

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2009

David R. Schanker
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. 2007AP2211

Cir. Ct. No. 2006CV4836

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

RICCIARDI, STERN & PATRICKUS, S.C.,

PLAINTIFF-RESPONDENT,

V.

JASON SPARBEL AND TRISHA SPARBEL,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Jason and Trisha Sparbel appeal from a summary judgment for unpaid legal fees and expenses in favor of Ricciardi, Stern & Patrickus, S.C. (“Ricciardi”). The Sparbels argue the circuit court erred by: (1) shifting the burden of proof; (2) determining expert testimony was necessary to

challenge the reasonableness of the fees; (3) failing to consider an affidavit authenticating documents; and (4) failing to recognize material issues of fact precluding summary judgment. We disagree and affirm.

FACTUAL BACKGROUND

¶2 Jason Sparbel retained Ricciardi to represent him in his personal capacity in connection with a lawsuit filed by his former business partner (“the Bishop case”).¹ Sparbel incurred more than \$79,000 in attorney fees in the Bishop case. He paid Ricciardi approximately \$43,000 for its representation, and Ricciardi eventually sued the Sparbels for the remaining balance allegedly owed of \$35,439.56.² The Sparbels raised as affirmative defenses that Ricciardi’s fees were “excessive, unnecessary and/or unsubstantiated,” and also that Ricciardi breached its duty of care during its representation, among other things.

¶3 Ricciardi filed a motion for summary judgment, together with the February 9, 2007 affidavit of Mark S. Stern, a senior partner at Ricciardi primarily responsible for representing Sparbel in the Bishop case. Stern also submitted an affidavit dated March 16, 2007. The Stern affidavits attached the contract for legal services, billing records, and monthly invoices sent to Sparbel over a two-year time period. The Stern affidavits established Sparbel paid Ricciardi \$43,000 in legal fees from October 2002 through August 2003. The Stern affidavits stated:

Not once during that time did [Sparbel] voice any displeasure with the quality of services [Ricciardi] was providing or the amount he was paying for those services.

¹ Sparbel already had corporate counsel, Attorney Lawrence Vesely.

² The complaint alleged Trisha Sparbel was married to Jason and subject to the Wisconsin Marital Property Act.

The attorney fee balance owed as of August 2003 was \$35,439.56, and Mr. Sparbel received monthly bills for that amount as evidenced by the invoices attached as **Exhibit C**. No agreement was entered into to defer the payment of these fees. Mr. Sparbel has failed to pay these invoices ever since, despite demand.

¶4 Ricciardi subsequently filed a supplemental Stern affidavit, which stated “that the Defendants never claimed over all years of representation that any bill was unreasonable, excessive, or duplicative.” The supplemental Stern affidavit also stated:

5. That [Ricciardi] never performed any services for the Defendants which it did not reasonably believe would benefit their interests in the case, and [Ricciardi] had the Defendants’ express permission and/or acknowledgement to proceed as it did. The Defendants never objected to any motions filed or other actions taken by [Ricciardi].

¶5 Neither Sparbel nor his wife submitted affidavits in opposition to summary judgment. The Sparbels’ current attorneys filed a brief in opposition to summary judgment, together with the affidavit of Brett A. Eckstein, an associate with their firm. The Eckstein affidavit attached various documents for authentication. The circuit court granted summary judgment to Ricciardi and the Sparbels now appeal.

DISCUSSION

¶6 The summary judgment methodology is well established. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. WISCONSIN STAT. § 802.08(3) (2007-08)³ provides in part, “the

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

adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." Evidentiary facts are to be taken as true if not contradicted by other opposing affidavits or proof. *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966).

¶7 The Sparbels argue the circuit court erroneously shifted the burden of proof to them to prove the unreasonableness of the fees. The Sparbels rely upon a quote from the court's oral decision:

I believe that the defendant has the burden in this case, where they allege an affirmative defense on the Summary Judgment motion. They have the burden to set forth specific facts that creates a genuine issue of fact.

¶8 However, the Sparbels take the court's statement out of context and ignore the court's next statement, which was as follows:

The only issue on this point is, whether plaintiff breached a duty of care. The plaintiffs ha[ve] asserted in an affidavit that the rate charged in this matter was reasonable, that the plaintiff's law firm never performed any services for the defendant, which were not reasonably – which they believe would not benefit their interest in that case. Plaintiff also, I think in the supplemental affidavit, Attorney Stern stated that the defendant expressed permission to the plaintiff to proceed as they did, and that they never objected to any actions taken by the plaintiff. I believe that was in paragraph five of one of the last affidavits.

The defendants have not provided any affidavits that contradicted this assertion. Evidentiary facts as stated in affidavits are taken as true, if not contradicted by opposing affidavits, and it is not.

¶9 Contrary to the Sparbels' perception, the court did not erroneously shift the burden to prove unreasonableness. Ricciardi had established, by virtue of

three separate affidavits, the existence of the signed contract for legal services at the agreed upon hourly rate of \$200. Ricciardi also established the reasonableness of the hourly rate based upon Stern's experience. Ricciardi further demonstrated that despite payment of \$43,000, Sparbel had failed to pay the balance of the fees invoiced despite never questioning, disputing, or opposing any actions taken by Ricciardi during its years of representation in the Bishop case. Ricciardi also established it had express permission and/or acknowledgment to proceed as it did in the matter.

¶10 Ricciardi made a prima facie case for summary judgment, and the circuit court properly recognized the Sparbels were required to respond with specific facts that established a genuine issue for trial. *See, e.g., Fox v. Wand*, 50 Wis. 2d 241, 184 N.W.2d 81 (1971). Here, the court specifically invoked WIS. STAT. § 802.08(3) and concluded the Eckstein affidavit was insufficient to raise a competing issue of material fact.

¶11 The Sparbels also argue the circuit court erred by determining expert testimony was necessary to challenge the reasonableness of the fees. However, the Sparbels' characterization of the court's oral decision is again inaccurate. The court merely referred to the need for expert testimony with respect to the Sparbels' malpractice affirmative defense, which was subsequently abandoned by the Sparbels. This conclusion is corroborated by the written order for judgment, which clearly indicates that the court's ruling with respect to expert witnesses was limited to the issue of Ricciardi's alleged breach of the duty of care owed to Sparbel during the Bishop case.

¶12 The Sparbels next argue the circuit court erred by excluding from consideration the Eckstein affidavit. We disagree. Eckstein was not in a position

to attest to facts upon personal knowledge and Eckstein's attestations are indeed not in the nature of assertions of fact. Eckstein's affidavit attached various documents and also contained arguments and characterizations of those documents. The court was not unwilling to consider the affidavit for that purpose. For there to be a triable issue of fact, however, it is incumbent upon a party opposing summary judgment to demonstrate that a sufficient *factual* basis exists to go to trial in order to survive a motion for summary judgment. The Sparbels do not articulate what portions of the affidavit the court improperly ignored and, more to the point, how those portions would have affected the outcome.

¶13 The Sparbels also contend the circuit court failed to recognize material issues of fact precluding summary judgment. The Sparbels insist genuine issues of material fact existed as to: (1) whether Ricciardi attempted to "double dip" by recovering \$1,673.63 in disbursements and costs when this amount was included in fees; (2) whether Ricciardi excessively litigated based upon filing and arguing motions denied by the circuit court in the Bishop case; (3) whether Ricciardi's billable hours were excessive and duplicative of time spent by Sparbel's business counsel; and (4) whether Ricciardi was entitled to recover costs associated with a vacation of a default judgment.

¶14 We turn first to the contention that Ricciardi attempted to "double dip." The Sparbels contend in their initial brief to this court that Ricciardi's own billing statements show it was double billing Sparbel for "at least \$1,673.63." However, the Sparbels fail to point out in their brief exactly where and when they were double billed.

¶15 In its response brief, Ricciardi argues that the "grand total" of fees and costs was \$79,183.63. The total of fees billed to Sparbel, after deducting all

disbursements and costs (totaling \$1,673.63 from the Bishop case and Ricciardi's collection action against the Sparbels) was \$77,510. If the \$43,000 Sparbel previously paid is subtracted from the total of \$77,510, the difference is \$34,510. When the costs attributable to the Bishop case are added back (which total \$929.56 from October 15, 2002 to November 24, 2003) the total is \$35,439.56, which is the exact amount demanded in the complaint.

¶16 Ricciardi points out it demanded the amount of \$35,439.56 in the complaint, the summary judgment motion and brief, the Stern affidavit filed therewith, and the supplemental Stern affidavit. Ricciardi also contends the total time expended on the file was not reflected in the actual charges to Sparbel, and various courtesy charges reduced the amount invoiced. For example, Ricciardi notes that costs related to its collection efforts were not charged to Sparbel, as evidenced by the invoices sent to Sparbel, even though those costs appear in the firm's billing records. The Sparbels did not file a reply brief in this court. Therefore, Ricciardi's arguments regarding the alleged "double billing" are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶17 Ricciardi concedes the March 2007 Stern affidavit contains a slightly different amount owed in total fees, but contends Stern's supplemental affidavit clarified the earlier affidavit by stating that any discrepancy in amounts charged was based upon additional costs incurred by Ricciardi, but the amount demanded in the complaint and Stern's first affidavit was the correct remaining balance.⁴

⁴ There is a typographical error in the supplemental Stern affidavit. Paragraph 3 of the supplemental affidavit asserts the amount owed is "\$35,459.36." The "5" of the "459" and the "3" of the ".36" were interposed from the \$35,439.56 pleaded in the complaint and the summary
(continued)

WISCONSIN STAT. § 802.08(3) specifically authorizes courts to accept supplemental affidavits, and we are satisfied the court properly exercised its discretion in doing so here. *See Gross v. Woodman's Food Mkt., Inc.*, 2002 WI App 295, ¶34, 259 Wis. 2d 181, 655 N.W.2d 718. We see no prejudice to the Sparbels based upon this correction. The Sparbels did not claim in the circuit court any confusion caused by the correction, nor did they assert the denial of an opportunity to respond to the supplemental Stern affidavit. *See id.*

¶18 We also reject the Sparbels' contention that Ricciardi excessively litigated based upon an award of \$351.07 in costs in bringing the suit underlying this appeal. According to the Sparbels, "a party's costs incurred during litigation are not recoverable under the 'American Rule,'" which provides that each party to a lawsuit should bear its own costs of litigation. This argument has no application in the context of a lawsuit commenced to obtain the payment of legal fees requested by clients pursuant to a written contract.

¶19 There is also no justification for the Sparbels' contention that Ricciardi filed "baseless motions" or "a baseless Third-Party Summons and Complaint." Indeed, these arguments appear to be geared towards the malpractice affirmative defense, which was abandoned. Regardless, the Eckstein affidavit merely states, "Defense counsel has highlighted the following entries [from Ricciardi's billing records] that deal, either in whole or in part, with the filing of baseless motions and a baseless Third-Party Summons and Complaint by Attorney Mark Stern." There is no factual predicate for Eckstein's statements regarding the

judgment motion. Indeed, paragraph 3 refers to the complaint and the first Stern affidavit filed with the summary judgment pleadings.

alleged “baseless” filings. Such statements constitute “just conclusions, not facts,” and as such are insufficient to refute a motion for summary judgment. *See Holsen v. Heritage Mut. Ins. Co.*, 182 Wis. 2d 457, 467, 513 N.W.2d 690 (Ct. App 1994), *vacated on other grounds*, 185 Wis. 2d 1, 2, 517 N.W.2d 448 (1994).

¶20 Similarly, we reject the Sparbels’ contention that Ricciardi’s hours are “duplicative of the time and work performed by Attorney Vesely.” Vesely represented Sparbel’s business interests in the Bishop case, and Ricciardi represented Sparbel’s personal interests. Although the Sparbels argue the attorneys appeared in court together during the Bishop case, there were no factual submissions that raise a triable issue of duplicative work.

¶21 Finally, we are unpersuaded by the Sparbels’ argument that Ricciardi was “illicitly attempting to collect fees and costs” associated with the filing of an “illegal” default judgment. The Sparbels argue Ricciardi “sought to recover \$393 costs incurred in connection with the first lawsuit it filed against the Sparbels, which ended with [Ricciardi] obtaining an illegal default judgment against the Sparbels before they were or could have even been in default.” However, it does not follow that simply because the Sparbels were ultimately successful in acquiring an order vacating a default judgment, the judgment was therefore “illegal.”

By the Court.—Judgment affirmed.

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

