COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2220 **Cir. Ct. No. 2012CV002757**

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

GARY PLATH,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

JEFF SCOTT OLSON, JEFF SCOTT OLSON LAW FIRM, S. C. AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Gary Plath appeals from a judgment dismissing his legal malpractice claim against Attorney Jeff Scott Olson and Olson's law firm. Olson cross-appeals, arguing that the circuit court erred in denying his motion for

sanctions against Plath for filing a frivolous claim. We agree with the circuit court that Plath's failure to show that an attorney-client relationship existed between himself and Olson is detrimental to his legal malpractice claim. However, we also conclude that Plath's claim was not frivolous. As such, we affirm.

BACKGROUND

¶2 The genesis of this case is a judgment in a prior lawsuit, ***National Civil Liberties Research Foundation, Inc. v. Merkel***, Waukesha County Circuit Court Case No. 2008CV1187, in which the circuit court sanctioned Plath for non-compliance with court orders. At issue in that case was who controls the National Civil Liberties Research Foundation, Inc. ("NCLRF") and its substantial assets. The facts in ***Merkel*** relevant to the parties' appeals are as follows.

¶3 In April 2008, David Kanz filed an action on behalf of NCLRF, alleging that Joseph Merkel was operating as an officer or director of NCLRF without authority and that Merkel had wrongfully taken control of NCLRF's bank accounts. The circuit court issued a temporary restraining order prohibiting Kanz or Merkel from using or transferring any NCLRF funds. After Merkel failed to comply with the court's order, the court appointed a receiver.

¶4 In May 2008, Plath, along with Craig Royske, Chieko Knoblock, and Joseph Merkel,[1] filed a *pro se* "Verified Notice and Demand by Third Party Intervenors." The motion to intervene claimed that Plath and the other individuals were "the legal and lawful members of the Board of Directors of NATIONAL CIVIL LIBERTIES RESEARCH FOUNDATION, INC." Plath's notarized

[1] We assume this is the same Joseph Merkel against whom Kanz filed the original complaint.

signature appears on the motion to intervene. However, the circuit court never acted upon the motion.

¶5 One month later, in June 2008, Olson and his law firm were retained by a group of individuals who also claimed to be the NCLRF board of directors ("the Intervenors"), including Royske and Knoblock who had signed the May 2008 *pro se* motion to intervene with Plath. Olson's retainer agreement defined his client as "The National Civil Liberties Research Foundation, Inc.," and four individuals signed the retainer agreement on behalf of the alleged board of directors: Royske, Knoblock, James W. Heiser, and James A. Stuart, Jr. Plath did not sign the retainer agreement and his name does not appear anywhere on the agreement.

¶6 In July 2008, Olson filed a "Notice of Motion and Motion for Leave to Intervene and Stay" on behalf of the Intervenors. In the motion, Olson stated that he represented "the true governing body of the National Civil Liberties Research Foundation, Inc." and "its true Board of Directors, including Craig Royske, Chieko Knoblock, James W. Heiser and James A. Stuart, Jr." Plath was not listed as a member of the board of directors in the Intervenors' motion to intervene.

¶7 In August 2008, the circuit court held a hearing on the Intervenors' motion. None of the parties objected to the intervention, and the circuit court granted the motion. Olson suggested to the circuit court that because both the Intervenors and Kanz claimed to represent the true and lawful governing body of NCLRF, that until the circuit court decided who made up the true board of directors, that the parties appear by their individual names. Olson reasoned that "if the case goes forward with the Kanz plaintiffs having the right to use the name

of the organization and my intervenors not, I think it cedes to them a sort of advantage." The court rejected Olson's proposal and instructed him "to set forth the appropriate pleadings and identifying names for your clients as an entity."

¶8 Thereafter, Olson emailed Royske and suggested that, for the purposes of the lawsuit, the Intervenors identify themselves as "National Civil Liberties Research Foundation, Inc., (by its true Board of Directors, Craig Royske, Jim Stuart, Chieko Knoblock, Nelson Boon, Gary Plath and Jim Heiser)." Royske responded the following day, acknowledging that Olson's suggestion was "acceptable." Plath was copied on Royske's response to Olson. Shortly thereafter, Olson filed a "Complaint of Intervenor" under the agreed upon name for the Intervenors. In other words, Plath was listed as a board member in the Intervenors' complaint even though he had not signed Olson's retainer agreement and he was not listed as a board member in the Intervenors' original motion to intervene.

¶9 In September 2008, Kanz moved for an order compelling discovery and for sanctions against Merkel and the Intervenors. Kanz alleged that Merkel and the Intervenors had continued to ignore the court's order requiring full disclosure of any information relating to NCLRF funds and had disbursed NCLRF's one-half million dollars in assets amongst the individual Intervenors. The court held hearings on the motion in November and December 2008. At the hearings, the receiver reported that he had encountered difficulties in obtaining financial information from Merkel and the Intervenors. The circuit court rejected Kanz's motion but warned the parties that failing to comply with discovery or court orders could result in sanctions, including striking of pleadings.

¶10 In March 2009, Royske, on behalf of the Intervenors, filed a document with the circuit court entitled "Declaration of Void Status," which repudiated and disavowed all previous actions taken by Olson on behalf of the Intervenors and terminated Olson's representation. Thereafter, Olson filed a motion to withdraw as counsel, and the court granted Olson's motion. Attorney Thomas McClure took over representation of the Intervenors.

¶11 Meanwhile, Kanz filed another motion for sanctions against Merkel and the Intervenors, asking the court to strike the parties' pleadings for failure to comply with court orders and discovery. At a hearing on the motion, the receiver stated that hundreds of thousands of dollars of NCLRF funds remained unaccounted for, that Merkel and the Intervenors had not responded to his demands for financial documents, and that funds were withdrawn from NCLRF accounts without records of where they had gone. He stated that the Intervenors had withdrawn hundreds of thousands of dollars from NCLRF accounts and then refused to turn those funds over to him.

¶12 The circuit court found that Merkel's and the Intervenors' continued failure to produce NCLRF's assets was a "continued flagrant, blatant disregard of Court orders" and that Merkel and the Intervenors exhibited "a lack of candor, which is a fancy way of saying lying, about the funds." The court went on to find that their actions were "in bad faith" and were "egregious" and that "[t]hey've frustrated, lied to the Court." As a sanction, the court ordered Merkel and the Intervenors to pay Kanz's attorneys fees and "all fees, costs and disbursements of the receiver" to date. Additionally, the court struck Merkel's pleadings and entered judgment against him, and then warned the Intervenors that if they failed to pay the amount they owed by the next hearing their pleadings would also be struck.

¶13 The Intervenors failed to pay the amount ordered by the next court hearing. At that hearing, Kanz requested that the Intervenors each be held personally liable for the amount owed. Kanz argued that because the Intervenors failed to prove their claim that they were a corporate board, they were not protected by the corporate shield. The court granted Kanz's request, and dismissed the Intervenors' complaint. The Intervenors appealed the dismissal of the complaint, and we affirmed.

¶14 In March 2010, Plath, represented by Attorney John A. Graettinger, moved the circuit court for relief from the judgment entered against him personally. The court denied the motion. Plath appealed, but voluntarily dismissed the appeal and settled the judgment for $25,000.

¶15 In March 2012, Plath filed the present suit against Olson, alleging legal malpractice. Plath believes that Olson acted negligently by naming Plath individually in the Intervenors' complaint in ***Merkel*** and that Olson's actions exposed Plath to personal liability without his consent. Plath sought to recover the $25,000 he paid to settle the judgment entered against him, as well as the attorney's fees he paid to Attorney Graettinger.

¶16 Olson filed a motion for summary judgment, contending that Plath's action was meritless because Olson's client was NCLRF as a corporate entity and not Plath. Because Plath was not his client, Plath could not demonstrate that Olson had engaged in legal malpractice. Olson also filed a motion for sanctions, arguing that Plath's lawsuit was frivolous. Plath filed his own motion for summary judgment, alleging that he was entitled to a judgment in his favor because Olson failed to name a viable expert witness by the deadline set by the court.

¶17 The circuit court granted summary judgment in favor of Olson, finding that Plath and Olson never enjoyed an attorney-client relationship. However, the court declined to grant Olson's motion for sanctions, concluding that Plath's lawsuit was not frivolous because Plath argued for a novel exception to the general rule requiring an attorney-client relationship. Both Plath and Olson appeal.

DISCUSSION

¶18 There are two issues before us on appeal. First, Plath argues that the circuit court erred in dismissing his legal malpractice claim on summary judgment. Second, Olson argues that the circuit court erred in failing to grant his motion for sanctions because he believes Plath's claim was frivolous. We address each in turn.

I. Plath's legal malpractice claim fails because he has not shown that he and Olson entered into an attorney-client relationship.

¶19 The circuit court dismissed Plath's legal malpractice claim on summary judgment, concluding that Plath failed to demonstrate that he and Olson entered into an attorney-client relationship, an element necessary to establish a legal malpractice claim. Plath argues that the circuit court's decision was erroneous because: (1) public policy requires that we create an exception to the general rule requiring an attorney-client relationship for legal malpractice claims; (2) a number of material issues of fact exist regarding whether Olson acted negligently; and (3) Olson's failure to name a viable expert by the date set forth in the circuit court's scheduling order is dispositive. Notably, Plath does not argue that an attorney-client relationship existed between himself and Olson. Because we agree with the circuit court that an attorney-client relationship between Plath

and Olson is necessary for Plath to establish his legal malpractice claim, we affirm.

¶20 We review a circuit court's summary judgment decision *de novo*, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2]

¶21 In order to establish a viable legal malpractice claim, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) acts constituting negligence; (3) negligence as the proximate cause of the alleged injury; and (4) the existence and extent of the injury alleged. ***Thiery v. Bye***, 228 Wis. 2d 231, 239, 597 N.W.2d 449 (Ct. App. 1999); *see also* ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979).

¶22 Here, Plath fails to allege that any attorney-client relationship existed between himself and Olson, and the record shows that no such attorney-client relationship existed. The retainer agreement between Olson and the Intervenors listed the client as "The National Civil Liberties Research Foundation, Inc." Furthermore, the retainer agreement was signed by Royske, Knoblock, Heiser, and Stuart. Plath's name does not appear anywhere on the retainer agreement. In fact, Plath appears to concede that no such relationship existed. Without an attorney-client relationship, Plath's legal malpractice claim must be dismissed.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶23 Plath attempts to persuade us that we should grant a rare exception to the rule requiring an attorney-client relationship for successful legal malpractice claims, arguing that public policy dictates that "an attorney can be liable to a third party when the attorney, unbeknownst to the third party, negligently exposes the third party to personal liability in a lawsuit." We disagree.

¶24 "'[T]he well established rule of law in Wisconsin is that absent fraud or certain public policy considerations, an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney.'" ***Yorgan v. Durkin***, 2006 WI 60, ¶27, 290 Wis. 2d 671, 715 N.W.2d 160 (citation omitted; brackets in ***Yorgan***). When asked to recognize a new exception to that rule, we must consider the public policy implications of the suggested exception. ***Id.***, ¶28.

¶25 Having considered the public policy implications of this case, we conclude that they do not dictate in favor of liability. Expanding an attorney's liability to include a third party when the attorney "negligently exposes the third party to personal liability in a lawsuit," as Plath requests, would expand third-party liability for attorneys with "no readily discernable stopping point." *See* ***id.***, ¶32. As the circuit court noted, Plath is asking for a new exception requiring that a lawyer have a duty to each member of an organization that he represents. This type of exception would require attorneys to personally inform each member of a client organization of any and all potential liability. Allowing individual members or constituents to bring forth an action against a negligent attorney representing the company would be novel law and would needlessly and exponentially increase attorney liability. Attorneys would be reluctant to represent organizations and corporations if they are liable to individual members of an organization they represent. In sum, an exception to the rule is not warranted here.

¶26 Plath also argues that "summary judgment should be reversed as genuine issues of material fact exist and demonstrate that Olson was negligent." However, whether Olson was generally negligent is immaterial because Plath's claim against Olson is for *legal* malpractice and Plath has failed to show that he and Olson were engaged in an attorney-client relationship. As such, any potential issues of fact generally relating to Olson's alleged negligence do not save Plath's claim.

¶27 Similarly, Plath alleges that summary judgment should be reversed because, according to Plath, Olson failed to name a viable expert to rebut Plath's expert's conclusion that Olson acted negligently by subjecting Plath to personal liability. But again, contrary to Plath's assertions, a failure to name an expert is not dispositive here because Plath has failed to demonstrate an attorney-client relationship. Plath's expert's opinion that Olson's actions were generally negligent means nothing in the context of Plath's legal malpractice claim because that claim requires an attorney-client relationship. As such, we must affirm.

II. The circuit court properly denied Olson's motion for sanctions.

¶28 The circuit court denied Olson's motion for sanctions under WIS. STAT. § 802.05(2)(b), concluding that Plath's argument for an exception to the general rule requiring an attorney-client relationship to establish a legal malpractice claim was not frivolous. Olson argues that the circuit court's decision was erroneous because even if a novel exception to the general rule might have gotten Plath past the first *prima facie* element of a legal malpractice claim, to wit, the existence of an attorney-client relationship, the other elements of his case were objectively groundless. We conclude that Plath's legal malpractice claim, while weak, was not frivolous.

¶29 WISCONSIN STAT. § 802.05(2)(b) states that:

> By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney … is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances …:
>
> ….
>
> (b) The claims … stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

If the circuit court determines that a paper violated § 802.05(2)(b), it may sanction the attorney, law firm, or party responsible for the violation. *See* § 802.05(3). Permissible sanctions include "an order directing payment ... of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." *See* § 802.05(3)(b). A finding of frivolousness "'is based on an objective standard, requiring a determination of whether the party … knew or should have known that the position taken was frivolous.'" ***Osman v. Phipps***, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (citation omitted).

¶30 The alleged frivolousness of a claim is "an especially delicate area of the law." ***Brunson v. Ward***, 2001 WI 89, ¶28, 245 Wis. 2d 163, 629 N.W.2d 140. "We resolve any doubts against a [conclusion] of frivolousness." ***Id.*** This approach encourages both law development based on "creative and innovative" advocacy, as well as zealous representation of clients' interests by their attorneys. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994).

¶31 Appellate review of frivolousness is a mixed question of law and fact. The circuit court's determination of what one party knew, or should have

known, is a question of fact, and we will uphold the circuit court's decision unless it is clearly erroneous. ***Id.*** at 236. Whether the circuit court's factual determination supports the legal determination of frivolousness is, however, a question of law, which we review *de novo*. ***Id.***

¶32 Plath's legal malpractice claim was not frivolous. As the circuit court pointed out, Plath properly relied on case law and argued for a novel exception to the general rule requiring an attorney-client relationship for legal malpractice claims. *See* WIS. STAT. § 802.05(2)(b) (permitting an extension of the law when warranted by existing law). Furthermore, there is arguable ambiguity in the record over whether the Intervenors intervened as individuals or as a group, and over how Plath came to be named in the Intervenors' complaint. Because there are some facts in the record, however meager, to support Plath's contention that Olson negligently exposed him to personal liability without his consent, we cannot say that Plath's claim is frivolous.[3] Consequently, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] Olson has also filed a motion with this court for fees and costs, pursuant to WIS. STAT. §§ 809.25 and 809.14, on the grounds that Plath's appeal is frivolous. For the same reasons set forth above, Olson's motion is denied.