IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY COFFEY PIERSON,

OPINION AND ORDER

Plaintiff,

01-C-0225-C

v.

TERRY R. KRAUCUNAS,
RAYMOND GERARD MEJIA,
and KRAUCUNAS LAW
OFFICE, S.C.,

Defendants.

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This is a civil action for money damages in which plaintiff Mary Coffey Pierson is suing defendants Terry R. Kraucunas, Raymond Gerard Mejia and Kraucunas Law Office, S.C., for legal malpractice. Plaintiff contends that defendant Mejia failed to represent her properly in her effort to have herself appointed guardian of her aunt and her aunt's best friend and undo the results of wills and trusts executed by the two women that reduced or eliminated her share of their estates. Plaintiff contends that defendant Kraucunas was negligent in overseeing the actions of her associate, defendant Mejia, in a situation in which Kraucunas was responsible for supervising Mejia.

The case is before the court on defendants' motions for summary judgment and on defendant Mejia's motion to strike certain testimony of one of plaintiff's expert witnesses for violation of discovery deadlines. Jurisdiction is present. The parties are of diverse citizenship and the amount in controversy exceeds $75,000.

Defendant Mejia's motion to strike the expert witness testimony will be granted. The witness's failure to include the subject matter of the testimony in his report or to produce a timely supplementation of the report require striking the testimony as a sanction. Defendants' motion for summary judgment will be granted for plaintiff's failure to show that any act or omission of defendants caused her injury. Plaintiff has failed to establish that defendants caused her any injury in connection with the guardianship of her aunt and her aunt's best friend and longtime roommate or their protective placement in a Milwaukee nursing home or that defendants did anything or failed to do anything that prevented her from challenging her aunt's and her aunt's friend's disposition of their assets after they died. Moreover, she has failed to show that she was injured by having to wait to challenge the disposition of the estates until after her aunt and her friend had died.

UNDISPUTED FACTS

Plaintiff Mary Coffey Pierson is a resident of Pennsylvania. At all times relevant to this litigation, she was a resident of a state other than Wisconsin or Indiana. Defendant

Terry R. Kraucunas is a resident of Indiana. At all relevant times, defendant Kraucunas was a resident of Wisconsin. Defendant Raymond Gerard Mejia is a resident of Wisconsin.

At all relevant times, defendants Kraucunas and Mejia were members of the Wisconsin bar, licensed to practice law in the state. Defendant Kraucunas was the owner and sole officer of Kraucunas Law Office, a Subchapter S corporation. The corporation hired defendant Mejia on or about April 11, 1994, to handle matters related to guardianship, protective placement, real estate and probate.

Plaintiff is 74 years old. She resided in the Milwaukee area for almost 50 years before moving to California upon her retirement in 1985. During the years plaintiff lived in Milwaukee, she developed a close relationship with her aunt, Mary Gloria Scofield, and with Scofield's best friend and roommate, Mary Clare Mahoney. Neither Scofield nor Mahoney had children of their own. Each served either as a godparent for some of plaintiff's children or sponsored them for confirmation. In several wills written before 1994, Scofield and Mahoney left all of their estates first to each other and then to plaintiff as residual beneficiary. Scofield outlived all of her six siblings, leaving plaintiff and two others as the only remaining blood relatives. (Presumably, the parties mean that plaintiff and two others were the only remaining relatives that stood in the same relationship to Scofield; plaintiff has a number of children who would be considered blood relatives of Scofield.)

In June 1992, Father Kenneth J. Herian, a friend of Scofield and Mahoney, talked to

Ed Kelly about ways of providing assistance to Scofield and Mahoney in managing their financial affairs. Father Herian was concerned about Scofield's declining cognitive abilities and he knew that Kelly had worked closely with the two women over the years in his capacity as a personal banker with M&I Bank. Kelly suggested a revocable trust (under which a trustee would pay bills, handle investments and prepare tax returns). He arranged for a representative of M&I Trust Company to meet with Scofield at her apartment to execute such a trust, naming M&I Trust as trustee and providing that any trust assets remaining at the time of her death were to be distributed to her estate. On February 9, 1993, both Scofield and Mahoney executed Restatements of the Revocable Trust documents and new wills, drafted for them by Susan Anderson, a lawyer. Each named the other's trust the residual beneficiary of her own trust, with the assets remaining after both had died to go primarily to Gesu Church, Milwaukee, Wisconsin.

The following year, 1994, both Mahoney and Scofield moved to the St. Camillus Retirement Center, where they lived until their respective deaths in 1998 and 1999. In October 1994, on a visit to Milwaukee from California, plaintiff met with James Walt, a lawyer, to discuss his drafting new wills for Scofield and Mahoney as well as documents revoking their 1993 trusts. Walt met with the women at St. Camillus and then drafted the documents, which Scofield and Mahoney signed on November 3, 1994. Under the terms of the documents, the 1993 trusts were revoked and M&I Trust was directed to transfer all

remaining assets in both trusts to plaintiff. Under the new wills, Mahoney left 25% of her estate to Gesu Church, 25% to St. Rose Catholic Church, 20% to plaintiff and 30% to Mahoney's nieces and nephews, with nothing for Scofield. Scofield left 75% of her estate to plaintiff and 25% to Gesu Church, with no provision for Mahoney. On November 4, 1994, Walt gave copies of the documents to M&I Trust and requested the transfer of funds to plaintiff.

On November 22, 1994, M&I Trust petitioned the Milwaukee County probate court to appoint temporary guardians for Scofield and Mahoney on two grounds: both women were suffering from infirmities of aging and plaintiff was about to remove them from the state of Wisconsin without their consent. On November 23, 1994, the Honorable John Foley appointed a guardian ad litem for Mahoney (one had been appointed for Scofield earlier) and a temporary guardian of the person for both women, appointed Dr. John Liccione to perform a psychological evaluation of both women, directed M&I Trust to maintain the status quo of both trusts and not transfer any assets pending further orders of the court and enjoined St. Camillus Center from releasing either woman to anyone other than the temporary guardian of her person.

On December 10, 1994, plaintiff met with defendant Mejia and signed a form retainer agreement with Kraucunas Law Office, S.C., that defendant Mejia modified to include specific case information. Defendant Kraucunas was not present at the meeting.

Defendant Mejia did not discuss the retainer with defendant Kraucunas either before or after it was signed; he never discussed the case or his strategy with her; and he never received any legal advice about the case from her. He told her only that his representation of plaintiff involved guardianship issues and the mental status of individuals at the time they created trusts and signed certain other documents. Defendant Kraucunas never attended any court hearings involving plaintiff.

On January 6, 1995, acting on behalf of plaintiff, defendant Mejia filed an objection to the appointment of the guardian of the person for Scofield and objected to a protective placement for her. On February 8, 1995, defendant Mejia filed petitions in Milwaukee County to set aside the revocable trusts Scofield and Mahoney created in February 1993. On February 16, 1995, M&I Trust filed a motion to require plaintiff to file a security for costs. Defendant Mejia told plaintiff that he did not think the motion would be successful and that she would not have to post a bond. In a hearing held on February 21, 1995, the court granted the motion, requiring plaintiff to pay $3,500 in each proceeding by April 1, 1995, because she was a non-resident. Defendant Mejia explained to plaintiff that if she did not post the security, she would still be a party to the guardianship and protective placement proceedings as an interested party and relative and that it was still possible that she could be appointed guardian of the person of Scofield. Plaintiff did not post the security.

On March 6, Scofield's guardian ad litem filed a motion for declaratory judgment,

seeking a determination that Scofield had not been mentally competent at the time she executed the November 3, 1994 will and revocation of trust document. On March 15, 1995, the probate court heard testimony from Dr. Liccione and others on the mental competence of Scofield and Mahoney and concluded that both were legally incompetent. The court appointed Sister Mary Howard Johnstone as the guardian of Scofield's person and Peter Brown as the guardian of Mahoney's person and scheduled a hearing to determine protective placement for both women.

On April 4, 1995, M&I Trust moved to dismiss plaintiff's petitions to set aside Scofield's and Mahoney's trusts on the ground that plaintiff had not filed the security for the costs, as directed by the court. In a letter to plaintiff dated April 7, 1995, defendant Mejia advised plaintiff that he anticipated certain expenses would have to be incurred in order to continue with the matter. One would be an assessment by an expert witness of Scofield's and Mahoney's mental competency in February 1993, when they signed the M&I Trust documents; another was taking two additional depositions and finally, "Possible Bond fees of $7,000 may need to be posted in order to avoid having the case dismissed altogether."

On April 17, 1995, Judge Foley granted M&I Trust's motion to dismiss the petitions to set aside the trusts for plaintiff's failure to post security. Defendant Mejia filed an objection to the proposed order drafted at the court's request by opposing counsel, but he said nothing about the fact that the draft order did not say whether the dismissals would be

with or without prejudice. Defendant Mejia did not recognize that the omission might be an issue then or in the future. In response to plaintiff's objection, Judge Foley set another hearing for May 11, 1995. (It is not clear whether he held such a hearing that day or changed it to May 15.) In any event, in an order dated May 11, he dismissed plaintiff's petitions, without stating whether the dismissals were with or without prejudice. Defendant Mejia informed plaintiff that she would have all the rights of a legal guardian and that the court had determined that the trust assets should remain at M&I Trust.

On May 11 or 15, 1995, Judge Foley held a hearing regarding guardianship and placement. Plaintiff was present. At the conclusion of the hearing, the judge ordered protective placement for both Scofield and Mahoney at St. Camillus and appointed plaintiff and Father Herian co-guardians of Scofield's person. Plaintiff agreed not to move Scofield and Mahoney out of state or to attempt to revoke the M&I trust documents or to remove any assets from the state of Wisconsin. The court found that the November 3, 1994 revocations of the M&I trusts were invalid (which meant that M&I Trust would continue to manage Scofield's and Mahoney's finances). Defendant Mejia asked the court to reconsider its order requiring plaintiff to file security for costs. The court refused. Mejia tried to argue that the 1993 wills and trust documents were not valid, but the court refused to consider the argument, saying that it should be taken up after the women died because it was essentially a will contest.

After the hearing, defendant Mejia told plaintiff that the petitions to set aside the M&I trusts had been dismissed but that plaintiff would be free to re-file the petitions after Scofield and Mahoney died. He did not discuss with her the difference between a decision "with prejudice" or "without prejudice" or whether it would be necessary to file a motion to reconsider Judge Foley's rulings or to appeal from those rulings.

On September 17, 1999, after both Scofield and Mahoney had died, plaintiff filed a petition to probate Scofield's November 3, 1994 will or, in the alternative, for a declaration of rights concerning the revocable trust that Scofield had created in 1992 and restated in 1993. Plaintiff alleged in the 1999 petition that the 1995 petition defendant Mejia had filed to set aside the trust had been dismissed without prejudice on April 7, 1995, for plaintiff's failure to file security for costs. Subsequently, in September 1999, plaintiff and Gesu Church entered into a settlement of the petition, with each agreeing to take 50% of the assets of Scofield's trust. Thereafter, the September 1999 petition was dismissed with prejudice.

During the course of Mejia's representation of plaintiff, he took the deposition testimony of Susan Anderson, the lawyer who drafted the wills and trust documents that Scofield and Mahoney signed in February 1993, and of Ed Kelly, the M&I Bank representative who had suggested the idea of revocable trusts to Scofield and Mahoney in 1992. Both Kelly and Anderson testified at their depositions that Scofield and Mahoney

were competent to sign wills and trust documents in February 1993.

Expert Testimony

Richard Cayo is a lawyer retained by plaintiff as an expert in legal ethics. He has no opinions about the February 17, 1995 hearing, the order resulting from that hearing requiring the posting of security for costs, the likelihood of a successful appeal from the order dismissing the petitions to set aside the trusts, the likelihood of a successful appeal concerning the protective placement order of May 15, 1995, or whether the order dismissing the petitions to set aside the trusts had the effect of being with prejudice or without prejudice. He does not have any opinions about the cause of any of plaintiff's alleged injuries or about the effect of the dismissal of the petitions to set aside the trusts. It is his opinion that defendant Mejia was negligent in a number of respects, including, among others, accepting work from plaintiff that was beyond his experience or competence; permitting the court to take up M&I Trust's challenge to the 1994 wills and the revocations of the 1993 trusts and ruling on their validity, while holding that plaintiff's challenge to the 1993 trusts and wills was premature; and failing to advise plaintiff to pay the security for costs or what the consequences would be if she did not; failing to advise her of the consequences of Judge Foley's ruling and failing to advise plaintiff to take an appeal from the ruling.

Andrew Willms is another lawyer retained by plaintiff as an expert in this case. He has no opinions concerning the conduct of defendant Kraucunas. He has no opinion that any of Judge Foley's rulings were inconsistent with Wisconsin law or would have been reversed on appeal. He has no opinion concerning an appeal of the order dismissing the petition to set aside the trusts. He has no opinion concerning the ramification of the omission of the words, "with prejudice" or "without prejudice" from the order dismissing plaintiff's petition to set aside the trusts. If the order dismissing the petition to set aside the trusts was without prejudice, Willms has no opinion whether defendant Mejia's conduct caused plaintiff any injury. He does believe that the ambiguity in the order denying the petitions to set aside the trusts resulted in significant litigation risks that had a negative effect on plaintiff's settlement position.

Willms believes that defendant Mejia should have begun an action against Susan Anderson, the lawyer who prepared the 1993 trust documents and wills, that the petitions Mejia prepared to challenge the validity of the trust documents were prepared inadequately and should have been accompanied by a brief, that Mejia should have advised plaintiff to post the security so that the validity of the 1993 trusts could have been determined before Scofield and Mahoney died, that he should have made sure that Judge Foley's May 15, 1995 rulings orders were set forth in written orders that would have indicated whether the dismissals were with or without prejudice and that he should have advised plaintiff to appeal

the court's rulings to the extent they were inconsistent with Wisconsin law. In his opinion, defendant Mejia's negligent representation of plaintiff caused her damages. Had Mejia demonstrated that Scofield was not competent in 1993 to execute a trust, then Scofield's 1974 or 1987 will would have controlled the disposition of her assets; alternatively, if Mejia had been unable to prove that Scofield was incompetent in 1993, he should have proved that the trust restatement and will she signed did not reflect her intent, in which case, the 1974 or 1987 will would have governed the disposition of her assets; alternatively, if the court found that Scofield was competent in 1993, Mejia should have been prepared to prove that she was also competent in 1994, "in which case the 1974 or 1987 Will would have governed the disposition of the assets." In addition, defendant Mejia's failure to clarify the manner in which the petitions to set aside the trusts were dismissed resulted in significant litigation risk that had an adverse effect on plaintiff's settlement position. Had defendant Mejia clarified the dismissals and learned that they were with prejudice he should have advised plaintiff to appeal immediately to avoid the bar of the statute of limitations or the doctrine of laches.

Plaintiff proffered Willms's expert report to defendants' counsel on October 31, 2001, one day before the deadline for disclosure of experts. The report said nothing about causation. Defendants' counsel scheduled a deposition of Willms for December 11, 2001. On December 6 or 7, 2001, plaintiff's counsel asked Willms to formulate an opinion on

causation and to prepare an amended report incorporating his opinions. Willms finished the report on December 11. Plaintiff's counsel gave the amended report to defendants' counsel at Willms's deposition that same day.

Neither Willms nor Cayo considers himself an expert with respect to either guardianship or protective placement issues. Neither criticizes defendant Mejia with regard to plaintiff's ultimate appointment as co-guardian of Scofield's person.

OPINION

A. Motion to Strike Expert Testimony

Before taking up defendants' motion for summary judgment, it is necessary to address defendant Mejia's motion to strike Andrew Willms's testimony and expert report, as it relates to causation, for non-compliance with this court's preliminary pretrial order and the Federal Rules of Civil Procedure. The pretrial order provides that all expert disclosures are to comply with the requirements of Fed. R. Civ. P. 26(a)(2). Subsection (B) of Rule 26(a)(2) provides that "[e]xcept as otherwise stipulated or directed by the court," the expert disclosure is to be "accompanied by a written report prepared and signed by the witness." This report is to "contain a *complete* statement of all opinions to be expressed and the basis and reasons therefor." Id. (emphasis added.) Plaintiff violated this requirement when her counsel supplied defendants' counsel with an expert report on October 31, 2001, that did

not contain a complete statements of all the opinions Willms was going to express. She could have cured the problem had she furnished defendants' counsel with a timely supplementation but she did not. Instead, she produced the supplemental report at Willms's deposition, far too late for defense counsel to prepare to depose Willms on his opinions.

In plaintiff's brief in opposition to the motion to strike, she refers to the difficulty her counsel had in scheduling defendant Mejia's deposition and says that Willms "did not have the benefit of time to review Mr. Mejia's transcript prior to rendering the opinions contained in his October 31, 2001 report." Plt.'s Br. in Opp. to Dft. Raymond Mejia's Mot. to Strike, dkt. #78, at 3. This may be true, but it is irrelevant. The critical question is why seven weeks passed between the production of the October 31, 2001 report and the disclosure to defendants' counsel of the new opinion on causation. Plaintiff is disingenuous in this regard, saying that "Mr. Willms, in the time between his October 31st report and his deposition, reviewed Mr. Mejia's transcript and felt the need to supplement his report by providing an additional opinion regarding the effect of Mr. Mejia's legal services on [plaintiff's] case." Id. Willms testified at his deposition that his formulation of an opinion on causation came at the request of plaintiff's counsel only four to five days before his deposition. Regardless whether the delay in the production of the supplemental opinion was Willms's fault or that of plaintiff's counsel, the delay violated Rule 26(a)(2)'s requirement that a complete report be produced at the time of production of the expert. Rule 26(e)(1) provides for

supplementation of reports; it is implicit in the provision that the supplementation be timely. The rule does not anticipate that supplementation will be withheld until the expert's deposition.

Plaintiff had fair warning that violating the Federal Rules on expert witness disclosure could result in sanctions. Defendant Mejia's motion to strike Andrew Willms's testimony on causation will be granted. (As will become apparent, this decision does not affect the outcome of the motions for summary judgment; even if Willms's testimony were to be considered, plaintiff has failed to make the showing she must make to defeat the motions.)

B. Motions for Summary Judgment

1. Plaintiff's claim for emotional damages

In her complaint, plaintiff alleges that she suffered significant emotional distress as a result of defendants' mishandling of her matter. In her brief in opposition to defendants' motions for summary judgment, dkt. #72, at 22, she refines her allegation, saying that she is "requesting compensation for damages as a result of being separated from her aunt, the battle for guardianship and being the recipient of insults from M&I." In an affidavit, dkt. #76, at 17-18, she adds two more injuries: being unable to take her aunt and Mahoney to California to live with her and enduring insulting accusations from the staff at St. Camillus.) Plaintiff does not explain why she attributes to defendants these injuries for which she is

requesting compensation. The decision to appoint guardians for Scofield and Mahoney was made before plaintiff met with defendant Mejia. The decision that Scofield and Mahoney should remain in Milwaukee at the St. Camillus nursing home was made by Judge Foley after he had heard extensive evidence about what plaintiff could provide and what Scofield and Mahoney needed. Plaintiff does not identify any act or omission of defendant Mejia that would have caused the judge to reach a different decision. The "battle for guardianship" was the "battle" she initiated when she retained Mejia; she does not explain why such a battle would not have ensued had she hired a different lawyer. Apparently, the "insults from M&I" and from personnel at the nursing home took the form of comments about her being a "gold digger" who did not have Scofield's and Mahoney's best interests at heart. She does not explain how any negligent act of Mejia caused M&I Trust or the nursing home staff to view her in this manner.

Not only does plaintiff fail to explain the connection between defendant Mejia's alleged negligence and her emotional damages, she has produced no expert evidence of causation. Neither of her two experts has criticized defendant Mejia's work as it related to the guardianship and protective placement issues raised in the hearings before Judge Foley. In fact, both experts disclaim any expertise in guardianship or protective placement matters. (It is irrelevant that Willms's opinion on causation was struck, because none of his opinions relate to this claim.)

Defendants seek summary judgment on plaintiff's emotional damages claim on another ground, in addition to the lack of causation. They argue that Wisconsin does not recognize the tort of negligent infliction of emotional damages in the context of legal malpractice. Plaintiff responds by asserting that the absence of any Wisconsin cases means that the court is not precluded from awarding such damages but may reach its own decision by looking to cases decided in other jurisdictions.

The critical flaw in plaintiff's argument is that she is making it to the wrong court. Plaintiff wants the court to expand the Wisconsin law on negligent infliction of emotional damages to include damages caused by legal malpractice. This would be a new departure for the Wisconsin courts. A plaintiff who wishes to succeed on a novel state law claim must present her claim in state court. Shaw v. Republic Drill Corp., 810 F.2d 149, 150 (7th Cir. 1987). A federal court is not the place in which a litigant should seek expansion of state law; the federal court is constrained to follow state law, not to make it or to speculate on trends in state law. Faced with deciding between expanding the law to make damages available to persons who suffer emotional distress caused by legal negligence and maintaining the restrictive view that such distress is not compensable, a federal court's response must be to choose the narrower, more restrictive path. Todd v. Societe Bic, S.A., 21 F.3d 1402, 1412 (7th Cir. 1994) (en banc).

2. Plaintiff's claim for the diminution of her anticipated inheritance

In order to prevail on her claim that defendants and defendant Mejia in particular were negligent in representing her in the various proceedings, plaintiff must establish (1) the relationship of attorney and client; (2) the acts constituting the alleged negligence; (3) the causal connection between the negligence and the injury; and (4) the fact and extent of injury. Lewandowski v. Continental Casualty Co., 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979). To make the last showing, it is usually necessary for the plaintiff to prove that "'but for the negligence of the attorney, [plaintiff] would have been successful in the prosecution or defense of an action.'" Id. (quoting 7 Am. Jur. 2d § 188 at 156 (1963)).

The parties do not dispute that plaintiff had an attorney-client relationship with defendants. As to the "acts constituting the alleged negligence," it is not enough for plaintiff to identify matters she thinks could have been handled better or to cite an adverse result. She must establish that defendants breached a duty owed to her. That duty is "to exercise a reasonable degree of professional care, skill, and knowledge." Peck v. Meda-Care Ambulance Corp., 156 Wis. 2d 662, 669, 457 N.W.2d 538 (Ct. App. 1990) (citing Malone v. Gerth, 100 Wis. 166, 75 N.W. 972, 974 (1898)). For the purpose of this motion only, defendants do not dispute plaintiff's contention that defendant Mejia did not exercise a reasonable degree of professional care, skill and knowledge in representing plaintiff. They argue that even if plaintiff could show negligence on defendant's part, she has no evidence

that his negligence was the proximate cause of any injuries that plaintiff incurred. Relying on Lewandowski, 88 Wis. 2d at 277, 276 N.W.2d at 287, defendants maintain that plaintiff has produced no evidence to prove that she would have obtained the full amount of Scofield's and Mahoney's estates *but for* the negligence of her attorney.

Plaintiff has alleged that her injury is losing the full amount of Scofield's and Mahoney's estates that had been left to her in prior wills executed by the two women. She estimates that this amount would have been about $1,800,000. She contends that but for defendants' negligence, she would not have had to split the estates with Gesu Church and would not have incurred substantial additional legal fees. (Plaintiff devotes the major portion of her brief to arguing that her settlement of her claim does not deprive her of the right to sue for injuries. Defendants do not argue to the contrary. They concede that if plaintiff was forced to settle for less than she could have received but for defendants' negligence, she was injured. Their only dispute at this stage of the litigation is over causation.)

Plaintiff has a number of theories about what defendant Mejia did wrong or failed to do during the 1995 proceedings that caused her economic injury. All of these fall away if she cannot prove she was barred from pursuing these theories in 1999 because of Mejia's failure to insure that Judge Foley's May 11, 1995 order specified that the dismissal of plaintiff's petitions to invalidate the February 1993 trusts was without prejudice. She has

produced no evidence to prove that without a bar to going forward, she could not have proceeded in 1999 with her petition to probate the will Scofield executed in November 1994. She has not shown that she would have been prevented in 1999 from adducing evidence of Scofield's mental state in February 1993 or, if successful in showing that Scofield had not been competent to execute trusts and wills in 1993, she could not have tried to prove up one of the earlier wills under which Mahoney's estate went to Scofield and Scofield's estate went to plaintiff.

Presumably, plaintiff would not have been allowed to adduce evidence that Scofield was competent in 1994 in light of Judge Foley's 1995 ruling that she was incompetent then, but plaintiff has no evidence of competency in 1994 anyway. The expert she hired for this litigation has expressed the opinion that both Scofield and Mahoney were incompetent in November 1994 and in February 1993. (Plaintiff's legal experts have suggested that defendant Mejia was negligent because he failed to pursue the argument that if Scofield and Mahoney were competent in 1993, they were competent in 1994. The experts seem not to have appreciated that if this argument would be successful in this litigation, plaintiff might be unable to show any damages. The fact is that plaintiff would have received less money under the 1994 wills than she received from her settlement with Gesu Church. Plaintiff asserts that her aunt's estate was about $993,220 and Mahoney's about $872,765. If this is accurate, plaintiff's share of the estate under the settlement would have been about

$933,000; under the terms of the 1994 wills, which included no pour-over provision from one testator to the other, plaintiff would have received only $919,468 (20% of Mahoney's estate and 75% of Scofield's).)

Plaintiff has not adduced any evidence to show that the four-year wait caused her any injury, in and of itself. Whether she proceeded in 1995 or in 1999 with the challenge to the 1993 trusts and wills, she would have to post security, conduct discovery, hire an expert and take all the other steps necessary to prepare for trial. She has adduced no evidence to show that she was unable to find an expert witness who could express an opinion on Scofield's and Mahoney's mental status in February 1993 or that any crucial fact witness was no longer available.

Thus, plaintiff's claim comes down to showing that the ambiguity in Judge Foley's order barred her from challenging the 1993 documents in 1999. However, she has not cited any admissible evidence to support her contention that defendant Mejia's failure had this effect. She has not named any expert who can testify that she could not have persuaded a court to allow the re-filing of the petitions to set aside the revocable trusts that Scofield and Mohoney signed in 1993. Defendants have cited Haselow v. Gauthier, 212 Wis. 2d 580, 591, 569 N.W.2d 97 (Ct. App. 1997), for the proposition that Wisconsin law permits the state courts to dismiss cases with prejudice only on a finding of egregious conduct or bad faith. They argue that it is plain from this case that the default rule is "without prejudice"

when an order is silent on this point.

Plaintiff has no expert witness who will testify that the holding in Haselow would not have applied to the May 1995 order entered by Judge Foley. She has cited Wis. Stat. § 805.03, which provides that a dismissal under that section for failure to prosecute or comply with procedure statutes operates as a dismissal upon the merits unless otherwise specified in the order. She does not cite the additional language in the statute, which provides that a dismissal on the merits may be set aside for the reasons set out in Wis. Stat. § 806.07. Section 806.07 offers litigants an escape hatch. It authorizes a court to set aside a dismissal with prejudice when a showing of good cause for the delay has been made. Marshall-Wisconsin Co. v. Juneau Square, 139 Wis. 2d 112, 133, 406 N.W.2d 764 (1987). Plaintiff has no expert witness who will testify about the effect of Haselow and § 805.03 and their applicability to her situation or who will testify that even if Judge Foley's order is considered to have been with prejudice, no Wisconsin court would set it aside after reading the transcript of the hearing in which Judge Foley reiterated his belief that plaintiff's challenge to the 1993 trusts was premature while the grantors of the trust were still alive.

Plaintiff argues that both she and her son *believed* in 1999 that the existence of Judge Foley's dismissal order barred them from challenging the 1993 trusts and wills. Their statements of belief are irrelevant. They must show that it was objectively reasonable for them to hold this belief. For this, they need expert testimony, because lay jurors cannot be

expected to know how Wisconsin courts treat orders that do not specify with or without prejudice. Indeed, no one would expect them to know even what "prejudice" means in this context. Without expert testimony for assistance, no jury could evaluate the reasonableness of plaintiff's belief.

Despite the need for this kind of expert testimony, neither of the experts plaintiff has retained is in a position to give it. Expert witness Cayo testified in his deposition that he does not know what the law is with respect to a dismissal order that does not specify whether it is with or without prejudice. Expert witness Willms expressed no opinion on the effect of such an order except in the cause portion of his report that I have struck and there he gives only a conclusion:

> The uncertainty which Mejia allowed to exist with regard to the grounds on which the Petition to set aside the trust was dismissed and whether the dismissal was with or without prejudice resulted in significant litigation risks which negatively affected [plaintiff's] settlement position.

In his deposition, Willms admitted that he did not know what the effect would be of an order of dismissal that did not specify whether it was with or without prejudice. Willms Dep., Exh. G, Affid. of Scott Halloin, dkt. #77, at 15, 159.

As defendants point out, the great likelihood is that plaintiff agreed to settle with Gesu Church because of the strong possibility that she would be unable to prove that Scofield and Mahoney were incompetent in 1993, given the testimony of Kelly and

Anderson and the possibility that even if she succeeded in doing so, she would not be able to prove up a valid prior will. In the latter event, she would inherit under the laws of intestacy, having to split her aunt's estate three ways or more, depending on how many collateral descendants Scofield left.

I conclude that defendants' motions for summary judgment should be granted on plaintiff's claim that defendant Mejia's negligence in representing her in her challenges to Scofield's and Mahoney's revocable trusts caused her injury in the form of losing a portion of her anticipated inheritance.

3. Negligence of defendants Kraucunas and Kraucunas Law Office, S.C.

Because the negligence of defendants Kraucunas and Kraucunas Law Office is derivative of defendant Mejia's negligence, plaintiff's claim against them falls with the finding that she cannot establish any injury caused by defendant Mejia's representation of her. Plaintiff has not alleged that defendant Kraucunas was negligent in any respect except that of supervising Mejia; defendant Kraucunas cannot be found negligent in that respect without a showing that Mejia's negligence was the cause of any injury to plaintiff.

Defendant Kraucunas argues that she did not supervise defendant Mejia while he was representing plaintiff or even discuss the matter with him and for that reason, she should be subject to the protections of Wis. Stat. § 180.1915. This statute protects shareholders of

a service corporation from the "omissions, negligence, wrongful acts, misconduct and malpractice of any person who is not under his or her actual supervision and control *in the specific activity in which the omissions, negligence, wrongful acts, misconduct and malpractice occurred.*" (Emphasis added.) Plaintiff argues that defendant Kraucunas cannot use the statute to shield her from her own negligence, which was letting Mejia take on the representation in the first place, when he had never had a case involving a will contest (or its equivalent) and had never dealt with a guardianship involving so much money.

Because plaintiff has failed to show causation, it is not necessary to reach the question whether defendant Kraucunas is protected from personal liability by the provisions of § 180.1915 if her alleged negligence consists of failure to supervise an associate in circumstances in which she should have known the associate was not qualified to take on a particular representation. The motion for summary judgment will be granted as to defendants Kraucunas and Kraucunas Law Office, S.C.

ORDER

IT IS ORDERED that defendant Raymond Gerard Mejia's motion to strike the expert report of Andrew Willms insofar as it relates to causation is GRANTED; the motion of defendants Mejia, Terry R. Kraucunas and Kraucunas Law Office, S.C. for summary

judgment is GRANTED with respect to plaintiff Mary Coffey Pierson's claims for money damages for emotional distress and loss of her expected inheritance resulting from defendants Mejia's and Kraucunas's alleged negligence. The clerk of court is directed to enter judgment for all defendants and close this case.

Entered this 20th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge