

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2015

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. 2014AP487

Cir. Ct. No. 2012CV557

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BARBARA BECKER,

PLAINTIFF-APPELLANT,

V.

GEBERT LAW OFFICE, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Wood County:
MARK T. SLATE, Judge. *Reversed and cause remanded for further proceedings.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Barbara Becker appeals a summary judgment granted in favor of Gebert Law Office, LLC, dismissing her action for abuse of process on grounds of attorney immunity. We conclude that genuine issues of

material fact preclude summary judgment. Accordingly, we reverse and remand for further proceedings.

¶2 Prior to his death, Becker's father, Robert, executed an "Account Ownership Agreement" at Lakewood Credit Union which included a payable on death (POD) beneficiary designation to Becker. Robert died on February 13, 2009. In late 2009, Becker's three siblings retained Attorney Timothy Gebert to challenge the POD designation.

¶3 Gebert issued two subpoenas duces tecum to the credit union seeking documents related to Robert's credit union account, as well as documents pertaining to credit union policies and bylaws. The subpoenas were signed by Gebert, and contained a heading stating that the subpoenas were issued "pursuant to [WIS. STAT. §] 805.07(2)." In addition, the subpoenas were captioned, "State of Wisconsin, Circuit Court, Wood County," and "The Estate of Robert C. Becker." However, no probate or other court action was pending in any circuit court at the time Gebert issued the subpoenas. Gebert did not provide copies of the subpoenas to Becker at the time they were issued. Nonetheless, the credit union believed the subpoenas to be lawful and forwarded the requested documents to Gebert.

¶4 Gebert subsequently prepared correspondence to Becker dated February 10, 2010, advising that he represented Becker's siblings, and had reviewed the account information from the credit union, and determined that Becker had changed the account only days after being appointed durable power of attorney. The letter also asserted that Becker's siblings had a strong case of undue influence against Becker and sought distribution of the POD account funds. Gebert threatened litigation if an amicable resolution could not be reached within ten days.

¶5 Copies of the credit union information obtained by Gebert was also used by Becker's brother to issue threatening letters to Becker, accusing her of stealing and money laundering. The credit union documents were attached. The information obtained by Gebert was further used by Becker's siblings to pursue a lawsuit against Becker alleging undue influence.

¶6 On October 24, 2010, Becker initiated a grievance against Gebert with the Supreme Court of Wisconsin Office of Lawyer Regulation. After a formal investigation, Gebert signed an Agreement for Imposition of Private Reprimand. Gebert agreed to the factual basis for the imposition of discipline. Gebert admitted that Wisconsin law prohibits an attorney from issuing subpoenas in the absence of an existing court proceeding, and that Wisconsin law makes it a crime for any individual to "simulate legal process." In addition, Gebert admitted that he violated the rules of professional conduct by submitting the subpoenas styled in the Estate of Robert Becker when no court proceeding existed.

¶7 On November 14, 2012, Becker commenced this action against Gebert in Wood County Circuit Court alleging abuse of process. The complaint sought compensatory damages, including legal fees related to the OLR proceeding and the undue influence lawsuit. Becker also sought damages related to emotional distress allegedly caused by the abuse of subpoena powers. Becker also sought punitive damages.

¶8 Gebert moved for summary judgment, contending that as a matter of law he was immune as an attorney from liability to third parties. Becker filed a cross-motion for partial summary judgment, contending that she was entitled to judgment as a matter of law on liability. Becker did not seek summary judgment

on damages, contending that because of disputed facts, “damages will need to be determined by a jury in this case.”

¶9 After a hearing, the circuit court requested further briefing on “whether or not a Wisconsin attorney is immune from liability to third parties for acts committed within the scope of an attorney/client relationship.” The court subsequently issued an oral decision granting summary judgment in favor of Gebert on the basis of attorney immunity. The court denied a motion for reconsideration. Becker now appeals.

¶10 A thorough discussion of an attorney’s liability to third parties is found in *Strid v. Converse*, 111 Wis. 2d 418, 331 N.W.2d 350 (1983). In that case, an abuse of process claim was found to lie where a husband used a bench warrant directing the sheriff to arrest his wife in order to coerce her into granting visitation with their children. The court stated:

[T]he immunity of an attorney who is acting in a professional capacity is qualified, rather than absolute. The immunity from liability to third parties extends to an attorney who pursues in good faith his or her client’s interests on a matter fairly debatable in the law. However, the immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled.

Id. at 429-30.

¶11 Abuse of process is a common-law tort. In Wisconsin, the following definition was adopted: “One who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby.” *Id.* at 426 (quoted source omitted). “The existence of an improper purpose alone is not enough, for this improper

purpose must also culminate in an actual misuse of the process to obtain some ulterior advantage.” *Id.* at 427 (quoted source omitted).

¶12 Gebert argues he merely committed a “procedural error” for the lawful purpose of discovering information that was relevant to his clients’ claims. Gebert characterizes his actions as “an erroneous procedure, albeit for a legitimate purpose.” He further argues that he believed he was authorized under Wisconsin law to issue the subpoenas notwithstanding the absence of a court proceeding. According to Gebert, he was merely “operating under a mistaken legal assumption, [and] did nothing more than subpoena records to discover relevant information on behalf of his clients in order to investigate whether they had a cause of action against their sister.” Gebert therefore argues that Becker’s claims fail as a matter of law.

¶13 However, Gebert’s assertions are contradicted by his admissions in the disciplinary proceedings. Gebert stipulated in the disciplinary action to a factual basis for the imposition of discipline, including the violation of numerous rules of professional conduct, including the following:

SCR 20:4.1(a), which provides, “(a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a 3rd person ...,” SCR 20:8.4(b), which provides, “It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” and SCR 20:8.4(c), which provides, “It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

¶14 As we have indicated, Gebert signed and submitted invalid subpoenas duces tecum to the credit union styled with a case caption stating they were issued “pursuant to [WIS. STAT. §] 805.07(2),” in the “State of Wisconsin,

Circuit Court, Wood County,” and in the name of “Estate of Robert C. Becker.” In fact, no such court proceeding existed at the time of the submission of the subpoenas.

¶15 This is not a case involving the proper use of a process with a bad motive. Rather, the facts raise a jury issue as to whether Gebert maliciously or tortiously caused invalid process to be issued. An improper purpose in this case may be inferred, as Gebert admitted violating the rules of professional conduct involving an attorney knowingly making false statements, as well as engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

¶16 Gebert argues that, even if the subpoena process was wrongful or the information improperly obtained, there is no evidence of “subsequent misuse,” the culmination of the process to obtain some ulterior motive. *See Strid*, 111 Wis. 2d at 427. However, we conclude that the evidence presented a genuine issue of material fact as to whether Gebert attempted to gain a collateral advantage by illegally obtaining the credit union documents in order to attempt to induce Becker to distribute the POD account proceedings to her siblings.

¶17 Significantly, the circuit court improperly found facts on summary judgment. In its oral decision on summary judgment, the court found that Gebert acted merely as “a lawyer representing his client.” The court stated:

The Court does not believe that the issuance of the subpoena to get bank records was intended to have any effect on the plaintiff. It was an attempt to get documents so Attorney Gebert could assess his client’s position and get more information to determine what action to take. The Court believes it is the duty of every attorney, during the representation of a client, to get information to determine whether or not their client has a case and how they can best advise their client to proceed. The Court does not believe that the subpoena was intended to affect the plaintiff,

induce the plaintiff to take any action, or otherwise get the plaintiff to do anything.

¶18 On the motion for reconsideration, the court further stated:

The defendant no doubt obtained the financial records improperly, but the Court finds there was no fraud, malice or malicious intent shown, only that the defendant did not follow the law. Second, the plaintiff has not shown that the act done by the defendant was done to induce, injure or otherwise make the plaintiff suffer as a result of the defendant's acts.

¶19 We explained in *Novell v. Migliaccio*, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544 (internal citations omitted):

“Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the party opposing the motion. If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party.”

The circuit court in the present case usurped the jury function by finding facts on summary judgment.

¶20 We cannot say as a matter of law that Gebert is entitled to judgment on the issue of attorney immunity. Becker is entitled to prove her allegations to a jury and Gebert is entitled to present his defense. Furthermore, we need not speculate as to what, if any, damages Becker may be able to prove in support of her claim of abuse of process. Because the circuit court granted summary judgment on the basis of attorney immunity, damages issues cannot be fairly resolved until the issues have been more fully developed in further circuit court proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

