COURT OF APPEALS
DECISION
DATED AND RELEASED

November 13, 1996

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

NOTICE

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

No. 95-1994

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

DARLYNE ESSER,

Plaintiff-Appellant,

v.

JEFFERY R. MYER,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Darlyne Esser appeals from a judgment in favor of Jeffery Myer on her claim of legal malpractice and on Myer's counterclaim for unpaid attorney's fees. Esser asserts eight potential issues culminating with a request for a new trial in the interests of justice. We conclude that the trial court properly exercised its discretion with respect to the presentation of the evidence and special verdict. We affirm the judgment.

Attorney Myer represented Esser between 1985 and 1987 in a lawsuit filed against Esser by her mother, Stephany Hubert. Hubert sought partition of property jointly owned with Esser on Lake Beulah in Walworth County. Hubert also sought judgment on a $5000 note from Esser, eviction from the Lake Beulah property of John Hazeltine, who was then residing there, and damages against Hazeltine. On January 13, 1986, a judgment was entered in that action ordering the Lake Beulah property to be sold by sheriff's sale, requiring Esser to credit Hubert with the sum of $666.67 per month from the time Hubert was "ousted" from the lake residence to the date of sale, and ordering Esser and Hazeltine to vacate the residence by March 1, 1986. Esser, through Myer, obtained a stay of the judgment pending appeal. On December 10, 1986, the judgment was affirmed on appeal. ***Hubert v. Esser***, Case No. 86-0189, unpublished slip op. (Wis. Ct. App. Dec. 10, 1986). A petition for review was denied by the supreme court in February 1987.

In March 1987, a settlement agreement between Hubert and Esser was drafted which required Esser to buy Hubert's interest. A settlement was never reached. The sheriff's sale was originally set for June 1987 but rescheduled to and held on July 16, 1987. Esser was the high bidder at the sale with a bid of $323,000. However, Esser did not deposit a certified check for the 10% down payment as required in the notice of sheriff's sale. Ultimately Hubert, the third highest bidder, was allowed to purchase the property for $321,000 with the 10% down payment waived because Hubert was the plaintiff in the sale action. On Esser's behalf, Myer appeared at the hearing to confirm the sale. The sale to Hubert was confirmed. After retaining a new attorney, Esser unsuccessfully appealed the confirmation order.

Esser commenced this action on August 16, 1993. She alleged that Myer was negligent in failing to object to the sheriff's sale, in failing to make proper objections at the confirmation hearing, in failing to keep her fully apprised of her legal position, rights and date of the confirmation hearing, in failing to appear and object to an amendment of the judgment pertaining to the assessment of costs against her, and in failing to secure settlement authority from Esser before accepting Hubert's settlement offer. The complaint also alleged misrepresentation, fraud and conversion of funds from the sheriff's

sale.[1] Myer counterclaimed for unpaid attorney's fees in the amount of $14,000, plus interest in the amount of $4200.

The jury found that Esser did not have funding available to her such that she could have successfully fulfilled her high bid when due and that Myer was not negligent in representing Esser in preparation for, at or after the confirmation hearing. It found that the reasonable value of attorney services rendered by Myer to Esser between June 1985 and September 1987 was $20,000. Judgment was entered dismissing Esser's claims and for Myer for $14,202.67, representing $20,000 attorney's fees less payments, prejudgment interest, costs and postverdict interest.

Esser first argues that she was improperly denied the opportunity to submit rebuttal testimony or contest Myer's counterclaim. "We review the decision to disallow rebuttal in light of the court's duty to exercise its discretion reasonably on the basis of the circumstances and the facts of record. Rebuttal is appropriate only when the defense injects a new matter or new facts." ***Pophal v. Siverhus***, 168 Wis.2d 533, 554-55, 484 N.W.2d 555, 563 (Ct. App. 1992) (citations omitted). Esser makes only a vague assertion that Myer raised additional issues during his presentation. Her argument, at best, is that rebuttal evidence was necessary to achieve justice. When that is the claim, we look to whether the rebuttal evidence "is so crucial that the trial court abused its discretion when refusing to admit it." ***Id.*** at 555, 484 N.W.2d at 563.

Despite the suggestion in the record that the trial court denied rebuttal testimony out of concern for timely completion of the trial,[2] the error, if any, was harmless. *See* ***id.*** ("[i]n a sense, the question is whether the refusal to allow a rebuttal is, at best, harmless error"). The record reflects that the

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[1] In her motion for default judgment, Esser asserted that she suffered a financial loss of $177,000, that being the difference between her bid at the sheriff's sale and the fair market value of the Lake Beulah property. In addition, she claimed that a check for $37,958.73 was the subject of conversion.

[2] The trial court commented that the evidence was closed because the "promised hour has arrived." Esser then made an offer of proof of her rebuttal testimony. Myer objected on the ground that it was not truly rebuttal evidence. The trial court did not make an express ruling based on Myer's stated objection.

questions to be asked on rebuttal pertained to matters which were or could have been explored in Esser's case-in-chief. As rebuttal, Esser would have been asked three questions by her attorney: did Myer ask her if she had additional funding beyond the $7000 cash she took to the sheriff's sale, did she have any additional money, and how much extra money did she have. Yet Esser's financial ability to complete her sheriff's bid was developed through the testimony of Hazeltine, the loan officer of the bank which had issued a loan commitment of $258,000 and Esser herself. Myer was examined adversely during Esser's case-in-chief as to his knowledge about cash available to Esser at the sheriff's sale and the willingness of Hazeltine to loan Esser additional money. There was no reason to provide Esser with an additional chance to prove that she in fact had the ability to fulfill her bid.

We reject Esser's claim that she was denied any opportunity to respond to Myer's counterclaim for unpaid attorney's fees. Esser's own expert admitted that the $75 per hour rate charged by Myer was reasonable. Myer's counterclaim was proved during the presentation of his defense to the malpractice claim. Esser did not cross-examine Myer's expert attorney witness or Myer about the attorney's fees charged, the number of hours expended or the necessity of such work.

Even if error occurred, Esser was not prejudiced by the inability to make a separate presentation of evidence in defense of the counterclaim. Esser's defense to the counterclaim was her claim of malpractice. Esser did not make an offer of proof at trial as to what her defense would have been. Her posttrial offer of proof indicated that she would have been called to testify that she was improperly charged for attorney's fees in her bills and that they were excessive. Esser was not competent to offer that opinion as the reasonable value of professional services is not a subject within the knowledge of lay witnesses. *See* ***Touchett v. E Z Paintr Corp.***, 14 Wis.2d 479, 488, 111 N.W.2d 419, 424 (1961) (value of legal services is subject of expert knowledge). Esser's testimony would not have made a difference.

Esser argues that the counterclaim for attorney's fees is barred by the six-year statute of limitations for an action on contracts, § 893.43, STATS. Our review of the application of a statute of limitations is de novo. ***Linstrom v. Christianson***, 161 Wis.2d 635, 638, 469 N.W.2d 189, 190 (Ct. App. 1991).

Esser explains that the contract to pay for legal services was breached in March 1987 when she stopped making the monthly $75 payments required by the retainer agreement. Under Esser's theory, Myer needed to bring his counterclaim by March 1993. The counterclaim was not filed until October 1993.

The statute of limitations was tolled when Esser filed her complaint because the cause of action was asserted as a counterclaim to that complaint. Section 893.14, STATS. The complaint was filed on August 16, 1993.

The statute of limitations had not run out on August 16, 1993. The agreement to pay $75 per month towards accumulating attorney's fees gave rise each month to a separate cause of action. ***Segall v. Hurwitz***, 114 Wis.2d 471, 491, 339 N.W.2d 333, 343 (Ct. App. 1983). Thus, Myer could recover for all payments not made beginning in August 1987.

The retainer agreement further provided that unpaid attorney's fees could be deducted "from any proceeds of any recovery." On September 10, 1987, Myer received a check for Esser's share of the sheriff's sale proceeds. If Myer's cause of action for the entire balance of fees arose at that time, the counterclaim was timely filed since the six-year period was tolled on August 16, 1993.[3]

Esser's next claim is that there is no credible evidence to support the jury's finding that she owed Myer any attorney's fees. A jury verdict will be sustained if there is any credible evidence to support the verdict, sufficient to remove the question from the realm of conjecture. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). In order to reverse, there must be "such a complete failure of proof that the verdict must have been based on speculation." ***Id.*** Our consideration of the evidence must be done in the light most favorable to the verdict, and when more than one

[3] Myer asserts that his cause of action for the balance due did not accrue until October 1988, when, after the unsuccessful second appeal, Esser refused to apply the suit proceeds to satisfy the entire attorney's fees bill. Because the counterclaim was timely from the earliest possible accrual date, we need not decide which event gave rise to Myer's cause of action.

inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. ***Id.***

The jury was asked, "What is the reasonable value of attorney services rendered by Jeffery Myer to Darlyne Esser between June 1985 and September 1987?"[4] Both Esser's and Myer's expert attorney witnesses agreed that the $75 hourly rate charged by Myer was reasonable. Myer's expert explained that he had reviewed itemized bills Myer had prepared and found that the number of hours billed was reasonable. He opined that a reasonable fee for the amount of work done over the two-year period of litigation was in the neighborhood of $24,000 to $25,000. Myer testified that he spent between 300 and 400 hours representing Esser in the litigation and on appeal. In addition to the direct testimony about the reasonableness of time expended by Myer, the jury was well aware of the protracted and at times contentious nature of the Hubert/Esser litigation.

We reject Esser's notion that it was necessary for Myer to support his claim with the itemized bills. Myer's decision not to corroborate testimony by written documentation goes only to the weight to be given to the testimony. The weight to be given to the evidence is a matter for the jury to determine. ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). We conclude that there was sufficient evidence for the jury to determine that the reasonable value of Myer's services was $20,000.

The next issue is whether the trial court erroneously exercised its discretion in framing the special verdict. Esser's complaint is that the trial court restricted the potentially negligent conduct by asking the jury if Myer was negligent "in preparation for, at, or after the confirmation hearing."[5] She sought to have the jury consider the "cumulative effect of the negligence committed." For the first time in her reply brief, Esser asserts that the first verdict question—

[4] It is important to make clear that the jury was not asked to determine what sum of money Esser *owed* Myer for attorney's fees. Thus, there was no need for Myer to make a record of payments made on the balance. Credit for payments was given in the final judgment.

[5] Esser's proposed verdict question was more general, "Was the Defendant, Jeffery R. Myer, negligent in his representation of the Plaintiff's legal interests?" The trial court was not required to rely on the proposed verdict questions submitted by the parties.

whether she had the funding available to successfully carry out her high bid—biased the jury in answering the negligence question.

The form of the special verdict is within the discretion of the trial court. ***Hannebaum v. Direnzo & Bomier***, 162 Wis.2d 488, 501, 469 N.W.2d 900, 906 (Ct. App. 1991). We look to whether the material issues of fact are encompassed by the verdict questions. ***Id.***

We conclude that the trial court appropriately framed the negligence question in terms of the representation at the confirmation hearing. The question did not restrict the jury's consideration of potential negligence regarding the sheriff's sale. It was the testimony of Esser's expert that defects in the sale proceeding could be raised by motion at the confirmation hearing. Thus, all alleged acts of negligence culminated at the confirmation hearing. Additionally, the negligence question was framed in a manner that kept the jury focused on the conduct Esser's expert opined was negligent. The jury was not left to speculate that the allegedly negligent conduct was Myer's failure to obtain a settlement agreement or to assist with the application for financing.

Finally, we agree with Myer that the first verdict question about Esser's ability to carry out the bid was a factual predicate for a finding of negligence. The opinion of Esser's expert was based on the assumption that Esser had the funds available to carry out the bid.

Next, Esser claims that the trial court should not have admitted the opinions of Myer's defense experts because those attorneys were not qualified as experts. Admission of opinion evidence, ***Patterman v. Patterman***, 173 Wis.2d 143, 152, 496 N.W.2d 613, 616 (Ct. App. 1992), and whether a witness is qualified as an expert are discretionary decisions for the trial court, ***Simpsen v. Madison Gen. Hosp. Ass'n***, 48 Wis.2d 498, 509, 180 N.W.2d 586, 592 (1970).

Attorney Mark Rogers testified as an expert for Myer. Rogers had only testified once before in a malpractice case and that case pertained to legal representation in an employment discrimination suit. Rogers had never been involved in a partition action, never attended a sheriff's sale and never participated in a confirmation hearing. Esser argues that Rogers was not

qualified to give an expert opinion about legal representation in a real estate case.

The trial court denied Esser's motion to disqualify Rogers as an expert. It determined that Rogers' unfamiliarity with real estate litigation went only to the weight of his testimony. We agree. "The law ... does not recognize any gradation of experts based on specialized training or practice. So long as [the witness] qualifies as an expert the weight to be accorded his [or her] testimony is for the jury." ***Riehl v. De Quaine***, 24 Wis.2d 23, 32, 127 N.W.2d 788, 793 (1964).

Attorney Michael Polsky, who served as Hubert's attorney in the Hubert/Esser litigation, also testified. Esser claims that Polsky had incentive to give high reviews of Myer's representation during that litigation because it would not reflect favorably on his own abilities to suggest that his client prevailed in the litigation only because Myer was a "pushover" or committed malpractice. Esser further asserts that even though Polsky had firsthand knowledge of the course of events of the litigation, he did not have knowledge of communications between Esser and Myer and could not render an opinion with only a "partial perspective" of the underlying litigation. Again, these matters only go to the weight of the testimony. ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis.2d 1, 37, 469 N.W.2d 595, 609 (1991). There was no error in admitting the testimony of either Rogers or Polsky.

One aspect of Myer's alleged negligence was that Esser was improperly charged with back real estate taxes and that resulted in a miscalculation of funds needed to carry out her high bid. Question five on the verdict asked, "Was Darlyne Esser improperly charged for 1985 and 1986 real estate taxes at the confirmation hearing?" The jury answered "no."

Esser argues that the question was one of law which should have been answered by the trial court based on existing court documents in the Hubert/Esser litigation. However, Esser did not object to the submission of that question to the jury. Failure to object to the form of the special verdict constitutes waiver. *See* ***Roach v. Keane***, 73 Wis.2d 524, 535-36, 243 N.W.2d 508, 515 (1976). Even if error occurred, it was not prejudicial. The question was

intended to determine damages and the jury determined that Myer was not negligent.

Esser's next claim is that the jury should have been able to review an appraisal of the Lake Beulah home that was a "central part" of her proof and referred to extensively during trial. This claim is irksome in light of the trial court's ruling on a motion in limine that the exhibit was inadmissible.[6] The record reflects that Esser violated the trial court's ruling by asking the bank loan officer about the value based on the appraisal. Esser then had the audacity to suggest that the appraisal should be admitted because "this bank officer has already testified to this." As did the trial court, we recognize Esser's conduct as "bootstrapping." We have stated our disdain for this type of trial tactic. ***Gainer v. Koewler***, 200 Wis.2d 113, 121-24, 546 N.W.2d 474, 478-79 (Ct. App. 1996). ***Gainer*** recognizes the need to impose some sanction on litigants who violate motion in limine orders with the assumption that there is no associated risk. ***Id.*** at 122, 546 N.W.2d at 478. We summarily reject Esser's argument about the exhibit lest a discussion on the merits gives even the slightest impression that the stated issue has merit or gives countenance to Esser's behavior.[7]

Esser's final claim is that a new trial should be granted in the interests of justice because the real controversy was not fully tried. Section 752.35, STATS. We exercise our discretionary power to grant a new trial infrequently and judiciously. ***State v. Ray***, 166 Wis.2d 855, 874, 481 N.W.2d 288, 296 (Ct. App. 1992). In support of her claim for a new trial, Esser relies on the cumulative effect of the alleged errors she argues on appeal and her belief that the trial court permitted the trial to pursue tangential and sometimes unrelated matters. A final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992). Moreover, we are not convinced from

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[6] The trial court held that the appraisal was not admissible for the purpose of proving the value of the property because the appraiser was not a witness. ***Bihlmire v. Hahn***, 31 Wis.2d 537, 545, 143 N.W.2d 433, 436 (1966). The trial court permitted experts to refer to the appraisal as relied upon in forming their opinions. *See* ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis.2d 1, 37, 469 N.W.2d 595, 609-10 (1991).

[7] The alleged error pertains only to the jury's determination of the fair market value of the property, a damage question. Esser would not recover damages because the jury found no negligence.

our review of the four-day trial that it failed to reach the real controversy. A new trial is not justified simply because Myer represented himself and therefore had to present his direct examination in a narrative form. We reject Esser's claim for a new trial.

By the Court.—Judgment affirmed.

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