

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1478

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

THOMAS W. REIMANN,

PLAINTIFF-APPELLANT,

v.

WILLIAM M. GINSBERG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Thomas Reimann appeals from a summary judgment dismissing his malpractice claim against Attorney William Ginsberg. The trial court held that Reimann failed to rebut Ginsberg's *prima facie* case that Reimann was not injured by the alleged malpractice. We agree and therefore affirm.

Ginsberg defended Reimann on a charge of delivering heroin. The State presented evidence that Reimann sold heroin to an undercover police agent. Reimann admitted doing so but claimed entrapment. The jury disagreed, however, and found him guilty. This court affirmed his conviction on appeal. *State v. Reimann*, Nos. 94-2528 and 94-2529, unpublished slip op. at 2 (Wis. Ct. App. Oct. 17, 1996).

Reimann subsequently commenced this malpractice action. He alleged numerous acts of malpractice by Ginsberg in his investigation and preparation for trial, and in his conduct of the trial itself. Ginsberg moved for summary judgment and presented evidence that none of his alleged acts or omissions affected the outcome of the trial. The trial court held that Ginsberg's evidence constituted a *prima facie* defense to Reimann's malpractice claim and that Reimann's affidavits and other submissions failed to set forth evidence establishing a disputed issue of material fact. Consequently, the court dismissed the action because a malpractice action requires proof that but for counsel's negligence, the plaintiff could have prevailed in the underlying action. *Cook v. Continental Cas. Co.*, 180 Wis.2d 237, 250, 509 N.W.2d 100, 105 (Ct. App. 1993).

We review summary judgments in the same manner as the trial court and without deference to the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The trial court should grant summary judgment when there are no genuine issues of material fact and the moving party has established an entitlement to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). The defendant, to prevail on summary judgment, must establish a *prima facie* defense that defeats the plaintiff's claim, and it must also appear that

no triable issue of material fact exists and that summary judgment is appropriate under the law. *Preloznik v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). The plaintiff may not contest the *prima facie* defense merely by relying on the complaint, but must present evidence that creates a triable issue of material fact. *E.S. v. Seitz*, 141 Wis.2d 180, 186, 413 N.W.2d 670, 673 (Ct. App. 1987).

Ginsberg presented a *prima facie* defense to the malpractice allegations. As noted, a legal malpractice plaintiff must prove that he or she would have succeeded in the underlying action but for the attorney's negligence. In an action against one's former defense counsel in a criminal prosecution, this means that the plaintiff must show his or her innocence of the prosecuted charge. *Harris v. Bowe*, 178 Wis.2d 862, 868, 505 N.W.2d 159, 162 (Ct. App. 1993). Here, Reimann does not dispute that entrapment was the only defense available to him in the underlying action. Ginsberg showed on summary judgment that the State's evidence included tape-recorded conversations in which Reimann set up heroin sales and referred to his heroin selling operation. This court affirmed the use of those tape-recordings on review of Reimann's conviction. *Reimann* at 3-12. Ginsberg therefore presented a *prima facie* case that Reimann would have been convicted regardless of the alleged malpractice, because Ginsberg had no reasonable basis to have the tapes excluded from evidence. With the tapes, the State was able to prove beyond a reasonable doubt that Reimann was predisposed to deliver heroin to the police agent. Consequently, Ginsberg was able to show that Reimann's entrapment defense was effectively destroyed by means outside his control. See *State v. Saternus*, 127 Wis.2d 460, 474, 381 N.W.2d 290, 296 (1986) (proof that defendant was predisposed to commit the crime defeats the entrapment defense.)

Reimann failed to rebut the *prima facie* defense described above. As noted, Reimann admitted that he delivered the heroin. He presented no admissible evidence that Ginsberg could have successfully challenged the State's use of the inculpatory tape-recordings, otherwise caused his entrapment defense to succeed, or obtained a dismissal on other grounds. Consequently, Ginsberg was entitled to summary judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(5),
STATS.

