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DISTRICT IV

June 28, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1595 Zachary Oelke v. Wisconsin Lawyers Mutual Insurance Company, Hupy & Abraham, S.C. and Michael Hupy (L.C. # 2015CV2836)

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

Zachary Oelke appeals a summary judgment order that dismissed his multi-claim lawsuit against Attorney Michael Hupy, his law firm Hupy and Abraham S.C. (collectively, Hupy and Abraham), and their insurer, Wisconsin Lawyers Mutual Insurance Company (WILMIC). After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm for the reasons discussed below.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Our summary judgment methodology begins with an examination of the pleadings to determine whether the complaint states a claim and the answer joins issue. *See* ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). Assuming the pleadings are sufficient, we then examine the moving party's supporting materials (such as depositions, answers to interrogatories, admissions, and affidavits) to determine whether they establish a prima facie case for summary judgment, and if so, whether the materials submitted by the opposing party are sufficient to place in dispute any material facts that would require a trial. *See* ***id.***; *see also* WIS. STAT. § 802.08(2).

According to the complaint and summary judgment materials, Oelke suffered muscle strains, whiplash, and a brain injury in a motor vehicle accident with a Dr. Pepper-Snapple Group truck owned by Ryder Truck Rental. The driver of the Ryder truck was ticketed at the scene for running a red light. Oelke hired the law firm Hupy and Abraham to represent him in a personal injury lawsuit. The law firm obtained a settlement with the Dr. Pepper-Snapple Group and its driver, releasing them from all claims in exchange for $18,500. However, the settlement amount, minus the firm's fees, was insufficient to compensate Oelke for the extent of his injuries and ongoing medical expenses.

Oelke identified six causes of action in his complaint, claiming that: (1) Hupy and Abraham committed legal malpractice by failing to adequately represent Oelke and to complete all of the tasks it contracted to do; (2) Hupy and Abraham violated Oelke's constitutional due process right to "life, liberty and the pursuit of happiness" by failing to obtain an adequate settlement on his behalf; (3) Hupy and Abraham committed fraud by concealing discovery information from Oelke prior to presenting him with the settlement offer; (4) Hupy and Abraham breached their contract with Oelke by failing to pursue "any and all persons responsible" for

Oelke's injuries and by taking out their fee without first making him whole; (5) Hupy and Abraham's legal malpractice carrier WILMIC breached an implied covenant of good faith to Oelke by failing to adequately investigate Oelke's case, and, in particular, the extent of his brain injury; and (6) Hupy and Abraham breached an implied covenant of good faith to Oelke by failing to adequately investigate the extent of Oelke's brain injury. Oelke further alleged that, absent Hupy and Abraham's negligence, Oelke would have "prevailed in the underlying action(s)" and would not have suffered economic and emotional losses.

The circuit court issued a scheduling order setting a date by which Oelke needed to identify his expert witnesses and provide copies or summaries of their reports to the defense. Oelke submitted a witness list a few weeks after the deadline, but stated he had "not been able to secure an expert witness or a report from one." Following a hearing, the circuit court dismissed Oelke's legal malpractice claim against Hupy and Abraham on summary judgment on the grounds that Oelke had not provided expert opinion to establish a material dispute of fact that the standard of care had been violated. The court also ruled that Oelke's due process cause of action failed to state a claim upon which relief could be granted because due process claims may only be brought against the State or state actors, and that Oelke's breach of good faith claim against WILMIC failed to state a claim because Oelke had no contractual relationship with WILMIC. Although the circuit court did not separately address Oelke's additional claims against Hupy and Abraham for fraud, breach of contract, and breach of implied good faith, the court appeared to treat them as intertwined with the legal malpractice claim, and to have dismissed them for the same reason.

Oelke raises three issues on this appeal.

First, Oelke argues that his claim against WILMIC should survive summary judgment because "third party claims are cognizable against insurers in Wisconsin." As subpoints to this argument, Oelke asserts that: (a) Wisconsin is a direct-action state pursuant to WIS. STAT. § 632.24; (b) an insurer's duty of good faith extends to third parties; and (c) bad faith and joint and severable liability apply to all affiliates and subsidiaries of the Dr. Pepper-Snapple Group and their insurers. We conclude that none of the legal propositions advanced by Oelke are accurate or on point.

The direct action statute does not transfer to a liability insurer the duty of care that its policyholder owes to a third party; it merely allows a litigant to sue the insurer directly to recover covered liability amounts for the *policyholder's violation* of its duty of care, rather than requiring the policyholder to file a third party complaint against the insurer.

Similarly, any duty of good faith that a liability insurer might owe to a third party would relate to the insurer's *handling of a claim*, not to somehow fulfilling its policyholder's underlying duty of care to the third party.

And, contrary to Oelke's apparent belief, corporate entities do not share joint and several liability with their subsidiaries and affiliates merely by virtue of their association. Here, there was no dispute that the accident in which Oelke alleged he had been injured was caused by the truck driver running a red light. There is nothing in either the complaint or the summary judgment materials that would suggest a valid theory of liability against anyone other than the truck driver, his actual employer, and each of their liability insurers, up to the amounts of their own coverage—not including the coverage limits for any corporate affiliates of the truck driver's

employer, some of whom WILMIC might also have insured but none of whom had any connection whatsoever to this accident.

In short, the circuit court properly dismissed Oelke's claim against WILMIC.

Second, Oelke asserts that Hupy and Abraham "did not meet [its] burden of proof that an expert was needed" on his negligence claim. However, a defendant does not carry a factual burden of proof to demonstrate the need for an expert opinion in a particular case. Rather, that is a legal requirement. It is well established that expert testimony is usually necessary in legal malpractice cases to establish the parameters of acceptable professional conduct in a given situation. *See* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985); *see also* ***DeThorne v. Bakken***, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (Ct. App. 1995) ("Whether an attorney has breached the applicable standard of care is a question of fact to be determined through expert testimony."). We agree with the circuit court that a law firm's handling of settlement negotiations in a personal injury lawsuit is precisely the type of conduct that is outside the purview of lay people, and therefore requires expert testimony.

Oelke makes a related argument that evidence that an attorney has violated an ethical rule constitutes prima facie evidence of malpractice sufficient to survive summary judgment. Oelke cites a Michigan case for that proposition, but, as we have just explained, that is not the rule in Wisconsin, where expert opinion is required in this type of case. We therefore conclude that Oelke's failure to obtain an expert witness was fatal to his legal malpractice claim.

Oelke has not developed any argument that his breach of contract, fraud, and bad faith claims—that were all also premised upon Hupy and Abraham failing to satisfy its professional obligations to Oelke—do not similarly require expert testimony.

Third, Oelke argues that his due process rights were violated in two ways: by Hupy and Abraham's alleged mishandling of his case, and by the circuit court's denial of Oelke's motion to compel additional discovery. As to the claim in Oelke's complaint that Hupy and Abraham violated his constitutional rights, we note that there is no provision in the constitution guaranteeing anyone an absolute right to "life, liberty, and the pursuit of happiness." That is a phrase from the Declaration of Independence. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the federal or state governments from depriving any person of "life, liberty, or property, without due process of law." However, none of the defendants in this case is a government entity or other state actor. Therefore, the circuit court properly dismissed Oelke's claim that Hupy and Abraham had violated his constitutional rights. Because all of Oelke's claims were properly dismissed, Oelke's contention that he was entitled to additional discovery is moot.

IT IS ORDERED that the circuit court's order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals