

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2006AP2448

Cir. Ct. No. 2005CV1830

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

FIDELIS OMEGBU,

PLAINTIFF-APPELLANT,

V.

BILLER HOTEL, LTD. AND SALLY BORCHARDT,

DEFENDANTS-RESPONDENTS,

SOCIETY INSURANCE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. The plaintiff-appellant, Fidelis Omegbu, appeals *pro se* from a judgment entered in favor of the defendants, Biller Hotel, Ltd. (“the Hotel”), Sally Borchardt, and Society Insurance on the jury verdict dismissing the plaintiff’s negligence claim, and awarding the defendants \$1,707.51 for taxable costs and disbursements. Omegbu claims that: (1) the court improperly used the transcript of his deposition testimony at trial; (2) his prior convictions and solicitation of prostitutes in this incident were inadmissible; (3) the form of the special verdict questions and denial of certain jury instructions were the result of an erroneous exercise of discretion; (4) this court should overturn the trial judge’s denial of a motion for judgment notwithstanding the verdict; and (5) the trial judge refused to permit Omegbu to retain counsel. Because the trial court did not erroneously exercise its discretion in the first four claims; because we decline to review the fifth issue; and because we find all of Omegbu’s claims to be frivolous, we affirm the judgment and remand with directions.

BACKGROUND

¶2 Omegbu alleges that two females stole property belonging to him and returned, with others, on subsequent occasions to assault him and take more of his property. However, the facts of the events leading up to the initial cause of action in this case are not at issue on this appeal. Rather, Omegbu bases his appeal in the procedural history of this case. The procedural history is protracted and confusing because the actions of Omegbu were often made without any foundation

in law or fact.¹ This appeal is no different—the claims Omegbu raises are absolutely frivolous.

¶3 On the morning of September 3, 2004, Omegbu claims he entered TCF Bank and withdrew six hundred dollars. When he exited the bank and returned to his car, he alleges that there were two strange women, in their twenties, either on or near his car. Omegbu testified that when the women asked for a ride to approximately 26th Street and Oklahoma Avenue, he agreed to drive them. During the drive, the women wanted to stop and use a bathroom, and when Omegbu told them he lived in a hotel, they asked if they could stop and use the bathroom in his room at the hotel. Again, Omegbu agreed and drove them to the hotel.

¶4 When they arrived at the hotel, Omegbu testified that he stopped at the front desk to register the women, but the desk attendant was not present. Although Omegbu testified that they waited five or ten minutes for the desk attendant to return, a videotape taken from a camera in the lobby of the hotel shows Omegbu waiting in the lobby only as long as necessary for the elevator to arrive—a matter of approximately ten seconds. Omegbu then led the women to his room, even though they had not been registered. A written policy of the hotel provides: “Unregistered guests are not allowed in rooms. If unregistered guests are discovered in the room it constitutes cause for immediate termination of stay and forfeiture of room deposit. Additional charges will be assessed for extra guests.” At the time of first renting his room at the hotel, Omegbu signed an agreement by which he agreed to follow this and other rules. Omegbu also

¹ Omegbu admitted to the Milwaukee Police Department that he was actually soliciting sexual acts from the two women.

testified that he knew he was required to get the hotel's permission before bringing the women to his room.

¶5 Upon entering the room, Omegbu testified that he placed his coat on the bed, with his wallet containing \$100 in the pocket, and his keys on the table. He then put the remaining \$500 in a coat in a closet in the bathroom. After one of the women used the bathroom, Omegbu also decided to use the bathroom, but left the bathroom door open. While he was on the toilet, the women left with his wallet, allegedly containing \$100 and some credit cards, and keys. However, Omegbu testified that "miraculously" his TYME card, medical card and immigration card all fell from his wallet and, thus, were not stolen. Omegbu chased after the women unsuccessfully. Omegbu did not report the theft to the police.

¶6 Omegbu claims that the same two women with two men returned the next day, September 4, 2004, at approximately 2:00 a.m. It appears that they used a key to get into the hotel and then into Omegbu's room. After the four alleged assailants entered his room, Omegbu testified that they slapped him more than ten times, tied his hands behind his back, put him in the bathtub at gun point and covered his head with a pillowcase. The assailants allegedly took the \$500 that Omegbu had hidden in the closet and forced him to give them his TYME card and pin number, which Omegbu had fortunately cancelled after the initial theft on September 3rd.

¶7 On September 4th, Omegbu finally filed police reports for the theft occurring on September 3rd, and the incident on the early morning of September 4th. On this date, the police also took Omegbu into custody because there was an outstanding warrant for his arrest related to his felony conviction for election

fraud. After serving a few days in the House of Correction, Omegbu returned to the hotel and had the hotel change the lock to his room. Omegbu testified that some of the assailants tried to return to his room on either September 14th or 15th, but were unable to enter because the locks were changed. Omegbu also alleged that the thieves broke into his car on September 15th and took a number of personal items.

¶8 Omegbu asserted four causes of action against the Hotel in his original complaint filed on March 4, 2005, which he subsequently amended on June 6, 2005, to include two additional claims against Society Insurance. Omegbu's six claims appear to be: (1) assault and battery; (2) breach of "duty of good faith and fair dealing" by failing to protect the plaintiff-appellant; (3) negligence resulting in damage to or loss of personal property; (4) negligence resulting in bodily injury; (5) a direct action claim against Society Insurance as the insurer of the Hotel; and (6) bad faith on the part of Society Insurance. Both Omegbu and the defendants-respondents filed motions for summary judgment. Accompanying the defendants-respondents' motion for summary judgment was an affidavit of defense counsel, authenticating portions of Omegbu's deposition transcript. In December 2005, the trial court dismissed all of Omegbu's claims, except his negligence claims allegedly resulting in bodily injury arising out of the events which occurred on or after September 4, 2004.

¶9 In a pretrial report, filed prior to the defendants' motion for summary judgment, the Hotel had notified the trial court and Omegbu that they intended to use the transcript of Omegbu's deposition at trial for impeachment purposes. In response, Omegbu filed a motion to strike the deposition and a motion in limine seeking prohibition of any reference of his deposition testimony during trial. Omegbu alleged that his deposition transcript should not be used

because only portions of it had been filed in connection with the defendants-respondents' motion for summary judgment. Following these motions, and less than a week before trial, the defense counsel also advised the trial court and Omegbu, that the defendants-respondents intended to examine Omegbu about his two prior convictions, as relevant to his credibility.

¶10 A jury trial was held on May 22 and 23, 2006. At the outset, the trial court addressed the motion to strike and the motion in limine. The trial court held that the arguments underlying Omegbu's motions were without a basis in the law and the use of Omegbu's deposition transcript to impeach him was appropriate:

[The defendants had] to show me[, the judge,] in support of their motion for summary judgment why ... I should throw this case out and ... [t]hey [had] to do it based on evidence in the case, meaning either sworn affidavits or someone's sworn testimony, which is exactly what your[, the plaintiff's,] deposition was. So, the fact that they attached only portions of your deposition is exactly what they [were] supposed to do [And] as to your motion to strike your deposition [generally] ... [t]here is no basis in law or fact for the relief you ... ask for [P]arties can use, in a civil trial[,] ... deposition transcripts in a variety of ways to support either affirmative testimony or ... to impeach somebody that is on the stand So, your motions ... are denied.

¶11 The trial court also ruled that the court would allow the Hotel and Borchardt to use Omegbu's prior convictions for impeachment purposes.² Omegbu did not dispute his two prior convictions. Rather, Omegbu objected because he wished to introduce additional information himself about the crimes of which he was convicted. While the trial court gave Omegbu permission to testify

² The judge determined that: "I am going to allow the defense to use them in the following fashion. They can ask you two questions. Have you ever been convicted of a crime before, to which the answer would be yes. How many times? To which the answer would be twice."

about the charges he was convicted of, it reminded Omegbu that he could not testify about what actually happened because such testimony would essentially turn the current trial into a re-trial of past criminal convictions. In addition, Omegbu claimed at the beginning of the trial that he was not permitted to procure a lawyer for the pretrial conference. The trial court's response made it clear that it never advised Omegbu that he could not retain a lawyer: "No, Mr. Omegbu, I never told you [that] you couldn't have a lawyer. In fact, I would much prefer if you had a lawyer."

¶12 At the conclusion of the evidence, the defense moved for a directed verdict on the grounds that Omegbu had not proven any physical injuries, and that in the absence of physical injury, the plaintiff cannot recover damages for negligence. The trial court reserved ruling on the motion until after the jury returned a verdict.

¶13 During the jury instruction conference, the trial court held that the only question on damages in the verdict form would be for past pain, suffering and disability. The trial court denied requests for instructions on punitive damages, assault and battery, armed robbery, loss of wages, medical expenses, and future pain, suffering and disability.

¶14 On May 23, 2006, the jury returned a verdict finding that the defendants-respondents were not negligent and awarded Omegbu zero damages. Subsequently, Omegbu filed a motion for judgment notwithstanding the verdict, which was denied because the trial court found the motion to be "frivolous," having no basis in law or fact. Therefore, on August 25, 2006, judgment was entered on the jury's verdict in favor of the Hotel and Borchardt, and awarded them \$1,707.51 for taxable costs and disbursements. Omegbu appeals.

DISCUSSION

I. PLAINTIFF-APPELLANT'S ISSUES ON APPEAL.

¶15 This case arises from a judgment entered in favor of the defendants-respondents on a jury verdict, dismissing Omegbu's negligence claim and awarding the defendants taxable costs and disbursements. "The admission of evidence is within the discretion of the trial court. We review a trial court's ruling on the admissibility of evidence for an erroneous exercise of discretion." *State v. Ross*, 2003 WI App 27, ¶35, 260 Wis. 2d 291, 659 N.W.2d 122 (citation omitted). Likewise, "[t]he decision whether to admit prior conviction evidence for impeachment purposes under § 906.09 lies within the trial court's discretion." *State v. Gary M.B.*, 2003 WI App 72, ¶24, 261 Wis. 2d 811, 661 N.W.2d 435, *aff'd* by 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475). A discretionary act of the trial court will be upheld if it considered the facts of the record under the proper legal standard and reasoned its way to a rational conclusion. *See Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶19, 261 Wis. 2d 598, 660 N.W.2d 705; *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). "The form of the special verdict questions is [also] within the discretion of the trial court. A trial court has wide discretion in framing the special verdict and determining what jury instructions to give." *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857 (citations omitted). In drafting a special verdict, the trial court should eliminate from the issues raised by the pleadings "those that are determined by the evidence on the trial by admissions, by *uncontradicted proof*, or by *failure of proof*." *Id.* (citation and internal quotations omitted). In addition, an appellate court "afford[s] special deference to a jury determination in those situations in which the trial court approves the finding of a jury. In such cases, this court will not overturn the jury's

verdict unless there is such a complete failure of proof that the verdict must be based on speculation.” *Morden v. Continental AG*, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659. However, the court of appeals may decline to review any issue that was inadequately briefed. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶16 Furthermore, using the same exercise performed in *County of Fond du Lac v. Derksen*, 2002 WI App 160, ¶4, 256 Wis. 2d 490, 647 N.W.2d 922 (citing *State v. Waste Mgmt. of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978)), we have reorganized and condensed Omegbu’s eleven issues that were numbered in his brief into five categories, because:

[an] appellate court is not a performing bear, required to dance to each and every tune played on an appeal. Here appellant raises [numerous] challenges to a judgment of conviction. However, we find the challenges to fit into five categories and will discuss each category. Any of the [numerous] issues raised and not discussed in any of the five categories can be deemed to lack sufficient merit or importance to warrant individual attention.

Id.

A. The Use of Deposition at Trial for Impeachment Purposes.

¶17 Omegbu first argues that his motion to strike the transcript of his deposition testimony should have been granted because the deposition was not filed with the trial court pursuant to WIS. STAT. § 804.05 (2005-06).³ There is no provision of § 804.05 that requires a deposition transcript to be filed with the trial

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court prior to its use at trial.⁴ The case law that Omegbu cites does not support his argument either. For example, the court in *Lamberson v. Lamberson*, 175 Wis. 398, 411, 184 N.W. 708 (1921), held that a deposition is not part of the trial record until it is offered at trial. The deposition transcript was properly offered and admitted into the record in this case, and therefore, this case is not inconsistent with the rule espoused in *Lamberson*.

¶18 With respect to Omegbu’s argument that the filing of excerpts, rather than the full transcript, of his deposition testimony on a motion for summary judgment was improper, the supreme court has mandated such a procedure. “Hereafter in using adverse examinations to support or refute a motion for summary judgment, the party using such adverse examination shall specify which portions of the adverse examination he deems to be material and on which he relies. This practice shall be mandatory” *Commercial Disc. Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 678, 214 N.W.2d 33 (1974). Thus, the trial court did not err when it said, “[the] fact that [the defendants] attached only portions of your deposition is exactly what they are supposed to do.”

¶19 Furthermore, the use of the deposition at trial for impeachment purposes was appropriate. WISCONSIN STAT. § 804.07 provides:

(1) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

⁴ Omegbu also cites Federal Rule of Civil Procedure 30(f) as authority for his argument, which is not applicable to Wisconsin’s state courts.

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

¶20 The case law cited by Omegbu in his brief does not address use of a deposition specifically for impeachment purposes, and therefore, we must base our decision upon Wisconsin statutory law. We conclude that the trial court properly used the transcript of Omegbu's deposition testimony at trial.

B. The Admissibility of Prior Convictions and Other Acts.

¶21 Omegbu's next contention is that the trial court's admission of evidence of his two prior criminal convictions and his solicitation of two prostitutes was unfairly prejudicial.

¶22 First, evidence of criminal convictions is expressly admissible under Wisconsin statutory law. "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible." WIS. STAT. § 906.09(1). The statute reflects the presumption that "a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted." *Gary M.B.*, 261 Wis. 2d 811, ¶24 (internal quotations omitted). Moreover, Omegbu admits in his brief that he "may be impeached ... in [sic] regard to matters which [sic] go directly to his reputation for truth and veracity." However, subsection (2) of § 906.09 requires that "a court also consider whether conviction evidence should be excluded because 'its probative value is substantially outweighed by the danger of unfair prejudice.'" *Gary M.B.*, 261 Wis. 2d 811, ¶26. Omegbu has not made a compelling argument, or really *any* argument, as to why the probative value of his two prior convictions is substantially outweighed by unfair prejudice. Besides, "[the] decision whether to admit prior conviction evidence for impeachment

purposes under § 906.09 lies within the trial court's discretion," *Gary M.B.*, 261 Wis. 2d 811, ¶24, and in this case, the trial court properly exercised its discretion. The matter of the two prior convictions was raised before the court at the beginning of trial, and the trial court properly limited their use to impeachment purposes:

I am going to allow the defense to use them in the following fashion. They can ask you two questions. Have you ever been convicted of a crime before, to which the answer would be yes. How many times? To which the answer would be twice.

They can't go into what the specifics of the crimes were, but they can be used for impeachment purposes. Meaning that the jury may get instructed at the end of the trial that someone who's been convicted of a crime may be considered less truthful than someone who's never been convicted of a crime. But that is up to the jury to decide whether they want to do that or not.

¶23 Furthermore, during trial, the defense attorney asked only the two questions about Omegbu's prior convictions that the trial court said it would allow. Additional details of those crimes—that they were a “misdemeanor and election fraud”—were voluntarily put before the jury by Omegbu himself because he did not want the jury to think he had committed burglary or robbery. Therefore, we affirm the trial court's decision to admit evidence of Omegbu's two prior convictions in this case.

¶24 Second, evidence that Omegbu solicited two prostitutes, who turned out to be the two women who allegedly robbed him, was properly admitted because the evidence was not used to prove acts in conformity with Omegbu's character, but was used for “other purposes.” WISCONSIN STAT. § 904.04(2) provides:

[Evidence] of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶25 The Hotel and Borchardt argued that the evidence that Omegbu solicited the two prostitutes was introduced to demonstrate that Omegbu invited the women, who he claims eventually robbed and assaulted him, onto the premises and, in doing so, violated hotel policy. This use of evidence of Omegbu's other acts is within the scope of "other purposes." Thus, after reviewing the record, we conclude that the trial court properly exercised its discretion in admitting evidence of these other acts.

C. The Special Verdict Form and Jury Instructions.

¶26 Omegbu also claims that the trial court erroneously exercised its discretion in the form of the special verdict questions and by denying certain jury instructions. We disagree.

¶27 At trial, over Omegbu's objections, the trial court denied requests for instructions on punitive damages, assault and battery, armed robbery, loss of wages, and future pain, suffering and disability. First, a verdict question and instruction were properly denied on punitive damages because "[p]unitive damages are not recoverable if a wrongdoer's conduct is merely negligent," *Wischer v. Mitsubishi Heavy Indus. Am. Inc.*, 2005 WI 26, ¶31, 279 Wis. 2d 4, 694 N.W.2d 320, and the cause of action in this case was only for negligence and there was no evidence of the requisite "intentional disregard of rights," *id.*, to merit a punitive damages instruction. Second, neither the assault and battery, nor the armed robbery verdict questions and jury instructions were given because it

was not alleged that the Hotel and Borchardt assaulted, battered, or robbed Omegbu. Third, a verdict question and jury instruction were appropriately denied on lost wages because there was no evidence offered as to lost wages resulting from the defendants-respondents' alleged negligence, and the claim that Omegbu lost wages because he was arrested on an outstanding warrant is not causally related to this negligence claim. Fourth, the trial court did not erroneously exercise its discretion in denying a verdict question and instruction on future pain, suffering and disability, because there is no evidence in the record to support an award for future damages. Finally, any verdict questions or instructions as to medical expenses were properly denied because, as the trial court correctly pointed out, there is no evidence in the record of medical expenses except for Omegbu's own testimony.

¶28 In his brief, Omegbu also argues that a host of additional instructions (over thirty) should have been given to the jury. However, WISCONSIN STAT. § 805.13(3) states that:

The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict ... [and f]ailure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

¶29 Omegbu did not object at the instruction and verdict conference as to the additional instructions he is now proposing, and therefore, any appeal of the trial court's denial to present those thirty plus instructions is waived.

D. The Denial of Motion for Judgment Notwithstanding the Verdict.

¶30 The fourth issue on appeal is whether this court should overturn the trial court's denial of a motion for judgment notwithstanding the verdict. At the motion hearing, the trial court said:

[T]here is absolutely no basis in law or in fact for this motion. I told you that when you brought this motion at the start of trial, I told you that when you brought it earlier in the case and I'm telling you that now, this motion is absolutely positively frivolous.

¶31 Because an appellate court “afford[s] special deference to a jury determination in those situations in which the trial court approves the finding of a jury,” *Morden*, 235 Wis. 2d 325, ¶40, and a review of the trial record does not reveal “such a complete failure of proof that the verdict must be based on speculation,” *id.*, we must uphold the ruling of the lower court. According to the record, Omegbu testified that he knew he was required to get the hotel's permission before bringing guests up to his room and had even signed an agreement acknowledging the hotel's policy that “unregistered guests are not allowed in rooms.” Yet, a security camera tape shows Omegbu escorting two women up to his room without registering, or attempting to register them, with the front desk of the hotel. In addition, the hotel had posted the rates and a notice as the availability of a safe in Omegbu's room. However, Omegbu did not utilize the safe for his valuables. Thus, there was more than ample evidence for the jury to base its verdict upon, finding the defendants not negligent and Omegbu negligent with respect to his own safety. Furthermore, Omegbu's argument that the trial court should grant judgment notwithstanding the verdict in his favor based upon an improper use of the deposition transcript has already been addressed. The

admission of the deposition transcript was proper, and therefore, it is not grounds for overturning the trial court's denial of a motion for judgment notwithstanding the verdict.

E. The Alleged Denial of Legal Representation.

¶32 Finally, Omegbu claims that the trial court prohibited him from procuring a lawyer at the pre-trial conference, despite the court stating at trial: “No, Mr. Omegbu, I never told you [that] you couldn't have a lawyer. In fact, I would much prefer if you had a lawyer.” Because Omegbu's brief presents this remaining issue “in [a] conclusory fashion, without citation to the record,” we find it inadequately briefed and therefore decline to address it. *See Pettit*, 171 Wis. 2d at 646-47.

II. DEFENDANTS-RESPONDENTS' MOTION FOR COSTS AND FEES.

¶33 The Hotel made a motion before this court, pursuant to WIS. STAT. § 809.25(3), for an award of costs, fees and attorney's fees. Section 809.25(3)(a) provides: “If an appeal ... is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section.” In order to find an appeal to be frivolous, the court must find one or more of the following:

The appeal ... was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

The party ... knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Sec. 809.25(3)(c). The standard we apply is an objective one:

what should a reasonable person in the position of this *pro se* litigant know or have known about the facts and the law relating to the arguments presented. As with lawyers, a *pro se* litigant is required to make a reasonable investigation of the facts and the law before filing an appeal.

Holz v. Busy Bees Contracting, Inc., 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998) (citations omitted). Omegbu’s appellate argument merely restates his trial court arguments and has not offered any legal or factual basis for undoing the trial court’s findings. In other words, Omegbu was obligated to “mount an arguable case showing where the trial court went wrong,” and he has utterly failed to do. *Id.* at 609. Because we find all of Omegbu’s arguments to be frivolous, we remand for the trial court to determine the Hotel and Borchardt’s costs, fees and reasonable attorney’s fees pursuant to § 809.25(3).

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

Not recommended for publication in the official reports.

