COURT OF APPEALS DECISION DATED AND RELEASED

September 26, 1995

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. 93-1520

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

JAMES R. SAKAR,

Plaintiff-Respondent,

RANDOLPH E. HOUSE
and FRISCH DUDEK, LTD.,

Respondents,

v.

GEORGENE QURESHI,

Defendant-Co-Appellant,

O'CONNOR & WILLEMS, S.C.,

Co-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Affirmed and cause remanded with directions*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Georgene Qureshi and O'Connor & Willems, S.C., a law firm, (the co-appellants) appeal from a judgment: (1) awarding Qureshi's former attorney, James R. Sakar, legal fees for representation in her earlier divorce action; (2) dismissing Qureshi's counterclaim for legal malpractice against Sakar; and (3) awarding Sakar and his attorneys, Frisch Dudek, Ltd. and Randolph E. House, frivolous costs.

The co-appellants present six issues for our review: (1) whether the trial court erred when it denied Qureshi's motion to amend her discovery responses; (2) whether Qureshi was "collaterally estopped"[1] from challenging the reasonableness of Sakar's attorney fees; (3) whether the trial court erroneously exercised its discretion in limiting Qureshi's expert witnesses; (4) whether Qureshi should be granted a new trial based upon the alleged partiality of the trial court; (5) whether the trial court erred in imposing § 802.05, STATS., sanctions against the co-appellants tendering a defense to Sakar's collection action and for filing an allegedly frivolous counterclaim; and (6) whether the trial court erred in granting judgment to Frisch Dudek, Ltd.

Further, Sakar and his attorneys move this court to award attorneys' fees costs for a frivolous appeal. We conclude that none of the co-appellants' arguments have any merit and we affirm the judgment. Additionally, because we conclude that the trial court properly imposed § 802.05, STATS., sanctions for the frivolous counterclaim, we also award the respondents attorneys' fees and costs for a frivolous appeal. Accordingly, we remand the matter to the trial court to determine the costs.

I. BACKGROUND

Qureshi retained eight successive attorneys, including Sakar, to represent her throughout her protracted divorce action. Sakar represented Qureshi from May 1989 through the entry of the divorce judgment. Sakar also provided legal services in order to extricate her from another lawsuit filed

[1] In ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 525 N.W.2d 723 (1995), the supreme court adopted the phrase "issue preclusion" instead of collateral estoppel. Accordingly, we use this "new" phrase throughout the remainder of the opinion.

against her husband, which potentially exposed her and the marital estate to a liability in excess of $900,000. At the conclusion of these actions, Qureshi failed to pay the attorney fees and costs owed to Sakar.

On July 18, 1990, Sakar filed suit seeking to compel Qureshi to pay for his legal services. Qureshi retained Attorney Robert Litak to represent her in the suit. She denied liability and filed a counterclaim for legal malpractice against Sakar. On June 27, 1991, O'Connor & Willems, S.C., replaced Attorney Litak as Qureshi's counsel in the action and the case proceeded to a bench trial in late January and early February 1993. On the first day of trial, the court found in favor of Sakar on his original complaint for unpaid attorney's fees. The rest of the trial focused on Qureshi's counterclaim against Sakar for legal malpractice.

In the malpractice counterclaim, Qureshi retained one of her former attorneys in the divorce action, Michelle Smith, and a certified public accountant, Donald Becker, as her expert witnesses. Prior to trial, Sakar deposed these experts twice. Before these depositions neither Smith nor Becker had substantially reviewed or investigated Sakar's legal services to Qureshi and, therefore, neither were prepared to present their completed opinions on Sakar's legal representation.

At trial, Sakar filed motions *in limine* seeking to exclude Smith and Becker from testifying as Qureshi's expert witnesses. As a basis for the motion, Sakar cited to Smith's prior representation of Qureshi and Smith and Becker's alleged unpreparedness at their depositions. The trial court ruled that while both witnesses could testify, neither Smith nor Becker would be permitted to present any opinion that they had not previously stated at their depositions.

At the conclusion of the trial, the trial court filed a written decision dismissing Qureshi's malpractice action. Included in the court's decision was a ruling striking Smith's entire testimony. The trial court determined that Smith lacked competency and credibility, and that she committed what the court labeled a "clear violation" of Supreme Court Rules—i.e., her alleged "contingency fee" arrangement as Qureshi's expert witness.

In May 1993, upon Sakar's motion for costs and attorney's fees, the court further ruled that Qureshi's defense of Sakar's suit and her subsequent counterclaim for malpractice violated § 802.05, STATS. Accordingly, the court entered the following judgment: (1) Sakar was awarded $57,499.24 (costs, fees, and interest) in his original action against Qureshi for her unpaid attorney's fees; (2) Attorney Randolph E. House, Sakar's attorney in the fee dispute action, was awarded $11,178.15 for frivolous costs and fees to be paid by Qureshi; (3) Frisch Dudek, Ltd., Sakar's defense attorneys in the counterclaim malpractice action, was awarded $65,288.89 for frivolous costs and fees to be paid by Qureshi; and (4) Frisch Dudek, Ltd., was additionally awarded $65,288.89 for frivolous costs and fees to be paid by O'Connor & Willems, S.C., Qureshi's attorneys in the malpractice counterclaim. Qureshi and O'Connor & Willems appeal. Further detailed facts will be discussed with each of the specific issues below.

II. MODIFYING DISCOVERY RESPONSES

The co-appellants first argue that the trial court erred when it denied Qureshi's motion to amend her discovery answers to Sakar's collection action. On September 14, 1990, Sakar forwarded his first set of combined interrogatories, request for production of documents, and request for admissions. Qureshi's responses to the request for admissions had to be served on Sakar by October 17, 1990; however, Qureshi did not file her responses until October 26, 1990. In her response, Qureshi admitted key facts, including that she owed Sakar $43,070.20. In July 1991, Qureshi then filed a motion to: (1) "withdraw from admissions deemed made by failing to timely respond to Plaintiff's Request for Admissions;" and (2) "file new responses to the Request for Admissions." The trial court ruled that, although pursuant to § 804.11(1)(b), STATS., a party failing to submit an answer within thirty days of service of a request for admissions is deemed to have admitted the matter, Qureshi could use her untimely answers instead of the admissions made by operation of law. The trial court, however, did not allow her to amend these answers.

Under § 804.11(2), "any matter ... is conclusively established unless the court on motion permits withdrawal or amendment of the admission." The trial court may permit withdrawal or amendment if either would "further the presentation of the merits of the controversy and if the party who obtains the admission fails to satisfy the court that withdrawal [or amendment] will

prejudice the party in maintaining the action or defense on the merits." ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 511, 434 N.W.2d 97, 101 (Ct. App. 1988). A trial court's decision on this question is discretionary, *see* ***id.***, and we will only reverse upon an erroneous exercise of that discretion. *See* ***Kotecki & Radtke, S.C. v. Johnson,*** 192 Wis.2d 429, 448, 531 N.W.2d 606, 613 (Ct. App. 1995). We conclude that the trial court did not erroneously exercise its discretion in this case.

Qureshi was represented by counsel at the time she filed the admissions and, when she sought to amend her admissions, she failed to show the trial court how her admissions were inconsistent with the actual facts at issue in Sakar's collection action against her. As such, the trial court could properly conclude that Qureshi's amended admissions would not "further the presentation of the merits of the controversy." ***Micro-Managers, Inc.,*** 147 Wis.2d at 511, 434 N.W.2d at 101.

III. DIVORCE ACTION FEE DETERMINATION

The co-appellants next argue that the trial court improperly applied the doctrine of issue preclusion to prevent Qureshi from challenging the reasonableness of Sakar's fees in her divorce action. She argues that the trial court applied issue preclusion to prevent her from challenging the original divorce court's finding that Sakar's fee was reasonable. The co-appellants have misconstrued the trial court's ruling. The court did not apply issue preclusion, although it mentioned in passing that Qureshi appeared to be collaterally attacking the earlier divorce judgment. Instead, the trial court used Qureshi's own response to Sakar's request for admissions; i.e., that she admitted owing Sakar $43,070.20 in attorney's fees, to support the conclusion that the fees were reasonable. As such, the co-appellants' argument has no merit.

IV. EXPERT WITNESSES

The co-appellants next argue that the trial court erroneously exercised its discretion in limiting the testimony of their expert witnesses, Smith and Becker, in the malpractice portion of the trial. The court denied the experts' leave to expand their opinions beyond the areas set forth in their

depositions. The trial court reasoned that this would avoid "trial by ambush." The co-appellants assert that this limitation prevented Qureshi from proving Sakar's negligence as to structuring of the settlement agreement.

The trier of fact has plenary discretion to accept or reject expert evidence, and is not bound by opinions even if uncontradicted. ***Krueger v. Tappan Co.,*** 104 Wis.2d 199, 203, 311 N.W.2d 219, 222 (Ct. App. 1981) (an expert's opinion must pass through the screen of the fact finder's judgment of credibility). When the experts were deposed, five months after formal designation and a month before discovery cut-off, none had fleshed-out their opinions and, in some instances, they had not familiarized themselves with the records. This prevented Sakar and his experts from analyzing the opinions, thereby hampering their preparation for cross-examination. The time of trial is too late to educate an expert on historical facts underlying an opinion. *See* ***Bell, Metzner and Gierhart v. Stern,*** 165 Wis.2d 34, 36-37, 477 N.W.2d 289, 290 (Ct. App. 1991). We conclude that the trial court did not erroneously exercise its discretion in limiting Qureshi's experts to the opinions set forth in their depositions.

Further, the trial court did not erroneously exercise its discretion in excluding the expert opinion of Becker, an accountant, concerning Sakar's alleged breach of a standard of legal performance. The trial court properly considered Becker's lack of sufficient credentials to pass upon the creation and scope of a lawyer's duty and then to opine about the alleged breach of this duty.

Attorney Smith's expert opinion testimony concerning Sakar's performance could also be properly excluded by the trial court. Although she is a lawyer with expertise in pensions, she had minimal expertise in divorce litigation. Further, her testimonial capacity was called into question by her contingency fee agreement with Qureshi.[2]

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[2] The record, including Smith's personal note, conclusively establishes that Smith had a contingent fee agreement for her testimony both as an occurrence and an expert witness. This contravenes SCR 20:3-4(b), which prohibits a lawyer from offering an inducement to a witness that is prohibited by law. An explanatory comment to the rule makes it clear that no fee may be paid to

V. JUDICIAL PARTIALITY

The co-appellants allege that the trial court's partiality violated Qureshi's due process rights. They take offense at several instances where the judge commented on the proceedings. Additionally, they contend that the court's statement that it privately investigated the reputations of the attorneys and found that they enjoyed good reputations mortally violated Qureshi's due process/fair trial rights. Further, they assert that the court's intemperate remarks were not isolated, but instead pervaded the trial and, when coupled with its supposed predisposition to rule in Sakar's favor, caused any appearance of partiality to vanish early in the trial. They cite a statement of the trial court's alleged sympathy for Sakar, and two heated colloquys between the court and her counsel.

Due process mandates that a neutral and detached judge preside over civil and criminal proceedings. ***Murray v. Murray,*** 128 Wis.2d 458, 462, 383 N.W.2d 904, 906 (Ct. App. 1986). Whether a judge's conduct denies a litigant a fair trial presents a legal issue which an appellate court determines *de novo.* ***Id.*** at 463, 383 N.W.2d at 907. Resolution of this issue requires this court to search the record to determine whether the trial judge demonstrated partiality against Qureshi and, if so, whether the partiality violated her due process rights.

At the outset, we note that neither Qureshi nor her counsel objected to the trial court's assignment to this bench trial. They filed no substitution motion, nor did they move for the trial court's recusal. Further, no claim is made that the court was prejudiced against Qureshi personally or that its remarks were directed at her. The colloquys which appellate counsel finds offensive were solely between the court and counsel.

We disagree with the co-appellants' assessment of the record. Although at times the trial court manifested irascibility at repetitious questions, it had a duty to control the mode of interrogation of witnesses and presentation of evidence to avoid needless consumption of time. Section 906.11(1), STATS.

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an occurrence witness and no contingent fee may be paid to an expert witness.

We have read portions of the record cited as examples of the trial court's partiality to Sakar. In one instance, the court attempted to qualify Smith as an expert for evaluation of a medical practice. In another incident, a controversy arose over valuation of the practice. In our opinion, these episodes do not come within a "country mile" of conduct that demonstrates trial court partiality, much less violate the Fifth Amendment of the United States Constitution.

Qureshi complains that the trial court conducted a "private investigation" into counsel's background. No authority is cited that this behavior constituted judicial misconduct. In any event, it could not possibly have affected Qureshi's due process rights. Appropriate to this matter is our statement in ***State v. Hollingsworth***, 160 Wis.2d 883, 467 N.W.2d 555 (Ct. App. 1991): "A litigant is denied due process *only* if the judge, in fact, treats him or her unfairly. A litigant is not deprived of fundamental fairness guaranteed by the constitution either by the appearance of a judge's partiality or circumstances which might lead one to speculate as to his or her partiality." ***Id***. at 894, 467 N.W.2d at 560 (emphasis added; citation omitted). We conclude that the trial court's conduct did not violate Qureshi's right to a fair trial.

VI. SANCTIONS

The trial court assessed sanctions upon its findings that O'Connor & Willems accepted a retainer to defend against Sakar's complaint and to prosecute the counterclaim without any reasonable inquiry into its merits, did not conduct discovery, proffered inane expert testimony, and, during trial, made statements not supported by evidence. The trial court ultimately determined that Qureshi unreasonably refused to pay her fees to Sakar, determined that her counterclaim was meritless, and concluded that her claim of compromised advocacy was false.

Whether to impose sanctions under § 802.05, STATS., lies within the discretion of the trial court. ***Riley v. Isaacson,*** 156 Wis.2d 249, 256-57, 456 N.W.2d 619, 622 (Ct. App. 1990).[3] Section 802.05 does not provide for a good

[3] Section 802.05(1)(a), STATS., provides in part as follows:

faith defense to pleading a non-meritorious defense or claim, nor does it allow an attorney to simply rely on his client's statements, but requires the attorney to make a reasonable inquiry into the issues involved "before proceeding with a claim or filing any paper." ***Id.*** at 259, 456 N.W.2d at 623.

The trial court's findings that the co-appellants' answers to Sakar's complaint were not well grounded in fact, nor warranted by law or good faith, is established by the record: (1) Sakar's complaint alleges that the trial court sitting in the divorce case found the fees to be reasonable, but the co-appellants' answer denied information about the fee determination and put Sakar to his proof; (2) Sakar's complaint alleges that Qureshi's husband tendered monies required by the divorce judgment, of which Qureshi would receive a credit of $10,000, but the co-appellants' answer denies knowledge of this and put Sakar to his proof; (3) Sakar's complaint alleges a balance of $43,070.20 due on his fee, plus interest, but the co-appellants' answer flatly denies anything due despite the fact that Qureshi admitted that she owed Sakar his fees in her answer to the first interrogatory, and despite the fact that on July 13, 1990, her then-lawyer, Robert E. Litak, in a letter to Sakar, stated: "I suspect that, as you are not fully aware of the difficulties she [Qureshi] has encountered in obtaining payment on

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Signing of pleadings, motions and other papers; sanctions. **(1)**(a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. ... The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

the judgment, through her husband's counsel, you may have a concern that the delivery [sic] for your services is intentional. *I can assure you that is not the case. Ms. Qureshi recognizes the depth and necessity of the services performed by you, as well as the accuracy of the bill relating thereto."* (Emphasis added.)

Additionally, the co-appellants' counterclaim for malpractice alleges a breach of duty "specifically" in Sakar's failure to advise of tax penalties in the resolution of the divorce action. According to the counterclaim, this failure allegedly caused Qureshi to lose sixty percent of the value of the asset received. The record, however, is void of any evidence that Qureshi sustained any penalty whatsoever in the divorce agreement. Further, the record established that she may withdraw substantial amounts from her IRA without penalty.

The trial court determined that Qureshi's claim of compromised advocacy was knowingly false. We test this finding upon a clearly erroneous standard. Section 805.17(2), STATS. In her deposition of November 24, 1992, Qureshi testified that by happenstance she saw her husband's attorney and Sakar at a park-and-ride parking lot near Cedarburg or Grafton, and that when she turned back to the lot, they were gone. According to Qureshi, Sakar was in his car and the other attorney was standing next to it. Qureshi's allegation was reasserted in an answer to an interrogatory subscribed by Qureshi. Her husband's attorney and Sakar, however, formally denied both that the incident occurred and that any compromising behavior existed. Shortly before trial, Qureshi withdrew the allegation. The trial court did not believe Qureshi and we can locate nothing in the record that would make this finding clearly erroneous.

Accordingly, the trial court did not erroneously exercise its discretion in applying sanctions against Qureshi and O'Connor & Willems. Qureshi was not a submissive client who meekly relied upon advice of counsel. The record paints her as a free-wheeling, forceful, hands-on litigant who involved herself in every aspect of the case. She hired and fired lawyers whom she freely critiqued, made discovery decisions, rejected a circuit court estate division to which she had previously agreed, and then engineered another and more favorable one. The trial court's conclusion that Qureshi is responsible for refusing to pay Sakar's concededly reasonable and necessary fee and

confronting him with a baseless malpractice suit, is fully supported by the record.

VII. THE JUDGMENT

Finally, the co-appellants assert that the trial court lacked jurisdiction to enter judgment for Frisch Dudek, Ltd., Sakar's attorneys, because they were not parties to the action. The record irrefutably proves that the attorney-judgment creditors represented Sakar and that the sanctions pertain to discharge of Sakar's obligation to pay their fees. It is no concern of the co-appellants whether Sakar or his carrier have paid the judgment creditors. We conclude that the circuit court had jurisdiction to enter the judgment. *See* ***Barrett v. Pepoon,*** 19 Wis.2d 360, 363, 120 N.W.2d 149, 151 (1963) (a judgment, once entered, is not void based solely upon the fact that a person was not a party to the lawsuit).

VIII. APPELLATE COSTS

Sakar, House, and Frisch Dudek have moved this court for frivolous costs on appeal. Because Sakar, House, and Frisch Dudek prevailed in their frivolous costs action under § 802.05, STATS., they are entitled to an award of frivolous costs on appeal without a finding that the appeal was frivolous under § 809.25(3), STATS. *See* ***Riley,*** 156 Wis.2d at 263, 456 N.W.2d at 624.

IX. CONCLUSION

In sum, we conclude that none of the issues raised by the co-appellants have any merit and, accordingly, affirm. Additionally, we remand the matter to the trial court with directions to make specific factual findings with respect to appellate costs in this case.

By the Court.—Judgment affirmed and cause remanded with directions.

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