

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-0792

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

EVELYN HOMMRICH,

PLAINTIFF-APPELLANT,

V.

CAROLYN SCHNEIDER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

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

PER CURIAM. Evelyn Hommrich, pro se, appeals a judgment following a four-day jury trial dismissing her claims against Carolyn Schneider and awarding Schneider \$25,000 on her counterclaim. Hommrich argues that the trial court erroneously denied her motion to be provided a transcript of the jury trial at no cost. Because Hommrich failed to demonstrate arguable merit to an

appeal, the trial court did not err when it denied her a free transcript. Hommrich also argues the trial court made numerous errors. To the extent we are able to review her allegations of error absent a transcript, we reject her arguments. Therefore, we affirm the judgment and order.

This action arose out of Hommrich's claims of intentional infliction of emotional distress and defamation. After a four-day jury trial, in a twenty-two-page verdict consisting of 106 questions, the jury returned a verdict against Hommrich on all her claims. Hommrich filed a notice of appeal and moved the trial court for an order providing her with a free transcript of the four-day jury trial. Hommrich's affidavit in support of her motion stated:

I believe that my contentions for appeal have merit by reason of numerous errors, some of which include, the denial of plaintiff's pre-trial motions for: (1) Directed Verdict; (2) Default Judgment and Dismissal of Action Due to Perjury, Subornation of Perjury, and Bad Faith Conduct of Defendant in Discovery; (3) Taking Facts as Established; (4) Precluding Defendant's from Putting Documents and Testimony Into Evidence; and, also by reason of denial of my ... Renewed Motion For Directed Verdict and Dismissal of Action due to perjury by defendant and her witnesses during the trial.

I believe that my contentions for appeal also have merit, by reason of the numerous other errors committed upon the trial in regard to the admission and exclusion of evidence and testimony, the charge to the jury and the granting and denial of requests to charge the jury, all of which were prejudicial to me and my cause of which more fully appears in the pleadings, transcript, and record.

I believe the trial court erred in granting summary judgment to defendant and dismissing plaintiff's claims of conspiracy and interference with contracts.

At the hearing, Hommrich testified to her indigency. With respect to the merits of her appeal, Hommrich stated that the testimony was totally contradictory to depositions and interrogatories; that she had asked for a directed

verdict on the grounds of perjury; that the tone of the judge's voice at trial "in front of the jury was that you believe [the witness]"; that the jury should have looked at bank records; that the bailiff said the jurors were scared that she might have a gun in her purse; and that witnesses lied under oath and their testimony was inconsistent. Hommrich also stated:

As far as prejudicial errors, I think the prejudicial error of letting the defendant build her whole case on saying I falsely arrested Ms. Babe and then me trying to show the jury every single check that was written out by her and counting on them seeing that to discredit her testimony that she used to help me, and the Court didn't allow that to go in.

Hommrich further stated that "anytime I brought up the perjury, I pointed it out, it just was like it's not bad enough."

The trial court stated that the jury understood Hommrich's claims and that the assessment of credibility is a jury function. The trial court stated that the complaints Hommrich had regarding evidence that should have been kept out or should have been let in were minor and that she could not possibly succeed on appeal. The court found that she was indigent but, because her claim was utterly without arguable merit, she was not entitled to a transcript at public expense. It stated: "I think it's your intention in life just to obsess and wallow in these cases and litigate until your final day" The court added that if she wanted to know what "my position is on it is, if you want to appeal, go get a loan, go get your mom's gratuitous support, go get a job, pay for the transcript and go up"¹ The

¹ The record in this matter is over ten inches thick and consists of 213 largely multiple-page documents. It would be helpful to the reviewing court if the appellant would cite the document and page number for every record reference. Section 809.19(1), STATS. Citation to the brief's appendix with occasional record references does not suffice.

court did provide a transcript of the hearing at which it denied her motion for a transcript of the jury trial.²

Hommrich argues that the trial court erroneously exercised its discretion when it found her appeal had no merit. She further argues that the court erred when it stated she may proceed if she gets a job or pays for a transcript. We are unpersuaded.

A person may prosecute an appeal without being required to pay for a transcript, based upon a finding of poverty, but "[t]he court may deny the request for an order if the court finds that the affidavit states no claim, defense or appeal upon which the court may grant relief." Section 814.29(1)(c), STATS. "[A] meritless assertion by a putative appellant will not furnish a foundation for a judicially ordered waiver of fees." *State ex rel. Girouard v. Circuit Court*, 155 Wis.2d 148, 159, 454 N.W.2d 792, 796-97 (1990). Whether a claim is arguably meritorious is a question of law we review de novo. *State ex rel. Hansen v. Circuit Court*, 181 Wis.2d 993, 998, 513 N.W.2d 139, 141 (Ct. App. 1994).

We turn to Hommrich's motion and accompanying affidavit to determine whether she states any arguable basis for her appeal. We conclude that Hommrich's summary recital of potential grounds for appeal set forth in her affidavit is insufficient to demonstrate arguable merit. We note that many of her claims relate to pretrial orders; as a result, a trial transcript is not necessary. For example, one of her alleged grounds for appeal was directed to the trial court's grant of a summary judgment.³ Because our review of summary judgment is

² See *State v. Jacobus*, 167 Wis. 2d 230, 481 N.W.2d 642 (Ct. App. 1992).

³ This ground for appeal, however, is not raised in her appellate brief.

de novo based upon the motion and accompanying affidavits, *see* § 802.08, STATS., a transcript of the four-day jury trial would be unnecessary. Also, the judge's tone of voice would not be a matter that could be recorded by means of a transcript.

We further conclude that Hommrich's explanation to the trial court is insufficient to demonstrate arguable merit. A number of her claims involve allegations of perjury and other credibility issues. An appellate court must accept the trier of fact's findings unless they are incredible as a matter of law. *State v. Simos*, 53 Wis. 493, 495-96, 192 N.W.2d 877, 878 (1972). Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts. *Id.* Because Hommrich's allegations do not rise to this level, the trial court correctly determined that her credibility challenges failed to state an appellate issue.

Other challenges involve evidentiary rulings and jury instructions. These issues are highly discretionary with the trial court and, absent any allegation as to how the trial court may have erroneously exercised its discretion, the claims cannot be said to demonstrate arguable merit. *See Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992); *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Because the trial court correctly concluded that Hommrich failed to state allegations demonstrating arguable merit, it properly denied her motion.

Hommrich argues that the trial court erroneously stated that she should get a job or finance an appeal with a loan. We are not persuaded. The trial court found that Hommrich was indigent. The trial court's comments with respect to her financial status were not material to the denial of her motion for lack of

arguable appellate merit. Taken in context, the trial court's comments suggested that despite its ruling that her appeal lacked merit, she was not foreclosed from taking an appeal in the event she financed it herself.

Next, Hommrich argues for reversal based on the trial court's allegedly erroneous evidentiary rulings, jury instructions, and denial of numerous motions. Without a transcript of the trial, this court's review is limited to those parts of the record before us. *In re Ryde*, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). We will review each of her allegations to the extent possible based upon the record before us.

Hommrich argues that the trial court erroneously refused evidence of bank records offered for the purpose of impeaching the credibility of a witness. She also argues that her theory to the jury was that "Schneider discovered [the witness's] theft when snooping in the records and blackmailed [the witness] into going along with Schneider's plot to take-over the business." Hommrich attached copies of the bank records to her appendix. She claims that the bank records were a hearsay exception under § 908.03(6), STATS., and should have been admitted.

With respect to her theory on admissibility, Hommrich's argument fails to consider that hearsay is just one prong in the analysis. Her argument fails to address the admissibility of collateral evidence for the purpose of impeachment. *See McClelland v. State*, 84 Wis.2d 145, 159-60, 267 N.W.2d 843, 849-50 (1978). Hommrich's argument further fails to allege the foundation necessary to demonstrate the bank records were relevant to the take-over plot. We conclude that Hommrich's evidentiary argument fails to establish reversible error.

Hommrich also argues the trial court erroneously instructed the jury that Schneider's defamatory statements were conditionally privileged because

(1) Schneider denied any purpose that affords privilege and (2) her bad faith conduct in discovery precluded privilege.⁴

The test for determining whether the jury instructions were erroneously prejudicial is whether there is a probability that the jury was misled by the instructions. *McMahon v. Brown*, 125 Wis.2d 351, 354, 371 N.W.2d 414, 416 (Ct. App. 1985). Reversal is required only when the instructional error is prejudicial. *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis.2d 743, 750-51, 235 N.W.2d 426, 431 (1975). Here, the special verdict is made part of the record. It demonstrates that the jury never reached the defense of conditional privilege because it found that each of the allegedly defamatory statements were not made. Because there is no possibility the jury was misled by the instructions, Hommrich fails to demonstrate reversible error.

Next, Hommrich argues that the trial court erroneously refused the jury to view Schneider's long distance phone records to prove that she and her witnesses lied under oath. Hommrich asserts that it took her fifteen months to obtain the records. The trial court eventually ordered an in-camera inspection of the records. She argues that she was never awarded expenses for her costs in compelling discovery. Hommrich further argues that she pointed out the inconsistencies between the records and statements during trial testimony; for

⁴ See WIS J I—CIVIL 2507 “Defamation.” Hommrich argues that the “best proof of this contention of error is provided by Schneider's own February 21, 1994, Brief in Opposition to Prudential's Summary Judgment.” In its brief, Prudential contended that there was no testimony that, at the time she made the allegedly defamatory statement, Schneider's purpose was in furtherance any business pursuits. Hommrich also points out that (1) in Schneider’s answers to interrogatories, she denied recalling the allegedly defamatory statements; and (2) Schneider herself stated she was not furthering any business pursuit. Hommrich argues that Schneider should have been precluded from raising the defense of conditional privilege.

example, Schneider testified that she did not call any clients, but the records showed five long distance calls to clients.

We conclude that Hommrich fails to adequately develop her theory of admissibility. Although the phone records may fit the business records exception to the hearsay rule, the records also must be material to an issue in the case. Generally, collateral evidence is not admissible solely for the purpose of impeachment of credibility. See *McClelland*, 84 Wis.2d at 159-60, 267 N.W.2d at 849-50. Because Hommrich fails to develop any theory of admissibility beyond impeachment, her argument must fail. See *State v. Gulrud*, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

Next, Hommrich argues that the trial court erroneously permitted testimony of statements allegedly contained in Hommrich's mental health files over her objection that the information was false, privileged, hearsay, irrelevant, prejudicial, and violates federal law that any drug treatment records may not be used in court proceedings. She contends that the testimony contained outrageous statements that Hommrich was dangerous and capable of murder.⁵ Without a transcript, however, we are unable to review the trial court's exercise of discretion and, as a result, her argument must fail. *In re Ryde*, 76 Wis.2d at 563, 251 N.W.2d at 793.

Finally, Hommrich argues that the trial court failed to grant numerous pretrial and trial motions, including a motion in limine, to compel

⁵ We note that the verdict indicates that the alleged defamatory statements included that Schneider stated "Plaintiff needed to be put in a mental institution" and "Plaintiff was a very sick lady," thereby putting at issue the truth of those statements. *Prahl v. Brosamle*, 98 Wis.2d 130, 140, 295 N.W.2d 768, 775 (1980) ("Substantial truth" is a complete defense to an action for defamation.').

discovery, for sanction and expenses, for default judgment, for dismissal of the counterclaim, for contempt of court, and exclusion of evidence. The extent to which a transcript of the jury trial is needed for resolution of these issues is unclear from Hommrich's argument. For example, on the one hand, she claims that without a transcript, she cannot present the witnesses' testimony; on the other hand, she argues that it is undisputed that Schneider failed to comply with discovery. It is unclear from this argument why the witnesses' trial testimony would be necessary to show noncompliance with a pretrial discovery proceeding. In any event, we conclude the argument is inadequately developed and for that reason, will not be addressed further in this appeal. *Gulrud*, 140 Wis.2d at 730, 412 N.W.2d at 142.

By the Court.—Judgment and order affirmed.

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

