COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3379

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

ALFRED SEALS,

Plaintiff-Appellant,

v.

DAVID MANDELL,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Alfred Seals appeals from an order dismissing his legal malpractice claim against attorney David L. Mandell for failure to state a claim upon which relief could be granted. The issue is whether Seals established facts showing he suffered damages as a result of Mandell's alleged negligence. Because Seals failed to establish that he suffered damages, we conclude that the circuit court properly dismissed the action and affirm.

BACKGROUND

After Seals allegedly injured himself by slipping and falling on a wet floor at the Dean Health Care Center in Madison, he contacted Mandell about commencing a civil suit against the center. Mandell undertook an investigation of the matter at no expense to Seals. The center denied any liability for the accident.

After his investigation, Mandell informed Seals that he would not be willing to represent Seals on a contingent fee basis. Mandell said he would initiate a suit against the center if Seals advanced all costs, including the initial filing fee, before the statute of limitations expired in approximately five months. According to Mandell, Seals did not contact him again prior to the expiration of the statute of limitations. However, after the time for filing suit had expired, Mandell received a check for $100 from Seals' chiropractor, apparently to cover the initial filing fee for Seals' suit. Mandell returned the check and informed the chiropractor that the statute of limitations had lapsed and that he was not going to commence a suit to recover costs for Seals' treatment.

Seals commenced legal malpractice and constitutional claims against Mandell. Mandell filed a motion to dismiss based on Seals' failure to state a claim. The circuit court treated the motion to dismiss as a motion for summary judgment because it considered affidavits filed by Mandell. After a hearing, the circuit court granted Mandell's motion for summary judgment. Seals appeals.

STANDARD OF REVIEW

In reviewing summary judgment decisions, we independently examine the record to determine whether any genuine issue of material fact exists. ***Backhaus v. Krueger***, 126 Wis.2d 178, 180, 376 N.W.2d 377, 378 (Ct. App. 1985). To be entitled to summary judgment, a moving defendant must show a defense that would defeat the plaintiff as a matter of law. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980).

The initial question of whether a claim has been stated is the same for summary judgment as for a motion to dismiss a complaint. ***Prah v. Moretti***,

108 Wis.2d 223, 228, 321 N.W.2d 182, 185 (1982). In reviewing a complaint, all facts pleaded by the plaintiff and all reasonable inferences therefrom are accepted as true. ***Id.*** at 229, 321 N.W.2d at 186. We will reverse when the trial court has incorrectly decided a legal issue. ***Rodey v. Stoner***, 180 Wis.2d 309, 312, 509 N.W.2d 316, 317 (Ct. App. 1993).

DISCUSSION

Seals appeals only the dismissal of his legal malpractice claim. He argues that the record in its entirety establishes a cause of action for legal malpractice against Mandell. Seals relies on a letter sent to him by Mandell, an evaluation and bill from his chiropractor, and his complaint to establish the necessary facts for his malpractice claim. Seals maintains that the circuit court erred when it refused to consider the documents he submitted to supplement his complaint and accuses the circuit court of failing to "put him in tune" with its affidavit policy. He seeks an opportunity on remand to conform his materials so they may be considered by the circuit court.

To state a tort action for legal malpractice, a plaintiff must allege facts which indicate the existence of an attorney-client relationship, acts or omissions constituting negligence, causation and damages. ***Cook v. Continental Casualty Co.***, 180 Wis.2d 237, 245 n.2, 509 N.W.2d 100, 103 (Ct. App. 1993). A complaint that does not allege any one of these elements fails to state a claim upon which relief may be granted. *See* ***Rendler v. Markos***, 154 Wis.2d 420, 426, 453 N.W.2d 202, 204 (Ct. App. 1990).

Seals' complaint does not assert that he was damaged by Mandell's alleged malpractice. Seals argues that he submitted a chiropractor's evaluation which shows that he was injured in a slip and fall accident at the center. He asserts that Mandell sent him a letter which reads: "The only way to obtain any compensation for your injuries would be to commence a lawsuit against them and either prevail at trial or settle the case prior to trial." He concludes that this is evidence that he would have won his suit against the center, and therefore was damaged by Mandell's negligence.

Setting aside the fact that Seals provided the trial court with no affidavits in opposition to Mandell's motion for summary judgment, we still conclude that Seals has not alleged that he was damaged. What Seals has

alleged is that he has lost his opportunity to litigate. His complaint reads: "Defendant then allowed the statutes of limitation to run out by not filing the civil suit and denying plaintiff any and all remedies at law to bring this civil suit."

In a malpractice case, the plaintiff cannot establish damages by showing only that litigation was prevented or impaired, since the loss of the ability to litigate is not itself worth anything. ***Estate of Campbell v. Chaney***, 169 Wis.2d 399, 405, 485 N.W.2d 421, 423 (Ct. App. 1992). And a plaintiff must plead facts to show each element of a legal malpractice claim, including damages. *See* ***Acharya v. Carroll***, 152 Wis.2d 330, 339, 448 N.W.2d 275, 279 (Ct. App. 1989). Seals recognizes this because he asserts that Mandell's letter is proof that he would have won his lawsuit against the center.

We disagree. All Mandell's letter shows is Mandell believed that it was not possible to settle Seals' claim without commencing a lawsuit, and if that were done, then the only way to be compensated would be to win the lawsuit or settle it. Mandell's letter does not in any way give his opinion as to the chance of success of such a lawsuit. Starting a lawsuit is no guarantee of success. Many lawsuits are started and then lost. The most we can infer from Mandell's letter is that he was willing to invest some time in the lawsuit but was not confident enough in the outcome to invest the costs of commencing it. This is insufficient to allege a successful result, and therefore is insufficient to show that Seals was damaged by Mandell's alleged negligence.

Seals has failed to pass the first test in summary judgment methodology: his complaint fails to state a claim. Accordingly, we conclude that the trial court correctly dismissed his complaint. We therefore affirm its order doing so.

By the Court.—Order affirmed.

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