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DISTRICT IV

September 12, 2024

To:

Hon. Rhonda L. Lanford
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Daniel P. Bach
Electronic Notice

Brian Maus 108205
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You are hereby notified that the Court has entered the following opinion and order:

2023AP791

Brian Maus v. Briane Pagel (L.C. # 2021CV3009)

Before Kloppenburg, P.J., Graham, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Maus, pro se, appeals a circuit court order granting summary judgment in favor of the respondent, Briane Pagel, and dismissing Maus's legal malpractice action against Pagel. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

Maus filed this legal malpractice action against Pagel after Maus lost his jury trial in the United States District Court for the Eastern District of Wisconsin. Maus, who is a prisoner, had

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

filed a federal civil rights action under 42 U.S.C. § 1983, alleging that he was subject to improper pat downs conducted by a prison guard, Robert Lade. At the request of the federal court, Pagel represented Maus on a pro bono basis at the jury trial. The jury found against Maus and in favor of Lade. Maus filed a motion for a new trial, which the federal court denied.

Maus then filed a complaint against Pagel in the Dane County Circuit Court, claiming legal malpractice and alleging that Pagel had conspired with the assistant attorney general to cause Maus to lose his case in federal court. Both parties filed motions for summary judgment. The circuit court granted Pagel’s motion for summary judgment on the ground that Maus required an expert witness to prove his claims and did not have one. The court denied Maus’s motion for summary judgment as moot and dismissed the complaint.

Maus then filed this appeal, in which he argues that the circuit court erred in granting Pagel’s summary judgment motion and dismissing Maus’s complaint.² We review summary judgment decisions de novo, applying the same methodology as the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

² Maus’s briefs and Pagel’s appendix do not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. See RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use “Arabic numerals with sequential numbering starting at ‘1’ on the cover”). This rule has recently been amended, *see* S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for eFiling. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief “will match ... the page header applied by the eFiling system, avoiding the confusion of having two different page numbers” on every page of a brief. S. CT. ORDER 20-07 cmt. at xl.

any material fact and that the moving party is entitled to judgment as a matter of law.” WIS. STAT. § 802.08(2).

“[A] successful legal malpractice case requires a plaintiff to prove two cases in a single proceeding (a ‘suit within a suit’).” *Pierce v. Colwell*, 209 Wis. 2d 355, 361, 563 N.W.2d 166 (Ct. App. 1997) (citation omitted). For Maus, this means that he must prove both that Pagel was negligent, and also “that the case would have been won absent the negligence.” See *id.* On the question of Pagel’s alleged negligence, expert testimony is “generally required to establish the standard of care applicable to an attorney ... and further to establish that [the attorney’s] conduct deviated from that standard.” *Olfe v. Gordon*, 93 Wis. 2d 173, 181, 286 N.W.2d 573 (1980) (citation omitted). There are two categories of legal malpractice cases in which expert testimony is not necessary: (1) cases “where the breach is so obvious, apparent and undisputed that it may be determined by a court as a matter of law”; and (2) cases “where the matters to be proven do not involve specialized knowledge, skill, or experience.” *DeThorne v. Bakken*, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (Ct. App. 1995). As we will discuss in further detail below, Maus’s malpractice case does not fall within either of these two categories.

Here, Maus alleged that Pagel committed legal malpractice in his federal trial by pursuing a strategy of characterizing Lade’s actions as sexual harassment instead of sexual assault, by failing to prevent the jury from hearing about Maus’s prior criminal convictions, by failing to call certain witnesses at trial, by failing to object to the presence of two uniformed prison guards at trial, and by failing to object to Lade’s counsel eliciting testimony about Lade’s military record. Maus’s allegations of legal malpractice can be summarized as a critique of Pagel’s strategic decisions and performance at trial. However, the alleged breaches are not so obvious that they could be determined as a matter of law, nor are the issues so simple that they would fall

within the common knowledge of a jury. Rather, these are nuanced issues that would require a legal expert to testify as to whether Pagel's strategic decisions and performance at trial constituted a breach of the applicable standard of care required of a lawyer presenting a civil rights case to a federal jury. *See id.* ("Whether an attorney has breached the applicable standard of care is a question of fact to be determined through expert testimony.") Maus failed to retain an expert witness to support his claims of legal malpractice and, therefore, his claims cannot proceed to trial. The circuit court properly granted summary judgment in favor of Pagel.

On appeal, Maus also renews his argument that Pagel conspired with the prosecution to lose Maus's case. To prevail on a civil conspiracy claim, "a plaintiff 'must show more than a mere suspicion or conjecture that there was a conspiracy or that there was evidence of the elements of a conspiracy.'" *North Highland Inc. v. Jefferson Mach. & Tool, Inc.*, 2017 WI 75, ¶23, 377 Wis. 2d 496, 898 N.W.2d 741 (citation omitted). "If circumstantial evidence supports equal inferences of lawful or unlawful action, then the conspiracy is not proven and the case should not be submitted to the jury." *Id.* Maus's conspiracy claim does not survive summary judgment because he makes only speculative, conclusory allegations. He fails to identify any specific facts in the record from which a jury could find that Pagel and the prosecutor conspired against him. Maus's conspiracy argument is without merit on appeal.

Maus also challenges the circuit court's decision denying his request for a court-appointed expert witness. Maus informed the court that he was indigent and could not pay for a legal malpractice expert, and asserted that the court could "collect all cost out of any winnings" if he prevailed in his suit against Pagel. The circuit court denied Maus's request, and Maus argues on appeal that it was an abuse of discretion to do so. We reject Maus's argument.

Under WIS. STAT. § 907.06(1), a circuit court “may appoint any expert witnesses agreed upon by the parties.” The parties agree that whether to appoint an expert witness is a discretionary decision. This is consistent with principles of statutory interpretation. See *State v. Matasek*, 2013 WI App 63, ¶9, 348 Wis. 2d 243, 831 N.W.2d 450, *aff’d*, 2014 WI 27, ¶9, 353 Wis. 2d 601, 846 N.W.2d 811 (“The word ‘may’ in a statute generally allows for the exercise of discretion, as opposed to the word ‘shall,’ which [often] indicates mandatory action.” (citation omitted)). A circuit court properly exercises its discretion when it “employ[s] a logical rationale based on the correct legal principles and the facts of record.” *Kohl v. DeWitt Ross & Stevens*, 2005 WI App 196, ¶28, 287 Wis. 2d 289, 704 N.W.2d 586. Here, the circuit court explained that Maus did not have a constitutional right to a court-appointed legal malpractice expert witness in a civil matter, nor was such a right granted by common law or statutory authority. Maus does not argue that the circuit court relied on any incorrect legal principle or factual error in denying his request for a court-appointed expert at no upfront cost to Maus. We are satisfied that the circuit court acted within the proper exercise of its discretion in denying Maus’s request.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals