

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2009

David R. Schanker
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. 2008AP1422

Cir. Ct. No. 2005CV176

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WILLIAM H. TELETZKE AND MARTA ALICE TELETZKE,

PLAINTIFFS-APPELLANTS,

v.

DOUGLAS C. NICKEL D/B/A NICKEL CONTRACTING,

DEFENDANT-RESPONDENT,

**MARIE C. KEENAN, KATHELINE WILLIAMS,
DONNA ARNOLDUSSEN, AND MICHAEL KEENAN,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. William Teletzke and Marta Teletzke appeal from the order of the circuit court granting summary judgment to Douglas Nickel. The Teletzkes argue that the circuit court erred when it heard and granted Nickel’s motion for summary judgment, and when it barred them from taking Nickel’s deposition. Because we conclude that the circuit court properly heard and decided Nickel’s motion, and the court properly declined to rule on the request to depose Nickel at that time, we affirm.

¶2 The underlying action involves a suit for negligence and fraud based on Nickel’s alleged failure to discover a faulty well. In 2004, the Teletzkes purchased a home from Marie Keenan. The offer the Teletzkes made to purchase the home was contingent on an inspection of the well and septic system. Douglas Nickel, d/b/a Nickel Contracting, was hired to do the inspection. Nickel found that the well functioned properly. The inspection report also noted that “the inspection of this well was a visible one.” On the day the Teletzkes moved into the home, they discovered that there was low water pressure and sand in the water. The Teletzkes eventually hired another company to fix the problem. That company discovered that there was a hole in the well casing, and the well had to be replaced.

¶3 The Teletzkes then brought this action against Nickel and Keenan, alleging negligence, fraud, breach of warranty, and misrepresentation. In the meantime, Marie Keenan died and was replaced by her beneficiaries (hereafter collectively referred to as “the Keenans”). The Teletzkes filed an amended summons and complaint in April 2007. The Keenans filed a motion for summary judgment on December 7, 2007. On January 22, 2008, the circuit court entered a scheduling order for the summary judgment motion. The order stated, in relevant part, that: “The other parties intending to oppose or support the Motion for

Summary Judgment shall file their briefs and affidavits on or before February 14, 2008.” The court also set a hearing date. On February 11, 2008, about two weeks after the statutory deadline had passed, Nickel filed a motion for summary judgment. Nickel’s motion stated that he was joining and supporting the motion filed by the other defendants, and joined in their brief. Nickel’s motion included his affidavit.

¶4 The Teletzkes objected to Nickel’s summary judgment motion as being untimely under the statutory deadline. Nickel responded saying that his motion was timely within the scheduling order, that he had merely joined in the Keenans’ motion, and that there was no prejudice to the plaintiffs because they were responding to the Keenans’ summary judgment motion. The Teletzkes continued to object to Nickel’s summary judgment motion.¹

¶5 The court held the hearing on March 4, 2008. At the hearing, the court asked counsel for the Teletzkes whether they had an expert witness. The court explained that they would need an expert witness to show that the hole in the well casing had been there before the inspection and that it would have been “observable.” The Teletzkes’ counsel responded that the evidence was there the day his clients took possession, because there was a “dump truck load of sand” in the well. The court said that was not sufficient for summary judgment, and that “it isn’t obvious without an expert witness to tell me that it’s obvious.” The court told the Teletzkes’ counsel that it would give them an opportunity to get an affidavit from an expert. The Teletzkes’ counsel then said that he needed to take

¹ The Teletzkes filed their own affidavit in opposition to the motion, and the defendants moved to strike the affidavit as untimely filed.

Nickel's deposition, and the court refused to allow him to do it until he had filed an affidavit from an expert witness. Counsel for the Teletzkes agreed to file an affidavit. The court gave him thirty days, until April 4, 2008, to submit an expert's affidavit. Counsel again agreed.²

¶6 The Teletzkes did not file an affidavit from an expert. The other defendants wrote the court stating that the affidavit had not been filed, and asking the court to grant summary judgment to all of the defendants. On April 25, 2008, the court granted summary judgment to Nickel and the other defendants, without holding another hearing. The court found that the Teletzkes had not filed an affidavit from an expert witness as the court had required, and had failed to prosecute the action.

¶7 The Teletzkes appeal from the order granting summary judgment to Nickel. They argue that the court erred because Nickel's motion for summary judgment was untimely under the statute, the court's order "barring" them from deposing Nickel was unlawful, and the court granted Nickel's motion without a proper hearing.

¶8 The Teletzkes assert that the circuit court erred when it allowed Nickel to file a motion for summary judgment beyond the eight month deadline established by WIS. STAT. § 802.08(1) (2007-08).³ The circuit court, however, had the discretion to allow Nickel's summary judgment motion beyond the statutory

² The court also denied the defendants' motion to strike the Teletzkes' own affidavit. [R.37:11]

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

deadline. *See Lentz v. Young* 195 Wis. 2d 457, 465-66, 536 N.W.2d 451 (Ct. App. 1995) (trial courts have the inherent authority to allow a party to file a summary judgment motion beyond the eight-month deadline in WIS. STAT. § 802.08(1)). We see no basis for concluding that the circuit court did not properly exercised its discretion when it heard Nickel's motion.

¶9 The Teletzkes also argue that the circuit court erred when it barred their statutory right to discovery. The circuit court told the Teletzkes' counsel that it would not allow Nickel to be deposed until after the Teletzkes filed an affidavit from an expert, and then it would decide "whether or not [they had] enough to go to trial." The circuit court reasoned that if the Teletzkes could not produce the affidavit from an expert, they did not have a case against any of the defendants, and there was no need to depose Nickel. The Teletzkes, however, did not file such an affidavit, nor did they ask the court for an extension of time in which to file an affidavit. The circuit court properly declined to rule on the discovery request until after the Teletzkes submitted an expert's affidavit.

¶10 The Teletzkes' final argument is that the circuit court should not have granted Nickel's summary judgment motion without holding a hearing. We do not decide whether the court was obligated to schedule such a hearing. Rather, we conclude that the Teletzkes have not explained how they were substantially affected by the alleged error. *See* WIS. STAT. § 805.18(2). The court had the discretion to allow a late motion, and Nickel's motion raised the same issues raised in the motion that was timely filed by the other defendants. Further, the court held a hearing and explained to the Teletzkes' counsel that an expert's affidavit was needed if they were to survive summary judgment. The Teletzkes' counsel agreed, and said he would provide such an affidavit within thirty days. Counsel did not provide the affidavit, did not move for an extension of time, and

did not ask to have a hearing scheduled. Under these circumstances, we are not convinced that the defendants' summary judgment motion would have been denied had the hearing been scheduled. Because the Teletzkes have not established they were affected by the alleged error, we reject their argument that the circuit court's order must be reversed on this basis.

¶11 Further, we reject the argument that Nickel was not entitled to summary judgment. We conclude that Nickel was entitled to summary judgment for the same reason the other defendants were entitled to summary judgment: the Teletzkes did not provide the court with an affidavit from an expert by the deadline stated and in fact did not file an affidavit at all.⁴ If the Teletzkes had some reason unique to Nickel to defeat his motion, they should have argued it to the circuit court and again to us in their brief. They have not done so. Consequently, we conclude that the circuit court properly granted summary judgment to Nickel. We affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

⁴ The Teletzkes do not argue that the circuit court erred by requiring them to file an expert's affidavit.

