COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2006

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. 2005AP1959 **Cir. Ct. No. 2003CV7497**

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

KELLY S. LONERGAN AND SEAN P. LONERGAN,

PLAINTIFFS-RESPONDENTS,

BLUE CROSS BLUE SHIELD OF MINNESOTA, MILWAUKEE COUNTY, AND LIFE INSURANCE COMPANY OF NORTH AMERICA,

INVOLUNTARY-PLAINTIFFS,

V.

EMPLOYERS MUTUAL CASUALTY COMPANY AND MARGANNE K. LAMAR,

DEFENDANTS,

CANNON & DUNPHY, S.C.,

PROPOSED-INTERVENOR-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Cannon & Dunphy, S.C., appeals the trial court's order denying its motion to intervene in the closed circuit-court case, ***Lonergan v. Employers Mutual Casualty Co.*** (Milwaukee County Circuit Court Case Number 2003CV7497). Cannon & Dunphy wanted to intervene in order to re-open the case so the firm could enforce what it contended was its lien on the settlement Kelly S. Lonergan got in her personal-injury action against Employers Mutual and its insured Marganne K. Lamar. We affirm.

I.

¶2 This is but one of many disputes between Cannon & Dunphy law firm and James J. Gende, a lawyer whom the firm employed as an associate until mid-April of 2004. When Gende left Cannon & Dunphy, Lonergan, who had retained Cannon & Dunphy to represent her in her claims against Lamar and Employers Mutual, went with him, and ended her client-attorney relationship with the firm. Gende settled Lonergan's case in May of 2004, and the case was dismissed on July 19, 2004. Cannon & Dunphy did not seek to intervene until March 24, 2005.

¶3 As Cannon & Dunphy concedes in the beginning of its main appellate brief before this court, "[t]his case is not about a dispute between an attorney [Cannon & Dunphy] and a [former] client [Lonergan]," but, rather, between Cannon & Dunphy and Gende, whom the firm contends violated his agreements with, and his duties to, the firm. Thus, Cannon & Dunphy's motion to

intervene, made some eight months after Lonergan's underlying case was settled and dismissed, is, at its core, a dispute in search of a forum.

II.

¶4 Intervention is governed by WIS. STAT. RULE 803.09, which, as material here, provides:

> **(1)** Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

RULE 803.09(1) thus directs a court faced with a motion to intervene under that rule to consider four factors, two of which are interrelated: (1) whether the motion is "timely," (2) whether "the movant claims an interest relating to the property or transaction which is the subject of the action," and (3) whether not permitting intervention "may as a practical matter impair or impede the movant's ability to protect that interest," because, among other reasons, (4) the interest that the movant seeks to protect is not "adequately represented by existing parties." *See* ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 545, 334 N.W.2d 252, 256 (1983). Whether a request to intervene is timely is a discretionary determination by the trial court, to which we give substantial deference. *See* ***id.***, 112 Wis. 2d at 550, 334 N.W.2d at 258. On the other hand, whether the movant has a sufficient protectable interest is a question of law that we review *de novo*. *See* ***id.***, 112 Wis. 2d at 549, 334 N.W.2d at 258. Further, in assessing RULE 803.09(1)'s elements, the trial court "must necessarily weigh the evidence on these factors." ***City of Madison v. Wisconsin Employment Relations***

Comm'n, 2000 WI 39, ¶11 n.10, 234 Wis. 2d 550, 558 n.10, 610 N.W.2d 94, 98 n.10. A trial court's findings of fact are determinative unless they are "clearly erroneous." WIS. STAT. RULE 805.17(2). We examine the trial court's findings and determinations in this light.

A. *Timeliness*.

¶5 As we have seen, Lonergan's case was settled in May of 2004, and was dismissed on July 19, 2004. Yet, Cannon & Dunphy did not seek to intervene until some eight months later, even though the firm knew before the case was settled and dismissed that Lonergan ended her client-attorney relationship with it and had retained Gende to represent her. The trial court held that this delay made the firm's motion to intervene not "timely," finding that the firm had sought timely to intervene in other cases involving former clients who went with Gende when he left Cannon & Dunphy, and that the firm "in June of 2004" "knew that there was an issue with respect to payment of fees and costs allegedly due" it in connection with those other cases. Thus, the trial court found that Cannon & Dunphy "could have filed a motion to intervene in" the Lonergan case when it filed its motions in the other cases. Although Cannon & Dunphy argues in its appellate briefs, without citation to any evidentiary material in the Record, that it did not learn of the Lonergan settlement and dismissal until late March of 2005, when it sought a hearing on its motion to intervene, it has not shown that the trial court's finding of fact about what it either knew or should have known about when the Lonergan case was settled and dismissed is clearly erroneous; simply put, although Cannon & Dunphy argues that inferences it draws from the chronology support its circumstantial-evidence contention that it had no reason to know that the case had been settled in May of 2004 and dismissed in July of that year, the inferences drawn by the trial court govern. *See* ***Global Steel Prods. Corp. v. Ecklund***

Carriers, Inc., 2002 WI App 91, ¶10, 253 Wis. 2d 588, 594, 644 N.W.2d 269, 272. Further, Cannon & Dunphy has not shown that the trial court erroneously exercised its discretion in determining that the firm did not establish good cause for the delay. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873, 879 (1991) (trial court's findings may be implicit in its decision).

B. *Firm's Interest in the Settlement Proceeds.*

¶6 The trial court recognized, as do we, that Cannon & Dunphy claims an interest in the money Lonergan got when she settled her lawsuit against Lamar and Employers Mutual.

C. *Firm's Ability to Protect its Claimed Interest.*

¶7 The trial court noted that Cannon & Dunphy and Gende were litigating in Waukesha County the issues involved in Gende's work for, and departure from, the firm, and that "[t]he issue of the fees could be resolved in that case." Further, the trial court found that "Cannon and Dunphy can always file an action with respect to enforcement of their attorneys lien under [WIS. STAT. §] 757.37 … [a]nd the firm clearly could also file a separate action [against Gende] for breach of contract under that [employment] separation agreement [between Cannon & Dunphy and Gende]." The trial court also determined that because there were many former-client cases involved in the firm's dispute with Gende, "the most judicial way to proceed is to have one judge decide the issue regarding the separation agreement" between Cannon & Dunphy and Gende. Thus, intervention in, and re-opening of, the Lonergan case was not the only way that Cannon & Dunphy could seek to protect what it contends is its interest in the fees and costs attributable to that case.

III.

¶8 The trial court properly considered the appropriate factors under WIS. STAT. RULE 803.09(1). We affirm.

By the Court.—Order affirmed.

Publication in the official reports is recommended.