COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP13 **Cir. Ct. No. 2003CV361**

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

CATHERINE E. REINKE,

PLAINTIFF-APPELLANT,

V.

DEMPSEY, WILLIAMSON, LAMPE, YOUNG, KELLY & HERTEL, LLP, A WISCONSIN LIMITED LIABILITY PARTNERSHIP, CHARLES J. HERTEL AND DANIEL D. KRUMREI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim.

¶1 SNYDER, P.J. Catherine Reinke appeals from a summary judgment dismissing her legal malpractice claim against Charles Hertel and Daniel Krumrei and their law firm. Reinke contends that the circuit court erred when it held that her malpractice claim was barred and denied her request for leave to amend her complaint. She argues that the court applied the wrong legal standards, that genuine issues of material fact preclude summary judgment, and that leave to amend her complaint should have been granted. We disagree and affirm the judgment and the order of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 On June 1, 1998, Reinke filed a voluntary petition for Chapter 13 relief in the United States Bankruptcy Court, Eastern District of Wisconsin. Charles Hertel and Daniel Krumrei, both of the defendant law firm, performed bankruptcy-related legal services for Reinke. Krumrei signed the petition as Reinke's attorney and subsequently submitted bankruptcy schedules on her behalf. Ultimately, Reinke's bankruptcy petition was dismissed on a finding of bad faith misconduct. The bankruptcy court referred the matter to the United States Attorney for the Eastern District of Wisconsin for possible criminal prosecution on grounds of bankruptcy fraud.[1]

¶3 Reinke filed a negligence action against Hertel, Krumrei and their firm (together, Hertel) on March 26, 2003, alleging legal malpractice in the handling of the bankruptcy case. The crux of Reinke's argument was that her bankruptcy petition "was dismissed on a finding of bad faith principally because

[1] No criminal charge has been filed against Reinke.

of the inaccuracies in the schedules, which were knowingly submitted with falsities by defendant Krumrei under the supervision of defendant Hertel." She alleged that, but for the attorneys' negligence, she would have succeeded in her bankruptcy action. She sought compensation for significant economic loss as well as "damage to her good name and reputation, humiliation, and accompanying emotional distress and anxiety."[2]

¶4 Hertel moved for summary judgment. The parties submitted numerous briefs, transcripts, and affidavits and the circuit court heard arguments on October 4, 2005. During the hearing, Reinke moved to amend her pleadings to add a cause of action based on willful, wanton, malicious or reckless conduct and to seek punitive damages therefor. The court denied Reinke's oral motion to amend, and held that summary judgment in favor of Hertel was appropriate. Specifically, the court concluded that Reinke was "equally at fault" for the unsuccessful bankruptcy petition. Furthermore, the court determined that, even assuming negligence on the part of Hertel, there was no causal link between the negligence and the alleged damages. Reinke appeals.

DISCUSSION

¶5 Reinke presents four issues for our review. First, she submits that the circuit court improperly applied the doctrine of *in pari delicto* to bar her claim

[2] Less than two months before Reinke filed her petition, a Dane county circuit court entered a civil judgment against Reinke for breach of contract, intentional misrepresentation, negligent and intentional damage to property, wrongful replevin, conversion, intentional infliction of emotional distress, and punitive damages. Margaret Madden, the judgment holder, objected to Reinke's Chapter 13 petition. Madden's execution of the judgment, which awarded her approximately $153,000, accounts for much of what Reinke now claims as damages caused by the unsuccessful bankruptcy petition.

against Hertel. Second, she argues that there was, indeed, a causal link between the negligence of Hertel and the damages she suffered. Third, she contends the court erred when it dismissed her claim for negligent infliction of emotional distress. Finally, she insists she should have been granted leave to amend her complaint to include additional claims against Hertel.

¶6 We begin with Reinke's first two propositions. The circuit court granted summary judgment to Hertel and offered two alternative legal theories to support its decision. First, the court concluded that summary judgment was appropriate because the parties stood *in pari delicto*, Reinke sharing equal fault for the failed bankruptcy. Where the parties are equally at fault, "the position of the defendant is stronger." ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). In the alternative, because Reinke could not demonstrate that the conceded negligence of her attorneys was the proximate cause of the failed bankruptcy, the circuit court held that summary judgment should be granted.[3]

¶7 We review a decision on summary judgment using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the record demonstrates "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). Reinke argues that a genuine issue of material fact exists as to whether her Chapter 13 bankruptcy plan would have been confirmed but for the negligence of her attorneys. Thus, her argument goes, summary judgment was

[3] Hertel conceded negligence for purposes of the summary judgment proceeding only.

improperly granted. We turn to the record to ascertain whether a genuine issue exists.

¶8 Hertel asserts that Reinke's financial status in 1998 was insufficient to qualify her for Chapter 13 relief. Further, because Reinke did not qualify, Hertel concludes that no act or omission on the part of the attorneys caused her Chapter 13 petition to fail. Hertel directs us to the affidavit of Attorney Mark Bromley, a bankruptcy expert, who opined to a reasonable degree of professional certainty that "[Reinke] could not have achieved confirmation of a Chapter 13 plan of reorganization because … [she] had not filed her income taxes for the years immediately preceding her bankruptcy filing," her monthly income and expense schedules "showed no disposable income from which payments to unsecured creditors could be made," and the tax returns filed years later demonstrate that her income "could not have funded a plan of reorganization."

¶9 Reinke counters by placing the responsibility for filing the necessary financial documents squarely at the feet of her attorneys. Essentially, she concedes that the tax returns were not completed and that her reorganization plan could not be confirmed without them, but argues that it was not her duty to file them. Reinke does not explain, however, how her attorneys could have filed tax returns that she did not complete.

¶10 Reinke asserts that she "acted in good faith and provided all of the information to her bankruptcy attorneys that she reasonably thought necessary." On the contrary, Reinke acknowledged her duty to complete and then produce her delinquent tax returns. During a bankruptcy hearing on August 28, 1998, the trustee learned that Reinke had not filed her 1996 or 1997 tax returns. The trustee informed Reinke that her reorganization plan "will not be confirmed without those

filed.… That's the bottom line on it. It will not happen." Reinke responded that she would "take measures to do that." Reinke's failure to complete and then produce the missing tax returns prevented the confirmation of any reorganization plan. The circuit court observed that her tax returns and the income and revenue statements for her business were "inherently in the hands of Ms. Reinke."

¶11 Reinke cannot show that Hertel's negligence was a substantial factor in the failed Chapter 13 petition. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶60, 235 Wis. 2d 325, 611 N.W.2d 659 (plaintiff may recover if defendant's negligence was a substantial factor in causing the injury). No genuine issue of fact on the issue of causation exists and summary judgment was properly granted.[4] Therefore, we need not address the doctrine of *in pari delicto*. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶12 Reinke next disputes the circuit court's dismissal of her claim for negligent infliction of emotional distress for failure to state a claim upon which relief may be granted. Such a claim requires Reinke to show that (1) Hertel's conduct fell below the applicable standard of care; (2) Reinke suffered an injury, specifically severe emotional distress; and (3) Hertel's conduct was a cause-in-fact of Reinke's injury. *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 632, 517 N.W.2d 432 (1994).

[4] Reinke also submits that the affidavit of her expert, Melvyn Hoffman, demonstrates that genuine issues of material fact are present. As noted by the circuit court, Hoffman's deposition revealed that he did not review much of the evidence in the case before offering an opinion and further that his "deposition [was] fraught with opinions that he has no opinions, essentially." The court also observed inconsistencies between Hoffman's affidavit and his deposition testimony, stating that Hoffman's "attempt to sort of change his opinion after the fact is improper."

¶13 Here, the parties dispute whether a genuine issue of material fact exists as to Reinke's alleged severe emotional distress. Reinke argues that no expert testimony is needed to prove up her condition; rather, she rests on her own affidavit to demonstrate "severe enough emotional distress and anxiety so that no reasonable person could be expected to endure it." She directs us to ***Hicks v. Nunnery***, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809, for the proposition that expert testimony is not necessary to prove the severity of her emotional distress. There, we stated that previous appellate decisions "note the presence of expert testimony in the record as supporting the severity of a plaintiff's emotional distress, but we are aware of none that require expert testimony as a legal prerequisite for recovery." ***Id.***, ¶26.

¶14 Hertel counters that Reinke's affidavit fails to assert "such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). Specifically, Hertel asserts that (1) the affidavit contains hearsay contrary to WIS. STAT. §§ 908.01 and 908.02; (2) it contains statements not based upon Reinke's personal knowledge contrary to WIS. STAT. § 906.02; (3) it conflicts with her prior testimony contrary to ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102; and (4) it contains impermissible collateral attacks on prior judgments and findings of fact contrary to ***Schramek v. Bohren***, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988). We agree.

¶15 Reinke's affidavit offers little to support her claim. She provides assessments of fairness in previous court proceedings, categorizes an opposing attorney as a "pit bull," hypothesizes about other peoples' rationales and motives in various contexts, and recounts her interactions with Hertel and Krumrei during the bankruptcy proceedings. She addresses the issue of her emotional distress only briefly, stating that she suffered "indignity" when rebuffed by a bank because

of her credit status, she fears seeking employment because she is stigmatized, and endures shame and insecurity as a result of the financial stress she has suffered. She states she suffered a miscarriage in December of 1998, but her affidavit does not specifically link this event to Hertel's conduct. Reinke's affidavit is not sufficient to raise a genuine issue of material fact with regard to severe emotional distress. Thus, it is not the lack of expert medical testimony that seals Reinke's fate, but rather the dearth of specific, relevant, admissible evidence of any kind. [5]

¶16 Finally, Reinke argues that the circuit court erred when it denied her oral motion to amend her pleadings. A circuit court's decision to grant leave to amend a complaint is discretionary. ***Finley v. Culligan***, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). Leave to amend pleadings "shall be freely given at any stage of the action when justice so requires." WIS. STAT. § 802.09(1). When considering a motion to amend pleadings, a circuit court must balance the interests of the party who would benefit from the amendment with those of the objecting party. ***State v. Peterson***, 104 Wis. 2d 616, 634, 312 N.W.2d 784 (1981). We will affirm a circuit court's discretionary decision where it is based upon the record facts and applies the appropriate law. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶17 At the summary judgment motion hearing, Reinke argued that "[t]he issue of willfulness, wantonness and intentionality has arisen as the facts have

[5] Furthermore, Reinke's claims all hearken back to the failed bankruptcy action. We do acknowledge that Reinke alleges negligent infliction of emotional distress arising from the threat of prosecution for bankruptcy fraud, distinguishing it from the failed bankruptcy itself. However, this is directly related to the bankruptcy court's suspicion that Reinke's failure to provide key financial information was an attempt to improperly manipulate the system. Therefore, our analysis regarding causation applies to her claim for emotional distress as well.

been developed in the course of the case." The circuit court determined that the motion came "rather late in the game." As Reinke asserts, the court provided only the briefest rationale for denying leave to amend. However, we have independently reviewed the record and conclude that it provides a reasonable basis for the circuit court's decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 (appellate court may look for reasons to sustain a circuit court's discretionary determination).

¶18 First, undue delay supports the circuit court's decision. *See* ***Hess v. Fernandez***, 2005 WI 19, ¶23, 278 Wis. 2d 283, 692 N.W.2d 655 (relevant factors include undue delay, motive, and prejudice). Reinke's complaint was filed on March 26, 2003. According to the scheduling order, all pretrial discovery was to be completed by January 10, 2005, and evidentiary motions were to be filed by January 17. Trial was originally set for January 24, but subsequently rescheduled to October 10, 2005. Witness lists were filed, depositions taken, and affidavits submitted between April 2004 and September 2005.

¶19 Also, Reinke asserts that the intentional, willful and wanton conduct came to light "[a]s the facts developed in this case." However, she does not specify what new information she discovered or why it was not available to her during the two years and five months that this case was pending. We are left to speculate what facts developed to prompt her motion to amend. Furthermore, Reinke's oral motion for leave to appeal came without notice to Hertel or the circuit court at the conclusion of the summary judgment motion hearing on October 4, 2005. Our review of the record reveals sufficient support for the circuit court's decision to deny Reinke's tardy motion. *See, e.g.,* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶13, 239 Wis. 2d 406, 620 N.W.2d 463 (where plaintiff did not explain why she did not seek leave to amend until nearly two

years after original complaint was filed, court properly exercised its discretion when it denied leave to amend).

CONCLUSION

¶20 We conclude that Reinke's failure to provide key financial information to Hertel during the bankruptcy proceedings resulted in the dismissal of her Chapter 13 petition. Despite the fact that Hertel has conceded negligence for purposes of this proceding, Reinke cannot establish the necessary causal link between Hertel's conduct and her alleged injury. Furthermore, we conclude that the circuit court properly denied Reinke's motion to amend her pleadings. Accordingly, we affirm the summary judgment in favor of Hertel.

By the Court.—Judgment and order affirmed.

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