COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1904 **Cir. Ct. No. 2011CV4993**

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

MARK HALBMAN,

PLAINTIFF-APPELLANT,

V.

MITCHELL J. BARROCK D/B/A BARROCK & BARROCK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Mark Halbman appeals from an order of the circuit court granting the motion to dismiss of Mitchell J. Barrock d/b/a Barrock & Barrock (hereinafter "Barrock") at the close of Halbman's case-in-chief during the jury trial of this legal malpractice action. The court granted the motion on the

basis that Halbman failed to introduce sufficient evidence of damages. Halbman contends the court erred; we disagree and affirm.

¶2 On August 7, 2000, Halbman retained Barrock to represent him in a lawsuit related to a motor vehicle accident. A 2004 jury trial resulted in a verdict in Halbman's favor in the amount of $182,250 plus court costs. Pursuant to a postverdict motion, the circuit court declared a mistrial and ordered a new trial, due in part to improper comments Barrock made during closing argument. *See* ***Halbman v. Farmers Ins. Grp.***, No. 2006AP3129, unpublished slip op. ¶¶1, 10, 21-25 (WI App Jan. 29, 2008). Halbman appealed, we affirmed, and a new trial was held in 2006. According to Halbman's testimony at the trial in the current case, the jury in the second trial returned a $36,000 verdict in his favor, which ultimately resulted in a $29,653.14 check, made out to Halbman and Barrock, being sent to Barrock from the insurer of the defendant in the motor vehicle action. Halbman testified Barrock deposited the check without Halbman's approval and that Halbman received no money from the verdict.

¶3 In 2011, Halbman filed this legal malpractice action against Barrock, founded upon the improper comments Barrock made during closing argument in the first trial. At the trial of this action, Halbman presented evidence that included his retainer contract with Barrock, which stated in relevant part that

> [t]he Attorneys' fee shall be a sum equal to … Thirty three and one third percent of the total valued amount recovered … [and] the Attorneys shall be entitled to recover their costs and expenses, and any judgment costs, regardless of the outcome of the legal action as a cost to be paid prior to the payment of any other costs or disbursement.

After Halbman rested, Barrock moved for dismissal on the basis that Halbman had failed to present a prima facie case as to his damages.

¶4 The circuit court granted the motion, dismissing the case on the basis that "I never saw any figures up here about" costs and expenses incurred, adding, "I can't guess at that. It's your duty to prove that; that's your burden." The court added:

> [H]ow that [$]36,000 [verdict from the second trial] became [$]29,653, there must be some type of, there must be some type of public record that could have been obtained to provide to the Court showing what properly would have been taken off that amount so that the insurance company didn't have to pay. That's why they came up with a net check of [$]29,653.14. You know, that's what I'm saying. I don't have the burden of proving this, you do.
>
> Now, I haven't heard anything about it. What am I supposed to do?
>
> ….
>
> If you have to do it by serving Barrock with a subpoena duces tecum to bring his books and records regarding what was supplied, any kind of settlement agreements, on and on and on and on it goes.
>
> Again, here we are today at trial, jury sworn, you rested, and all I have is one figure that I'm supposed to figure out everything else from. The jury has to get more direction than that.
>
> ….
>
> I mean I can't determine this. I don't have any proof. I have questions. I'm sure the jury has questions too.
>
> ….
>
> Now, I'm sorry but … there has been no damage shown sufficient to allow for a reasonable jury to come to a calculation of what the damages are in this case. I'm not saying that he didn't cause damage, he probably did. I just can't determine how much. But that's not my job, that's your job.

Halbman appeals, contending "there was credible evidence to support [his] claim against Barrock and the circuit court failed to view the evidence in the light most favorable to Halbman."[1] We conclude the circuit court did not err.

¶5 "[W]e will not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that it was 'clearly wrong.'" ***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶17, 274 Wis. 2d 143, 682 N.W.2d 389 (citations omitted). "A circuit court is 'clearly wrong' when it grants a motion to dismiss despite the existence of 'any credible evidence' to support the claim." ***Id.*** On such a motion, the circuit court must consider the evidence in the light most favorable to the plaintiff. WIS. STAT. § 805.14(1) (2013-14)[2]; ***Haase***, 274 Wis. 2d 143, ¶15.

¶6 Halbman asserts the circuit court here was clearly wrong to dismiss his case because "there was credible evidence to support a jury verdict in his favor." He points out that he introduced into evidence a copy of his August 7, 2000 retainer agreement with Barrock as well as the $29,653.14 insurance company check made payable to Halbman and Barrock. Halbman asserts in his *briefing* on appeal that "once the [$36,000] judgment [from the second trial] was entered and costs were applied and offset" the insurance company "sent Barrock a

[1] Halbman also asserts the circuit court erred in excluding from the malpractice trial evidence of the first jury verdict of $182,250 on the basis that such evidence was irrelevant. Halbman asks us to reverse this ruling of the circuit court. Because our ruling on the issue of Halbman's failure to establish his damages disposes of this matter, we need not address whether the court erred in excluding the evidence of the first jury verdict. *See* ***Hegwood v. Town of Eagle Zoning Bd. of Appeals***, 2013 WI App 118, ¶1 n.1, 351 Wis. 2d 196, 839 N.W.2d 111 (citations omitted) (We need not address other issues when one is dispositive.).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

check for $29,653.14, which was payable to Barrock and Halbman." Significantly, however, Halbman cites to no *evidence* of "costs" that were "applied and offset."

¶7 The retainer agreement indicates Halbman would be entitled to funds from a recovery once the attorney's fee of "Thirty three and one third percent" had been taken out of "the total valued amount recovered" and Halbman's attorneys had been reimbursed for "costs and expenses, and any judgment costs" incurred in relation to the case. In his briefing on appeal, Halbman cites to no numbers presented as evidence in the trial other than the $29,653.14 written on the check made out to him and Barrock following the second trial. From this, he contends "a jury could render a verdict in Halbman's favor for two-thirds of $29,653.14 or $19,768.76 based upon the terms of the Retainer entered into between the parties." The problem with Halbman's contention is that it fails to account for the "costs and expenses" also required to be paid pursuant to "the terms of the Retainer." He cites to no trial evidence as to the amount of costs and expenses the jury would have to deduct—from either $36,000 or $29,653.14 or $19,768.76—under the retainer agreement in order to render a lawful verdict pursuant to that document.[3]

[3] Halbman fails to cite to trial evidence related to any costs and expenses incurred. Reviewing the trial transcript ourselves, we observe that Halbman testified at one point to paying "10 to 15,000" "towards the trial of this matter." Halbman also indicated he issued some checks to Barrock for "court costs," "there was cash involved too," and around "four or five thousand" dollars in "court costs" "came out of" the $36,000 award. He also testified that after Barrock received the check for $29,653.14, he visited Barrock's office and "was told that [Barrock] was keeping … $7,000 for fees and that the check would be for fees and for him and I think there was like a hundred-some dollars left or something like that." Halbman further testified he had spent "about 30, 40,000" for "[l]andscaping work [that he apparently had performed for Barrock] that I wasn't paid for and money that I paid him for the trial." Again, Halbman makes no mention in either his brief-in-chief or his reply brief to any of this vague testimony. Nonetheless, even if we were to consider it, it still provided the jury with no basis to compute a damage award other than guesswork and speculation.

¶8 Halbman asserts that "[i]f Barrock incurred costs that would offset the $19,768.76 to which Halbman was entitled, he could have presented such evidence during his case. The jury then would have made a determination as to what amount, if any, should be deducted from $19,768.76 to compensate Barrock for costs." Halbman cites to no law supporting his argument that it was Barrock's burden to provide evidence of costs and expenses incurred in prosecuting *Halbman's* personal injury case, and his position appears contrary to the well-established law that the plaintiff bears the burden of proving his/her damages. *See* ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶19, 308 Wis. 2d 258, 746 N.W.2d 447 ("[I]n an attorney malpractice case, the client ... has the burden of proving both the fact and the extent of the alleged injury." (citation omitted)); WIS JI—CIVIL 202. It was Halbman's burden to persuade the jury of the appropriate amount of damages to which he was entitled under the facts of the case, including the terms of the retainer agreement. The evidence at trial did not identify the litigation costs and expenses incurred so as to make it possible for the jury to determine an appropriate damage award without resorting to guesswork and speculation. *See* ***Caygill v. Ipsen***, 27 Wis. 2d 578, 589-90, 135 N.W.2d 284 (1965) ("Damages must be proved with reasonable certainty." (citation omitted)); *see also* ***Grand View Windows, Inc. v. Brandt***, 2013 WI App 95, ¶22, 349 Wis. 2d 759, 837 N.W.2d 611 ("We cannot uphold a judgment based on 'conjecture, unproved assumptions, or mere possibilities.'" (citation omitted)).

¶9 Even considering the evidence in the light most favorable to Halbman, we must agree with the circuit court that Halbman failed to present the requisite evidence to support a damage award in his favor. We conclude the court did not err in dismissing the case at the close of Halbman's case-in-chief.

By the Court.—Order affirmed.

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