

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 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. 98-3461-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LEE, KILKELLY, PAULSON & KABAHER, S.C.,

PLAINTIFF-RESPONDENT,

v.

**ROI INVESTMENTS, JOHN AMMERMAN AND
ROBERT L. KLEIN,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. ROI Investments, a partnership, and John Ammerman and Robert L. Klein, its partners (collectively ROI) appeal a summary judgment in favor of the law firm of Lee, Kilkelly, Paulson & Kabaker, S.C.

(LKPK).¹ The judgment awarded LKPK \$3,100 in attorney's fees, and dismissed ROI's legal malpractice counterclaim. The issues are whether the trial court properly struck affidavits from ROI's expert witnesses on summary judgment, and whether any material fact disputes remain on either LKPK's claim or ROI's counterclaim. We reject ROI's arguments on these issues and affirm.

ROI owned an office building that was the subject of a foreclosure proceeding. Judgment was entered and Community National Bank, which held a second mortgage on the property, bid \$1.18 million plus property taxes at the foreclosure sale. In the meantime, ROI attempted to sell the property, at a better price, to Select Properties, Inc. To preserve its chances, ROI engaged Attorney Susan Kelley of the LKPK firm to commence a ch. 11 bankruptcy proceeding in order to stay confirmation of Community Bank's purchase. Ammerman told Kelley that Select had offered \$1.6 million for the property. Select subsequently informed Kelley, however, that it had canceled its offer because ROI could not satisfy certain rental contingencies.

After ROI commenced the bankruptcy proceeding and obtained a stay of the sale confirmation, Select offered \$1.3 million for the property. ROI accepted, subject to bankruptcy court approval. However, Klein then presented a competing offer of \$1.4 million, causing the bankruptcy court to withhold approval of Select's purchase. Klein then withdrew his offer, citing rental contingencies similar to those that originally concerned Select.

At ROI's request, Kelley subsequently examined whether ROI could enforce Select's original \$1.6 million offer, and concluded that it could not. The

¹ This is an expedited appeal under RULE 809.17, STATS.

bankruptcy proceeding continued with the court approving LKPK's \$8,000 billing for work performed thus far. Also, ROI stipulated that if a proposed sale to yet another interested buyer did not occur within six weeks, the bankruptcy stay would terminate. When ROI once again failed to satisfy the buyer's rental contingencies, this prospective sale was also canceled and ROI dismissed its bankruptcy proceeding.

LKPK subsequently billed ROI \$3,100 in additional fees, and commenced this action in small claims court when ROI failed to pay. In turn, ROI sued LKPK for Kelley's alleged malpractice during the bankruptcy proceeding. The damages alleged in the counterclaim caused removal of the action from small claims court. A scheduling order and its later amendment provided an August 21 deadline for ROI to name its expert witnesses. The deadline for filing summary judgment motions was June 26, 1998, with opposing briefs and affidavits due on July 31.

LKPK moved for summary judgment on its claim and the counterclaim. It relied on Kelley's affidavit, with extensive recitation and documentation of the events described above, and an expert's opinion that her representation did not constitute malpractice.

In response, ROI timely filed an affidavit by Ammerman that contained the following assertions: that Ammerman did not agree to pay any legal fees beyond those authorized by the bankruptcy court; that Kelley failed to collect rents due ROI during the bankruptcy proceeding; that Kelley neglected to submit a settlement stipulation in the foreclosure action that would have saved ROI \$61,000 on Community Bank's claim; that her neglect caused another creditor to collect more than it was owed; that Kelley wrongly concluded that Select's \$1.6 million

offer was not enforceable; and that Kelley failed to seek resolution of the creditors' excess legal fees in the foreclosure action.

On August 20, 1998, one day before the deadline for submitting the names of experts, ROI submitted additional affidavits from two legal malpractice experts and an accounting expert. LKPK moved to strike the affidavits as untimely, and the trial court did so. The court noted that ROI "apparently confused two distinct deadlines," the July 31 date for submitting affidavits and arguments on summary judgment, and the August 21 date for naming the expert witnesses. The court further reasoned:

It is clear that defendants' submissions may not be considered. The briefing schedule set by this court was intended to establish a time frame for disposition of the summary judgment motion, and admitting defendants late submissions would prejudice the plaintiff and require another delay in proceedings that began [two and one-half years previously]. Defendant simply did not have the luxury of waiting to submit their expert affidavits until after the summary judgment briefing time limitations had passed.

On the merits of the counterclaim, the trial court concluded that ROI had the burden of proving a genuine dispute of material fact as to the alleged malpractice, and that ROI had not and could not do so without expert witnesses. Because the court viewed the alleged malpractice as the only defense to LKPK's claim for its fees, the trial court granted judgment to LKPK on both the claim and the counterclaim.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

Sometimes, as in this case, a party moving for summary judgment can demonstrate the absence of facts to support the opposing party's claim, but cannot submit specific evidentiary material proving the negative. In such cases, the party asserting the claim must present sufficient admissible evidence on summary judgment to demonstrate the factual basis for its claim. See *Moulas v. PBC Prods., Inc.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739, 741 (Ct. App. 1997) *aff'd*, 217 Wis.2d 449, 576 N.W.2d 929 (1998). In reviewing this issue, we apply the same standards as the trial court. See *Pierce v. Colwell*, 209 Wis.2d 355, 361, 563 N.W.2d 166, 168 (Ct. App. 1997) *review denied*, 211 Wis.2d 532, 568 N.W.2d 299 (1997).

The trial court properly excluded ROI's late affidavits. Whether to sanction a party for violating a scheduling order is a matter for the trial court's discretion. See *Schneller v. St. Mary's Hosp.*, 162 Wis.2d 296, 305, 470 N.W.2d 873, 876 (1991). The trial court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a reasonable conclusion. See *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Here, ROI did not and could not offer any reasonable excuse for its late filing. Confusing two separate and distinct deadlines is simply not within the limits of excusable neglect. Under those circumstances, the trial court reasonably determined that fairness to LKPK and avoiding undue delay justified the decision to strike the affidavits.

ROI's remaining evidence did not establish a sufficient factual basis for its malpractice counterclaim. To prove legal malpractice, the client must show (1) the existence of the lawyer-client relationship (undisputed here); (2) acts constituting the alleged negligence; (3) negligence as the proximate cause of the alleged injury; and (4) the fact and extent of injury. See *Lewandowski v.*

Continental Cas. Co., 88 Wis.2d 271, 277, 276 N.W.2d 284, 287 (1979). To establish causation and injury the plaintiff must prove that the underlying case would have been won but for the lawyer's negligence. In most cases, expert testimony is necessary to prove a lawyer's malpractice, because the evidence usually concerns matters of special knowledge, skill or experience outside the realm of the ordinary experience of lay persons. See *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 112, 362 N.W.2d 118, 128 (1985); *Olfe v. Gordon*, 93 Wis.2d 173, 180-81, 286 N.W.2d 573, 576-77 (1980).

Here, the circumstances of Kelley's representation involved complex questions of bankruptcy, foreclosure, landlord-tenant, and real estate law. ROI's only proof, however, was Ammerman's affidavit that identified certain alleged acts and omissions by Kelley, and his conclusory opinion that they were negligent and that they damaged ROI by causing it to forfeit certain legal claims. Ammerman is neither an expert on malpractice, nor a lawyer, and was not qualified to offer that opinion. To support a malpractice claim based on such issues as the enforceability of a complex and contingency laden offer to purchase, it was necessary for ROI to rely on expert witnesses. That it failed to do in timely fashion.

LKPK was also entitled to summary judgment on its claim for attorney's fees. Ammerman's sole defense, aside from the alleged malpractice, was his assertion that he only agreed to pay fees that the bankruptcy court approved. However, the court no longer had jurisdiction to approve fees after ROI voluntarily dismissed its action. It is not disputed that LKPK performed the work for ROI upon which it bases its claim. Ammerman offered no evidence that ROI's contract with LKPK allowed it to escape paying attorney fees for that work, solely because it voluntarily dismissed the bankruptcy action.

By the Court.—Judgment affirmed.

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

