COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP194 **Cir. Ct. No. 2007CV14463**

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

TIMOTHY J. BROPHY, JR.,
A/K/A TIMOTHY J. BROPHY,

PLAINTIFF-APPELLANT,

V.

DANIEL J. MEI,
PATRICK MCMAHON,
MEI & ASSOCIATES, S.C., AND
TRAVELERS INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Timothy J. Brophy, Jr., a/k/a Timothy J. Brophy, appeals from an order granting summary judgment and dismissing his complaint.

Brophy argues that the trial court improperly applied the summary judgment standard by failing to take the facts most favorable to him, as the nonmoving party, prior to granting summary judgment in favor of Daniel J. Mei, Patrick McMahon, Mei & Associates, S.C., and Travelers Insurance Co. (collectively referred to as Mei & Associates unless otherwise specified). In addition, Brophy asserts that the trial court erred when it concluded that an expert was required to establish legal malpractice under the circumstances presented and that Brophy could not establish a causal connection between his damages and the conduct of Mei & Associates. Because we conclude that expert testimony is required to prove the applicable standard of care, and further, that Brophy cannot prove causation, we affirm the trial court's order.

I. BACKGROUND.

¶2 This appeal arises out of a legal malpractice action filed by Brophy against Mei & Associates. Brophy retained Mei & Associates to represent him in four cases that had been filed against him. At their initial meeting on May 17, 2006, Brophy advised his attorneys that he had been served with a summons and complaint in ***Wineberg v. Brophy***, Milwaukee County Case No. 06CV3064, a class action lawsuit initiated against Brophy by his former tenants; however, the service date written on the pleadings was illegible. At his deposition, Brophy claimed he told Daniel Mei that he recalled being served while getting into his truck on his way to a meeting and that such service occurred thirty days prior to the May 17, 2006 meeting.[1] In contrast, Patrick McMahon, an associate attorney

[1] Brophy tried, unsuccessfully, to retain four other attorneys after being served in ***Wineberg v. Brophy***, Milwaukee County Case No. 06CV3064, and prior to his meeting with Mei & Associates.

with Mei & Associates, testified during his deposition that Brophy told him he had been sleeping prior to being served—as opposed to being served while getting into his truck—and further told McMahon that he remembered the exact date he was served. Based on the date provided, McMahon calculated that the answer was due on May 24, 2006.

¶3 It was later determined that Brophy had been served with the ***Wineberg*** class action summons and complaint on April 4, 2006; accordingly, the May 24, 2006 answer was late. Mei & Associates never submitted an affidavit to explain the reason for the late filing. It is undisputed that Mei & Associates did not contact a process server or opposing counsel to verify that the date Brophy told them was correct.

¶4 A default judgment was subsequently entered against Brophy as to liability, leaving only certification of the class and a hearing on damages to be resolved. Thereafter, Mei & Associates withdrew as counsel for Brophy. The class action plaintiffs served Brophy with requests for admissions relating to damages, which Brophy failed to timely answer.[2] Consequently, the class plaintiffs' damages were deemed admitted in the amounts set forth in the requests. Brophy ultimately settled with the class plaintiffs on a compromise basis.

¶5 Brophy's malpractice action, which is the focus of the instant appeal, stems from Mei & Associates' handling of the ***Wineberg*** class action lawsuit. Brophy alleged that Mei & Associates: (1) failed to answer the ***Wineberg*** complaint in a timely fashion; (2) failed to promptly file a motion for additional

[2] Brophy was apparently represented by new counsel at this time.

time to answer; (3) failed to inform Brophy that a motion for default judgment was filed against him; (4) failed to promptly reply to the motion for default judgment; and (5) made representations to the trial court that Brophy was the sole cause of the untimely answer. As a result of the alleged negligence, Brophy claimed to have sustained damages in the form of a judgment against him and incurred attorney fees, accountant fees, and loss of use of that money.

¶6 Mei & Associates filed a motion for summary judgment. At the time of the summary judgment hearing, Brophy's time for securing an expert had passed under the court's scheduling order. Mei & Associates gave Brophy an extension of time to determine whether to retain any expert witnesses, and Brophy's attorney later confirmed that he did not anticipate naming an expert. Consequently, Mei & Associates pointed out that Brophy had an opportunity to call expert witnesses in the malpractice action but opted not to. In the absence of expert testimony, Mei & Associates argued that Brophy could not establish liability and, in the alternative, that even if expert testimony was not required, Brophy could not prove that the alleged negligence caused his damages.

¶7 The trial court granted Mei & Associates' request for summary judgment and dismissed Brophy's complaint. Brophy now appeals.

II. ANALYSIS.

A. Summary judgment methodology.

¶8 Our summary judgment methodology is well-known. We first must determine whether a claim for relief is set forth in the pleadings. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. After we have determined that a claim has been stated, we next examine "the moving

party's affidavits and other proof to determine whether a prima facie case for summary judgment has been established." ***Id.*** A prima facie case is one in which the "moving [party] must show a defense which would defeat the [nonmoving, opposing party]." ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. If the moving party established a prima facie case, we must then determine whether the nonmoving opposing party has demonstrated "that there are disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn," which entitle the party opposing summary judgment to a trial. ***Baumeister***, 277 Wis. 2d 21, ¶12. In examining the evidence, we view it in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶9 Summary judgment is properly granted if no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08 (2007-08).[3] An appellate court reviews a grant of summary judgment *de novo*, and applies the same standards and methodology as the trial court. ***Raymaker v. American Family Mut. Ins. Co.***, 2006 WI App 117, ¶10, 293 Wis. 2d 392, 718 N.W.2d 154.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

B. Summary judgment is appropriate because expert testimony is required to establish what a reasonably prudent attorney would have done under the circumstances presented.

¶10 Brophy argues that instead of reviewing the facts in the light most favorable to him, as the nonmoving party, the trial court viewed them in the light most favorable to Mei & Associates, as the moving party. To support his argument, Brophy submits that there is an issue of material fact regarding what Mei & Associates knew about the date Brophy was served with the summons and complaint upon accepting Brophy as its client. Brophy asserts that he did not know when he was served and advised Mei & Associates accordingly upon retaining the firm to represent him. Consequently, he claims that the trial court "should have determined that it would have been impossible for [Mei & Associates] to know when [Brophy] was served without taking some other action and the court should have based its decision on the fact that [Mei & Associates] did not take **any** action to determine when [Brophy] was served."

¶11 As an initial matter, we note that Brophy's recollection as expressed in his appellate brief—that he did not know when he was served and so advised Mei & Associates—conflicts with his deposition testimony where he claimed that he told Daniel Mei that he recalled being served approximately thirty days prior to the May 17, 2006 meeting.[4] While Brophy may not have provided a specific date,

[4] Brophy's deposition testimony in this regard was as follows:

> Q So, to the extent there was any uncertainty about when your response was due, it was only uncertainty about what the beginning date was because of this uncertainty about when you had been served; true?

(continued)

he did provide an approximation. Furthermore, it is not enough for Brophy to simply rely on a factual discrepancy. *See* ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) ("[T]he 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'") (citation omitted). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (citation omitted). No reasonable jury could return a verdict in favor of Brophy merely by resolving whether he advised Mei & Associates of the exact date of service. The factual dispute on which Brophy's argument hinges lacks the element of genuineness which would otherwise prevent summary judgment. Regardless of which version of what Brophy claims he told Mei & Associates regarding service at the initial meeting is accepted, we conclude that what a reasonable attorney would do when faced with a client's representation as to the timing of service requires expert testimony.

¶12 "'Whether expert testimony is required in a given situation must be answered on a case-by-case basis.'" ***Robinson v. City of West Allis***, 2000 WI 126, ¶33, 239 Wis. 2d 595, 619 N.W.2d 692 (citation and brackets omitted). This presents a question of law that we decide without deference to the trial court. ***Grace v. Grace***, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

> [Brophy] Well, I don't know what—obviously, I wouldn't know the end date if I didn't know the beginning date. But I knew—I had told [Daniel] Mei that I felt about a month, just pure—you know, just from memory, that I had thought about 30 days. 'Cause he asked me, "Was this two days ago, ten days ago?" I go, "It feels like it's been about 30 days."

"'Expert testimony should be generally required to establish the standard of care applicable to an attorney whose conduct is alleged to have been negligent and further to establish that his conduct deviated from that standard.'" ***Olfe v. Gordon***, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980) (citation omitted). The general rule requiring expert testimony is not without exceptions. Namely, such testimony is not necessary "(1) where the breach is so obvious, apparent and undisputed that it may be determined by a court as a matter of law; or (2) where the matters to be proven do not involve specialized knowledge, skill, or experience." ***DeThorne v. Bakken***, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (Ct. App. 1995).

¶13 Brophy relies on the exceptions to the rule requiring expert testimony by asserting that "the failure to file a timely answer is obvious and negligent and does not involve specialized knowledge, skill, or experience and no expert is required to tell the jury that missing a deadline caused a default judgment to be entered against [him] in the ***W[ine]berg*** case." Brophy submits that Mei & Associates further compounded its negligence when it failed to take any action in defense of the motion for default judgment, and instead attempted to impute its conduct to him, which he asserts "is clearly legal malpractice and it requires no specialized knowledge, skill or experience to know that taking no action when action is clearly required is negligent."

¶14 To support his position that expert testimony is not required in an attorney malpractice case arising out of a missed deadline, Brophy relies on ***Smith v. Herrling, Myse, Swain & Dyer, Ltd.***, 211 Wis. 2d 787, 565 N.W.2d 809 (Ct. App. 1997), for the following proposition: "We believe that a reasonable person in Smith's position, even a person without legal training, would understand the significance of a missed deadline." ***Id.*** at 793. At first glance, this would indeed seem to support Brophy's position; however, when this isolated quote is

read in the context of the case, it is clear that ***Smith*** is inapposite. In that case, Smith brought suit for legal malpractice against the law firm that represented him in criminal proceedings for allegedly failing to timely file a jurisdictional challenge. ***Id.*** at 788. At issue was when Smith first had notice that the firm had failed to timely raise the jurisdictional claim so as to determine whether he filed his malpractice suit within the applicable statute of limitations. ***Id.*** The court concluded that Smith had notice of the missed deadline when the criminal court issued a pretrial order notifying him that his subsequently filed jurisdictional challenge was untimely, ***id.*** at 793, and that he had failed to commence his malpractice action within the time frame set forth in the statute of limitations, ***id.*** at 794. ***Smith*** does not speak to whether expert testimony is required in a legal malpractice action arising out of a missed deadline.

¶15 Despite Brophy's efforts to categorize it as such, Mei & Associates' failure to file a timely answer is not the sole issue in this case; instead, at issue is Mei & Associates' reliance on Brophy's recollection as to service. We conclude that Brophy needed an expert witness to show that Mei & Associates should not have relied on one of his versions of the date of service. What an attorney exercising reasonable care would have done under the circumstances presented in this case requires expert testimony. *Cf.* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985) (concluding that plaintiff's presentation of expert testimony of three experienced divorce attorneys during a legal malpractice trial "was appropriate and necessary to establish the standard of care in this case, because the issue of what a reasonably prudent attorney would have done in this divorce action in 1977, with respect to property division and maintenance, is not within the realm of ordinary experience or common knowledge").

¶16 The same rationale applies to Brophy's argument that Mei & Associates failed to defend against the motion for default judgment. Again, we conclude that expert testimony is needed to establish what a reasonably prudent attorney would have done when faced with a motion for default judgment. *See* ***DeThorne***, 196 Wis. 2d at 717 ("'It is a lawyer's duty, in rendering legal services to a client, to exercise that degree of care, skill, and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in this state.'") (citation omitted). The decision of how to defend against a motion for default judgment "involve[s] specialized knowledge, skill, or experience," *see* ***id.*** at 718, and as such the general rule requiring expert testimony to establish the standard of care applies, *see* ***Olfe***, 93 Wis. 2d at 181.

C. Summary judgment is appropriate because Brophy cannot prove causation.

¶17 Although we could end our analysis based on the lack of expert testimony, we nevertheless conclude that summary judgment was also appropriate based on the second ground advanced by Mei & Associates: Brophy cannot prove causation. *See* ***DeThorne***, 196 Wis. 2d at 717 ("In a legal malpractice action, the plaintiff must show: (1) the existence of an attorney-client relationship; (2) the acts constituting the attorney's negligence; (3) causation; and (4) damages.") (footnote omitted).

¶18 Brophy submits that he was forced to settle with the class action plaintiffs as a result of the default judgment having been entered against him. He recognizes, however, that the issue of damages remained to be litigated after the default judgment. We are not convinced by Brophy's assertion that: "It is only because there was a default judgment entered against [Brophy] that his failure to respond to the Requests to Admit had any consequences in the case." We

conclude that Brophy's damages were not causally related to the alleged malpractice; rather, they resulted from his failure to respond to the requests for admission regarding damages, which occurred after Mei & Associates had withdrawn from representing him. Due to this failure, the amount of damages was deemed admitted for purposes of the class action litigation. *See* WIS. STAT. § 804.11(2) ("Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission.").

¶19 The allegations in the underlying class action were that Brophy rented properties and took security deposits when there were uncorrected building code violations on the properties and that he failed to return security deposits to various tenants.[5] Although he contested the number of alleged instances of wrongful conduct on his part, Brophy admitted in his deposition that at least one building he owned at the time he entered into a lease to rent it as a residential property had an uncorrected building code violation, and that on at least one occasion he failed to return a security deposit or furnish an accounting within twenty-one days after a tenant vacated his building.[6] In light of these concessions,

[5] The ***Wineberg*** complaint does not appear to have been included in the appellate record; however, the parties are in agreement as to the nature of the claims alleged.

[6] The following excerpts are from Brophy's deposition testimony:

> Q Again, given what you've already told me about the security deposits, I take it, it in all likelihood was true that there was at least one building that, at the time you entered into a lease to rent it as a residential property, had an uncorrected building or housing code violation in it; fair?
>
> [Brophy] Yes.
>
> ….

(continued)

Mei & Associates contends that "[t]he default established that Brophy had violated the law as to at least some of the class action plaintiffs in each respect alleged—precisely what Brophy has admitted to be true." We agree and are persuaded by Mei & Associates' reasoning that "a factually correct answer would have had to admit the basic liability facts, although it could have denied the allegations as to the number of class members harmed, i.e., contested the amount of the damages."

¶20 Brophy claims, without any supporting legal citation, that the first allegation (i.e., that he rented properties and took security deposits when there were uncorrected building code violations at the properties) does not amount to a violation of any law and no damages would have resulted from this claim. As to the second allegation (i.e., that he failed to return security deposits to various tenants), he accepts that this claim may have subjected him to some liability, but claims that "the class action plaintiffs would have had to prove that the security deposits were wrongfully withheld and [that he] could have shown at trial that the amounts of withheld security deposits were limited to less than $20,000.00."[7] In any event, Brophy argues that had a timely answer been filed, the damages issue would have been moot because he could have shown that the security deposits were not wrongfully withheld.

Q	If we change this request to say, on at least one occasion [you] failed to return a security deposit or furnish an accounting within 21 days after someone vacated one of these buildings in this time frame, would that be a true statement? That that happened once, at least?
[Brophy]	Yes.

[7] This would have been less than the amount Brophy ultimately settled the ***Wineberg*** case for.

¶21 The loss of these defenses to the ***Wineberg*** class action, Brophy asserts, is a legally recognized type of damage under ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 465 N.W.2d 812 (1991). In what amounts to an acknowledgement that he cannot prove that monetary damages were caused by the default judgment, in his reply brief, Brophy cites ***Hennekens*** for the proposition that "[m]onetary loss is not the only form of actual damage." *See* ***id.*** at 153. In ***Hennekens***, the court explained:

> One form of actual damage is injury to a legal interest or loss of a legal right. Injury to a legal interest or loss of a legal right often occurs without a contemporaneous monetary loss. However, we have held that injury to a legal interest or loss of a legal right constitutes actual damage before such an injury or loss produces monetary loss.

Hennekens, 160 Wis. 2d at 153-54.

¶22 ***Hennekens*** does not convince us that Brophy lost his right to defend the ***Wineberg*** lawsuit as a result of the untimely answer. To the contrary, following the default judgment, Brophy remained in a position to raise defenses as to how many plaintiffs the allegations set forth in the complaint applied to and what the appropriate measure of damages was for those plaintiffs. Specifically, in resolving the damages issue, which remained to be litigated even after the default judgment had been entered against him, Brophy would have been able to assert the defenses cited above; he could have argued that no damages resulted from the claim that he rented properties and took security deposits when there were uncorrected building code violations at the properties, and could have required the class action plaintiffs to prove the amounts of withheld security deposits.

¶23 Insofar as Brophy contends that the damages issue would have been moot had a timely answer been filed because he could have shown that the

security deposits were not wrongfully withheld, we agree with Mei & Associates that the affidavit on which he relies to support this proposition was a sham in light of his previous deposition testimony. The affidavit at issue was filed by Brophy in opposition to Mei & Associates' motion for summary judgment. In it, Brophy averred that Wineberg did not have a valid claim against him and that he could "prove that the [sic] any security deposits which were kept after a tenant moved out of one of [his] building[s] were not wrongfully withheld."

¶24 The sham affidavit rule precludes a party from creating genuine issues of material fact on summary judgment "by the submission of an affidavit that directly contradicts earlier deposition testimony." ***Yahnke v. Carson***, 2000 WI 74, ¶15, 236 Wis. 2d 257, 613 N.W.2d 102. "The rule is based in part on the proposition that testimony given in depositions, in which witnesses speak for themselves, subject to the give and take of examination and the opportunity for cross-examination, is more trustworthy than testimony by affidavit, which is almost always prepared by attorneys." ***Id.***

¶25 In his reply brief, Brophy claims that the statements made in his affidavit do not contradict those made during his deposition. He asserts that "[t]he affidavits do not deny having taken any of the actions he admitted to in the deposition, and the deposition testimony does not contain any statement that he had no defenses to the allegations contained in the class action complaint, which is what [Mei & Associates is] implying." Despite this representation, we cannot otherwise reconcile Brophy's admission during his deposition that on at least one occasion he failed to return a security deposit or furnish an accounting within twenty-one days after a tenant vacated his building with the statement in his affidavit that he could prove that any security deposits which were kept after a tenant moved out of one of his buildings were not wrongfully withheld. Brophy

offers no further explanation in either his brief or the affidavit at issue, and the record contains only excerpts of his deposition testimony, as opposed to the entire deposition transcript, so we are unable to verify that his deposition testimony does not contain any statement that he had no defenses to the allegations contained in the class action complaint.

¶26 In summary, there is no proof of damages caused by Mei & Associates. The impact of failing to respond to the request for admissions was the admission of the class action plaintiffs' damages, which, in turn, led to Brophy's damages. We agree with Mei & Associates that "whether Brophy was in default or not, failing to respond to the request for admissions with respect to damages had real and appreciable consequences in the litigation." Without causation, Brophy cannot prove his legal malpractice claim. Accordingly, summary judgment was properly awarded on this basis as well.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.