

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2010AP755
2010AP756
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2009SC1458
2009AP1459**

**IN COURT OF APPEALS
DISTRICT II**

KRISTINE A. PANENKA,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY PANENKA,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 BROWN, C.J.¹ This is an appeal of two small claims judgments. Both were awarded to Kristine Panenka for reimbursement of money given to her

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

sister, Kimberly Panenka. Kimberly² appeals both judgments. She contends that because they add up to more than \$5000, they exceed the jurisdictional limit for small claims. She also argues that the trial court erred in granting judgment on one of the loans under a theory of unjust enrichment. Kristine responds that because there are two separate judgments, neither of which exceeds \$5000, there is no jurisdictional issue, and the trial court's findings regarding unjust enrichment should be upheld. We agree with Kristine, and affirm.

FACTS

¶2 On March 10, 2009, Kristine filed two separate small claims lawsuits alleging that Kimberly had failed to repay three loans. One of the complaints alleged that on December 4, 2007, Kristine gave Kimberly \$4750 to help her pay her mortgage. A second lawsuit alleged that later that same day, Kimberly asked Kristine for an additional loan of \$1100. The second lawsuit also sought reimbursement in the amount of \$845.40 for sums paid by Kristine on December 10, 2007, when Kimberly asked Kristine to pay her dental bill.

¶3 At trial, Kristine testified that on December 4, 2007, Kimberly had contacted her asking to borrow money so that Kimberly could make her monthly mortgage payment. Kristine stated that she wrote a check for \$4750 and deposited it at Kimberly's bank. Several hours later the same day, Kimberly contacted her to request an additional \$1100 because the loan for \$4750 was not enough. In response to the second call, Kristine stated that she took out a cash advance on her credit card and deposited \$1100 into Kimberly's account at another bank location.

² Because both parties share the same last name, we will refer to them by their first names throughout this opinion.

She offered as evidence two separate bank deposit receipts and a handwritten note from Kimberly to Kristine, which stated “I, Kim[berly] Panenka, agree to pay back Kris[tine] Panenka \$5,850.00 that she loaned me on December 4, 2007.”

¶4 Regarding the third alleged loan, Kristine testified that on December 10, 2007, Kimberly contacted Kristine to request that she loan Kimberly money to pay an outstanding dental bill in the amount of \$845.40. That day, Kristine paid Kimberly’s dentist \$845.40 by credit card, which was evidenced at trial by both Kristine’s credit card statement and a receipt. Kristine testified that she requested repayment on all three loans from Kimberly several times but that they were never repaid.

¶5 Kimberly also testified at trial as to her version of the facts. Kimberly agreed that she had requested a loan from Kristine so that she could pay her mortgage, but she stated that Kristine had told her that she only had \$4750 to give. Kimberly then testified that later in the day, her sister contacted her with the idea that Kristine could obtain an additional \$1100 cash advance from her credit card. Kimberly also acknowledged that she asked Kristine to pay her dental bill, but she denied any agreement to repay Kristine that money. On cross-examination, Kimberly admitted that the dental bill payment was not a gift, but stated that she and Kristine had a long history of paying for things for each other without expecting repayment. She claimed that the dental payment was part of that arrangement, and listed several favors she had done for Kristine that had gone uncompensated.

¶6 Following the close of evidence, Kimberly requested that the trial court only allow judgment on one of Kristine’s claims in the amount of \$4750 because the total of both claims would exceed the small claims jurisdictional limit

of \$5000. The trial court pointed out that Kimberly had not previously brought a motion on the issue, but then stated that there were “three separate and distinct claims by the plaintiff.” Noting Kristine’s credibility, the trial court found that Kristine made two separate payments to Kimberly on December 4, 2007, and that they were “two separate transactions.” Because the amount sought in each of the two small claims cases was less than \$5000, the trial court reasoned that the separate judgments were within the jurisdictional limit.

¶7 As to the \$845.40 dental payment, the court rejected the idea that it was not meant to be repaid. Although there was no promissory note to evidence a loan, the court found in favor of Kristine. In so finding, the trial court stated the following:

All equities lie with the plaintiff and whether or not there is a written contract to support the amount is not necessarily required. It’s whether or not someone gives something over, pays something for somebody and it’s inequitable for that person to retain the benefit of that without returning the money.

The trial court explicitly found there was no credibility with respect to Kimberly’s version of the events as to any offsets. Rather, the court stated “[t]he credibility here lies with the plaintiff concerning all of this.” The court thereupon granted two judgments in favor of Kristine for reimbursement of both mortgage loans and the dental payment—one for \$4750 and the other for \$1945.³ Kimberly appeals.

³ Costs and fees were also awarded, but they are not at issue so we do not discuss them.

DISCUSSION

¶8 Kimberly makes two arguments on appeal. First, she reiterates her argument that the trial court could not award both judgments in Kristine’s favor because when added together, they exceed the small claims jurisdictional limit. Her second claim is that there was insufficient evidence to support the trial court’s finding in favor of Kristine for the \$845.40 dental payment based on a theory of unjust enrichment.

Jurisdictional Limit

¶9 Kimberly’s first argument appears to be that the trial court lacked competency to award the judgments because when combined, they are in excess of \$5000. *See* WIS. STAT. § 799.01(1)(d) (setting a jurisdictional limit of \$5000 for small claims court).⁴ In our review, we will uphold the trial court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Fryer v. Conant***, 159 Wis. 2d 739, 744; 465 N.W.2d 517 (Ct. App. 1990). When more than one reasonable inference can be drawn from the credible evidence, we accept the inference drawn by the trier of fact. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250; 274 N.W.2d 647 (1979). We defer to the determination of the trial court on assessment of weight and credibility given “the superior opportunity

⁴ Although Kimberly did raise the jurisdictional issue in her answers to Kristine’s complaints, Kimberly did not make any motion to join, dismiss, or move the cases out of small claims court. Instead, she waited until after the close of evidence to argue that the total sum of the two separate small claims actions exceeded \$5000 and therefore Kristine should be limited to one claim for \$4750. Arguably, this issue is waived because of her failure to make a motion prior to trial. However, since Kimberly did raise the issue to the trial court and the trial court addressed it, we will consider it as well.

of the trial court to observe the demeanor of witnesses and gauge the persuasiveness of their testimony.” *In re Estate of Dejmaj*, 95 Wis. 2d 141, 151-52; 289 N.W.2d 813 (1980) (citation omitted). However, we will review the application of the facts to a statute—in this case § 799.01(1)(d)—de novo. *See State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

¶10 This issue involves the interplay between the small claims jurisdictional limit and procedure, so a brief overview of small claims case law is helpful. First, small claims courts have subject matter jurisdiction to hear claims that involve damages greater than \$5000, but they lack competency to award a single judgment higher than that amount. *Bryhan v. Pink*, 2006 WI App 111, ¶¶15-16, 294 Wis. 2d 347, 718 N.W.2d 112. Attorney’s fees and costs, however, are not included in the \$5000 limit, so a single judgment may exceed \$5000 including costs and fees. *Reusch v. Roob*, 2000 WI App 76, ¶37, 234 Wis. 2d 270, 610 N.W.2d 168.

¶11 We see no reason why a small claims court may not hear two cases at the same time. And we see no reason why a court could not then render two separate judgments that, when combined, exceed \$5000, so long as each individual judgment is under the \$5000 limit. Kimberly cites no law that says otherwise. So, we are left with the same argument she made at the close of trial—that only one transaction occurred as shown by a single promissory note for \$5850. This devolves into a factual determination to be made by the fact-finder as to the intent of the parties.

¶12 The trial court explicitly found that Kristine had given money to Kimberly through three separate transactions. In addition, it found that even though two of the transactions occurred on one day and shared a promissory note,

they were still “two separate transactions.” Although the trial court heard both cases simultaneously, the issues and pleadings were not merged and each action resulted in a separate judgment. Kristine’s testimony that Kimberly asked for money on two separate occasions on the same day supports the trial court’s finding of fact that each of Kristine’s claims was based on a separate transaction. The trial court’s finding is not clearly erroneous, so we will not disturb it. *See* WIS. STAT. § 805.17(2). Then, since each claim was for an amount under the small claims jurisdictional limit of \$5000, the trial court did not err when it concluded that the jurisdictional limit was not exceeded.

Unjust Enrichment

¶13 Kimberly’s second claim is based on sufficiency of the evidence for the trial court’s finding of unjust enrichment requiring reimbursement of the \$845.40 dental payment. Once again, we note that the trial court’s findings of fact will not be set aside unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). In addition, unjust enrichment, or a quasi-contract, is a cause of action in equity. *See Puttkammer v. Minth*, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). A circuit court’s decision to grant relief pursuant to an equitable doctrine is discretionary. *Ulrich v. Zemke*, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458 (2002). We uphold a discretionary decision of the trial court if it can be concluded ab initio that the trial court’s decision is supported by the facts. *See Conrad v. Conrad*, 92 Wis. 2d 407, 415, 284 N.W.2d 674 (1979).

¶14 There are three elements to a claim of unjust enrichment: (1) the plaintiff must confer a benefit upon the defendant, (2) the defendant must appreciate or have knowledge of the benefit, and (3) the defendant must have retained the benefit under circumstances that would render it inequitable to retain

the benefit without paying the value of it. *Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987). Kimberly argues that there was insufficient evidence to support a finding in Kristine’s favor.

¶15 The thrust of Kimberly’s argument is that the burden of proof is on Kristine to show all three elements and that there was no evidence to support the third element of an unjust enrichment claim—that it would have been inequitable for Kimberly to retain the benefit without paying for it. She bases this argument on the fact that she testified that the sisters were in the habit of helping each other out from time to time without expectation of repayment. She states that her testimony to this effect was uncontroverted because Kristine did not explicitly refute it. Instead, Kristine stated only that she had loaned Kimberly the money at Kimberly’s request.

¶16 We point out that whether or not Kristine explicitly denied Kimberly’s testimony, the trial court was free to disregard it entirely if it chose to do so. See *Dejmal*, 95 Wis. 2d at 151-52 (stating that the trial court determines the credibility of witnesses). And that is exactly what it did when it stated that “[t]he credibility here lies with the plaintiff concerning all of this.” On top of that, the decision whether to grant equitable relief was within the trial court’s discretion. *Ulrich*, 258 Wis. 2d 180, ¶8.

¶17 And we disagree that Kimberly’s testimony regarding expectation of repayment was uncontroverted. Kristine stated that she “loan[ed]” Kimberly the money, which implies that she expected repayment. Thus, there was sufficient evidence for the trial court to find that Kristine gave her sister money with the expectation that she would be repaid. Therefore, it was not error for the trial court to conclude that it would be inequitable for Kimberly not to reimburse her.

By the Court.—Judgments affirmed.

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

