**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 1, 2005**

Cornelia G. Clark
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 Nos. 2004AP2171**
**2004AP2193**

**Cir. Ct. Nos. 2003CV27**
**2003CV27**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT III**

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**NO. 2004AP2171**

**RICHARD ENGBERG,**

**PLAINTIFF,**

**V.**

**BRETT ERIC REETZ,**

**DEFENDANT-APPELLANT,**

**CHRISTINE L. REETZ,**

**DEFENDANT,**

**WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,**

**INTERVENOR-RESPONDENT.**

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**NO. 2004AP2193**

**RICHARD ENGBERG,**

**PLAINTIFF-APPELLANT,**

**V.**

**BRETT ERIC REETZ AND CHRISTINE L. REETZ,**

**DEFENDANTS-RESPONDENTS,**

**WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,**

**INTERVENOR-RESPONDENT.**

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APPEALS from judgments and orders of the circuit court for Door County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. This consolidated appeal involves legal malpractice claims and insurance coverage questions arising from a real estate transaction between Richard Engberg and the lawyer, Brett Reetz, who represented Engberg in his divorce. Engberg argues that his legal malpractice claim should not have been dismissed because Reetz was acting as his lawyer during the time Reetz was buying real estate from him and because he properly pled all the elements of negligence and legal malpractice. Engberg also argues the trial court erred when it denied his motion for partial summary judgment because Reetz never disclosed any conflicts of interest to him in writing. Reetz contends that if we decide there is a viable case for legal malpractice, we must also reverse the summary judgment in favor of Wisconsin Lawyers Mutual Insurance Company (WILMIC) because there are genuine issues of material fact as to whether his actions injured Engberg and whether any injury was intended.

¶2 Because we conclude that Reetz was not acting as Engberg's attorney in the real estate transaction in question, we reject both of Engberg's arguments. Given that conclusion, Reetz's remaining claims are moot. We therefore affirm the judgments and orders.

## BACKGROUND

¶3 Many of the facts in this case are undisputed. Engberg retained Reetz in 1998 to represent him in his divorce from his second wife, Amanda. The Engbergs were divorced on July 7, 1998. Reetz continued to represent Engberg until August 1998, however, while the couple completed a land exchange that was part of the marital settlement agreement.[1] Under that agreement, Amanda was to receive title to an eighty-acre parcel of land in Door County, subject to a twelve-foot easement benefiting an adjacent forty-acre parcel. Engberg was awarded title to that adjacent forty acres. Reetz prepared quitclaim deeds for Engberg and, on August 10 1998, Engberg and Amanda exchanged deeds.

¶4 Sometime before the divorce was final, Amanda listed her eighty acres for sale. In response, Reetz, Reetz's partner Richard Hoyerman, and Engberg agreed that Engberg would buy the eighty-acre parcel from Amanda after the settlement agreement was completed and sell some portion of the land to Reetz and Hoyerman. That is what happened on August 10. After the Engbergs exchanged quitclaim deeds, Amanda conveyed her eighty acres back to Engberg by warranty deed. Engberg then conveyed a quarter of the northwest quarter of the land to Reetz and his wife and another quarter of that same quarter, plus three

[1] Reetz also represented Engberg in the fall of 1999 regarding possible litigation against his health care providers.

acres, to Hoyerman; both were subject to a thirty-three foot easement. The next day, Engberg sold 3.8 acres of the remaining land to Reetz and his wife. In January 2000, Engberg sold approximately 5.2 more acres to the Reetzes. The only easement reserved for the benefit of the forty-acre parcel was the twelve-foot easement provided in the original conveyance to Amanda.

¶5 Engberg and Reetz disagree over whether Engberg requested a "Hoyerman" easement before these sales took place, and they give different versions of the events of August 10.[2] Three critical facts are uncontested, however. Sometime after July 7 and before any land was conveyed to Reetz, as Engberg concedes, Reetz told Engberg he could not, and did not, represent Engberg in any real estate transaction between them. Engberg also concedes that Reetz prepared a written waiver, explained the waiver to him, and that he signed the waiver. That waiver acknowledged, among other things, that Reetz advised Engberg to seek the advice of other counsel on their real estate transactions and that he was not Engberg's lawyer for the purposes of the sales. Finally, although Engberg chose not to retain other counsel, he admits that, at the time of his transactions with Reetz, he knew and understood that Reetz was not acting as his attorney.

[2] Reetz testified that Engberg first broached the idea of buying back Amanda's land and selling it to Reetz before July 7, the final divorce date. He also testified that he refused to talk about a possible sale until after that date. He then prepared a waiver and Engberg signed that waiver prior to any land assignment. Reetz insisted that Engberg never said anything about a thirty-three-foot easement before or during the sale period. According to Engberg's testimony, however, he asked Reetz repeatedly about getting a "Hoyerman type" easement (thirty-three-feet rather than twelve-feet) before the land sales. Engberg also testified that Reetz promised to make the deeds reflect that request.

¶6 In February 2003, Engberg sued Reetz for legal malpractice based on Reetz's failure to secure a thirty-three-foot easement for the forty-acre parcel of property Engberg retained after the divorce. After Reetz answered, WILMIC filed a motion to intervene, a counter-claim, and a cross-claim for declaratory judgment. In July, the parties stipulated to WILMIC's intervention. WILMIC then moved for summary judgment, arguing that Reetz was not rendering professional services during the transaction in question. WILMIC also contended its policy did not cover intentional actions and that Reetz's alleged acts were intentional.

¶7 In response, Engberg sought leave to file an amended complaint, alleging malpractice in both the divorce and the real estate transaction as well as general malpractice and negligence. The circuit court granted Engberg's motion and partially granted WILMIC's, denying summary judgment only on Engberg's new allegation that Reetz negligently provided advice to Engberg during the divorce.

¶8 After a flurry of activity in March 2004, including WILMIC's second motion for summary judgment, Reetz's motion for summary judgment, and another motion by Engberg for leave to amend his complaint, the circuit court granted Reetz's motion for summary judgment and denied Engberg's motion to amend his complaint. The circuit court concluded Reetz was not acting as Engberg's attorney in the real estate transaction between them, that Engberg had not sufficiently alleged a claim for general malpractice, and that Engberg failed to

state a claim of negligence. It then ordered a judgment in WILMIC's favor on coverage and dismissed all claims against Reetz.[3] Engberg now appeals.

DISCUSSION

¶9 We review grants and denials of summary judgment using the same standards and methodology as the trial court. *See* ***Peck v. Meda-Care Ambulance Corp.***, 156 Wis. 2d 662, 669, 457 N.W.2d 538 (Ct. App. 1990). Motions for summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** When deciding a summary judgment motion, the trial court must first consider whether the complaint states a claim for which relief may be granted and whether the answer states a defense. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986).

¶10 Engberg contends that, under Wisconsin's liberal pleading regime,[4] he sufficiently pled all the elements for legal malpractice. More particularly, he argues that "whether Brett Reetz had a duty to Richard Engberg arising out of their

[3] All claims against Reetz's wife were also dismissed. That dismissal is uncontested on appeal.

[4] Wisconsin law requires that pleadings contain:

> [a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

WIS. STAT. § 802.02(1)(a). The pleadings must also contain a demand for relief. WIS. STAT. § 802.02(1)(b).

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

lawyer-client relationship in a personal business transaction is a separate issue from whether or not a lawyer-client relationship existed." What matters, he insists, is that "Richard Engberg and Brett Reetz had a lawyer-client relationship" on August 10, 1998. Engberg's argument implies that the existence of an ongoing lawyer-client relationship in one sphere is sufficient to satisfy an element of legal malpractice even if the alleged negligence occurs outside that sphere. We are not persuaded.

¶11 The elements of legal malpractice are well established in Wisconsin. A client has the burden of proving the existence of an attorney-client relationship, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of that injury. *See* ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979).

¶12 While there is no question that Engberg and Reetz had an attorney-client relationship on August 10, 1998, that does not mean the two men were functioning within that relation when Engberg sold land to Reetz. An attorney is the agent of his or her client. *See* ***Security Bank v. Klicker***, 142 Wis. 2d 289, 295, 418 N.W.2d 27 (Ct. App. 1987). Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958). Because both parties agree that Reetz told Engberg he was not acting on his behalf during the sales at issue, Reetz was not Engberg's agent for those sales and not in an attorney-client relationship with Engberg for that purpose.

¶13 Engberg cannot salvage his claim by asserting that Reetz committed legal malpractice during the divorce or in general. Whether a legal malpractice

action is brought in tort or contract, contract principles[5] determine when the attorney-client relationship is established. *See* ***Klicker***, 142 Wis. 2d at 295. We have recognized that representation decisions may be informal and that contracts between attorneys and clients are often not explicit. *See* ***id.*** Like other contractual relationships, however, the attorney-client relationship has parameters and limits.

¶14 Reetz prepared deeds and other conveyances for Engberg while representing him in his divorce and could have offered him advice about investments, his financial future, or any number of issues arising from that representation. After Engberg and Amanda had exchanged properties, however, Engberg owned the eighty acres he wanted to sell, knew he could consult a lawyer to ensure his interests were being protected, and understood that Reetz was not acting in those interests. Although reasonable people might question Reetz's timing or his method of pursuing investment opportunities, Engberg does not allege that Reetz did anything as his divorce attorney that made it impossible for him to negotiate the terms of the land sale. Nor can the implicit contract between Reetz and Engberg be defined so broadly as to include a responsibility to protect Engberg from any mistakes he might make, unrelated to Reetz's advice, in the future.

¶15 Engberg argues lastly that the trial court erred when it dismissed his motion for partial summary judgment against Reetz because Reetz did not provide him with a written disclosure of conflicts.[6] This argument fails as well, for

[5] Legal malpractice actions can sound in contract or in tort. *See* WIS. STAT. § 893.53. Even where the claim involves a tort, however, whether a client has met his or her burden of proof on the first element of legal malpractice involves contract and agency questions.

[6] Engberg never articulates what he believes Reetz should have disclosed. He simply asserts that Reetz should have fully disclosed his conflicts.

reasons we have already stated. Reetz was not in an attorney-client relationship with Engberg when Engberg sold him land. He thus had no duty to disclose anything to Engberg at that time, whether in writing or not.

¶16 Engberg suggests that Reetz did not disclose something to him that "caused" him to buy the eighty-acre parcel from Amanda even though it did not include the thirty-three foot easement he desired for his own forty acres. But Engberg has not identified what Reetz should have disclosed. More importantly, once Engberg owned the property, he was free to burden it with any type of easement he desired. We thus need not reach the substantive question of what duty of disclosure an attorney in Reetz's position[7] might have had because the real estate transaction in this case did not occur in the course of an attorney-client relationship.[8]

*By the Court.*—Judgments and orders affirmed.

Not recommended for publication in the official reports.

[7] Under SCR 20:1.8(a)(1) (2004), a lawyer shall not enter into a business transaction with a client unless the "transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client." But, as the preamble to SCR ch. 20 states, "[v]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." To establish legal malpractice based on failure to disclose, a client would therefore still have to establish not just an attorney-client relationship, but what the standard of care would be in the specific context of that relationship, and to prove that standard was breached. *See* ***Olfe v. Gordon***, 93 Wis. 2d 173, 180-81, 286 N.W.2d 573 (1980).

[8] We need address only dispositive issues. ***Mudrovich v. Soto***, 2000 WI App 174, ¶16 n.5, 238 Wis. 2d 162, 617 N.W.2d 242.