COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-3292

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

SCOTT A. HEIMERMANN,

PLAINTIFF-APPELLANT,

V.

MARTIN E. KOHLER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Scott A. Heimermann, *pro se*, appeals from a grant of summary judgment dismissing his legal malpractice cause of action against his former criminal trial counsel, Martin E. Kohler.

¶2 Heimermann raises four issues: (1) whether the trial court erred when it refused to allow him to amend his complaint for a third time; (2) whether the trial court improperly refused to compel the expert witness whom he hired to testify; (3) whether the trial court erred in imposing sanctions; and (4) whether the trial court improperly ordered summary judgment against him. Because the trial court did not erroneously exercise its discretion when it: (1) refused to allow a third amended complaint; (2) refused to compel the testimony of an expert witness; (3) imposed sanctions; and (4) granted summary judgment, we affirm.

I. BACKGROUND

¶3 During 1991 and 1992, Kohler defended Heimermann, who was charged with two counts of first-degree intentional homicide, party to a crime. The defense was unsuccessful. Subsequently, on January 15, 1998, Heimermann filed a complaint and an amended complaint in the circuit court for Milwaukee County, alleging that Kohler committed professional malpractice in the manner in which he conducted his criminal defense. After Kohler filed his answer and affirmative defenses, Heimermann initiated certain discovery requests. In turn, on April 23, 1998, Kohler successfully obtained a stay of all discovery pending the court's receipt of a report from a qualified legal expert establishing a prima facie case for legal malpractice. The court ordered Heimermann to disclose an expert witness to support a prima facie claim by June 1, 1998. Heimermann received an extension of that order until July 24, 1998.

¶4 Heimermann filed a letter dated July 23, authored by a private investigator, purporting to be an expert report concerning Kohler's representation of Heimermann. On August 14, 1998, Heimermann also filed a motion to amend

his complaint a third time. Kohler moved to strike the report, sought an order for summary judgment, and requested costs as a sanction.

¶5 After a hearing, the trial court ruled that the author of the report was not qualified to render an opinion on legal malpractice, and granted the motion for summary judgment, ordering costs as sanctions. It also denied Heimermann's motion to amend his complaint for the third time. Heimermann then moved for reconsideration and summary judgment. He later filed a letter motion requesting the trial court to issue a subpoena compelling testimony from Waring R. Fincke, an attorney he had retained to issue an opinion evaluating Kohler's representation of him. The trial court denied all of Heimermann's motions, and awarded Kohler additional costs as sanctions pursuant to WIS. STAT. §§ 802.05(1) and 801.04 (1997-98).[1] Heimermann now appeals.

II. ANALYSIS

A. Third Amended Complaint.

¶6 First, Heimermann claims that the trial court erroneously exercised its discretion when it refused to allow him to amend his complaint a third time.

¶7 Under WIS. STAT. § 802.09(1), a party may amend its pleadings once as a matter of course within six months after filing the summons and complaint. A trial court has the discretion to decide whether to permit any subsequent amendments. *See* ***Rendler v. Markos***, 154 Wis. 2d 420, 433, 453 N.W.2d 202 (Ct. App. 1990). Leave to amend shall be granted freely at any stage

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

of the action when justice so requires. *See* § 802.09(1). The amendment may be granted if, in the discretion of the trial court, the amendment does not come at a time when it is likely to cause unfairness, prejudice or an erroneous exercise of discretion. *See* ***Wussow v. Commercial Mechanisms, Inc.***, 97 Wis. 2d 136, 148, 293 N.W.2d 897 (1980). A court has properly exercised its discretion when it relies upon facts of record, applicable law, and articulates a reasonable rationale justifying its decision. *See* ***Rendler***, 154 Wis. 2d at 433. Unless there is a clear erroneous exercise of discretion, the trial court's decision will not be disturbed. *See* ***Troy Co. v. Perry***, 68 Wis. 2d 170, 178, 228 N.W.2d 169 (1975).

¶8 In addressing Heimermann's request for additional amendments after the expiration of the six-month period, the trial court first noted that the original complaint and its first amendment had been filed in December 1997. It observed that the original complaint and amendments essentially stated a legal malpractice claim relating to Kohler's criminal defense of Heimermann on two homicide charges. The trial court determined that, regardless of how Heimermann tried to recast his allegations against Kohler, the proposed third amendment still sounded in malpractice "based on that same representation in the criminal proceedings in Milwaukee County." Even if the nature of the new proposed claims were different from the generic malpractice claim,[2] to allow new amendments at this late stage, as the court pointed out, "would put the defendant in a tremendous disadvantage … to be … spending considerable resources on one claim later only to have other claims being raised." The trial court further stated:

[2] Heimermann proffered as an amendment, a violation of the Wisconsin Consumer Act, but set forth no nexus for applicability. The trial court ruled it was not obligated to do Heimermann's work. The court did not err in its judgment. *Cf.* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

"I think that the [third] amended complaint is too little too late and really is only an effort to avoid the consequences of the Court's prior order with respect to requiring the production of an expert in support of its claims." The trial court then denied the request to further amend the complaint. The trial court's decision was reasonable. We conclude that the trial court did not erroneously exercise its discretion in denying the proposed third amended complaint.

B. Failure to Compel Expert Witness.

¶9 Heimermann's second claim of error is that the trial court erroneously exercised its discretion when it failed to compel Heimermann's expert witness to testify. Heimermann hired Attorney Waring R. Fincke to provide an expert opinion on the question of whether Kohler was negligent in his representation of him in the criminal matter.

¶10 In reviewing discovery decisions, we employ the erroneous exercise of discretion standard. *See* ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 270, 306 N.W.2d 85 (Ct. App. 1981). It is the burden of the appellant to demonstrate an erroneous exercise of discretion. *See* ***Fanshaw v. Medical Protective Ass'n***, 52 Wis. 2d 234, 240, 190 N.W.2d 155 (1971). Absent a showing of compelling circumstances, an expert cannot be compelled to give testimony whether the inquiry asks for the expert's existing opinion or would require further work. *See* ***Burnett v. Alt***, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999). From a review of the entire record, we are unable to ascertain the slightest basis for this claim of error. In fact, Heimermann has admitted in the record that Fincke could not conclude that Kohler was negligent in his representation. There is nothing more to be said in refuting this claim of error. We reject the claim.

C. Sanctions.

¶11 Third, Heimermann contends that the trial court erroneously exercised its discretion by imposing sanctions for commencing his cause of action. Our review of a WIS. STAT. § 802.05[3] decision is deferential. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 256, 456 N.W.2d 619 (Ct. App. 1990).

> Determining what and how much pre-filing investigation was done is a question of fact. We are bound by those findings unless they are clearly erroneous. Determining

[3] WISCONSIN STAT. § 802.05 provides:

> **Signing of pleadings, motions and other papers; sanctions. (1)** (a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. A party who is not represented by an attorney shall subscribe the pleading, motion or other paper with the party's handwritten signature and state his or her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

> how much investigation *should* have been done, however, is a matter within the trial court's discretion because the amount of research necessary to constitute "reasonable inquiry" may vary, depending on such things as the particular issue involved and the stakes of the case. We will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

Id. at 256-57 (citations omitted). When the trial court granted summary judgment, it also granted Kohler's motion under § 802.05, for sanctions in the amount of $2,500. After Heimermann moved for reconsideration and summary judgment, both of which were denied, the trial court awarded an additional $5,000 in sanctions for a total of $7,500.[4]

¶12 In imposing the sanctions, the trial court made the following findings. The alleged malpractice occurred in 1991 and 1992. The cause of action had been filed nine months prior to the hearing on the summary judgment motion. Heimermann still was not able to make a clear statement of what his claim was. He was not able to produce a qualified person to support his claim. The nature of his claim kept shifting. Based on these facts, the trial court concluded that Heimermann failed to make a good faith inquiry into the facts and the law. From our review of the record, these findings of fact are not clearly erroneous; they provide an adequate basis to conclude that sanctions under WIS. STAT. § 802.05 were warranted.

¶13 Last, Kohler requests that additional sanctions be imposed for the continuation of this frivolous claim. *See* WIS. STAT. § 814.025. In response, Heimermann contends that he was either applying established law or, citing

[4] The amount of the sanctions is not challenged on appeal.

Marquardt v. Hegemann-Glascock, 190 Wis. 2d 447, 454, 526 N.W.2d 834 (Ct. App. 1994), testing the outer parameters of the law.

¶14 Normally, when addressing the continuation of a frivolous action, we engage in a process involving a mixed question of law and fact. The legal conclusion of frivolousness we review independently, while we defer to the findings of fact of the trial court. *See* ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 562-63, 597 N.W.2d 744 (1999). Here, however, Heimermann makes no effort to develop or explain his argument. We are not obligated to assume that task and eschew doing so. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Additionally, where a claim was correctly adjudged to be frivolous in the trial court, it is frivolous per se on appeal. *See* ***Riley***, 156 Wis. 2d at 262. We need not determine again whether the appeal is frivolous. Therefore, we remand this case to the trial court for a determination of appropriate sanctions arising out of the frivolous appeal.

D. Summary Judgment.

¶15 Fourth, Heimermann contends that the trial court erred in granting a summary judgment in Kohler's favor.

¶16 We review summary judgments independently, employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do, however, value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

¶17 "Actionable legal malpractice consists of the following: (1) existence of the lawyer-client relationship; (2) acts constituting the alleged negligence; (3) negligence as the proximate cause of the alleged inquiry; and (4) the fact and extent of injury." ***Pierce v. Colwell***, 209 Wis. 2d 355, 361, 563 N.W.2d 166 (Ct. App. 1997) (citation omitted). While not required in every legal malpractice case, expert testimony will generally be required to satisfy the standard of care as to those matters which fall outside the area of common knowledge and lay comprehension. *See* ***Olfe v. Gordon***, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980).

¶18 The underpinnings of Heimermann's claim are his proposed third amended complaint and desired order to compel Attorney Fincke to testify. Had his motions to obtain those results been successful, this claim of error might have had some merit. Although we have disposed of these two issues, thereby rendering this claim moot, for the sake of completeness, we address the propriety of the trial court's order granting summary judgment.

¶19 As indicated earlier in this opinion, the trial court ordered Heimermann to submit the names of any expert witnesses he intended to call, along with their written reports, to demonstrate that he had a prima facie case for legal malpractice. As articulated by the trial court, this was necessary to establish the relevant standard of care, and to show how the alleged conduct of Kohler caused injury to Heimermann in the investigation and development of the defense. This information was not within the realm of ordinary experience or common knowledge of the average juror. After receiving an extension, Heimermann filed a report submitted by a private investigator. The trial court rejected the report finding that the writer was not a lawyer and "did not have the requisite expertise to offer an opinion with respect to the standard of care in the representation of a

client in a criminal matter." Thus, the trial court concluded that the report failed to comply with the court's order that an expert and a report be provided on or about July 24, 1998. Under the facts of this case, we conclude that Heimermann was obligated to present expert testimony to sustain his claim that Kohler's alleged negligence caused injury or damage.

¶20 In the absence of expert testimony necessary to provide a prima facie showing of the elements of legal malpractice, dismissal by summary judgment was appropriate. The trial court did not commit error.

By the Court.—Judgment affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.