COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3073

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

CURRAN, HOLLENBECK & ORTON, S.C.,

PLAINTIFF-APPELLANT,

V.

JEANNINE PEMBERTON AND CHARLES R. PAULMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Adams County: JAMES M. MASON, Judge. *Reversed and cause remanded.*

DYKMAN, P.J.[1] Curran, Hollenbeck & Orton, S.C. appeals from a judgment dismissing its small claims action against Jeannine Pemberton and Charles Paulman without prejudice. Curran, Hollenbeck & Orton argues that the trial court erred in dismissing the action and that it is entitled to judgment as a

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

matter of law. We conclude that the trial court erred in dismissing the case. However, we cannot conclude based on the record that Curran, Hollenbeck & Orton is entitled to judgment as a matter of law. Accordingly, we reverse the judgment and remand to the trial court for further proceedings.

On March 10, 1997, Curran, Hollenbeck & Orton filed a small claims action against Jeannine Pemberton and Charles Paulman seeking a money judgment in the amount of $4,912.82 for unpaid legal services performed by Attorney Paul Curran. The defendants filed an answer to contest the claim. They noted that they had filed a complaint against Curran with the Board of Attorneys Professional Responsibility (BAPR) for malpractice. They also alleged that they were charged for work that was not performed and that Curran's bills were wrong and inconsistent.

The case proceeded to a trial to the court. The court granted Curran's motion in limine to exclude any evidence on the issue of malpractice. Curran testified that he was retained by Pemberton and Paulman to defend them in a civil suit. Curran withdraw as Pemberton and Paulman's attorney when his bills became past due. Curran testified that all of his charges were reasonable and necessary.

Pemberton testified that they did not pay Curran because they were billed for work that was not done. Pemberton and Paulman testified that Curran took important witnesses off of the witness list without their knowledge and requested a bench trial instead of a jury trial, contrary to their wishes. Pemberton also read from a letter to her from Attorney Todd Bennett, who succeeded Curran in defending her and Paulman. Bennett's letter states that Curran took important

witnesses off of the witness list and failed to depose two of the plaintiff's critical witnesses.

Pemberton testified that she and Paulman intended to retain an attorney and file a malpractice suit against Curran if BAPR rendered a decision that was favorable to their point of view. Pemberton did not believe that they would have a case against Curran if BAPR concluded that Curran did not act inappropriately.

The trial court noted that Curran testified that his bills were correct and that the defendants did not prove that Curran overcharged them. The court stated that it could not decide that Curran acted inappropriately based on the defendants' testimony because an attorney's negligence needs to be shown by expert testimony. The court did not rely on Attorney Bennett's letter because Bennett did not testify.

Although the court believed that the defendants raised factual matters relevant to malpractice as part of their defense, it did not want to take up the issue of malpractice out of fairness to the parties. The court told the defendants that they were wasting everybody's time because they were asserting a malpractice defense without notice to the plaintiff and without expert testimony.

The trial court went on to announce its disposition to the defendants:

> By bringing the matter to a close today, it means you're all done. You never get to raise those issues. Perhaps, another court's going to look at this and say: You had your chance to bring those issues up; and you never brought them up, and they're done. They're over.
>
> ….

> They may present sufficient defenses. I don't know that, and I don't find that. I don't find that they are, and I don't find that they aren't.
>
> ….
>
> Now I will grant you this: if you are willing to pay Attorney Curran $160 [in attorney's fees plus the $61 filing fee] for the time that he has spent here today because of that, I will dismiss the matter without prejudice, allowing Attorney Curran to bring the case back on another day, so he can present his case after you've received whatever result you get from [BAPR].
>
> That way your rights are protected, and he hasn't wasted his time; and you had been warned about the waste of time that would occur. Do you agree to that?
>
> I can tell you if you don't agree with that, I'm going to be forced into giving Attorney Curran his judgment; and it's going to work against you twice: not only in the form of a judgment, but in the form that it may preclude you from bringing up any of those defenses again.

Curran objected. Curran then asked the court:

> MR. CURRAN: Your Honor, am I—you're suggesting it's—the case is actually dismissed; so I have to refile a new small claims action to pursue a new collection case again?
>
> We're not just postponing the trial date and having another trial at some point in time in the future? We're actually dismissing the case that you've acknowledged that I've proven so—
>
> THE COURT: Actually, I have acknowledged that in the form of saying if there aren't any defenses that can be established here because of the form of presentation by Miss Pemberton, that I have to grant the judgment you've asked. You're right.
>
> So that's right. I guess you've summarized it correctly. Case dismissed without prejudice.

Curran appeals.

Curran argues that we should reverse the trial court's decision to dismiss its claim because the trial court gave no basis for its decision. Pemberton

and Paulman do not cite to any authority to support their argument that the trial court has the discretion to dismiss an action in order to preserve the defendant's defenses or claims against the plaintiff. We generally do not address arguments unsupported by legal authority. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Although Pemberton and Paulman are proceeding *pro se* before both the trial court and the court of appeals, we apply the same rules to both *pro se* litigants and attorneys. ***Waushara County v. Graf***, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20 (1992). Nonetheless, we have reviewed the law and find no authority for the trial court's exercise of discretion in this case.

Curran argues that he has proven his case and is entitled to judgment as a matter of law. In support of his argument, he cites § 799.215, STATS., which states:

> Upon a trial of an issue of fact by the court, its decision shall be given either orally immediately following trial or in writing and filed with the clerk within 60 days after submission of the cause, and shall state separately the facts found and the conclusions of law thereon; and judgment shall be entered accordingly.

We cannot conclude, based on the record, that Curran is entitled to judgment as a matter of law. First, we do not believe that the trial court set forth what it considered to be its findings of fact and conclusions of law. The trial court dismissed Curran's cause of action in order to preserve the defendants' claims and defenses, and therefore the court did not need to make findings of fact and conclusions of law on the merits of the case. Although the court stated that the defendants did not prove that they were overcharged or that Curran was liable for malpractice, it also stated that it was not going to decide whether the defendants' defenses were sufficient.

Second, we do not know whether the trial court has finished taking evidence in this case. The court has indicated a desire to allow the defendants to assert their malpractice claim after they hear from BAPR. Although we do not find any authority for the trial court's exercise of discretion in dismissing the case, the trial court does have the discretion to grant a continuance. *See* ***Robertson-Ryan & Assocs., Inc. v. Pohlhammer***, 112 Wis.2d 583, 587, 334 N.W.2d 246, 249 (1983). The question of whether to decide the case on the evidence presented or grant a continuance to allow the defendants to present further testimony is a decision that we leave to the trial court's discretion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.