COURT OF APPEALS DECISION DATED AND FILED

June 10, 2008

David R. Schanker
Clerk of Court of Appeals

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.**

Appeal No. 2005AP2336 **Cir. Ct. No. 2002CV98**

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

GERALD TYLER,

PLAINTIFF-APPELLANT,

V.

THE RIVERBANK,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

ABC INSURANCE COMPANY,

DEFENDANT,

V.

BIANCA TYLER,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerald Tyler, pro se, appeals a judgment, entered on a jury's verdict, finding The Riverbank not liable for losses Tyler claims he suffered when his wife Bianca made withdrawals from certain accounts. In essence, Tyler alleges that the evidence does not support the verdict and that the trial court made certain procedural errors which corrupted the results. Tyler also appeals an order denying his motion to change the jury's answers, reiterating his insufficient evidence argument. We reject Tyler's arguments and affirm.

Background

¶2 With assistance from banker Kathy Jacobson, Tyler opened several accounts at Riverbank in 1996 and 1997, including a checking account, several short-term certificates of deposit (CDs), and an individual retirement account (IRA).[1] Only Tyler's name was on the accounts, and Bianca had no accounts of her own at Riverbank.

¶3 When Tyler set up his IRA and the CDs, it was his intent to use the accounts to fund living expenses of $3,500 to $4,500 per month. He was self-employed as a real estate developer from 1997-2000 and drew no salary from 1997-1999. Each month, Tyler withdrew funds from his CDs to pay bills, and

[1] There is some dispute over the character of the IRA funds. Riverbank states that the funds were put into a CD, but the account is treated like an IRA for tax purposes. Tyler appears to argue he did not authorize this set up, but the exact nature of the account is irrelevant to this appeal. We refer to the account as the IRA to distinguish it from the CD accounts.

from his IRA to pay insurance premiums. Each time the CD balances changed, Riverbank collected prior documentation and issued new certificates. With the exception of one, all CD withdrawals were transferred into Tyler's checking account, not paid out in cash.

¶4 In 1997, Bianca offered to take over the family bookkeeping, balancing Tyler's checkbook each month. She also began making the CD and IRA withdrawals. Most withdrawals, whether by Tyler or Bianca, were done by phone or mail. Riverbank indicated this was not unusual; it had many "snowbird" clients who transacted some way other than in person. The first time Bianca called to complete a transfer, Jacobson informed her the banker would need to speak to Tyler as the account holder. Tyler informed Jacobson that from time to time, he would be out of town and would be asking Bianca to make transactions.

¶5 Sometime in 1999, Bianca informed Tyler that there was $22,000 left in the CD. Although Tyler thought the balance should be between $60,000 and $80,000, he did not investigate the discrepancy. In October 1999, Tyler had surgery for prostate cancer, followed by a period of treatment. By November 1999, there was nothing left in the CD and $39 in the IRA, which had an opening balance of $130,000.

¶6 In June 2000, Tyler sought copies of his records from Riverbank. He believed Bianca had been forging his signature and raiding the accounts to pay for expenses she incurred on her own, including a large Visa bill. In January 2001, Tyler filed for divorce from Bianca. The divorce court found that Bianca had no authority to withdraw from the IRA but had "at least tacit approval" from Tyler for CD withdrawals.

¶7 In March 2002, Tyler sued Riverbank and its insurer, alleging breach of contract, breach of fiduciary duty, and negligence, and seeking exemplary damages and actual attorney fees based on what Tyler asserted were unauthorized withdrawals from his IRA. In November 2002, Tyler filed an amended complaint, seeking additional damages for unauthorized withdrawals from his CDs. Riverbank filed a third-party complaint against Bianca for indemnification and contribution, in the event it were held liable.

¶8 Riverbank sought summary judgment, arguing a three-year statute of limitations applied and had expired. The court granted the motion in part, dismissing Tyler's claims for attorney fees and punitive damages. Riverbank and Tyler both moved for reconsideration. The court denied Tyler's motion on damages but determined the statute of limitations barred Tyler's claims for IRA withdrawals predating March 4, 1999.

¶9 In June 2004, Tyler sought an interlocutory appeal on the statute of limitations ruling. In July 2004, the trial court clarified its prior ruling, stating the statute of limitations applied to both IRA and CD transactions. We denied the motion for an interlocutory appeal.

¶10 Riverbank had filed a motion in limine to preclude Tyler from mentioning his cancer diagnosis, treatment, and effects thereof. The court granted this motion just before the start of trial on March 29, 2005. The jury ultimately concluded that Tyler had given Bianca authority to make transactions; Riverbank had not breached the contract, was not negligent, and was not liable for any loss; Tyler himself was negligent and, in any event, Tyler had not suffered any losses from Riverbank's account management.

¶11 Tyler moved to set aside the verdict or, in the alternative, for a new trial, arguing the evidence was insufficient to support the verdict. The court denied the motion. Tyler appealed. We raised on our own motion the question of the whether the appeal was timely filed. We concluded it had not been and dismissed the appeal for lack of jurisdiction. Tyler petitioned the supreme court for review. The court granted the petition and concluded that the appeal was timely. The case is now before us on the merits.

Discussion

¶12 Tyler makes two types of arguments on appeal. First, he argues the evidence is insufficient to support the jury's verdicts. Second, he argues various trial court errors affected the outcome of the case.

I. Sufficiency of the Evidence

¶13 Tyler moved to change the jury's answers. This is a challenge to the sufficiency of the evidence supporting the verdict. ***Johnson v. Neuville***, 226 Wis. 2d 365, 378, 595 N.W.2d 100 (Ct. App. 1999). We will not upset a verdict if there is any credible evidence to support it, and we will examine the record for evidence to sustain the jury's determination. ***Id.*** The evidence must, under any reasonable view, support the verdict and be sufficient to remove the question from the realm of conjecture and speculation. ***Id.*** If more than one reasonable inference my be drawn, we are obligated to accept the jury's verdict. ***Id.***

A. Breach of Contract

¶14 Tyler alleges the CD paperwork created his contract with Riverbank and cites language stating: "Only those of you who sign the permanent signature card may withdraw funds from this account…." He contends that because

Bianca's signature was not on the card, Riverbank breached the contract by permitting her to make withdrawals. Tyler further complains about eleven allegedly forged signatures and nine withdrawals made with no signature. The IRA paperwork stated that "requests for withdrawal shall be in writing on a form provided by or acceptable to us. The method of distribution must be specified in writing." Tyler complains Riverbank breached the contract by allowing Bianca to make withdrawals by phone.

¶15 Questions five and eight specifically asked whether Riverbank had breached these contracts. The jury answered no to both questions. Tyler asserts there is "simply no evidence in the record to support the jury's finding that The RiverBank's actions in honoring the … withdrawal requests made by Bianca … was not a breach of the contract."

¶16 Tyler's argument completely ignores the first four questions of the verdict. Those questions asked whether Bianca was Tyler's agent for the purposes of transactions on the CDs, whether Bianca had apparent authority to make transactions on the IRA, whether Tyler had ratified Bianca's activity on the CDs, and whether he had ratified the activity on the IRA. The jury concluded Bianca was Tyler's agent, with apparent authority, and that Tyler had ratified her actions.

¶17 An agent is one "authorized to act for or in place of another…." BLACK'S LAW DICTIONARY 68 (8th ed. 2004). Apparent authority "binds a principal to acts of another who reasonably appears to a third person to be authorized to act as the principal's agent…." ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶22, 277 Wis. 2d 350, 690 N.W.2d 835. Thus, the first question is whether there is sufficient evidence to support the jury's conclusions that Bianca was Tyler's agent and had apparent authority. We conclude there was. Jacobson

testified Tyler had informed her that Bianca would be making withdrawals for him from time to time. Moreover, Tyler admitted that he knew Bianca was making arrangements for the monthly transfers from his CDs to his checking account because he had authorized her to do so.

¶18 It was also appropriate for the jury to conclude Bianca had apparent authority. Whether Tyler intended to give her authority or not, it would have reasonably appeared to Riverbank, as the "third person," that Bianca was authorized to act as his agent for IRA transactions. In any event, Tyler ignores the apparent authority argument. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶19 The second question is whether there is sufficient evidence that Tyler ratified Bianca's actions. Ratification is "a definitive manifestation of intent to become a party to the transaction done or purported to be on [one's] account." ***M&I Bank v. First Am. Nat'l Bank***, 75 Wis. 2d 168, 181, 248 N.W.2d 475 (1977). Here, Tyler's intent was manifested by his lack of protestation.

¶20 In 1999, when Bianca informed Tyler of the balance in the CD and Tyler thought it was in error, he did not investigate. He received monthly statements for his checking and CD accounts, showing the account balances. Deposit slips—reflecting the funds put in the checking accounts—were sent with each statement. Every time a CD had a withdrawal, Riverbank issued a new certificate for the account's new balance. As to his IRA account, Tyler was provided annual summaries for 1997 though 2000 and received 1099-R tax forms reflecting distributions from the IRA in 1998 and 1999. Tyler also signed tax returns for those years, reflecting IRA payments.

¶21 The CD and IRA documents, which Tyler says created the contractual relationship, require account holders to dispute questionable transactions within sixty days of their occurrence, but Tyler first complained to Riverbank in May 2000. Moreover, even had Tyler never planned to let Bianca access the accounts, he was alerted to her attempts when Jacobson called him during Bianca's first effort to make a withdrawal. Had Tyler not wanted Bianca to make transactions, he could have informed Jacobson at that time. Given the information available to him at any particular time in his bank records, and given that Tyler advised Riverbank Bianca would be making some transactions, it was reasonable for the jury to infer he had granted her agency and ratified her subsequent actions.

¶22 Turning to the breach questions, there was sufficient evidence for the jury to find Riverbank had not breached the contract. Tyler argues that because authorized individuals had to be listed on the signature card, Riverbank committed a breach when it let Bianca make withdrawals. But because the jury found Bianca was Tyler's agent, whenever she made a transaction, it was as though Tyler himself were making the transaction. Tyler also contends that Bianca forged his signature and that Riverbank allowed withdrawals without signed withdrawal forms. Although courts have struggled with the notion, the trend seems to be that even forgeries can be ratified—sometimes, there may be a good reason for allowing ratification—so long as the opportunity to pursue criminal charges is not blocked. *See* ***id.*** at 178-80. Moreover, we agree with Riverbank—the language about the signature card only indicates *who* may make a withdrawal, not *how* it may be transacted.

¶23 Tyler also complains that the IRA language, requiring written withdrawal requests, meant that Riverbank breached whenever there was an

unwritten request. However, this obligation is one Riverbank imposes on its customers, not one imposed on Riverbank. Riverbank itself was free to waive that requirement. Also, the record suggests that Riverbank would perform the transaction, then send out the request forms to be completed and returned. Ultimately, there was sufficient evidence permitting the jury to conclude there was no breach of contract.

B. Negligence

¶24 Tyler also alleged negligence, complaining Riverbank failed to exercise ordinary care by allowing withdrawals without signatures or with forged signatures and by failing to verify Tyler's intent. He asserts there is insufficient evidence for the jury to have concluded Riverbank was not negligent. Again, this argument ignores the findings Bianca was authorized to act on his behalf.

¶25 In any event, both parties presented expert testimony. Both experts testified that it was within industry standards to permit banking by mail or phone, which might not permit a signature, particularly when the transaction was not a cash withdrawal but a transfer between two accounts belonging to the same individual. Both experts agreed that if Riverbank complied with Tyler's intent, it was not negligent. Both agreed that the customer's intent should be verified but that there can be multiple ways to do so.[2] As noted, Tyler's intent was demonstrated by his failure to protest transactions despite the volumes of paperwork Riverbank set to him, reflecting transactions and balances. Tyler even

[2] Tyler's expert was not aware of the evidence Tyler had given Bianca authority to act as his agent. Because this demonstrates that the expert lacked complete facts, it would have been well within the jury's province to accept Riverbank's expert's testimony in the event of any discrepancies between the experts.

conceded that if he had read the paperwork Riverbank gave him, he probably would have recognized a problem sooner. Thus, the jury could properly infer that Tyler's negligence, not Riverbank's, was the cause of his loss.

II. Alleged Trial Court Errors

A. Cancer Evidence

¶26 Tyler claims the trial court erred when it failed to let him present evidence about his cancer treatment. Tyler argues this evidence would have explained his failure to check his statements to the jury, likely mitigating its perception of his negligence.

¶27 The admission of evidence is generally left to the trial court's discretion. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶30, 251 Wis. 2d 45, 640 N.W.2d 764. Even otherwise admissible, relevant evidence may sometimes be excluded if the court determines that the evidence's prejudicial nature outweighs its probative value. WIS. STAT. § 904.03 (2005-06). The court properly exercises its discretion when it reviews the relevant facts, applies the correct law, and provides a reasonable basis for its decision. ***Mared Indus.***, 277 Wis. 2d 350, ¶9. We reverse only if the trial court erroneously exercises its discretion.

¶28 The trial court here concluded that the evidence of Tyler's cancer and treatment was irrelevant or, alternatively, unfairly prejudicial. Although we do not go so far as to say this evidence was irrelevant as a matter of law, we conclude the court properly exercised its discretion when it concluded any probative value might be outweighed by sympathy from the jury. The court knew Tyler was a sophisticated businessman with corporate finance experience who was

involved in certain professional endeavors during his treatment, undercutting the suggestion that his cancer distracted him from more mundane tasks like reviewing bank statements. Because of the risk the jury would be unduly prejudiced by sympathy rather than facts, the court properly exercised its discretion when it excluded evidence of Tyler's diagnosis and treatment.[3]

B. Other Alleged Errors

¶29 Tyler complains the trial court erred in applying a three-year statute of limitations instead of a six-year statute of limitations and in barring his claims for fraudulent transactions predating March 4, 1999. Determining the applicable statute of limitations is a question of law. ***South Milw. Savings Bank v. Barrett***, 2000 WI 48, ¶18, 234 Wis. 2d 733, 611 N.W.2d 448. While we agree with Riverbank on the merits—the applicable statute of limitations is three years—we need not reach the merits, because the jury was actually asked to determine if Tyler was damaged by transactions prior to March 4 and found that he was not.

¶30 Tyler also complains it was error for the court to dismiss his punitive damages claim. The question is irrelevant. Because we affirm the jury's findings, Tyler is not entitled to punitive damages.

¶31 Finally, Tyler claims the trial court was biased against him. The only evidence he cites in support of this argument is the court's adverse rulings, which are insufficient to demonstrate bias. *See* ***Liteky v. United States***, 510 U.S.

[3] Moreover, this is a double-edged sword: evidence of the cancer bolsters Riverbank's agency argument. If Tyler wants to claim his condition and treatment left him incapable of tending to his banking, it lends further credence to the notion that he authorized Bianca to be in control of transferring funds to pay bills. In any event, Tyler still mentioned his cancer indirectly, despite the court's prohibition.

540, 555 (1994). Further, to the extent this issue is raised for the first time on appeal—Tyler never sought judicial substitution or asked for recusal—it is waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

By the Court.—Judgment and order affirmed.

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