

Wisconsin Court of Appeals Discusses Wisconsin Supreme Court's MacLeish Decision

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[*Pence v. Slate, et al.*, 2018AP652](#)

Brief Summary

One month after the Wisconsin Supreme Court issued its decision in *MacLeish v. Boadman & Clark, LLP*, 381 Wis. 2d 471 (2019)—[a decision discussed in our previous alert](#)—the Wisconsin Court of Appeals issued *Pence v. Slate, et al.* This decision includes a concurrence that discusses *MacLeish*'s relationship with an older Supreme Court case, *Tensfeldt v. Haberman*, 2009 WI 77, ¶¶ 59-68, and also suggests the court revisit the *Tensfeldt* decision in order to further expand the *Auric* exception relating to attorneys' liability to non-client beneficiaries.

Complete Summary

Underlying Estate

Attorney William Slate ("William") drafted an irrevocable life insurance trust as part of the estate plan for his client, William Leek. The trust was intended to maintain a \$600,000 life insurance policy, which would be distributed to Leek's beneficiaries upon his death. In 2002, Leek appointed Joan Slate ("Joan"), who prepared Leek's taxes each year, to be the trustee. Joan and attorney William were related. Joan administered the trust competently until 2014, when she failed to pay the life insurance premium, and also failed to reinstate it. When Leek died in 2015, the beneficiaries did not receive \$600,000, the intended benefit of the trust.

Malpractice Action

The beneficiaries sued Joan for breach of fiduciary duty and William for legal malpractice. They claimed William recommended Joan, despite knowing that she had no trustee training or insurance; failed to disclose a conflict of interest arising out of his relationship with her; administered the trust and helped Joan administer the trust; and

failed to ensure that the life insurance premiums were paid. William moved for summary judgment and the trial court granted the motion. The Court of Appeals affirmed. The court expressed doubt that plaintiffs had set forth a recognizable theory of liability against William, but even assuming they had, the court found that they did not provide any factual support in opposition to Williams' summary judgment motion.

The Concurrence

In a concurring opinion, Justice Lundsten wrote separately to discuss the impact of the recent decision in *MacLeish* on both *Auric* and *Tensfeldt*. The concurrence described *MacLeish* as expanding the *Auric* exception of non-client liability to include liability for negligent administration of an estate plan, as well as negligent drafting. However, the concurrence notes that the *MacLeish* expansion conflicts in some way with *Tensfeldt*.

In *Tensfeldt*, the beneficiaries sued an attorney who negligently failed to advise their father on a change in law that affected his estate plan. Because of that failure, there was a negative impact on the distribution of the estate to the beneficiaries. The *Tensfeldt* court determined that the attorney was immune from liability because the attorney had not drafted the estate plan and "his only role was giving [his client] admittedly negligent advice" after execution of the estate plan documents.

The concurrence points out that the *Tensfeldt* holding is difficult to reconcile with *MacLeish*:

My take on *MacLeish* is that it placed emphasis on whether the non-client beneficiaries were seeking to vindicate *the client's intent* because that is a key justification for the *Auric* exception. But why then, in *Tensfeldt*, indicate in blanket fashion that post-drafting/post-execution negligent legal advice, regardless whether it thwarts a client's intent is not covered by the *Auric* exception? Suppose the beneficiaries in *Tensfeldt* had proof that the negligent legal advice in that case did thwart their father's estate-planning intent. Why should that attorney be immune from suit while an attorney who negligently administers an estate has no immunity? *Pence*, at ¶ 55.

Because of this tension, the concurrence suggests that the Wisconsin Supreme Court may wish to revisit the *Tensfeldt* holding in a future case.

Significance of Opinion

The concurrence suggests that Wisconsin courts may be primed to further expand the holding of *Auric* to include liability to non-client estate planning beneficiaries where the attorney only provided—or failed to provide—relevant estate planning advice, but did not draft or administer the estate plan.

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