

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 28, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1354

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM J. EVERS,

Plaintiff-Appellant,

v.

ROBERT J. LERNER,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Brown County:
DONALD J. HANAWAY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William Evers appeals a summary judgment of dismissal of his suit against Robert Lerner, his former attorney. Because Evers' proofs fail to rebut Lerner's prima facie defenses, Lerner is entitled to judgment as a matter of law. We affirm the judgment.

Evers retained Lerner to represent him to defend a defamation suit filed against Evers. After the suit was settled for a \$5,000 judgment against Evers, Evers sued Lerner. Lerner moved for summary judgment. At the

hearing on the motion, the trial court carefully explored Evers' claims. Evers essentially made five claims: The first three claimed legal malpractice based upon Lerner's alleged negligence in defending the defamation suit; the fourth was breach of contract and fraud because Lerner allegedly charged an excessive fee and failed to credit Evers' payments on the bill; and, fifth, that Lerner committed theft, fraud and breach of contract by failing to apply to his bill proceeds he derived from selling Evers' car.

The trial court granted Lerner summary judgment of dismissal on all claims but the fee dispute and permitted Evers to properly amend his complaint. At the subsequent hearing, the trial court concluded that the amended complaint failed to state a claim for overpayment of fees. When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., de novo. *Cook v. Continental Cas.*, 180 Wis.2d 237, 244, 509 N.W.2d 100, 103 (Ct. App. 1993).

The trial court correctly dismissed the malpractice claims based upon Evers' statement that he would not produce expert legal testimony to establish the reasonable professional standard of care in a defamation case. Evers' allegations of legal malpractice involved decisions requiring the exercise of professional judgment based upon legal expertise and therefore require proof by expert testimony to establish the reasonable standard of professional care. *Id.* at 245-46, 509 N.W.2d at 103. Absent such proof, the claims will not stand.

Next, the trial court correctly dismissed Evers' claims based upon excessive fees and overpayment. Summary judgment methodology requires the court to first determine whether the complaint states a claim for relief. Next, the court determines whether the moving party, in this case the defendant, has produced affidavits or other proofs demonstrating a prima facie defense. If so, the court reviews the opposing party's affidavits, here the plaintiff's, to determine whether they demonstrate a disputed issue of material fact. See *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980); *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis.2d 555, 566-67, 278 N.W.2d 857, 861-62 (1979). To survive a prima facie case for summary judgment, a party may not rely on pleadings but must support his allegations with evidentiary facts. *Hopper v. Madison*, 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977); § 802.08(3), STATS.

Evers claimed Lerner charged an excessive fee because Lerner performed state public defender work for \$40 per hour. Evers, however, failed to offer evidentiary facts to rebut Lerner's affidavit that his hourly charges of \$100 were his normal rate for similar work, and that the hours billed were necessary and reasonable. Also, Evers failed to rebut with evidentiary facts Lerner's affidavit that Lerner only collected fees that were owed.

Additionally, Evers' amended complaint was similar to his original complaint, disregarding the court's direction to plead over his claim based upon overpayment. Consequently, the trial court properly exercised its discretion to dismiss the complaint for failure to coherently state a claim upon which relief may be granted. Sections 805.03 and 804.12(2)(a), STATS. In any event, based upon the record, because Evers' affidavits fail to rebut Lerner's prima facie defense, summary judgment of dismissal was appropriate.

Finally, Evers' complaint attempts to state claims of theft, fraud and breach of contract based upon Lerner's alleged improper disposal of Evers' car. Evers claims that Lerner took possession of the vehicle pursuant to the parties' agreement, that Lerner would attempt to sell it for not less than \$12,000 and apply proceeds to the \$5,000 balance owed on his fee, and return the excess proceeds to Evers. Lerner placed the vehicle with another party to facilitate sale. Lerner's affidavit establishes that he did not sell or dispose of the vehicle. Lerner's affidavit states a prima facie defense to claims of theft, fraud and breach of contract. Although Evers' affidavit states that the vehicle was improperly sold, there is no proof that it was Lerner who sold or otherwise improperly disposed of it. Evers' affidavits fail to rebut Lerner's affidavits that he did not sell or dispose of the vehicle. Consequently, Lerner is entitled to summary judgment of dismissal of the theft, fraud and breach of contract claims with respect to the vehicle. Section 802.08(3), STATS.

By the Court. — Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.