COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3092 **Cir. Ct. No. 2006CV1378**

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

ANDREW MATTHEW OBRIECHT,

PLAINTIFF-APPELLANT,

V.

LAW OFFICES OF LETTENBERGER & GLASBRENNER, S.C. AND JENELLE GLASBRENNER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. This appeal concerns two contracts for legal services between Attorney Jenelle Glasbrenner and Andrew Obriecht, the client.[1] The circuit court granted summary judgment against Obriecht, concluding that Attorney Glasbrenner had not breached the contracts by failing to file a postconviction motion in state court before the expiration of the statute of limitations for a habeas petition in federal court. We conclude there are no material issues of fact and that, as a matter of law, the contract language is unambiguous and did not condition payment on Attorney Glasbrenner filing a postconviction motion nor require her to file a motion by any specific date. We therefore affirm the circuit court's grant of summary judgment.

BACKGROUND

¶2 The following facts are not disputed for purposes of this appeal.[2] In 1999 Obriecht was convicted in Dane County circuit court of one felony count of attempted second-degree sexual assault of a child, five misdemeanor counts of fourth-degree sexual assault, and one count of disorderly conduct. He was sentenced to a total of seven years' incarceration on the misdemeanor counts and probation on the felony count. He appealed the convictions and this court affirmed; the supreme court denied his petition for review in December 2001.

[1] Attorney Glasbrenner's firm, the Law Offices of Lettenberger & Glasbrenner, S.C., is also a defendant in this action and a respondent on this appeal. However, for simplicity's sake, we will refer only to Attorney Glasbrenner in this opinion.

[2] The procedural history regarding the 1999 convictions is taken from Judge Barbara Crabb's decision in ***Obriecht v. Thurmer***, No. 07-C-409-C, 2007 WL 3166094 (W.D. Wis. Oct. 23, 2007).

¶3 Meanwhile, Obriecht's probation on the felony count was revoked and he was sentenced in August 2001 to seven years' imprisonment, consecutive to the combined seven years on the misdemeanor counts. He filed a notice of his intent to appeal that sentence and eventually obtained from this court an extension for filing that appeal.

¶4 Obriecht also sought to obtain relief from the 1999 convictions in both the federal court and state court. In December 2002 he filed a petition for a federal writ of habeas corpus in the United States District Court for the Western District of Wisconsin, claiming ineffective assistance of trial and postconviction counsel. On January 23, 2003, Judge Barbara Crabb dismissed the petition without prejudice for failure to exhaust state court remedies and informed Obriecht that he had to file a postconviction motion in state court by March 17, 2003, to toll the one-year limitations period for filing his federal petition.[3]

¶5 Shortly before filing the petition in federal court, Obriecht began communicating with Attorney Glasbrenner about postconviction relief in state court. Obriecht and Attorney Glasbrenner arranged an initial meeting on December 21, 2003, at the facility where Obriecht was being held in Minnesota. Prior to the meeting Obriecht signed a retainer agreement providing that he was to pay "a non-refundable flat fee retainer" in the amount of $2,000 for a meeting with Attorney Glasbrenner at the facility "to discuss appellate issues and further representation." Obriecht paid the $2,000.

[3] ***Obriecht v. Swenson***, No. 03-C-004-C, (2003 U.S. Dist. LEXIS 26943 W.D. Wis. Jan. 15, 2003). In order to toll the one-year federal limitations period, which begins to run ninety days following the entry of judgment by the Wisconsin Supreme Court, Obriecht had to collaterally attack his conviction in a state habeas corpus proceeding. ***Id.*** *See* 28 U.S.C. § 2244(d)(1) and (2).

¶6 Following that meeting Attorney Glasbrenner and Obriecht agreed that she would provide further representation in pursuing postconviction relief. Obriecht signed a second retainer agreement in January 2003. This agreement called for a $5,000 initial retainer to be applied toward fees and expenses "in this matter," with "matter" described as "Postconviction (98 CF 27[1])."[4] Obriecht was to be charged at a minimum rate of $125 per hour for work performed. Obriecht paid the $5,000.

¶7 When Obriecht received Judge Crabb's January 23, 2003 order dismissing his federal habeas petition without prejudice, he sent a copy to Attorney Glasbrenner. According to Obriecht, Attorney Glasbrenner told Obriecht that he did not need to worry about the March 17 deadline because it had been tolled by the Wisconsin Court of Appeals' extension of the deadline to appeal his post-revocation sentence on the felony. No postconviction motion was filed in state court by March 17, 2003.

¶8 On June 20, 2003, Attorney Glasbrenner moved to withdraw as Obriecht's counsel on the ground that her attorney-client relationship with him had "deteriorated to a point where counsel can no longer effectively act as counsel for [him]…." Over Obriecht's objection, the circuit court granted her motion. No postconviction motion had been filed at that time.

¶9 Two years later, in June 2005, Obriecht filed a pro se petition for a writ of habeas corpus in his state court case, followed by a second petition a year

[4] The $5,000 retainer agreement gives the case number "98CF274." This must be a typographical error because the number of the case in which the 1999 judgments of conviction were entered is 98CF271.

later. Both were denied and after unsuccessful appeals, the supreme court denied review. Obriecht then filed a petition for a writ of habeas corpus in federal court, which was dismissed with prejudice for failure to file within the one-year limitations period. Judge Crabb held that, while Attorney Glasbrenner was incorrect when she advised Obriecht that the extension of the deadline for filing a direct appeal of his sentence tolled the federal deadline, this error did not warrant equitable tolling of the deadline for a number of reasons. ***Obriecht v. Thurmer***, No. 07-C-409-C, 2007 WL 3166094 (W.D. Wis. Oct. 23, 2007).

¶10 After the dismissal of his federal petition, Obriecht filed this action against Attorney Glasbrenner, seeking the return of the $7,000 he paid under both retainer agreements. He alleged that he did not want her to withdraw, there was no reason for her to withdraw, and while she may have done work on the motion, she did not file and litigate it, which she had contracted to do.

¶11 Both parties moved for summary judgment. Attorney Glasbrenner argued that the retainer agreements were unambiguous contracts to perform legal services, and that Attorney Glasbrenner performed the services contemplated by each contract. Obriecht contended that Attorney Glasbrenner breached the contract and committed fraud by not filing a state postconviction motion and was not entitled to any payment for her services. The circuit court granted summary judgment in favor of Attorney Glasbrenner, concluding that Attorney Glasbrenner had performed as required by the terms of the contracts. The court also found that

the claim of fraud was unsupported by the submissions.[5] The court denied Obriecht's motion for reconsideration.

DISCUSSION

¶12 Obriecht appeals, contending the circuit court erred in granting summary judgment in favor of Attorney Glasbrenner instead of to him. We review the grant or denial of summary judgment de novo, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 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. ***Burbank Grease Servs. v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. *See also* WIS. STAT. § 802.08 (2007-08).[6]

¶13 As a threshold matter we address Obriecht's contention that he is entitled to summary judgment because Attorney Glasbrenner conceded his claims. The first part of this argument is that, in order to prevail, Attorney Glasbrenner was required to support her brief in opposition to his motion for summary judgment with affidavits and to file a reply to his brief in opposition of her motion for summary judgment. This argument has no merit. Attorney Glasbrenner filed her own motion for summary judgment, accompanied by her affidavit and attachments, and a brief setting forth legal arguments in support of her motion. There is no requirement that she file additional factual or legal materials in order

[5] Obriecht argued in his brief that Attorney Glasbrenner had committed "theft by fraud" and cited WIS. STAT. § 943.20(1)(d), although there was no allegation of fraud in the complaint. The circuit court interpreted this as a civil claim for fraud.

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

to prevail if what she did file entitles her to summary judgment. If what she filed does not entitle her to summary judgment, then she loses on that score, not because she was obligated to file additional materials.

¶14 The second part of Obriecht's argument is that, because Attorney Glasbrenner failed to respond to his request for admissions, summary judgment in his favor is compelled under WIS. STAT. § 804.11(1)(b). Subsection (1)(b) provides in part:

> The matter [in a request for admissions] is admitted unless, within 30 days after service of the request…the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter…

The effect of an admission is that the matter is conclusively established. *See* § 804.11(2).

¶15 Obriecht's request for admissions included the following: "13. The defendants did not provide 'legal services' to the plaintiff"; "29. The defendants did not earn any portion of the $2,000 retainer"; and "30. The defendants did not earn any portion of the $5,000 retainer." Obriecht asserts that he brought the failure to respond to the circuit court's attention but the court did not rule on it.

¶16 Attorney Glasbrenner counters that she did respond to Obriecht's request for admissions, but she does not provide a record cite and does not elaborate. Because she provides no record cite and because we are unable to locate a response to Obriecht's request for admissions, we presume no response was filed.

¶17 We do not see in either the summary judgment decision or the reconsideration decision an explicit ruling on this issue. Our review of the record

persuades us that this is either because the circuit court did not understand that Obriecht was arguing that the failure to respond to his request for admissions was dispositive or because the circuit court implicitly relieved Attorney Glasbrenner from the effect of the admissions. In either case, we conclude Obriecht is not entitled to summary judgment based on Attorney Glasbrenner's failure to respond to the request for admissions.

¶18 The circuit court may not have understood that Obriecht was arguing the case should be disposed of based on WIS. STAT. § 804.11 because Obriecht did not clearly bring this issue to the court's attention. The only place Obriecht raises the issue in his forty-page brief in support of summary judgment is in a single footnote. A copy of the request for admissions and his affidavit on the lack of response are included among 122 additional pages of submissions. In his reply brief and in his motion for reconsideration, he merges the § 804.11 argument with the argument that we have already addressed and rejected—that Attorney Glasbrenner's failure to submit an affidavit in response to his affidavit and a reply brief disposed of the case in his favor. A litigant must raise an issue with sufficient prominence such that the circuit court understands that it is being called upon to make a ruling, and failure to do so generally forfeits the right to make the argument on appeal. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656.[7] We conclude Obriecht did not raise this issue with sufficient prominence to preserve it for appeal.

[7] ***Bishop v. City of Burlington***, 2001 WI App 154, 256 Wis. 2d 879, 631 N.W.2d 656, uses the term "waiver," but we use "forfeiture," consistent with the recent decision, ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. In ***Ndina***, the court explains that, while courts often use "waiver" and "forfeiture" interchangeably, they are distinct concepts. When the right to make an objection or assert a right on appeal is lost because of failure to do so in the circuit court, the proper term is "forfeiture." ***Id.*** at ¶¶30-31.

¶19 If the court *did* understand that Obriecht was arguing that the admissions were dispositive**,** then a reasonable reading of its reconsideration decision is that it implicitly rejected that argument and relieved Attorney Glasbrenner from the effect of the admissions. In this decision the court rejected Obriecht's argument that Attorney Glasbrenner "conceded his arguments by failing to file adverse pleadings and to support them with affidavits," noting the brief and affidavits Attorney Glasbrenner filed in support of her motion. It may be the court viewed Attorney Glasbrenner's factual submissions as a basis for relieving her from the admissions.

¶20 The decision to allow relief from an admission is within the circuit court's discretion. ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98. We uphold a discretionary decision if the circuit court examined the relevant facts, applied the proper legal standard, and using a demonstrated rational process, reached a reasonable conclusion. ***Id.*** If the circuit court does not explain its reasoning on the record, we uphold the decision if an independent review of the record reveals a basis for the court's exercise of discretion.

¶21 Under WIS. STAT. § 804.11(2), the circuit court may permit the withdrawal or amendment of an admission when "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits." Here, the presentation of the merits would be subserved by relieving Attorney Glasbrenner from the effect of the admissions. Whether Attorney Glasbrenner provided legal services and whether she earned any part of the retainers are ultimate issues in this case**.** Relief

from the admissions would allow Attorney Glasbrenner to present her position that she did provide legal services and earn the retainers.

¶22 In addition, the record shows that Obriecht was not prejudiced by the court's relieving Attorney Glasbrenner from the effect of the admissions. Obriecht filed his request for admissions on April 2, 2008. On April 30, 2008, Attorney Glasbrenner filed an affidavit averring that she provided services to Obriecht under both agreements and attached itemized invoices detailing the services she performed.[8] Thus, as of April 30, before the time to answer his request for admissions had expired, *see* WIS. STAT. § 804.11(1)(b), Obriecht knew that Attorney Glasbrenner was asserting that she did provide legal services to him and that she did earn the retainers. Therefore, Obriecht cannot argue that he relied on the admissions in preparing his case. The fact that Obriecht was not successful in arguing that Attorney Glasbrenner did not provide legal services or earn the retainers is not sufficient to establish prejudice. *See* ***Mucek***, 252 Wis. 2d 426, ¶30 ("the party benefiting from the admission must show prejudice in addition to the inherent consequence that the party will now have to prove something that would have been deemed conclusively established if the opposing party were held to its admissions").

¶23 Obriecht relies on ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1983), which holds that summary judgment may be granted based on a failure to respond to a request for admissions, even if the admissions are dispositive. However, that case does not compel summary judgment in this

[8] It may be that these factual materials are what Attorney Glasbrenner is referring to in her brief on appeal when she asserts she did respond to the request to admit.

situation. In ***Bank of Two Rivers*** the court held that summary judgment was appropriate because the party who received the request for admissions not only failed to respond to the request, but also failed to file any opposing affidavits when the other party moved for summary judgment based on the admissions. ***Id.*** at 632-33. Thus, the court concluded that the party who failed to respond to the request had never actually disputed the matter admitted. ***Id.*** That is not the case here: Attorney Glasbrenner did file an affidavit and other factual materials disputing the contentions that she did not provide legal services and did not earn the retainers.

¶24 Having concluded that Attorney Glasbrenner did not concede Obriecht's claims, we turn to the dispositive issue on Obriecht's breach of contract claim: the proper construction of the two retainer agreements he signed.[9] The goal of contract construction is to ascertain the intent of the parties. ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). If the language of the contract is clear, we enforce that clear language, and do not look to information outside the contract to determine its meaning. ***Solowicz v. Forward Geneva Nat.***, 2009 WI App 9, ¶42, __ Wis. 2d. __, 763 N.W.2d 828 (Ct. App. 2008). Contract language is unclear, that is to say, ambiguous, when it is reasonably susceptible to more than one meaning. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987).

[9] Obriecht makes an argument that the $2,000 and $5,000 written retainer agreements are not legally enforceable because they were signed only by him. He did not raise this argument in the circuit court and therefore has forfeited the right to raise it on appeal. ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388. Even if we overlook forfeiture and consider this argument, it does not entitle him to summary judgment. A written agreement may be legally binding in the absence of a signature if there is an intent to be bound. ***Chudnow Constr. Corp. v. Commercial Discount Corp.***, 48 Wis. 2d 653, 657, 180 N.W.2d 697 (1970). Obriecht signed both agreements, so there is no dispute that he intended to be bound by their terms. Attorney Glasbrenner did not sign them, but she is not disputing the binding nature of the agreements; instead, she asserts their validity.

The question of whether a contract is ambiguous is a question of law, and we review questions of law de novo. ***Id.***

¶25 With respect to the $2,000 retainer agreement, the parties dispute the meaning of this language:

> **RETAINER**: Client shall pay Firm a non-refundable flat fee retainer in the amount of $2,000.00 flat fee to meet with client at Prairie Correctional Facility to discuss appellate issues and further representation. This retainer does not cover any further action or proceeding without a further Retainer Agreement.

¶26 Obriecht contends that Attorney Glasbrenner's entitlement to the fee under this agreement was contingent upon her performance of the $5,000 retainer agreement. Obriecht points to the statement, "further representation," and the provision stating "[t]his retainer does not cover any further action or proceeding without a further Retainer Agreement." Obriecht argues that this language shows that, if Attorney Glasbrenner decided any postconviction issues had merit, she would provide further representation "in harmony with" a second retainer, and that the decision to enter into a second agreement made the performance of the second agreement a condition of the $2,000 retainer agreement.

¶27 Obriecht's construction is not supported by the plain language of the contract. The language does not promise further representation. It promises a meeting and a *discussion* of further representation. Any act of further representation is expressly excluded from coverage under this contract by the language "[t]his retainer *does not cover any further action or proceeding* without a further Retainer Agreement." (Emphasis added.) Furthermore, Attorney Glasbrenner had no obligation to make a second retainer agreement. The fee was nonrefundable, which plainly means that Attorney Glasbrenner was entitled to

keep the money even if she decided against "further representation." The only acts required of Attorney Glasbrenner in order to earn the $2,000 retainer were to meet with Obriecht and discuss the possibility of representing him in an appeal.

¶28 It is undisputed that on December 21, 2002, Attorney Glasbrenner met with Obriecht at Prairie Correctional Facility and discussed postconviction issues with him. Accordingly, under the plain language of the first agreement, Attorney Glasbrenner is entitled to the entire $2,000 retainer.

¶29 With respect to the $5,000 retainer agreement, the parties' dispute centers on this language:

> The undersigned Andrew Obriecht (hereafter referred to as "Client") retains the Law Offices of Lettenberger & Glasbrenner, S.C. (hereafter referred to as "Firm") to represent and provide legal services to Client in the matter indicated in this agreement.
>
> ….
>
> **MATTER**: Postconviction (98 CF 274)[sic].

¶30 Obriecht contends this language unambiguously conditions payment of the $5,000 on the filing of a postconviction motion. In addition, he argues that Attorney Glasbrenner was obligated under this agreement to file a postconviction motion by March 17, 2003, in order to toll the one-year limitations period for filing his federal habeas petition. Attorney Glasbrenner responds that the agreement contemplated only the performance of services on an hourly basis and did not require the completion of any specific item.

¶31 We first address whether the contract language requires Attorney Glasbrenner to file a motion in order to be entitled to the $5,000. We conclude it

does not. There is no such condition in the agreement and it is not a reasonable construction because it is inconsistent with the language in the agreement.

¶32 Under the terms of the agreement, Attorney Glasbrenner is to "represent and provide legal services" in the postconviction matter of 98CF271. No particular task or service is specified. Indeed, the contract provides that "[c]lient authorizes Firm to perform services and to take actions as deemed advisable in the discretion of the Firm in representation of Client in this matter." No total fee is specified. The agreement specifically states:

> Client understands that many factors affect the ultimate fee to be paid by Client to Firm and that the final fee cannot be determined at this time. Client agrees that the fee to be paid by Client to Firm in this matter will be determined as follows:
>
> ….
>
> Attorney services will be charged at a minimum rate of $125 per hour....

The agreement plainly contemplates that Attorney Glasbrenner's work on the matter might exceed $5,000. The $5,000 is not an amount to be paid for a specified task but is "an initial retainer … to be applied toward fees for services and for disbursements of Firm in this matter as billed or incurred" and "[a]dditional retainer [is] to be made if necessary … [p]ayable within 30 days of interim invoice so as to remain current."

¶33 Obriecht asks that we consider evidence extrinsic to the contract that he asserts supports his interpretation. Because the contract language is clear, we do not consult extrinsic evidence to determine its meaning. ***Solowicz***, 2009 WI App 9, ¶42. However, even if we consider the extrinsic evidence Obriecht points to, it does not support his construction. His affidavit and correspondence with

Attorney Glasbrenner show that he conveyed to her his expectation that she was going to file a postconviction motion and he understood that he might be required to provide a retainer in addition to the $5,000 in order to accomplish this. This does not support a construction of the agreement that, if she provided legal services toward the end of filing a postconviction motion, she was not entitled to any payment if no motion was filed.

¶34 Obriecht next contends that Attorney Glasbrenner did not provide "legal services" to him as contemplated in this agreement[10] because she was negligent in failing to file a state postconviction motion before March 17, 2003, and, consequently, in failing to toll the statute of limitations on his federal habeas petition. We agree with the circuit court that whether Attorney Glasbrenner was negligent in the advice she gave Obriecht and whether she was negligent in failing to toll the federal statute of limitations are separate issues from whether she breached the $5,000 retainer agreement. Because Obriecht did not plead a negligence claim, but only a breach of contract claim, we, like the circuit court, may address only the breach of contract claim. Thus, the issue is whether the *retainer agreement* obligated Attorney Glasbrenner to file a postconviction motion by the date necessary to preserve his federal habeas option.

¶35 We have already concluded that this agreement does not obligate Attorney Glasbrenner to perform any particular task, including filing a postconviction motion. It follows that it does not obligate her to file that motion

[10] Obriecht also argues that Attorney Glasbrenner did not provide "legal services" under the $2,000 retainer agreement because payment under that $2,000 agreement was conditioned on not breaching the $5,000 agreement. Because we have already rejected that premise, we address Obriecht's "legal services" argument only in the context of the $5,000 agreement.

by a particular time. In addition, the agreement cannot reasonably be read to obligate her to "represent" or "provide legal services" with respect to a federal habeas petition. The "matter" as defined in the agreement is limited to the state court case, 98CF271. There is no language that can reasonably be read as referring to a federal habeas petition. We conclude that the language of the contract is unambiguous and does not impose an obligation on Attorney Glasbrenner to file a postconviction motion by the date necessary to preserve Obriecht's federal habeas option.

¶36 Even if we were to consider extrinsic evidence, as Obriecht asks us to do, our construction of the agreement would not change. He points to a letter he sent to Attorney Glasbrenner dated December 11, 2002, in which he stated, "I am concerned my … Federal Writ of Habeas Corpus deadline may lapse before you could file a State action to toll the deadline. *You indicated that you could not do filings in the Federal Court*, so I filed a Motion for an extension of time to file…." (Emphasis added.) He also points to his January 10, 2003 letter in which he states:

> I enjoyed discussing the new agreement with you on the phone yesterday, as well as, the Federal Writ of Habeas Corpus. I filed the actual Federal Writ December 13, 2002 because the Court said I need one filed before I could ask for an extension of my deadline. *You said you could not help me with the Federal Writ on requesting the extension because you do not practice Federal law*. You said I should let you know what the Court says about my extension request, I will let you know as soon as I hear something.

(Emphasis added.) Finally, he points to a letter he sent to Attorney Glasbrenner dated January 27, 2003, in which he attaches a copy of the District Court's order and states "[i]t appears we must have our postconviction in before the 17th of March." He also followed that letter up with a second letter dated January 28,

2003, in which he asks for the return of the order and states, "*I know you don't do Federal,* just thought I'd keep you up to date." (Emphasis added.)

¶37 This evidence does not show that Attorney Glasbrenner undertook any contractual obligation to Obriecht with respect to his federal habeas deadline. Rather, it shows that before Obriecht executed the first retainer agreement, Attorney Glasbrenner advised him that his federal claim was beyond the scope of her practice, and Obriecht understood this. The contract language defining the "matter" in terms of only the state court case is consistent with this extrinsic evidence.[11]

¶38 Our conclusion—that the $5,000 retainer agreement did not obligate Attorney Glasbrenner to provide legal services with respect to Obriecht's federal habeas claim and did not obligate her to file the state postconviction motion by the date required to preserve the federal claim—does not mean that Attorney Glasbrenner may not be negligent for the advice she gave him on the tolling of the federal deadline. Our holding is only that any such negligence does not constitute a breach of the $5,000 retainer agreement.

¶39 Having concluded that Attorney Glasbrenner did not breach the $5,000 retainer agreement by failing to file a postconviction motion or by failing to file the motion by March 17, 2003, we conclude she is entitled to the $5,000. Her submissions show that she prepared itemized statements of the services she

[11] Obriecht also asserts that Attorney Glasbrenner did not provide "legal services" within the meaning of the $5,000 retainer agreement because her failure to file a postconviction motion violated the Rules of Professional Responsibility. *See* SCR 20: 1.1, 1.3 (2008). However, the Rules of Professional Responsibility do not in themselves provide a basis for an attorney's civil liability. SCR 20, preamble; *see also* ***Peck v. Meda-Care Ambulance Corp.***, 156 Wis. 2d 662, 669, 673, 457 N.W.2d 538 (Ct. App. 1990).

performed and the expenses incurred and these were sent to Obriecht on a monthly basis. According to these statements and her affidavit, those services and expenses exhausted the $5,000 retainer, with a balance owed by Obriecht of $28.04, which she has not attempted to collect. Obriecht has not submitted factual materials disputing that she provided the services in the statements or contesting their appropriateness.

¶40 Finally, Obriecht argues that the circuit court erred in determining that there was no evidence to support his assertion in his brief that Attorney Glasbrenner committed fraud. We agree with the circuit court. There is no evidence and no reasonable inference from the evidence that Attorney Glasbrenner intended to defraud him of the $7,000 he paid her because she did not file a postconviction motion. *See* ***Mackenzie v. Miller Brewing Co.***, 2001 WI 23, ¶18, 241 Wis. 2d 700, 623 N.W.2d 739 (intent to defraud is an element of fraudulent misrepresentation).

CONCLUSION

¶41 The circuit court correctly decided that Attorney Glasbrenner was entitled to summary judgment in her favor. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.