

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 26, 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, 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. 95-2328**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**PETER J. AMBLER,**

**Plaintiff-Appellant,**

**v.**

**RICHARD F. RICE,  
FOX & FOX, S. C.,  
CONTINENTAL CASUALTY CO.,**

**Defendants-Respondents.**

APPEAL from orders of the circuit court for Dane County:  
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve  
Judge.

PER CURIAM. Peter J. Ambler filed a legal malpractice action against Richard E. Rice, alleging that Rice, his former attorney, negligently failed to timely appeal a state claims board decision. Both parties filed motions

for summary judgment, and the court granted Rice's motion and denied Ambler's. The court also denied Ambler's motion for reconsideration.

Ambler appeals from both orders, raising the following issues: (1) whether there was substantial evidence for the claims board to determine that Ambler failed to establish his innocence; and (2) whether the claims board was bound by a jury's prior credibility determination. We conclude that there was substantial evidence for the claims board to determine that Ambler failed to establish his innocence and that the claims board was not bound by the jury's prior credibility determination. We therefore affirm.

## BACKGROUND

Ambler was convicted of murder in June 1987. On August 18, 1988, we reversed and remanded for a new trial because the trial court refused to allow Ambler's attorney to impeach the credibility of the prosecution's primary witness, Tina Visgar, who placed Ambler at the scene of the crime. Ambler was acquitted after a second trial in March 1989.

Ambler subsequently retained Rice as his attorney to pursue a claim before the state claims board for compensation as an "innocent convict" under § 775.05, STATS. After a contested hearing, the claims board denied Ambler's claim because it determined that he had not established his innocence by clear and convincing evidence as required by § 775.05(3), STATS.

Ambler was notified that to appeal the claims board decision, a petition for review had to be filed with the circuit court and served on the board within thirty days. Rice prepared and filed a petition in the circuit court but failed to serve the claims board within thirty days. The circuit court dismissed Ambler's appeal for failure to serve the board. Ambler then brought this malpractice action against Rice for failing to perfect his appeal.

Both Ambler and Rice moved for summary judgment. Ambler argued that Rice's negligence caused him to lose his claim against the state

because it precluded an appeal which he should have won. Rice conceded his negligence for purposes of the motion but maintained that this did not prejudice Ambler because he should not have prevailed in his appeal.

The circuit court concluded that Ambler did not lose his claim as a result of Rice's negligence because the court would have affirmed the claims board decision had it heard the appeal. It granted summary judgment to Rice and dismissed Ambler's malpractice action. Ambler filed a motion for reconsideration, which the circuit court denied. Ambler appeals.

### STANDARD OF REVIEW

"In reviewing summary judgment decisions, we independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Backhaus v. Krueger*, 126 Wis.2d 178, 180, 376 N.W.2d 377, 378 (Ct. App. 1985). The moving party has the burden to establish the absence of a genuine issue of material fact and a moving defendant must show a defense that would defeat the plaintiff as a matter of law. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). We will reverse when the trial court has decided a legal issue incorrectly. *Rodey v. Stoner*, 180 Wis.2d 309, 312, 509 N.W.2d 316, 317 (Ct. App. 1993).

### DISCUSSION

To establish legal malpractice, a plaintiff must prove the existence of an attorney-client relationship, acts or omissions constituting negligence, causation and damages. *Cook v. Continental Casualty Co.*, 180 Wis.2d 237, 245 n.2, 509 N.W.2d 100, 103 (Ct. App. 1993). Ambler and Rice agree that an attorney-client relationship existed and Rice has conceded negligence for purposes of the motion.

Causation is usually a question of fact. However, in attorney malpractice actions causation is a question of law and appropriate for summary

judgment disposition. *General Accident Fire & Life Assurance Corp. v Cosgrove*, 257 Wis. 25, 27, 42 N.W.2d 155, 156 (1950). To determine causation for legal malpractice, the case moves to a second phase called a "suit within a suit" to determine what the outcome of the underlying action should have been had it been properly presented. *Glamann v. St. Paul Fire & Marine Ins.*, 144 Wis.2d 865, 870, 424 N.W.2d 924, 926 (1988). To be entitled to relief, Ambler must establish that he would have been successful in his claim "but for" the negligence of Rice. *Id.* The issue then is whether Ambler should have prevailed in his appeal.

Ambler first argues that he should have prevailed in his appeal of the claims board decision because there was no substantial evidence in the record to support its conclusion that he failed to establish his innocence. Ambler contends the claims board relied on evidence which was not credible, disputes allegations made against him at the hearing, and maintains that, after the testimony of Visgar was discredited at his second trial, there was no evidence left to conclude he had any involvement with the murder.

The standard of review for an "innocent convict" claim is governed by Chapter 227, STATS. Section 775.05(5), STATS. The reviewing court may not substitute its judgment for that of the administrative agency as to the weight of the evidence and should only reverse a finding of fact if it is not supported by substantial evidence. Section 227.57(6), STATS. On review of an administrative agency decision, we review the agency decision and not that of the circuit court. *School Dist. v. School Dist. Boundary Appeal Bd.*, 201 Wis.2d 109, 116, 548 N.W.2d 122, 126 (Ct. App. 1996).

The test for substantial evidence is whether reasonable minds could arrive at the same conclusion as the board. *Madison Gas & Elec. Co. v. Public Service Comm'n*, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-43 (1982). When two conclusions from the same facts are reasonable, we defer to the conclusion of the agency. *Hamilton v. DILHR*, 94 Wis.2d 611, 617, 288 N.W.2d 857, 860 (1980).

The circuit court concluded that the substantial evidence test had been satisfied because reasonable minds could have arrived at the same

conclusion as the claims board. We agree. Ambler's allegation that there was no credible evidence to support the conclusion of the claims board is not substantiated by the record. The case against Ambler included not only the testimony of Visgar but also evidence of opportunity and motive, including numerous death threats made against the victim, the concoction of an alibi, and incriminating statements Ambler made in front of correctional officers after he was acquitted.

The burden was on Ambler to establish his innocence to the satisfaction of the claims board by clear and convincing evidence. Section 775.05(3), STATS. Ambler disputes the evidence tending to incriminate him, but this alone does not provide a basis to reverse the board's findings supported by substantial evidence. Under § 227.57(6), STATS., the extent to which Ambler successfully refuted substantial evidence against him was a matter of factual interpretation for the claims board.

Ambler next argues that he should have prevailed in his appeal because the claims board improperly made its own credibility determination regarding the testimony of Visgar. He contends that the claims board was bound by the credibility determination made by the jury at his second trial because Visgar did not testify before the board. In such a situation, he asserts, the jury rather than the claims board was the original finder of fact and, since the jury did not believe Visgar, the claims board was precluded from considering her trial testimony. Absent the testimony of Visgar, Ambler contends that there is no substantial evidence left to connect him to the murder.

The factfinder in an "innocent convict" claim is the claims board. Section 775.05(3), STATS., provides that "*the claims board shall find* either that the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent." (Emphasis added.) Nothing in the statute requires the board to rely on prior jury determinations of a witness's credibility when that witness does not testify before the board. Under § 16.007(2), STATS., the claims board is not bound by formal rules of evidence and must admit any testimony having "reasonable probative value, excluding that which is immaterial, irrelevant or unduly repetitious." The fact that Visgar

was not brought before the claims board, yet some weight was given to her trial testimony, was not a reversible error which would have saved Ambler's claim.

We conclude that Ambler should not have prevailed in his appeal of the claims board decision denying his claim. Therefore, Ambler failed to show that Rice's negligence damaged him. We therefore affirm the order granting Rice's motion for summary judgment and the order denying Ambler's motion for reconsideration.

*By the Court.* – Orders affirmed.

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