

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 15, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 00-1516**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**VERLYN A. SCHLEUSNER,**

**PLAINTIFF-RESPONDENT-CROSS-  
APPELLANT,**

**v.**

**WILLIAM R. LAMB, DOAR, DRILL & SKOW, S.C. AND  
NATIONAL CASUALTY COMPANY,**

**DEFENDANTS-APPELLANTS-CROSS-  
RESPONDENTS.**

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APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

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

¶1 HOOVER, P.J. William Lamb, his employer Doar, Drill & Skow, S.C., and their malpractice insurer, National Casualty Company (collectively, Lamb) appeal a judgment and order awarding legal malpractice damages. Lamb contends that the trial court erred when it submitted a verdict form to the jury with only one negligence question, even though the jury was asked to consider Lamb's conduct in two distinct transactions. He also contends that the damages award should be reduced. Because we agree that the trial court erred when it failed to give the jury separate questions for each transaction, we reverse and remand for a new trial on whether Lamb negligently disbursed settlement proceeds to his former client, Verlyn Schleusner and, if so, what damages Schleusner suffered as a result. We also agree that Schleusner's malpractice damages should not exceed \$471.38.

¶2 Schleusner cross-appeals, arguing that the court should not have reduced the jury award by his share of contributory negligence and that the court should have reimbursed him for the expert fees that he was charged. We disagree and dismiss the cross-appeal.

## BACKGROUND

¶3 Lamb is an attorney practicing in the Doar, Drill & Skow firm. Schleusner hired Lamb to help him recover for personal injuries. Lamb negotiated a settlement with the opposing party's insurer and received a check for \$20,000 around November 2, 1994.<sup>1</sup> On May 30, 1995, Schleusner received \$9,000, his first disbursement from the settlement proceeds. He received his remaining

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<sup>1</sup> Schleusner does not claim that Lamb misused the trust account funds, which were always in Doar, Drill & Skow's trust account until disbursed to Schleusner or his creditors.

disbursement, \$1,671, on April 25, 1997, or thirty months after Lamb received the check from the insurer. The remaining funds were distributed to subrogated plaintiff Blue Cross & Blue Shield, to Schleusner's health care providers, and a total of \$1,507.75 to Doar, Drill & Skow for its fees and costs.

¶4 Schleusner sued Lamb for legal malpractice, contending that Lamb did not properly represent him with regard to the personal injury claim<sup>2</sup> and that he and his firm negligently delayed disbursing his portion of the settlement proceeds.<sup>3</sup> The case proceeded to trial, and the jury concluded that Schleusner suffered \$31,024 in damages for his personal injury claim and that Schleusner was 49% negligent. In answer to a single verdict question, the jury also found that Lamb had been negligent and that his negligence was a cause of economic damages to Schleusner. It awarded \$25,000 in damages for the malpractice claim.

¶5 Lamb filed a postverdict motion asking the court to conclude as a matter of law that Lamb had not acted negligently by settling the personal injury case because the jury verdict, adjusted for contributory negligence, was less than the amount Lamb was able to obtain from the insurance company. The court agreed, reduced the jury verdict of \$31,024 by 49% to account for Schleusner's negligence and concluded that the remaining \$15,822 was less than the \$20,000 settlement check that Lamb obtained.

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<sup>2</sup> Schleusner contended that Lamb told him to accept the \$20,000 settlement or he would get nothing. He claims that Lamb failed to contact any of Schleusner's physicians or lay damage witnesses. He also argues that Lamb gave up Schleusner's right to claim a loss of income or earning capacity without discussing these issues with him.

<sup>3</sup> Lamb claimed that the disbursement was delayed at Schleusner's specific request.

¶6 Schleusner filed a postverdict motion for additur. The court denied this motion, approved all other verdict answers, and entered judgment, awarding \$25,000 plus \$1,997.89 in costs to Schleusner. Lamb and Schleusner cross-appeal the judgment and postverdict order.

## ANALYSIS

### I. MALPRACTICE VERDICT QUESTION

¶7 Lamb contends that the trial court erred by submitting a verdict to the jury with only one negligence question when the jury was asked to consider Lamb's conduct in two distinct transactions.<sup>4</sup> Lamb argues that the verdict question that asked if Lamb was negligent in his representation of Schleusner does not allow the court to ascertain whether the jury concluded that Lamb was negligent with respect to the timing of the trust account disbursements. He requests a new trial on this issue. We agree that he is entitled to a new trial.

¶8 While it is well settled that the form of the special verdict is committed to the discretion of the trial court, *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 445-46, 280 N.W.2d 156 (1979), whether the special verdict should have separately inquired as to a specific allegation of negligence is a question of law that we review de novo. *Zintek v. Perchik*, 163 Wis. 2d 439, 454, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds by Steinberg v. Jensen*, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Where there are two distinct causes of action, it is error to submit them to the jury in a single question as though they were part of a single claim. *Paulsen v. Gundersen*, 218 Wis. 578, 584, 260 N.W.

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<sup>4</sup> The record reflects that Lamb preserved his claim by requesting a verdict form with separate questions both before the jury deliberated and in a postverdict motion.

448 (1935). Otherwise, “an inquiry embracing more than one ultimate fact becomes a multiple question,” and the jury’s answer to each question may not be ascertainable. John A. Decker, *Special Verdict Formulation in Wisconsin*, 60 MARQ. L. REV. 201, 229 (1977).

¶9 Schleusner’s claims were based on two separate transactions. First, he alleged that Lamb’s malpractice deprived him of adequate compensation for his personal injury claim, such as medical expenses; past and future loss of earnings; and past and future pain, suffering and disability. Second, Schleusner claimed that he suffered economic loss due to the delay in the settlement funds disbursement. Lamb now contends that the court is unable to ascertain whether the jury concluded that Lamb was negligent with respect to the distribution, the personal injury claim prosecution or both. We agree.

¶10 The two transactions requested different damages. The first claim’s damages are measured by determining whether Schleusner would have been successful in his personal injury suit and what damages he would have received if Lamb had properly represented Schleusner. These damages are proved by trying the personal injury case within the malpractice case, a “suit within a suit.” *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 103, 362 N.W.2d 118 (1985). This procedure was employed without objection in this case. The second claim’s damages include consequential or economic damage unrelated to how the injury claim was handled. See *Gustavson v. O’Brien*, 87 Wis. 2d 193, 200, 274 N.W.2d 627 (1979) (attorney failed to convey property as directed by the client, with the result that the property was not insured and the client sustained uninsured loss when fire damaged the property). The damages Schleusner sought for his claim that Lamb had untimely disbursed the settlement funds fall into this second category of damages.

¶11 Schleusner argues that WIS. STAT. § 805.12(1)<sup>5</sup> gives the trial court discretion to determine the jury verdict form and that the single question on negligence was properly advanced to the jury. Here, however, the jury was not given the opportunity to resolve the factual issues presented. See *Lofgren v. Preferred Acc. Ins. Co.*, 256 Wis. 492, 495, 41 N.W.2d 599 (1950). Schleusner concedes that this court should not reverse the trial court’s discretion with respect to the jury verdict form “unless the questions do not fairly present the material issues of fact to the jury,” citing *Maci v. State Farm Fire & Cas. Co.*, 105 Wis. 2d 710, 719, 314 N.W.2d 914 (Ct. App. 1981). The verdict in this case does not reveal whether the jury believed Lamb was negligent in preparing Schleusner’s personal injury case or in disbursing funds from the firm trust account or both. It did not fairly present the material issues of fact to the jury and thereby prejudices Lamb.

¶12 Because no one challenges the jury’s answers with respect to the “trial within a trial,” we affirm the personal injury damages and negligence apportionment. We do, however, remand the case to the trial court for a new trial on whether Lamb was negligent with regard to disbursing the funds and, if so, the damages resulting.

## II. MALPRACTICE DAMAGES

¶13 Lamb contends that the \$25,000 awarded for his negligence should be reduced to no more than \$471.38 because the evidence does not support the

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<sup>5</sup> WISCONSIN STAT. § 805.12(1) provides in relevant part: “In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.” All references to the Wisconsin Statutes are to the 1997-98 version.

award. He argues that the court should apply WIS. STAT. § 138.04<sup>6</sup> and award 5% interest for the time the disbursements, a liquidated obligation, were delayed. *See Erickson v. Gundersen*, 183 Wis. 2d 106, 123, 515 N.W.2d 293 (Ct. App. 1994). Lamb submits that no other rate was presented in evidence, so the statutory rate should apply, citing *Kilgust Heating v. Kemp*, 70 Wis. 2d 544, 550, 235 N.W.2d 292 (1975). We agree.

¶14 Lamb calculates the interest due assuming that he should have distributed the settlement funds immediately upon receipt. Schleusner received \$9,000 slightly less than seven months after Lamb received the proceeds. The interest on this amount is:  $\$9,000 \times 5\% = \$450$  interest per year;  $\$450 \div 12$  months =  $\$37.50$  per month;  $\$37.50 \times 7$  months =  $\$262.50$ . Schleusner received \$1,671 slightly less than two and one-half years after Lamb received the proceeds. The interest on this amount is:  $\$1,671 \times 5\% = \$83.55$  per year;  $\$83.55 \times 2.5$  years =  $\$208.88$ . Adding the two sums together ( $\$262.50 + 208.88$ ) totals  $\$471.38$ .

¶15 Schleusner does not address why the statutory limitation to interest should not apply. It is therefore deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1995).

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<sup>6</sup> WISCONSIN STAT. § 138.04 provides:

The rate of interest upon the loan or forbearance of any money, goods or things in action shall be \$5 upon the \$100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in ss. 138.041 to 138.056, 138.09 to 138.12, 218.01 or 422.201, in which case such rate shall be clearly expressed in writing.

## III. CROSS-APPEAL: ADDITUR

¶16 Schleusner cross-appeals, arguing that the court should have granted his motion to increase the judgment to \$46,589.44, instead of the \$26,997.89 that was granted.<sup>7</sup> Schleusner contends that the personal injury award of \$31,024 should not have been reduced by 49% because the court should not have applied the “trial within a trial” method for trying the malpractice claim. However, Schleusner embraced this format both during the verdict conference and in closing statements. *See* WIS. STAT. § 805.13(3). In legal malpractice cases, juries properly consider how a reasonable jury would have valued the underlying case and then use that information to determine whether the attorney has committed malpractice. *Helmbrecht*, 122 Wis. 2d at 103. Further, WIS. STAT. § 895.045 provides that a plaintiff’s contributory negligence will reduce the award.<sup>8</sup> We reject Schleusner’s arguments.

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<sup>7</sup> The court granted judgment for \$25,000 (as awarded by the jury for Lamb’s negligence) plus \$1,997.89 costs.

<sup>8</sup> WISCONSIN STAT. § 895.045 Contributory negligence provides:

(1) COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the persons legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but *any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering*. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed. (Emphasis added.)

#### IV. CROSS-APPEAL: EXPERT FEES

¶17 Finally, Schleusner contends that a legal malpractice case requires legal experts, and that instead of receiving the statutory expert witness fee, he should have been reimbursed for his actual fees as consequential damages. Under WIS. STAT. § 814.04(2), a plaintiff may recover “an expert witness fee not exceeding \$100 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert ....” The circuit court properly allowed these costs and denied Schleusner’s motion for additional fees because his expert happened to be an attorney and charged an amount in excess of the statutory amount. Schleusner provides no legal basis to award actual expert witness fees as either attorney fees or consequential damages. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

#### V. CONCLUSION

¶18 The trial court erred when it submitted only one question on attorney negligence to the jury when the case raised two separate transactions. Because we conclude that the court properly dismissed the negligence claim with regard to settling the personal injury suit, we reverse and remand for a trial solely on whether the delay in disbursements constituted attorney negligence. If found negligent, Schleusner’s damages for the disbursement delay will not exceed \$471.38. We reject Schleusner’s argument on cross-appeal.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

