COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1127 **Cir. Ct. No. 2012CV724**

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

ZICK & WEBER LLP,

PLAINTIFF-RESPONDENT,

V.

ROBERT STANGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. The law firm Zick & Weber LLP brought a breach of oral contract claim against Robert Stangler to recover unpaid legal fees. A jury rendered a verdict in favor of Zick & Weber, awarding it $17,643.50 in damages. Stangler appeals the money judgment.

¶2 Stangler argues that the circuit court erred in four respects: (1) concluding that the oral contract between Stangler and Zick & Weber did not violate the Wisconsin Statute of Frauds and, therefore, denying Stangler's motion to dismiss at the close of evidence at trial; (2) excluding as evidence at trial summaries of the requirements of certain Wisconsin Supreme Court Rules of professional conduct for attorneys; (3) denying Stangler's motion to limit Zick & Weber's claim for damages to not more than $10,000; and (4) making "repeated negative comments regarding Stangler" which cumulatively "denied Stangler the opportunity to have a fair trial." We reject each of Stangler's arguments and affirm.

BACKGROUND

¶3 Stangler retained Zick & Weber in 2007 to represent him in various matters relating to a real estate transaction between Stangler and a third party. The third party filed suit against Stangler in April 2011 in Waukesha County, and Stangler retained Zick & Weber to represent him in the lawsuit. Stangler paid Zick & Weber's invoices for services rendered through November 2011, but did not pay for services rendered thereafter.

¶4 In early 2012, Zick & Weber offered to discount the unpaid balance by $3,000, reducing the outstanding balance to $13,068.06. Stangler did not pay the $13,068.06 balance, and Zick & Weber informed Stangler on April 3, 2012, that it was withdrawing from representing him in the Waukesha County case. On April 9, 2012, Stangler informed the firm that he had filed a motion to proceed pro se in the Waukesha County case. The judge in the Waukesha County case ordered firm member Vicki Zick removed as attorney of record for Stangler on April 19, 2012.

¶5 In May 2012, Zick & Weber filed a small claims action against Stangler to recover the unpaid balance in legal fees, limiting its damages claim to $10,000, which is the maximum amount that can be sought in a small claims action. Stangler filed a counterclaim alleging that Zick & Weber provided "ineffective representation" in the Waukesha County case. The case was tried to a court commissioner in July 2012. The court commissioner found in favor of Zick & Weber and awarded it $10,000 in damages.

¶6 Stangler then filed a demand for trial before the circuit court and amended his answer and counterclaim, alleging that Zick & Weber committed professional negligence which caused him $65,000 in damages.

¶7 Because the counterclaim exceeded the jurisdictional limits of small claims court, Zick & Weber moved to convert the small claims action to a large claims action and to seek the full outstanding balance amount—purporting to rescind the $3,000 discount it had offered to Stangler in early 2012—together with other costs allegedly paid by Zick & Weber on behalf of Stangler in the Waukesha County case. Stangler did not object to the conversion. The case was transferred in September 2012 to the Jefferson County Circuit Court.

¶8 After the transfer, Stangler moved to dismiss the complaint for failure to state a claim. The circuit court denied this motion in December 2012.

¶9 Zick & Weber moved for summary judgment in August 2013 to dismiss the malpractice counterclaim. After briefing and oral argument, the circuit court dismissed Stangler's malpractice counterclaim from this proceeding because Stangler had not obtained an expert witness to support his counterclaim.

¶10 The case proceeded to trial, and the jury found that: (1) Stangler and Zick & Weber entered into a contract for the provision of legal services by Zick & Weber to Stangler; (2) Zick & Weber did not breach that contract; (3) Stangler did breach that contract; and (4) $17,643.50 would reasonably compensate Zick & Weber for legal services rendered to Stangler.

DISCUSSION

¶11 As noted, Stangler argues that the circuit court erred in four respects: (1) concluding that the oral contract between Stangler and Zick & Weber did not violate the Wisconsin Statute of Frauds and, therefore, denying Stangler's motion to dismiss at the close of evidence at trial; (2) excluding from evidence at trial summaries of the requirements of certain Wisconsin Supreme Court Rules of professional conduct for attorneys; (3) denying Stangler's motion to limit Zick & Weber's claim for damages to not more than $10,000; and (4) making "repeated negative comments regarding Stangler" which cumulatively "denied Stangler the opportunity to have a fair trial." For the reasons set forth below, we reject each of Stangler's arguments and affirm.

A. The Wisconsin Statute of Frauds

¶12 Stangler does not dispute the jury's finding that Stangler and Zick & Weber entered into a contract for the provision of legal services by Zick & Weber to Stangler. However, Stangler asserts that the contract is unenforceable because, as an oral contract for legal representation that "would reasonably be expected to require more than a year to be completed," it violated the Wisconsin Statute of Frauds, and therefore, the circuit court erred in denying Stangler's motion to dismiss.

¶13 Specifically, Stangler argues that the circuit court erred in "adopting Zick's argument that the Statute of Frauds is inapplicable if there is any possibility, no matter how remote, that the representation contemplated by the [contract] might be concluded within a year." Stangler suggests that the proper standard is whether it is "reasonable or likely" that the contract would "require more than a year to be finished." Stangler contends that had the circuit court applied the "reasonable or likely" standard, it would have found that the April 2011 oral contract for legal representation in the Waukesha County case was void under the Wisconsin Statute of Frauds because it was "likely" that representation would not end within a year. Thus, we are asked to determine whether "the circuit court utilized the proper legal standard, [which] is a question of law we review independently of the circuit court, benefiting from its analysis." ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788. In order to answer this question, we start with the language of the Wisconsin Statute of Frauds, as codified in WIS. STAT. § 241.02 (2013-14),[1] and review relevant Wisconsin case law interpreting the one-year provision within the Wisconsin Statute of Frauds. We conclude that the circuit court properly applied the statute here.

1. Wisconsin's Statute of Frauds Language and Case Law

¶14 WISCONSIN STAT. § 241.02, the Wisconsin Statute of Frauds, requires that certain agreements must be in writing in order to be valid. "The general purpose of the [Statute of Frauds] is described in its ancient title to prevent

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

frauds and perjury. It was not intended to give one party or the other a technical escape from a fair and definite agreement." ***Kenner v. Edwards Realty & Finance Co.***, 204 Wis. 575, 601, 236 N.W. 597 (1931). Our supreme court has accordingly interpreted the Statute of Frauds in favor of parties' right to contract. *See* ***id.*** at 586-87 (addressing the use of parol evidence to preserve a contract, pursuant to the "'firmly rooted'" liberal construction of the Statute of Frauds (quoted source omitted)).

¶15 As pertinent here, agreements required by the Wisconsin Statute of Frauds to be in writing include an "agreement that *by its terms is not to be performed within one year* from the making thereof." WIS. STAT. § 241.02(1)(a) (emphasis added).

¶16 This one-year provision has long been interpreted by our courts to mean that "'[i]f, by *possibility*, an agreement may by its terms, be executed within [one year], it is not within the statute.'" ***Nelson v. Farmers Mut. Auto. Ins. Co.***, 4 Wis. 2d 36, 52, 90 N.W.2d 123 (1958) (citing ***Jilson v. Gilbert***, 26 Wis. 637, 642 (1870)) (emphasis added). In other words, "in order to bring a case within [the one-year provision of the Wisconsin Statute of Frauds], the court must be able to see from [the contract's] terms, that the performance is not to be completed within the year, or what is the same thing, that it cannot, in the nature of things, be done." ***Rogers v. Brightman***, 10 Wis. 49 [*55], 60 [*66] (1859); *see also* ***Treat v. Hiles***, 68 Wis. 344, 357, 32 N.W. 517, 522 (1887) ("The cases in this court hold that the contract must be such that *it cannot* be performed within one year, to be void under this statute." (alteration in original)).

¶17 Under this case law, an oral contract is void under the one-year provision of the Wisconsin Statute of Frauds if and only if the contract cannot

possibly be performed, or, in other words, if "in the nature of things it cannot be performed, by its terms, within one year of its making.[2] *See* ***Rogers***, 10 Wis. at 61 [*67] (concluding that "there was nothing in the terms of [the contract at issue] which showed that it was not to be performed in the year, nothing in its nature that showed that it could not be"). As an example, where a salesperson orally contracts with an employer for one year's employment but postpones the commencement of such employment to some future date, the oral contract is void under the Statute of Frauds, because the performance of one year's employment cannot possibly, by its terms and given the nature of time, be performed within one year of the making of the oral contract. *See* ***Brown v. Oneida Knitting Mills, Inc.***, 226 Wis. 662, 665, 277 N.W. 653 (1938).

¶18 On the other hand, an oral contract for the rendering of services for an indefinite period is generally not void under the Wisconsin Statute of Frauds, because it can *possibly* be performed within one year of the making of the oral contract if the services end within the year. Indeed, our supreme court has "consistently held that contracts for hire for an indefinite term are valid contracts although not in writing, under [the Statute of Frauds]." ***Marek v. Knab Co., Inc.***,

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[2] This understanding is consistent with the black letter law on the statute of frauds, as summarized in 9 WILLISTON ON CONTRACTS § 24:3 (4th ed.):

> It is well settled that the oral contracts made unenforceable by the statute because they are not to be performed within a year include *only* those which *cannot* be performed within that period. A promise which is not likely to be performed within a year, and which in fact is not performed within a year, is not within the statute if at the time the contract is made there is a *possibility* in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.

(Emphasis added and alteration in original.)

10 Wis. 2d 390, 393, 103 N.W.2d 31 (1960); *see also* ***Kirkpatrick v. Jackson***, 256 Wis. 208, 212-13, 40 N.W.2d 372 (1949) ("A contract for hire for an indefinite term is a valid contract although not in writing.").

¶19 In sum, we conclude that in Wisconsin, an oral contract is not void under the Statute of Frauds if there is a *possibility* that it can be performed, by its terms, within one year of its making.[3]

2. Application to the Contract Here

¶20 As stated above, the parties do not dispute that the oral contract provided for Zick & Weber to render legal services to Stangler in the Waukesha County case and for Stangler to pay for those legal services. As also explained above, the proper standard is whether it is *possible* that the oral contract could be performed within one year. Stangler points to nothing "in the nature of things," that is to say, by the terms of the agreement, that absolutely prevented his oral contract with Zick & Weber from being performed within one year of its making in April 2011. Rather, Stangler concedes on appeal that there is "no evidence that the [contract] was 'by its terms … not to be performed within 1 year of [its] making ….'"

¶21 Moreover, the circuit court reasonably explained that there were "plenty" of ways in which Zick & Weber's legal services could have "wrap[ped]

[3] Stangler suggests in his reply brief that ***Warner v. Texas & P. Ry. Co.***, 164 U.S. 418 (1896), supports his contention that the applicable standard is "what is reasonable or likely" to happen within one year. To the contrary, ***Warner*** is consistent with the Wisconsin case law discussed above. The ***Warner*** court held, "The question is not what that probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, *required* that it should *not* be performed within the year." ***Id.*** at 434 (emphasis added).

up within one year's time," including the possibility of the parties in the Waukesha County case going to mediation and settling.[4] Thus, we conclude that the circuit court properly applied the law when it considered whether there was "any possibility" of the oral contract being performed within one year of its making, found that there were many such possibilities, and decided that the contract was not void under the Wisconsin Statute of Frauds.

B. Exclusion of Evidence About Requirements of Wisconsin Supreme Court Rules of Professional Conduct for Attorneys

¶22 Stangler argues that the circuit court erred in excluding from evidence at trial the requirements of certain Wisconsin Supreme Court Rules of professional conduct for attorneys, specifically Rule 20:1.5 concerning fee agreements and Rule 20:1.2 concerning an attorney's obligations during representation. For reasons we now explain, we conclude that the circuit court properly exercised its discretion in excluding evidence about the requirements of these rules.

¶23 Appellate courts "review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. "In making

[4] Other courts have noted similar options for resolving litigation within one year. *See, e.g.*, ***Linscott v. Shasteen***, 847 N.W.2d 283, 291 (Neb. 2014) (concluding that the record did not establish that the oral contract could not be performed within one year, and therefore the contract was not void under the one-year provision within the Statute of Frauds, because each of the open cases subject to the contract could have wrapped up within the year either by settlement, dismissal, or final disposition, even though actual performance took place over seven years); ***Argonaut Ins. Cos. v. Medical Liability Mut. Ins. Co.***, 760 F. Supp. 1078, 1083 (S.D. N.Y. 1991) (holding that while it might not be likely that malpractice claims would be settled, tried, or otherwise disposed of within one year, likelihood is not the test but, rather, whether the explicit terms of the agreement requires the construction that the agreement could not be performed within one year).

evidentiary rulings, the circuit court has broad discretion." ***Id.*** "'The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the [circuit] court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" ***Id.***, ¶29 (quoted source omitted). "As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***, ¶28.

¶24 Here, Stangler does not specifically explain why it was error for the circuit court to have excluded evidence about the requirements of the Wisconsin Supreme Court Rules where the only disputed material facts for the jury to decide were whether there was a contract and whether Stangler and/or Zick & Weber breached that contract. Indeed, Stangler "readily concedes that current Wisconsin case law … establishes that violation of the Wisconsin Supreme Court Rules by an attorney does not give rise to any independent claim or cause of action, nor does violation of a rule create a presumption that some legal duty has been breached."[5]

¶25 Stangler nevertheless "urges [this court] to hold that" the requirements of the rules should be "engrafted onto the law of contracts in Wisconsin." However, Stangler fails to explain how admitting those requirements into evidence would have assisted the jury in resolving any material issue in this

[5] *See* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶68 n.14, 299 Wis. 2d 81, 726 N.W.2d 898 (stating that the rules of professional conduct for attorneys "by design do not form the basis for responsibility for the purpose of civil litigation," citing the preamble which states that the rules "'are not designed to be a basis for civil liability'").

contract dispute over whether Stangler breached the parties' contract when he failed to pay for the legal services rendered. Stangler's argument that the Wisconsin Supreme Court Rules "[were] surely relevant evidence" is conclusory, undeveloped, and unsupported by legal authority, and, therefore, we reject Stangler's argument as inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may "decline to review issues inadequately briefed").

C. Motion to Limit Zick & Weber's Damages to $10,000

¶26 Three days prior to trial, Stangler filed a motion *in limine* asking the court to limit Zick & Weber's claim for damages to not more than $10,000. Stangler argues that the circuit court erred in denying his motion. Stangler appears to make three arguments here; we address and reject each argument as unsupported by legal authority.

¶27 First, Stangler contends that Zick & Weber never amended its pleadings, and therefore, is limited to the damages amount pled in the complaint it originally filed in small claims court. However, Stangler does not cite to any legal authority to support his contention that Zick & Weber was required to formally amend its pleadings in order to prove and be awarded a higher amount of damages. As the circuit court noted, courts may "allow an amendment of pleadings" to conform with proof. *See* WIS. STAT. § 802.09(2) ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure to so amend does not affect the result of the trial of these issues*." (emphasis added)). For this reason, we reject Stangler's argument.

¶28 Second, Stangler argues in his reply brief that Zick & Weber's failure to formally amend its pleadings resulted in Stangler not receiving notice of the damages. Stangler asserts "[t]he only pleading of which Stangler had notice was the original pleading asking for $10,000 in damages." However, Stangler's argument fails because Zick & Weber's motion to convert the small claims action to a large claims action provided Stangler with actual notice. Specifically, attorney Vicki Zick averred in the affidavit attached to the motion for conversion to a large claims action:

> [P]laintiff no longer benefits from the expeditious nature of small claims procedures. For that reason, plaintiff now demands the full amount of fees due and owing, [and] also demands the mediation fees it was forced to pay because Stangler never paid them .... Finally, plaintiff rescinds the "good client" discount it extended to Stangler .... All totaled, plaintiff now seeks:
>
> ….
>
> $17,643.50

Stangler received this motion for conversion and did not object to its contents.

¶29 Third, Stangler argues that because the case was originally converted to a large claims action on the basis that his counterclaim exceeded the $10,000 jurisdictional limit, and because his counterclaim was dismissed, "the basis for having the case proceed in Large Claims Court no longer existed, [and] the case should have once again been regarded as a Small Claims case." Stangler, again, cites to no legal authority to support his contention that, by operation of law, the case automatically reverted to a small claims action "subject to the small claims procedure" once the court dismissed his counterclaim. Because Stangler does not develop or support his argument with legal authority, we do not consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

¶30 In sum, we conclude that the circuit court did not err in denying Stangler's motion to limit Zick & Weber's damages to $10,000.

D. "Negative Comments" by the Circuit Court

¶31 Finally, Stangler argues that the circuit court's "repeated negative comments regarding Stangler, combined with the rulings of the Court adverse to Stangler, denied Stangler the opportunity to have a fair trial." However, Stangler neither develops this argument nor supports it with any legal authority, and therefore, we reject his argument on that basis. *See* ***Pettit***, 171 Wis. 2d at 646 ("We may decline to review issues inadequately briefed" and "[a]rguments unsupported by references to legal authority will not be considered."). Stangler appears to raise a judicial bias argument in his reply brief by citing the law of judicial bias, but we decline to consider any argument he may be making for the first time on reply. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (appellate courts do not, "as a general rule, consider arguments raised for the first time in a reply brief").

CONCLUSION

¶32 For the reasons set forth above, we reject Stangler's arguments that the circuit court erred in denying Stangler's motion to dismiss at the close of evidence, in excluding evidence about the requirements of the Wisconsin Supreme Court Rules, in denying Stangler's motion to limit Zick & Weber's claim for damages to not more than $10,000, and in making "repeated negative comments" so as to deny Stangler a fair trial. Therefore, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.