COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP805 **Cir. Ct. No. 2010SC1055**

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

RONALD L. AUGSBURGER,

PLAINTIFF-RESPONDENT,

V.

KAMMER & GREIBER, S.C.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] A law firm appeals a judgment requiring the firm to return $2,000 in fees paid to the firm by an individual under a special

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

retainer agreement that defined the scope of legal work to be performed. The circuit court found that the law firm anticipatorily breached an attorney-client contract by abandoning, virtually on the eve of promised performance, a specific task that it promised to perform, on the asserted grounds that the attorney handling the matter was too busy with other work. On appeal, the law firm references two legal arguments, but does not develop either one sufficiently to allow this court to resolve them fairly on appeal. Therefore, the judgment is affirmed.

BACKGROUND

¶2 Extensive summary of the facts here is not needed, given the lack of developed argument from the law firm and the absence of a challenge by either party to detailed factual findings by the circuit court. The following brief summary is taken entirely from the uncontested findings of the circuit court. The court was assigned this case on appeal from a small claims court proceeding before a court commissioner.

¶3 A neighbor of Ronald L. Augsburger obtained a building permit for, and began construction of, a structure that would block Augsburger's view of a nearby lake. Under a written retainer agreement, the law firm, through Attorney Douglas Kammer, committed to undertake the following representation on behalf of Augsburger in connection with what the agreement called the "Pardeeville Zoning Problem": "the filing of an appeal with the Pardeeville Zoning Board of Adjustments, and the commencement of a Suit to obtain a temporary restraining order blocking construction" of the neighbor's building. The scope of representation portion of the agreement also stated that appearances by the firm "are needed for both" the filing of the appeal and commencement of the action for a temporary restraining order.

¶4 Under this agreement, Augsburger paid the firm a nonrefundable retainer of $2,000 to be credited against attorney's fees as Kammer performed services at a rate of $250 per hour. The retainer guaranteed that the firm would do its best to represent Augsburger's interests in addressing the Pardeeville Zoning Problem "thoroughly, carefully, and competently."

¶5 Attorney Kammer took steps that included the following. He sent a letter to the zoning board[2] requesting that the building permit for construction of the project be rescinded and that a hearing be scheduled on that issue. In the meantime, the zoning board scheduled a separate hearing, at the request of Augsburger's neighbor, for a zoning variance for the project. Attorney Kammer appeared at this hearing on the variance. At this hearing, the zoning board granted the variance.

¶6 The zoning board subsequently scheduled a hearing on Augsburger's challenge to the building permit for a Tuesday. On the Friday before the scheduled permit hearing, Kammer left a voicemail for Augsburger informing Augsburger that Kammer was, as the circuit court found,

> too busy with other matters to represent Augsburger at the July 28, 2009 hearing. Kammer informed Augsburger in that message, that he had several briefs due and lacked the time to work on Augsburger's matter. Kammer left the names of several other ... attorneys [who] may have been able to represent Augsburger.

[2] The letter was addressed to "the Zoning Board of Appeals," which appears to be the same entity as the "Pardeeville Zoning Board of Adjustments" referred to in the special retainer agreement. This entity is variously referred to by the circuit court as the Village of Pardeeville Zoning Board of Appeals and the Pardeeville Board of Appeals. This opinion refers to this entity as the zoning board.

Kammer did not inform Augsburger of any reason that he could not appear at the zoning board hearing on Augsburger's behalf other than that Kammer had several briefs he needed to complete. In addition, Kammer never sought to have the hearing cancelled, and did nothing to communicate to Augsburger that it was in Augsburger's interest to drop his opposition to the construction project.

¶7 Augsburger appeared at the July 28, 2009, zoning board hearing without counsel. He failed to obtain relief at this hearing. The construction project proceeded to completion. The circuit court found that Augsburger did not receive the "thorough, careful, and competent" representation that he had bargained for.

¶8 Based on its factual findings, the circuit court concluded that the law firm had anticipatorily breached its contract with Augsburger. The court concluded that the firm's refusal to perform was "distinct and unequivocal," as those terms are used in ***Stolper Steel Prods. Corp. v. Behrens Mfg. Co.***, 10 Wis. 2d 478, 490, 103 N.W.2d 683 (1960) (citing 1 BLACK, RESCISSION AND CANCELLATION § 202, 569 (2d ed. 1929) (rescission based on anticipatory breach "must be distinct, unequivocal, and absolute" and acted upon as such by the opposing party). The court concluded that this represented a "substantial" breach that "destroyed the essential purpose of the representation under the contract." For these reasons, the court concluded, "Augsburger is entitled to rescind and recover his $2,000 deposit, minus any value to Augsburger of any services rendered by Kammer," under the authority of ***Seidling v. Unichem, Inc.***, 52 Wis. 2d 552, 557-58, 191 N.W.2d 205 (1971) and ***Wisconsin Dairy Fresh, Inc. v. Steel & Tube Products Co.***, 20 Wis. 2d 415, 429, 122 N.W.2d 361 (1963).

¶9 Turning to the issue of the value of the firm's work to Augsburger, the court concluded that Augsburger

> received no benefits from anything Kammer did. Kammer stopped working on the matter after the [zoning board][3] granted a variance, but before the [zoning board] even had the hearing on the appeal of the building permit. Much of the time that Kammer spent on the matter was obtaining background information on the issues for further representation. Augsburger could not just hire another lawyer without expending additional time and money [in order to] convey[] the same background information [to a new attorney]. The time Kammer spent on the Augsburger matter had no value to Augsburger once Kammer decided to terminate his representation.

DISCUSSION

Breach of Contract

¶10 A puzzling aspect of the firm's principal brief is that it asserts in its statement of the issues and argument heading, and repeats in its conclusion, that the firm challenges the circuit court's determination that the firm unequivocally and anticipatorily breached the contract, and requests that the court be reversed on that ground. Yet in the first paragraph of argument, the principal brief states that, given the applicable standard of review, the firm does not "focus on" the breach question. Consistent with at least this last statement, the firm presents no argument in either its principal or its reply brief questioning the court's determination that the firm breached the contract; much less does the firm provide

[3] The court actually stated here, "the Village Board," and not "the Board of Appeals" or any other variation of the zoning board's name. This is apparently inaccurate. The parties agree on appeal that the zoning board was the governmental body that granted the variance, and not the village board. For purposes of this opinion, the zoning board may fairly be substituted for "the Village Board" at this point in the circuit court's decision; the court's decision did not turn on a distinction between the two entities.

legal authority purporting to undermine the court's legal conclusion that there was a breach by the firm meriting rescission. That is, the firm does not even attempt to present a developed argument against a finding of a breach meriting rescission supported by legal authority. Therefore, in fairness to Augsburger and in the interests of judicial efficiency, this court will ignore the topic, with a reminder to counsel for the law firm that adequate briefing on appeal requires counsel for an appellant to follow requirements that include WIS. STAT. § 809.19(1)(d) and (e) (2009-10). *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

"No Benefits Received"

¶11 Turning to the second issue referenced in the principal brief, the firm asserts that the court was "clearly erroneous" in deciding that Augsburger received no benefit from the firm and therefore the firm is not entitled to any share of the $2,000 retainer. However, the firm fails to develop a legal argument to this effect, failing to cite even one relevant legal authority for this position. Therefore, this court declines to attempt to identify authority that might match the firm's desired outcome. As this court stated in ***Pettit***, this court "cannot serve as both advocate and judge," which is effectively what the law firm requests. ***Id.***

¶12 To expand slightly on the summary above, the circuit court applied ***Seidling*** and ***Wisconsin Dairy Fresh*** to conclude that Augsburger was entitled to the equitable remedy of rescission. Under the law cited by the court, the goal of rescission is to "restore the parties to the position they would have occupied if no contract had ever been made between them." ***Seidling***, 52 Wis. 2d 552, 557-58. Regarding damages, the court concluded that Augsburger was entitled to recovery of the full amount of the special retainer, less "any value to Augsburger of any

services rendered by Kammer." In other words, in the mutual return of benefits received, Augsburger is to get back his $2,000 and the firm is to receive "such benefits as have been received" by Augsburger, including payment for services rendered. *See* ***First Nat. Bank & Trust Co. v. Notte***, 97 Wis. 2d 207, 225–26, 293 N.W.2d 530 (1980) ("When rescission is sought each party is to return to the other such benefits as have been received from the other."). In addressing the question of what benefits were received by Augsburger from the firm, the court concluded the answer was none, and therefore the firm is required to return the entire $2,000 paid as the special retainer.

¶13 It may be worth pausing to note that these determinations by the circuit court present a highly unusual factual scenario. Attorneys are not ordinarily found to have unequivocally repudiated agreements with clients by announcing an intention to refuse future performance. Yet despite the highly unusual nature of the case, the law firm does not submit even the minimal briefing necessary to prevail on an argument that clear authority controls a routine dispute.

¶14 In challenging the court's final determination of "no benefits received," the firm fails to cite a standard of review, or indeed even to make clear whether it is arguing that the court clearly erred in establishing facts, selected the wrong legal standard, or misapplied the law to the facts.

¶15 Aside from uncritical citation to the cases that were cited by the circuit court in its decision, the firm cites only one legal authority in its principal

brief, and this authority is not relevant, because its proposed application in this case rests on a factual error, as the firm acknowledges in its reply brief.[4]

¶16 Insofar as the firm alleges that the damages decision was "clearly erroneous," the firm suggests that the court erred in finding facts. However, if this is the argument, this court is left entirely in the dark as to any fact that the firm would assert the court erred in finding in connection with the damages determination. In determining that Augsburger received no benefit from the law firm's work, the court did not ignore the fact that attorney Kammer performed tasks before committing the breach. Instead, the court concluded that the pre-breach work was of no benefit to Augsburger. The firm's argument to the contrary does not appear to raise a factual dispute, and so its reference to a "clearly erroneous" decision is misplaced.

¶17 If the firm means instead to argue that the court erred in selecting rescission and restitutionary damages as the correct legal standard on these facts, it fails to identify the correct legal standards that the court should have used.

¶18 Finally, if the firm means to argue that the court misapplied correct legal standards to settled facts, this court is left to guess why the firm believes that the court's application of the law was incorrect. The significance of particular

[4] In its principal brief, the firm starts from the inaccurate premise that the village board, and not the zoning board, granted the variance. As explained above, in footnote 3 of this opinion, the zoning board granted the variance. From this inaccurate premise, the firm argues that, in appearing at the variance hearing, Attorney Kammer appeared at the only hearing that ended up mattering in attempting to address the Pardeeville Zoning Problem. The firm asks this court to conclude that the variance hearing, allegedly held before the village board, was the only hearing that mattered, because, under the only case cited by the law firm in support of its appeal, village board decisions are "routinely affirmed" when challenged. The firm acknowledges its error in its reply brief, but continues to fail in the reply brief, as it has in its principal brief, to cite relevant legal authority.

facts to the "no benefits received" question would have to be evaluated under relevant case law or other recognized authority, and the firm provides none. That is, the firm does not suggest what legal standard this court should apply to determine that the circuit court was incorrect in concluding that the tasks performed represented no benefit to Augsburger if the parties are to be restored to the status quo, as if no contract has been signed.

¶19 The firm simply recites a number of tasks performed by Attorney Kammer, and then asserts that the tasks count as value to Augsburger (how much value, or even how a fact finder should go about determining that value under the facts of this case, the firm does not say). As referenced above, this is not a simple case; the questions raised by the law firm's appeal certainly do not answer themselves. The status of a special retainer when an attorney fails to provide a client with services contemplated in an attorney-client contract can be viewed in various ways. *See, e.g.*, ***In re Gray's Run Tech., Inc.***, 217 B.R. 48, 52-54 (Bankr. M.D. Pa. 1997) (contracts for legal services are more strictly interpreted than contracts "between parties on equal footing"; depending on multiple factors, special retainer *may remain property of the client* if contemplated services are not provided). While ***In re Gray's Run*** involves the bankruptcy context, the law firm fails to provide legal authority in *any* context for the proposition that it earned any fee on the facts found by the circuit court. The firm fails even to address this court's standard for reviewing the damages determination, which is an elemental requirement in framing an argument.

¶20 To summarize, the law firm does not appear to contest any factual finding of the court, provides no legal authority for the proposition that the court relied on an incorrect legal theory in addressing damages for breach of contract, and further provides no legal authority for the proposition that, even if the circuit

court relied on the correct legal theory, this court should determine that the circuit court applied that theory incorrectly. It would be unfair for this court to develop the law firm's argument for it and render a decision on that basis, because that would deprive Augsburger of an opportunity to respond. *See* ***Pettit***, 171 Wis. 2d at 647.

CONCLUSION

¶21 For these reasons, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.