

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 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. 94-3414

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BOCKHORST, EHRLICH & KAMINSKI,

Plaintiff-Respondent,

v.

DAVID B. KALAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

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

PER CURIAM. David B. Kalan appeals from a judgment entered in favor of Bockhorst, Ehrlich & Kaminski (law firm) awarding breach of contract damages, interest and attorney fees pursuant to § 814.025, STATS.

Kalan claims the trial court erred in the following respects: (1) the trial court entered judgment before he completed his defense; and (2) the

evidence is insufficient to support the trial court's findings of fact and conclusions of law. Because Kalan waived his right to present further defense evidence and because the evidence is sufficient to support the findings and conclusions made by the trial court, we affirm.

I. BACKGROUND

Kalan hired Peter Bockhorst of the law firm of Bockhorst, Ehrlich & Kaminski to represent him in his attempt to seek relief from a City of St. Francis municipal court judgment for \$37,375 and accumulated fines of \$375,000. Both sums were incurred as the result of building code violations on two separate pieces of property Kalan owned. Kalan orally agreed to pay the law firm \$75 per hour for representation. As a result of the law firm's efforts, a stipulation and order was entered relieving Kalan of all liability from the judgment and fines. In turn, Kalan transferred title to certain property to the City of St. Francis. For its services, the law firm billed Kalan \$4,242.69. When Kalan did not pay the bill, the law firm sued.

The claim was tried to the court. Bockhorst testified for the plaintiff. Kalan testified on his own behalf and, midway through the trial, decided to proceed without counsel. Kalan offered no other witnesses on his own behalf. The trial court entered judgment against Kalan and, additionally, granted the law firm frivolous claim costs of \$2,450. Kalan moved to vacate the judgment. After a hearing, the trial court denied the motion and Kalan now appeals.

II. DISCUSSION

Kalan first claims he was deprived of his opportunity to provide a defense. Kalan bases his claim upon the following trial court transcript excerpt:

MR. EHRLICH: I have no further questions Your Honor. I move for judgment, and I also move for costs as a frivolous defense.

THE COURT: So ordered. This is a frivolous waste.

This cited excerpt, however, portrays only part of the state of the record and thereby conveys an inaccurate impression of what truly happened during the course of the trial. The law firm presented its case by calling Peter Bockhorst as its sole witness. Kalan and his counsel, Royal Cass, cross-examined Bockhorst.¹ After the law firm's counsel stated it had no re-direct questions to ask of Bockhorst, the following exchange took place:

¹ Kalan's counsel was found in contempt of court midway through the trial and withdrew from further questioning of Bockhorst. Kalan finished the cross-examination of Bockhorst.

MR. EHRLICH: Plaintiff rests.

THE COURT: Any witnesses for the defense?

MR. KALAN: Yes, I'd like to call myself.

THE COURT: All right.

Kalan, with the assistance of the trial court, then gave testimony which fills fifteen pages of trial transcript. He was then cross-examined by the law firm's counsel. At the conclusion of the cross-examination, although Kalan did not say he rested, he did not indicate any intent to call additional witnesses. Further, he did not object to the trial court's granting of the law firm's motion for judgment. Kalan's motion papers to vacate the judgment do not allege that he intended to call additional witnesses. They do not allege that he intended to submit further evidence. Thus, we reject Kalan's claim because he waived his right to object and did not present any evidence to demonstrate what additional defenses he was prepared to make. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

Kalan next asserts that the evidence is insufficient to sustain the trial court's findings of fact and conclusions of law. We are not convinced.

We shall uphold the findings of fact of a trial court unless they are clearly erroneous. See § 805.17(2), STATS. The trial court made the following findings of fact and conclusions of law:

1. That the plaintiff was a business organization organized as a partnership, and at all times material hereto the plaintiff, Peter O. Bockhorst, was an attorney licensed to practice law in the courts of the State of Wisconsin.
2. That on or about September 10, 1990, the defendant engaged the services of the plaintiff to represent the defendant relative to an alleged ordinance violation prosecuted by the City of St. Francis against the

defendant as case number 89-4475. That as a result thereof, a contractual relationship existed between the plaintiff and the defendant.

3. That said ordinance violation was transferred to the Milwaukee County Circuit Court as case number 1-900469, City of St. Francis vs. David Kalan.
4. That in addition thereto, the plaintiff was engaged by the defendant for representation in a separate matter entitled City of St. Francis vs. David R. Kalan, case number 91-CV-007608.
5. That at all times material hereto, the defendant agreed to compensate the plaintiff in the amount of \$75 per hour, with statements payable within 30 days of receipt.
6. That the plaintiff, for its part, has done all things necessary and has complied with the terms and conditions of the contract and that the defendant received consideration and the benefit of said contract.
7. That the defendants [sic] assertion that he did not receive the benefit of his bargain with the plaintiff is wholly without merit and frivolous; the defendants [sic] testimony is not credible or reasonable in that the evidence conclusively shows that the defendant knew that the plaintiff's representation would lead to a settlement of the issues between the defendant and the City of St. Francis, and, further, that the defendant at no time rejected the settlement and insist[ed] on a jury trial.
8. That there remains an outstanding balance in the amount of \$4,242.69 due and owing from the defendant to the plaintiff for the work as identified to [sic] the contract.

9. That although due demand has been made upon the defendant by the plaintiff for payment, the defendant refused and continues to refuse to pay same.

CONCLUSIONS OF LAW

That the defendant, David Kalan, is in breach of the contract existing between David Kalan and the plaintiff herein, and that as a result the plaintiff has been damaged in the amount of \$4,242.69.

That the defendant, David Kalan, and his attorney, Royal Eugene Cass, continued a defense against the plaintiff that was wholly frivolous and without merit, as set forth at Ch. 814.025(1), Wis. Stats., and further, that David Kalan, and his attorney, Royal Eugene Cass, knew or should have known, that the defense offered in this action was without any reasonable basis in law, and could not be supported by a good faith argument for an extension, modification or reversal of existing law, as set forth at Ch. 814.025(3), Wis. Stats.

From our review of the record, it was undisputed that Kalan agreed to pay the law firm \$75 per hour for legal fees in an effort to mitigate paying the judgment and fines for the building code violations. It is also undisputed that the law firm was successful in reaching a settlement that released Kalan of all financial responsibilities for the judgment and fines, thereby receiving exactly that for which he had bargained. Our review of the record reveals that these trial court findings are not clearly erroneous and that they supply an adequate basis for the trial court's conclusions of law. We affirm the judgment, including the trial court's award of frivolous costs.²

By the Court. – Judgment affirmed.

² We have also reviewed and considered the law firm's motion for frivolous appeal costs, filed pursuant to § 809.25(3), STATS. That motion is denied.

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