COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2849 **Cir. Ct. No. 2001CV1834**

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

ELIZABETH FREER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MICHAEL A. WHITCOMB,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Elizabeth Freer appeals from a judgment dismissing her legal malpractice action against Michael A. Whitcomb. Whitcomb cross-appeals the denial of his motion to have the action declared frivolous. We conclude that the evidence supports the finding that there was no attorney-client

relationship at the time the alleged malpractice occurred and that the action was not frivolous. We affirm the judgment.

¶2 Freer's complaint alleged that Whitcomb committed legal malpractice by not commencing a defamation action against her former employer, M&I Bank, before expiration of the statute of limitations.[1] Freer alleged that Whitcomb was retained for the purpose of investigating the dispute with M&I and commencing an action on her behalf. Whitcomb's position was that he was retained solely for the purpose of investigating the viability of claims against M&I and that Freer refused to continue the attorney-client relationship for the purpose of commencing a suit. The statute of limitations for a defamation action expired in early September 2000. A trial to the court was held on the issue of whether an attorney-client relationship existed when the statute of limitations expired. The trial court found it did not.

¶3 The trial court made the following findings. Freer first retained Attorney Gerald P. Boyle and Whitcomb in February 2000.[2] Both attorneys provided service to Freer and went to California to interview potential witnesses. The attorneys were retained for the purpose of investigating whether there was a basis for legal action against M&I. As of June 22, 2000, Freer was advised that a viable breach of contract claim existed and that unless they could resolve the claim

[1] Upon the termination of her employment with M&I Bank, M&I agreed to give only a neutral employment reference for Freer which would include dates of employment, positions held and salary. Freer believed that M&I violated the agreement and defamed her when phone inquiries were made by persons from California.

[2] Freer contacted Attorney Gerald P. Boyle in early 2000. Boyle indicated he would investigate the matter but wanted the assistance of Whitcomb. The retainer fee was paid to Whitcomb.

by discussions with M&I, the option would be to either litigate or walk away. A contingent fee agreement was presented to Freer but she did not sign it. In July and August of 2000, Freer attempted to resolve the matter with M&I herself. She understood that if she obtained a settlement, she was under no obligation to pay attorneys Boyle or Whitcomb any additional fees. Freer was unsuccessful in her contacts with M&I. She returned to Whitcomb to discuss representation. A new fee agreement was reached and a written agreement was sent to Freer in August 2000. Again Freer did not sign the agreement.

¶4 The trial court specifically found that there was no indication from Whitcomb that he would commence a defamation action because he believed the viable claim was for breach of contract. It found that while Freer engaged in contact with M&I, there was no attorney-client relationship between Freer and Whitcomb. It also found that Freer had not directed Whitcomb to start any lawsuit. The court concluded that Freer had not retained Whitcomb for the purpose of filing a defamation lawsuit and there was no attorney-client relationship when the statute of limitations expired on a defamation claim.

¶5 Freer had the initial burden of proving the existence of an attorney-client relationship. *See* ***Security Bank v. Klicker***, 142 Wis. 2d 289, 295, 418 N.W.2d 27 (Ct. App. 1987). The rules of contract formation apply and yet formality is not essential. ***Id.*** "[T]he relationship may be implied from the words and actions of the parties." ***Id.*** Whether an attorney-client relationship exists rests on the intent of the parties and presents a question of fact for the fact finder. ***Marten Transport Ltd. v. Hartford Specialty Co.***, 194 Wis. 2d 1, 14, 533 N.W.2d 452 (1995).

¶6 The trial court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).[3] For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id.***

¶7 Freer argues that the attorney-client relationship with Whitcomb continued until she formally terminated his services by a letter dated September 28, 2000. She points to documents in Whitcomb's work file dated after June 22, 2000, as indicative that Whitcomb continued working on her behalf. She asserts that Whitcomb had a duty to tell her that their attorney-client relationship would be terminated if she did not sign the fee agreement, to expressly withdraw, and to advise her of her possible rights under a defamation action in a reasonable time to get other counsel. Freer's arguments really challenge the sufficiency of the evidence to support the trial court's findings.

¶8 There were only two witnesses at trial, Freer and Whitcomb. The trial court's findings are based on a credibility determination between these two witnesses. When a finding of fact is premised on the court's assessment of the competing credibility of the parties, we must give due regard to the trial court's

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

opportunity to make this assessment. ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 386, 515 N.W.2d 539 (Ct. App. 1994). Our deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶9 Whitcomb testified that his services were retained for the purpose of claim investigation and to determine and advise whether a viable claim existed. This was corroborated by Whitcomb's June 22, 2000 letter transmitting a contingency fee agreement which indicated that the original retainer was "to conduct the initial investigation for the purpose of determining whether sufficient evidence/testimony could be obtained to support a civil complaint against M&I." In her testimony, Freer acknowledged that she retained counsel to advise her as to how to pursue her concerns with M&I's conduct. She was told that if the matter went to litigation there would be a contingency fee. Freer's termination letter of September 28, 2000, acknowledged that the retainer fee was paid "for investigative purposes and to assess the facts regarding issues between myself and [M&I]." The trial court's finding that the attorney-client relationship was limited is not clearly erroneous.

¶10 Whitcomb's testimony further explained that once documentary evidence was received from California witnesses in June 2000, the advice to Freer was to present her "portfolio" of evidence directly to M&I in an attempt to settle the matter without lawyers. Freer acknowledged that she attempted to deal directly with M&I. The trial court's finding that the original purpose of the attorney-client relationship was fulfilled as of June 22, 2000, is not clearly erroneous. We are not persuaded that Whitcomb had a duty to expressly withdraw when there was no active litigation. Further, the trial court found that both parties

acknowledged that once Freer undertook direct contact with M&I, there was no attorney-client relationship.

¶11 Both Whitcomb and Freer testified that Freer was told the statute of limitations on a defamation claim would expire in September 2000. Her claim on appeal that she should have been so advised is disingenuous. Freer's testimony also acknowledged that Whitcomb advised her that it was a contract case and that she did not direct Boyle or Whitcomb to file any lawsuit. The trial court's finding that Whitcomb was not retained for the purpose of filing a defamation suit is not clearly erroneous. Thus, the conclusion that there was no attorney-client relationship when the statute of limitations expired is affirmed.

¶12 By cross-appeal Whitcomb argues that Freer's malpractice action was frivolous under WIS. STAT. §§ 802.05(1)(a), 814.025.[4] Whitcomb complains that the trial court did not make requisite findings in denying his motion to declare the action frivolous.[5] *See* ***Sommer v. Carr***, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981). He urges this court to decide the issue as a matter of law. We need not decide the matter de novo.

¶13 Implicit in the trial court's denial of Whitcomb's motion to have the action declared frivolous, and its denial of summary judgment earlier in the action, is the finding that there were sufficient factual disputes to make an arguable claim that there was a continuing attorney-client relationship after the investigative

[4] Supreme Court order 03-06 repealed and recreated WIS. STAT. § 802.05 and repealed WIS. STAT. § 814.025. S. CT. ORDER, 2005 WI 38, 2005 WI 86 (eff. July 1, 2005).

[5] Whitcomb's concern that adequate findings had not been made was not raised in the trial court in his motion for reconsideration.

purpose was fulfilled.[6] *See* ***Estate of Villwock***, 142 Wis. 2d 144, 149, 418 N.W.2d 1 (Ct. App. 1987) (when a trial court fails to make express findings of fact, we may assume that a missing finding was determined in favor of the judgment); ***State v. Walstad***, 119 Wis. 2d 483, 515, 351 N.W.2d 469 (1984) (the failure to make required findings is not fatal when findings can be gleaned from a trial judge's decision). We agree because most attorney-client relationships continue for the duration of litigation or settlement. This was a rare occasion where the scope of the attorney-client relationship was limited and therefore presented an arguable issue of fact as to the scope of representation.

¶14 We are not persuaded, as Whitcomb urges, that there should be any consideration of whether or not Freer had a viable defamation cause of action against M&I. Whitcomb argues that frivolousness is demonstrated by the sham affidavit Freer filed in opposition to summary judgment. However, the remedy for such a submission is that the offending affidavit is deemed insufficient to create a genuine issue of fact for trial. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102.

¶15 Whitcomb moves to have the appeal declared frivolous under WIS. STAT. RULE 809.25(3)(c). He argues that if we reverse the trial court's conclusion that the action was not frivolous, the appeal is per se frivolous. We do not reverse the trial court's ruling and need not consider whether the appeal is per se frivolous. We observe that an appeal may be frivolous when it challenges the sufficiency of

[6] In denying Whitcomb's motion for reconsideration, the trial court noted that the case presented a "close call." Even though the hearing on the motion for reconsideration occurred after the filing of Whitcomb's notice of cross appeal, the transcript of the hearing is in the record. *See* WIS. STAT. RULE 809.15(1)(a)8.

evidence and the appellant fails to offer any factual or legal basis for undoing the trial court's factual findings. *See* ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998); ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998). While Freer's appeal fails to recognize that findings of fact made on credibility determinations are virtually unassailable, her argument in support of contrary findings is not without a reasonable basis. We deny Whitcomb's motion to have the appeal declared frivolous.

By the Court.—Judgment affirmed.

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