

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 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. 2008AP1629

Cir. Ct. No. 2007CV204

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**JENNIFER L. FEARS AND BRIAN FEARS, INDIVIDUALLY, AND D/B/A
CHOICES FAMILY EDUCATION SERVICES, S.C.,**

PLAINTIFFS-APPELLANTS,

v.

ANN BRILL, INDIVIDUALLY, AND D/B/A ANN BRILL, CPA,

DEFENDANT-RESPONDENT,

JOHN DOE INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Psychotherapist Brian Fears does business as Choices Family Education Services, S.C. (“Choices”). Choices, Brian Fears and his wife, Jennifer, (collectively, Fears) appeal from a summary judgment granted in favor of Ann Brill, a certified public accountant. Fears claimed that Brill was negligent and breached her fiduciary duty in performing her accountant responsibilities. We agree that Fears’ failure to provide expert testimony defeats his claims. We also agree that Fears’ and his attorney’s misrepresentations and dilatory conduct warrant WIS. STAT. § 802.05 (2007-08)¹ sanctions. We affirm.

¶2 Brill prepared Fears’ personal tax returns since 1994. In 1999, Fears retained her to help incorporate Choices and to assist as its accountant. In March 2007, Fears—acting pro se—filed suit against Brill. He alleged that Brill negligently performed her accounting duties and, as corporate treasurer, breached her fiduciary duty by failing to file tax forms for 2000 through 2003 and falsely representing that she had done so. He further alleged that Brill’s negligence was “unbeknownst” to him “until recently.” As a result, Fears alleged, the state and federal governments levied fees and penalties against him and Choices. Contending that Brill’s actions were malicious and in deliberate disregard of his rights, Fears also sought punitive damages.

¶3 Brill’s position is that she prepared the tax returns but was unable to file them because Fears provided incorrect financial information and was uncooperative with her many requests for accurate data. Brill also contends she could not prepare payroll tax returns because, after becoming aware of undelivered payroll checks, disputes between Fears and payees, and checks not clearing the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

bank, she was unsure of which payroll checks actually were delivered. Brill disputed Fears' claim that he only recently learned that the returns had not been filed because she delivered the returns to him, prepared but unsigned, when she and Fears parted ways in 2003.

¶4 The litigation path was not smooth. Fears failed to respond to discovery requests, prompting a motion to compel. In the meantime, he retained Attorney Rebecca Gietman on June 28, 2007. Neither Fears nor Gietman appeared at the July 2 scheduling conference or advised that they would not appear. Fears' discovery responses remained outstanding and the court entered an order to compel and to pay Brill's attorney fees by August 24. Fears filed unsigned responses on August 27. He paid the ordered fees on September 18.

¶5 Fears named two expert witnesses, Thomas Dudley and Paul Lau. The notice did not describe Dudley's or Lau's education, background or area of expertise. It stated only that Dudley would testify about the negligence with which Brill handled Fears' personal and corporate financial matters, Lau would testify about her negligent performance of her fiduciary duties, and both would testify about "the financial devastation Ms. Brill left in her wake." Contrary to the scheduling order, the witness disclosure did not contain the experts' reports.

¶6 Gietman did not comply with a written request to supply the reports. Brill filed a motion in limine to preclude the experts' testimony, citing the missing reports and the difficulty contacting Gietman to confirm the experts' availability for deposition.² A date for both depositions finally was set. On that day, shortly

² The affidavit Brill's counsel filed in support of the motion averred that faxes would not go through due to "poor line connection," telephone calls to Gietman's office were not answered, and messages could not be left because the voice mailbox was "full."

before the first was to start, Gietman informed the court reporter's office that she would not be attending and the depositions should proceed without her. They did.

¶7 Dudley, an accountant who worked with Fears after Brill left, testified that Gietman did not advise him about his role as an expert or what opinions would be sought and had not prepared him for the deposition. Dudley testified that he, too, found Fears uncooperative in providing information and discovered that Fears had untruthfully blamed Brill for his tax problems. Dudley testified that he saw no basis for criticizing Brill's work. He also said he conveyed that opinion to Fears when Fears asked him to give a deposition.

¶8 Similarly, Lau testified that someone from Gietman's office contacted him only a week earlier to see if he would testify and just the day before informed him that the deposition was set. Gietman never spoke to him about the deposition or any analysis he should perform to prepare himself for it.³ Despite the representation that he would opine as to Brill's fiduciary duty, Lau testified that he understood the case dealt "mainly with payroll." His sole criticisms of her were that "it appeared" that she was not filing certain payroll tax returns and unemployment forms in a timely manner. Asked whether he would prepare payroll tax returns if he did not know which employees were receiving payroll checks, Lau responded, "If I had a client like that, I would be gone."

¶9 Brill moved for summary judgment and for WIS. STAT. § 802.05 sanctions. Her supporting affidavit recited that she could not file corporate and

³ Lau's professional background is not clear. He testified that he and Fears "barter" their services, Lau helping Fears with his books in exchange for Fears providing Lau free psychotherapy to address post-Vietnam issues.

payroll tax returns due to the inaccurate financial information Fears provided, his uncooperativeness, the undelivered payroll checks and her lack of confidence in the records supplied to her. She asserted that sanctions were warranted because, besides the pattern of noncompliance, the complaint lodged baseless allegations, the experts' opinions were falsely represented and, by not investigating, Gietman advocated the same misrepresentations.

¶10 Fears responded, late,⁴ to the summary judgment motion. He asserted that Brill had oversight of and responsibility for all of Choices' books and that he was "intensely shocked" by Dudley's deposition testimony. He did not formally oppose the motion on sanctions.

¶11 The court concluded that summary judgment was proper because, given Brill's defense, Fears' allegations required, but lacked, expert testimony. It also granted the motion for sanctions and ordered that Gietman and Fears reimburse Brill her reasonable attorney fees incurred after October 1, 2007, the date the experts' reports were due per the scheduling order and, thus, the date Gietman should have been aware of Dudley's and Lau's opinions. Fears appeals.

¶12 On appeal, Fears first argues that summary judgment was improper because factual issues exist as to the skill, judgment and care required of a reasonable accountant to prepare and timely file tax returns and payroll taxes and of a corporate treasurer to handle in good faith the corporation's financial affairs. He contends that those matters fall within the ken of the average layperson and do

⁴ Gietman defended the tardy filing in an unnotarized "affidavit" in support of the memorandum of law opposing summary judgment. Signed but unnotarized "affidavits" merit no consideration. See *Wisconsin Hosp. Ass'n v. Natural Resources Bd.*, 156 Wis. 2d 688, 723 n.13, 457 N.W.2d 879 (Ct. App. 1990).

not require expert testimony. He also contends that if the question is not *whether* Brill filed the forms but *why* she did not, then the issue is one of credibility, which should be put to a jury.

¶13 We review summary judgments de novo, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well-established. See, e.g., *Lambrech v. Estate of Kaczmarczyk*, 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment must be entered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.” WIS. STAT. § 802.08(2). While our review is de novo, we nonetheless value a circuit court’s well-reasoned decision. See *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475-76, 507 N.W.2d 163 (Ct. App. 1993).

¶14 Here, the circuit court determined that Fears’ complaint stated claims for negligence and breach of fiduciary duties and that Brill’s submissions established the defense that she was unable to prepare the tax forms because she was provided inaccurate financial information. The court concluded that expert testimony was required to establish a CPA’s duty under such circumstances.

¶15 Whether expert testimony is necessary in a given situation is a question of law. *Grace v. Grace*, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995). Expert testimony generally is necessary in professional malpractice cases to establish the parameters of acceptable professional conduct, given the underlying fact situation. See *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985). Fears argues that Brill had full and ready access to

Choices' books and financial information and that Brill breached her duty by failing to use that information to file all necessary tax forms. Brill, by contrast, contends she could not rely on the information's accuracy and therefore could not affix her professional signature to the returns she prepared. We agree that expert testimony was required to determine the parameters of her duty under these circumstances. The court concluded that Dudley and Lau did not provide that support. Indeed, it noted that since Gietman had not provided Dudley's or Lau's qualifications or a summary of their testimony, it was "not even sure if they can be experts." When expert testimony is required and is lacking, the evidence is insufficient to support a claim. See *Cramer v. Theda Clark Mem'l Hosp.*, 45 Wis. 2d 147, 152, 172 N.W.2d 427 (1969). Summary judgment was proper.

¶16 Fears also argues that WIS. STAT. § 802.05 sanctions were unwarranted. He contends that the circuit court erroneously concluded that no investigation was done before the experts were named. Determining what and how much investigation was done is a question of fact. *Belich v. Szymaszek*, 224 Wis. 2d 419, 429, 592 N.W.2d 254 (Ct. App. 1999). We will not disturb the circuit court's findings unless they are clearly erroneous. *Id.* Whether to award reasonable expenses and attorney fees under this section is left to the circuit court's discretion. *Ten Mile Inv., LLC v. Sherman*, 2007 WI App 253, ¶1 n. 2, 306 Wis. 2d 799, 743 N.W.2d 442.

¶17 Brill sought sanctions for misrepresentations in the complaint and in the naming of experts. The court deemed the lack of honesty in the complaint superfluous and insignificant to the gist of the claims. It felt differently about the experts, however. The court found that Gietman failed to establish their qualifications or summarize their testimony and that, because Gietman had no contact with them to speak of, neither expert "had any clue" what was expected of

them at deposition. The court also found that the failure to submit the required reports unnecessarily lengthened the litigation. These findings, coupled with “the careless history of this prosecution,” convinced the court that Fears and Gietman had run afoul of WIS. STAT. § 802.05(2)(c)⁵ and that an order was warranted directing Gietman and Fears to pay any reasonable attorney fees incurred since the date that the expert reports were due.

¶18 The circuit court’s findings are not clearly erroneous. Gietman argued at the motion hearing that she was “not able” to talk to Lau about being an expert witness but that Fears spoke with both Lau and Dudley. She also told the court that Fears had done “a lot of this legwork” prior to her being retained in June 2007. An attorney may not simply rely on his or her client’s word, however. *Belich*, 224 Wis. 2d at 430. Once Gietman agreed to represent Fears, she had the duty to investigate Fears’ rendition of the claims against Brill. She also should have examined Dudley’s and Lau’s anticipated testimony; indeed, complying with the scheduling order and furnishing expert reports would have discharged this duty. She would have learned that Dudley had “zero confidence” in Fears’ books,

⁵ WIS. STAT. § 802.05(2)(c) provides:

(2) Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

....

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

that he had no criticisms of Brill’s work and, in fact, thought Brill was “awfully kind ... to help [Fears] out as much as she did.”

¶19 Furthermore, resting on Fears’ earlier “legwork” does not explain Gietman’s and/or Fears’ failure to appear at the July scheduling conference, submit expert reports or attend the depositions. It also does not explain why Gietman did not take advantage of the twenty-one-day “safe harbor” opportunity to correct the offending matter. *See* WIS. STAT. § 802.05(3)(a)1.; *see also* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶27, 302 Wis. 2d 299, 735 N.W.2d 1. Awarding reasonable attorney fees was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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

