

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 5, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP262

Cir. Ct. No. 2007CV12915

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL D. BARTZ,

PLAINTIFF-APPELLANT,

V.

MICHAEL J. EDMONDS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Michael D. Bartz, proceeding *pro se*, filed a complaint against his former attorney, Michael J. Edmonds, for legal malpractice, fraudulent misrepresentation, and breach of fiduciary duty. All of Bartz's claims relate to Edmonds's representation of Bartz in a federal *habeas corpus* action

following Bartz's state court conviction for first-degree intentional homicide. Before the circuit court, Bartz alleged that Edmonds's failure to notify him of the federal district court's denial of his *habeas corpus* petition caused Bartz to incur litigation expenses and to lose the ability to appeal the denial of his petition (which he asserts would have led to his acquittal or a lesser homicide charge). Edmonds responded that Bartz's claims should be dismissed because Bartz lacked any credible evidence to support his claims and Bartz failed to show his actual innocence, as required by state law. The circuit court agreed with Edmonds and dismissed Bartz's claims. Bartz appeals the circuit court's order. We affirm.

FACTUAL BACKGROUND¹

¶2 Bartz was convicted in Wisconsin state court of first-degree intentional homicide and was sentenced to life in prison in April 1994 for intentionally shooting Donald Scott in the face at close range with a shotgun. Bartz initially told police that Scott had committed suicide in his presence. However, after further investigation revealed that Scott's hands were in his pockets at the time of his death, Bartz admitted that he shot Scott. At his jury trial, Bartz's defense was that he was assisting suicide, and he argued, unsuccessfully, for a conviction of a lesser-included homicide offense.

¶3 Bartz appealed his conviction; we affirmed the conviction, and the supreme court denied his petition for review. In April 1999, proceeding *pro se*,

¹ The facts were compiled based upon the parties' briefs and the court's review of the record. While both parties failed to adequately support all of their facts with accurate citations to the record in all instances, to the extent those unsupported facts appear uncontested and are necessary to the disposition of this case, the court accepts them at face value.

Bartz filed a petition for *habeas corpus* relief in federal district court. A federal judge granted Bartz's request for appointment of counsel and appointed Edmonds to aid Bartz's postconviction relief efforts.

¶4 The federal district court denied Bartz's *habeas* petition in September 2001, and mailed copies of its decision and judgment dismissing the action to Edmonds's office. After receiving the court's decision and judgment, Edmonds marked it "cc client" with directions to his secretary to forward the decision and judgment to Bartz. The procedure was customary at the private law firm for which Edmonds worked. Edmonds was under the impression that the procedure was complied with on this occasion and that his secretary sent the materials to Bartz.

¶5 Bartz claims that neither Edmonds nor the court informed him of the court's September 2001 decision and judgment. Bartz alleges that his friend, Spriggie Hensley, told him that he had spoken with Edmonds in August 2004 and that Edmonds had told Hensley that Bartz's *habeas* case was still awaiting decision by the court. Bartz states that when he had not heard from Edmonds in March 2005, he asked a family member to check on the status of his federal *habeas* petition. The family member informed Bartz that an order denying his petition had been entered in September 2001. Thereafter, in May 2005, Bartz moved the federal district court to reopen his case and requested that the court provide him an additional period of time to appeal because the original period had

expired.² The court denied his motion. Bartz later filed a notice of appeal; however, the Seventh Circuit Court of Appeals dismissed Bartz's appeal for lack of jurisdiction because the appeal was not timely filed.

¶6 When Bartz notified Edmonds that he had not received the dismissal order, Edmonds responded by offering to assist Bartz in attempting to reopen the case. Edmonds offered to prepare a statement for the court stating that he could not guarantee that Bartz had actually received the September 2001 *habeas* decision or judgment and that Bartz may not have received them. Bartz responded in a letter to Edmonds that “there is absolutely nothing left to be done” with the *habeas* case.

¶7 In December 2006, Bartz brought this civil suit against Edmonds, asserting claims related to Edmonds's alleged failure to notify Bartz of the federal district court's September 2001 decision and judgment. In his original complaint, Bartz asserted legal malpractice and fraudulent misrepresentation claims. As to the legal malpractice claim, Bartz contended that Edmonds's negligence in not timely notifying him of the dismissal of his *habeas* petition had injured him by preventing him from appealing the court's decision and judgment. As to the fraudulent misrepresentation claim, Bartz alleged that Edmonds had lied to Bartz's friend Hensley in August 2004 by telling Hensley that the *habeas* petition was still

² FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(1)(A) (2009) requires a notice of appeal be filed with the district clerk thirty days after the judgment appealed from is entered. When Bartz moved the district court to extend the appeals period, the court denied his motion because FED. R. APP. P. 4(a)(6)(B) only permits the court to reopen the time to file an appeal when a motion to do so is filed within 180 days after judgment is entered. Bartz did not file his motion until several years after judgment was entered.

pending. Bartz claimed that this misrepresentation had injured him by delaying his ability to pursue a civil claim against Edmonds for legal malpractice.

¶8 Bartz filed a motion to amend the complaint in November 2007, realleging the legal malpractice and fraudulent misrepresentation claims and adding what he characterized as an additional claim for litigation expenses. He sought no motion hearing date, and the circuit court did not immediately rule upon the motion. Nevertheless, Edmonds filed an answer to the proposed amended complaint.

¶9 In May 2008, Bartz filed a second motion to amend the complaint, again without any request for a hearing. In the proposed second amended complaint, Bartz repeated his past claims and added a new claim for intentional breach of fiduciary duty. Edmonds did not respond to the motion or otherwise answer the proposed second amended complaint; the circuit court did not immediately address the motion.

¶10 Edmonds answered Bartz's first complaint and first amended complaint by denying the allegations. Edmonds then filed a summary judgment motion, accompanied by a supporting brief and affidavits, asking the circuit court to dismiss Bartz's claims in their entirety. Bartz filed a response opposing summary judgment. The circuit court granted Edmonds's motion, dismissing all of Bartz's claims against Edmonds, including those claims in the first and second amended complaints. Bartz appeals.

DISCUSSION

¶11 Bartz challenges the circuit court's order granting Edmonds's motion for summary judgment and dismissing his claims against Edmonds.³ We review orders for summary judgment independently, employing the same methodology as the circuit court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We will affirm the circuit court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (2007-08).⁴

I. Legal Malpractice

¶12 Bartz bases his legal malpractice claim on his assertion that Edmonds failed to notify him of the federal district court's decision and judgment denying his *habeas* petition, allegedly costing him his appeal and an acquittal. Bartz's legal malpractice claim requires proof of four elements: (1) that Bartz had a lawyer-client relationship with Edmonds; (2) that Edmonds committed acts or omissions constituting negligence; (3) that Edmonds's negligence caused injury to

³ Bartz also appears to appeal the denial of his numerous pretrial and discovery motions. However, he presents no legal arguments relating specifically to the denial of these motions, although he couches some discussion of them in his argument for breach of fiduciary duty. Because Bartz fails to develop these arguments on appeal, and because we affirm the circuit court's decision dismissing all of his claims, we also affirm the circuit court's denial of Bartz's pretrial and discovery motions. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

⁴ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Bartz; and (4) the nature and extent of the injury. See *Hicks v. Nunnery*, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809.

¶13 In addition to those elements, we concluded in *Hicks* that “as a matter of public policy, persons who actually commit the criminal offenses for which they are convicted should not be permitted to recover damages for legal malpractice from their former defense attorneys.” *Id.*, ¶48. Necessarily then, Edmonds must also demonstrate that he is actually innocent to succeed on his legal malpractice claim. See *id.*, ¶34; *Tallmadge v. Boyle*, 2007 WI App 47, ¶21, 300 Wis. 2d 510, 730 N.W.2d 173.

¶14 In *Tallmadge*, we applied *Hicks*’s actual innocence requirement to facts similar to the ones before us. See *Tallmadge*, 300 Wis. 2d 510, ¶21. Tallmadge, a convicted criminal filing suit against his former counsel, claimed that his attorney’s negligence cost him his right to file a state or federal *habeas corpus* action. *Id.*, ¶¶2, 9, 16. We found in *Tallmadge* that the factual dispute between the parties was immaterial because Tallmadge had no possibility of proving actual innocence. *Id.*, ¶18. We dismissed Tallmadge’s legal malpractice claim on that ground, noting that Tallmadge’s proposed *habeas* petition would have addressed only two of Tallmadge’s fifteen convictions, and even if Tallmadge successfully overturned those two convictions, he still remained convicted of the thirteen other crimes. *Id.*

¶15 Bartz concedes in his appellate brief that he cannot meet the *Hicks* and *Tallmadge* standard of actual innocence, stating that he

has not alleged that he was not criminally culpable for the 1993 shooting death of his friend Rather, [he] has merely maintained that the killing was the product of recklessness, and that, had he been afforded a full and fair

trial with the benefit of effective representation, he would have probably obtained a verdict of guilt on the lesser charge of first-degree reckless homicide.

Because Bartz admitted at trial and in his brief that he actually shot the victim, he cannot demonstrate that he is actually innocent; consequently, his legal malpractice claim against Edmonds was properly dismissed by the circuit court. See *Tallmadge*, 300 Wis. 2d 510, ¶19.

II. Fraudulent Misrepresentation

¶16 Bartz's fraudulent misrepresentation claim was based on his argument that Edmonds told Hensley in August 2004 that the *habeas* case was still pending, when actually it had been dismissed in September 2001. To succeed on a fraudulent misrepresentation claim, a plaintiff must show: (1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) actual inducement of another to rely and act upon that representation, causing injury or damage. *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985).

¶17 The parties dispute whether Edmonds told Hensley that Bartz's federal case was still pending. However, even if we assume, without deciding, that Edmonds made the misrepresentation, Bartz makes no showing that the misrepresentation caused him injury. The harm he alleges is delay in pursuing a civil claim against Edmonds. The damage he seeks is the amount of interest that would have accrued on a civil judgment had he successfully pursued a legal malpractice claim against Edmonds months earlier. But, for the reasons stated above, Bartz's injury does not exist because he never had a viable legal malpractice claim. Therefore, he has not pled or shown proof of an injury.

III. Breach of Fiduciary Duty

¶18 Bartz next asserts that the circuit court erred in dismissing his claim for intentional breach of fiduciary duty. The circuit court, in granting summary judgment against Bartz, characterized his evidence of the conversation between Hensley and Edmonds as not credible.⁵ We analyze Bartz's evidence somewhat differently than the circuit court but come to the same result. We conclude that Bartz failed to rebut Edmonds's factual support for his summary judgment motion, and as a result, there was insufficient evidence in the record to support Bartz's intentional breach of fiduciary duty claim on both the intent and causation elements.

¶19 To prevail on an intentional breach of fiduciary duty claim, Bartz must demonstrate that: (1) Edmonds had a fiduciary duty to Bartz; (2) Edmonds intentionally breached that duty; and, (3) that the breach caused Bartz damages. See *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800.

¶20 Bartz argues that Edmonds had a duty to notify Bartz of the federal court's denial of his *habeas corpus* petition and breached it by not notifying Bartz.

⁵ The circuit court stated:

Accordingly, I can find under no reasonable view of the facts, even those, as I say, viewed in the light most favorable to the nonmovant, Mr. Bartz, that that conversation took place as Mr. Hensley has asserted.

The evidence against it is overwhelming, and accordingly, I grant summary judgment on the second cause of action against Mr. Bartz and in favor of Mr. Edmonds.

Bartz acknowledges that under *Zastrow v. Journal Communications*, 2006 WI 72, ¶38, 291 Wis. 2d 426, 718 N.W.2d 51, a breach of a fiduciary duty is an intentional tort. To prove that the breach here was intentional, Bartz relies on his argument that Edmonds lied to Hensley and said the *habeas* petition was still pending when he knew it was not. Even if we assume, without deciding, that Edmonds had a fiduciary duty to notify Bartz of the federal court decision, Bartz's claim fails because he has presented no evidence in rebuttal to Edmonds's evidence, to prove that any breach was intentional.

¶21 Pursuant to WIS. STAT. § 802.08, a party seeking to resist summary judgment must respond to the movant's affidavits showing that a genuine material factual dispute exists. "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." Sec. 802.08(3).

¶22 In the course of discovery, Bartz claimed that Edmonds had lied to Bartz's friend, Hensley, by telling him in a phone call that the *habeas corpus* action was still pending. For proof, Bartz relied on Hensley's statement that he had spoken to Edmonds at phone number (414) 271-1440, a copy of Hensley's phone bill showing a call to that number and a copy of an email purporting to be from Edmonds to Hensley referring to the call.

¶23 Edmonds filed a summary judgment motion with supporting evidence by way of affidavits and an expert's report showing that Hensley could not possibly have spoken to Edmonds at phone number (414) 271-1440 because it belonged to the Gimbel, Reilly, Guerin & Brown law firm which Edmonds never belonged to and had no access to on the day of the alleged call. Additionally, Edmonds supplied an affidavit from a computer forensic expert who had evaluated the email document and determined that the email offered by Hensley was

“created by a word processing software to give the impression that this was an Email sent from a Email client software” and that the email was a fabricated document.

¶24 In his “Brief in Opposition to Summary Judgment,” Bartz filed only one document of proof of the existence of the Edmonds/Hensley phone call, namely, the email copy which he had supplied before summary judgment and which Edmonds’s expert had already determined to be a fabricated document. A party does not successfully resist summary judgment under WIS. STAT. § 802.08 by simply restating their original allegations. Bartz was required to file some affidavit that contradicted Edmonds’s affidavits and showed that a material factual issue existed as to whether the Edmonds/Hensley conversation ever took place. He did not do so. He filed nothing at all to respond to Edmonds’s evidence that Edmonds did not and could not have had access to (414) 271-1440 and he filed no new evidence to respond to the fabricated email evidence. As a result, Bartz has failed to support his claim that Edmonds lied to Hensley or that Edmonds intentionally breached any fiduciary duty to Bartz.

¶25 And finally, Bartz fails to demonstrate any causal link between his claimed breach of fiduciary duty and any harm to himself. His claimed harm is that he “would have probably prevailed, both on appeal and upon any retrial of his case.” There is no basis in this record for Bartz’s claim that he would have prevailed, either on appeal or retrial. As we noted in Section I above, he admitted shooting the victim in the face and only hoped to be convicted of a lesser form of homicide. He never had any hope of an acquittal, and does not now.

IV. Monetary Relief

¶26 Finally, in his second amended complaint, Bartz asserts a claim for litigation expenses that he incurred as a result of Edmonds’s failure to notify. Though titled “second cause of action,” this is nothing more than a claim for monetary relief arising out of the malpractice and breach of fiduciary duty claims and was properly dismissed by summary judgment.

¶27 Accordingly, Edmonds is entitled to summary judgment dismissing all of Bartz’s claims.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

