

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 21, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1939**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOHN LOUIS CASTELLANI, TRUSTEE OF  
THE BANKRUPT ESTATE OF THOMAS N. TOMCZAK  
AND MARY ANN TOMCZAK,**

**PLAINTIFF-APPELLANT,**

**v.**

**WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY  
(WILMIC) AND MICHAEL F. DUBIS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Racine County:  
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. John Louis Castellani, Trustee of the Bankrupt Estate of Thomas N. and Mary Ann Tomczak (the Tomczaks), appeals from a

judgment dismissing an attorney malpractice claim against Michael F. Dubis and Wisconsin Lawyers Mutual Insurance Company. The appeal challenges whether the evidence supports the jury's verdict, whether it was proper to include Attorney Robert Bichler, successor counsel to Dubis, on the verdict, and whether expert testimony was properly admitted. We conclude that the evidence supports the jury's verdict and affirm the judgment.

¶2 In 1994 it was discovered that the Tomczaks' home encroached on their neighbors' property. The Tomczaks retained Dubis to represent their legal interests. It turned out that a survey performed by Pete Bailey and American Surveying Company (collectively, Bailey) was in error. The Tomczaks, represented by Attorney Robert Bichler, instituted a negligence action against Bailey to recover attorney's fees and other damages they sustained in litigation with their neighbors. The underlying facts of that action are more fully stated in *Tomczak v. Bailey*, 218 Wis. 2d 245, 250-51, 578 N.W.2d 166 (1998). *Tomczak* held that the action against Bailey was time barred by a six-year statute of repose. *See id.* at 249-50.

¶3 The time for bringing an action against Bailey for the erroneous survey expired during the fifty-day period in which Dubis represented the Tomczaks.<sup>1</sup> The Tomczaks commenced this malpractice action against Dubis to recover attorney's fees incurred in litigating Bailey's time defense and damages for the lost claim against Bailey.<sup>2</sup>

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<sup>1</sup> Dubis represented the Tomczaks from July 7, 1994, to September 12, 1994. The time for filing an action against Bailey expired on August 26, 1994.

<sup>2</sup> The Tomczaks filed bankruptcy while the action against Bailey was still pending in the Wisconsin Supreme Court. Castellani, the bankruptcy trustee, was substituted as a proper party.

¶4 The jury found that the Tomczaks had not relied on Bailey's survey, that Dubis was not negligent in his legal representation, that Bichler was negligent in providing legal representation to the Tomczaks in the underlying actions, and that the Tomczaks were contributorily negligent. Negligence was apportioned 35% to the Tomczaks and 65% to Bichler. The Tomczaks moved the trial court to change the jury's answers and to direct the verdict upon a finding as a matter of law that the Tomczaks relied on the survey and that Dubis was negligent. The trial court denied the motion and judgment was entered dismissing the complaint.

¶5 The Tomczaks' claims that certain findings should have been made as a matter of law essentially challenge the sufficiency of the evidence to support the jury's verdict. Our standard of review on a claim that the jury's verdict should be set aside is whether there is any credible evidence, or reasonable inferences based on that evidence, to support the verdict. *See Foseid v. State Bank*, 197 Wis. 2d 772, 784, 541 N.W.2d 203 (Ct. App. 1995). That a jury verdict will be sustained if there is any credible evidence to support it is even more true when, as here, the trial court gives its explicit approval to the verdict by considering and denying postverdict motions. *See Radford v. J.J.B. Enters.*, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). One of the guiding principles in considering the sufficiency of the evidence is that the credibility of witnesses and the weight to be given their testimony are matters left to the jury's judgment. *See Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). Where more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See id.*

¶6 The claim against Bailey was for misrepresentation and required proof that the Tomczaks had relied on Bailey's survey in the placement of the

encroaching improvements.<sup>3</sup> See WIS JI—CIVIL 2402. The Tomczaks characterize their proof as conclusive that they had looked to Bailey’s survey stakes in purchasing the land and sketching in the location of their house for the purpose of obtaining a conditional use permit. The Tomczaks’ characterization is not justified by the record.

¶7 The Bailey survey was prepared for the person selling the property to the Tomczaks. During his testimony, Thomas Tomczak was confronted with deposition testimony that he was not sure whether he had received a copy of the Bailey survey before the purchase closing. The Tomczaks’ builder had Inman Surveying complete a certified survey which the builder utilized for placement of the home.<sup>4</sup> It was the Inman survey that the Tomczaks brought to Dubis when he asked for the survey they had relied upon in constructing their home. Dubis indicated that when he examined the building inspector records, he found that the Inman survey was used to obtain the Tomczaks’ building permit. The Bailey survey was not found in the government records where it should have been filed. Dubis also discovered that the Tomczaks made other improvements to their property which were beyond the boundary lines established by either the Bailey or the Inman survey. We conclude that credible evidence exists from which the jury could conclude that the Tomczaks did not rely on the Bailey survey.

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<sup>3</sup> As a legal malpractice action, the Tomczaks had the burden to prove that the claim against Bailey was viable, thus proving a “suit within a suit.” See *Lewandowski v. Continental Cas. Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979).

<sup>4</sup> Although the Inman survey was certified as an independent field survey, it apparently relied on the Bailey survey. The Inman survey was also in error and a settlement was reached as a result of a lawsuit against Inman Surveying.

¶8 Having determined that the underlying action against Bailey was not viable, it is not necessary to address any of the remaining arguments on appeal.<sup>5</sup>

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>5</sup> The Tomczaks claim that Dubis was negligent as a matter of law because he was “repeatedly told of Bailey’s survey.” Although there was evidence that the Bailey survey was mentioned in conversation with the Tomczaks, the Tomczaks never indicated to Dubis that they had relied on the Bailey survey in building their home. If we were to address this issue, we would conclude that there was credible evidence to support the jury’s finding that Dubis was not negligent.

