COURT OF APPEALS
DECISION
DATED AND RELEASED

June 4, 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

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No. 95-2522

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

DUFFEY LAW OFFICE, S.C.,

Plaintiff-Respondent,

v.

TANK TRANSPORT, INC.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

Before Fine, Schudson and Myse, JJ.

PER CURIAM. Tank Transport, Inc., appeals from an order granting Duffey Law Office, S.C., over $20,000 in legal fees and dismissing Tank Transport's counterclaim for legal malpractice. We affirm.

This case is a reprise of our decision in ***Duffey Law Office, S.C. v. Tank Transport, Inc.***, 194 Wis.2d 674, 535 N.W.2d 91 (Ct. App. 1995) ("Duffy I"). The general factual and procedural background of this dispute is recited in that case and we incorporate it here by reference. Additional specific facts relative to disposition of the instant appeal will be set forth as necessary.

In ***Duffey I***, we held that Thomas Duffey, as the attorney for Tank Transport, in an effort to provide two sets of bargaining units in order to avoid payments into the Teamsters Central States pension fund, had represented himself to be an expert in the field of labor law, collective bargaining agreements and pension funds, and therefore had to meet the level of professional competence consistent with that claimed expertise. The trial court decision did not clarify which standard (that of the general practitioner or expert) it had applied in concluding that Duffey had not been negligent. On remand, the trial court applied the expert standard and determined that Duffey was not negligent. The trial court issued a new decision and order identical to the original one except that it clarified the standard:

> That based on the state of the law at the time, Duffey exercised the degree of knowledge, care, skill, ability and diligence usually possessed by lawyers engaged in the practice of law in this state, *who present themselves as experts in the areas of labor law, collective bargaining agreements, and pension fund contribution laws.*

(Emphasis added.)

Tank Transport argues that the trial court's finding of no negligence was clearly erroneous. Tank Transport also argues that Duffey was negligent in failing to warn him of the precise risks associated with the dual collective bargaining agreements and, therefore, that the trial court erred in concluding that Tank Transport was contributorily negligent. Finally, Tank Transport argues that it would be "inequitable" to require it to pay the cost of defending Duffey's "dual" plan.

A claim of attorney malpractice presents a "mixed question of fact and law, because the trier of fact is confronted with a dual problem—what, in fact did [the attorney] do or fail to do in the particular situation, and what would a reasonable or prudent attorney do or have done in the same circumstance." ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 112, 362 N.W.2d 118, 128 (1985). We review the trial court's factual findings under the "clearly erroneous" standard. *See* § 805.17(2), STATS. Although we review legal questions or conclusions *de novo*, we give some deference to the trial court's determinations when a conclusion of law is intertwined with factual findings. ***Armor All Prods. v. Amoco Oil Co.***, 194 Wis.2d 35, 47, 533 N.W.2d 720, 724 (1995).

Tank Transport first argues that the trial court's determination that Duffey had not committed malpractice regarding the creation of the plan and the alleged failure to warn about its risks is clearly erroneous. Tank Transport's argument, on appeal, essentially emerges as an effort to retry the case based on its theory that the summary judgment against it in federal court invalidating the labor agreement/pension plan *ipso facto* means that Duffey was negligent. We conclude, however, that the trial court's determination was not clearly erroneous.

In addition to his own expert testimony, Duffey offered the expert testimony of John Loomis, a shareholder in Beck, Chaet, Loomis, Molony & Bamberger, S.C. Loomis, prior to his own labor practice, worked for the National Labor Relations Board for a number of years. Loomis testified that Duffey had created two valid, separate collective bargaining units for Tank Transport. He further stated that an attorney exercising reasonable care in 1987 would have concluded that the contracts validly established two separate units and that Tank Transport would have prevailed in federal court. Loomis concluded that Duffey had not been negligent under either standard (general practitioner or expert).

Loomis also testified that the plan devised by Duffey "appeared to be the only viable alternative" to Tank Transport's problems with non-union trucking competition. Loomis stated that similar plans had been adopted by some of the largest trucking firms in the country. Loomis also stated that the federal district court relied heavily on ***Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Service, Inc.***, 870 F.2d 1148 (7th Cir. 1989),

in ruling against Tank Transport on summary judgment. Loomis testified that ***Gerber***, unlike Tank Transport's situation, involved one bargaining unit. Loomis stated that no reasonably prudent attorney in 1987 would have anticipated the result of ***Gerber*** because, prior to its holding, the Fund did not pursue noncompliant employers.

Tank Transport points to the testimony of its expert, Attorney Alan Gunn, in support of its argument. Gunn testified that the dual plan would cause adverse selection, which an expert practitioner should have known would draw an objection from the Fund. Gunn testified that Duffey had been negligent. Gunn also acknowledged, however, that Duffey's position in the federal litigation was reasonable and that as of 1987, the Fund had not litigated the dual plan scheme. The trial court was not persuaded by Gunn's testimony that Duffey had been negligent. It is the function of the fact-finder, here the trial court, to assess the weight and credibility of the testimony presented at trial and reviewing courts cannot interfere with the reasonable inferences drawn from the credible evidence by the fact-finder. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). We see nothing clearly erroneous in the trial court's evaluation of Gunn's testimony.

Next, Tank Transports specifically attacks the trial court's findings of fact 12-17 and 20. We address each argument in turn.

Finding of Fact 12 states: "Duffey was not aware prior to 1987 that the Fund would not recognize two separate bargaining units with the same employer (dual)." In support of its challenge to this finding, Tank Transport cites ***Central Hardware Co. v. Central States, Southeast & Southwest Areas Pension Fund***, 770 F.2d 106 (8th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986), decided approximately two years prior to Duffey's plan. In ***Central Hardware***, the employer, hoping to cut pension benefits expenses to the Fund but also hoping to avoid withdrawal liability, began making contributions for new hires to a different pension plan pursuant to a separate agreement with the union. ***Id.*** at 108. The Fund terminated the employer from the Fund, and the Eighth Circuit Court of Appeals held that the Fund was justified in doing so. Tank Transport argues that ***Central Hardware*** should have put Duffey on notice that "attempts to evade pension-fund contributions by methods that impact a fund's actuarial soundness were illegal." The facts in ***Central Hardware***, however, were different than the operative facts in this dispute. In ***Central Hardware***, the

union employees were part of one bargaining unit that was subject to a consensual agreement that provided for different pension plan contributions. In contrast, here the plan involved two separate bargaining units.

Finding of Fact 13 states: "Duffey advised Tank to keep the lines of distinction between the two groups [of employees] clear." This finding is not clearly erroneous. Jerry Boedeker, President of Tank Transport, Inc., admitted that Duffey had advised him to keep separate rosters for the two sets of employees.

Tank Transport also objects to Findings 14-16, which state:

> 14. That Duffey advised Tank that there are risks inherent in every bargaining agreement, and the Fund's reaction could not be predicted with certainty.
>
> 15. That Duffey considered the dual arrangement to be legally and practically separate and distinct from an arrangement where a single bargaining unit differentiated between employees in pension contributions (split).
>
> 16. That Duffey had previously negotiated bargaining agreements for other employers involving Classic and SSD units.

Tank Transport, however, points to nothing in the evidence that would establish anything clearly erroneous in these findings. Indeed, the record supports the trial court's findings.

Finding of Fact 17 states: "That prior to 1987, Duffey had no notice that the Fund would refuse to recognize a dual bargaining agreement arrangement." Again, Tank Transport's challenge to this finding is based on its interpretation of ***Central Hardware***—an interpretation that did not control the trial court's conclusion.

Finding of Fact 20 states: "That Duffey reasonably relied on Local 200 to forward required documentation to the Fund." Contrary to Tank Transport's assertions, however, Finding 20 is supported by the record. Duffey and Kenneth Friesner, Secretary-Treasurer of Teamsters General Local 200, testified that it was industry custom for the local union to send copies of new bargaining agreements. This finding is not clearly erroneous.

Tank Transport also attacks the trial court's Conclusion of Law No. 4, which states: "That Duffey, as an expert in this specific area of the law reasonably and sufficiently informed Tank of risks inherent in the plan including potential withdrawal liability." Tank Transport contends that this means that the trial court concluded that Duffey specifically warned it of the risk of contribution liability as well as withdrawal liability. Tank Transport claims that because Duffey maintains the risk represented by the federal lawsuit was unforeseeable, he, therefore, could not have warned Tank Transport about contribution liability and, thus, the trial court's conclusion was wrong. We disagree. The trial court's specific mention of withdrawal liability reflected its focus on withdrawal liability at the time the contracts were drafted in light of the state of law at that time and given the Fund's history of threatening to oust an employer for noncompliance.

Tank Transport also challenges Conclusions of Law Nos. 2, 3 and 8, which state:

> 2. That Tank chose to defend the Federal lawsuit, though it now assigns responsibility for the judgment to Duffey's negligence.
>
> 3. That if Duffey's negligence were so clear, the Federal lawsuit should have been compromised and resolved.
>
> . . . .
>
> 8. That although there were some risks apparent in the bargaining agreements, e.g. the Fund may posit that "dual" is "split" and would not recognize the Tank arrangement, neither the concept of risk nor

> acceptance of risk by itself constitutes negligence where, as here, the defendant knew there were risks.

Tank Transport argues that these three conclusions of law suggest that the trial court, in assessing Duffey's alleged malpractice, held Tank Transport partially responsible for the result of the federal litigation under the theories of "assumption of risk and/or contributory negligence". Contrary to Tank Transport's arguments, however, these conclusions deal with its failure to settle the federal litigation before judgment or prior to the appeal deadline. Indeed, Tank Transport: (1) continued to make 401(k) contributions for SSD drivers; (2) failed to settle with the Fund either prospectively or retroactively; (3) did not renegotiate the agreements with the union; and (4) renegotiated the SSD agreement with the union in 1992. Indeed, Tank Transport did elect to continue its course of conduct and defense of the federal litigation after it retained successor counsel and Duffey had withdrawn from the case. The conclusions reflect no legal error.

Finally, Tank Transport makes a "catch-all" argument that it would be "inequitable" to require it "to bear the costs of defending Duffey's negligent scheme." Tank Transport cites no authority in support this argument and, therefore, we decline to address it. *See* ***Lerner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988).

By the Court. – Order affirmed.

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