COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP211 **Cir. Ct. No. 2010CV516**

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

JAMES C. BOURNE AND MADISON HOMES, INC.,

PLAINTIFFS-CO-APPELLANTS,

V.

QUARLES & BRADY, LLP AND DONALD K. SCHOTT,

DEFENDANTS-RESPONDENTS,

RICHARD M. BURNHAM,

DEFENDANT-APPELLANT,

NEIDER & BOUCHER, S.C., MELLI LAW, S.C. AND PHILIP J. BRADBURY,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 LUNDSTEN, J. This is an appeal from an order dismissing from a malpractice suit an attorney who voluntarily dismissed an appeal and then failed to timely file a subsequent appeal involving the same subject matter. The attorney, Donald Schott, was the third attorney to represent the client, James Bourne, in connection with misrepresentation claims Bourne brought against a former business partner and others. Bourne retained a new attorney and brought a legal malpractice action against Schott and his previous attorneys.[1]

¶2 Although Attorney Schott initially took the position that Bourne's misrepresentation claims were viable despite a settlement agreement Bourne entered into that appeared on its face to preclude those claims, Schott now argues that the circuit court correctly concluded that the agreement bars the claims and, therefore, that Bourne's malpractice suit against Schott was properly dismissed because the claims could not have succeeded. We agree. And we are not persuaded by Bourne's arguments that the agreement, even if unambiguous, is unenforceable. We therefore further agree with Schott that the circuit court properly dismissed Schott as a defendant from Bourne's malpractice action. Accordingly, we affirm the circuit court.[2]

[1] Bourne named both the individual attorneys and their respective law firms as defendants. We see no reason here to distinguish between the individual attorneys and their respective law firms. Thus, we refer only to the individual attorneys. In particular, we refer only to "Schott" when we mean both Schott and Quarles & Brady. Similarly, Bourne's company, Madison Homes, is a plaintiff and appellant along with Bourne, but we refer only to "Bourne."

[2] As far as we can tell, our affirmance of the circuit court's order moots Richard Burnham's appeal. Burnham was one of the attorneys who previously represented Bourne. Burnham explains in his brief that he filed cross-claims in the circuit court against Schott, one for contribution in the event that Burnham and Schott were found jointly liable, and one for equitable subrogation in the event that Burnham and Schott were found to be causally negligent successive (continued)

Background

¶3 Bourne was one of four members in an LLC called Four Empty Milk Cans. Two other members were Anthony Heinrichs and Jerome Heinrichs. At some point, Bourne and Anthony Heinrichs began having disputes relating to Four Empty Milk Cans. They resolved those disputes by entering into the settlement agreement at issue here. The agreement provided, among other things, that Anthony Heinrichs would make payments to Bourne on a note for $567,500.

¶4 As addressed in more detail below, the settlement agreement also included the provisions in dispute. Those terms included a broadly worded mutual release from liability. Bourne characterizes this mutual release as an "exculpatory clause." The agreement also included a provision stating that the written agreement constituted the "entire agreement" between Bourne and Anthony Heinrichs. The parties agree that this provision is an "integration clause."

¶5 According to Bourne, he entered into the settlement agreement based on certain representations that are not in the written agreement and were made by Vernon Jesse, the attorney representing Anthony Heinrichs.[3] Also according to Bourne, he later learned that Attorney Jesse's representations were false. In particular, Bourne alleged that Attorney Jesse falsely represented that the fourth partner in Four Empty Milk Cans wanted Bourne "out" of that entity. Bourne does not fully explain why this representation is significant. He asserts that it led him to believe that he would be out-voted on matters involving Four Empty Milk

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tortfeasors. Under our decision, Schott cannot be jointly liable or causally negligent in any malpractice alleged by Bourne. We therefore address Burnham's appeal no further.

[3] Bourne disputes whether Attorney Jesse was representing Four Empty Milk Cans or Anthony Heinrichs individually. We address this below.

Cans such that he would receive "little if anything" from his ownership interest in the LLC.

¶6 An issue arose as to whether Bourne should accept Heinrichs' payment under the settlement agreement. Two non-Quarles & Brady attorneys from separate law firms advised Bourne that he could accept the payment and still bring suit for tort damages based on misrepresentation. After receiving this advice, Bourne cashed a check for the full amount due him under the settlement agreement.

¶7 One of the attorneys who advised Bourne filed a tort action on Bourne's behalf against Attorney Jesse and Anthony and Jerome Heinrichs.[4] The complaint included a variety of claims based on misrepresentation, including fraud in the inducement. The circuit court, Judge Moria Krueger, dismissed Bourne's complaint for failure to state a claim, without prejudice. The court concluded that Bourne's claims were barred by the economic loss doctrine and that any fraud in the inducement exception to that doctrine did not apply.

¶8 Attorney Schott began representing Bourne shortly thereafter. Schott filed a notice of appeal in an effort to overturn Judge Krueger's dismissal of Bourne's claims. Schott also filed a second tort action against the same

[4] The parties do not develop arguments as to whether Jerome Heinrichs should be treated differently from Anthony Heinrichs for purposes of our analysis. Instead, the parties appear to agree, albeit implicitly, that Jerome Heinrichs stands in the same shoes as Anthony Heinrichs even though Jerome Heinrichs was not a party to the settlement agreement. We are uncertain why, but it may be because the parties agree that Jerome Heinrichs was aligned with Anthony Heinrichs in the disputes between Bourne and Anthony Heinrichs. Or, it may be because Bourne concedes that, if the terms of the settlement agreement are unambiguous and enforceable, then Jerome Heinrichs is covered by those terms. Regardless, we follow the parties' lead and do not discuss Jerome Heinrichs separately.

defendants on Bourne's behalf. Later, Schott voluntarily dismissed the appeal relating to the action Judge Krueger had dismissed, apparently based on a concern that a final appellate decision in that case might increase the chances that Judge Krueger's decision would preclude Bourne's second tort action.

¶9 The circuit court, Judge C. William Foust presiding, dismissed the second tort action. Judge Foust concluded that, based on issue preclusion, Judge Krueger's decision barred the action.

¶10 Attorney Schott attempted to appeal Judge Foust's decision, but missed the filing deadline. As a result, we dismissed the appeal for lack of jurisdiction. As indicated above, during the time that Schott represented Bourne, Schott took the position that Bourne's claims were not barred by the settlement agreement.

¶11 Bourne hired a new attorney and brought an action for legal malpractice against Schott and the attorneys who previously represented him. As to Attorney Schott, Bourne alleged that Schott was negligent in dismissing the first appeal and, regarding the action Schott filed, in failing to timely appeal Judge Foust's decision.

¶12 Attorney Schott moved to have the malpractice action against him dismissed on summary judgment. The circuit court, Judge John Albert presiding, granted summary judgment to Schott, and dismissed Schott from Bourne's malpractice action.

Discussion

¶13 We review summary judgment de novo. ***Jessica M.F. v. Liberty Mut. Fire Ins. Co.***, 209 Wis. 2d 42, 48, 561 N.W.2d 787 (Ct. App. 1997).

Summary judgment is granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[5]

¶14 As the background section recounts in more detail, Attorney Schott voluntarily dismissed an appeal in a tort action—filed by a prior attorney representing Bourne—against Heinrichs and his attorney, Vernon Jesse. And, Schott later missed a filing deadline, thereby failing to pursue an appeal in a similar tort action Schott himself filed. Generally speaking, for Bourne to prevail in his malpractice action, he needs to establish that, "but for" these alleged failings by Schott, Bourne could have successfully sued Heinrichs or Jesse. *See* ***Glamann v. St. Paul Fire & Marine Ins. Co.***, 144 Wis. 2d 865, 870, 424 N.W.2d 924 (1988) (proving legal malpractice entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action'" (quoted source and internal quotations marks omitted)).

¶15 We need not discuss the underlying merits of any claim Bourne might have against Heinrichs or Jesse. The question before us is whether there is a threshold bar to success—whether the settlement agreement bars all tort actions against these men.

¶16 Bourne does not seriously argue that he did not intend to resolve all of his disputes with Heinrichs and Attorney Jesse when he entered into the settlement agreement. Rather, Bourne argues that the agreement is ambiguous and

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

cannot be enforced to prohibit his tort actions. Bourne's supporting appellate arguments are divided into two main sections under the following headings:

> A. Bourne's intent upon cashing the promissory note payment and then pursuing claims for tort remedies is a crucial issue for determining whether he waived his right to sue for fraud but it is a factual issue that should be decided by the jury.
>
> B. The law regarding general release, integration, and no-reliance clauses is not clear in order for the circuit court to rule that Bourne's claims were barred and grant Schott's motion for summary judgment without a full factual record.

Despite this division, we discern some overlap between the two main sections. We make this point not to quibble with Bourne's briefing, but so that he understands why we take some of his arguments out of order and that we have made our best efforts to address what we perceive to be the substance of those arguments.[6]

¶17 Attorney Schott, in contrast, now argues that the settlement agreement bars Bourne's claims against Heinrichs and Attorney Jesse. We agree with Schott's present argument.

A. Bourne's Intent Argument

¶18 Bourne appears to argue that he did not, by entering into the settlement agreement and accepting payment, *intend* to give up his right to sue

[6] At this point in our analysis, we note that neither Bourne nor Attorney Schott develops an argument relating to the economic loss doctrine even though that doctrine was the primary basis for Judge Krueger's decision and an alternative basis relied on by Judge Albert to dismiss Schott as a party. If we were to conclude that these decisions by Judges Krueger and Albert were correct, we would affirm in favor of Schott. However, in the absence of argument on the topic, we decline to address it; we limit ourselves to the arguments the parties put before us.

based on the alleged misrepresentations by Attorney Jesse. Bourne points to actions he and Jesse took *after* Bourne executed the settlement agreement. In keeping with this, Bourne sometimes discusses his intent in terms of whether he "ratified" or "affirmed" the agreement. As framed by Bourne, he seems to believe that ratification or affirmance of the agreement was necessary. However, as the circuit court recognized, and as Attorney Schott now argues, subsequent actions by those involved in the settlement are extrinsic to the settlement agreement and are evidence of Bourne's intent only if the settlement agreement is ambiguous and if such actions help resolve that ambiguity.

¶19 When construing a contract, our goal "'is to ascertain the true intentions of the parties as expressed by the contractual language.'" ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (quoted source omitted). "Stated another way, the best indication of the parties' intent is the language of the contract itself ...." ***Id.*** "'If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.'" ***Id.*** (quoted source omitted). "Only when the contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, may the court look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent." ***Id.***

¶20 Thus, if we are to consider extrinsic evidence of Bourne's intent regarding the settlement agreement, Bourne needs to persuade us that either the agreement is ambiguous or some exception applies to the ordinary rule that courts do not consider extrinsic evidence absent ambiguity. Bourne does neither.

1. Ambiguity

¶21 In addressing whether the settlement agreement is ambiguous, we focus on three clauses in the agreement. The first clause is a mutual release, the second is an "entire agreement" or integration clause, and the third clause is one that extends the benefits of the agreement to "legal representatives":

> 7. Mutual Release.… [T]he Parties [Bourne and Anthony Heinrichs] do hereby fully release … each other *and their ... agents … and all other persons* … from any claims whatsoever *related in any way to ... [Four Empty Milk Cans*] or any other matters between them arising or accruing as of the date of this Agreement, … and from any complaints, causes of action, or liabilities of any kind whatsoever, whether the same are presently known, unknown, latent, developed or undeveloped, anticipated or unanticipated.... *Heinrichs and Bourne are each relying upon their own judgment, belief and knowledge and not upon any representation or statements made by any person ... hereby released or by anyone representing them....*
>
> ….
>
> 10. Entire Agreement. This Agreement and the attached exhibits constitute the entire agreement of the Parties with respect to the subject matter hereof *and are intended to super[s]ede entirely the provisions of any prior agreements, negotiations or understandings, if any, whether oral or written among the Parties or their representatives*.
>
> ….
>
> 14. Binding Effect. This Agreement shall be binding upon the Parties and *inure to the benefit of the ... legal representatives of the Parties* hereto.

(Emphasis added.)[7]

[7] The settlement agreement contains at least one additional clause that may apply here, but we conclude that that additional clause adds nothing to our analysis. That clause states as follows:

(continued)

¶22 We agree with the circuit court and Schott that these clauses are unambiguous as applied here, and that they apply to bar Bourne's misrepresentation claims against both Heinrichs and Attorney Jesse as Heinrichs' legal representative. The agreement unambiguously releases Heinrichs from all claims by Bourne relating to Four Empty Milk Cans, expressly disclaims reliance on "any representation or statements made by" Heinrichs or anyone representing him, provides that the agreement's written terms control over any prior understandings, and extends the agreement's benefits to Heinrichs' "legal representative[]."

¶23 Bourne argues that the agreement is ambiguous as to Attorney Jesse, or at least that there is some factual issue in this respect, because there is an unresolved fact question relating to whether Jesse represented Four Empty Milk Cans or Anthony Heinrichs as an individual. On this topic, it is evident from the parties' briefing that there is a long-running dispute as to Jesse's legal representation of Heinrichs and Four Empty Milk Cans and whether Jesse had some sort of conflict of interest. However, regardless of Attorney Jesse's legal representation for other purposes, it cannot seriously be disputed that Jesse acted as Heinrichs' agent and "legal representative" for purposes of the settlement agreement. This is apparent to us from the parties' briefing, the trial level pleadings they cite, and from the agreement itself, which specifies that notices under the agreement must be sent to Heinrichs with a copy to Attorney Jesse. Accordingly, we discern no reason why a factual dispute over other aspects of

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> 17. Acknowledgement.… The Parties understand that this Agreement includes a final general release and that no claims may be brought by any party hereto against any other party hereto for any matter or cause whatsoever ….

Attorney Jesse's legal representation affects the validity or meaning of the settlement agreement.

¶24 Bourne argues that the settlement agreement is ambiguous because it refers to "a slew of people and entities, which are not specifically identified." Assuming without deciding that the agreement is ambiguous as to whether it covers other people or entities, we reject Bourne's argument because the agreement plainly covers the individuals that matter here.

¶25 Bourne's appellate brief-in-chief asserts that the settlement agreement terms are ambiguous "because the clause stating that the parties are not relying on *any representations* is followed by a sentence stating that the parties are *representing* that they have the full authority to execute the agreement." (Bourne's emphasis.) Bourne apparently means to argue that the language he refers to is internally inconsistent because it says that the parties both are and are not relying on "representations." We see no such inconsistency. The only reasonable interpretation of the agreement as a whole is that Bourne and Heinrichs agreed that they were relying on the written terms of the agreement but not on representations extrinsic to the agreement. It makes no sense to argue, as Bourne seems to, that the agreement could be ambiguous as to whether the parties intended to rely on its written terms.

2. Exception To Rule Barring Consideration Of Extrinsic Evidence

¶26 In his brief-in-chief, Bourne relies on ***Benz v. Zobel***, 255 Wis. 542, 39 N.W.2d 713 (1949), and ***Sell v. Mississippi River Logging Co.***, 88 Wis. 581, 60 N.W. 1065 (1894), to argue that the court must consider extrinsic evidence of his intent. Both cases establish that evidence of fraud may be used to set aside a contract, and in both cases the court considered evidence extrinsic to the contract.

See ***Benz***, 255 Wis. at 558 (involving a settlement agreement); ***Sell***, 88 Wis. at 584, 586-87 (involving a logging contract). In neither case, however, did the contract involve an integration clause or a disclaimer of reliance on extrinsic representations like the one here. Accordingly, we are not persuaded by ***Benz*** and ***Sell***.

¶27 In his reply brief, Bourne relies instead on ***Batt v. Sweeney***, 2002 WI App 119, 254 Wis. 2d 721, 647 N.W.2d 868. We may, and frequently do, decline to address arguments raised for the first time in reply briefs, *see* ***A.O. Smith Corp. v. Allstate Insurance Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998), but we will address ***Batt***.

¶28 ***Batt*** involved a settlement check issued by an insurer to an injured party. ***Batt***, 254 Wis. 2d 721, ¶¶1-4. The check stated on its face that the check was a "FINAL SETTLEMENT OF ANY AND ALL CLAIMS ARISING FROM BODILY INJURY CAUSED BY [THE] ACCIDENT." ***Id.***, ¶4. The injured party cashed the check, but did not sign an accompanying release. ***Id.***, ¶¶4, 8. That party later asserted that the insurer induced her into signing the check based on misrepresentations. ***Id.***, ¶8. We concluded that the circuit court erred by granting summary judgment to the insurer without considering extrinsic evidence of the injured party's intent and the insurer's misrepresentations. ***Id.***, ¶¶6, 9-12.

¶29 Unlike the injured party in ***Batt***, Bourne signed a mutual release as part of a settlement agreement and, as we have explained, that release expressly and unambiguously disclaims reliance on any representation extrinsic to the contract. Bourne's cashing of the promissory note check, occurring after he signed the release, is not analogous to the injured party's cashing of a check *without* signing an accompanying release in ***Batt***. In addition, as we explain

below, we agree with Schott that Bourne's case is more analogous to ***Peterson v. Cornerstone Property Development, LLC***, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716. We are therefore not persuaded by Bourne's reliance on ***Batt***.

B. Bourne's Argument Regarding Exculpatory And Integration Clauses

¶30 As indicated above, Bourne's second main heading in his brief states that the "law regarding general release, integration, and no-reliance clauses is not clear in order for the circuit court to rule that Bourne's claims were barred and grant Schott's motion for summary judgment without a full factual record." When we review Bourne's sub-arguments under this heading, it becomes clear that the question that remains is whether the settlement agreement, although unambiguous, is nonetheless unenforceable with respect to one or more of Bourne's misrepresentation claims. We agree with the circuit court that the agreement is enforceable.

¶31 Bourne's supporting arguments can be broken down into two categories, one relating to exculpatory clauses and one relating to integration clauses. Although some of Bourne's arguments, like some of the case law, blend the two together, we discuss them separately.

1. Exculpatory Clauses

¶32 An "exculpatory clause" has been defined generally as a provision that "'relieve[s] a party from liability for harm caused by his or her own negligence.'" *See* ***Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶26, 286 Wis. 2d 170, 706 N.W.2d 95 (quoted source omitted). Exculpatory clauses are generally disfavored in Wisconsin. *See, e.g.*, ***Atkins v. Swimwest Family Fitness Ctr.***, 2005 WI 4, ¶12, 277 Wis. 2d 303, 691 N.W.2d

334; ***Mettler v. Nellis***, 2005 WI App 73, ¶13, 280 Wis. 2d 753, 695 N.W.2d 861. In 2005, the supreme court observed that "each exculpatory contract that [that court] has looked at in the past 25 years has been held unenforceable." ***Rainbow Country***, 286 Wis. 2d 170, ¶35. The reason for disfavoring exculpatory clauses is that "they tend to allow conduct below the acceptable standard of care." ***Richards v. Richards***, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118 (1994); *accord* ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 81, 557 N.W.2d 60 (1996); ***Mettler***, 280 Wis. 2d 753, ¶13.

¶33 When deciding whether an exculpatory clause should be enforced, we consider both traditional contract principles and public policy. *See* ***Brooten v. Hickok Rehab. Servs., LLC***, 2013 WI App 71, ¶8, 348 Wis. 2d 251, 831 N.W.2d 445. In ***Brooten***, however, we observed that "the contractual analysis has been de-emphasized …. Public policy is 'the germane analysis for exculpatory clauses.'" ***Id.*** (quoted source and internal quotation marks omitted).

¶34 "Courts look at a variety of factors ... to determine whether an exculpatory clause violates public policy." ***Mettler***, 280 Wis. 2d 753, ¶14. We summarized some of those factors as follows in ***Mettler***:

> In *Yauger*, the court concluded "the waiver must clearly, unambiguously, and unmistakably inform the signer of what is being waived" and "the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed." *Yauger*, 206 Wis. 2d at 84. The *Richards* court concluded a release was unenforceable because it (1) served two purposes and neither purpose was clearly identified or distinguished; (2) was broad and all-inclusive; and (3) was a standard, pre-printed form signed with little or no opportunity to negotiate or bargain.

Id.

¶35 Bourne argues that the mutual release in the settlement agreement is an unenforceable exculpatory clause under the case law described. We disagree because we conclude that the mutual release is not an exculpatory clause.

¶36 As already noted, it is true that an "exculpatory clause" has been defined generally as a provision that "'relieve[s] a party from liability for harm caused by his or her own negligence.'" *See* ***Rainbow Country***, 286 Wis. 2d 170, ¶26 (quoted source omitted). And, we recognize that this definition seems broad enough to include a mutual release like the one in the settlement agreement here. We conclude, however, that, when the published opinions on this topic refer to exculpatory clauses, they do not mean to include a mutual release that is part of a settlement agreement.

¶37 This conclusion is supported by the "well settled" principle that "an exculpatory clause may only release claims of negligence; it cannot, under any circumstances—bargained or not—preclude claims based on reckless or intentional conduct." ***Brooten***, 348 Wis. 2d 251, ¶10; *see also* ***Werdehoff v. General Star Indem. Co.***, 229 Wis. 2d 489, 507, 600 N.W.2d 214 (Ct. App. 1999); ***Kellar v. Lloyd***, 180 Wis. 2d 162, 183, 509 N.W.2d 87 (Ct. App. 1993). Accepting this principle means that a release in a settlement agreement must be something other than an exculpatory clause; otherwise, it would be impossible to enforce any settlement agreement that resolves claims for reckless or intentional conduct. Schott makes an argument largely along these lines, except that he refers only to intentional conduct. And, Bourne provides no reply on this key point. Obviously, parties do and should be permitted to resolve with finality ongoing disputes by entering into a settlement agreement.

¶38 Our common-sense conclusion that settlement agreements ordinarily are not covered by the rule disfavoring exculpatory clauses is further supported, at least implicitly, by the cases Bourne cites that either label a contract term an "exculpatory clause" or reference the principles that apply to such clauses. As Schott argues, none of those cases involve a settlement agreement. *See* ***RepublicBank Dallas, N.A. v. First Wisconsin Nat'l Bank of Milwaukee***, 636 F. Supp. 1470, 1471-72 (E.D. Wis. 1986) (agreement to assign loan notes); ***Richards***, 181 Wis. 2d at 1011-14 ("Passenger Authorization" form for rider in commercial vehicle); ***Anderson v. Tri-State Home Improvement Co.***, 268 Wis. 455, 457-60, 67 N.W.2d 853 (1955) (contract to install siding); ***Peterson***, 294 Wis. 2d 800, ¶¶4-7, 35-37 (real estate contract relating to condominium purchase); ***Mettler***, 280 Wis. 2d 753, ¶¶2-3, 12-19 (release waiving liability related to horse riding lessons); ***Finch v. Southside Lincoln-Mercury Inc.***, 2004 WI App 110, ¶¶2-5, 16-23, 274 Wis. 2d 719, 685 N.W.2d 154 (dealership lease agreements); ***Grube v. Daun***, 173 Wis. 2d 30, 47, 59-60, 496 N.W.2d 106 (Ct. App. 1992) (real estate contract); *see also* ***Atkins***, 277 Wis. 2d 303, ¶¶1-2, 4-5, 12-27 ("Waiver Release" and registration card for pool use at swim facility); ***Yauger***, 206 Wis. 2d at 78-89 (liability waiver form for use of ski facilities); ***Brooten***, 348 Wis. 2d 251, ¶¶4, 7-15 (liability waiver for use of health club); ***Werdehoff***, 229 Wis. 2d at 492-506 (liability waiver for use of motorcycle race course); ***Kellar***, 180 Wis. 2d at 168-74 ("release, waiver, and indemnity agreement" for participation as volunteer worker at race track).

¶39 We therefore reject Bourne's argument that the mutual release in the settlement agreement is an unenforceable exculpatory clause. While there may be additional reasons to reject this argument, and to make a general distinction

between exculpatory clauses and most settlement agreements, the reasons we have provided are sufficient.

2. Integration Clauses

¶40 An integration clause, generally speaking, is a clause that "demonstrates that the parties intended the contract to be a final and complete expression of their agreement." ***Town Bank***, 330 Wis. 2d 340, ¶39. As indicated earlier, the settlement agreement here has an integration clause providing that the agreement "constitute[s] the entire agreement of the Parties" and is "intended to super[s]ede entirely the provisions of any prior agreements, negotiations or understandings … whether oral or written among the Parties or their representatives."

¶41 Bourne contends that the rules applying to such clauses make the agreement unenforceable against his fraud or other misrepresentation claims. He relies in large part on ***Peterson***, 294 Wis. 2d 800, for these arguments. We agree with the circuit court and Schott, however, that ***Peterson*** supports a conclusion that the settlement agreement is enforceable against those claims.[8]

¶42 Bourne correctly asserts that ***Peterson*** contains two related propositions governing integration clauses that apply here:

[8] In ***Peterson v. Cornerstone Property Development, LLC***, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716, we addressed only a statutory misrepresentation claim under WIS. STAT. § 100.18(1). *See* ***Peterson***, 294 Wis. 2d 800, ¶¶1-3, 35. Nonetheless, it is clear from ***Peterson*** that the portion of our reasoning that matters here applies to common law claims as well. *See* ***id.***, ¶¶35-37.

(1) "'Wisconsin follows the *general rule* that integration clauses which negate the existence of any representations not incorporated into the contract may not be used to escape liability for the misrepresentations.'" ***Id.***, ¶33 (quoting ***Grube***, 173 Wis. 2d at 59-60) (emphasis added).

(2) "[D]isclaimers in the form of integration clauses will not be honored, as [a] matter of public policy, *unless the disclaimer is specific as to the tort that is being disclaimed and the disclaimer makes it 'apparent that an express bargain was struck* to forego the possibility of tort recovery in exchange for negotiated alternative economic damages.'" ***Id.***, ¶36 (quoting ***Grube***, 173 Wis. 2d at 60) (emphasis added).

¶43 However, what Bourne fails to acknowledge is that ***Peterson*** applied these propositions to *uphold* an integration clause and disclaimer provision substantially similar to those at issue here. *See* ***id.***, ¶37. The pertinent provisions in ***Peterson*** were in a real estate contract and were quoted in our opinion as follows:

> "This Offer, including any amendments to it, contains *the entire agreement* of the Buyer and Seller regarding the transaction. *All prior negotiations and discussion have been merged into this Offer"*; "Seller has made no representations other than written in this offer and attached documents concerning the property"; and finally:
>
> > The Buyer acknowledges, subject to the Limited Warranty contained in Exhibit E … (c) other than those written representations concerning the condition of the Property contained in the Condominium Offer to purchase, including the Exhibits annexed thereto, *she has not relied on any representations made by the Seller in entering into the Condominium Offer to Purchase* ….

Id., ¶37. We explained in ***Peterson*** that the provisions were enforceable because they passed muster under the two propositions cited:

> [U]nlike the clause in *Grube*, the integration clause here *specifically disclaims the purchaser's right to rely on any alleged fraudulent misrepresentations*. Indeed, the three provisions of Peterson's contract that expressly stated that the written contract made up the entire contract, to the exclusion of all other provisions, *provide exactly the kind of specific disclaimer that makes it apparent that an express bargain had been struck*. *See Grube*, 173 Wis. 2d at 60. With an integration clause, worded as clearly and unmistakably as the one in question, we see no reason not to give the integration clause its intended effect.

Id. (emphasis added).

¶44 We see no meaningful distinction between the contract terms in ***Peterson*** and those here. Bourne specifically disclaimed his right to rely on representations outside the settlement agreement made by Attorney Jesse as Heinrichs' legal representative. As we have seen, the agreement states that Heinrichs and Bourne "are each relying upon their own judgment, belief and knowledge *and not upon any representation or statements made by any person ... hereby released or by anyone representing them.*" (Emphasis added.) And, Bourne agreed that the settlement agreement constituted the entire contract. Further, Bourne expressly agreed that the settlement agreement terms would supersede any prior understandings.

¶45 We acknowledge the obvious, which is that ***Peterson*** did not involve a settlement agreement. But Bourne does not argue that this is a reason to distinguish ***Peterson***. Rather, as already indicated, Bourne relies on ***Peterson***. In addition, we see no principled basis on which to distinguish ***Peterson***. In particular, we see no public policy reason why a comprehensive, negotiated settlement agreement like the one here should be more readily set aside than a real

estate contract like the one in ***Peterson***. If anything, it would appear that there is more reason to enforce such a settlement agreement, the primary purpose of which is to put an end to ongoing disputes.

¶46 We observe that, although Bourne does not plainly frame it as such, at least part of his argument seems to be that the integration clause should not be enforced to bar his misrepresentation claims because he was fraudulently induced into the agreement by those very misrepresentations. In this respect, we note that a similar argument was made and rejected in ***Peterson***. *See* ***id.***, ¶¶27, 38. And, Bourne does not attempt to distinguish ***Peterson*** in this respect. Nor does he provide a persuasive argument for why a settlement agreement like the one here should be rendered unenforceable based on the nature of fraud he alleges. It is obvious from the briefing and record that Bourne is a sophisticated party who entered into an agreement with another party of similar bargaining power, and that the agreement was intended to resolve all disputes between them. In particular, Bourne's attempt to use alleged misrepresentations by Attorney Jesse to avoid the settlement agreement's prohibition on bringing suit rings hollow because he specifically agreed to "rely[] upon [his] own judgment, belief and knowledge" and not on "any representation or statements" made by others.

¶47 Finally, we acknowledge an argument Bourne makes that, even if the settlement agreement bars his other claims, he has a viable claim under WIS. STAT. § 183.0402 pertaining to breach of fiduciary duties by members in LLCs. We conclude that this argument is undeveloped and, therefore, we do not resolve it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments). We note only that Bourne's minimal argument does not persuade us that his § 183.0402 claim would fall outside the part of the settlement agreement in which Bourne and Heinrichs

agreed to "fully release … each other … from any claims whatsoever related in any way to … [Four Empty Milk Cans]."

Conclusion

¶48 In sum, Bourne has failed to persuade us that the circuit court erred in granting summary judgment on the question of whether the settlement agreement bars Bourne's claims against Attorney Jesse and Heinrichs. Bourne therefore has not shown that he would have been successful on those claims but for Schott's alleged negligence. Accordingly, we affirm the circuit court's order dismissing Schott from Bourne's legal malpractice action.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.