COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP891-FT **Cir. Ct. No. 2006CV68**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BERT ROEHL,

PLAINTIFF-APPELLANT,

V.

SHARON GISSELMAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded for further proceedings*.

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

¶1 PER CURIAM.[1] Bert Roehl appeals an order granting Attorney Sharon Gisselman summary judgment on Roehl's legal malpractice action against her. Roehl challenges the circuit court's determination that there was no dispute of material fact regarding whether Gisselman negligently failed to collaterally challenge a prior OWI conviction while representing Roehl on an OWI-5th charge. For the reasons discussed below, we reverse the summary judgment order, and remand for further proceedings.

BACKGROUND

¶2 In 2000, Gisselman represented Roehl on a case involving, among other things, a charge of a fifth or subsequent offense of operating a motor vehicle while intoxicated (OWI-5th) within the past ten years. The four prior OWI-related convictions relied upon by the State dated from 1990 (OWI-1st), 1993 (OWI-2nd), 1994 (refusal to take a chemical test), and 1998 (OWI-1st).

¶3 Roehl contends that the 1998 municipal judgment could have been collaterally challenged because that case was erroneously charged as an OWI-1st, which is a civil matter, rather than a misdemeanor OWI-2nd based upon the five-year look-back period that was in effect at that time. *See* ***City of Kenosha v. Jensen***, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994) (setting aside as void an erroneously charged OWI-1st conviction on the grounds that a municipal court did not have jurisdiction over what should have been a criminal OWI case). Roehl presented an affidavit from an expert witness with extensive experience in OWI cases stating that the decision not to collaterally attack the 1998 conviction fell

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2005-06). All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

short of the degree of skill and care ordinarily exercised by Wisconsin lawyers in similar circumstances—even if the 1998 offense would subsequently have been recharged as a criminal offense. Roehl further argues that he could have prevailed on the merits of the 1998 charge, which was entered upon a default, because someone else was actually driving his car during that incident. Gisselman did not pursue a collateral attack on the 1998 conviction, however, and Roehl ultimately entered a plea to the OWI-5th charge.

STANDARD OF REVIEW

¶4 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

DISCUSSION

¶5 To prevail in an action for legal malpractice, a litigant must establish: (1) the existence of an attorney-client relationship; (2) acts or omissions constituting negligence; (3) causation; and (4) damages. ***Hicks v. Nunnery***, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809. The negligence element, in turn, requires a showing that an attorney violated the duty to exercise that degree of care, skill, and judgment usually exercised under like or similar circumstances by lawyers licensed to practice in this state. ***DeThorne v. Bakken***, 196 Wis. 2d

713, 717, 539 N.W.2d 695 (Ct. App. 1995). An attorney will not be held liable for those errors of judgment that are made in good faith, are well founded, and are in the best interests of the client. ***Id.*** at 718. Whether an attorney has breached the applicable standard of care is a question of fact to be determined through expert testimony, unless: (1) the breach is so obvious, apparent, and undisputed that it may be determined by a court as a matter of law; or (2) the matters to be proven do not involve specialized knowledge, skill, or experience. ***Id.***

¶6 To survive summary judgment, Roehl had to present materials sufficient to create at least a material dispute of fact on each element. Gisselman argues that the summary judgment materials were insufficient to show that she committed any acts or omissions constituting negligence. Roehl counters that there are material factual disputes regarding: (1) whether Gisselman's actual reason for failing to raise a collateral attack was her failure to recognize that Roehl's 1994 conviction fell within the five-year look-back period for the 1998 conviction; (2) whether Gisselman's purported reason for failing to raise a collateral attack—namely, that doing so could subject Roehl to additional criminal penalties if the 1998 conviction were vacated and recharged—was outside the professional standard of care, given the felony penalties Roehl faced in the 2000 case in the absence of a collateral attack; and (3) whether Gisselman's failure to raise a collateral attack was also outside the professional standard of care in light of Roehl's claim that someone else was actually driving his car during the 1998 incident.

¶7 Addressing the last claim first, we note that Roehl's affidavit does not actually allege that he told Gisselman while his 2000 case was pending that someone else had been driving his car during the 1998 incident. Rather, Roehl claimed only that he had informed his attorney at some unspecified time that he

was "not guilty of the 1998 offenses, and explained the circumstances of [his] conviction for them." Furthermore, Vicky Roehl's affidavit, in which she averred that she was driving during the 1998 incident, did not state that she had ever informed Gisselman of her claim. Thus, while Roehl's expert does give the opinion that it "seems unlikely" that the 1998 offenses would result in convictions if recharged, given the wife's assertion that she was driving along with the fact that the police had no witness who had actually seen Roehl driving, Roehl's affidavits do not directly dispute Gisselman's contention that Roehl did not inform her, during her representation of him on the 2000 case, that he was not actually driving the car during the 1998 incident.

¶8 Absent specific information on Roehl's purported defense to the 1998 charge, it would have been reasonable for Gisselman to proceed under the assumption that raising a collateral challenge in the 2000 case would expose Roehl to additional criminal penalties if the 1998 judgment were set aside and recharged as a criminal matter. It does not automatically follow, however, that Roehl would have been in a worse position if the 2000 charge had been reduced to OWI-4th and the 1998 incident had been recharged than he would have been if the 2000 case had proceeded as an OWI-5th.

¶9 To begin with, neither party has provided an analysis of what Roehl's sentence exposure would have been if the 1998 municipal judgment were set aside and recharged as a criminal matter. Would the 1998 incident have been recharged as an OWI-2nd based on the five-year look-back period which was in effect at the time of the offense? Would it have been charged as an OWI-5th based on the ten-year look-back period which would have been in effect by the time of recharging, assuming that the 2000 case proceeded to sentencing before the 1998 matter was resolved? And, if so, would there be any ex post facto problem based

on the changed look-back period? The parties do not dispute that a successful collateral attack downgrading the 2000 charge from OWI-5th to OWI-4th would have reduced Roehl's immediate sentence exposure by four years. Unless recharging the 1998 case as a criminal matter would have resulted in more than four years of additional sentence exposure, Roehl's total sentence exposure would not have been any greater following a successful collateral attack.

¶10 Furthermore, neither party has addressed the possibility that the 1998 municipal judgment could have been set aside and recharged even if no collateral challenge were raised in the 2000 case. The municipal court had inherent authority to vacate the void judgment whenever the matter was brought to its attention. ***Jensen***, 184 Wis. 2d at 98. Therefore, if Roehl were to have incurred yet another OWI after the 2000 case had been resolved but before the statute of limitations on the 1998 incident had expired, and the new case had prompted a new review of his record leading to discovery of the jurisdictional problem in the 1998 case, Roehl could have faced the reinstated 1998 charge while still having an OWI-5th conviction on what should have been an OWI-4th.

¶11 Regardless of the actual exposure involved, Gisselman also asserts that she had a reasonable chance to get a minimal sentence for Roehl on the 2000 case as charged, but that the State would have aggressively pursued higher sentences on both the 1998 and 2000 cases if she had pursued a collateral challenge on the 2000 case. However, it does not necessarily follow that the circuit court would have imposed higher sentences, even if the State pursued them. Moreover, even if that possibility existed, the question remains whether it was a well-founded defense strategy, in the client's best interest and within the legal standard of care, to fail to take steps to reduce Roehl's sentence exposure by a certain four years against the possibility that Roehl might subsequently face

additional exposure. Roehl has proffered expert opinion bearing on this point, placing material facts in dispute.

¶12 In sum, we are not persuaded that the reasonableness of the defense strategy in this case can be determined as a matter of law on summary judgment. Rather, absent possible further summary judgment proceedings, it is a question for the fact finder whether Gisselman violated the applicable legal standard of care by failing to pursue a collateral challenge. Therefore, we must set aside the order granting summary judgment to Gisselman and remand this case for trial.

By the Court.—Order reversed and cause remanded for further proceedings.

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