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**DISTRICT II**

May 19, 2021

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

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2019AP1621

Brian Galston v. Rebecca C. Castonia (L.C. #2018CV1)

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

**Summary disposition orders 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).**

Brian Galston appeals from an order dismissing, on summary judgment, his legal malpractice action against his former criminal defense attorney, Rebecca C. Castonia.<sup>1</sup> Based upon our review of the briefs and record and, most importantly, our supreme court's decision in *Skindzelewski v. Smith*, 2020 WI 57, 392 Wis. 2d 117, 944 N.W.2d 575, released on

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<sup>1</sup> Basiliere, Thompson, Bissett, Castonia, Swardenski, LLP, as well as its liability insurer, United States Fire Insurance Company, are also Defendants-Respondents in this case.

June 18, 2020, after the parties' briefing was completed,<sup>2</sup> we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>3</sup> We summarily affirm.

Galston pled no contest to felony child abuse and criminal trespass to a dwelling in July 2009 and was found guilty.<sup>4</sup> Sentence was withheld, and he was placed on four years of probation. Galston failed on probation, which was revoked in 2010, and he was sentenced to prison. Galston filed a legal malpractice action against Castonia, who represented him at his sentencing after revocation, arguing that the State presented incorrect information concerning Galston's sentencing credit and that Castonia "failed to correct material misstatements of fact to the court that deprived Galston of fair and reasonable representation." Galston claims that because of Castonia's negligence he spent 253 days in prison that he should not have. The circuit court dismissed Galston's complaint on summary judgment on the ground that the "actual innocence rule" precludes any such claim.<sup>5</sup>

For purposes of our analysis, we accept Galston's claim that Castonia's negligence caused him to spend 253 additional days in prison. However, it has been the law in Wisconsin since *Hicks v. Nunnery*, 2002 WI App 87, ¶46, 253 Wis. 2d 721, 643 N.W.2d 809, that a

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<sup>2</sup> Galston filed his brief-in-chief on November 12, 2019, and Castonia filed her response brief on December 12, 2019. Galston did not file a reply brief.

<sup>3</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

<sup>4</sup> Charges for burglary, battery, child abuse, false imprisonment, and bail jumping were dismissed and read in.

<sup>5</sup> Castonia's motion for summary judgment also alleged that Galston's claims were barred by the applicable statutes of limitation. The circuit court did not reach this issue given its decision on the actual innocence rule.

plaintiff can only maintain a malpractice claim against his or her criminal defense attorney if he or she can show actual innocence of the underlying charge(s). As Galston pled no contest to the charges and they remain of record, Galston cannot prove, nor did he argue to the court below, that he is innocent of the underlying charges of which he was convicted. Rather, Galston asked the court to apply an exception to the actual innocence rule.

In our supreme court's recent decision in *Skindzelewski*, Skindzelewski sued his defense counsel for legal malpractice, arguing that his attorney failed to raise the statute of limitations as an affirmative defense in his criminal case. *Skindzelewski*, 392 Wis. 2d 117, ¶1. The circuit court granted summary judgment, and we affirmed, on the basis that Skindzelewski could not prove he was actually innocent of the crime for which he was convicted. *Id.* “The actual innocence rule requires a criminal defendant who sues his [or her] defense attorney for legal malpractice to establish the defendant did not commit the crime of which he [or she] was convicted.” *Id.*, ¶2. Skindzelewski, like Galston, asked our supreme court to create an exception to the actual innocence rule. *Id.* The court declined, found as a matter of law that Skindzelewski could not succeed on his legal malpractice claim, and affirmed our decision. *Id.* Wisconsin law is clear that a malpractice plaintiff must demonstrate actual innocence to prevail on a claim arising out of the acts or omissions of his or her criminal defense attorney.

*Skindzelewski* instructs us that there are no exceptions to the actual innocence rule, and as an error-correcting court we cannot overrule that ruling. As no exceptions exist at this time to the actual innocence rule, we summarily affirm the circuit court's dismissal of Galston's legal malpractice action against Castonia.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*