COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2665 **Cir. Ct. No. 2008CV5150**

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

GIMBEL REILLY GUERIN BROWN,

PLAINTIFF-RESPONDENT,

V.

ANNE O'CONNOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anne O'Connor, *pro se*, appeals a judgment in favor of Gimbel, Reilly, Guerin & Brown. O'Connor argues: (1) that the circuit court erred in ruling that she had a contract with the law firm to pay for legal services at an hourly rate; (2) that the circuit court's findings of fact were clearly

erroneous; (3) that the circuit court applied the wrong standard of proof; (4) that the circuit court misused its discretion in admitting evidence at trial; (5) that the circuit court should have allowed her to proceed with a counterclaim; (6) that the circuit court was biased; (7) that the circuit court should have recused itself; and (8) that the circuit court should have granted her motion for reconsideration. We resolve all of these issues against O'Connor. Therefore, we affirm.

¶2 Raymond Dall'Osto, Esq., represented O'Connor for several years, defending a felony criminal charge against her and assisting her with various civil matters that arose in conjunction with the criminal charge. His law firm, Gimbel, Reilly, Guerin & Brown, brought this action against O'Connor for breach of contract, arguing that O'Connor failed to pay $7300 in attorney's fees she owed the firm. O'Connor filed a counterclaim, arguing that she overpaid the firm $24,000. After a four-day trial, the circuit court ruled in favor of the law firm. O'Connor moved for reconsideration or, in the alternative, for a new trial. The circuit court denied the motion. The circuit court then entered judgment against O'Connor.

¶3 O'Connor argues that the circuit court erred in ruling that she had an enforceable contract with the law firm to pay for legal services at an hourly rate. She contends that she had a flat rate agreement with the firm to pay a set amount for each stage of the criminal proceeding.

¶4 The "Legal Representation Agreement" between O'Connor and the law firm provided:

I. ATTORNEY FEES AND EXPENSES

I agree that the following method will be used to determine the proper amount of legal fees, which includes all services and costs in connection with the client's case:

(A) THROUGH INVESTIGATION

A nonrefundable initial retainer of $5,000 shall be paid to ensure the firm's availability to represent the client in the initial stages of the investigation, in discussions with police investigators, prosecutors and counsel for her sons and through the preliminary hearing held on November 3, 2003. Additional stage fees will be required thereafter, which the client will be advised of and will be agreed upon at that time. I agree to pay the initial stage fee at the time I sign this agreement, and any further stage fees within twenty-one (21) days of being informed by the firm that the additional fee will be necessary.

….

II. BILLING

I agree to the following schedule of billing:

(A) Additional fees will be billed as new stages are reached in the case.

….

(C) I understand that I will be billed for and I agree to pay for all activity of the firm in connection with my case, including, but not limited to research, investigation, preparation, travel, intra-office consultations, office and telephone conferences with and written communications to and from me, opposing counsel and counsel for co-defendants and parties, witnesses, courts and persons and consultants engaged to assist with my case.

¶5 "A contract provision [that] is reasonably and fairly susceptible to more than one construction is ambiguous." ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815, 819 (1979). Whether a contract is ambiguous is a question of law. ***Mattheis v. Heritage Mutual Insurance Company***, 169 Wis. 2d 716, 720, 487 N.W.2d 52, 54 (Ct. App. 1992). We review questions of law without deference to the circuit court. ***Ibid.*** The contract language is ambiguous because it states that O'Connor must pay fees at each stage of the proceedings—which, according to O'Connor, meant that the fee for each stage would be a flat fee—but the contract also states that O'Connor would be billed for all activity of the firm in connection with the case and enumerates various types of activities for which O'Connor would be billed as examples, which suggests that the billing would be based on actual work done, not a flat fee.

¶6 When a contract is ambiguous, a circuit court may use extrinsic evidence to determine the parties' intent. *See* ***Jenkins***, 88 Wis. 2d at 722, 277 N.W.2d at 819. After a trial to the circuit court, the circuit court found as a matter of fact that O'Connor had been "fully and repeatedly [orally] informed that the contract would be billed on an hourly basis at $250.00 per hour by Attorney Dall'Osto, prior to signing the contract" and that Dall'Osto sent O'Connor a letter before she signed the billing agreement that provided: "Our firm like most other law firms keeps its time on an hourly basis." The circuit court also found that O'Connor "knew that she had contracted for services to be billed on an hourly basis" and "signed the agreement knowing that it was hourly," although she had asked Dall'Osto "prior to signing … to accept a flat fee agreement," which he rejected "reiterat[ing] that the agreement was hourly and not flat fee." Based on the circuit court's factual findings that the parties intended to enter into a contract that billed for actual hours worked, albeit billed in stages, the circuit court

properly ruled that the contract was an enforceable contract for legal services billed at an hourly rate.

¶7 O'Connor contends that the circuit court's findings of fact were clearly erroneous. She argues that the circuit court should not have believed Dall'Osto's testimony that he told her billing was hourly. When there is conflicting testimony, the circuit court, as the trier of fact, is the arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony. ***Milbauer v. Transport Employees' Mutual Benefit Society***, 56 Wis. 2d 860, 865, 203 N.W.2d 135, 138 (1973). The circuit court found Dall'Osto's testimony credible and found O'Connor's not credible because she contradicted herself repeatedly in statements to the police, to Dall'Osto, in pleadings and in her deposition testimony. O'Connor raises other challenges to the circuit court's findings of fact that are based on her characterization of the findings, rather than the findings themselves. These challenges do not merit further discussion. O'Connor has not shown that the circuit court's findings of fact were clearly erroneous.

¶8 O'Connor next argues that the circuit court applied the wrong standard of proof to this action because it found that Dall'Osto's testimony "was clear, convincing and consistent with the contract, emails and correspondence in evidence." She contends that this shows that the circuit court incorrectly used a "heightened middle burden of proof in issuing its findings," rather than the appropriate "ordinary burden of proof that … [required that the circuit court] be satisfied by the greater weight of the credible evidence." She concedes, however, that the use of a higher burden by the circuit court worked to her advantage. Therefore the error, if any, was harmless because it did not adversely affect O'Connor's substantial rights. *See* WIS. STAT. § 805.18(2).

¶9 O'Connor next argues that the circuit court misused its discretion in admitting at trial an exhibit from the law firm's affidavit in support of a prior summary judgment motion. A circuit court's decision to admit evidence at trial may not be challenged on appeal unless a timely objection appears on the record. WIS. STAT. RULE 901.03(1)(a); *see also* ***Chitwood v. A.O. Smith Harvestore Products, Inc.***, 170 Wis. 2d 622, 636, 489 N.W.2d 697, 704 (Ct. App. 1992). O'Connor did not object to admission of this evidence. Therefore, we will not consider her argument.

¶10 O'Connor next argues that the circuit court erred when it refused to let her proceed with a counterclaim alleging that she overpaid the law firm $24,000. The determinative issue in this case was whether the parties had an hourly fee agreement. There was no dispute about the amount that O'Connor paid or the hours that the law firm worked. O'Connor's contention that she overpaid $24,000 was based on *her* interpretation of the fee agreement. The circuit court properly concluded that O'Connor's contention should not be tried as a separate counterclaim because it was, in fact, a defense to the suit brought by the law firm; O'Connor was arguing that she overpaid because the fee agreement was a staged flat fee agreement. We reject O'Connor's argument that the circuit court erred in its treatment of O'Connor's contention that she overpaid the firm.

¶11 O'Connor next argues that the circuit court was biased. She points to multiple instances when the circuit court interrupted her, corrected her or spoke to her in a manner that she characterizes as showing bias. "The right to a fair trial includes the right to be tried by an impartial and unbiased judge." ***State v. Walberg***, 109 Wis. 2d 96, 105, 325 N.W.2d 687, 692 (1982). A circuit court judge "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to … [m]ake the interrogation and

presentation effective for the ascertainment of the truth … [and] [a]void needless consumption of time." WIS. STAT. RULE 906.11. After reviewing the transcripts, we find no evidence of bias. We see nothing more than a trial judge firmly in control of the proceedings in front of her, directing the parties to the most efficient resolution of their dispute. We reject this claim.

¶12 O'Connor next argues that the circuit court should have recused itself on her request. A judge shall disqualify herself if the "judge determines that, for any reason, … she cannot, or it appears … she cannot, act in an impartial manner." WIS. STAT. § 757.19(2)(g). A judge must disqualify herself "only when that judge makes a determination that, in fact or in appearance, … she cannot act in an impartial manner." ***State v. American TV & Appliance***, 151 Wis. 2d 175, 183, 443 N.W.2d 662, 665 (1989). A judge is not required to disqualify herself when "one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner[.]" ***Ibid.*** The circuit court judge concluded that she was acting, and could continue to act, in an impartial manner in this case. Based on this subjective determination, the judge was not required to recuse herself. Moreover, it is well-established that a litigant is not entitled to a new judge simply because she does not like the circuit court's demeanor or adverse rulings. ***Pure Milk Products Cooperative v. National Farmers Organization***, 64 Wis. 2d 241, 249, 219 N.W.2d 564, 568 (1974). We reject the argument that the circuit court should have recused itself.

¶13 Finally, O'Connor argues that the circuit court should have granted her motion for reconsideration. As previously explained, the circuit court did not

err in entering judgment against O'Connor. Therefore, the circuit court properly denied O'Connor's motion for reconsideration.[1]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[1] Any issues O'Connor raised that we have not discussed in this opinion did not have sufficient potential merit to be separately considered. *See* ***County of Fond du Lac v. Derksen***, 2002 WI App 160, ¶4, 256 Wis. 2d 490, 494, 647 N.W.2d 922, 923 (citation omitted) ("'An appellate court is not a performing bear, required to dance to each and every tune played on appeal.'").