COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1335 **Cir. Ct. No. 00-CV-851**

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

ARMANDO TREVINO AND JEAN TREVINO,

PLAINTIFFS-APPELLANTS,

V.

LADD & MILAEGER AND JOHN DOE INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

Before Brown, Anderson and Dykman, JJ.

¶1 ANDERSON, J. Armando Trevino claims that the trial court erred when it granted summary judgment dismissing his legal malpractice action against his criminal defense attorney. We affirm because Trevino has failed to allege in his complaint or present evidence in opposition to the motion for summary

judgment that he is actually innocent of the criminal charge of which he was convicted.

¶2 When he was charged with three counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1) (1995-96), Trevino retained Attorney Andrew C. Ladd of Ladd & Milaeger to represent him. The sexual assaults were alleged to have occurred between January 1, 1991, and October 1, 1994. Trevino's legal malpractice claim arose out of the twenty-five year prison sentence that was imposed after he entered a plea pursuant to a plea agreement to one count of first-degree sexual assault of a child. The information, dated January 19, 1995, recited that the offense was a Class B felony punishable by imprisonment of up to forty years; 1993 Wis. Act 194, § 9 had increased the penalty for all Class B felonies from twenty years to forty years effective April 21, 1994. Trevino alleges that Ladd committed legal malpractice because he was not aware of the increase in the penalty for the charge and allowed Trevino to be sentenced under a greater penalty scheme. Trevino asserted that as a result of Ladd's malpractice, he had to pursue a modification of his sentence for more than five years; and with the assistance of appellate counsel from the state public defender's office, he was able to have the sentence reduced to seventeen years' imprisonment.[1]

¶3 In this case, Ladd filed a motion for summary judgment asserting that to maintain a legal malpractice action against a criminal defense lawyer a

[1] As the result of a scheduling conference, Trevino filed, as an amendment to his *ad damnum* clause, an itemization of his alleged damages. Trevino alleged that among his damages were legal fees of $1500 paid to Ladd, $15,000 paid to postconviction counsel and $50 paid to appellate counsel appointed by the state public defender.

plaintiff must prove that he or she was innocent of the crime charged. He asserted that Trevino could not prove he was innocent of the charge of first-degree sexual assault of a child because he had twice pled guilty to the charge. The trial court granted the motion for summary judgment, reasoning from ***Harris v. Bowe***, 178 Wis. 2d 862, 505 N.W.2d 159 (Ct. App. 1993), that Trevino could not meet the requirement that he demonstrate that he was innocent of the charge.

¶4 In this appeal, Trevino argues that the trial court erred. He argues that Ladd had a duty to know and understand the law as it applied to Trevino and Ladd's failure to do so was a breach of this duty and the cause of Trevino's injuries. He claims that his damages include all legal expenses he incurred in his successful attempt to have his sentence imposed under the old penalty scheme for a Class B felony.

¶5 Our summary judgment methodology is well established. We first examine the pleadings to determine whether the complaint states a claim and the answer joins issue. WIS. STAT. § 802.08 (1999-2000); ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). If we conclude that the pleadings are sufficient, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Dunn***, 213 Wis. 2d at 368. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id.***

¶6 The disposition of Trevino's appeal is controlled by our recent decision in ***Hicks v. Nunnery***, 2002 WI App 87, No. 01-0751. In that opinion, we held that public policy requires a plaintiff in Trevino's position to prove he or she is innocent of the charges of which he or she was convicted in order to prevail on a claim of legal malpractice against his or her defense attorney. ***Id.*** at ¶46. We

explained our conclusion that "as a matter of public policy, persons who actually commit the criminal offenses for which they are convicted should not be permitted to recover damages for legal malpractice from their former defense attorneys." ***Id.*** at ¶48. Trevino has failed to assert in the complaint that he was innocent of the criminal charge and he has failed to present any evidence in opposition to the summary judgment motion that he is innocent of the criminal charge; therefore, the trial court was correct in granting summary judgment dismissing this action.

¶7 Trevino's pleadings, affidavits and other material assert that because his attorney did not know of a statute limiting his sentence to twenty years, he was originally sentenced to a twenty-five year term. He further asserts that he incurred attorney's fees to remedy this error. Absent ***Hicks***, this claim would survive summary judgment. But because of a factor not relevant to his claim, his guilt of the crime charged, his negligent attorney is entitled to summary judgment. We recognize a member of this panel authored the dissent in ***Hicks*** and feels that the case was wrongly decided. However, all members of this panel agree that we are bound to follow our own precedent given that we "may not overrule, modify or withdraw language from a previously published decision of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.