COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2002

Cornelia G. Clark
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. 01-2011 Cir. Ct. Nos. 99CV5303 & 00CV1705

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

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions.*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Ronald and Shannon Morters appeal the order granting partial summary judgment, and a later judgment entered in the respondents' favor. The Morters complain that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents have filed a motion requesting frivolous costs on appeal. We affirm all the trial court's rulings. Further, we deem this appeal frivolous. Thus, we remand this matter to the trial court for a determination of frivolous costs on appeal.

I. BACKGROUND.

¶2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries. The Morters and their granddaughter hired Charles Barr as their

[1] Judge John A. Franke proceeded over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶3 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the Morters did not have just cause to discharge Barr or the second law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶4 Morters and his granddaughter then started legal malpractice suits against Barr,[2] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to

[2] Ronald's wife, Ann, died before either suit was filed.

demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters case-in-chief.

II. ANALYSIS.

A. *The trial court properly exercised its discretion when consolidating the suits of Ronald and Shannon Morters.*

¶5 The Morters argue that the trial court erroneously exercised its discretion when it consolidated their two separate suits. They contend that the two actions were "distinct" from one another, and their consolidation led to Shannon Morters' lawsuit being "lost in the shuffle." We disagree.

¶6 WISCONSIN STAT. § 805.05 (1999-2000)[3] permits a court to "order all the actions consolidated" if they "might have been brought as a single action." The trial court's decision to consolidate actions is reserved for the sound discretion of the circuit court. *See* ***Fire Ins. Exchange v. Basten***, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). Thus, we look to see whether the trial court erroneously exercised its discretion.

¶7 Here, the trial court's exercise of discretion in consolidating the two separate suits was proper. As noted by the respondents, the two complaints contained numerous identical paragraphs, made the identical claims, and sought

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the same damages.[4] Moreover, the two legal malpractice cases emanate out of the same facts. As to the allegation that Shannon Morters' suit was "lost in the shuffle," it is apparent from the accident reports attached to the two complaints that Shannon's injuries were minor as compared to Ronald's and, thus, more time may very well have been spent on discovering the extent of Ronald's injuries and whether they were permanent. Moreover, Ronald was employed at the time of the accident and had other insurance claims. However, while these factors may have required more time to be devoted to Ronald's claims, they do not necessarily lead to the conclusion that Shannon's action was "lost in the shuffle." Shannon can point to no damages that occurred because of the consolidation. Consequently, contrary to the assertion made to this court, we conclude: (1) Shannon's case was not "distinct" from that of her grandfather in any important respects; and (2) Shannon was not harmed by the consolidation.

¶8 The trial court's decision to consolidate was based upon the interests of judicial economy and the fact that the respondents would not have to defend against two suits in two different courts. This was a proper exercise of discretion.

B. *The award of partial summary judgment was appropriate.*

¶9 The Morters next argue that the trial court erred in granting partial summary judgment to the respondents. Although the Morters' claim in this regard is not entirely clear, the Morters seem to be arguing that the trial court erred in not accepting the opinions of their expert witnesses. In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same

[4] Ronald Morters' complaint stated the damages in specific dollar amounts; Shannon Morters' complaint does not specify a dollar amount.

standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. ***Reel Enters. v. City of LaCrosse***, 146 Wis. 2d 662, 667, 431 N.W.2d 743 (Ct. App. 1988).

¶10 The Morters submit that their expert witnesses "provided … opinions concerning the failure of Attorney Barr to properly represent the plaintiffs under the standard of care required of an attorney in such a case." The Morters contend that because of the existence of this testimony, the motion for summary judgment should have been denied in all respects.[5] We disagree.

¶11 The trial court granted summary judgment on the claims that Attorney Barr failed to obtain a jury trial, and that he failed to address the issue of whether he had a conflict of interest in representing all three parties.[6] As the trial court aptly noted: "It is a question of whether there is any causal connection between the alleged negligen[t] acts – alleged negligen[t] act and any loss by the plaintiffs and I'm satisfied that there is not."

¶12 We agree with the trial court that while there was expert testimony that construed Barr's acts as being negligent, there was no evidence that these alleged negligent acts caused the Morters any damages. Thus, the trial court correctly determined that the Morters still had the right to a jury trial when Barr

[5] Attorney Barr argues that the trial court should have granted his entire summary judgment motion. Because those claims are dealt with in the discussion of the directed verdict order, we decline to address them here.

[6] The trial court also granted summary judgment on Ronald Morters' allegations that Attorney Barr mishandled some of his insurance. No reply was offered to the respondents' motion for summary judgment, and summary judgment was granted on those claims as well.

was discharged, and that there was no showing that the timing of the case caused the Morters any damages.

¶13 With respect to the issue of a possible conflict of interest, the trial court stated: "The only argument that arguably flows out of this conflict issue is somehow this loss of a jury trial right, and once again there's nothing but speculation to link that alleged loss to any damage that the Morters suffered." We agree with the trial court. Even if Attorney Barr's actions could be viewed as negligent in those two respects, the Morters were unable to show how they were damaged.

C. *The trial court properly granted the respondents motion in limine.*

¶14 The Morters next argue that the trial court "improvidently granted parts of the motion in limine." Again, it is difficult to discern from the Morters' brief exactly how the trial court erred in granting the motion in limine.

¶15 The trial court ruled that the Morters' witnesses could not discuss any claims of negligence for matters that the trial court had already excluded in its summary judgment ruling. The trial court determined that it was inappropriate for one of the Morters' expert witnesses to offer an opinion as to what amount of money a jury would have returned as a verdict in the accident case. The trial court also granted the respondents' motion seeking to exclude any testimony from one of the Morters' experts alleging Barr was negligent for failing to make an earlier demand on the insurance company for settlement. Also granted was dismissal of Morters' contention that Barr was negligent in failing to send Ronald Morters to a psychiatrist or psychologist. However, the trial court only ruled on these two claims after the Morters' attorney informed the court that no such testimony was planned.

¶16 At the motion hearing, considerable time and argument were devoted to the issue of exactly what Morters' expert witness from California was going to testify to concerning the value of the Morters' cases. Ultimately, the trial court prohibited this expert witness from stating that the insurance company would have paid more money if a certain demand process had been utilized by Attorney Barr. Later, the trial court also ruled that this expert was precluded from giving testimony as to the value of the case because what the insurance company would have paid was determined by an expert witness who represented the insurance company in the underlying suit. The insurance company's attorney testified that what the insurance company offered at mediation was the maximum the Morters would have obtained.

¶17 The Morters' brief addressing these matters is just that – very brief. Excluding several long quoted passages from cases, the Morters' argument consists of the following:

> The Circuit Court engaged in a process of denuding the plaintiffs' cases by incrementally excluding the experts testimony. If an expert is qualified he should be allowed to give his opinion not just some of his opinions but all of his opinions that are relevant on the issue in dispute.
>
> The fundamental principles that apply to expert testimony in Wisconsin were announced by Chief Judge Hallows in *Cramer v. Theda Clark Memorial Hospital*, 45 Wis.2d 147, 172 N.W.2d 427 (1969).
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> ….
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> There is little case law in Wisconsin addressing the procedure followed by the trial court in the cases at bar. It is respectfully submitted that is because such a procedure is virtually unprecedented. The gatekeeper function of a court is simply to determine whether or not an expert is qualified. If so, his opinions should be admitted into evidence. It is clear that in Wisconsin in a legal malpractice case expert testimony is usually required but it is not parsed.

> ….
>
> The plaintiff's expert witnesses in the case at bar rendered the same kind of opinions that were given in *Helmbrecht* yet the trial court rejected the opinions.

In their reply brief, the Morters amplify their unhappiness with the trial court's ruling and state:

> Again, it is very important to note that the respondents' brief is totally bereft of any discussion of the standards that question the admissibility of expert testimony or a discussion of the specific expert testimony rendered in the opinion letters of Attorneys Tessier and Schulz set forth at Appellants' Appendix pages 169-178. The bottom line error in the case at bar is that the experts were not allowed to testify regarding their opinions because of the continuing successful obstruction of the defendants.

Thus, it would appear that the Morters' argument is that their expert witnesses should have been permitted to testify to all their opinions, regardless of whether any foundation for those opinions was present. This is basically a rehash of the Morters' arguments concerning the trial court's summary judgment decision.

¶18 Under WIS. STAT. § 907.02, a person may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education." An expert's competence may be shown by experience or technical and academic training, so long as the witness knows something beyond that which is generally known in the community. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991).

¶19 The trial court's determination to admit or exclude evidence is discretionary and will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App.

1992). Here, the trial court did not prevent the expert witnesses from testifying solely because of their lack of expertise, but rather, the trial court ruled that they could not give certain opinions about Attorney Barr's negligence because the Morters had failed to establish that they were damaged by those acts. Without a showing of any damages, their opinions about Barr's negligence in these areas were irrelevant to the case. Thus, the trial court's ruling is not clearly erroneous.

D. *The trial court correctly directed a verdict for the respondents.*

¶20 Finally, the Morters argue that the trial court erred when it directed a verdict for the respondents at the close of their case. The Morters' major contention is that the trial court directed the verdict because the trial court "did not comprehend or understand the expert testimony … regarding the 'value of the case,'" and that the trial court "viewed the evidence in the light most favorable to the defendants." The record belies their arguments.

¶21 WISCONSIN STAT. § 805.14(1) sets forth the test for granting a motion challenging the sufficiency of the evidence, and WIS. STAT. § 805.14(3) authorizes the bringing of such a motion at the close of the plaintiff's case.

> 805.14 **Motions challenging sufficiency of evidence; motions after verdict.**
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> **(1)** TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.
>
> ….

> **(3)** MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

Stated differently, the motion to dismiss must be denied unless no jury could disagree on the facts or inferences to be drawn and no credible evidence exists to support a verdict for the plaintiff. *See* ***State v. Joerns Furniture Co.***, 114 Wis. 2d 324, 328, 338 N.W.2d 331 (Ct. App. 1983).

¶22 Here, the trial court gave a detailed and lengthy decision as to why the motion had to be granted. The trial court reiterated the procedural history of the case and its rulings on the various motions. It noted that, as a result of its earlier rulings, the trial was based on a narrow theory of negligence that survived the motions. Essentially, at trial, the Morters contended that had Attorney Barr filed the cases earlier, preserved evidence (such as by taking pictures of the injuries), made a proper demand, contacted the insurance company earlier with his settlement demand, made separate settlement demands for the three parties, and filed a statutory settlement demand, the Morters would have recovered more money. Thus, the trial court outlined the theories of the case as the suit began and as they evolved throughout the jury trial, ultimately determining: "It's overwhelmingly clear to me that a jury, based on this evidence, can only speculate, at best, about what would have happened.… But ultimately it's simply speculation as to whether things would have happened any differently had Mr. Barr not been negligent as was alleged here." We agree.

¶23 No reliable evidence was produced that the insurance company would have paid more money had an offer been made earlier, or paid more if the

demand presented to the insurance company had been better packaged. Indeed, the only testimony touching on the insurance company's intentions suggested that the company would not have offered any more money than the original offer regardless of the way the facts were presented; and it must be remembered that the Morters rejected this offer. Further, successor counsel did submit separate offers and the insurance company declined to accept them, so Barr's alleged failure to submit separate offers did not harm the Morters. Finally, the evidence reflects that Barr was not authorized to submit an offer that would have triggered the 12% interest under WIS. STAT. § 807.01(4).[7] The Morters would only accept a higher award, which was never obtained here. Therefore, nothing was presented to the jury that would have permitted the jury to find that Barr's negligence caused the Morters any damage.

¶24 Regarding the Morters' contention that the trial court failed to understand the theory of the "value of the case," they misread the trial court's written decision. As the trial court noted, the "value of the case" evidence discussed the process a *lawyer* would use in valuing the case, not how a *jury* would do so. Also: "The only evidence of an objective value of the case – of what plaintiffs 'should have [ ] received' – was the arbitrator's award, less the liability discount. This was, of course, the amount they actually did receive."

[7] WISCONSIN STAT. § 807.01(4) provides:

> **(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).

Thus, the trial court properly directed a verdict in favor of the defendants because no credible evidence or inferences from the evidence would have permitted a jury to award damages to the Morters.

E. *Frivolous costs on appeal are appropriate here.*

¶25 The respondents have filed a motion seeking frivolous costs. They contend that the appeal of this matter is frivolous because the briefs filed on behalf of the Morters are totally devoid of a factual presentation, and are most likely deficient under WIS. STAT. § 809.19. The Morters have not replied to this request. We agree that this appeal is frivolous.

¶26 WISCONSIN STAT. § 809.25(3) permits this court to find an appeal frivolous if "the party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal or existing law." Here, the briefs did not entirely comply with the requirements set forth in WIS. STAT. § 809.19(1) – (3).[8] The description of the

[8] WISCONSIN STAT. § 809.19(1) – (3) provide:

> 809.19 **Rule (Briefs and appendix).**
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> **(1)** BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:
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> (a) A table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited.
>
> (b) A statement of the issues presented for review and how the trial court decided them.

(continued)

case is vague and the issues are poorly presented. Often extensive portions of the transcripts needed to be read in order to understand the arguments presented. In

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> (c) A statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor.
>
> (d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.
>
> (e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.
>
> (f) A short conclusion stating the precise relief sought.
>
> (g) Reference to an individual by first name and last initial rather than by his or her full name when the record is required by law to be confidential.
>
> (h) The signature of the attorney who files the brief; or, if the party who files the brief is not represented by an attorney, the signature of that party.
>
> (i) Reference to the parties by name, rather than by party designation, throughout the argument section.
>
> **(2)** APPENDIX. The appellant's brief shall include a short appendix providing relevant trial court record entries, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

some instances, the reader needed to guess at the Morters' arguments. Further, the trial court's ruling, that while negligence was shown no causation or damages were proved, was never addressed. Consequently, we remand this matter to the trial court for a determination of the frivolous costs on appeal.

By the Court.—Judgments and orders affirmed and cause remanded with directions.

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