COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP787 **Cir. Ct. No. 2006CV436**

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

FRANCIS GROSHEK AND KAREN GROSHEK,

PLAINTIFFS-RESPONDENTS,

V.

MICHAEL G. TREWIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 VERGERONT, J. In this action Francis and Karen Groshek claim their former attorney, Michael G. Trewin, breached his fiduciary duty to them in the course of purchasing their property, which included their homestead. The

circuit court denied Trewin's motion for summary judgment and, after a trial to the court, determined that Trewin had breached his fiduciary duty. The court ordered rescission of the contract, awarded punitive damages in the amount of $38,200, and dismissed Trewin's counterclaim for eviction and unpaid rent. Trewin appeals, contending that the court erred in denying his motion for summary judgment, in finding that he had breached his fiduciary duty, in awarding punitive damages, and in dismissing his counterclaim.

¶2 We conclude that the court properly denied Trewin's motion for summary judgment. We also conclude that the court's findings of fact are supported by the evidence and are sufficient to establish that Trewin breached his fiduciary duty to the Grosheks. However, we determine that the court erred in awarding punitive damages given that it granted the equitable remedy of rescission. More specifically, we conclude that in ***White v. Ruditys***, 117 Wis. 2d 130, 343 N.W.2d 421 (Ct. App. 1983), on which the Grosheks rely for the court's authority to award punitive damages when the relief awarded is equitable, we impermissibly declined to follow an earlier supreme court opinion, ***Karns v. Allen***, 135 Wis. 48, 59, 115 N.W. 357 (1908). We must, therefore, follow ***Karns***, which holds that a court sitting in equity may not award punitive damages.

¶3 Accordingly, we affirm the order denying summary judgment, the order dismissing Trewin's counterclaim, and the judgment insofar as it orders Trewin to convey the property back to the Grosheks. However, the amount the Grosheks were ordered to pay Trewin in the judgment as part of the rescission remedy was reduced by the award of punitive damages. Because we reverse the award of punitive damages, we direct the court on remand to make the corresponding adjustment in the amount the Grosheks owe Trewin.

BACKGROUND

¶4 In March 2004, the Grosheks owned real estate in Portage County that consisted of their house and approximately seventy-five acres, on which they operated a saw mill. F&M Bank-Wisconsin held a mortgage on the real estate and equipment and had a foreclosure judgment and a replevin judgment against the Grosheks. In March 2004, the Grosheks filed a petition for Chapter 13 Bankruptcy in the United States District Court, the Western District of Wisconsin, and Trewin was their attorney of record. F&M Bank was the principal secured creditor in the bankruptcy proceeding and the petition stated that the bank held a mortgage on the real estate and equipment for $239,985.

¶5 In July 2004, the Grosheks fell behind in the payments due F&M Bank under the bankruptcy plan. On July 27, 2004, the supreme court entered an order suspending for a period of five months Trewin's license to practice law, effective August 31, 2004.

¶6 During August 2004, Trewin was attempting to negotiate on the Grosheks' behalf with F&M Bank to obtain a reduced amount for which the Grosheks could settle the bank's claim against them while the Grosheks were attempting to obtain financing to pay off the bank. The details of these efforts are disputed by the parties and will be discussed later in the opinion. On August 27, 2004, Trewin wrote to the Grosheks proposing that he buy their land "for enough money to pay off F&M Bank," sell roughly forty acres to their neighbors, and give the Grosheks a lease on the remaining land for $1,300 per month with an option to purchase for $239,585, less the proceeds from the sale to the neighbors. On August 30, 2004, the Grosheks executed a waiver of conflict of interest drafted by Trewin. At the same time they executed an agreement with him that provided that

he was to purchase from them the real estate on which F&M Bank held the mortgage "in return for a full release of any claim against [the Grosheks]" and further provided that, after selling approximately forty acres to the neighbors, he was to lease the property back to the Grosheks according to the terms of an attached lease. Neither the Grosheks nor Trewin signed the attached lease at that time. The next day, August 31, Trewin's license to practice law was suspended.

¶7 At some point thereafter, Attorney Mark Morrow took over representation of the Grosheks in the bankruptcy proceeding and also provided legal services to the Grosheks in connection with the transaction with Trewin. The timing and extent of those services will be discussed later in the opinion.

¶8 On November 26, 2004, the Grosheks executed and delivered to Trewin a deed to their home and thirty-four acres, having sold forty acres to their neighbors for $108,000. Trewin paid the Grosheks $94,500. That same day, the Grosheks and Trewin signed a five-year lease, effective December 1, 2004, with a monthly rent of $1,300 plus real estate taxes and insurance on the property. The lease contained an option to purchase for $127,500 between January 1, 2006, and the end of the lease term, provided all monthly rental payments were promptly made.

¶9 Trewin canceled the lease in April 2006 for nonpayment of rent. The Grosheks remained living in the home for several months under an oral lease.

¶10 Apparently while still living on the property, the Grosheks initiated this action claiming that Trewin had breached his fiduciary duty to them in various ways by entering into the transaction with them regarding their property. They sought rescission of the conveyance of their property to Trewin, upon repayment

of the purchase price to Trewin, and related injunctive relief.[1] Trewin answered and filed a counterclaim seeking eviction and unpaid rent.

¶11 Trewin moved for summary judgment on both the complaint and his counterclaim. He contended that the undisputed facts showed that Attorney Morrow, not he, was representing the Grosheks at the time Trewin purchased their property in November 2004. The circuit court denied the motion. The court concluded the submissions showed there were a number of material disputed facts, including whether Trewin had pressured the Grosheks to sign the August 30 agreement and the conflict waiver, the relationship between the August 30 agreement and the November dealings, and whether Trewin used financial information he had obtained during the process of representing the Grosheks to his benefit and their detriment.

¶12 Before trial the court permitted an amendment to the complaint to add a claim for punitive damages. After a trial to the court, the court found that the sale of the property was Trewin's idea, not the Grosheks', and that Trewin took advantage of the Grosheks and of information he had as the result of his attorney-client relationship with them, and paid them only approximately 50% of the value of their property, knowing that they would likely be unable to make the rental payments and so lose the option to buy back the property. The court also found that Morrow acted "primarily as a scrivener" in drafting the deed and the closing statement and was not actively engaged in representing the Grosheks in the transaction. Based on these and other findings, the court determined that Trewin

[1] As an alternative remedy to rescission, the Grosheks sought imposition of a constructive trust, but this remedy is not relevant to this appeal.

had breached his fiduciary duty to the Grosheks. The court concluded that rescission was the appropriate remedy and that this entailed return of the property to the Grosheks upon their payment to Trewin of $96,872.[2] The court also determined that punitive damages were appropriate and fixed that amount at $38,200, which it then deducted from the amount the Grosheks owed Trewin.

DISCUSSION

¶13 On appeal, Trewin contends that the court erred in denying his motion for summary judgment because the undisputed facts show he did not breach a fiduciary duty to the Grosheks. Even if the denial of that motion was correct, he asserts, the circuit court erred in finding that he breached his fiduciary duty, awarding punitive damages, and dismissing his counterclaim for eviction. We first address the circuit court's determination that Trewin breached his fiduciary duty, then return to the court's denial of summary judgment and, finally, discuss the award of punitive damages. We do not separately address Trewin's counterclaim because Trewin implicitly concedes in his reply brief that he is not entitled to relief on his counterclaim if the judgment for rescission is upheld.

I. Court Determination on Claim for Breach of Fiduciary Duty

¶14 Trewin's challenge to the court's determination after trial that he breached his fiduciary duty to the Grosheks is based on two primary arguments: (1) because the conveyance of the property and the execution of the lease did not occur until late November 2004 and the Grosheks were represented by another

[2] To the purchase price of $94,500, the court added the amount of interest and late payments to which Trewin testified.

attorney at that time, nothing that transpired on or before August 30, 2004, when he was representing them, can constitute a breach of his fiduciary duty to them; and (2) even if he did breach his fiduciary duty, the Grosheks did not establish damages because they did not present evidence that they had any means to avoid losing their farm other than by entering into the transaction with him, a transaction that provided them with some benefits.

¶15 The elements of a claim for breach of fiduciary duty are: (1) the defendant owed the plaintiffs a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiffs damage. ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800. It is well established that a fiduciary relationship exists between an attorney and his or her client and that an attorney has a fiduciary duty of undivided loyalty to his or her client. ***Burkes v. Hales***, 165 Wis. 2d 585, 594 n.6, 478 N.W.2d 37 (Ct. App. 1991); *see also* ***Berner Cheese Corp.***, 312 Wis. 2d 251, ¶41.[3]

[3] In the trial court, the Grosheks argued both that Trewin's conduct violated provisions of the Rules of Professional Responsibility, SCR 20 (2008), and constituted a breach of his fiduciary duty at common law. The circuit court's findings after the trial addressed both legal theories. On appeal, Trewin correctly asserts that violations of the rules of professional responsibility do not give rise to a cause of action. The preamble to SCR 20 provides:

> Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached…. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

See also ***Yorgan v. Durkin***, 2006 WI 60, ¶25 n.8, 290 Wis. 2d 671, 715 N.W.2d 160 (citing ***Williams v. Rexworks, Inc.***, 2004 WI App 228, ¶20, 277 Wis. 2d 495, 691 N.W.2d 897 ("[I]t is clear from the preamble, and from the lack of any authority to the contrary, that the [Rules of Professional Conduct for Attorneys] do not provide an independent basis for civil liability, and do not create any presumption that a legal duty has been breached.")). The Grosheks do not dispute this proposition and base their arguments on appeal only on the claim for breach of a fiduciary (continued)

¶16 "A consistent facet of a fiduciary duty is the constraint on the fiduciary's discretion to act in his own self-interest because by accepting the obligation of a fiduciary he consciously sets another's interests before his own." ***Zastrow v. Journal Commc'ns, Inc.***, 2006 WI 72, ¶28, 291 Wis. 2d 426, 718 N.W.2d 51 (citations omitted).

> This constraint on acting in one's own self-interest, [generally] described as a fiduciary's duty of loyalty. … is broader than simply requiring the fiduciary to refrain from acting in his own self-interest. For example, it also may require … fully disclosing to the beneficiary all information relevant to the beneficiary's interest.
>
> ….
>
> The fiduciary's duty of loyalty is "to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interests."

Id., ¶¶29, 31 (citations omitted; footnote omitted).

¶17 One of the ways an attorney may violate the fiduciary duty of loyalty to a client is to enter into a transaction with the client without full disclosure that the transaction will benefit the lawyer and potentially disadvantage the client. ***Id.***, ¶30.

¶18 When we review a circuit court's findings of fact, we accept them unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[4] We also accept the circuit court's credibility assessments of the witnesses and the

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duty at common law. Therefore, this claim is the framework for our analysis and we do not address whether Trewin's conduct violated a rule of professional responsibility.

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

reasonable inferences it draws from the evidence. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). Whether the facts as found by the circuit court and the undisputed facts fulfill the elements of a claim for breach of fiduciary duty presents a question of law, which we review de novo. *See* ***Jorgensen v. Water Works, Inc.***, 2001 WI App 135, ¶8, 246 Wis. 2d 614, 630 N.W.2d 230.

¶19 The court's findings on Trewin's conduct prior to and on August 30, 2004, while he was still representing the Grosheks, include the following. The idea for the whole transaction was Trewin's, not the Grosheks'. The Grosheks did not want to sell their property, but Trewin portrayed the sale to them as the only option they had. The Grosheks did not understand the transaction and did not understand Trewin would have the ability to sell their property "out from underneath them." Trewin told the Grosheks the deal had to be done right away, and both of the Grosheks felt it was a rush deal because he was losing his license on August 31. Although the signed August 30 agreement stated that the Grosheks "ha[ve] had the opportunity to review this agreement prior to the execution of this agreement, and ha[ve] been advised to review the agreement with another attorney of their choosing, which they have done," the Grosheks had not done this when they signed it because Trewin had not given them a reasonable opportunity to do so. Trewin did not make a full disclosure in that there was no purchase price specified, the profit he was going to make was not disclosed, and the buy-back process was not specified.

¶20 The court also found that Trewin knew of the Grosheks' financial situation because he represented them in the bankruptcy, he knew it would be difficult for them to make the rental payments under the lease, and he expected that he would benefit from their default under the lease—if they defaulted in the

first year, the lease would be terminated, as would the option to buy their property back. Trewin's letter to his own bank on August 24, 2004, seeking a loan to buy the property—in which he described his plans to subdivide twenty-four acres and sell the lots for between $175,000 and $200,000—showed, in the court's words, his "predatory" intent toward the property. The court also found that the terms of the transaction were unfair because the property was valued at $180,000 and Trewin purchased it for $94,500; even if the Grosheks had been able to buy it back at $127,500, the terms were still not fair to them.

¶21 While Trewin takes issue with the above findings, pointing to other evidence and other inferences from the evidence, we conclude these findings are supported by the evidence and are not clearly erroneous. We also conclude the above findings support the circuit court's finding that Trewin acted in his self-interest and put his own interests above those of the Grosheks.

¶22 We next turn to Trewin's contention that, even if we accept the above findings, his conduct cannot constitute a breach of his fiduciary duty because he was not representing the Grosheks when the transaction closed. Trewin's primary support for this argument is the letter dated April 18, 2007, from the Office of Lawyer Regulation (OLR) to Frank Groshek reporting the results of a preliminary evaluation of Frank's pro se complaint against Trewin. The letter does not describe the specific content of Frank Groshek's complaint. The letter states:

> Based on our preliminary evaluation of your inquiry, we have concluded that we do not have a sufficient basis to proceed. Attorney Trewin provided a copy of the conflict of interest waiver that you signed on August 30, 2004. The available evidence suggests that the terms of the lease agreement were fully disclosed and that you retained Atty. Morrow to protect your interests. There is no evidence that Attorney Trewin provided any legal services after the date

> his license was suspended. Therefore the matter will not be forwarded for formal investigation, and will be closed at this time.

The letter explained how to obtain review of the decision to close the matter, but the Grosheks did not seek review.

¶23 The circuit court declined to find that this letter resolved the issue of Trewin's breach of fiduciary duty in his favor, reasoning that the court had before it much more evidence than did the OLR. Trewin has provided no authority for the proposition that this preliminary evaluation of a complaint to the OLR is dispositive, or even persuasive, in resolving a claim for common law breach of fiduciary duty. As we have noted, Trewin correctly contends that violation of the Rules of Professional Responsibility, SCR 20, does not give rise to civil liability or create any presumption that a legal duty has been breached. *See* footnote 3, *supra*. Without some authority from Trewin for the proposition that a preliminary OLR decision that no rule has been breached must be considered in an action for civil liability against an attorney, we conclude the circuit court did not err in declining to give the OLR letter any weight.

¶24 Apart from the OLR letter, Trewin's contention that he did not breach his fiduciary duty is based on the facts that he was no longer representing the Grosheks when the transaction closed and that Morrow represented them at that time. The circuit court did not view these facts as precluding a breach of fiduciary duty by Trewin because, the court found, Morrow's role was limited to carrying out what Trewin had set in motion while he was still representing the Grosheks.

¶25 The court's finding that Trewin set the transaction in motion while he was still representing the Grosheks is not clearly erroneous. It is undisputed

that Trewin obtained their signatures on the conflict waiver and the sale agreement while still representing them and without their having consulted other counsel. It is also undisputed that the Grosheks signed those documents because they trusted that Trewin was acting in their best interests, and the evidence supports a finding that Trewin led the Grosheks to believe he was acting in their best interests in order to advance his own interests. The court's finding that Morrow played a limited role is also not clearly erroneous. Morrow's own testimony supports the finding that he drafted the documents to effectuate the conveyance and the final terms of the lease, but did not advise the Grosheks on the advisability of completing the transaction.

¶26 The circumstances of this case present a difficult question on an attorney's breach of fiduciary duty. The parties have not provided any cases that address this situation, and we have found none. We are therefore guided by the fundamental principles underlying the imposition of a fiduciary duty.

¶27 A fiduciary duty is imposed because the fiduciary has consciously accepted a special position with regard to another person in which he or she implicitly or explicitly agrees to act for that person's benefit. *See* ***Zastrow***, 291 Wis. 2d 426, ¶28. The other person trusts the fiduciary will do so and that trust creates a relationship in which the fiduciary has a great deal of influence over the other. Hence the law imposes a duty on a fiduciary not to take advantage of that influence in order to advance the fiduciary's self-interest. *See* ***id.***, ¶29. In the particular context of a lawyer-client relationship, a transaction between a lawyer and client, such as a contract for the sale of property, has the potential to work to the lawyer's advantage and the client's disadvantage. *See* ***Armstrong v. Morrow***, 166 Wis. 1, 6-8, 163 N.W. 179 (1917) (discussing the burden placed on attorneys who enter into transactions with their clients to show they did not take advantage

of their clients). This is so because the client is accustomed to the attorney acting for the benefit of the client and may not fully understand that entering into the transaction creates a different relationship, one in which the attorney's and the client's interests are potentially adverse. Hence, the law imposes on the attorney the duty to fully disclose the potential benefits to the attorney and the risks to the client. *See* ***Zastrow***, 291 Wis. 2d 426, ¶30.

¶28 In this case, based on the facts found by the circuit court, Trewin used his position of influence and the trust the Grosheks had in him to obtain a waiver of a conflict of interest and their signatures on an agreement to sell, which stated they had consulted another attorney. He did this without disclosing the potential benefits to him of the sale and the potential risks to them, and knowing they had not consulted an attorney. His argument that this conduct is irrelevant as a matter of law is not persuasive. If the Grosheks' signing of those documents on August 30 was not significant, why did Trewin have them do so? Why did he tell them, as they testified and the court found, that they had to do so on that date? The reason, the court found and the evidence supports, is that he was taking advantage of their trust in him as their attorney to get as much of the transaction as possible accomplished before his license was suspended.

¶29 In these circumstances we conclude Trewin breached his fiduciary duty, notwithstanding that the Grosheks had another attorney representing them to close the transaction. Trewin's misuse of his fiduciary position resulted in their not having an attorney without a conflict of interest to advise them from the beginning of the transaction. Trewin's misuse of his fiduciary position also resulted in their reliance on him to advise them on what was best for them. Whether or not Morrow could have or should have repaired the adverse effects of

Trewin's conduct, Trewin's conduct was a breach of his fiduciary duty to his clients.

¶30 We next consider Trewin's argument that the Grosheks did not prove they suffered any compensable damages as a result of a breach of his fiduciary duty. The third element of a claim for a breach of fiduciary duty is that the breach of duty caused injury to the plaintiff. ***Berner Cheese Corp.***, 312 Wis. 2d 251, ¶40. Trewin has provided no authority for the proposition that the plaintiff must prove damages resulting from that injury rather than seeking and obtaining another remedy for the injury, such as rescission.

¶31 As for whether the Grosheks proved they were injured by Trewin's breach of his fiduciary duty, the court found they were. We conclude this finding is supported by the record. The circuit court found that the purchase price was one-half the value of the land, and the record supports that finding. Indeed, Trewin acknowledged in his testimony that he paid less than the value of the property. In addition, his own statement in the August 24 letter to his bank is evidence that the value of the property was significantly greater than the price he paid. Trewin contends that the Grosheks would have lost their property anyway because they could not find a lender to help finance a settlement with F&M Bank. The evidence on whether they would have been able to find a lender was conflicting and the court did not make specific findings on that point. However, even if the Grosheks would not have been able to keep their property, the evidence supports the reasonable inference, which the court drew, that they would have been able to sell it for more than Trewin paid them. The lesser amount of money in exchange for their property is an injury.

II. Denial of Summary Judgment

¶32 A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We employ the same methodology as the circuit court and our review is de novo. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987).

¶33 Trewin's challenge to the court's denial of his motion for summary judgment is based on essentially the same argument we have rejected in paragraphs 24 through 29, *supra*. He asserts that, as a matter of law, he could not breach a fiduciary duty to the Grosheks because it was undisputed, based on the summary judgment submissions, that he was not acting as their attorney for at least a month before the transaction closed in late November 2004. We do not understand Trewin to contend that, if this undisputed fact does not preclude a claim for breach of his fiduciary duty, he was nonetheless entitled to summary judgment. Accordingly, we conclude the circuit court properly denied his motion.

III. Punitive Damages

¶34 Trewin contends that the circuit court erred in awarding punitive damages because, as a matter of law, they are not available in the absence of proof of compensatory damages. He relies on ***Tucker v. Marcus***, 142 Wis. 2d 425, 418 N.W.2d 818 (1988). ***Tucker*** held that punitive damages may not be recovered where an award of damages is unavailable due to the operation of WIS. STAT. § 895.045, which prohibits the recovery of damages for negligence if contributory negligence is greater than the negligence of the person against whom recovery is sought. ***Id.*** at 438. ***Tucker*** rejected the proposition that an injury is sufficient and there need not be an award of compensatory damages. ***Id.*** at 438-46. While part

of the court's reasoning in ***Tucker*** concerned the desire not to undermine the comparative negligence system adopted in WIS. STAT. § 895.045, ***id.*** at 440-41, 449-54, the court also found support for its conclusion in the principle that the amount of the compensatory damages is a factor in considering the amount of punitive damages. ***Id.*** at 446-48. According to Trewin, because the Grosheks did not plead or prove compensatory damages and the court did not award any, the Grosheks may not recover punitive damages.

¶35 The Grosheks respond that ***White*** rather than ***Tucker*** is controlling because they sought and were awarded the equitable remedy of rescission.[5] In ***White***, we held that it is within the discretion of a court acting in equity to award punitive damages, using the same standard as the jury uses in awarding punitive damages. 117 Wis. 2d at 141-42. In ***White***, the circuit court granted injunctive relief and punitive damages, but no compensatory damages, although they were requested. ***Id.*** at 133-34.

¶36 The question whether punitive damages are available when a party seeks and is awarded rescission and not compensatory damages presents a question of law, which we review de novo. *See* ***Jacque v. Steenberg Homes***, 209 Wis. 2d 605, 614-15, 563 N.W.2d 154 (1997) (treating as a question of law the issue whether nominal damages can support a punitive damage award in the case of an intentional trespass to land).[6]

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[5] Common law rescission of a contract is an equitable remedy. ***Ott v. Peppertree Resort Villas, Inc.***, 2006 WI App 77, ¶55, 292 Wis. 2d 173, 716 N.W.2d 127.

[6] The court in ***Jacque v. Steenberg Homes***, 209 Wis. 2d 605, 614-15, 617, 563 N.W.2d 154 (1997), held that nominal damages may support a punitive damage award in an action for intentional trespass to land. The Grosheks do not argue that ***Jacque*** supports the availability of punitive damages in this case and we therefore do not address this issue.

¶37 For a reason unrelated to ***Tucker***, we conclude that ***White*** is not controlling. In ***White***, a prior supreme court decision, we chose not to follow ***Karns***, 135 Wis. at 59, which held that the trial court could not award exemplary damages in an equitable action.[7] ***White***, 117 Wis. 2d at 138, 141. The supreme court explained that "[t]he damages which may be recovered in an equitable action under our [prior] decisions are compensatory and not exemplary damages. We think no decision of this court can be found where in an equitable action exemplary damages were allowed." ***Id.*** at 58. The court then rejected the argument that a statute governing nuisance actions authorized punitive damages, explaining:

> Under this statute the plaintiffs had their election to sue at law or in equity. They elected to sue in equity, and having done so they brought themselves within the rules of equitable actions and waived the right to recover exemplary damages. We are therefore of the opinion that the court was in error in giving plaintiffs exemplary damages.

Id. at 59.

¶38 In ***White***, after acknowledging the holding and reasoning in ***Karns***, we stated:

> We note that at the time ***Karns*** was decided the supreme court was unable to find any cases where exemplary damages were allowed by a court of equity. ***Id.*** at 57, 115 N.W. at 360. Since the ***Karns*** decision, many jurisdictions have reached the question of whether a court in equity may award punitive damages.

[7] The case law often uses "exemplary damages" and "punitive damages" interchangeably. ***Shopko Stores v. Kujak***, 147 Wis. 2d 589, 596 n.3, 433 N.W.2d 618 (Ct. App. 1988). We have no reason to think that in ***Karns v. Allen***, 135 Wis. 48, 115 N.W. 357 (1908), the court meant anything other than "punitive damages" when it used the term "exemplary damages."

117 Wis. 2d at 138 (footnote omitted consisting of cases from other jurisdictions, with cases going both ways on the issue). After a discussion of some cases from other jurisdictions, we adopted the reasoning employed in a New York case that rejected the waiver theory, ***id.*** at 139-41, which was the very theory articulated in ***Karns***, 135 Wis. at 59. We also concluded that "the power to award punitive damages is derived from the flexibility a court of equity has in fashioning its relief" and declined to adopt the reasoning of the New York case that this power is the result of the merger of courts of law and equity. ***White***, 117 Wis. 2d at 141.

¶39 This court is bound by supreme court opinions and does not have the authority to overrule or disregard a supreme court decision. *See* ***State v. McCollum***, 159 Wis. 2d 184, 196 n.6, 464 N.W.2d 44 (Ct. App. 1990). Therefore, because the supreme court did not overrule ***Karns*** before we decided ***White***, we were obligated to follow ***Karns***. We have found no supreme court case decided after ***Karns*** and before ***White*** that would provide a basis for disregarding ***Karns***. Indeed, in ***White***, we acknowledged that "no Wisconsin case since 1908 [when ***Karns*** was decided] has decided this issue…" 117 Wis. 2d at 139.[8] We have not

[8] In ***White v. Ruditys***, we added that "dicta in ***Wussow v. Commercial Mechanisms, Inc.***, 97 Wis. 2d 136, 293 N.W.2d 897 (1980), appears to support the awarding of punitive damages in an equitable action." 117 Wis. 2d 130, 139, 343 N.W.2d 421 (Ct. App. 1983). We quoted the following passage from ***Wussow***:

> It could not be reasonably argued that, in a case which showed a need for both equitable relief and damages, the granting of an injunction would bar a plaintiff from additionally seeking damages although all stemmed from a single cause of action. This is the everyday use of an injunction to prevent further harm, and the same cause of action will support a damage award. They are merely alternative or concomitant remedies. ***Id.*** at 151-52, 293 N.W.2d at 905 (citation omitted).

White, 141 Wis. 2d at 139-40. However, this statement does not conflict with ***Karns***, which recognizes that prior decisions had permitted compensatory damages to be awarded in equitable actions. Therefore, ***Wussow*** does not provide a reason for disregarding ***Karns***.

found a supreme court decision issued after ***White*** that would provide a basis for disregarding ***Karns***. In ***Entzminger v. Ford***, 47 Wis. 2d 751, 758 & n.7, 177 N.W.2d 899 (1970), the supreme court cited ***Karns*** as an example of its refusal to extend the doctrine of punitive damages, describing it as a case in which "the court refused exemplary damages in equity." This tells us that the supreme court in 1970 viewed ***Karns*** as good law, and we have not found a more recent supreme court decision indicating the contrary.[9] Accordingly, we conclude that we must follow ***Karns***, rather than ***White***. *See* ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 354, 560 N.W.2d 309 (Ct. App. 1997) (if a supreme court decision is controlling, we must follow it in spite of decisions of this court to the contrary).

¶40 There may be good reasons to re-examine ***Karns*** and consider whether seeking and obtaining an equitable remedy should bar the availability of punitive damages. However, those reasons must be directed to the supreme court.

¶41 The Grosheks' only argument against a requirement that punitive damages are not available in the absence of an award of compensatory damages is that this requirement does not apply in an equitable action. Because ***Karns*** holds that punitive damages are not available in an equitable action, we conclude the circuit court erred in awarding punitive damages.

[9] There have been decisions from this court that have referred to ***White***'s holding. *See, e.g.*, ***Gianoli v. Pfleiderer***, 209 Wis. 2d 509, 527 n.4, 563 N.W.2d 562 (Ct. App. 1997). However, we have found no published decision from this court that has applied ***White***. Of course, even if this court had applied ***White*** in a prior case, that would not affect our obligation to follow ***Karns*** now. *See* ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 354, 560 N.W.2d 309 (Ct. App. 1997).

CONCLUSION

¶42 We affirm the circuit court's denial of Trewin's motion for summary judgment, the dismissal of Trewin's counterclaim, and the determination that Trewin breached his fiduciary duty to the Grosheks. We also affirm the judgment insofar as it orders Trewin to convey the property back to the Grosheks. However, the amount the Grosheks were ordered to pay Trewin in the judgment as part of the rescission remedy was reduced by the award of punitive damages. Because we reverse the award of punitive damages, we direct the court on remand to make the corresponding adjustment in the amount the Grosheks owe Trewin.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.