

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2008AP3213

Cir. Ct. No. 2008SC1486

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT W. TESSEN,

PLAINTIFF-APPELLANT,

V.

RICHARD E. BENDER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Robert Tessen appeals an order of the circuit court dismissing his small claims legal malpractice action against Richard Bender upon

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the court's finding that the action should not have been filed because Tessen failed to either pay the filing and service fees or receive a waiver of the fees. We affirm.

¶2 Tessen, an inmate at the Columbia Correctional Institution, petitioned the circuit court for a waiver of the filing and service fees for his small claims suit against Bender for alleged legal malpractice, which stemmed from Bender's representation of Tessen at Tessen's reincarceration hearing. Tessen alleged that Bender's representation at the hearing was ineffective because it led Tessen to being reincarcerated "longer than allowed for by law." He further alleged that he discovered Bender's alleged malpractice when he received a letter from the Department of Corrections to the circuit court stating the court's original reconfinement orders modified "the relationship of the originally imposed sentences." This letter was attached to the summons and complaint. Tessen sought damages in the amount of \$5,000.

¶3 The circuit court denied Tessen's petition for waiver of the required fees on the ground that Tessen had not stated a meritorious claim. Although his petition for waiver was denied, Tessen did not pay the fees. Nevertheless, the action was filed by the Portage County Clerk of Courts. The circuit court, however, subsequently dismissed the action on its own motion, finding the action should not have been filed since no filing or service fee had been paid and a waiver of the fees had not been obtained. Tessen appeals.

¶4 Giving liberal construction to Tessen's appellate brief, Tessen appears to be contending that contrary to the circuit court's determination, his claim against Bender did in fact state a meritorious claim for relief, that claim being an error on Bender's part that resulted in an increase in Tessen's sentence following the reincarceration hearing. Tessen contends that because he stated a

meritorious claim, the court's denial of his petition seeking a waiver of the filing and service fees was erroneous, as was the court's subsequent order dismissing his complaint.

¶5 Whether a complaint sets forth a meritorious claim for relief is a question of law which we review de novo. *State ex rel. Hansen v. Circuit Court for Dane County*, 181 Wis. 2d 993, 998, 513 N.W.2d 139 (Ct. App. 1994).

¶6 It is the public policy of this state that convicted criminals are barred from recovering money from their former defense counsel on a legal malpractice claim unless they can prove that “but for” defense counsel's actions, the criminal would be free. *Tallmadge v. Boyle*, 2007 WI App 47, ¶22, 300 Wis. 2d 510, 730 N.W.2d 173. Tessen's complaint and its attachment fail to allege in any manner that but for Bender's alleged malpractice, Tessen would have been free. Accordingly, we conclude that Tessen's petition to waive the applicable filing and service fees was properly denied on the basis that Tessen failed to state a meritorious claim upon which the circuit court could grant relief. Because Tessen failed to pay the proper fees, we further conclude that circuit court properly dismissed the action.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

