

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0947

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHALLONER MORSE McBRIDE,

PLAINTIFF-APPELLANT,

V.

PATRICIA STERNARD, N/K/A PATRICIA HENKE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Door County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Challoner Morse McBride appeals from a judgment dismissing her small claims action for legal services against Patricia Henke

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(f/k/a Sternard). McBride argues that the circuit court erroneously exercised its discretion by dismissing her action for failing to satisfy her burden of proof. This court rejects McBride's argument and affirms the judgment.

¶2 It is undisputed that in June of 1987, Henke retained McBride to represent her in a divorce proceeding. McBride additionally represented Henke's interests when her former husband filed for bankruptcy, attempting to discharge money owed to Henke from the divorce. On October 17, 1991, McBride wrote Henke the following:

We have received the monies from [your former husband and his attorney] and they are now in my trust account. As per our discussion at the last hearing, I am applying them toward your bill in this office. There still remains \$3,207.84 on this bill. If you will set-up an appointment I am willing to negotiate a break on the final bill, if you will make monthly payments. Please sign and return the enclosed Disbursal Sheet at your earliest convenience. Thank you.

The referenced disbursal sheet was signed by both Henke and McBride and contained a written notation, "Pd. 10/29/91."

¶3 McBride filed this small claims action on June 9, 1998, seeking payment for legal services, including interest owed pursuant to a second retainer agreement the parties allegedly entered into. At trial, however, McBride was unable to produce either a signed copy of the second retainer agreement or records of her bills. Rather, McBride attempted to reconstruct the alleged billings from ledger cards and time slips. Henke, however, testified that she never entered into a second retainer agreement and that she neither saw McBride nor sought legal services from her after October of 1991. The circuit court concluded that McBride

failed to satisfy her burden of proof and granted Henke's motion to dismiss. This appeal followed.

¶4 When a defendant seeks dismissal on the ground that the plaintiff has failed to present evidence sufficient to establish a prima facie case, the court need not view the evidence in the light most favorable to the plaintiff or seek inferences from facts that might, under some view, support the plaintiff's claim. *See Household Utils., Inc. v. Andrews Co.*, 71 Wis. 2d 17, 24-25, 236 N.W.2d 663 (1976). On appeal, this court is to view the evidence in the light most favorable to the trial court's findings unless they are contrary to the great weight and clear preponderance of the evidence. *See Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319 (1977). Further, this court may independently review the record for reasons to support the circuit court's exercise of discretion. *See State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶5 Here, the court implicitly found that McBride did not render legal services to Henke after October of 1991. *See State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."). Although McBride argues to the contrary, the circuit court is the ultimate arbiter of the weight of the evidence and credibility of the witnesses. *See* WIS. STAT. § 805.17(2).

¶6 With regard to any amounts owed for services performed before October 1991, a claim for these amounts is barred by the statute of limitations. The statute of limitations for an action to recover fees for professional services is defined in WIS. STAT. § 893.43, which provides that "[a]n action upon any contract ... including an action to recover fees for professional services ... shall be commenced within 6 years after the cause of action accrues or be barred."

Because the circuit court implicitly determined that no legal services were rendered after October of 1991, McBride's June 1998 small claims action is barred by the statute of limitations.

¶7 McBride nevertheless contends that Henke's last payment on her account was made in October of 1992. This court has held that "[a] partial payment on an obligation made prior to the running of the statute of limitations tolls the statute, and sets it running from the date of the payment." *See St. Mary's Hosp. Med. Ctr. v. Tarkenton*, 103 Wis. 2d 422, 424, 309 N.W.2d 14 (Ct. App. 1981). Henke, however, disputed making this payment. Because the circuit court is the ultimate arbiter of the credibility of witnesses and because the record otherwise supports the circuit court's determination, the judgment dismissing McBride's claim is affirmed.

By the Court.—Judgment affirmed.

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

