COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-0727

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

EVELYN HOMMRICH,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ALLAN RITTENHOUSE,

DEFENDANT,

MARK D. TOUSIGNANT AND MARK D. TOUSIGNANT, P.C.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Florence County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Evelyn Hommrich appeals a judgment awarding her damages of $8,389.94 on her legal malpractice claim and dismissing her conspiracy and misrepresentation claims against her former attorney, Mark Tousignant. She argues that the trial court erroneously ruled that (1) there was insufficient evidence to support the jury's malpractice award of $12,000; (2) there was insufficient evidence to support the $100,000 jury award on her misrepresentation claim; and (3) there was insufficient evidence for the conspiracy claim to go to the jury. She also argues that the trial court made numerous other errors demonstrating bias.

¶2 Tousignant cross-appeals, arguing that Homeric's claim is only a fee dispute that has previously been the subject of binding arbitration. He argues, therefore, that the trial court erroneously denied his various motions to dismiss Hommrich's malpractice claim. We conclude that the record supports the trial court's rulings and therefore affirm the judgment.

¶3 This appeal arises out of the following events. Hommrich retained Tousignant's law firm to pursue a claim against several individuals for damages to her business. Tousignant had employed an attorney, Allan Rittenhouse, who was licensed in Texas but not in Wisconsin. Tousignant filed a complaint on Hommrich's behalf, and Rittenhouse conducted depositions. Eventually the attorney-client relationship broke down, and Tousignant sought and received trial court permission to withdraw from Hommrich's case.

¶4 Hommrich lacked funds to retain subsequent legal counsel and proceeded pro se on her business injury claims. She ultimately lost that suit when the trial court entered summary judgment against her.

¶5 Tousignant had billed Hommrich $12,000 for services rendered in the case before he withdrew. Hommrich paid a portion of the fees and disputed the balance. The parties submitted their dispute to arbitration. The arbitration panel found that Tousignant was entitled to his entire fee of $12,000 and that Hommrich owed a balance of $3,610.06.

¶6 Hommrich, pro se, filed this action for legal malpractice, misrepresentation and conspiracy against Rittenhouse, Tousignant and the Tousignant law firm. Hommrich obtained a default judgment against Rittenhouse and proceeded to trial against Tousignant and the law firm. At trial, her expert witness testified to the effect that having an unlicensed attorney practicing law was fraud and legal malpractice. On the basis of the expert's testimony, the trial court permitted these two claims to go to the jury. However, the court dismissed Hommrich's conspiracy claim, finding that no evidence supported the submission of this claim to the jury.

¶7 The jury returned a verdict in favor of Hommrich. It found that Tousignant had committed legal malpractice and awarded $12,000 damages. It also found that Tousignant had committed misrepresentation, damaging Hommrich in the sum of $100,000.

¶8 On motions after verdict, the trial court found that sufficient evidence supported the jury's malpractice award to the extent that it reflected the sums she paid Tousignant, and entered judgment in the sum of $8,389.94. It found that Hommrich failed to prove damages with respect to her misrepresentation claim and that the jury's award was based on speculation. It struck the $100,000 award. Hommrich appeals, and Tousignant cross-appeals the judgment.

¶9 Hommrich argues that the trial court erroneously held that there was insufficient evidence to support the $12,000 damages awarded on her malpractice claim. We conclude that the record supports the court's determination. At the outset, we note that Hommrich's arguments are difficult to approach in a logical, orderly manner. While obviously products of great time, effort and diligent research, her arguments are nevertheless cluttered with extraneous, irrelevant factual, legal and editorial assertions. Evidence is sometimes inappropriately intermingled among various legal theories, which are themselves confusingly intertwined. Having said this, Hommrich's brief is far superior to Tousignant's. His brief, although organized, fails to develop his arguments, but simply asserts his position. The only assistance his brief affords is its references to the precise basis for the trial court's ruling, absent in the appellant's briefs. For the reasons that follow, we reject the parties' arguments.

¶10 When reviewing whether a judgment is excessive, the evidence must be viewed in the light most favorable to the verdict. *See* ***Fahrenberg v. Tengel,*** 96 Wis. 2d 211, 231, 291 N.W.2d 516 (1980). A reviewing court must search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict that the jury could have reached but did not. *See* ***Coryell v. Conn***, 88 Wis. 2d 310, 317-18, 276 N.W.2d 723 (1979). "[A]ll that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience." ***Fahrenberg***, 96 Wis. 2d at 236. "[T]his court may not substitute its judgment for that of the jury but, rather, must determine whether the award is within reasonable limits." ***Mikaelian v. Woyak***, 121 Wis. 2d 581, 592, 360 N.W.2d 706 (Ct. App. 1984).

¶11 It is undisputed that Tousignant billed Hommrich $12,000 for legal services performed before he withdrew from her case. It is also undisputed that

Hommrich did not pay the entire bill, but only $8,389.94. Because there is no dispute that Hommrich paid Tousignant $8,389.94, we conclude that the trial court viewed the evidence in the light most favorable to the verdict and correctly ordered that the judgment reflect that sum.[1]

¶12 Hommrich argues, however, that she is entitled to greater damages and that the trial court erroneously prevented her from presenting her "suit within a suit" required for legal malpractice claims. We disagree. The record reflects that the court permitted Hommrich to present evidence of the nature of the underlying suit, but rejected evidence of events that occurred in that suit after Tousignant withdrew. The record reflects the court's explanation:

> MS. HOMMRICH: The suit within the suit. Case law that I keep researching says how I have to prove that I would have won that case if he wouldn't have with[drawn] and left me with no money and no attorney.
>
> ….
>
> THE COURT: After he withdrew he was done representing you. He could not have engaged in any malpractice after that point because he didn't represent you. Your malpractice claim can only be for the period of time which he represented you.

¶13 Pro se litigants, other than prisoners, are "bound by the same rules that apply to attorneys on appeal." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Hommrich offers no legal authority for her proposition that legal counsel is liable for malpractice for events occurring after he withdrew with the court's permission. *See* WIS. STAT. § 809.19(1)(e) (1997-98).[2]

[1] Hommrich does not brief the effect of the arbitration determination, and therefore we do not address that issue. *See* ***Public Serv. Employees Union v. WERC***, 246 Wis. 190, 198-99, 16 N.W.2d 823 (1944).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

As a result, we reject her argument on this ground alone. *See* WIS. STAT. § 809.83(2).

¶14 Even on its merits, however, this argument must fail. The jury found in favor of Hommrich on her legal malpractice claim. Therefore, to the extent her argument could be interpreted to go to liability issues, she suffered no prejudice from the court's ruling. *See* WIS. STAT. § 805.18. To the extent that her argument could be interpreted to go to the damages issue, the record reflects no offer of proof that her damages exceeded the legal fees paid. Thus, we do not further review this claim of error. *See* WIS. STAT. § 901.03(1)(b).[3]

¶15 Next, Hommrich argues that the trial court erroneously granted Tousignant's motion after verdict striking the jury's $100,000 award for misrepresentation. Hommrich's misrepresentation claim was premised on her assertion that she would have never retained the Tousignant law firm if she knew Rittenhouse was not a licensed attorney. She claimed that the firm's misrepresentation of Rittenhouse's licensing status caused her to ultimately lose her underlying lawsuit.

¶16 Hommrich presented insufficient evidence upon which a jury could determine misrepresentation damages. She presented testimony that her business charged clients $2,600 for services rendered. The evidence indicated that the number of clients varied, but at times Hommrich would have fourteen to twenty clients. This evidence presents only a portion of the necessary equation. The record lacks any evidence showing gross receipts, business expenses, net income

[3] Hommrich also claims that the evidence showed that Tousignant breached his duty of loyalty, engaged in a conflict of interest, and permitted an employee to practice law without a license. Again, this evidence demonstrates liability, not damages.

or anticipated profits. There is no evidence that the business turned a profit in any year. "Neither a court nor a jury as the trier of the facts can determine damages by speculation or guesswork." ***Pleasure Time v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977). Damages must be proven with reasonable certainty. *See* ***id***. Viewing the evidence in the light most favorable to the verdict, we must agree with the trial court that the jury's award of $100,000 was based on pure speculation. Because there is no credible evidence to sustain the jury's damage calculation, the trial court properly granted Tousignant's motion after verdict and struck the award. *See* WIS. STAT. § 805.14.

¶17 Next, Hommrich argues that the trial court erroneously ruled that the evidence was insufficient to submit her conspiracy claim to the jury. This claim is based on her assertion that Tousignant conspired with individuals whom she contends injured her business reputation. She argues, without citation to the record, that she provided testimony of eight witnesses with whom Tousignant conspired to injure her reputation with malicious lies. The lack of record citation is a sufficient basis to reject this argument. *See* WIS. STAT. § 809.19(1)(e); ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Nonetheless, this court has reviewed the testimony presented at trial. While the evidence may perhaps support claims against individuals other than Tousignant, there is, as the trial court noted, not one shred of evidence linking Tousignant to a conspiracy with others to damage Hommrich.[4] We conclude, therefore, that the trial court correctly dismissed the conspiracy claim.

[4] At trial, Hommrich offered into evidence a letter she wrote to Tousignant making various accusations against him. As the trial court observed, the letter contained only allegations that she had written down and mailed; it was not evidence of the accusations made therein.

¶18 Next, Hommrich argues that the trial court made a variety of errors demonstrating bias.[5] She complains that the trial court interrupted her examination of witnesses a total of fifty-four times during the course of the two-day trial. The record reveals that Hommrich's claim of error is utterly without merit. The trial court was faced with the daunting task of keeping the trial focused on the issues at hand in the face of rambling and oftentimes irrelevant testimony. The court's "interruptions" were legitimate, indeed necessary, attempts to clarify the proceedings. For example, while Tousignant cross-examined witness Carolyn Schneider Arcand, the court interrupted, saying:

> I don't want to mislead the jury here. You would know if there was another lawsuit filed; was there in fact another lawsuit filed?
>
> ….
>
> This thing is very confusing and hard to figure out exactly what's going on at any given time here. Go ahead.

¶19 At another point in the trial, when Hommrich was examining Tousignant adversely, she asked Tousignant about allegations in the complaint. The court interrupted, stating: "The complaint is not evidence. We have the witness here, so you can ask him directly whether he did or didn't or whether he received it or what records he has." After a few more questions, the court asked: "Just so I understand, that's not a disputed issue; is it? I mean it is not disputed to you that she paid a retainer to Mr. Rittenhouse?" The witness replied that it was

[5] Hommrich claims that the trial judge demonstrated bias against Hommrich throughout the entire trial by: (1) acting as if he was Tousignant's expert witness and attorney; (2) being hostile and demeaning to Hommrich and her witnesses; (3) constantly interrupting Hommrich during her examination of witnesses; and (4) interposing endless objections on behalf of Tousignant.

undisputed. These examples demonstrate that the court was attempting to keep the parties focused on material issues.

¶20 The court's comments did not suggest any hostility toward or bias against Hommrich. For example, in response to an objection from Tousignant about the expert witness answering a hypothetical question without sufficient foundation, the court replied, "Well, given the pro se nature and given your ability to cross-examine, I'll let the witness testify."

¶21 This court has examined the entire transcript of the two-day trial and the motions after verdict. The transcript reveals numerous instances when the court was flexible with the rules of evidence to permit Hommrich to introduce evidence. The court also helped clarify confusing and disjointed testimony. The record demonstrates that Hommrich's attacks on the trial court are groundless.

¶22 Next, we turn to Tousignant's cross-appeal. Tousignant complains that because the parties' fee dispute had previously been the subject of binding arbitration, the trial court erroneously denied his various motions to dismiss Hommrich's malpractice claim. We disagree. The record fails to disclose whether the issues in the arbitration proceeding were the same as the issues in the malpractice proceedings. The record does not contain the arbitration panel's decision or any of the arbitration proceedings.

¶23 The authorities Tousignant cites state that an arbitration award is presumed valid and where an award on its face makes clear that no issue was left

unresolved, it is to be considered final and definite.[6] While early in the trial the court stated that Hommrich's evidence only showed a fee dispute that had been the subject of arbitration, later in the proceedings the court explained that Hommrich's expert's testimony supported her legal malpractice claims. Tousignant fails to demonstrate that the legal malpractice issues as testified to by the expert witness were subjects of arbitration. Because the record does not show that the malpractice issues were arbitrated, Tousignant's argument fails.

By the Court.—Judgment affirmed.

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

[6] Tousignant cites the following three cases: ***Richco Structures v. Parkside Village***, 82 Wis. 2d 547, 263 N.W.2d 204 (1978), ***Manu-Tronics, Inc. v. Effective Mgmt. Systems***, 163 Wis. 2d 304, 471 N.W.2d 263 (Ct. App. 1991), and ***Jones v. Poole***, 217 Wis. 2d 116, 579 N.W.2d 739 (Ct. App. 1998).