

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 23, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

**No. 98-0284**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STEVEN F. WEISS,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL M. RAJEK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Michael Rajek appeals a judgment that confirmed an arbitration award in favor of Steven Weiss. The arbitrator awarded Weiss a refund of excessive attorney fees Rajek had charged while defending Weiss in a criminal case. The arbitration and trial court proceedings languished several years without significant progress. On appeal, Rajek makes three basic arguments: (1)

the trial court should have dismissed Weiss' lawsuit, including the arbitration proceedings, for want of prosecution; (2) the evidence at the arbitration hearing did not support the arbitration findings and award; and (3) the arbitration and trial court proceedings merit reversal in the interest of justice. We reject these arguments and affirm the trial court's judgment upholding the arbitration award.

We first uphold the trial court's denial of the motion to dismiss. The trial court made a discretionary decision, *see Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991), and we discern no erroneous exercise of discretion. First, Weiss gave the trial court good cause for the delay. Weiss' counsel had had to deal with traumatic events in his personal life during the time frame. While not completely exonerating Weiss' counsel, those events were mitigating factors that the trial court could consider. Second, the trial court took partial responsibility for the delay, admitting that it had failed to exercise the kind oversight of the case it customarily exercises in arbitration cases. Third, Rajek did not show a high level of prejudice from the delay. He has not shown how the delay may have significantly hurt his defense or unfairly impeded the arbitrator's search for the truth. Under the circumstances, the trial court had a reasonable discretionary basis to give little weight to the case's delay.

We will not review the merits of the arbitration award. As an appellate court, we cannot go outside the record reviewed by the trial court. *See In re Ryde*, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). Here, Rajek asks us to review the transcript of the arbitration hearing. Rajek, however, never furnished that transcript to the trial court. In fact, Rajek did not have the transcript prepared until he had filed his appeal. Rajek had no right to bypass the trial court with such material and bring it directly to the attention of this court. Rather, Rajek had to make his entire case against the arbitration award in the trial court first.

The trial court is the court that must render judgment on the award in the first instance; we hear only appeals from the trial court's ruling and its analysis of the arbitration proceedings. *See* §§ 788.09, 788.10 and 788.15, STATS. As a result, the trial court's ruling stands on the trial court record, unaffected by evidence from the arbitration hearing.

Nonetheless, even if we were to review the merits of the trial court's decision, we would uphold it. Trial courts may overturn arbitrator's awards in limited circumstances, only for fraud, mistake, and perversity. *See Joint Sch. Dist. v. Jefferson Educ. Assn.*, 78 Wis.2d 94, 116-18, 253 N.W.2d 536, 547 (1977). Here, the trial court rejected Rajek's attempt to impeach Weiss' credibility, and we agree with the trial court. Having seen and heard the witnesses, the arbitrator, not the trial court, was the judge of credibility. *See INEWS American Pub., Inc. v. Newark Typo. Union Local No. 103*, 918 F.2d 21, 24 (3d Cir. 1990). The trial court also rejected Rajek's claim that the arbitrator had a conflict of interest. The trial court found no evidence of any conflict, and we discern none. The trial court further viewed Rajek's tactics as a tacit consent to confirmation; Rajek had withdrawn his motion to vacate the award, attacking it solely on Weiss' failure to prosecute. Despite those tactics and the limited record, the trial court examined the award simply to put "this long, drawn-out matter" to rest. We detect no error.

Last, we will not reverse the trial court's judgment or the arbitration award in the interests of justice. We have that discretionary power in the event that the lower court proceedings worked a miscarriage of justice or did not try the full controversy. *See Vollmer v. Luety*, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990). Here, Rajek complains that Weiss gave Rajek notice of Weiss' expert only one week before the arbitration hearing and that the expert's testimony

weighed heavily in the arbitration decision. Again, Rajek did not furnish the trial court a transcript of the arbitration hearing, and we therefore will not review any issue tied to such testimony. The trial court noted, however, that Weiss disclosed the need for an expert one year earlier and that Rajek should have known from experience alone the need for expert testimony. Under the circumstances, we cannot fault the trial court's analysis on this issue. In short, Rajek has shown no miscarriage of justice.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

