COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1777 **Cir. Ct. No. 2012CV212**

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

JOHN WILLIAMSON AND ARLINE WILLIAMSON,

PLAINTIFFS-RESPONDENTS,

V.

PAUL F. SCHWEIGER, SIEBEN, GROSE, VON HOLTUM & CAREY, LTD. AND ABC INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Sieben, Grose, Von Holtum & Carey, Ltd., Attorney Paul F. Schweiger, and ABC Insurance Company (collectively,

"Schweiger") appeal a non-final order denying their summary judgment motion.[1] They contend John and Arline Williamson have failed to satisfy their initial burden of showing the existence of an attorney-client relationship in this legal malpractice case. We agree, reverse, and remand for the circuit court to enter judgment in Schweiger's favor.

BACKGROUND[2]

¶2 The Williamsons filed this negligence action against Schweiger in November 2012. According to the complaint, they contacted Attorney Schweiger's office to discuss a potential medical malpractice claim against James P. Fogarty and Fogarty Surgical Services, and an attorney-client relationship was formed. The Williamsons later discovered the statute of limitations had run, barring their medical malpractice claim, and they alleged that Attorney Schweiger "never told the [Williamsons] that there was a statute of limitations, what that meant, or when the statute of limitations would expire."

¶3 Schweiger filed a motion for summary judgment. The attachments contain the following undisputed facts. Arline Williamson first contacted Attorney Schweiger at the Sieben firm in October 2007. She spoke with Paula Schweiger, Attorney Schweiger's paralegal and spouse. Ms. Williamson stated

[1] We granted leave to appeal a non-final order on August 27, 2013.

[2] Schweiger cites only to his brief's appendix rather than the record. We remind counsel that an appellant's brief must include "a statement of facts relevant to the issues presented for review, with appropriate references to the record." WIS. STAT. RULE 809.19(1)(d). The appendix is not the record, and we admonish counsel that future violations of the Rules of Appellate Procedure may result in sanctions under WIS. STAT. RULE 809.83(2).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

her husband had been mistreated by Dr. Fogarty, and mentioned a nurse told her "she would have brought the doctor up on charges … because of his poor treatment."

¶4 Ms. Schweiger responded that she was familiar with Dr. Fogarty, and the parties agreed to a meeting on October 30. Ms. Williamson was given directions to the Sieben law office in Duluth. Ms. Schweiger mailed a confirmation letter on October 26, which included a brochure about the firm and requested that the Williamsons bring any medical records or notes.

¶5 Ms. Williamson cancelled the October 30 meeting. She believed she did so because her husband was sick. The parties scheduled a second meeting, which Sieben cancelled because it fell on a holiday. Ms. Williamson did not remember when the meeting was cancelled or who she spoke with at the firm.

¶6 On November 1, 2007, Ms. Williamson called Ms. Schweiger to express frustration at the parties' inability to meet. Ms. Williamson offered to send her notes by mail, and stated she had pictures Dr. Fogarty tried to throw away. Ms. Schweiger agreed Ms. Williamson could send the notes. Ms. Schweiger never told Ms. Williamson her husband or the Sieben firm would take the case.

¶7 On November 4, Ms. Williamson sent a letter to Attorney Schweiger at the Sieben office. Attached to the letter were extensive notes regarding her husband's hospitalization.[3] The letter began, "Since attempts to meet in person

[3] Ms. Schweiger testified at deposition that no one from the Sieben firm received Ms. Williamson's notes. The factual dispute concerning receipt of the notes is not germane to our decision.

have proven impossible, I would like to tell you a bit of the happenings that have occurred since my hospital notes." The letter then chronicled the events between late September 2007 and the parties' initial phone contact. It concluded:

> I am asking you to help us. Please send us any forms needed to be signed to release John's hospital records. If we are not able to meet in person, possibly we can take care of this by telephone consultations.
>
> If this is agreeable to you and you are interested in pursuing this case, I will forward to you the photographs from the surgery in Ashland. In the meantime, I will keep them in safe place.

No one from the Sieben firm responded, and no forms were sent. Ms. Williamson did not send the photos mentioned in the letter.

¶8 The November 4 letter was the last contact the Williamsons had with the Schweigers or anyone else at the Sieben firm. Attorney Schweiger never spoke with the Williamsons and later stated he had no intention of taking the Williamsons' case. Attorney Schweiger generally sends a rejection letter that includes information about the statute of limitations, but acknowledged no letter appeared to have been sent to the Williamsons.

¶9 During her deposition, Ms. Williamson stated she believed Attorney Schweiger had agreed to represent her. The sole basis for her belief was Ms. Schweiger's statement that she was familiar with Dr. Fogarty's name.

¶10 Six months after Ms. Williamson's November 4 letter, she continued to believe Attorney Schweiger was representing her despite no communication whatsoever from Attorney Schweiger or the firm. Ms. Williamson's belief was based on second-hand information from a bartender who said there were five cases

ahead of the Williamsons'.[4] Ms. Williamson took this to mean she "would have to wait in line for the other cases to be rectified." Ms. Williamson did not follow up with Schweiger or attempt to confirm the bartender's statement.

¶11 After two years with no communication from Schweiger, the Williamsons continued to believe they were represented. Ms. Williamson testified they believed this because no one from Sieben ever contacted them to inform them they were not a client. Ms. Williamson acknowledged that during this time the Williamsons did not attempt to contact Attorney Schweiger to inquire about their case. Ms. Williamson stated it was too painful to rehash the details of her husband's alleged mistreatment.

¶12 After another two and one-half years with no communication, in April 2012, Ms. Williamson visited her present lawyer after reading he had won a lawsuit against Dr. Fogarty. Ms. Williamson did not attempt to contact Attorney Schweiger before seeking out her present attorney. She stated that after more than four years with no communication from Attorney Schweiger, she was "done waiting."

¶13 At a hearing on Schweiger's motion for summary judgment, the circuit court, drawing from ***OLR v. Kostich***, 2010 WI 136, 330 Wis. 2d 378, 793 N.W.2d 494, stated the "attorney[-]client relationship is established based upon the reasonable expectations of the person seeking the lawyer's advice." The court found the ***Kostich*** standard contrary to, and more applicable than, older case law,

[4] In fact, Attorney Schweiger handled only one prior case against Dr. Fogarty.

"which says that there is an attorney[-]client relationship only when there is an agreement by both parties and services are actually provided."

¶14 Applying ***Kostich***, the court determined that when Ms. Williamson sent the November 4 letter, the Williamsons "had a reasonable expectation that Mr. Schweiger was going to evaluate the medical malpractice claim … and get back to them on it." The court acknowledged that at some point, the expectation was no longer reasonable, but concluded that was an issue for the jury. Accordingly, it denied the summary judgment motion. We granted Schweiger leave to appeal a non-final order.

DISCUSSION

¶15 We review a denial of summary judgment de novo, applying the same well-established methodology as the circuit court. *See* ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶16 The purpose of summary judgment is to avoid trial when there are no issues to be tried. ***Ixonia State Bank v. Schuelke***, 171 Wis. 2d 89, 94, 491 N.W.2d 772 (Ct. App. 1992). Summary judgment should not be granted unless the facts presented conclusively show the plaintiff's action has no merit and cannot be maintained. ***Smaxwell***, 274 Wis. 2d 278, ¶12 (citing ***Goelz v. City of Milwaukee***, 10 Wis. 2d 491, 495, 103 N.W.2d 551 (1960)).

¶17 The Williamsons' ability to pursue this action turns entirely on whether the undisputed facts establish an attorney-client relationship. To have a viable legal malpractice case, the plaintiff must establish, among other things, that an attorney-client relationship was formed. *See* ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979) (citation omitted). Ordinarily, whether an attorney-client relationship has been created depends upon the intent of the parties and is a question of fact. *See* ***Kostich***, 330 Wis. 2d 378, ¶16. However, when the material facts are not disputed, the court is presented solely with a question of law. ***Smaxwell***, 274 Wis. 2d 278, ¶12.

¶18 We believe the circuit court misinterpreted ***Kostich*** when it determined the applicable standard. Contrary to the circuit court's perception, ***Kostich*** establishes that an attorney-client relationship is formed when legal advice is sought from a person who the soliciting party knows is an attorney, and the attorney actually provides legal advice. ***Kostich***, 330 Wis. 2d 378, ¶16. However, whether this standard has been satisfied is determined largely by the reasonable expectations of the person seeking the lawyer's advice. ***Id.***

¶19 The supreme court's application of this test in ***Kostich*** is illuminating in determining whether the Williamsons had an attorney-client relationship with Attorney Schweiger. There, thirteen-year-old G.K., who was the victim of sexual abuse, sought out Attorney Kostich to explore the possibility of a civil suit. ***Id.***, ¶6. G.K. shared highly confidential information about the sexual assaults, and Kostich responded that he would research the statute of limitations and get back to G.K. ***Id.*** The parties discussed fees, but no retainer agreement was signed. ***Id.*** Kostich obtained authorization to access G.K.'s medical and therapy records, he sought out additional details about the abuse, and he and G.K. had a second meeting, at which he informed G.K. he would not take the case

because, in his opinion, the statute of limitations had run. ***Id.***, ¶6. Based on these facts, our supreme court concluded G.K. was Kostich's client, and it was a conflict of interest to subsequently represent the alleged abuser. ***Id.***, ¶21.

¶20 ***Kostich*** fully comports with the rule that an attorney-client relationship can only be formed by the mutual consent of the lawyer and client. *See* ***Wisconsin Patients Comp. Fund v. Physicians Ins. Co. of Wisconsin***, 2000 WI App 248, ¶11, 239 Wis. 2d 360, 620 N.W.2d 457; *see also* ***Freer v. Whitcomb***, 2006 WI App 31, ¶5, 289 Wis. 2d 549, 710 N.W.2d 725 (rules of contract formation generally apply to the formation of an attorney-client relationship, though formalities are not essential and the relationship may be implied from the words and actions of the parties). It is clear from the facts in ***Kostich*** that an attorney-client relationship had formed between G.K. and Kostich despite his ultimate decision not to pursue her case. Kostich performed legal research, sought out treatment records, and had two meetings with G.K. ***Kostich***, 330 Wis. 2d 378, ¶6.

¶21 Here, we conclude the Williamsons have failed to meet their initial burden of showing the existence of an attorney-client relationship. *See* ***Freer***, 289 Wis. 2d 549, ¶5; ***Security Bank v. Klicker***, 142 Wis. 2d 289, 295, 418 N.W.2d 27 (Ct. App. 1987). Based on the undisputed facts, no reasonable fact-finder could conclude there was an attorney-client relationship between Attorney Schweiger and the Williamsons. Attorney Schweiger did not provide any legal services or advice, never met with the Williamsons, and did not respond to Ms. Williamson's

November 4 letter explaining the historical facts of her case.[5] Further, Ms. Williamson's belief that she was represented was objectively unreasonable; Ms. Williamson never spoke to an attorney, was never told by anyone at the Sieben firm that Attorney Schweiger would take her case, and appeared uncertain in her final communication to Attorney Schweiger whether he was even interested in pursuing a claim on her behalf. Indeed, the sole basis for Ms. Williamson's belief was Ms. Schweiger's statement that the firm was familiar with Dr. Fogarty. This is insufficient.

¶22 Accordingly, we conclude the circuit court erred by denying Schweiger's summary judgment motion. We reverse the order and remand to the circuit court so it may enter judgment for Schweiger.

By the Court.—Order reversed and cause remanded with directions.

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

[5] By this, we do not mean to condone Attorney Schweiger's failure to send a letter rejecting the Williamsons' case, which—as a matter of good practice—may well have prevented the present litigation.