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DISTRICT II

June 1, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1863

Mary Jean Barton v. Dennis M. Barton (L.C. # 2014CV2275)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Mary Jean Barton appeals from a circuit court order dismissing an action against her husband, Dennis M. Barton. Mary Jean had sued Dennis to enforce provisions of a written agreement. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We reverse the order of the circuit court and remand for further proceedings.

Prior to their marriage on July 28, 1995, Mary and Dennis entered into a written agreement concerning their property. The agreement, which was later modified several times,

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

requires Dennis to: (1) designate Mary as a twenty-five percent beneficiary on all of his payable on death accounts and (2) provide Mary with copies of all such beneficiary designations. Dennis has not complied with these requirements.

Mary commenced this action against Dennis on November 17, 2014. She sought enforcement of their written agreement under WIS. STAT. ch. 766, claiming breach of the duty of good faith. Both parties filed motions for summary judgment. Ultimately, the circuit court did not address the arguments of the parties. Instead, it concluded that the matter was not one that it should decide because the parties remained married and were not seeking legal separation or divorce. The court explained:

[J]udicial restraint needs to be exercised here. And we've heard some arguments about public policy. I think public policy is a great argument to be made in this case. Public policy should not be that the court is going to become the super parent or part of the marriage to decide what these disputes are. The parties obviously want to stay married. Stay married. Go to a marriage counselor and figure out how you're going to resolve some of this.

Accordingly, the court dismissed the action. This appeal follows.

On appeal, Mary contends that the circuit court erred in dismissing her action. She maintains that she has a cognizable claim against Dennis under WIS. STAT. Ch. 766, which governs property rights during a marriage. The interpretation of statutes and their application to a set of facts are questions of law that we review de novo. *Acuity v. Albert*, 2012 WI App 87, ¶8, 343 Wis. 2d 594, 819 N.W.2d 340.

WISCONSIN STAT. § 766.15 creates a duty of good faith between spouses with respect to matters involving marital property or other property of the other spouse. Meanwhile, WIS. STAT § 766.70(1) allows one spouse to bring a claim against the other spouse for breach of that duty

when it results in damage to the claimant spouse's property. There is no requirement in the statutes that a spouse first seek legal separation or divorce in order to pursue such a claim. Indeed, a spouse cannot bring a claim under § 766.70(1) while an action for divorce is pending. *See Gardner v. Gardner*, 175 Wis. 2d 420, 431, 499 N.W.2d 266 (Ct. App 1993) (“Once an action for divorce is filed, a separate cause of action under [§ 766.70] is barred”).²

For these reasons, we conclude the circuit court should have considered Mary's claim under WIS. STAT. ch. 766, regardless of the fact that she and Dennis were married and not seeking legal separation or divorce. Accordingly, we reverse the order of the circuit court and remand for further proceedings. On remand, the court can address the arguments made by the parties in their motions for summary judgment.³

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause remanded pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

² Although Mary has commenced multiple actions for divorce against Dennis, she has always dismissed them. There was no action for divorce pending at the time of the present action.

³ Because the circuit court has not yet addressed these arguments, we decline to do so here.