COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2134

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

ACTION LAW, S.C.,

PLAINTIFF-APPELLANT,

V.

HABUSH, HABUSH, DAVIS & ROTTIER, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. This is the second appeal in this fee dispute between appellant Action Law and respondent Habush, Habush, Davis and Rottier. For the reasons set forth below, we affirm the circuit court order granting Habush $46,000 in legal fees. We deny Habush's motion to find this appeal frivolous.

BACKGROUND

The factual background is fully set out in our decision in ***Action Law v. Habush, Habush, Davis & Rottier***, No. 96-2305, unpublished slip op. (Wis. Ct. App. Feb. 20, 1997). (***Action I***). To summarize briefly, Habush represented Stephen Wolenec on a contingency fee basis in a personal injury action. Wolenec discharged Habush and retained Action Law, also on a contingency fee basis. After Action settled the action, Habush claimed a portion of the attorney's fees. All the parties to the underlying action stipulated that $56,760 would be held in escrow as disputed attorney's fees, and that the circuit court would determine the proper allocation between Action and Habush based on the record.

We found in our prior decision that the circuit court erred in allocating fees on the then-existing record.[1] We reversed and remanded, because: (1) the court should have advised the parties that the matter could not be decided on the record because credibility issues remained unresolved; and (2) it should have advised Action Law that Action could either present additional evidence or dismiss.

We also held previously that the circuit court correctly concluded that if Wolonec discharged Habush without cause, Habush was entitled to fees under ***Tonn v. Reuter***, 6 Wis.2d 498, 95 N.W.2d 261 (1959). We remanded so the court could determine whether Wolenec had cause to discharge Habush.

[1] Although such consideration was pursuant to a stipulation between the parties, we noted that the parties cannot, by stipulation, require the circuit court to proceed in an incorrect manner. ***Action I*** at 10, n.3.

On remand, appellant requested judicial substitution, which was granted. After a hearing, the court held that Habush acted properly in representing Wolonec, and that Wolonec had no cause to discharge Habush. Therefore, under ***Tonn***, Habush was entitled to attorney's fees. Action appeals.

ANALYSIS

Action argues that ***Tonn*** does not apply because Habush performed only minimal work for Wolonec; that even if ***Tonn*** applies, the circuit court misapplied the legal standard for "cause" under ***Tonn*** because Wolonec lost confidence in Habush; and that the court erred in granting Habush fees which exceeded its "expectation interest." Habush responds that the court correctly defined "cause"; that the court's findings are factual ones, and as such must be affirmed because not clearly erroneous; and that Habush is entitled to the fees awarded. Habush also argues that Action's appeal is frivolous.

Tonn's applicability is central to both parties' arguments. In ***Tonn***, the supreme court held that an attorney retained under a contingent fee agreement who is discharged without cause may recover damages based on an eventual settlement or judgment. The correct measure of damages is the amount of the contingent fee based on the amount of the settlement or judgment, less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract. ***Id.*** at 505, 95 N.W.2d at 265.

Minimal Work

Action argues that ***Tonn*** is distinguishable because the attorney there "perform[ed] ... substantial services." ***Id.*** at 503, 95 N.W.2d at 264. Action

argues that Habush performed minimal work for Wolonec, and the circuit court therefore erred by invoking ***Tonn***.

We have already considered and rejected this argument in ***Action I***. Although we agreed that the client's case in ***Tonn*** had progressed further than that here, we nevertheless stated "nothing in the ***Tonn*** decision indicates that the amount of work performed before discharge has a bearing on the manner for determining damages." We concluded that by rejecting a *quantum merit* approach, the ***Tonn*** court was "deciding that the attorney initially retained and then discharged without cause, rather than the attorney subsequently retained should benefit from any 'windfall' resulting from the contingent fee contract." ***Action I*** at 11-12. We are bound by ***Tonn***. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979) (we are bound by supreme court decisions). Therefore, we reject Action's "minimal work" argument.

Standard for "Cause"

Action argues that, even if ***Tonn*** applies, the circuit court erred in finding that discharge for "cause" required conduct by the attorney which would evidence a "substantial breach [defined as "clear misconduct"] so as to destroy the essential objects of the client-attorney relationship." Action argued to the circuit court, and argues to us, that the correct standard is whether the client "reasonably loses trust and confidence in his attorney."

We do not address this argument, because we conclude that even under the modified standard proposed by Action, the circuit court made factual findings adverse to Action. Specifically, the court was "well satisfied, based on the credible testimony, much of which is not in dispute, that [Habush] did not ... deviate from the standard of care that an attorney handling a plaintiff's PI case

should be held to." The court also noted that Wolenec never communicated his alleged dissatisfaction to Habush. Based on our analysis of the record, these findings were not clearly erroneous, and we affirm. *See* § 805.17(2), STATS.; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985) (findings of fact shall not be set aside unless clearly erroneous).

Expectation Interest

Action argues that even if Habush is entitled to fees, the circuit court erred in awarding $46,000. In Action's analysis, damages are designed to place Habush in the position it would have been had there been no breach of contract. Habush estimated the case was worth $100,000, and signed a contingency fee agreement for one-third of the amount recovered. Action argues that its settlement of the case for $240,000 resulted in a windfall for Habush which exceeded its expectations.

In our first opinion, we rejected a similar argument, noting that Wolenec signed a one-third contingency fee agreement, which was specifically found fair and reasonable, and that the dispute here was about allocation of that amount between two law firms. We also stated that under our reading of ***Tonn,*** "any 'windfall' resulting from the contingent fee contract" was to go to the original attorney hired, rather than successor counsel. ***Action I*** at 11-13.

Frivolous Appeal

Habush argues that Action's appeal is frivolous because it amounts to a request that we redetermine issues of credibility. ***Lessor v. Wangelin***, 221 Wis.2d 659, 669, 586 N.W.2d 1, 5 (1998). We disagree. Action argues ***Tonn***'s standards and applicability to the facts of this case. We are bound by ***Tonn***, but

Action's appeal to this court preserves for possible Wisconsin Supreme Court review any argument that ***Tonn*** should be restricted, modified or overruled.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.