gore for loss of consortium is reversed and the case is remanded for a new trial of that issue.

***745** Affirmed in part, reversed in part. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MICHAEL J. KELLY, J., concurs.J.H. GILLIS, Presiding Judge (concurring in part and dissenting in part).

While I agree with the remainder of the majority opinion, I would affirm the circuit court's order granting defendants' motion for a judgment notwithstanding the verdict with respect to Virginia Gore's loss of consortium claim and reverse the trial court's order denying defendants' motion for a judgment notwithstanding the verdict with respect to the jury's separate $60,000 verdict in favor of Mark Gore for emotional distress caused by the legal malpractice.

Dr. Lin removed Mark Gore's testicle on April 14, 1983, suspecting cancer. Malignant cancer was confirmed, and Mark Gore was scheduled to undergo a second surgery on May 9, 1983. Mark Gore and Virginia Gore married on May 7, 1983. Mark Gore underwent the second surgery to remove his lymph nodes on May 9, 1983.

After defendants notified plaintiffs that they would not file a medical malpractice suit on behalf of Mark Gore, he filed suit against defendants, alleging that they had failed to file a timely malpractice suit against doctors who had treated him at Thorne Hospital. On November 5, 1985, plaintiffs filed an amended complaint, adding Virginia Gore as a plaintiff and claiming that she had suffered a loss of consortium as the result of the legal malpractice.

Defendants filed a motion for summary disposition of Virginia Gore's loss of consortium claim, alleging that she had married Mark Gore after the removal of his testicle and, therefore, she had no loss of consortium claim.

***746** In response, plaintiffs filed affidavits averring that, as a result of the legal malpractice, Mark Gore had suffered psychiatric damage that impaired his relationship with plaintiff Virginia Gore. Plaintiffs further averred that when they married, they did not know that plaintiff Mark Gore would have his lymph nodes removed two days later. The circuit court denied defendants' motion for summary disposition.

At trial, however, Mark Gore testified that he knew that the lymph node surgery was scheduled two days after his wedding and, therefore, he could not completely enjoy his wedding day. Moreover, Mark Gore testified that, after he first met with Dr. Lin, he began to fear that the doctors had committed malpractice in 1981 by failing to diagnose a cancerous tumor. Nonetheless, Mark Gore testified that he did not consult with an attorney because he was too worried about himself. After the second surgery, Mark Gore thought that he should consult an attorney, because any money he recovered could be used to support his family in the event that he did not survive.

Likewise, at trial, Virginia Gore testified that when she married Mark Gore, she knew that he was scheduled to have his lymph nodes removed two days later. Virginia Gore also testified that plaintiffs discussed seeing an attorney soon after Mark Gore's first visit with Dr. Lin. Virginia Gore further testified that plaintiffs went to see an attorney because they assumed that the doctors had committed malpractice when they failed to diagnose Mark Gore's cancer. Virginia Gore repeated that plaintiffs' discussion occurred shortly after a discussion with Dr. Lin.

On appeal, Virginia Gore claims that the trial court improperly granted the defendants' motion for a judgment notwithstanding****822** the verdict with

***747** regard to her claim. Virginia Gore contends that she was married to Mark Gore when the legal malpractice occurred and, therefore, is entitled to recover for loss of consortium with respect to the legal malpractice claim. In support of her contention that she is entitled to loss of consortium damages for the legal malpractice, Virginia Gore argues that the "suit within a suit" requirement, *Basic Food Industries, Inc. v. Grant*, 107 Mich.App. 685, 692-693, 310 N.W.2d 26 (1981), does not apply and that Mark Gore could recover for the emotional distress which resulted from the legal malpractice.

I would hold that the "suit within a suit" requirement applied to this case because defendants failed to file the medical malpractice suit within the statute of limitations. *Id.*, at p. 693, 310 N.W.2d 26.

Even if I accepted Virginia Gore's claim that the "suit within a suit" requirement did not apply, I would hold that Virginia Gore did not have a derivative claim for loss of consortium for the emotional damages Mark Gore suffered as the result of the legal malpractice. I note that Mark Gore claimed that he had suffered "great anxiety which is permanent" as a result of defendants' legal malpractice. In *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390 (1970), our Supreme Court held:

> [W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.

I do not think that ***748** *Veselenak v. Smith*, 414 Mich. 567, 327 N.W.2d 261 (1982), changed this requirement. Instead, I believe that a complete reading of *Veselenak* and *Ledbetter v. Brown City Savings Bank*, 141 Mich.App. 692, 703, 368 N.W.2d 257 (1985), demonstrates that they are consistent with *Daley*.

Here, Mark Gore did not sustain any bodily injury at the time of the legal malpractice; therefore, he could recover for emotional distress only where a definite and objective physical injury was produced as a result of the emotional distress. I note that plaintiffs' failed to allege physical injury resulting from emotional distress. *Daley, supra.* In any event, plaintiffs testified that Mark Gore was upset by defendants' failure to return their telephone calls and answer their letters and by their receipt of defendants' June 25, 1985, letter. Plaintiffs' expert, who met with plaintiffs on two occasions in restaurants, testified that Mark Gore was depressed and stated his opinion that the subsequent legal malpractice exacerbated Mark Gore's depression. Plaintiffs' expert could not distinguish between the emotional damages caused by the medical and legal malpractice and failed to testify how Mark Gore's depression was exacerbated by the legal malpractice. Moreover, plaintiffs' expert testified that Mark Gore's depression primarily stemmed from his concern about his future (i.e., the reoccurrence of cancer because the alleged tumor went undiagnosed for a number of months). Plaintiffs testified that Mark Gore had trouble sleeping. Plaintiffs' expert testified that this was one of the manifestations of depression. Still, Mark Gore testified that his inability to sleep occurred after the cancer was diagnosed. Given this testimony, I am unable to conclude that Mark Gore suffered a definite and objective physical injury as the result of emotional distress proximately caused ***749** by defendants' legal malpractice. As a result, Virginia Gore's derivative claim for loss of consortium must fail to the extent it is based on emotional distress suffered by Mark Gore as a result of the legal malpractice which occurred.

Virginia Gore also claims that she is entitled to bring a loss of consortium claim because she was married to Mark Gore when he discovered the existence of the underlying medical malpractice claim, which under the "suit within a suit" requirement would be part of plaintiffs' damages for legal malpractice. I agree with the trial court that Virginia Gore could not marry a cause of action.

Moss v. Pacquing, 183 Mich.App. 574, 455 N.W.2d 339 (1990); *Furby v. Raymark Industries, Inc.*, 154 Mich.App. 339, 397 N.W.2d 303 (1986). See also *Chiesa v. Rowe*, 486 F.Supp. 236 (W.D.Mich.1980). Plaintiffs' trial testimony confirmed that they believed that the physicians who treated Mark Gore at Thorne Hospital committed malpractice by failing to diagnose his testicular enlargement as cancer. Plaintiffs believed that malpractice occurred after Mark Gore's first meeting with Dr. Lin in early April, before plaintiffs' marriage. Moreover, Virginia Gore knew of the required surgery and its possible side effects before her marriage. Under these circumstances, I agree with the trial court that Virginia Gore did not have a cause of action for loss of consortium with regard to the underlying medical malpractice claim. I believe that the majority is distorting this record when it states: "While Virginia Gore was aware of Mark's physical condition when they married, neither was necessarily on notice that his physical condition was attributable to the medical malpractice committed in 1981." Plaintiffs need not have had a legal or a medical opinion that malpractice was committed before it could be said that they discovered their cause of action. *Szatkowski v. Isser*, 151 Mich.App. 264, 390 N.W.2d 668 (1986). Here, plaintiffs believed that the failure to diagnose the enlarged testicle was malpractice after their first meeting with Dr. Lin. I would hold that they discovered***750** their cause of action at that time and, therefore, Virginia Gore was not entitled to loss of consortium for the underlying medical malpractice because she married Mark Gore having knowledge of that claim.

Virginia Gore further claims that she was also defendants' client because she had attended with Mark Gore the meeting in defendants' office. Consequently, Virginia Gore argues that the jury's verdict represents appropriate damages for defendants' breach of the standard of care with respect to her. Plaintiffs' first amended complaint alleged that Virginia Gore suffered mental anguish as the result of defendants' conduct. While there was some testimony by plaintiffs' that Virginia Gore was upset, that condition appeared to be related to Mark Gore's diagnosis of cancer. Once again, there was no definite and objective physical injury produced as the result of emotional distress proximately caused by defendants' negligent conduct and, therefore, Virginia Gore could not recover. *Daley*, *supra*. Consequently, I would hold that the trial court properly granted defendants' motion for a judgment notwithstanding the verdict with respect to the $30,000 judgment entered in favor of Virginia Gore.

I now turn to the issues raised in defendants' cross appeal. Defendants claim that the trial court should have granted their motion for remittitur with respect to the jury's separate award of $60,000 for Mark Gore's emotional damages arising out of the legal malpractice claim because he failed to prove that a definite and objective physical***751** injury was produced as a result of emotional distress proximately caused by defendants' negligent conduct. For the reasons discussed above, I agree. *Id.*

Hence, I would affirm the jury's verdict in favor of Mark Gore for $60,000 on the medical malpractice claim underlying the legal malpractice claim, as well as the trial court's order granting defendants' motion for a judgment notwithstanding the verdict with respect to the jury's award of $30,000 to Virginia Gore; however, I would reverse the jury's separate verdict for $60,000 for Mark Gore's emotional damages resulting from legal malpractice.

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