

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

October 19, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 99-1121-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STEVEN C. DEISS AND SHELLEY A. DEISS,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH AND LESLIE J. WEBSTER,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Pierce County:  
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Steven Deiss and his wife, Shelley Deiss, appeal a summary judgment dismissing their claims against Leslie Webster, their former

attorney.<sup>1</sup> They argue that issues of material fact concerning Webster's negligence in their bankruptcy proceedings preclude summary judgment. Because the record reveals that there is no disputed issue of material fact and that Webster is entitled to judgment as a matter of law, we affirm the judgment.

¶2 The underlying facts are not disputed.<sup>2</sup> The Deisses retained Webster to assist them with incorporating their tavern business and for debtor/creditor services. Webster recommended that they file bankruptcy. Based on Webster's advice, their tavern business was not listed as an asset in the bankruptcy schedules. Webster was convicted of aiding and abetting the concealment of an asset from the bankruptcy trustee. Steven, after entering into a plea agreement that would protect Shelley from prosecution, pled guilty to bankruptcy fraud.

¶3 The Deisses initiated this action against Webster and his malpractice insurer alleging that Webster "negligently represented the Plaintiffs in connection with the preparation and filing of the federal bankruptcy petition." The complaint further alleged that "[t]he legal advice and services rendered by the Defendant, Leslie J. Webster, to the Plaintiffs, were beneath the standard of care for attorneys practicing bankruptcy law in Wisconsin at the time in question." The insurer moved for summary judgment on the basis of a policy exclusion for criminal conduct. Conceding that there was no coverage for Webster's criminal and fraudulent acts, the Deisses and Webster nonetheless argued that the policy

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

<sup>2</sup> Webster failed to accompany his statement of facts with record citation, contrary to § 809.19(1), STATS. We do not impose sanctions at this time, but admonish him that future noncompliance may be subject to sanction. *See* § 809.83(2), STATS. Also, to the extent that his brief states facts outside the record, they will not be considered.

provides coverage for any other malpractice Webster may have committed during his representation of the Deisses.

¶4 The trial court entered summary judgment in favor of the insurer, and we affirmed on appeal.<sup>3</sup> We concluded that although a broad construction of the complaint would support the proposition that the Deisses sought recovery for other malpractice unrelated to the bankruptcy fraud, they never identified any specific act of negligence other than Webster's participation in the bankruptcy fraud scheme. We concluded that the policy exclusion precluded coverage.

¶5 After we affirmed the summary judgment in favor of Webster's insurer, Webster moved the trial court for summary judgment. He argued that Steven was *in pari delicto*<sup>4</sup> with Webster, warranting dismissal of his complaint, and, because Shelley's claims of lost society and companionship were derivative, her claims should also be dismissed. The trial court agreed and granted summary judgment dismissing the Deisses' complaint. The Deisses appeal the judgment of dismissal.

¶6 The Deisses argue that the trial court erroneously applied the rule of *in pari delicto*. They argue that their claim is not specifically founded upon any immoral and illegal act, so the rule does not apply. We disagree. We review a summary judgment de novo, applying the same standards as the trial court. *See Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App.

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<sup>3</sup> *Deiss v. National Union*, No. 99-0150 (per curiam) (Wis. App. July 30, 1999).

<sup>4</sup> “*In pari delicto*” is an application of the principle that no court will lend its aid to one who founds his claim on an illegal or immoral act. *See Evans v. Cameron*, 121 Wis.2d 421, 427, 360 N.W.2d 25, 28 (1985).

1994). Summary judgment is appropriate if the material facts are undisputed and the reasonable inferences lead to one conclusion. *Id.*

¶7 We first examine the complaint to determine whether it states a claim, and then the answer to determine whether it raises a material issue of fact. *Id.* Next, we examine the moving parties' affidavits and supporting documents to determine whether that party has established a prima facie case for summary judgment. *Id.* If so, we review the opposing parties' proofs to determine whether there are any material facts in dispute. *Id.* A party may not rest on mere allegations in the pleadings to establish a genuine issue of material fact. Section 802.08(2), STATS.

¶8 The record fails to identify any specific act of negligence outside the fraudulent conduct in the bankruptcy proceeding. The Deisses' answers to interrogatories asking them to state with particularity each act or failure to act that constitutes negligence identified only the bankruptcy proceeding. To oppose a summary judgment motion, the Deisses can no longer rely on the bare allegations of their complaint, but must bring forth evidentiary facts that would establish some basis for a negligence claim against Webster other than his handling of the bankruptcy petition. See *Larson v. Kleist Builders*, 203 Wis.2d 341, 345, 553 N.W.2d 281, 283 (Ct. App. 1986). The only action the Deisses specifically identify was Webster's failure to correct the fraudulent filing at an earlier date. Webster's failure to terminate and rectify the fraud he jointly perpetrated with the Deisses is not a separate act of negligence. It is merely a continuation of the criminal and fraudulent acts.

¶9 “The doctrine of *in pari delicto* is an application of the principle of public policy that “[n]o court will lend its aid to a man who founds his cause of

action upon an immoral or illegal act.” *Evans v. Cameron*, 121 Wis.2d 421, 427, 360 N.W.2d 25, 28 (1985) (quoted source omitted). “Absent some allegation of special circumstances constituting an exception to the rule of *in pari delicto* independent of the attorney-client relationship, the client's deliberate act of lying under oath places that client *in pari delicto* with the attorney who advised that client to lie.” *Id.* at 428, 360 N.W.2d at 28. The Deisses have not asserted any circumstances of oppression, imposition, hardship, undue influence, great inequality of condition or the like. As a result, we conclude that the trial court correctly applied the doctrine of *in pari delicto*.

¶10 The Deisses also argue that the trial court erroneously applied § 802.06, STATS., because a motion to dismiss a complaint tests only the legal sufficiency of the complaint and that the facts pled must be taken as true. The Deisses’ argument ignores that the motion here was one for summary judgment. To defeat a motion for summary judgment, a party must submit proofs demonstrating a disputed issue of material fact. Section 802.08(2), STATS.<sup>5</sup>

¶11 The Deisses further argue that Webster himself argued to the trial court, in response to his insurer’s motion for summary judgment, that the Deisses did not base their claim on Webster’s criminal or fraudulent conduct. We are unpersuaded. At that stage of the proceedings, the issue was one of insurance coverage and Webster was asking the trial court to look merely at the allegations of the pleadings. On a motion for summary judgment, when proofs have been submitted on the issue of liability, the court does not confine itself to the pleadings.

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<sup>5</sup> Also, because matters outside the pleadings were submitted and considered by the court, the court was entitled to treat the motion as one for summary judgment under § 802.06(3), STATS.

¶12 The Deisses also contend that there has been no additional discovery since the November 13, 1998, hearing on the insurer's motion for summary judgment. They contend that as a result, the facts are not clear and established and therefore the case is not appropriate for summary judgment. We disagree. The Deisses' argument fails to identify any material fact that is not clear and fails to explain any reason for the lack of additional discovery. *See* § 802.08(4), STATS. We conclude that their argument fails to defeat Webster's summary judgment motion.

¶13 Next, the Deisses complain that there are differing degrees of guilt in this case. They contend that due to the inequality of knowledge and complexity of issues, Webster shoulders more blame. We agree that there may be circumstances that would justifiably place more blame on the attorney. Here, however, the Deisses have failed to identify what those circumstances are. It does not require specialized knowledge to know that it is wrong to lie. Absent identification of special circumstances, "the client's deliberate act of lying under oath places that client *in pari delicto* with the attorney who advised that client to lie." *Evans*, 121, Wis.2d at 428, 360 N.W.2d at 28.

¶14 The Deisses also argue that the trial court should not have applied the rule of *in pari delicto* to Shelley's claim because she was not convicted of any offense. Her claims, however, are for lost society and companionship. Consequently, the trial court correctly dismissed them as derivative claims. *See Giese v. Montgomery Ward*, 111 Wis.2d 392, 404, 331 N.W.2d 585, 592 (1983).

¶15 Finally, the Deisses argue that public policy requires that relief should be granted to them because Steven was less guilty than Webster. The record, however, fails to uncover any specific acts upon which to base this

conclusion. The Deisses' proofs do not identify circumstances of oppression, imposition, hardship, undue influence, great inequality of condition or the like. Because the record fails to reveal a dispute of material fact, we conclude that the trial court correctly applied the doctrine of *in pari delicto* to bar relief.

*By the Court.*—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

