IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARK McCRAW,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-86-S

LINDA S. MENSCH, LINDA S. MENSCH, P.C. and ISBA MUTUAL INSURANCE COMPANY,

Defendants.

Plaintiff commenced this legal malpractice action in the Circuit Court for Dane County Wisconsin alleging that defendant attorney Linda S. Mensch was negligent in her representation of defendant in connection with the creation of a business partnership and that she made certain misrepresentations concerning the transaction to plaintiff. The matter was removed to this Court based on diversity of citizenship, 28 U.S.C. § 1332. On April 10, 2006 plaintiff amended his complaint to allege that defendant Mensch's conduct was a violation of Wisconsin Statute §757.30, which prohibits the practice of law in Wisconsin without a license, and that this violation constituted negligence per se. The matter is presently before the Court on defendants' motion to dismiss the negligence per se claim.

MEMORANDUM

Defendants' motion to dismiss is based exclusively on the legal premise that Wis. Stat. §757.30 cannot be the basis for negligence per se. A claim should be dismissed under Rule 12(b)(6) only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Because the present motion raises a legal issue independent of any factual allegations, it is appropriately resolved on a Rule 12(b)(6) motion. The sole issue before the Court is whether a violation of § 757.30, Wis. Stat., prohibiting the practice of law without a license, can constitute negligence per se under Wisconsin law.

Under Wisconsin law, the violation of a statute constitutes negligence per se only if:

> (1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for imposition of civil liability.

Antwaun A. ex. rel. Muwonge v. Heritage Mut. Inc. Co., 228 Wis. 2d 44, 67, 596 N.W.2d 456 (1999)(quoting Tatur v. Solsrud, 174 Wis. 2d 735, 743, 498 N.W.2d 232 (1993)). Concerning the third component, a statute will not be found to expand common law liability unless it "clearly and beyond any reasonable doubt expresses such purpose

by language that is clear, unambiguous and peremptory." Antwaun A., 228 Wis. 2d at 67 (quoting Delaney v. Supreme Investment Co., 251 Wis. 374, 380, 29 N.W.2d 754 (1947)).

Wisconsin Statute § 757.30(1) provides:

> Every person, who without first having obtained a license to practice law as an attorney of a court of record in this state, as provided by law, practices law within the meaning of sub. (2), or purports to be licensed to practice law within the meaning of sub. (2), or purports to be licensed to practice law as an attorney within the meaning of sub. (3), shall be fined not less than $50 nor more than $500 or imprisoned not more than one year in the county jail or both, and in addition may be punished as for a contempt.

Nothing in the text of the statute suggests that it is intended to be the basis for the imposition of civil liability, much less expresses such an intent "clearly and beyond any reasonable doubt." Notwithstanding that the statute or its predecessors have been in place since 1861, there is no evidence of legislative intent to impose civil liability based on a violation, and no Wisconsin Court has ever done so.

In the absence of any evidence of intent to impose civil liability, plaintiff argues generally that the statute "is clearly concerned with the public's welfare" and was enacted to protect the public. Of course, virtually every legislative enactment and professional regulation is concerned with advancing the public welfare.

> In distinguishing "safety statutes" from more general regulatory measures, plaintiffs must do more than baldly assert that the statute in question protects a specific class of individuals. All legislation promotes the public welfare to some degree. Instead the legislation must evince a clear an unambiguous legislative desire to establish civil liability.

Cooper v. Eagle River Memorial Hosp., Inc., 270 F.3d 456, 460 (7th Cir. 2001). Accordingly, Cooper rejected the argument that Wisconsin regulations governing nurse conduct could be the basis for negligence per se.

There is no indication that the legislature intended a violation of section § 757.30 to be a basis for imposition of civil liability as a matter of law. Accordingly,

ORDER

IT IS ORDERED that defendants' motion to dismiss the fourth claim of plaintiff's amended complaint is GRANTED.

Entered this 12th day of September, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge