COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1649 **Cir. Ct. No. 2003CV524**

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

DOROTHY MCGRANE,

PLAINTIFF-APPELLANT,

V.

JOHN O'BRIEN AND O'BRIEN, ANDERSON, BURGY, GARBOWICZ & BROWN, LLP,

DEFENDANTS-RESPONDENTS,

LUMBERMEN'S MUTUAL CASUALTY CO.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 BROWN, J. This is a legal malpractice action. Dorothy McGrane hired Attorney John O'Brien to represent her in converting an Eagle River resort she owned with her estranged husband into condominiums and facilitating the sales of two units. It is undisputed that O'Brien satisfactorily performed this work. McGrane claims, however, that O'Brien was nonetheless negligent because he knew the McGranes' marriage at its end and therefore should have drafted a postnuptial agreement reclassifying the property as hers. She claims that the failure to do so caused her to obtain less in the later divorce. Her legal malpractice action fails on many fronts. First, O'Brien was hired to do real estate work and nothing was said about a divorce, so there was no duty on O'Brien's part. Second, it is complete speculation that her estranged husband would even have signed such an agreement had it been drafted, so there is no causation. Also regarding causation, the law is that a person may repudiate a postnuptial agreement of this sort up to the divorce. Summary judgment was appropriately granted.

¶2 Dorothy and William McGrane married in 1962. In 1988, they purchased property outside of Eagle River, Wisconsin, known as the Meander Post Resort, which included a house and three cabins. Six years later, William moved out of the house at Meander Post and consulted O'Brien about the possibility of divorce. O'Brien informed William that divorce was not financially advisable, and William had no further contact with him about the matter. Dorothy continued to manage the resort property herself.

¶3 On April 10, 1998, William sent Dorothy a letter disclaiming his interest in Meander Post. He acknowledged that Wisconsin law considers all property communal regardless of title but stated, "[I]n my eyes, Meander Post and its contents belong to you. I don't know what happens there …. I don't know

what happens, period, in divorce. But your lawyer will.… The future of Meander Post is in your hands.… I don't expect to be back there to live or visit ….”

¶4 In August, Dorothy approached O'Brien about converting Meander Post to condominium ownership so that she could sell the three cabins. On October 16, she signed a contract to sell Unit 3 with closing to occur on November 30. Dorothy represented to O'Brien that Meander Post belonged solely to her. At some point, she told O'Brien that she and William were separated. She did not, however, indicate to O'Brien that she was contemplating divorce. Indeed, she had not even discussed the matter of divorce with William at the time she retained O'Brien. O'Brien converted Meander Post as contemplated, and the condominium declaration he prepared listed Dorothy as the sole declarant. When O'Brien received the title insurance commitment in mid-November, however, he discovered that William's name was still on the title.

¶5 Dorothy told O'Brien to prepare a deed in which William would convey his interest in Meander Post to her. O'Brien did so. William signed the deed and returned it to O'Brien during the last week of November. The sale of Unit 3 went as planned.

¶6 In 1999, Dorothy retained O'Brien to represent her in the sale of another unit at Meander Post. She filed for divorce in Ozaukee county in April, at about the same time the sale took place. Dorothy retained different counsel to represent her in the divorce action.

¶7 In February 2000, William wrote a letter to the McGranes' four children, stating in pertinent part:

> I have proposed that Dot have the property up north. After the mortgage is paid, she would have about $350,000.

> She's already spent some of that money on improvements, but it's still there, still in the property.
>
> We have an additional $10,000 in investments. In my proposal, those funds would go to me.

His position during the divorce proceedings, however, was that Meander Post was part of the marital estate. The parties' marital settlement agreement, incorporated in the divorce judgment, divided the property accordingly.

¶8 Dorothy subsequently filed suit against O'Brien. She claimed that because Meander Post remained part of the marital estate, she had to settle for $60,000 in maintenance payments over a two-year period rather than long-term maintenance. She alleged that O'Brien was negligent in his representation because he did not ask William to sign a marital property agreement reclassifying Meander Post as Dorothy's individual property. Dorothy believed O'Brien could have foreseen the divorce because he knew of their marital difficulties: the parties had been separated for four years, and William had previously contacted O'Brien about divorce.

¶9 O'Brien moved for summary judgment on the grounds that Dorothy could not prove causation or breach of duty. He took the position that: (1) Dorothy had not consulted him for family law advice but rather to assist her in a real estate transaction and (2) even if he should have attempted to execute a marital property agreement, there is no basis to assume William would have signed it or that William would not have repudiated the agreement prior to the final judgment of divorce. The circuit court agreed that even if O'Brien had done everything Dorothy says he should have done, she could not show that a different result would have been obtained. Hence, the court found lack of causation and granted summary judgment to O'Brien. Dorothy appeals.

¶10 We review summary judgment decisions de novo, using the same well-known methodology as the circuit court. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. We will uphold the circuit court's summary judgment decision when the prevailing party is entitled to judgment as a matter of law and where no genuine issue of material fact exists. ***Id.***, ¶24.

¶11 When a plaintiff brings a malpractice action, he or she must prove that the attorney acted negligently by not observing the level of care usually exercised by legal professionals under like circumstances. ***DeThorne v. Bakken***, 196 Wis. 2d 713, 717, 539 N.W.2d 695 (Ct. App. 1995). Moreover, the plaintiff must also prove causation. ***Id.*** In proving negligence, the plaintiff must put forth enough evidentiary facts to establish the ultimate facts to a degree that removes those ultimate facts from the realm of pure speculation and conjecture. ***Zillmer v. Miglautsch***, 35 Wis. 2d 691, 700, 151 N.W.2d 741 (1967).

¶12 O'Brien must prevail on this appeal, first, because he had no duty to execute a marital property reclassification agreement. Dorothy retained him solely to carry out real estate endeavors. She made no mention of divorce and did not ask him to perform any other family law work. Yes, he knew the McGranes were separated at the time Dorothy retained his services and that the couple had experienced marital difficulties. However, it was William, not Dorothy, who had expressed an interest in divorce. As far as O'Brien knew, William had dropped the idea after O'Brien advised him against it four years earlier. Nothing in the record supports that the parties' marital situation had changed in the interim. O'Brien had no reason to suspect that the McGranes' separation would progress further when it had gone nowhere in four years.

¶13 Second, it remains pure speculation to assume that William would have signed a marital property reclassification agreement. Dorothy points to the letters William wrote as evidence that William intended Meander Post to be Dorothy's separate property. We agree that the letters conclusively establish that William wished Dorothy to have Meander Post to herself, even in the event of divorce. However, they do not establish, or even suggest, that William was willing to let Dorothy keep the property with no quid pro quo in the event of divorce. Indeed, his deposition testimony is to the contrary.

> Here is what I know. When our marriage ended, when we divorced, the most valuable thing that we had was the Eagle River property. I wanted my wife to have that, and I know that I had said, which is documented in there somewhere in advance, that I felt that she should have this.
>
> ….
>
> But I must say—while saying that, I felt that still is part of any settlement between us. It's a part of our dividing up who gets the lamp and who gets, you know, the Viking ring….

William also stated in his deposition that had O'Brien given him a legal document to sign, he would have taken it as a sign that Dorothy was moving forward with divorce plans and sought counsel prior to signing any reclassification agreement. William's attorney in the divorce case averred that he would have advised William against signing such a document. Moreover, William maintained throughout the divorce action that the property was part of the marital estate. This action commenced less than six months after William signed over his title to Meander Post. It is pure guesswork that his position just months prior to the divorce would have been different.

¶14 Finally, even if William had signed a postnuptial agreement to reclassify Meander Post as Dorothy's individual property, William could have

repudiated it, pursuant to ***Evenson v. Evenson***, 228 Wis. 2d 676, 598 N.W.2d 232 (Ct. App. 1999). In ***Evenson***, we recognized two types of postnuptial agreements, "family settlements" and "separation agreements." ***Id.*** at 682. Any reclassification agreement here would have been the latter sort of agreement because the parties had already been living apart for four years. *See* ***id.*** (separation agreements are made after separation or in contemplation of separation in the immediate future). Either party may repudiate a separation agreement at will until the circuit court incorporates it in a judgment. ***Id.*** at 686. Dorothy submitted no facts to the circuit court to support the proposition that William would not have repudiated a postnuptial reclassification agreement. The only evidence in the record probative of what William might have done is his divorce attorney's affidavit that he would have advised William to repudiate such an agreement and William's actual position throughout the divorce proceedings. Again, causation is purely speculative, and Dorothy's appeal must fail.

¶15 Because Dorothy cannot make out her prima facie case on the evidence presented, summary judgment in favor of O'Brien was proper. Causation is speculative at best, and she has not demonstrated that O'Brien breached any duty of care. Even if Dorothy envisioned filing for divorce at some point, that does not mean O'Brien could have foreseen such a turn of events. We affirm.

By the Court.—Judgment affirmed.

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