

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 29, 2019**

Sheila T. Reiff  
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 No. 2018AP623**

**Cir. Ct. No. 2016CV8101**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**DAVID SKINDZELEWSKI,**

**PLAINTIFF-APPELLANT,**

**V.**

**JOSEPH SMITH, JR.,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County:  
MARY E. TRIGGIANO, Judge. *Affirmed.*

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

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. David Skindzelewski appeals from an order of the circuit court that granted summary judgment to Joseph Smith, Jr., in this legal

malpractice action. The circuit court concluded that in order to prevail, Skindzelewski needed to demonstrate his actual innocence on the criminal charge in the underlying case that precipitated the malpractice claim. Skindzelewski acknowledges the actual innocence rule, but argues that the facts of this case warrant creation of an exception. We conclude that the actual innocence rule controls, and we are not persuaded that we can craft an exception on these facts. We therefore affirm the circuit court's order.

### **BACKGROUND**

¶2 The facts of this case are undisputed. In March 2014, Skindzelewski was charged in Waukesha County with one count of theft by a contractor, less than \$2500, a Class A misdemeanor contrary to WIS. STAT. §§ 779.02(5) (2009-10) and 943.20(3)(a) (2009-10).<sup>1</sup> The complaint alleged that in July and August 2010, Skindzelewski, doing business as DS Roofing, accepted payments of \$600 and \$664 to install roof vents on a couple's residence, but never performed the work. He admitted using the money for rent and vehicle repairs. Although he allegedly called the homeowners to apologize and promise repayment, he did not return their funds.

¶3 Smith, an assistant state public defender, was appointed to represent Skindzelewski. Skindzelewski made an initial appearance on the charge in August 2014. In August 2015, Skindzelewski entered a guilty plea and was sentenced to eight months in jail, consecutive to an unrelated revocation sentence.

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

He filed a timely notice of intent to pursue postconviction relief, and postconviction counsel was appointed.

¶4 Postconviction counsel realized that the statute of limitations for charging a misdemeanor offense is three years. *See* WIS. STAT. § 939.74(1) (2009-10). Thus, the 2014 prosecution for a 2010 offense was time barred. Postconviction counsel moved to vacate Skindzelewski’s conviction based on the statute of limitations. The Waukesha County Circuit Court granted the motion on April 11, 2016, and Skindzelewski was released from jail on April 12, 2016.

¶5 Skindzelewski commenced this legal malpractice action against Smith. Skindzelewski asserted he was incarcerated from December 10, 2015—when the revocation sentence was completed—through April 11, 2016, solely as a result of the conviction obtained through Smith’s professional negligence and failure to recognize the statute of limitations problem. Smith does not dispute that he violated a professional standard of care.

¶6 Both parties moved for summary judgment, which the circuit court granted to Smith. The circuit court concluded that Skindzelewski was required to demonstrate that he was actually innocent of the criminal charge in order to prevail on the malpractice claim. Because Skindzelewski does not dispute he committed the theft, he could not recover against Smith. Skindzelewski appeals.

## DISCUSSION

¶7 Summary judgment is appropriate if “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” *See* WIS. STAT. § 802.08(2). We review the grant or denial of summary judgment *de novo*, using the same methodology as the circuit court. *See BMO*

*Harris Bank, N.A. v. European Motor Works*, 2016 WI App 91, ¶14, 372 Wis. 2d 656, 889 N.W.2d 165. We will reverse a grant of summary judgment if the circuit court incorrectly decided a legal issue or if material facts were in dispute. *See id.* When the parties file cross-motions for summary judgment, as they did here, it is generally the equivalent of a stipulation of facts, allowing the circuit court to decide the case on the legal issues presented. *See id.*, ¶15.

¶8 In a legal malpractice action, the plaintiff must prove four elements to prevail: “(1) a lawyer-client relationship existed; (2) the [attorney] committed acts or omissions constituting negligence; (3) the attorney’s negligence caused the plaintiff injury; and (4) the nature and extent of injury.” *Hicks v. Nunnery*, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809. “[A]s 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. Thus, a former criminal defendant generally must “prove he is innocent of the charges of which he was convicted in order to prevail on a claim of legal malpractice.” *See id.*, ¶46. Proof of actual innocence is in addition to, not a substitution for, the causation element. *See Tallmadge v. Boyle*, 2007 WI App 47, ¶15, 300 Wis. 2d 510, 730 N.W.2d 173.

¶9 There are multiple public policy reasons for the actual innocence rule. Among other things, allowing a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would “shock the public conscience, engender disrespect for courts and generally discredit the administration of justice,” and allowing a guilty plaintiff a civil recovery “impermissibly shifts responsibility for the crime away from the convict.” *See Hicks*, 253 Wis. 2d 721, ¶¶40-41 (citations and quotation marks omitted).

Additionally, criminal defendants have “an array of postconviction remedies” for ineffective representation. *See id.*, ¶44 (citation omitted).

¶10 Skindzelewski generally acknowledges the actual innocence rule and appears to further acknowledge that, absent an exception to that rule, *Hicks* controls to bar his claim. Thus, relying on cases from other jurisdictions that carve out such exceptions, Skindzelewski urges us to create an exception, too.

¶11 We decline Skindzelewski’s invitation to craft an exception to the actual innocence rule. The court of appeals is primarily an error-correcting court. *See Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). While we sometimes perform a law-defining or law-developing function, this typically occurs as we adapt common law and interpret statutes. *See id.* Because of the nature of our role, only the supreme court may “overrule, modify or withdraw” language from a published court of appeals decision. *See id.* at 189-90. Creating an exception would modify the holding of *Hicks*.

¶12 The rule in this state is that a plaintiff in a legal malpractice action against his or her prior criminal defense counsel must demonstrate his or her actual innocence of the criminal charges. Skindzelewski cannot do that, so the circuit court here appropriately granted summary judgment to Smith.

*By the Court.*—Order affirmed.

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

