COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2109 **Cir. Ct. No. 99-CV-120**

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

WILLIAM J. ADNEY,

PLAINTIFF-APPELLANT,

V.

USAA PROPERTY & CASUALTY INSURANCE AND UNITED SERVICES AUTOMOBILE ASSOCIATION, AN UNINCORPORATED ASSOCIATION,

DEFENDANTS,

ROBERT W. KETTERING, JR.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. William Adney appeals a summary judgment dismissing his legal malpractice claim against Robert Kettering, Jr. Kettering represented Adney in a personal injury action brought by Michael Gronquist. Adney contends that summary judgment was inappropriate because (1) Kettering failed to establish that there was no genuine material issue of fact as to his negligence, (2) Kettering's negligence caused damage to Adney, and (3) Wisconsin public policy does not preclude Adney's claims against Kettering.

¶2 We conclude that there is no genuine issue of material fact, just a difference in judgment about trial strategy, and that Kettering's good faith decisions are judgmentally immune. In any event, there are no facts in dispute that would permit a finding that Kettering was negligent. Adney did not create genuine issues of material fact as to whether Kettering should have pursued a seat belt defense and whether Kettering should have hired medical or vocational experts to evaluate Gronquist's injuries and damages.[1] Accordingly, we affirm.

I. BACKGROUND

¶3 The underlying facts are undisputed. As recounted in the trial court opinion, Kettering represented Adney in a civil action brought by Gronquist for personal injuries arising out of an accident on August 9, 1991. It is undisputed that Adney was intoxicated, drove the wrong way on a bridge and collided head-on with Gronquist's vehicle.

[1] Because of our resolution of this case, we need not address Adney's actual damages and public policy arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1993). Additionally, Adney argues for the first time on appeal that Kettering's trial performance and failure to conduct further investigation constituted negligent representation. Our resolution of the case precludes our consideration of these arguments, but they also would not be considered because they are raised for the first time on appeal. *See* ***id.***

¶4 Two eyewitnesses, Tom Dougherty and Tony Ernst, came to Gronquist's assistance. They observed that he had on his seat belt. In fact, Dougherty testified that he unfastened Gronquist's seat belt so that he and Ernst could lift Gronquist from his burning vehicle. Another witness also observed Gronquist seated in an upright position consistent with having his seat belt on.

¶5 Several hours after the accident, Adney's blood alcohol content was still nearly twice the legal limit when it was drawn at the hospital. Adney did not recall how he got on the wrong side of the bridge, and he did not recall seeing any of the signs indicating that he was traveling the wrong way. Further, Adney did not learn until later at the hospital that other motorists were honking at him and trying to get him to stop before the collision. Both Adney and Gronquist were injured, but Gronquist suffered catastrophic injuries, which resulted in neurological impairments severe enough to render him permanently disabled. Adney eventually pled guilty to causing serious bodily harm by use of an intoxicant.

¶6 Gronquist filed a civil action against Adney and his insurer, which ultimately resulted in a judgment for more than $7,000,000. Kettering represented Adney in this action.

¶7 Adney subsequently filed this legal malpractice action against Kettering, alleging that Kettering was negligent for not pursuing a seat belt defense or hiring medical or vocational experts to evaluate Gronquist's injuries and potential damages in the case. Adney offered expert testimony disagreeing with Kettering's decisions. Kettering testified at a deposition and described the tactics he employed and the decisions he made regarding his representation of Adney. He described the reasons for his choice of defense and asserted that the

choice was made in good faith and in what he deemed to be in Adney's best interests. Kettering moved for summary judgment.

¶8 The trial court noted that summary judgment rarely is appropriate in negligence cases. However, the court was "satisfied that the only reasonable conclusion that can be drawn from the evidence presented with this motion is that Mr. Gronquist was belted at the time of the accident." It also concluded that the testimony of Adney's experts criticizing Kettering's decision not to hire experts amounted merely to a difference of opinion and failed to "create a genuine issue of material fact with respect to establishing a causal connection between failing to use defense experts in the underlying case and any damage or injury to Adney in this case as a result of that failure."

¶9 The court found that Adney's allegations "are not supported by competent evidence sufficient enough to raise a genuine issue of material fact with respect to the claims of malpractice …." It dismissed Adney's claims as a matter of law and entered summary judgment in favor of Kettering. Adney now appeals.

II. STANDARD OF REVIEW

¶10 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). "A motion for summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." ***Thompson v. Threshermen's Mut. Ins. Co.***, 172 Wis. 2d 275, 280, 493 N.W.2d 734 (Ct. App. 1992).

III. DISCUSSION

A. LEGAL MALPRACTICE

¶11 To establish a claim for legal malpractice, Adney must prove (1) the existence of an attorney-client relationship, (2) acts or omissions constituting negligence, (3) causation and (4) damages. *See* ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979).

¶12 Whether an attorney was negligent requires a showing that the attorney violated a duty of care. ***Cook v. Continental Cas. Co.***, 180 Wis. 2d 237, 245, 509 N.W.2d 100 (Ct. App. 1993). The duty of care a lawyer owes his client is "rendering legal services to a client, to exercise that degree of care, skill, and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in this state." ***Id.*** at 245-46. Liability for malpractice turns on the reasonableness of an attorney's skills, knowledge and actions, given the particular circumstances of the case. ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 111-12, 362 N.W.2d 118 (1985). "This determination is a mixed question of fact and law, because the trier of fact is confronted with a dual problem—what in fact did [an attorney] do or fail to do in the particular situation, and what would a reasonable or prudent attorney have done in the same circumstances." ***Id.*** at 112.

B. JUDGMENTAL IMMUNITY

¶13 Adney argues that Kettering failed to exercise reasonable care when he did not pursue the defense that Gronquist negligently contributed to his injuries because he was not wearing his seat belt and when he decided not to hire medical or vocational experts to evaluate Gronquist's injuries and damages. Kettering

asserts that Adney's challenges involve matters on which he made well-founded, reasoned decisions in good faith and in Adney's best interests. Kettering therefore contends that, as a matter of law, judgmental immunity precludes Adney's claims against him. We agree.

¶14 An attorney is bound to exercise his or her best judgment in light of his or her education and experience, but is not held to a standard of perfection or infallibility of judgment. ***Id.*** at 111. "Judgment involves a reasoned process based upon the accumulation of all available pertinent facts." ***DeThorne v. Bakken***, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (Ct. App. 1995). An attorney is not liable for errors in judgment that are made in good faith, are well founded and are made in the best interest of the client. ***Helmbrecht***, 122 Wis. 2d at 117. In ***DeThorne***, 196 Wis. 2d at 724, this court noted:

> [W]e will not hold attorneys responsible when their decisions are ones that a reasonably prudent attorney might make even though they are later determined by a court of law to be erroneous. Attorneys not holding themselves out as experts in a particular field are subject to an ordinary standard of care. We will not make attorneys liable for all errors under a theory of legal malpractice, but for only those errors which fall outside of the realm of reasonable due care.

¶15 Judgmental immunity shields Kettering's decisions not to pursue the seat belt defense and not to hire medical and vocational experts.[2] Kettering testified at deposition about his options, thought processes and conclusions for each issue. We conclude that his reasoning was well founded and a good faith

[2] Adney did not file a reply brief. As a result, he made no attempt to dispute Kettering's judgmental immunity argument or distinguish this case from Kettering's interpretation of ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 362 N.W.2d 118 (1985).

analysis of each issue with Adney's best interests in mind. Adney did not raise a genuine issue of material fact. His experts merely presented a difference in judgment about trial strategy. We conclude that Kettering's good faith trial strategy is judgmentally immune.

¶16 Kettering testified that he discussed with Adney the possibility of a seat belt defense. Kettering indicated that he informed Adney of the potential consequences of pursuing such a defense and attempting to place any fault or blame on Gronquist for his injuries. Kettering testified that they elected not to pursue a seat belt defense because he felt there was a great risk of offending or insulting the jury by asserting it. These facts are not disputed.

¶17 In addition to the risk of offending the jury, Kettering considered Adney's driving and intoxication, the severity and extent of Gronquist's injuries, the Gronquist family's animosity toward Adney and the fact that the parties were still negotiating a punitive damages claim until the parties stipulated on the issue after the trial was underway. Under all of these circumstances, Kettering felt that pursuing a seat belt defense could reinforce and bolster Gronquist's claim for punitive damages rather than diminish Adney's liability. These also are undisputed facts.

¶18 Kettering also decided not to retain any medical or vocational experts for the defense. He reviewed Gronquist's medical records, deposed Gronquist and other witnesses and took into account that almost one-half million dollars already had been spent in medical expenses for Gronquist's care and treatment. Kettering decided that Gronquist's injuries and damages were

undisputed and that medical or vocational experts provided by the defense would only bolster Gronquist's claims by reinforcing the testimony of his experts.[3] Adney presented no summary judgment proofs to contradict that these were Kettering's actions and determinations.

¶19 Kettering considered relevant factors and made the strategic decisions that pursuing a seat belt defense or hiring independent medical or vocational experts would be more likely to bolster Gronquist's claims than to diminish Adney's liability. We conclude that these well-founded decisions were made in good faith and in Adney's best interests and are protected from legal malpractice claims by judgmental immunity.

C. SEAT BELT DEFENSE

¶20 Aside from judgmental immunity, Adney did not show a genuine dispute of material fact to preclude summary judgment on the viability of the seat belt defense. In order to assert a seat belt defense, Adney would have to show that Gronquist was not wearing a seat belt at the time of the collision. Adney failed to allege sufficient facts to create a genuine issue of that material fact. Adney offered the testimony of an accident reconstruction expert who said that, based on his injuries, Gronquist was not wearing a seat belt. However, there is no evidence that the expert was qualified to give an opinion regarding the use of seat belts by comparing the injuries to the drivers. There also is no evidence that the expert reviewed Gronquist's medical records.

[3] Kettering was aware that independent evaluations of Gronquist's injuries performed in connection with his claim for worker's compensation merely reinforced the seriousness and debilitating nature of the injuries.

¶21 The trial court concluded that the proffered opinion of Adney's accident reconstruction expert was insufficient to create a factual dispute in the face of the testimony of three eyewitnesses, one of whom had to unfasten the seat belt in order to extricate Gronquist from the burning vehicle. We agree.

D. MEDICAL AND VOCATIONAL EXPERTS

¶22 Adney contends that Kettering should have hired an expert to conduct an independent medical examination of Gronquist. Kettering testified at deposition that he decided not to hire an expert based on the facts of the case and his experience with similar personal injury actions. He reviewed Gronquist's medical records, and there was no dispute that Gronquist suffered catastrophic injuries due to the collision with Adney.[4] Kettering decided that one more medical expert testifying as to the severity of Gronquist's injuries would serve only to bolster the case against Adney.

¶23 In support of his assertions, Adney offered the testimony of two legal experts who disagreed with Kettering's decision. However, the experts merely expressed a different opinion from Kettering's. As indicated, we conclude that Kettering exercised his judgment in good faith when he decided not to employ an independent medical examiner for the defense, and Adney did not raise a genuine issue of material fact to preclude summary judgment in favor of Kettering on the negligence issue. Moreover, Adney failed to show what an independent medical examiner's testimony would have accomplished that would have decreased Adney's liability or the judgment against him.

[4] Adney concedes that Gronquist would have been awarded several million dollars, even in the absence of Kettering's alleged negligence.

IV. CONCLUSION

¶24 We conclude, as a matter of law, on the undisputed facts, that judgmental immunity covers Kettering's strategy for Adney's defense. Moreover, Adney failed to present sufficient evidence to create genuine issues of material fact and preclude summary judgment in favor of Kettering on whether he was negligent by not pursuing a seat belt defense and not hiring medical or vocational experts. As a matter of law, Kettering did not violate the standard of care he owed Adney. We therefore affirm the trial court's judgment.

By the Court.—Judgment affirmed.

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