COURT OF APPEALS DECISION DATED AND RELEASED

July 23, 1997

NOTICE

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.

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No. 96-1140

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

CARL E. MEROW, INDIVIDUALLY AND AS TRUSTEE OF THE ERNIE L. MEROW REVOCABLE TRUST,

PLAINTIFF-APPELLANT,

V.

SHINNERS, HUCOVSKI & COMPANY, S.C.,

DEFENDANT-
THIRD PARTY PLAINTIFF-RESPONDENT,

V.

ROBERTS, RITSCHKE & MCNEELY, LTD.,

THIRD PARTY DEFENDANT-
RESPONDENT,

TORGERSON LAW OFFICES, S.C.

THIRD PARTY DEFENDANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

NETTESHEIM, J. The Ernie L. Merow Revocable Trust appeals from a summary judgment dismissing its complaint asserting claims of malpractice against two accounting firms, Shinners, Hucovski & Company, S.C. (Shinners), and Roberts, Ritschke & McNeely, Ltd. (Roberts).[1] The complaint also alleged a breach of contract claim against Shinners. The claims were based on a conceded error made by an accountant, Joseph Kox, when preparing the estate tax return in the estate of Ernie L. Merow. The trust paid the estate tax as computed by Kox and it sues in this action for the amount of additional tax occasioned by Kox's error.

The trial court granted the summary judgment motions of Shinners and Roberts concluding that no genuine issue of material fact existed and that the summary judgment evidence did not support a claim of negligence against either accounting firm. We affirm the court's ruling. We additionally affirm the trial court's refusal to accept supplemental affidavits submitted by the trust on its motion for reconsideration and the court's resulting denial of the motion for reconsideration.

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[1] The trust prosecutes this action in the name of Carl E. Merow, the trustee. Merow also sues in his individual capacity. For convenience, we will refer to the appellant as "the trust."

The trust additionally filed a malpractice complaint against the Torgerson Law Offices, S.C. The trial court denied the law office's motion for summary judgment. The law firm has appealed that ruling. We originally consolidated this appeal with the law firm's appeal. However, we subsequently decided to issue a separate opinion in each case. Our decision affirming the trial court's ruling in the legal malpractice case is set forth in ***Merow v. Shinners, Hucovski & Company, S.C.***, No. 96-1756, slip op. (Wis. Ct. App. July 23, 1997).

FACTS

While the summary judgment record reveals no genuine issue of factual dispute, it does present a lengthy and involved history. During his lifetime, Ernie Merow created a revocable trust which provided income to himself and his wife, Minerva. Ernie named his son, Carl Merow, as trustee. The trust recited that upon Ernie's death, the trust would continue to provide support for Minerva and that upon her death the trust corpus would be divided between Carl and his sister. When Ernie became ill in late 1991, Carl contacted the Roberts firm for advice concerning the trust and estate matters. He was referred to Kox.

Ernie died on February 24, 1992. By this time, Kox had been doing tax work for both Carl and Ernie. According to Carl, he engaged Kox to prepare the federal estate tax return in Ernie's estate. In May 1992, Carl met with Kox and Jeffrey Tyczkowski, a partner at Roberts, to discuss Carl's concern that Kox had not yet prepared the estate tax return. Carl claims that Tyczkowski informed him that the estate tax return did not need to be completed until after January 1, 1993. Tyczkowski claims that the estate tax return was not a topic of conversation at that meeting and that Roberts was not retained to prepare the estate tax return. Nonetheless, it is undisputed that the deadline for filing the estate tax return, or a request for an extension, was November 24, 1992.

Kox's employment at the Roberts firm was terminated in early November 1992. Roberts did not inform Carl of Kox's termination. On December 24, 1992, Minerva Merow died. Four days later, Carl attempted to contact Kox at the Roberts firm to discuss his father's estate. Carl was told that Kox was no longer with the firm. Carl then contacted Kox at his home on December 28 and 29, 1992. Based on these conversations, Carl believed that Kox, working independently of the Roberts firm, would complete the necessary work

regarding the estate tax return. Although Carl and Kox do not agree as to when Kox accepted the assignment,[2] they agree that the estate tax return was not prepared by Kox until after March 30, 1993, some four months after its due date.

It is also undisputed that during the course of Kox's engagement, he was temporarily employed by the Shinners firm and sought advice about the estate tax from Kenneth J. Lardinois, an accountant at the firm. It is also undisputed that during this time, Kox also sought advice from Dean McNeely, a partner at the Roberts firm. In June 1993, Kox's employment at Shinners was terminated.

Despite his termination with the Shinners firm, Kox met thereafter with Lardinois to review the estate tax return. Kox was contemplating making a qualified terminable interest property (QTIP) election on the estate tax return in order to avoid penalties and reduce taxes.[3] According to Kox, Lardinois advised

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[2] As previously noted, Carl contends that Kox was retained to prepare the estate tax return while Kox was still at the Roberts firm. Kox maintains that he was not retained to do the estate tax return until after March 30, 1993. Regardless of this dispute, it does not constitute a *material* factual issue since we hold that the actionable negligence in this case was Kox's improper preparation of the return. The question of when Kox was retained to do the work, as well as the fact that the return was not timely filed, do not bear on the alleged negligence of either the Roberts or Shinners firm.

[3] Qualified terminable interest property has been defined as:

> property in which a deceased spouse passes to the surviving spouse a "qualified income interest for life." The surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all of the income for life and if, during the surviving spouse's lifetime, no one has a power to appoint any part of the property to any person other than the surviving spouse. Internal Revenue Code section 2056(b)(7)(B)(ii).
>
> The entire property, the life interest, as well as the remainder, is treated as passing to the surviving spouse, and, therefore, the entire property qualifies for the marital deduction. This treatment also applies in the case of a bequest which is split between a life interest in the spouse and a remainder interest which goes to charity.

(continued)

him as to "how to go about claiming a QTIP election should it be the most advantageous way to go" and which schedule Kox should refer to in making a marital property deduction. There was no understanding that Lardinois would have any further involvement in completing the estate tax return.

On July 8, 1993, approximately nine months after his termination at Roberts, Kox met with Dean McNeely, a partner at Roberts, to discuss the estate tax return. According to Kox, McNeely immediately disagreed with him that the trust was "a QTIP trust eligible for marital deduction, and that kind of negated the necessity of spending much time going into 706s ...." Because McNeely disagreed with him, Kox did not ask McNeely any further questions regarding the estate tax return.

Following his meeting with McNeely, Kox again contacted Lardinois. At this meeting, Lardinois confirmed that Kox was properly considering a QTIP election and that the trust assets were eligible for the QTIP election. Kox again spoke with Lardinois on July 21, 1993. Following this discussion, Lardinois had an assistant send information to Kox regarding QTIP elections.

> In order to obtain qualified interest, however, an election must be made; otherwise, the general terminable interest rule applies. Section 2056(b)(7)(B)(v) states:
>
> An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.
>
> Thus, the plain language of the election provision of the statute requires the executor to indicate its election of qualified terminable treatment on the estate tax return itself.

Lawrence A. Jegen, III, *Tax Tips QUALIFIED TERMINABLE INTEREST*, 33 Res Gestae 536, 537 (May 1990).

This brings us to the subject of this appeal. When Kox prepared the estate tax return in August 1993, he elected to treat all of the trust assets as QTIP eligible property. The parties agree that Kox should have made a partial, not a full, QTIP election. A partial election would have maximized the federal taxation exemptions for both Ernie's and Minerva's estates. This error produced an estate tax liability in excess of $147,000. The trust paid this tax. Because the QTIP election is irrevocable, *see* 26 IRC § 2056(b)(7)(B)(v), the trust was unable to correct Kox's mistake.

PROCEDURAL HISTORY

In July 1994, the trust brought an action against Kox and Shinners to recover the damages caused by the improper QTIP election. The trust's claims against Kox were grounded in breach of contract and negligence, alleging that:

> 14. If [Kox] had made a partial QTIP election on the Estate tax return for Ernie L. Merow using a fractional formula to increase the taxable estate and take full advantage of the $600,000.00 exemption equivalent, it would have reduced the tax due on the estate tax returns for Mrs. Merow.

The trust alleged that Shinners was negligent because Kox had consulted Lardinois and Lardinois had "failed to … supervise the completion of the Estate tax return …." On September 24, 1994, Kox filed for bankruptcy. Subsequently, the trust and Kox stipulated to the dismissal of the original complaint against Kox.

In January 1995, the trust filed an amended complaint against Shinners realleging that Shinners was negligent for failing to exercise due care in advising Kox on matters relating to the estate. Shinners in turn filed a third-party summons and complaint against Roberts, alleging that Roberts was negligent in handling the estate tax return. Finally, the trust filed a second amended complaint,

including an allegation that if Shinners' third-party allegations against Roberts were true, then Roberts would be jointly and severally liable to the trust as well.[4]

Both Shinners and Roberts moved for summary judgment. Following a hearing, the trial court granted the motions, dismissing all claims against Shinners and Roberts. The trust filed a motion for reconsideration and tendered supplemental affidavits in support. The trial court granted Roberts' and Shinners' motions to strike the supplemental affidavits and denied the trust's motion for reconsideration. The trust appeals. Additional facts will be recited as they relate to the appellate issues.

DISCUSSION

Standard of Review

We review a motion for summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); *see also* § 802.08(2), STATS. That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Although summary judgment presents a question of law which we review de novo, we still value a trial court's decision on such a question. *See* ***id.*** at 497, 536 N.W.2d at 182.

The Trust's Claim Against Roberts

[4] The parties filed various other pleadings in this case. We recite only those which are relevant to the appellate issues.

The trust contends that Roberts was not entitled to summary judgment because the evidence raises a material issue of fact as to whether Roberts was negligent for failing to "do more to prevent the foreseeable damages" to the trust and as to whether Roberts' actions damaged the trust.

We begin by addressing the trust's argument that Roberts was negligent in failing to timely file Ernie Merow's estate tax return and that the late filing was a substantial factor in causing damages to the trust. Roberts responds that the damages were the result of Kox's improper QTIP election, not the late filing. Thus, Roberts contends that it was entitled to summary judgment.

In order to sustain a cause of action in negligence against Roberts, the trust must establish: (1) a duty of care; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *See* ***Lisa's Style Shop v. Hagen Ins. Agency***, 181 Wis.2d 565, 572, 511 N.W.2d 849, 852 (1994).

It is undisputed that Kox took an improper QTIP election. It is also undisputed that the estate tax return which contained the improper QTIP election was untimely filed. However, there is no indication that the improper QTIP election was caused by the untimely filing of the return. The trust contends that if Kox had prepared the estate tax return while still at the Roberts firm, "[I]t is probable that these supervisors would have corrected Mr. Kox's mistake in making a full QTIP election." This argument is speculative and we are unpersuaded. Instead, we agree with Roberts that even if the firm negligently failed to see that the return was timely filed, Kox's subsequent negligence in taking the full QTIP election *after he was terminated from the firm* was the superseding cause of the trust's damages.

"A superseding cause is an intervening force which relieves an actor from liability for harm which his negligence was a substantial factor in producing." ***Stewart v. Wulf***, 85 Wis.2d 461, 475, 271 N.W.2d 79, 85 (1978). An intervening force is "'one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.'" ***Id***. at 475, 271 N.W.2d at 85-86 (quoted source omitted). However, an intervening force is not always a superseding cause of damages. In ***Rixmann v. Somerset Public Schools***, 83 Wis.2d 571, 586, 266 N.W.2d 326, 334 (1978) (quoted source omitted), our supreme court set forth the following test for determining when an intervening action becomes a superseding cause:

> "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> "(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> "(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> "(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

Whether an intervening negligent act is a superseding cause of the plaintiff's injury is a question of law. *See **id***.

The trust contends that "the negligence of the Roberts firm was 'actively operating' at the time of the injury" and that the "chain of events" which began with Roberts' negligent actions ended with Kox's error and the trust's injury. However, applying the ***Rixmann*** test to the "chain of events" in this case,

we conclude that Kox's choice of an improper QTIP election was a superseding cause of the trust's damages. At the time the Roberts firm allegedly failed to inform Kox of the correct estate tax return filing date, Roberts could not reasonably have foreseen that nine months later Kox would make a substantial error in the calculation of the QTIP. In short, Roberts' alleged failure to notify Kox of the filing deadline did not create or contribute to Kox's improper QTIP election. Thus, Kox's action was not a "normal consequence" of a situation created by Roberts' conduct. *See* ***id***. As the trial court aptly reasoned, whether the return was filed timely or belatedly, it still would have carried Kox's improper QTIP election.

Next, the trust argues that Roberts was negligent based on McNeely's discussions with Kox after Kox had left the Roberts firm. The trust argues that McNeely did not "take any steps to help his ex-employee or ex-client." The trust's argument is based in part upon McNeely's notes from the meeting in which he stated that Kox appeared to be "lost." The trust argues that McNeely "should have realized that his former client was at risk if Mr. Kox was 'lost' in the preparation of the estate tax return." The trust additionally argues that McNeely breached his duty of care by failing to make sure that Kox understood his advice.

It is undisputed that the Roberts firm and the trust did not have an accountant-client relationship at the time of McNeely's meeting with Kox. We acknowledge, however, that under certain circumstances an accountant may be held liable for negligence to a relying third party with whom the accountant is not in privity. *See* ***Citizens State Bank v. Timm, Schmidt & Co***., 113 Wis.2d 376, 385, 335 N.W.2d 361, 365 (1983). Assuming that lack of privity does not bar the trust's claim against Roberts, it nonetheless is undisputed that *Kox did not rely upon McNeely's advice that the property was not eligible for the QTIP election.*

Instead, Kox took the election. On this basis, the trust fails to establish that any breach of duty which McNeely may have owed to the trust caused any damage.[5]

The trust argues, however, that because McNeely responded to Kox's inquiry, McNeely was duty bound to investigate the question further, discover his own mistake in advising Kox that a QTIP election was inappropriate, and then continue to oversee Kox's performance to assure that Kox properly prepared the return. We are unwilling to extend the law of foreseeability to these questionable limits. McNeely could not reasonably have foreseen that his response to Kox's limited inquiry regarding a QTIP election during the course of a lunch meeting would eventually cause damage to the trust.

We agree with the trial court that there were no genuine issues of material fact and that Roberts was entitled to summary judgment dismissing the trust's negligence claim. Accordingly, we affirm the trial court's ruling.

The Trust's Claim Against Shinners

The trust's negligence claim against the Shinners firm is premised on the discussion which Kox had with Lardinois, a Shinners' accountant. The trial court ruled that Shinners did not owe a duty of care to the trust. As noted above, in order to prove negligence, the trust must establish a duty of care, a breach of that duty, and a causal connection between the breach and the injury. *See* ***Lisa's Style Shop***, 181 Wis.2d at 572, 511 N.W.2d at 852.

[5] The trust contends that ***Citizens State Bank v. Timm, Schmidt & Co.,*** 113 Wis.2d 376, 335 N.W.2d 361 (1983), does not require reliance in order for an accountant to be held liable for negligence to a relying third party. We question this reading of ***Citizens***. However, even assuming it is accurate, ***Citizens*** certainly did not dispense with the element of causation.

The trust argues that Shinners, acting through Lardinois, had a duty to advise Kox on how to use the QTIP election after Lardinois informed Kox that a QTIP election could be used. We disagree. As with McNeely, there was no privity between the trust and Lardinois when this consultation occurred. However, as we have previously noted, that alone does not insulate Shinners from liability. But the trust must still establish that Shinners could foresee that its actions might injure the trust.

Here, Lardinois, as a professional courtesy, answered Kox's questions concerning the estate tax return, notified Kox of the proper schedules to be used and sent Kox information regarding the QTIP election. The trust does not allege that the information provided by Lardinois was incorrect. Instead, the trust contends that Lardinois had a duty to provide more information and to supervise Kox's completion of the estate tax return.

The trust cites to ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck***, 127 Wis.2d 127, 142-43, 377 N.W.2d 605, 612 (1985), in support of its argument that because Lardinois volunteered information, he had a duty to "disclose further information or give additional advice in order not to make his initial advice erroneous or misleading." The trust's reliance on ***Merrill Lynch*** is misplaced.

First, ***Merrill Lynch*** involved representations made by a broker to a customer. *See* ***id***. at 130, 377 N.W.2d at 606. As we have already noted, in this case the trust did not have a professional relationship with Lardinois. Lardinois offered advice to Kox as a professional courtesy. Second, the ***Merrill Lynch*** court stated that once a professional has offered advice to a customer, the professional "has a duty to disclose subsequently acquired information that he knows will make

a previous representation erroneous or misleading." ***Id***. at 142-43, 377 N.W.2d at 612. Nothing in this summary judgment record reveals that the information given by Lardinois was erroneous or misleading. Nor does the record reveal that Lardinois acquired any subsequent information which brought his initial advice into question.

The trust additionally argues that Lardinois "should have realized that if the QTIP election was incorrect, damages were foreseeable, especially in light of the fact that a QTIP election is irrevocable." In support, the trust cites to ***Schuster v. Altenberg***, 144 Wis.2d 223, 235, 424 N.W.2d 159, 164 (1988), and ***Citizens***, 113 Wis.2d at 388, 335 N.W.2d at 367. In ***Schuster,*** the defendant psychiatrist failed to warn his patient and her family of the effects of her illness. *See* ***Schuster,*** 144 Wis.2d at 226, 424 N.W.2d at 160. The patient subsequently was involved in an automobile accident causing her death and serious injury to her daughter. In ***Citizens***, a defendant accountant was engaged by a client to prepare an audit report. The accountant's negligent preparation of the report caused financial injury to a third party relying on the report. *See* ***Citizens,*** 113 Wis.2d at 377, 335 N.W.2d at 362.

In both cases, the supreme court held that the defendants could be held to owe a duty of care to injured third parties. However, the linchpin of both cases was foreseeability. *See* ***Schuster,*** 144 Wis.2d at 233-40, 424 N.W.2d at 163-66; ***Citizens,*** 113 Wis.2d at 386, 335 N.W.2d at 366. Neither case presented the professional courtesy setting presented by the facts of this case in which the discussion between the principals was limited. We reject the contention that Shinners, acting through Lardinois, should be held liable to the trust for offering correct advice as a professional courtesy to Kox.

Finally, we address the trust's argument that the opinion of its expert, Paul Jaeger, precludes summary judgment.[6] Jaeger testified that Lardinois failed to conform to the accepted standard of care in the accounting field. "A certified public accountant or public accountant shall exercise due professional care in the performance of an engagement." WIS. ADM. CODE § ACCY 1.201(1)(b). However, we have already rejected the trust's claim that Shinners was ever engaged by the trust to complete the estate tax return. Moreover, the standard of care is determined by the law, not the opinion of an expert in a given case. Whether Jaeger personally would have undertaken to supervise Kox's activities regarding the estate tax return does not make such conduct the applicable standard of care.

In summary, we conclude that the trial court properly granted summary judgment to the Shinners firm.[7]

The Trust's Motion for Reconsideration

Following the trial court's grant of summary judgment, the trust filed a motion for reconsideration and in support submitted supplemental affidavits from Jaeger and from its attorney. The trial court refused to consider the affidavits

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[6] The trust cites the following testimony of its expert, Paul Jaeger:

> Also, with respect to the conference that Mr. Lardinois had with Mr. Kox, I think he failed to follow through in terms of reviewing the Form 706 itself. I think a very primary or almost the most important aspect of any estate tax return is to utilize the exemption. Mr. Lardinois did help in connection with some of the compliance matters on a very rough draft return, but he should have gone farther to assure that the basics, just the very basic concept, in obtaining the use of the exemption was completed in that return.

[7] Because we conclude that the trust has not alleged facts sufficient to maintain a negligence action against Shinners, we do not address Shinners' public policy arguments.

and denied the trust's reconsideration motion. The trust argues that the court should have received the supplemental affidavits.

In reviewing the trial court's decision to strike the trust's supplemental affidavits, we look to the purpose of motions for reconsideration.

> Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment …. Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (quoting ***Keene Corp. v. International Fidelity Ins. Co***., 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)).

By submitting additional affidavits, the trust was functionally seeking to reopen the summary judgment evidentiary record. We are not satisfied that such is the purpose of reconsideration. We conclude that the trial court properly exercised its discretion in rejecting the supplemental affidavits. Moreover, even if the court had accepted the affidavits, we do not construe them as introducing anything substantively new. The trust's motion for reconsideration attempted "to show three fact issues that the circuit court either had overlooked or not understood." Likewise, the trust's brief in support of its motion, while arguably clarifying the issues, did nothing more than present the same information which the trial court had already considered and rejected on summary judgment. When reviewing a trial court's ruling on motion for reconsideration of summary judgment, our standard of review is that which we would apply on direct review of summary judgment. *See* ***Envirologix Corp. v. City of Waukesha,*** 192 Wis.2d 277,

287, 531 N.W.2d 357, 362 (Ct. App. 1995). Based on our earlier conclusion that summary judgment was appropriate in this case, we conclude that the trial court properly denied the trust's motion for reconsideration.

CONCLUSION

In summary, we conclude that the summary judgment record does not reveal any genuine issue of material fact as to the liability of the Roberts and Shinners firms. Under those facts, we conclude that the trial court properly granted summary judgment to Roberts and Shinners dismissing the trust's second amended complaint. We additionally conclude that the trial court properly exercised its discretion in rejecting the trust's supplemental affidavits on motion for reconsideration and denying the reconsideration motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.