COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0750

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

DONALD DOERING,

PLAINTIFF-RESPONDENT,

V.

SAM KAUFMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ERNEST C. KEPPLER, Reserve Judge. *Reversed.*

SNYDER, P.J. Sam Kaufman appeals from a judgment granting Donald G. Doering $200 in damages, plus costs, in this breach of contract and legal malpractice dispute. Kaufman contends that Doering failed to meet his burden of proof under either a theory of legal malpractice or breach of contract, and that this award is unsupported by the record. We agree and therefore reverse the decision of the circuit court.

On April 4, 1996, Attorney Kaufman entered into a legal representation agreement with Doering. Under this agreement, Kaufman agreed to represent Doering in four criminal misdemeanor charges filed under case nos. 96-CM-21 and 96-CM-22. During the course of the criminal proceedings, Kaufman met with Doering numerous times to discuss the case, investigated the charges against Doering, examined witness statements, attended court proceedings and filed various motions on behalf of his client. Furthermore, Kaufman received a pretrial offer from the district attorney whereby the State offered to dismiss and read into the record three charges if Doering agreed to a plea to criminal damage to property on the fourth charge.

In a letter to Doering, Kaufman advised Doering that the proposed pretrial offer was in Doering's best interests. Doering told Kaufman that he did not want to accept this plea agreement, but rather wanted to plead not guilty because he felt that a number of government agencies were in a conspiracy to convict him. Doering also accused Kaufman of being in a conspiracy with the district attorney. Eventually, an impasse occurred between Doering and Kaufman, and Kaufman notified Doering by letter that he would request to withdraw as Doering's attorney.

In this same letter, Kaufman notified Doering that a status hearing concerning the four charges had been rescheduled from 10:00 a.m. on July 29, 1996, to 2:00 p.m. the same day. However, the caption of the letter referred only to case no. 96-CM-21, not to case no. 96-CM-22. It was Kaufman's practice, as evidenced by other letters he sent to Doering, to refer only to case no. 96-CM-21 in referring to the two case files that dealt with the four criminal charges.

Notwithstanding this letter, Doering appeared at the courthouse at 10:00 a.m. for the rescheduled status hearing. Upon arriving at the courtroom, the judge told Doering that the court erred in its notice process and that the status hearing had been rescheduled by Kaufman for 2:00 p.m. that afternoon. Doering consented to this change.

At the 2:00 p.m. hearing, the court allowed Kaufman to withdraw from both cases. The court determined that Kaufman had diligently represented the interests of his client but that "philosophical" differences between Doering and Kaufman warranted the withdrawal. Moreover, the court again noted that it made a mistake in its notice process concerning rescheduling of the 10:00 a.m. hearing. Thereafter, Doering represented himself pro se and voluntarily accepted a plea bargain from the district attorney. The accepted plea bargain was virtually the same as the one Kaufman had negotiated.

On October 17, 1996, Doering, acting pro se, initiated a small claims action against Kaufman to recover the $2200 retainer he had paid Kaufman. Doering argued that Kaufman had breached their legal representation agreement because he did not act in Doering's "best interest" by: (1) failing to appear at the 10:00 a.m. status hearing, and (2) failing to question the witnesses in the criminal cases.

The court awarded Doering damages of $200, plus costs. The court's rationale for its decision was that "there could have been a little more [communication] and also just a better overall understanding, and there should have been an attempt or explanation to Mr. Doering why the witnesses were not being called." Kaufman now appeals.

Kaufman contends that the circuit court erred because: (1) Doering has not met his burden of proof under either a theory of legal malpractice or breach of contract, and (2) the damages award is not supported by the record and is inconsistent with the circuit court's findings of fact. We address these arguments in turn.

LEGAL MALPRACTICE

Legal malpractice claims may give rise to either a tort claim or a contract claim. *See* ***Boehm v. Wheeler***, 65 Wis.2d 668, 676, 223 N.W.2d 536, 540 (1974). A tort claim arises from a breach of the attorney's common-law duty, whereas a contract claim arises from a breach of duty created by a contractual agreement between the attorney and the client. *See* ***Smith v. Long***, 178 Wis.2d 797, 802, 505 N.W.2d 429, 431 (Ct. App. 1993). Each cause of action is grounded upon the same acts of the defendant, namely, his or her failure to exercise the proper skill or care. *See* ***County of Milwaukee v. Schmidt, Garden & Erikson***, 43 Wis.2d 445, 454, 168 N.W.2d 559, 563 (1969).

Here it is not necessary for us to determine whether Kaufman committed legal malpractice because the circuit court rejected any malpractice claim and determined that any issue of malpractice was a matter for nonjudicial peer review. Implicit in this ruling is the court's recognition that Doering failed to meet his burden of proof on this issue.

In addition, we decline to address Doering's trial argument that Kaufman breached his contractual duty by not acting in Doering's "best interest." First, Doering's "best interest" argument is basically a legal malpractice claim

under a breach of contract theory.[1] This is a malpractice claim because under his "best interest" argument, Doering would be required to show that Kaufman did not act as a reasonable attorney would have under the circumstances. *See* ***DeThorne v. Bakken***, 196 Wis.2d 713, 717, 539 N.W.2d 695, 697 (Ct. App. 1995). As discussed above, the court rejected any malpractice claim. Second, Doering fails to make this "best interest" argument on appeal. It is a well-established rule in Wisconsin that appellate courts will not consider arguments or decide issues which are not specifically raised on appeal. *See* ***Riley v. Town of Hamilton***, 153 Wis.2d 582, 588, 451 N.W.2d 454, 456 (Ct. App. 1989).

We also reject those factual assertions made by Doering on appeal that are not supported by the record.[2] *See* RULE 809.19(1)(d), STATS.; *see also* ***Nelson v. Schreiner***, 161 Wis.2d 798, 804, 469 N.W.2d 214, 217 (Ct. App. 1991). Our decision is limited to the circuit court's findings of fact, not Doering's.[3]

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[1] Under the terms of the contract, Kaufman was to act in Doering's "best interest" in his pretrial work on the criminal matters.

[2] Doering attempts to contradict the circuit court's findings regarding the number of client conferences, communications with the district attorney and the substance of the adjudicated criminal charges filed against him.

[3] Doering also violated numerous other requirements of appellate procedure under RULE 809.19, STATS. These include but are not limited to: improper form, no form and length certification, no table of contents, improper arrangement of argument, no legal citation or support for argument, no conclusion stating precise relief sought, and no statement as to whether oral argument is necessary or whether the opinion should be published. *See* ***id.***

Furthermore, even though Doering is a pro se litigant, he must still satisfy all appellate procedural requirements. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20 (1992). Pro se litigants are bound by the same rules that apply to attorneys on appeal. *See* ***id.*** Moreover, while pro se litigants in certain circumstances deserve some leniency with regard to waiver of rights, the rule applies only to pro se prisoners. *See* ***id.*** at 451-52, 480 N.W.2d at 19-20. These concerns have not been extended to persons such as Doering who are not incarcerated. *See* ***id***. at 452, 480 N.W.2d at 20.

Therefore, the remainder of our discussion will focus on the factual basis for a traditional breach of contract claim.

BREACH OF CONTRACT

Whether a party to a contract has breached a contractual provision is a question of law which is decided without deference to the circuit court. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 316, 485 N.W.2d 403, 405 (1992). A plaintiff claiming a breach of contract must establish that the contract exists and that the defendant's actions violated the terms of the contract**.** Where the terms of a contract are plain and unambiguous, we construe the contract as it stands. *See* ***Heritage Mut. Ins. Co. v. Truck Ins. Exch.***, 184 Wis.2d 247, 252, 516 N.W.2d 8, 9 (Ct. App. 1994).

Under the contract, Doering agreed to make an initial, nonrefundable payment of $2200 to Kaufman to secure his time and services for "representation in preparing, filing and attending hearings on all pre-trial Motions."[4] Both parties agree that the contract is valid, and neither party contests the language of the contract. Therefore, the only issue is whether Kaufman breached his contractual duty to Doering by not appearing at the 10:00 a.m. status hearing and not

[4] The relevant portion of the contract is as follows:

> I agree that the following method is to be used for determining the proper amount of legal fees:
>
> > **1. Fees and Retainer for Pre-trial Motions.** To secure the time and services of the attorney for representation in preparing, filing and attending hearings on all pre-trial Motions my attorney may determine is in my best interest to bring before the court in this matter, I agree to make an initial, non-refundable payment of the amount of $2,200.00 toward my attorney's fees, costs, and expenses. I understand this is the minimum fee I will be charged for services, costs, and expenses.

questioning witnesses as Doering requested. To make this determination, we look first to the circuit court's findings.

According to § 799.215, STATS., in a small claims action the court's "decision … shall state separately the facts found and the conclusions of law thereon." When confronted with inadequate findings by the circuit court, an appellate court may affirm if the trial court's conclusions are supported by the great weight and clear preponderance of the evidence, reverse if they are not so supported or remand the cause for the making of conclusions and findings. *See* ***In the Matter of Guardianship of Shaw***, 87 Wis.2d 503, 518-19, 275 N.W.2d 143, 151 (Ct. App. 1979).

Here, the trial court awarded Doering damages for Kaufman's lack of communication and failure to explain to Doering why witnesses were not being called. However, the court never made any findings that the contract was breached, nor did the court state any conclusions of law to support its award.

Our independent review of the record convinces us that as a matter of law, Kaufman did not breach his contractual duty to Doering. The record indicates that Kaufman prepared, filed and attended all pretrial hearings and pretrial motions in accordance with his client's best interests. Although the court determined that there was a lack of communication between Kaufman and Doering as to the time of the 10:00 a.m. status hearing, Kaufman did notify Doering by letter of the change in the hearing time. Doering misinterpreted the letter to mean that case no. 96-CM-22 would still be heard at 10:00 a.m. When Doering arrived, the judge presiding over the 2:00 p.m. hearing also told Doering that the court had made an error in its notice procedures and that, in fact, the 10:00 a.m. hearing had been rescheduled for 2:00 p.m. Doering acquiesced to this

change. Moreover, neither Doering nor the court ruling cites to any authority supporting the premise that a lack of communication is grounds for a breach of contract.

Concerning Kaufman's alleged failure to call witnesses, the court again appears to incorrectly base its decision to award damages on a lack of communication. The court determined that Kaufman should have made "an attempt or explanation to Mr. Doering why the witnesses were not being called." However, the court did not find that as a result of not calling witnesses Kaufman breached his contractual duty to Doering. On the contrary, the court found that Kaufman earned the amount he billed Doering. Additionally, Kaufman testified that he told Doering that as the case moved along and got closer to trial he would question the witnesses. Kaufman explained that there was no need to question the witnesses early in the case because most of the witnesses were character witnesses with no personal knowledge of the allegations in the complaint.

Therefore, because Kaufman did not breach his contractual duty to Doering, there was no basis for the court's award of damages.[5] Accordingly, we reverse the decision of the circuit court.

[5] On appeal, Doering also claims in part that his injury is loss of "trust and confidence in the legal profession." Not only has Wisconsin never awarded damages for this type of injury, such damages would not be recoverable in an action on contract because they are based on emotional distress or mental pain and suffering. *See* ***County of Milwaukee v. Schmidt, Garden & Erikson***, 43 Wis.2d 445, 454, 168 N.W.2d 559, 563 (1969).

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.