COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1891 **Cir. Ct. No. 03SC000095**

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

DONAHUE'S ACCOUNTING AND TAX SERVICE, S.C.,

PLAINTIFF-APPELLANT,

V.

HOLLY RYNO,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge.[1] *Affirmed in part and reversed in part*.

¶1 ANDERSON, P.J.[2] Expert testimony is generally required to establish the standard of care and breach of duty in an accounting malpractice

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[1] Judge Paul V. Malloy entered the judgments. Judge Thomas R. Wolfgram presided over the trial.

[2] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

action, except when the breach is either so obvious that it may be determined by the court as a matter of law, or when it is within the ordinary knowledge and experience of lay persons. We reverse the judgments on Holly Ryno's counterclaim because her entitlement to "Innocent Spouse" status and the timing of her application for that status require expert testimony.

¶2 Donahue's Accounting and Tax Service, S.C., (Donahue) started a small claims action to recover $460 in professional fees for preparation and filing of income tax returns for Ryno. Ryno answered, denying that she owed Donahue for services rendered and counterclaimed, seeking to recover her entire federal and state refunds for tax year 1999, $3272, which were kept by the respective taxing authorities and applied to unpaid taxes. At the trial to the court, only Ryno and Michael D. Donahue, on behalf of the accounting firm, testified. At the conclusion of the trial, the court granted judgment to Donahue in the full amount of its fees and to Ryno on the full amount of her counterclaim.

¶3 Donahue appeals, relying upon ***Olfe v. Gordon***, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980). It asserts that Ryno failed to present expert testimony regarding the standard of care to which an accounting professional should be held and that the professional's actions, on behalf of Ryno, breached that standard of care. One of the major limitations to reviewing Donahue's assertion is that the requirement for expert testimony was not raised in the circuit court, which brings into play the general refusal of appellate courts to consider issues raised for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). This rule is one of judicial administration and does not limit the power of an appellate court in a proper case to address issues not raised in the trial court. ***Brown County v. DHSS***, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981). We will address Donahue's assertion because, as explained below, the law of

professional negligence requires the presentation of expert testimony where the activities of the professional being scrutinized present unusually complex or esoteric issues and the relaxed procedures in a small claims action do not exempt a party from meeting the burden of proof.[3]

¶4 In order to sustain a cause of action in negligence against Donahue, Ryno 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 because of the injury. *See* ***Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.***, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994). In discharging the duty of

[3] WISCONSIN STAT. § 799.209 provides:

> **Procedure.** At any trial, hearing or other proceeding under this chapter:
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> **(1)** The court or circuit court commissioner shall conduct the proceeding informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts.
>
> **(2)** The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.
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> **(3)** The court or circuit court commissioner may conduct questioning of the witnesses and shall endeavor to ensure that the claims or defenses of all parties are fairly presented to the court or circuit court commissioner.
>
> **(4)** The court or circuit court commissioner shall establish the order of trial and the procedure to be followed in the presentation of evidence and arguments in an appropriate manner consistent with the ends of justice and the prompt resolution of the dispute on its merits according to the substantive law.

reasonable care, an accountant is required to exercise that degree of knowledge, care, skill, ability and diligence usually possessed and exercised by members of the accounting profession in this state. *Cf.* WIS JI—CIVIL 1023.5; *cf. also* ***Gustavson v. O'Brien***, 87 Wis. 2d 193, 199, 274 N.W.2d 627 (1979). While not required in every malpractice case, expert testimony will generally be required to satisfy this standard of care as to those matters which fall outside the area of common knowledge and lay comprehension. ***Olfe***, 93 Wis. 2d at 180.

¶5 Stated differently, but to the same effect, expert testimony is not necessary "in cases involving conduct not necessarily related to [accounting] expertise where the matters to be proven do not involve 'special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of [persons], and which require special learning, study, or experience.'" *Cf.* ***id.*** at 181 (citation omitted).

¶6 The necessity for expert testimony is a question of law which we review de novo. ***Id.*** at 179-85.

¶7 Ryno's counterclaim is premised on her assertion that Donahue committed malpractice when her 1999 federal and state tax returns were filed prior to the filing of a request for "Innocent Spouse" status and, as a result, her refunds were applied to the tax liability of her former husband. The Federal Court of Claims describes "Innocent Spouse" status in ***Flores v. United States***, 51 Fed. Cl. 49, 51 (2001):

> As a general proposition, under section 6013(d)(3) of the Code, if a joint return is filed by a husband and wife, any tax liability deriving from that return is joint and several. In 1971, Congress enacted section 6013(e) in order to address perceived injustices associated with imposing joint and several liability on certain spouses. *See* 26 U.S.C. § 6013(e) (1983) (current version at 26 U.S.C. § 6015(b)

> (2001)). *See also* S. Rep. No. 91-1537, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 6089 (statute designed "to bring government tax collection practices into accord with basic principles of equity and fairness.") This subsection was later amended in 1984, *see* Tax. Reform Act of 1984, Pub.L. No. 98-369, 98 Stat. 494, 803 (1984), and, as amended, provided that a spouse could be relieved of tax liability if the spouse proved, *inter alia*, that: (i) the joint return contained a substantial understatement of tax attributable to "grossly erroneous" items of the other spouse; (ii) in signing the return, the spouse seeking relief did not know, and had no reason to know, of the substantial understatement; and (iii) under the circumstances, it would be inequitable to hold the spouse seeking relief liable for the substantial understatement. *See* ***Cheshire v. Comm'r***, 115 T.C. 183, 189, 2000 WL 1227132 (2000). The relief granted under this provision was typically referred to as "innocent spouse" relief.

¶8 Whether or not Donahue breached a duty to Ryno to file a claim for "Innocent Spouse" status prior to filing her 1999 tax returns requires reading, comprehending and applying the Internal Revenue Code (IRC). It is obvious to this court that the IRC is incomprehensible without the assistance of a qualified expert in tax law.

¶9 This conclusion is best supported by a short and snappy comment from Justice Jackson, once Chief Counsel for the IRS, in a dissenting opinion in ***Arrowsmith v. Commissioner of Internal Revenue***, 344 U.S. 6, 12 (1952), where he referred to federal taxation as "a field beset with invisible boomerangs."

¶10 One of America's most respected jurists, Judge Learned Hand, offers a more thoughtful observation on the law of taxation:

> In my own case the words of such an act as the Income Tax … merely dance before my eyes in a meaningless procession; cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within

> my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegal: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.

Ruth Realty Co. v. Horn, 353 P.2d 524, 526 n.2 (Or. 1960) (citing 57 YALE L.J. 167, 169 (1947)), *overruled on other grounds by* ***Parr v. DOR***, 553 P.2d 1051 (Or. 1976).

¶11 To support her counterclaim, Ryno, through her testimony, offered the hearsay statement of an IRS agent that the manner in which Donahue pursued her "Innocent Spouse" status was incorrect and would result in her loss of all refunds. This hearsay statement does not qualify as expert testimony on the standard of care an accountant owes a client. WISCONSIN STAT. § 799.209(2) forbids basing essential findings solely on hearsay statements. ***Scholten Pattern Works, Inc. v. Roadway Express, Inc.***, 152 Wis. 2d 253, 258, 448 N.W.2d 670 (Ct. App. 1989).

¶12 We reverse the circuit court's judgment in favor of Ryno's counterclaim for the reason that the standard of care Donahue owed Ryno to properly file her request for "Innocent Spouse" status fell outside the area of common knowledge and lay comprehension of the circuit court and had to be established by expert testimony. *See* ***Olfe***, 93 Wis. 2d at 180. Ryno's failure to present expert testimony dooms her counterclaim premised on accounting malpractice.

By the Court.—Judgments affirmed in part and reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.