COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2016AP1915 **Cir. Ct. No. 2015CV130**

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

JUDY L. BIERMEIER,

PLAINTIFF-APPELLANT,

V.

KATHERINE E. CAMPBELL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Juneau County: PAUL S. CURRAN, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman, and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Judy Biermeier appeals a summary judgment dismissing her complaint for legal malpractice against Attorney Katherine Campbell based on Campbell's representation of Biermeier in a divorce action. As part of the property division, the circuit court assigned ownership of the marital house to Biermeier's former husband, along with all debt associated with the marital house. Subsequently, the mortgage and accompanying note on the marital house went into default, and Biermeier was named in the resulting foreclosure action as sharing responsibility with the former husband for the amount due the mortgagee. In this action, Biermeier alleges that Campbell was negligent in not asking the circuit court to include in the judgment of divorce a requirement that the former husband obtain refinancing on the marital house that would have resulted in termination of Biermeier's shared liability with her former husband on the mortgage. Biermeier alleges that she suffered damages as a result of Campbell failing to ask the court for a refinancing provision. We conclude that Biermeier has failed to submit evidence creating a genuine issue of material fact on causation and damages, and accordingly we affirm the circuit court.[1]

BACKGROUND

¶2 For purposes of summary judgment, the following facts are not in dispute. Campbell represented Biermeier throughout the divorce proceedings. After a two-day bench trial, the court issued Findings of Fact, Conclusions of Law, and Judgment of Divorce in August 2009.[2]

[1] The Hon. John Pier Roemer presided over the divorce action, and the Hon. Paul S. Curran presided over this legal malpractice action.

[2] The court entered an initial set of findings, conclusions, and judgment in May 2008. After Tuttle moved for reconsideration, the court issued a new set in August 2009.

¶3 During the course of their marriage, Biermeier and Scott Tuttle jointly signed a note and mortgage with a lender to purchase the marital house. As part of the property division, the circuit court assigned to Tuttle both the marital house valued at $490,000 and responsibility for the mortgage on the marital house, which then had an outstanding balance due of $280,193.03. Specifically, the court ordered that Tuttle make the mortgage payments on the marital house and that Tuttle "shall hold [Biermeier] harmless thereon." However, the divorce judgment did not contain any provision that directed Tuttle to take any steps to refinance or sell the marital house or otherwise to affirmatively terminate Biermeier's responsibility for payments on the mortgage.[3]

¶4 Shortly after the divorce judgment was entered, Campbell sent Biermeier a quit claim deed and a real estate transfer return for the marital house, asking Biermeier to execute and return these two documents. Biermeier complied with this request. According to her amended complaint in this action, when she executed these documents Biermeier believed that, as a result, "she was no longer associated with the [marital house] or the mortgage" on that property, and she "would not have agreed to sign" the documents "had she known that she would still be responsible for the mortgage" for the marital house.

¶5 At the time of the divorce, Tuttle was an investment advisor with an annual average gross income of $123,726. However, in 2010, after the judgment of divorce had been entered, Tuttle became severely ill, became no longer able to

[3] Also as part of the property division, the court assigned Biermeier a farm with a value of $529,509, along with responsibility for $24,338.08 in debt on the farm. The divorce judgment did not contain a provision requiring Biermeier to take affirmative steps to relieve Tuttle of responsibility under the land contract or mortgage for the farm.

make a steady living, and stopped making mortgage payments on the marital house.

¶6 In 2014, the mortgagee on the marital house filed a foreclosure action against Tuttle and Biermeier. Biermeier asked attorneys for the mortgagee to dismiss her from the foreclosure action, and also asked the circuit court to order this, but these requests were denied, leaving Biermeier as a party to the foreclosure action. The marital house sold for $183,547 at a sheriff's sale. The mortgagee did not seek a deficiency judgment for the $59,624.82 difference between the sales price and the principal balance owed, and as a result this debt was discharged.

¶7 Although the mortgagee did not hold Biermeier responsible for the deficiency, in her amended complaint in this action Biermeier claimed four categories of alleged damages resulting from Campbell's alleged negligence: half of the outstanding mortgage debt on the marital house, which the divorce court had assigned in its totality to Tuttle, because Biermeier "was responsible for the debt"; damage to her credit resulting from the foreclosure proceedings; emotional distress and aggravation resulting from the foreclosure proceedings; and penalties and interest that she owed in taxes, due to the discharge of debt when the mortgagee did not seek a deficiency judgment.

¶8 Campbell moved for summary judgment on several grounds, which the circuit court granted. The court effectively explained, in pertinent part, that Biermeier had failed to produce evidence that a reasonably prudent attorney would have prevented the damages that Biermeier alleges by seeking an order from the divorce court requiring Tuttle to refinance the mortgage in a manner that would have resulted in the elimination of Biermeier's responsibility on the marital house mortgage and note. Biermeier appeals.

DISCUSSION

¶9 The bulk of the briefing on appeal addresses the question of whether summary judgment is merited because Biermeier failed to obtain expert testimony to prove that Campbell breached the standard of care. However, as we now explain, we do not address that question. Instead we resolve this appeal based on Campbell's separate argument that the evidence submitted on summary judgment does not contain evidence to support a claim of causation and damages.[4]

¶10 When reviewing a circuit court's grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08 (2015-16),[5] and our review is de novo. *See* ***Siebert v. Wisconsin Am. Mut. Ins. Co.***, 2011 WI 35, ¶27, 333 Wis. 2d 546, 797 N.W.2d 484.

¶11 In a legal malpractice action, the plaintiff has the burden of proving the following elements: (1) existence of an attorney-client relationship; (2) "'acts constituting the alleged negligence'"; (3) "'that the negligence was the proximate cause of the injury'"; and (4) "'the fact and extent of'" injury. ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979) (quoting 7 Am. Jur. 2d, Attorneys at Law, sec. 188, at 156 (1963)).

[4] We emphasize that we intend to convey no opinion on the following issues: whether it could constitute negligent conduct for an attorney to fail to inform her client in a divorce that the client would remain responsible for mortgage payments after surrendering her interest in the property at issue; whether it could constitute negligent conduct for the attorney to fail to seek from the court a provision that in some manner requires the spouse assigned all interests in and debts on property to take affirmative steps to terminate ongoing debt responsibility by the attorney's client; and whether proving the standard of care in a case of this type necessarily requires expert testimony.

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶12 We focus on the third and fourth elements, causation and damages, which our supreme court has explained are typically closely linked in this context. That is, in legal malpractice actions proof of the fact and extent of injury "often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action." ***Id.***; *see also* ***Fischer v. Ganju***, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992) (plaintiffs in negligence actions have the burden of producing evidence from which a court may conclude that a jury could reasonably find a causal nexus between the negligent act and the resulting injury, and at trial the burden of persuading the jury that negligence in fact caused the injuries).

¶13 Turning to the summary judgment context, our supreme court recently clarified that a non-moving party cannot defeat a motion for summary judgment merely by alleging the existence of a factual dispute. *See* ***North Highland Inc. v. Jefferson Mach. & Tool Inc.***, 2017 WI 75, ¶22 & n.10, __ Wis. 2d ___, 898 N.W.2d 741 (quoting ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "A party opposing a motion for summary judgment must demonstrate that there exists a genuine issue of material fact." ***Id.*** "'It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony that is not based upon personal knowledge.'" ***Id.*** (quoting ***Helland***, 229 Wis. 2d at 756); *see also* ***Menick v. City of Menasha***, 200 Wis. 2d 737, 747-48, 547 N.W.2d 778 (Ct. App. 1996) (citing ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993) ("[t]he party with the burden of proof on an element must establish that there is a genuine issue of fact by submitting evidence setting forth specific facts material to that element.").

¶14 As we now explain, applying these standards we conclude that summary judgment is appropriate here because Biermeier fails to point to evidence in the summary judgment record that could support jury findings of causation and damages. *See* ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 118, 362 N.W.2d 118 (1985) ("The plaintiff satisfies her burden of proving causation and damages by establishing that the divorce award she actually received is less than what a reasonable judge who was aware of all of the facts would have awarded in the … divorce action."). As the circuit court aptly observed, the evidence on causation and damages amounts to a "pil[e]" of unanswered "ifs."

¶15 We first clarify two aspects of Biermeier's arguments. The first clarification involves how she characterizes her negligence claim. In the amended complaint, Biermeier contends that Campbell "was negligent in reviewing [the] final judgment and [failing to request] that the court order Scott Tuttle to refinance the [marital house] so that [Biermeier] would not be held responsible for the mortgage." However, on appeal she primarily contends that Campbell was negligent in failing to explain to Biermeier that she would remain responsible on the mortgage even after she executed the quit claim deed and real estate transfer form, and that if Campbell had provided this explanation Biermeier would not have signed away her ownership interest in the martial house. However, this inconsistency in Biermeier's description of the allegedly negligent conduct does not matter to our analysis. For the sake of simplicity we will discuss this concept as alleged in the amended complaint, that is, a failure to seek court ordered refinancing.

¶16 The second clarification involves a lack of consistency and precision in how Biermeier discusses the contents of the provision that, according to

Biermeier, a reasonably prudent attorney in Campbell's shoes would have requested that the divorce court include in the divorce judgment, which we will refer to as the refinance provision. The following are among the unclear aspects of the refinance provision that Biermeier contemplates: what would it have specifically required Tuttle to attempt to do or to actually accomplish? (*e.g.*, would an effort by Tuttle to sell the marital house, or perhaps merely listing it for sale, have satisfied the provision?); what sort of deadlines would it have included for attempted or accomplished actions by Tuttle? (*e.g.*, "best efforts" by a certain date?); would Tuttle be required to refinance regardless of the interest rate and closing costs?; and, what potential consequences to Tuttle needed to be specified for any failures on his part to make efforts or to achieve results?

¶17 With these clarifications in mind, we now explain why we conclude that Biermeier has failed to produce evidence upon which a jury could resolve the questions of causation and damages. In sum, Biermeier does not direct us to evidence in the summary judgment record that provides an answer to any of the following questions, much less to all of them, and we do not see any such evidence in the record.

¶18 First, would the divorce court have granted a request from Campbell to order a refinance provision, regardless of the precise contents of such a provision? Biermeier candidly acknowledges in her briefing that there is no clear answer to this question, because "the judge could have accepted or declined" a request from Campbell. Moreover, the circuit court observed that allocating property and debts in this particular case presented "very difficult" questions.

¶19 Second, if the answer to the first question is yes, would Tuttle have made reasonable, timely efforts to comply with such a provision?

¶20 Third, and we think particularly significant, if the answer to each of the first two questions is yes, was there a reasonable chance that Tuttle's efforts would have resulted in termination of Biermeier's responsibility on the mortgage and note? For example, would the contemplated refinancing have involved additional costs to either Biermeier or Tuttle, which they had the means to pay, and what were market conditions and pertinent lender practices at the time of the divorce?

¶21 Fourth, if the answer to each of the first three questions is yes, is there a reasonable chance that all of this would have occurred *before* Tuttle stopped making payments on the mortgage and a foreclose action were filed?

¶22 To repeat, Biermeier points to little or no evidence that could provide answers to these questions. In addition, she makes no clear arguments on these topics. Therefore, so far as we can discern, proof of the causation and damages elements would rest on speculation alone. The admissible evidence she submitted on summary judgment is paltry and much of it is off point. We could end here. However, in recognition of Biermeier's pro se status in the circuit court in this action and now on appeal we briefly address two assertions she makes that she may intend as pertinent arguments on the dispositive issue.

¶23 Biermeier apparently intends to argue that, because it is undisputed that she remained responsible on the mortgage after executing the quit claim deed and real estate transfer form, she has a triable case that Campbell caused damage to her in failing to object to the circuit court assigning to Tuttle, on the property division balance sheet, the entire outstanding mortgage debt of $280,193.03. More specifically, Biermeier contends that Campbell should have advocated that she be assigned only half of this debt. However, she fails to develop an argument,

supported by legal authority, that Campbell could have persuaded the circuit court with such an argument. And, it is uncontested that the parties and the court all understood at the time of the divorce that Tuttle was a relatively high earner with stable employment, and therefore appeared fully capable of making the remaining payments on the marital house.

¶24 Separately, Biermeier appears to operate from the false premise that it is sufficient to avoid summary judgment that she submitted to the circuit court a list of witnesses who she asserts could have shared with a jury "expertise in business, banking, and finance," presumably because these potential witnesses could provide evidence that answers one or more of the questions we pose above. The premise is false for at least the following reason: *admissible evidence* is required at the time a motion for summary judgment is considered. *See* ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, ¶¶30-32, 259 Wis. 2d 181, 655 N.W.2d 718 (in determining whether there are genuine issues of material fact and the moving party is entitled to judgment as a matter of law, we look to affidavits, which "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence") (quoting WIS. STAT. § 802.08(3)). It is not enough merely to identify persons who might be able to provide admissible evidence.

CONCLUSION

¶25 For the foregoing reasons, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. Rule 809.23(1)(b)5.