

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2012

A. John Voelker
Acting 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. 2010AP2638

Cir. Ct. No. 2008CV5862

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LAWTON & CATES, S.C.,

PLAINTIFF-RESPONDENT,

V.

ROGER W. ALSWAGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
JULIE GENOVESE, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Roger Alswager appeals an order granting summary judgment to Lawton & Cates, S.C., in Lawton's action against Alswager for payment of attorney's fees and in Alswager's counterclaims for legal malpractice, breach of fiduciary duty, and breach of contract. Alswager contends

that there are disputed issues of fact that preclude summary judgment, that the circuit court failed to separately address each of Alswager's affirmative defenses and counterclaims, and that the court awarded Lawton costs that are not authorized by statute. We reject each of these contentions, and affirm.

Background

¶2 In December 2008, Lawton sued Alswager for fees and costs Lawton incurred while representing Alswager in postconviction proceedings following Alswager's conviction for Operating While Intoxicated (OWI), fifth offense. Alswager disputed the fees and costs claimed by Lawton, arguing that his attorney at Lawton, Lisa Goldman, had provided negligent representation during trial and had not provided any services of value in postconviction proceedings. Alswager also counterclaimed for "breach of fiduciary duty/professional malpractice/ineffective assistance of counsel," and breach of contract.

¶3 Lawton moved for summary judgment on its claim for fees and costs on grounds that Alswager could not challenge the charges that he had already paid for Lawton's services because the payment constituted an account stated, and that Alswager had not disputed that Lawton's postconviction charges were necessary and reasonable. Lawton also moved for summary judgment on Alswager's counterclaim for legal malpractice, contending that Goldman's representation was not negligent and there were no material facts in dispute. Lawton contended that Alswager could not prove his innocence following his conviction, and thus could not prevail on his malpractice claim. Lawton submitted an affidavit by Goldman averring that she acted diligently in representing Alswager in accord with the standard of care required of a criminal defense attorney and that the fees charged for postconviction proceedings were reasonable.

¶4 Alswager responded that Lawton was not entitled to fees for claimed postconviction work because Goldman never actually filed a postconviction motion, and because Lawton had not submitted time slips or other proof to support its claims of work performed. Alswager also argued that Lawton was not entitled to summary judgment on Alswager's malpractice claim because Alswager was in the process of challenging his conviction, and because there were disputed issues of fact as to whether Goldman provided professionally competent representation. Alswager argued that Lawton had not moved for summary judgment on Alswager's counterclaims for breach of fiduciary duty or breach of contract, and had not addressed Alswager's affirmative defenses. Alswager submitted his own affidavit, averring that Goldman had agreed to secure both an analysis of the blood sample taken at the time of Alswager's arrest for presence of the sleeping pill Ambien and an expert witness on Ambien for Alswager's defense of involuntary intoxication at trial, but had failed to do so. Alswager also averred that Goldman had failed to make revisions to postconviction motions and provide copies of the revised motions to Alswager in time for filing.

¶5 Lawton replied that it had moved for summary judgment on Alswager's claim for "breach of fiduciary duty/professional malpractice," and that the tort claim, however characterized, failed because Alswager had presented no evidence of innocence. Lawton also argued that Alswager had not submitted any specific evidentiary facts creating a genuine dispute over the reasonableness of the fees that Lawton charged for postconviction work.

¶6 The circuit court granted summary judgment to Lawton, explaining that Alswager had failed to establish any injury from Goldman's alleged negligence or that he was actually innocent, precluding his tort claims. The court also determined that Alswager's only dispute as to the bill from Lawton was

Alswager's claim that Goldman's work constituted malpractice or a breach of her duties to him, but that those claims failed. Alswager moved for reconsideration, which the court denied. Alswager appeals.

Standard Of Review

¶7 We review summary judgment de novo, applying the same methodology as the circuit court. *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58. Under WIS. STAT. § 802.08(2),¹ summary judgment is properly granted when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. “To make a *prima facie* case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff.” *Paul v. Skemp*, 2001 WI 42, ¶9, 242 Wis. 2d 507, 625 N.W.2d 860 (citation omitted). If the defendant makes a *prima facie* case, the court examines the submissions of the non-moving party to determine whether any material factual disputes necessitate trial. *Id.*

Discussion

¶8 Alswager contends that the circuit court improperly granted summary judgment to Lawton.² He contends the court failed to recognize that, as an initial matter, Lawton did not establish a *prima facie* case to defeat Alswager's counterclaims for legal malpractice, breach of fiduciary duty, and breach of

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Alswager contends that the court did not follow proper summary judgment methodology. Although we do not discern any error in the circuit court's methodology, this argument is irrelevant because our review is de novo.

contract. Alswager also asserts that, even if Lawton established a prima facie case, Alswager then established that there were disputed issues of material fact that necessitated a trial. We disagree.

¶9 Alswager's first cause of action in his counterclaim against Lawton, labeled "breach of fiduciary duty/professional malpractice/ineffective assistance of counsel," asserted that Lawton was liable for damages Alswager suffered due to Goldman's failure to present blood test results or expert testimony at trial. Lawton moved for summary judgment, contending that Goldman had acted diligently in attempting to obtain blood test results and an expert for trial, and that Alswager had not established his innocence to support his claim.

¶10 Lawton submitted Goldman's affidavit in support of its motion for summary judgment, which averred the following: Alswager retained Goldman to represent him as subsequent counsel in Alswager's criminal case for OWI, fifth offense, approximately two months prior to the scheduled trial date. Alswager and Goldman discussed Alswager's defense of involuntary intoxication based on mistakenly ingesting his wife's Ambien. Goldman contacted Rocky Mountain Instrumental Laboratories (RMI) and arranged for the lab to test Alswager's blood for Ambien.³ The week of trial, Goldman learned that the expert at RMI was unavailable for trial, and Goldman filed a motion to adjourn, which the court denied. Goldman unsuccessfully sought leave to appeal and a supervisory writ from this court. In support of the petitions for leave to appeal and supervisory writ, Goldman obtained an affidavit from the expert at RMI averring that he is

³ Lawton has moved to dismiss this appeal based on Alswager's assertions in his federal action against RMI. Because we affirm on the merits, we need not address the motion to dismiss. Accordingly, we deny the motion to dismiss as unnecessary.

well versed in the effects of Ambien on memory and involuntary actions and would explain those effects to the court, that the lab was in the process of testing Alswager's blood for Ambien, and that he was unavailable for the scheduled trial. The analysis of Alswager's blood sample—which showed that Alswager's blood contained evidence of Ambien consistent with what would be expected one to four hours after ingestion of a single five milligram tablet of Ambien—was not ready until the second day of trial. Because Goldman was away from her office, at trial representing Alswager, Goldman did not read the email informing her that the test results were ready until after the trial.

¶11 Alswager submitted his own affidavit opposing summary judgment.⁴ Alswager contended that, when he first met with Goldman, Goldman knew that trial was set for February 19, 2008, and that the court had stated that no further adjournments would be granted. Alswager averred that Goldman had agreed to obtain blood test results and an expert witness for trial. He averred that Goldman did not do so, and that lab results confirmed that Alswager's blood had contained Ambien the night of the OWI incident.

¶12 Later, when Alswager moved for reconsideration of the summary judgment order, Alswager submitted an affidavit by the expert at RMI that had

⁴ Alswager also submitted a declaration by the expert at RMI to supplement his opposition to summary judgment. The declaration states that the expert was never retained for trial and that the expert's opinion was that, under all the facts of the case, Alswager's ingestion of alcohol was voluntary and not a result of ingesting Ambien. Lawton points to the expert's declaration in arguing that Alswager's legal malpractice claim fails because Alswager has not offered any evidence of his actual innocence. See *Hicks v. Nunnery*, 2002 WI App 87, ¶¶32-50, 253 Wis. 2d 721, 643 N.W.2d 809 (legal malpractice claim in criminal context requires proof of actual innocence). Alswager argues, so far as we can tell, that the declaration is inadmissible because it lacks foundation and Alswager has not had the opportunity to cross-examine the expert. Lawton argues that Alswager may not argue inadmissibility of evidence that he offered. In any event, for purposes of this opinion, we need not consider the expert's declaration.

been prepared in anticipation of a postconviction motion. The expert's affidavit averred that the expert was retained in Alswager's case, that Alswager's blood contained evidence that he had ingested Ambien one to four hours before the blood sample was collected, and that ingesting one tablet of Ambien could render Alswager incapable of knowing right from wrong and could cause ingestion of liquids with no memory of the ingestion.⁵

¶13 A claim of legal malpractice or breach of fiduciary duty against an attorney requires evidence that the attorney's actions caused the client's damages. See *Groshek v. Trewin*, 2010 WI 51, ¶12, 325 Wis. 2d 250, 784 N.W.2d 163; *Hicks v. Nunnery*, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809. Here, the crux of Alswager's tort claims against Lawton is the allegation that Goldman's failure to secure the blood test results and expert testimony for trial caused Alswager's conviction. According to Lawton's summary judgment submissions, Goldman acted as a reasonable defense attorney in attempting to obtain blood test results and expert testimony for trial, the proposed expert was well versed in the effects of Ambien on memory and involuntary actions, and the blood test results received after trial revealed evidence that Alswager had ingested one Ambien tablet one to four hours prior to the time the blood sample was taken. Lawton's summary judgment submissions created a prima facie case that Goldman was not negligent, and that her actions did not cause injury to Alswager. To defeat the motion for summary judgment, Alswager was required to submit evidence to

⁵ Lawton disputes that an affidavit submitted to support a motion for reconsideration may defeat the prior summary judgment motion. For purposes of this opinion, we consider the affidavit.

establish that Goldman was negligent, and that the negligence caused Alswager injury.

¶14 We conclude that Alswager did not submit evidence to establish a causal connection necessary to defeat Lawton's motion for summary judgment. Alswager's submissions support a finding that the blood test results revealed evidence that Alswager had ingested one Ambien tablet one to four hours before the OWI incident, and that ingesting one Ambien tablet *could* lead to Alswager not knowing the difference between right and wrong and unknowingly ingesting liquids. However, Alswager has not submitted any evidence that his ingestion of Ambien *actually* led to those results in this case. Thus, Alswager has submitted no evidence that Goldman could have introduced at trial to establish that Alswager unknowingly ingested Ambien and experienced the side effects of unknowingly drinking and driving, which would have been necessary to support Alswager's involuntary intoxication defense.⁶ See *State v. Gardner*, 230 Wis. 2d 32, 37-40,

⁶ Alswager contends that Goldman has conceded the issue of causation in her affidavit by asserting that the outcome of Alswager's trial was the result of the RMI expert's failure to timely complete the blood test and his unavailability for trial, contrary to his agreement to testify. However, the question of whether facts satisfy the elements of a claim is a legal question, see *Groshek v. Trewin*, 2010 WI 51, ¶12, 325 Wis. 2d 250, 784 N.W.2d 163, and we are not bound by a party's legal concession, see *Fletcher v. Eagle River Mem'l Hosp., Inc.*, 156 Wis. 2d 165, 168, 456 N.W.2d 788 (1990). Additionally, we addressed this issue in Alswager's direct appeal in rejecting Alswager's claim that he was entitled to a new trial based on newly discovered evidence. *State v. Alswager*, No. 2008AP3046, unpublished slip op. ¶20 (WI App Apr. 20, 2011). In that case, we said:

We recognize that Alswager is arguing that he is entitled to raise an involuntary intoxication defense because, unlike a defendant who knowingly mixes a prescription sleeping pill and alcohol, he did not know he was ingesting Ambien. However, even assuming that an involuntary intoxication defense could apply to the charges of operating a motor vehicle while intoxicated or with a prohibited BAC, as contended by the State, the post-trial evidence proffered here was insufficient to entitle Alswager to a new trial based on newly discovered evidence.

(continued)

601 N.W.2d 670 (Ct. App. 1999). Notably, in Alswager’s criminal appeal we concluded that this same evidence did not provide a “reasonable probability” of a different result at a new trial.

¶15 Because there are no disputed issues of fact as to whether any negligence on Goldman’s behalf caused injury to Alswager, summary judgment was properly granted to Lawton on Alswager’s tort claims.⁷

¶16 Alswager also contends that the circuit court improperly granted Lawton summary judgment on claims that were not part of its summary judgment motion, depriving Alswager of notice and an opportunity to respond, and that Lawton’s motion was not timely because it was filed more than eight months after the filing of the complaint. *See* WIS. STAT. § 802.08(1) and (2). Alswager claims

[The RMI expert] opined only that ingesting one Ambien tablet “could” render Alswager incapable of knowing the difference between right and wrong. While he also opined about potential extreme side effects from Ambien like sleep driving and the unknowing consumption of liquids, nothing in the affidavit of [the expert] provided a basis to conclude that Alswager, in fact, experienced such side effects and consumed alcohol and drove without knowing the difference between right and wrong. Because any conclusion that Alswager suffered effects that rendered him incapable of distinguishing between right and wrong would be purely speculative, the new evidence that Alswager ingested one Ambien pill on the day of his arrest was irrelevant and immaterial to the issues in this case. The post-trial lab results and affidavit of [the expert] provide no basis to conclude that there is a reasonable probability of a different result at a new trial.

Id.

⁷ Alswager also contends that the circuit court erred in determining that he could not prove his innocence to support his malpractice claim, and that he has asserted viable claims that do not require proof of innocence, specifically, breach of contract and breach of fiduciary duty. Because there is no evidence to support causation, we need not reach the question of innocence.

that Lawton did not move for summary judgment as to Alswager's claims of breach of fiduciary duty, breach of contract, or on his affirmative defenses.

¶17 As to notice, Alswager's breach of fiduciary duty claim was intertwined with his legal malpractice claim. We do not agree that Alswager did not have notice that Lawton had moved for summary judgment on Alswager's first counterclaim, which was titled "breach of fiduciary duty/professional malpractice/ineffective assistance of counsel."

¶18 Also, Alswager's breach of contract and affirmative defense claims both appear to be claims that Goldman did not provide the legal services Alswager expected, and thus Alswager was not liable for legal fees. Lawton clearly moved for summary judgment on its claim for legal fees. Alswager's claim that he lacked notice that Lawton had moved for summary judgment as to those issues is without merit.

¶19 As to timeliness, the record reveals that the circuit court set a deadline of November 30, 2009, for all pretrial motions, and that Lawton filed its motion for summary judgment on October 21, 2009. The motion was filed within the time set by the circuit court, and was thus timely under WIS. STAT. § 802.08(1).

¶20 Next, Alswager argues that there are disputed issues of fact as to his breach of contract claim. It appears that Alswager is arguing that there was no contract for Goldman to provide postconviction representation because their fee agreement excluded an appeal and that, if a contract existed, Goldman breached

that contract by failing to prepare and file postconviction motions.⁸ First, we reject Alswager's contention that the fee agreement did not apply to postconviction proceedings. The fee agreement stated that it applied to the OWI, fifth offense, charges against Alswager, and that it did not apply to an appeal. There is no evidence that Lawton is attempting to obtain fees for work on an appeal. Rather, Lawton is attempting to obtain fees in connection with postconviction proceedings *in the trial court*, and Alswager has not explained why the fee agreement would not apply to postconviction proceedings in the trial court. We discern no disputed material facts on this issue.

¶21 Finally, Alswager contends that the court allowed Lawton costs contrary to WIS. STAT. § 814.04(2). He asserts the following costs and fees were awarded contrary to statute: (1) copies at \$.20 a page; (2) 400 minutes of telephone use under a monthly plan; (3) cost of obtaining copies from the correctional institution housing Alswager; (4) filing fees; and (5) costs incurred for depositions and subpoenas. Alswager asserts that these costs and fees were not specifically authorized under § 814.04(2), exceeded a reasonable amount, were unnecessary, or were not supported by documentation. We reject these contentions. Section 814.04(2) allows costs and fees for:

All the necessary disbursements and *fees allowed by law*; the compensation of referees; a reasonable disbursement for the *service of process or other papers in an action* when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; *amounts actually paid out for certified and other copies of papers*

⁸ It appears Alswager is also contending that there is a material factual issue as to whether the fees Goldman charged were reasonable and if legal work was actually performed. We discern no factual dispute in the record. Goldman averred the work was performed and the charges were reasonable. Alswager has not submitted any evidence to dispute those assertions.

and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

Id. (emphasis added). Thus, the costs and fees were authorized by the statute. Lawton claimed these costs and fees as incurred in this litigation, supported by affidavit. The circuit court found the bill of costs was reasonable. Alswager has not presented a persuasive argument to disturb the court's award of costs and fees in this case. Accordingly, we affirm.

By the Court.—Order affirmed.

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

