COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP242 **Cir. Ct. No. 2003CV1236**

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

WILLIAM C. FRAZIER, JOANN M. FRAZIER AND FRAZIER INDUSTRIES, INC.,

PLAINTIFFS,

V.

JEFFREY W. SENGLAUB AND EXECUTIVE PENSION DESIGN, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

DSM, INC., WAYNE D. GRANDY, WILLIAM C. MARRIS, CLU & ASSOCIATES, INC., AND NEW ENGLAND LIFE INSURANCE CO.,

DEFENDANTS,

V.

BRIAN W. WANASEK,

THIRD-PARTY DEFENDANT-RESPONDENT,

WAYNE D. GRANDY,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. This case arose out of a claim of negligent tax advice allegedly provided by Jeffrey W. Senglaub and his company, Executive Pension Design, Inc. (Senglaub) to William C. and Joann M. Frazier and their company, Frazier Industries, Inc. (the Fraziers). Senglaub appeals from an order granting summary judgment in favor of Brian W. Wanasek, against whom Senglaub had asserted a third-party claim for contribution and/or indemnification as a result of the Fraziers' claim. Senglaub contends there remains a material issue of fact as to whether Wanasek, an attorney, also acted as a financial advisor to the Fraziers regarding the events at issue. In addition, Senglaub challenges the circuit court's sua sponte ruling that the contribution and/or indemnification action against Wanasek actually was a camouflaged legal malpractice claim and that Senglaub had no standing to bring such a claim.

¶2 We hold that there are material issues of fact on the question of whether Wanasek provided legal or financial advice to the Fraziers regarding the tax matter. We also hold that the circuit court should have allowed the parties, particularly Senglaub, to be heard on the question of whether Senglaub had standing to assert the contribution and/or indemnification claim against Wanasek. We remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 Since this appeal directly involves only Senglaub and Wanasek, we largely limit our recitation of facts to those parties. The Fraziers own Frazier Industries, Inc., a corporation in the business of manufacturing products related to water wells. In 1995, the Fraziers decided to sell part of their business and contacted Senglaub, a financial planner, for advice about minimizing the tax impact related to the sale. Senglaub, in turn, consulted with other financial advisors who are not part of this appeal. As a result of these consultations, Senglaub informed the Fraziers about a life insurance vehicle called a "Voluntary Employees' Beneficiary Association" or "VEBA" Trust, which may qualify for a tax exemption under I.R.C. § 501(c)(9) (2005).

¶4 The Fraziers told Senglaub that before moving forward with the VEBA Trust, they wanted to speak both with Wanasek, an attorney with whom they and Frazier Industries had done business in the past, and with John Best,[1] their accountant.

¶5 Correspondence from Best to William Frazier, and copied to Wanasek, references meetings at which the VEBA Trust was discussed. One of the letters, dated June 19, 1996, states that "Brian Wanasek will determine from Jeff [Senglaub] via letter how much can be contributed to the V[EBA] …." A memo handwritten by Best indicates Best told William Frazier that from what Best knew of VEBA trusts:

[1] John Best was named as a third-party defendant, but Senglaub stipulated to his dismissal.

> [T]hese type of things can come back to haunt you and bite you in the butt. My opinion is don't do it.
>
> I suggested Bill [Frazier] bounce his questions regarding tax and V[EBA]s off John Schwab and Brian Wanasek at their meeting. He said he does nothing without Brian and would call Brian ….

¶6 The Fraziers went forward with the VEBA Trust in November 1995 for the tax year ending June 30, 1996. However, the VEBA Trust did not result in favorable tax treatment for them. The Internal Revenue Service audited Frazier Industries' 1996 tax return and disallowed the $350,000 in contributions Frazier Industries had made to the VEBA Trust, treating it instead as taxable income. The Fraziers and Frazier Industries ultimately paid over $250,000 in back taxes and penalties.

¶7 The Fraziers sued Senglaub,[2] asserting negligence, negligent and strict responsibility misrepresentation, breach of contract and unjust enrichment. Senglaub denied liability and at the same time filed a third-party complaint against Wanasek seeking contribution and/or indemnification. Specifically, Senglaub's complaint alleged in relevant part:

> Wanasek rendered professional services to Plaintiffs … in connection with Frazier Industries' participation in the [VEBA Trust] and in connection with the events described in the Complaint and Answer.
>
> ….
>
> In the Complaint, Plaintiffs allege certain acts of negligence, misrepresentation, breach of contract and unjust enrichment against Defendants Senglaub and EPD. Should it be found at trial or otherwise that Defendants, or

[2] The Fraziers also sued DSM, Inc., a California financial and insurance consultant with which Senglaub had consulted regarding the Fraziers' requests for tax planning advice. DSM is not part of this appeal.

> either of them, are liable to Plaintiffs, or any of them, Defendants and Third-Party Plaintiffs Senglaub and EPD are entitled to contribution and/or indemnification from … Wanasek … pursuant to the laws of the State of Wisconsin.

¶8 Wanasek denied the allegations and shortly thereafter moved for summary judgment. In support, Wanasek submitted his affidavit in which he denied that either he or his law firm had provided the Fraziers or Frazier Industries any legal advice concerning the VEBA Trust. Wanasek also averred that he had never researched or furnished any advice on the tax treatment of the VEBA Trust contributions because the Fraziers did not retain either him or his law firm to do so.

¶9 Senglaub countered that Wanasek, indeed, was among the "advisors" with whom the Fraziers consulted for advice on minimizing the tax impact of the sale of their business, specifically in regard to "the tax and accounting aspects of the VEBA transaction." In support, Senglaub proffered deposition testimony excerpts and various documents, many copied to Wanasek, chronicling Wanasek's presence at meetings and involvement in VEBA-related discussions with the Fraziers' other financial advisors.

¶10 At the hearing on the motion, the circuit court stated that in examining the lawsuit as a whole, Senglaub's contribution and/or indemnification claim "doesn't fit within what are the other claims of this lawsuit." The court also ruled that Senglaub's claim, although not pled in such terms, was in essence "a legal malpractice claim," and the action could not be maintained because Senglaub was not Wanasek's client. Wanasek had not made this argument in support of his summary judgment motion. Instead, the court made this ruling sua sponte, without any input of the parties on this question. The court granted summary

judgment to Wanasek, dismissing Senglaub's third-party complaint. Senglaub appeals.

SUMMARY JUDGMENT

¶11 This court reviews summary judgments de novo, employing the same well-known methodology the circuit court employs. ***Holschbach v. Washington Park Manor***, 2005 WI App 55, ¶2, 280 Wis. 2d 264, 694 N.W.2d 492, *review denied*, 2005 WI 134, ___ Wis. 2d ___, 700 N.W.2d 273 (WI May 11, 2005) (No. 2004AP1307). We first look to whether the complaint states a claim for relief. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If so, we then look to the affidavits and other summary judgment evidence to determine whether there are any issues of material fact that would entitle the opposing party to a trial. ***Bellon v. Ripon College***, 2005 WI App 29, ¶5, 278 Wis. 2d 790, 693 N.W.2d 330. We do not decide issues of fact when reviewing summary judgment motions, but simply determine if there is a dispute of material fact. ***Fischer v. Doylestown Fire Dep't***, 199 Wis. 2d 83, 87, 543 N.W.2d 575 (Ct. App. 1995). Only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law will we affirm such a judgment. ***Holschbach***, 280 Wis. 2d 264, ¶2. We also must resolve all reasonable inferences in the appellants' favor. *See* ***id***.

DISCUSSION

¶12 Our review of the moving papers and supporting documentation reveals a material issue of fact on the question of whether Wanasek also advised the Fraziers and Frazier Industries regarding the decision to participate in the VEBA Trust. We recognize that only the Fraziers and Wanasek can know firsthand the true nature of the relationship—and Wanasek unequivocally says he

did not advise the Fraziers. Wanasek also notes that the Fraziers did not sue him. But this latter point does not, in our judgment, put the question of Wanasek's representation to rest. The Fraziers' decision not to sue Wanasek establishes nothing because that decision could rest on a variety of factors—family or community ties, personal friendship, a long-standing professional relationship—unrelated to the question of whether Wanasek was negligent.

¶13 We are left, then, with Wanasek's affidavit stating that he did not represent the Fraziers in this matter pitted against Senglaub's summary judgment evidence produced during the course of discovery: Wanasek had worked up calculations comparing the benefit of making contributions to the VEBA Trust as opposed to purchasing term insurance; Senglaub and Wanasek had had "some very lengthy conversations and meetings" regarding VEBA Trusts; Wanasek was copied with an opinion letter dealing with the IRS's stance on VEBA Trusts and had discussed with Senglaub the odds of successfully protesting an IRS challenge; Wanasek sent Senglaub materials about VEBA Trusts and he and Senglaub had "a continued dialogue of questions" about entering into a VEBA trust; and Wanasek confirmed to Senglaub that, before the VEBA Trust was adopted, Wanasek spoke to DSM, the other financial consultant, regarding whether a certain IRS notice would pose problems for the Fraziers' VEBA Trust. The Fraziers' interrogatories reveal that during the relevant time period, Wanasek had provided services to them relating to taxes, estate or retirement planning and the disposition of Frazier Industries and its stock or assets, and had litigated the resulting tax assessment. Finally, and perhaps most importantly, Best, the Fraziers' accountant, counseled

William Frazier to consult Wanasek regarding the VEBA Trust and Frazier responded that "he does nothing without Brian and would call Brian."[3]

¶14 At a minimum, the parties' competing summary judgment evidence gives rise to reasonable alternative inferences on the question of Wanasek's representation of the Fraziers such that summary judgment was not appropriate.[4] *See* ***Fischer***, 199 Wis. 2d at 87-88. To the contrary, where disputed reasonable inferences remain, the issue is one for the jury. ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶43, 254 Wis. 2d 77, 646 N.W.2d 777. Otherwise, summary judgment becomes a trial on affidavits and depositions. ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶56, 249 Wis. 2d 142, 638 N.W.2d 355.

¶15 Moreover, summary judgment is ill-suited to negligence questions. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986). Negligence involves the reasonableness of a person's action or inaction, and reasonableness turns on the totality of the facts and circumstances.

[3] According to Senglaub's deposition testimony, Wanasek was "playing the quarterback role" and was "the point guard" among the parties.

[4] The circuit court said that Wanasek's mere attendance at meetings concerning the VEBA Trust was not sufficient to raise a material issue of fact indicating that Wanasek was acting as the Fraziers' representative. But as our recital of Senglaub's summary judgment evidence reveals, at minimum there remains a reasonable inference that Wanasek's participation was more than as a mere bystander and he may have been actively involved in the investigation and preparation of the VEBA Trust.

Id. Summary judgment seldom can portray adequately that totality and therefore usually is inappropriate to resolve negligence issues.[5] ***Id.***

¶16 Finally, we note that Senglaub and Wanasek each label the other's arguments and evidence in support of those arguments "self-serving." Such contentions invoke witness credibility and point up again why this debate is best left to a trier of fact. *See* ***Salveson v. Douglas County***, 2000 WI App 80, ¶18, 234 Wis. 2d 413, 610 N.W.2d 184, *aff'd*, 2001 WI 100, 245 Wis. 2d 497, 630 N.W.2d 182.

CIRCUIT COURT'S SUA SPONTE RULING

¶17 As a final matter, we address the circuit court's rejection of Senglaub's contribution and/or indemnification claim against Wanasek on the basis that it is a camouflaged legal malpractice claim which Senglaub had no standing to assert because Senglaub was not Wanasek's client. The court said: "In effect, it's sort of a claim of malpractice against the lawyer, even though that wasn't pled, even though that's not the claim, even though the attorney/client relationship would be between the plaintiffs and Mr. Wanasek, that's in this

[5] We appreciate that Senglaub's claims against Wanasek sound in contribution and/or indemnification. However, Senglaub's third-party complaint incorporates the Fraziers' complaint which sounds, in part, in negligence and negligent representation. In addition, Senglaub's third-party complaint alleges that Wanasek rendered professional services to the Fraziers "in connection with the events described in the Complaint" and that if the Fraziers prevailed, Senglaub was entitled to contribution and/or indemnification. This linkage between the Fraziers' claims and Senglaub's third-party complaint logically indicates that Senglaub's contribution and/or indemnity claims against Wanasek are negligence based.

Senglaub's third-party complaint also establishes the three prerequisites for a contribution claim: (1) both parties must be joint negligent wrongdoers; (2) they must have common liability because of negligence to the same person; and (3) one such party must have borne an unequal proportion of the common burden. ***General Accident Ins. Co. v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 103, 549 N.W.2d 429 (1996).

Court's opinion what this boils down to." In making this ruling, the court appears to have invoked the first step of summary judgment methodology, inquiring whether the complaint states a claim for relief. *See* ***Green Spring Farms***, 136 Wis. 2d at 317. The court did not cite any authority in support of this ruling.

¶18 As we have noted, Wanasek did not assert this as a basis for his summary judgment motion. Instead, the circuit court made this ruling sua sponte without any input from the parties, especially Senglaub. Moreover, Wanasek, the beneficiary of this favorable ruling, does not defend the circuit court's ruling on appeal. On that basis alone, we could summarily reverse the circuit court's ruling. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed [when] they do not undertake to refute [them]." ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (citation omitted).

¶19 We decide, however, not to invoke that sanction against Wanasek. Instead, we reverse the circuit court's ruling on a narrower ground, which does not reach the merits—the court's failure to allow the parties to be heard on the question.[6] A circuit court's authority to raise issues sua sponte is a natural outgrowth of the court's function to do justice between the parties. ***State v. Holmes***, 106 Wis. 2d 31, 39, 315 N.W.2d 703 (1982). However, while a court may consider sua sponte legal issues not raised by the parties, "theory and practice militate against" it. ***Id.*** at 39-40. Should a court choose that path, fairness dictates that the litigants be given notice of the court's consideration of the issue and an

[6] If we do not reach the merits of the circuit court's ruling, Senglaub asks that we fashion this narrower form of relief.

opportunity to argue it. *See* ***id.*** at 41; *see also* ***Hydrite Chem. Co. v. Aetna Cas. & Sur. Co.***, 220 Wis. 2d 26, 49, 582 N.W.2d 423 (Ct. App. 1998) (Roggensack, J., dissenting) (stating that when circuit courts raise legal issues sua sponte, fairness requires that the parties have the opportunity to develop the relevant facts and present legal arguments on the issue).

¶20 We therefore reverse the circuit court's ruling on this narrow ground and remand for the parties to be heard on the issue. We acknowledge that if the court should confirm its ruling on this issue and once again dismiss Senglaub's third-party complaint, Senglaub again will be put to the expense and effort of a further appeal if he wishes to challenge the ruling. But at least we then would have the benefit of a full circuit court exploration of the question and the circuit court can provide us with legal authority for its ruling if such exists. On the other hand, if the court should change its mind on the ruling, the matter can then proceed in due course.

CONCLUSION

¶21 We conclude that reasonable competing inferences exist on the question of Wanasek's alleged representation of the Fraziers, making improper the grant of summary judgment. We also conclude that, in fairness, the parties should be given an opportunity to be heard on the further question of whether an attorney enjoys immunity from a contribution and/or indemnification claim under circumstances such as these. Accordingly, we reverse the circuit court's grant of summary judgment to Wanasek and we remand for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.