COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1304

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

VALLEY BANK NORTHEAST,
a Wisconsin Banking Corporation,

Plaintiff,

v.

ANGELA L. BARTA,

Defendant-Third Party Plaintiff-Respondent,

VALLEY TRUST COMPANY,

Defendant-Third Party Plaintiff,

v.

LOUIS H. LA COUNT,

Third Party Defendant-Appellant.

APPEAL from an order and a judgment of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Louis LaCount appeals an order and a judgment that awarded Angela Barta $205,838.51 for damages she suffered from his fraudulent investment scheme. This amount included $100,000 in principal on a promissory note Barta had given Valley Bank, Northeast, to borrow the $100,000 she invested in LaCount's scheme. The $205,838.51 also included (1) $12,561.03 in interest at 12.5% that accrued on the $100,000 note, (2) $64,722.59 in additional interest at 11.5% that accrued on the sum of the $100,000 note plus the $12,561.03 of 12.5% accrued interest, and (3) $23,333.33 in attorney fees she incurred for opposing the bank's attempt to collect a second unrelated $65,000 promissory note she had previously given the bank. LaCount admits that he encouraged Barta to borrow the $100,000 in order to defraud her of it in his investment scheme.

Nonetheless, LaCount raises several arguments on appeal seeking reduction of the damage award: (1) the $64,722.59 ultimately compensated Barta twice for another award she had already received concerning the unrelated $65,000 note; (2) the trial court should have denied Barta attorney fees under the American Rule; (3) the attorney fees were excessive; (4) LaCount's bankruptcy case extinguished his liability for the attorney fees and other costs; (5) Barta should recover interest at the prejudgment statutory 5% rate, not the 11.5% and 12.5% rates; and (6) the trial court either should have required Barta to return 21,000 shares of common stock LaCount gave her to repay her investment, or should have reduced her damage award for the stock's value. We reject these arguments and affirm the damage award.

None of LaCount's arguments have merit. First, Barta's $64,722.59 award did not represent a double recovery related to the $65,000 note she gave the bank. Rather, the $64,722.59 award represented the interest Barta incurred on the $100,000 note she gave the bank on the basis of LaCount's fraud. She invested the $100,000 she borrowed from the bank in LaCount's fraudulent investment scheme. Viewed in this context, such interest was a consequence of LaCount's fraud and therefore recoverable damage. It was mere coincidence that the amount of interest was almost identical to the $65,000 note Barta had originally given the bank. Injured persons may recover all damages reasonably caused by someone's fraud, including consequential damages. *See* ***Gyldenvand v. Schroeder***, 90 Wis.2d 690, 698, 280 N.W.2d 235, 239 (1979); ***Luebke v. Miller***

Consulting Engineers, 174 Wis.2d 66, 75-76, 496 N.W.2d 753, 757 (Ct. App. 1993); ***Costa v. Neimon***, 123 Wis.2d 410, 417, 366 N.W.2d 896, 901 (Ct. App. 1985). We see no reason why the interest Barta incurred on the $100,000 note was not recoverable consequential damage.

Second, the trial court had a sufficient basis to award Barta the attorney fees she incurred in litigation with the bank on her $65,000 note. Although Barta did not give the bank the $65,000 note as a result of LaCount's fraud, such fraud depleted her financial resources and prevented her from repaying the note. This connection warranted the attorney fees award, despite the fact that the American Rule normally bars such recoveries. Wisconsin applies an exception for wrongful acts that involve someone like Barta in litigation with others or that force her to incur expense to protect her interests. *See* ***Weinhagen v. Hayes***, 179 Wis. 62, 65, 190 N.W. 1002, 1003 (1922); ***Meas v. Young***, 142 Wis.2d 95, 101-06, 417 N.W.2d 55, 57-59 (Ct. App. 1987). Moreover, the attorney fees were independently recoverable as fraud based consequential damages, regardless of the ***Weinhagen*** rule. Third, LaCount did not challenge the amount of attorney fees in the trial court and has therefore waived the issue on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Fourth, LaCount did not raise his bankruptcy discharge or statutory interest issues until his reply brief. We therefore do not address them. ***Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

Finally, LaCount has not shown that the 21,000 shares of Nutech Engineering International, Inc., common stock he provided Barta mitigated her damages and compelled a reduction of the damage award. LaCount never demonstrated that the Nutech stock had any value, at either the time of the hearing or of its transfer to Barta. The Nutech stock had no active market. The corporation was privately held. Its president testified that the stock had registered a book value of $0.21 per share at some unspecified time in the past. He did not express an opinion on the stock's fair market value, although he believed that the stock's book value might now be higher than $0.21 per share. This testimony was insufficient to establish the fair market value of the stock, either at the time of the hearing or its transfer to Barta. LaCount did not show that the book value had any connection to fair market value.

The information LaCount provided was equally inconclusive. By affidavit and brief commentary at the end of the hearing, LaCount claimed that

the Nutech stock was worth $52,000 to $52,500 in November 1990, or $2.50 per share, when Nutech issued him the stock in exchange for real estate and in order to avoid a potential lawsuit. LaCount alleged that Nutech furnished him an IRS Form 1099 for tax year 1990, declaring the stock's value as $52,000 to $52,500 at the time of the exchange, and that the IRS accepted this valuation. He also claimed that he transferred stock ownership to Barta in November 1990, while retaining possession of the stock certificate himself. Although the stock certificate contains a nominal endorsement date of November 26, 1990, LaCount provided no other evidence confirming the transfer's alleged transaction date. For unknown reasons, LaCount did not forward the stock certificate to Nutech to change registration until January 28, 1992. Nutech changed registration and issued Barta a new stock certificate on February 18, 1992.

This evidence did not establish that the stock was worth $52,000 to $52,500, either at the date of the hearing or at whatever time Barta may have acquired ownership. LaCount's claims about Nutech's IRS Form 1099 were hearsay, and he made no attempt to elicit corroborative proof from Nutech's president. Although the president alluded to the fact that Nutech and LaCount may have mutually set the stock's value at $52,000 to $52,500 when they consummated the real estate transaction, the president then equivocated and testified in terms of book value, without specifically equating book value with fair market value. In addition, whatever value LaCount and Nutech may have accorded privately held stock in November 1990 carried little evidentiary weight. LaCount made no attempt to show how he and Nutech arrived at the $52,000 to $52,500 figure, and without such information, the trial court could not judge the figure's accuracy. Further, the November 1990 value had little practical significance to Barta, in light of the fact that LaCount retained possession of the old stock certificate until February 1992. She could not sell the stock and realize its value until Nutech issued her the new stock certificate in February 1992. By then, its value may have changed.

Last, we will not order Barta to return the stock to LaCount. LaCount never asked the trial court for the stock's return and therefore waived the matter. ***Wirth***, 93 Wis.2d at 443-44, 287 N.W.2d at 145-46. Moreover, until LaCount pays what he owes Barta as a result of his fraud, his request for the stock's restitution may well be premature. Restitution is mutual. Ordinarily, someone has no obligation to make restitution unless the other party restores the status quo. *See* ***Chris-Craft Industries, Inc. v. Piper Aircraft Corp.***, 480 F.2d 341, 391 (2d Cir. 1973); ***Lummus Co. v. Commonwealth Oil Refining Co.***, 280

F.2d 915, 928 (1st Cir. 1960); RESTATEMENT OF RESTITUTION § 65, comment a, at 255-56, and § 66, comment a, at 265 (1937). LaCount has not compensated Barta for the damages she incurred as a result of his fraud, and apparently made no attempt to restore the status quo. Under these circumstances, the trial court had no obligation to make any allowance for the Nutech stock.

By the Court.—Order and judgment affirmed.

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