

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 7, 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(1), 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. 95-2846

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM J. EVERS,

Plaintiff-Appellant,

v.

ERIC A. STEARN,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN P. HOFFMAN, Judge. *Affirmed.*

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

PER CURIAM. William Evers, pro se, appeals a judgment directing a verdict of dismissal after he presented his evidence in what the trial court characterized as a legal malpractice claim. Evers claims that the trial court erroneously directed the verdict because Evers' claim was not based upon legal malpractice but rather a conspiracy between his former criminal defense attorney, Eric Stearn, and the prosecutor. Specifically, Evers argues that (1) Stearn was negligent and breached his contract with Evers; (2) Stearn conspired with the assistant district attorney to deprive him of due process of law; and (3)

expert legal testimony was not required to prove his allegations. We reject his argument and affirm the judgment.

The record reveals that in July 1987, Stearn was appointed through the State Public Defender's office to represent Evers on approximately forty-eight felonies and 113 predicate acts. Evers was eventually convicted of twenty-three counts and those convictions were affirmed on appeal. *See State v. Evers*, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991). Stearn and Evers had numerous disagreements throughout the course of the proceedings, which culminated in a five-month trial that started in February 1988. When Evers requested that Stearn be removed as his attorney, the trial court denied the motion and ordered that the two work out their differences.

Approximately two and one-half weeks before the start of the criminal trial, the State brought contempt of court proceedings against Evers that give rise to Evers' instant claims. The contempt proceedings were eventually dismissed, but not before they led to a court order limiting Evers' jail telephone privileges. The court ordered that Evers could not use the telephone to contact anyone other than his wife, his attorneys and his investigators.¹ The court stated that it would permit a motion for reconsideration of its order. Evers testified that he asked Stearn to bring a motion for reconsideration, that Stearn agreed, but failed to do so. Stearn also agreed with the State to postpone the return date on the contempt matter until after the criminal trial.

After Evers rested his case against Stearn, Stearn moved for directed verdict pursuant to § 805.14, STATS.² The trial court granted the motion and dismissed Evers' claims.

¹ The contempt court file has not been made a part of the record before us on appeal; we derive the contents of the order from Evers' testimony at the trial against Stearn.

² Section 805.14, STATS., provides:

(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

Evers argues that the trial court erroneously granted the motion. He contends that the record demonstrates a factual dispute that Stearn was negligent and breached his contract with Evers. We disagree. An attorney is held to use a reasonable degree of care and skill and to possess to a reasonable extent the knowledge required to a proper performance of duties of his profession. *Olfe v. Gordon*, 93 Wis.2d 173, 179-80, 286 N.W.2d 573, 576 (1980). If injury to his client results as a consequence of the lack of such knowledge or skill or the failure to exercise it, the client may recover damages to the extent of the injury sustained. *Id.* at 181, 286 N.W.2d at 577. "Expert testimony should be generally required to establish the standard of care applicable to an attorney whose conduct is alleged to have been negligent and further to establish that his conduct deviated from that standard." This general rule is subject to two exceptions: (1) when the record discloses obvious, apparent or undisputed breach; or (2) where the matters in issue fall within the area of common knowledge and lay comprehension not involving specialized knowledge or skill. *Id.* at 181-82, 286 N.W.2d at 577.

Here the exceptions do not apply. Evers' allegations involve Stearn's decisions that required the exercise of professional judgment. "The lack of expert testimony in cases where it is necessary constitutes an insufficiency of proof." *State v. Johnson*, 54 Wis.2d 561, 565, 196 N.W.2d 717, 719 (1972). Because the allegations involve the standard of care required of a criminal defense lawyer when faced with a myriad of strategic decisions shortly before a five-month criminal trial of virtually dozens of felony charges, expert testimony is necessary. Evers' failure to produce any amounted to insufficiency of proof. The trial court properly directed the verdict and dismissed the action.

Next, Evers argues that the record discloses facts sufficient to justify the submission of his conspiracy claim to the jury. He relies on
(..continued)

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.

Onderdonk v. Lamb, 79 Wis.2d 241, 255 N.W.2d 507 (1977), for the proposition that a claim for a civil conspiracy must include the following elements: (1) the formation and operation of the conspiracy; (2) wrongful acts done pursuant thereto; and (3) damage resulting from such acts. *Id.* at 247, 255 N.W.2d at 510.

The alleged conspiracy to deprive him of his constitutional rights apparently stems from Stearn's agreement with the assistant district attorney to calendar the appearance for the contempt charge after the criminal trial. Although the contempt charge was eventually dismissed, Evers argues that its postponement deprived him of his day in court and therefore of due process. We disagree. The return date was scheduled to fall in the midst of Evers' criminal trial. Whether Stearn agreed or not, it is unlikely that the trial judge would have interrupted the criminal trial to litigate the contempt matter and the matter would have had to have been postponed. In any event, Evers fails to demonstrate that Stearn's decision to reschedule the return date was a "wrongful act." A conspiracy by a lawyer to injure his client amounts to malpractice. Whether Evers characterizes his claim as one for malpractice or civil conspiracy, he must demonstrate the standard that he alleges was breached. Having failed to do so, the trial court appropriately ruled that his claims failed for insufficiency for proof.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.