COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

NOTICE

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.

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No. 96-1756

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

CARL E. MEROW, INDIVIDUALLY AND AS TRUSTEE OF THE ERNIE L. MEROW REVOCABLE TRUST,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. KOX AND SHINNERS, HUCOVSKI & COMPANY, S.C.

DEFENDANTS-
THIRD PARTY PLAINTIFFS-RESPONDENTS,

V.

ROBERTS, RITSCHKE & MCNEELY, LTD., ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY,

THIRD PARTY DEFENDANTS,

TORGERSON LAW OFFICES, S.C.,

THIRD PARTY DEFENDANT-
APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. This appeal concerns a legal malpractice action arising out of the settlement of an estate. The attorney is accused of having failed to adequately supervise the settlement process because one of the tax returns was not properly prepared and the estate was exposed to roughly $147,000 in extra federal estate taxes. Although the plaintiff had retained a CPA to complete the return, the plaintiff claims that the defendant-attorney had the duty to supervise its preparation and that his negligent oversight contributed to the resulting loss. We agree with the circuit court that the plaintiff has stated a cause of action and affirm its decision not to award summary judgment to the defendant-attorney.

INTRODUCTION

This malpractice action is part of a larger controversy involving errors in the settlement of the estate of Ernie L. Merow. Carl E. Merow is Ernie's son and serves as the personal representative of the estate and is the trustee of the Ernie L. Merow Revocable Trust. He initiated this malpractice action against the Torgerson Law Offices, S.C. (we will hereinafter refer directly to Torgerson) in April 1995. Merow also brought claims against two accounting firms which were involved in the settlement process. Although Torgerson and the firms each moved for summary judgment, the circuit court only dismissed the claims against the accounting firms; it ruled that the claim against Torgerson could proceed to trial. And although a separate appeal has been filed challenging the granting of summary judgment for the accounting firms, this opinion only examines whether

the court correctly ruled on Torgerson's motion. *See* ***Merow v. Shinners, Hucovski & Co., S.C.***, No. 96-1140 slip op. (Wis. Ct. App. July 23, 1997).

FACTUAL AND PROCEDURAL BACKGROUND

Many of the facts are disputed and where a dispute exists, we present each party's allegations of fact in a light most favorable to its position. Carl Merow's father died in February 1992. Merow was appointed personal representative of the estate and also became the trustee of his father's existing trust.

According to Merow, his father had retained Torgerson in 1991 to prepare various documents for the estate. Thus, after his father died, Merow retained Torgerson to "handle the probate of his [father's] estate." Even though the estate had over $1 million in assets (if the probate estate and the corpus of the trust were combined), Merow contends that Torgerson led Merow to believe that he was capable of handling the settlement. Merow claims that Torgerson never expressed to Merow any concerns that he "lacked expertise in this area."

However, at Torgerson's suggestion, Merow contacted one of the above-mentioned accounting firms to have it prepare some of the tax returns related to the settlement process. Merow accepted Torgerson's suggestion that this firm should do the tax work because of its "familiarity" with trusts, although Merow claims that he nonetheless expected that Torgerson would be "coordinating the handling of those returns." Indeed, Merow claims that he did not know which party, Torgerson or the firm, would be completing each of the various forms. Merow expected that Torgerson and the firm would "work out" those matters themselves.

Merow alleges that he began to suspect that there was a problem with the estate's tax return in May 1992. By that time, he had received some of the trust's tax returns, but contacted the accounting firm to see what was delaying one of the estate's returns, specifically, the 706 form. Two members of the firm who were involved with the project told him that nothing had to be done until the beginning of 1993. But this was wrong; one issue which is not disputed is that the 706 form should have been filed by November 1992.

Nonetheless, believing that the 706 form was not due until 1993, Merow alleges that he again contacted the firm in late December 1992 to see how this project was progressing. At this time, Merow was first informed that the person handling the project, Joseph J. Kox, had left the firm. Merow thus contacted Kox and Merow eventually decided to keep Kox working on the project.

In March 1993, through a conversation with Torgerson, Merow apparently learned that the 706 form still had not been filed and that interest and penalties might result. Merow then contacted Kox, who told him that he was researching a way in which to avoid those penalties.

In addition, by this time Merow's stepmother had also passed away and Merow expected that Torgerson and Kox would "work out the details of coordinating [his stepmother's] estate tax return with my father's estate tax return." Accordingly, Kox had been researching if Merow's father's estate could achieve more favorable tax treatment through a qualified terminable interest property (QTIP) election.[1]

[1] According to the parties, a QTIP election permits the settlor of an estate to transfer assets from the decedent spouse's estate to the surviving spouse, thus allowing the decedent spouse's estate to take advantage of the marital deduction for estate taxes.

Kox finally completed the 706 form for Merow's father's estate in August 1993. However, the parties agree that this 706 form was not properly completed. The QTIP election, which is nonrevocable, was not correct. As a result, the estate did not receive the full tax advantage of the QTIP election and the estate had to pay roughly $147,000 in extra federal estate taxes.

In support of the general allegation that Torgerson had supervisory authority over the completion of the 706 form, Merow points to invoices which show that Torgerson billed Merow for time he spent discussing "Tax Returns" and "Trust Liability" with Kox. Merow also submitted expert testimony relating to the role of an attorney handling the settlement of an estate. This expert opined that Torgerson, as an attorney retained to guide the estate through probate, was the "quarterback" who had the duty to ensure that all of the estate's tax returns were properly filed.

Continuing with this football analogy, Merow provided the following summary of his case during arguments before the circuit court. According to Merow, Torgerson was the "quarterback" and he "fumbled the exchange" with Kox. Torgerson never clearly defined, for himself or for Merow, what he would be responsible for and what Kox would be responsible for. In addition, Torgerson "let the clock run out" on the filing of the 706 form, even though he could have sought a "timeout" by filing for an extension. Finally, Torgerson did not know the "playbook." He should have known, or at least could have easily learned, how the QTIP election should have been made. In sum, moving this estate through probate was a "team effort" and as "quarterback," Torgerson was at least partially responsible for the error that resulted.

Torgerson, however, views the events in a different manner. He claims that he was only retained to handle *the probate* of the estate. Pointing to his deposition and to Kox's deposition, he notes that they each understood that Kox was solely responsible for preparing the 706 form. Moreover, Torgerson references a letter he sent to Merow dated March 30, 1993, which states in part:

> Dear Carl:
>
> After our telephone conversation this morning, I called Joe Kox and advised him that you confirmed to me that you have been relying on him as your C.P.A. to prepare and file the required federal and state estate tax returns for your father's estate.
>
> ….
>
> /s/ Robert Torgerson

Finally, Torgerson points to the deposition testimony of Merow's expert. Although, as we noted above, this expert described Torgerson as the "quarterback," the expert also acknowledged that Torgerson had no reason to "foresee" that Kox was going to make this mistake on the QTIP election.

Before the circuit court, Torgerson summarized his position in this manner: Merow never retained him to prepare the 706 form. Merow hired Kox to do it and thus Kox "goofed up on his own." Most importantly, as Merow's expert described, there was no way in which Torgerson could have foreseen that Kox was going to make this error.

The circuit court rejected Torgerson's motion for summary judgment. It found that there were disputed issues of fact concerning the scope of the attorney-client relationship between Torgerson and Merow, namely, did Merow expect Torgerson to engage in "some sort" of "overview and coordination." The court concluded that the disputed factual issues "need to be tested" and "that means a jury."

Torgerson appealed this ruling alleging that the circuit court erred in its reading of the facts and should have awarded him summary judgment. Alternatively, Torgerson argues that the circuit court should have dismissed Merow's claim because imposing liability in this instance would be contrary to public policy.

DISCUSSION

1. Summary Judgment

We independently gauge whether Torgerson is entitled to summary judgment. *See* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). We owe no deference to the circuit court's conclusion. *See* ***id.***

The basic elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship (a duty); (2) acts or omissions constituting negligence (a breach of that duty); (3)causation; and (4) damages. *See* ***Cook v. Continental Cas. Co.***, 180 Wis.2d 237, 245 n.2, 509 N.W.2d 100, 103 (Ct. App. 1993).

Torgerson's appellate argument is directed at the first prong. He contends that Merow did not retain him, using Merow's term, to "quarterback" the settlement of the estate. Torgerson argues that the record conclusively reveals that Merow did not retain him to complete, nor supervise the completion of, the 706 form. Thus, Torgerson concludes that he cannot be liable as a matter of law because he is not responsible for errors in legal documents which were not related to his retainer.

In support of this argument, Torgerson directs us to Merow's pleadings. He reads them as an admission that Kox and his firm, and only Kox

and his firm, were retained to complete the 706 form. The complaint states: "[The firm] did not prepare the estate tax return for Ernie L. Merow in a timely fashion." Torgerson contends that this statement, on its face, reveals that Kox and the firm are the only potentially responsible parties.

We are not persuaded. To determine if Torgerson is entitled to judgment, we must liberally construe Merow's pleadings and draw any inferences in his favor. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,*** 90 Wis.2d 97, 103, 279 N.W.2d 493, 496 (Ct. App. 1979). Therefore, as Merow's pleadings also allege that he retained the firm "[a]t the recommendation of Attorney Torgerson," his pleadings support an inference that Merow indeed hired Torgerson to supervise the preparation of any tax documents, including the 706 form. Moreover, Merow's affidavit opposing summary judgment alleges that he believed that Torgerson would be "coordinating" the preparation of the necessary tax returns. Merow's pleadings and his affidavit create a dispute over a material fact—whether Torgerson was retained to supervise the preparation of the 706 form—and this dispute may only be resolved at trial.

Torgerson next argues that the March 1993 letter he sent to Merow separately demonstrates that the firm and Kox were given complete authority regarding the 706 form and that Merow could not have legitimately believed that Torgerson was going to be involved in its preparation. This letter describes a phone conversation between Torgerson and Merow during which Merow apparently "confirmed" that he was using Kox to prepare the 706 form. According to Torgerson, this letter proves that "at least from March 30, 1993 forward" Merow knew that Torgerson "had no responsibility with respect to the 706 and that Kox was completely responsible for it."

But while this letter can be read as an admission by Merow, acknowledging that only Kox was responsible for the 706 form, such an admission is in conflict with Merow's factual allegation that Torgerson was retained to "coordinate" the filing of the return. While this letter supports an argument that Merow "confirmed" that Kox, and only Kox, was responsible, Merow's affidavit suggests that this letter does not correctly summarize the conversation between Merow and Torgerson. Resolution of this evidentiary conflict must await trial.

Lastly, Torgerson argues that he is entitled to summary judgment because the "error made by CPA Kox" was not "foreseeable." Indeed, he suggests that the above factual disputes concerning the scope of his lawyer-client relationship with Merow are "immaterial" because Kox's error was not foreseeable and therefore liability may not be imposed. *See* ***A. E. Inv. Corp. v. Link Builders, Inc.,*** 62 Wis.2d 479, 484, 214 N.W.2d 764, 766 (1974) ("A defendant's duty is established when it can be said that it was *foreseeable* that his act or omission to act may cause harm to someone") (emphasis added); *see also* WIS J I—CIVIL 1005. As support for this position, Torgerson points to the deposition of Merow's expert where he confirmed that Torgerson could not have any reason to "foresee" that Kox was going to make a mistake completing the 706 form.

Merow responds that Torgerson has misinterpreted the foreseeability standard. Merow contends that the question is not whether *the particular mistake* was foreseeable (that Kox would improperly complete the 706 form), but rather whether *the resulting harm* was foreseeable (that Merow would be financially damaged if the tax returns were not properly completed). Merow adds that the issue of foreseeablity is traditionally resolved by the finder of fact.

We agree with Merow. The supreme court's discussion of "foreseeability" in ***A. E. Investment*** reveals that this issue involves only a determination about reasonably expected "harm," not the causes of the harm. *See* ***id.*** Thus, the fact that Torgerson could not have foreseen that Kox would make this mistake in completing the 706 form does not conclusively establish that Torgerson could not have reasonably foreseen that if Kox made an error on these documents, Merow would be harmed. Proof that Torgerson could not have foreseen that Kox would make this specific mistake is not pertinent to the foreseeability of injury to Merow. The foreseeability of *harm or injury* is what the factfinder must resolve in a negligence analysis. *See* WIS J I—CIVIL 1005.

2. Dismissal on Public Policy Grounds

Regardless of whether Merow has stated a claim for legal malpractice, Torgerson argues that holding him liable in these circumstances would be contrary to public policy. He develops this claim with specific arguments directed to each of the six "frequently cited" public policy considerations. *See* ***Schuster v. Altenberg***, 144 Wis.2d 223, 242-43, 424 N.W.2d 159, 167 (1988).

We decline, however, to engage in this public policy analysis in light of the many unresolved factual disputes. This analysis must wait for a full factual resolution of the claims against Torgerson. *See* ***id.*** at 241, 424 N.W.2d at 166. In fact, we read Torgerson's introduction to his public policy argument to support remanding this case; he writes:

> The plaintiff claims that Torgerson, a general practitioner lawyer not familiar with a Q-tip and other intricate tax issues, who was retained for the probate of an estate but not the 706, should be liable for failing to monitor the quality of the tax work of Kox, a CPA

> directly retained by the client to do the 706. Public policy precludes such liability.

Our concern is that Torgerson's public policy argument relies too heavily on *disputed* facts. Torgerson states that he was only "retained for the probate of an estate …." But Merow disputes this claim. Torgerson further states that Kox was "directly retained ... to do the 706." But Merow contends that he only retained Kox because of Torgerson's recommendation. Torgerson also characterizes the QTIP as an "intricate" tax issue. While it may be "intricate," we do not know whether a reasonably capable attorney would have been able to ascertain that Kox had made an error. The public policy analysis must await a resolution of these (and the other) factual matters.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.