COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2220 **Cir. Ct. No. 00-CV-1801**

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

AIKEN & SCOPTUR, S.C.,

PETITIONER,

LARRAINE MCNAMARA-MCGRAW, S.C. AND CYNTHIA MANLOVE,

PETITIONERS-RESPONDENTS,

V.

JOHN BRENDEL AND BRENDEL LAW OFFICES,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. John Brendel and Brendel Law Offices appeal from an order requiring distribution of 80% of attorney's fees earned in a personal injury action to Larraine McNamara-McGraw, S.C. Brendel argues that claim preclusion prevents relitigation of the contractual right to a portion of the fees following an arbitrator's decision on the relevant fee agreement and that the evidence does not support the trial court's findings. We affirm the order of the trial court.

¶2 In July 1998, while Attorney Cynthia Manlove was employed at Brendel's law firm, she undertook representation of a female client for a personal injury claim. When Manlove left Brendel's firm in November 1998, she took the case with her. Manlove was then employed by Attorney Larraine McNamara-McGraw. (The civil complaint in the personal injury case was filed on November 1, 1999. Manlove was then employed at another law firm.) Eventually the law firm of Aiken & Scoptur, S.C. was named as co-counsel to prepare the pending personal injury case for trial. At mediation in November 2000, a settlement was reached and contingent attorney's fees were approximately $216,666. In December 2000, Aiken & Scoptur, McNamara-McGraw, and Manlove brought this action for a declaration of rights allocating the fees between the parties. A partial settlement was reached and Aiken & Scoptur was dismissed from the action after taking 50% of the fees. The remainder of the contingent fees was apportioned by the trial court 80% to McNamara-McGraw (because Manlove was an employee of that firm) and 20% to Brendel.

¶3 McNamara-McGraw's share of the fee is based on Manlove's entitlement. When Manlove left Brendel's firm, an agreement was made regarding the transfer of cases. As to attorney's fees the agreement provided:

> Manlove agrees that all legal fees collected and/or due shall be held by her solely as trustee for Brendel until such fees are divided pursuant to mutual agreement, if possible. If there is no mutual agreement, such fees will be divided between the parties pursuant to Wisconsin law on the quantum merit [sic] basis.

¶4 In September 1999, Manlove and Brendel submitted to arbitration under the State Bar of Wisconsin Lawyer Dispute Resolution Program when they were unable to agree on the splitting of fees in two other cases. The arbitrator's decision explained the two different concepts adopted by the agreement:

> By the reference to "Wisconsin law" the parties agreed that the principle of ***Tonn [v. Reuter***, 6 Wis. 2d 498, 95 N.W.2d 261 (1959),] that Brendel would get the benefit of his bargain with the clients would apply. However, that is not all. The parties also agreed that the fees would be divided "pursuant to Wisconsin law *on the quantum merit* (sic) *basis*" (emphasis supplied). This can only mean that the parties agreed that *both* the ***Tonn*** principle that Brendel gets the benefit of his bargain with the clients *and* that the fees would be divided on the *quantum meruit* basis are applicable here.

The arbitrator concluded that under the agreement Brendel "would get the amount of the contingent fee based upon the amount of the settlement ultimately realized by the client, and Manlove would get a fair sum from that fee based upon her services and work after leaving the Brendel Law Offices."

¶5 Brendel first argues that the arbitrator's decision precludes McNamara-McGraw from relitigating the meaning of the agreement to "split fees pursuant to Wisconsin law on the quantum merit [sic] basis." We need not decide if claim preclusion applies because we conclude that the trial court did not depart from the arbitrator's interpretation of the agreement. Contrary to Brendel's contention that the trial court misconstrued the agreement, the trial court did not engage in contract construction. The trial court repeatedly gave recognition to the

arbitrator's decision that the method of fee resolution set forth in ***Tonn v. Reuter***, 6 Wis. 2d 498, 95 N.W.2d 261 (1959), was modified by the agreement's reference to the concept of quantum meruit. The trial court reviewed the two applicable methodologies as the underpinnings for the factual findings it was required to make and not by way of grafting a different interpretation on the parties' agreement. The trial court's determination is an execution of the arbitrator's interpretation of the agreement.

¶6 Brendel argues that the trial court committed legal error by considering it significant that Brendel had never met the client and had not expended any time on the case prior to Manlove taking it to the McNamara-McGraw firm. He argues that his entitlement to fees is governed by ***Tonn*** and that ***Tonn*** does not permit the amount of work performed before the attorney leaves to have a bearing on the apportionment of fees. What Brendel fails to recognize is that quantum meruit requires the trial court to determine the reasonable value of services; it permits an assessment of not only the quantity of the work performed by the McNamara-McGraw firm but also the quality of services. *See* ***Ramsey v. Ellis***, 168 Wis. 2d 779, 784, 484 N.W.2d 331 (1992) ("Literally translated, 'quantum meruit' means 'as much as he deserves.'"). The personal injury case involved the very sensitive subject matter of rape of a patient in a rehabilitation center. McNamara-McGraw testified that she and her firm supported their client throughout the related criminal trial and performed other services for which no separate billing was made. The very supportive environment created by McNamara-McGraw was contrasted with Brendel's lack of contact with the client. It was a useful comparison in determining the value of the services rendered by McNamara-McGraw. *Cf.* ***Diedrick v. Hartford Accident & Indem. Co.***, 62 Wis. 2d 759, 767, 216 N.W.2d 193 (1974) (appropriateness of fee award based on

import of attorney's services in bringing about the result); ***McBride v. Wausau Ins. Cos.***, 176 Wis. 2d 382, 389, 500 N.W.2d 387 (Ct. App. 1993) (no entitlement to attorney's fees because the attorney rendered substandard service).

¶7 Brendel challenges the trial court's findings. The trial court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000). For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. *See* ***id.***

¶8 The trial court found that during the time that the personal injury case was handled by McNamara-McGraw, there was significant work done by both Attorney McNamara-McGraw and Attorney Manlove. In attacking this finding Brendel relies on a rendition of evidence that tends to minimize hours expended once the case was at McNamara-McGraw. He relies primarily on the testimony of the personal injury client that she tried to minimize contact with Attorney McNamara-McGraw when she became dissatisfied with her services and disclosure of certain information. The client testified that she did not believe that McNamara-McGraw or Manlove did anything on her case.

¶9 Contrary evidence exists. Manlove testified that after leaving Brendel's firm she pursued a circuit court petition to get the psychiatric records of

the alleged rapist. She also looked into sources of alternative funding so her client could leave the rehabilitation center before the suit was commenced. Attorney McNamara-McGraw testified that her client was a "very, very high demand client" because of trauma she had suffered, on-going issues with her residence at the rehabilitation center, and the criminal trial. She indicated her role in trying to find the right attorney to handle the civil suit and the continued involvement she had after Aiken & Scoptur, S.C. was brought in as co-counsel. She had billing records reflecting a total of 67.5 hours spent but she also testified that she underreported a great deal of time spent on the case.

¶10 The trial court specifically noted that the client's perception of what occurred may have been affected by her medical condition. The trial court's finding that McNamara-McGraw had done significant work is not clearly erroneous and is based on its assessment of the credibility of the witnesses. There is no basis to disturb the apportionment of the attorney's fees.

By the Court.—Order affirmed.

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