COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 30, 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. 95-2837

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

In the Matter of the Arbitration Proceedings Between:

JIM MATTSON and MARIFRAN MATTSON,

Petitioners-Appellants,

v.

THOMAS O. SCHULTZ,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Jim and Marifran Mattson appeal a judgment affirming an arbitration award to Attorney Thomas Schultz. They argue that

the arbitration panel committed misconduct when it refused to grant an adjournment of the arbitration hearing until jurisdiction could be determined, that the arbitrators exceeded their authority when they awarded Schultz compensation for his legal work without permitting the Mattsons to mount a defense, and that the arbitration decision should be reversed because a witness was not sworn before giving testimony. We reject these arguments and affirm the judgment.

Schultz represented Jim Mattson in an age discrimination case. Under the terms of the contract, Schultz was to receive one-third of the judgment if the matter went to trial. The contract was silent as to what the attorney fees would be if the matter settled prior to trial. The age discrimination suit was settled before trial for $250,000. Schultz demanded a fee of one-third of the gross settlement which was less than a bill sent to the Mattsons based on an hourly rate. The Mattsons agreed to a fee arbitration when they filed a fee arbitration application with the State Bar. The arbitrators awarded Schultz one-third of the amount of the settlement.

The Mattsons argue that the arbitrators were guilty of misconduct when they refused the Mattsons' request for an adjournment until a jurisdictional issue could be resolved. *See* § 788.10(1)(c), STATS. The record does not show that the Mattsons requested an adjournment for that reason. Rather, they requested an adjournment pending resolution of their complaint against Schultz before the Board of Attorneys Professional Responsibility. The record discloses no misconduct and no grounds for a continuance based on the complaint filed with BAPR. The issues presented to BAPR are not sufficiently related to the fee question to justify postponing arbitration of the fee agreement. The decision to adjourn the arbitration hearing is within the arbitrators' discretion, *see* ***In re Kemp v. Fisher***, 89 Wis.2d 94, 101, 277 N.W.2d 859, 863 (1979), and the Mattsons have not established that the panel's discretion was improperly exercised.

To the extent the Mattsons challenge the arbitrators' jurisdiction, we conclude that the panel had jurisdiction to decide this fee dispute. The Mattsons' argument on jurisdiction closely parallels their argument on the merits. They contend that the jurisdiction of the arbitrators under the State Bar's Rules for Arbitration preclude arbitration where there was no attorney-client arrangement between the parties at the time the legal services were performed.

They construe the contract to create no attorney-client arrangement if the case did not go to trial. We disagree. The parties' express contract created an attorney-client relationship. The fact that the contract did not specify a formula for compensation if the case did not go to trial does not mean that there was no attorney-client arrangement.

We also reject the Mattsons' argument that the arbitrators exceeded their authority by "amending the contract." The contract was ambiguous regarding the amount of payment if the case settled before trial. The arbitrators did not recreate or amend the existing contract, they merely construed the existing contract.

Next, the Mattsons argue that the arbitrators exceeded their authority when they "fashioned a quantum meruit remedy for Schultz without permitting the Mattsons to mount a defense." The "defenses" consist of the Mattsons' claims that Schultz was negligent and inadequate in preparing their case, that he told them they would not have to worry about attorney fees if they accepted the settlement offer, and that he coerced an out-of-court settlement. The Mattsons concede, however, that "An arbitration hearing is not the proper forum to adjudicate an action for attorney negligence." The Mattsons' argument appears to be a challenge to the method used by the arbitrators to fashion a remedy for Schultz rather than a claim that the arbitrators erred by failing to consider their "defenses."

The standard of review for arbitration awards is very limited. *See* ***Lukowski v. Dankert***, 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1984). The function of the court is essentially supervisory, ensuring that the parties receive the arbitration for which they bargained. The court will overturn an arbitration award only if there is a "perverse misconstruction or if there is a positive misconduct plainly established, or if there is a manifest disregard of the law, or if the award is illegal or violates strong public policy." ***Id***. The panel's decision to award Schultz one-third of the settlement proceeds does not meet any of the criteria for judicial interference.

Finally, the fact that a witness was not sworn does not provide a basis for relief. Even if that witness's testimony were stricken, the result would remain the same. That witness, Attorney Winston Ostrow, who represented the

opposing party in the age discrimination case, testified that Schultz's hourly rate was reasonable and that the number of hours he expended on the case was reasonable. Because the panel chose to award one-third of the settlement proceeds, Ostrow's testimony had no effect on the outcome. Although witnesses are required to be sworn, we conclude that failure to swear a witness whose testimony is not utilized does not constitute grounds for reversal.

By the Court.—Judgment affirmed.

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