

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 16, 1996

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.

NOTICE

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No. 95-2562

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**WILLIAM BECKER and
LISA BECKER,**

Plaintiffs-Respondents,

v.

**JOHN C. TRITSCHLER and
DEBRA J. TRITSCHLER,**

Defendants-Appellants,

ABC INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. John C. and Debra J. Tritschler appeal from a judgment entered after a trial to the court where the trial court ruled that William and Lisa Becker were entitled to judgment in the amount of \$20,538.86. The Tritschlers claim that the trial court's findings on witness credibility and legal fee payment were clearly erroneous and that, therefore, the trial court erred in ordering judgment in favor of the Beckers. Because the trial court's findings of fact are not clearly erroneous, and because the findings reasonably support the trial court's conclusions, we affirm.

I. BACKGROUND

John Tritschler borrowed \$10,000 from the Beckers in January 1988. Tritschler was serving as Becker's attorney at the time the loan was made. Tritschler and his wife signed a promissory note pledging to pay back the loan amount at 15% interest, and to pay the cost of collection if necessary. Tritschler made a partial payment of \$2,000 in July 1988. Tritschler also claims that he made subsequent payments totalling an additional \$3,000. Becker acknowledges receiving the \$2,000 payment, but denies receiving any additional payments on the promissory note.

In March 1991, the Beckers filed suit against the Tritschlers to recover the balance of the note together with interest and attorney's fees. The case was tried to the court in April 1995. At trial, Tritschler claimed that any remaining amount on the note was "offset" by legal fees that the Beckers owed him. He also filed a counterclaim for money he claimed the Beckers owed him for these legal services. Tritschler introduced eleven documents entitled "duplicate billings" to support his claim for outstanding legal fees the Beckers had not paid. Tritschler admitted during his testimony at trial, however, that the billings were not actual duplicate bills, but in fact had been recently reconstructed from memory.

Tritschler also claimed that William Becker agreed to cancel the outstanding promissory loan amount in exchange for partial payment, a set of wills for Lisa, and forgiveness of the unpaid legal fees. Becker denied that he had ever reached any such agreement with Tritschler.

At the conclusion of the trial, the court ruled: “[B]ased on a preponderance of the credible evidence, the plaintiffs have established an indebtedness by the defendant on the note in question,” and ordered judgment be entered in favor of the Beckers. Tritschler appealed that decision to this court and we remanded with instructions to the trial court to make findings of fact and conclusions of law. Consistent with our mandate, the trial court issued a second decision with its findings of fact and conclusions of law.

The trial court made the following findings of fact: (1) the Tritschlers had defaulted on the promissory note on or about February 3, 1988; (2) the Tritschlers had made a partial payment of \$2,000 prior to defaulting on the note; (3) Becker had made oral demands for payment of the balance of the promissory note throughout 1988 and 1989; (4) Tritschler made promises to pay the balance of the note during the balance of the calendar years 1988 and 1989; (5) Tritschler informed Becker that he did not have any money at some point during 1990; (6) Becker filed his suit against Tritschler in March 1991; (7) the Beckers enjoyed a client-attorney relationship with John Tritschler from late 1985 until 1989; (8) this relationship continued into 1990 though Tritschler was no longer a licensed practicing attorney; and (9) based on the credibility of the witnesses and the lack of any probative evidence, the Beckers did not owe Tritschler for any legal services.

Based on these findings, the trial court concluded that the Tritschlers' counterclaim should be dismissed and judgment should be granted in favor of the Beckers. The Tritschlers now appeal.

II. DISCUSSION

In reviewing a trial court's findings of fact and conclusions of law, we will not set aside the findings of fact unless they are clearly erroneous, and we will give due regard to the trial court's opportunity to judge the credibility of witnesses. Section 805.17(2), STATS. After reviewing the record in this case, we conclude that the findings of fact are not clearly erroneous and that its conclusions are logically based upon these findings. Accordingly, we must affirm the judgment.

The issue presented in this appeal is whether the trial court's findings were clearly erroneous. Its decision rested with a credibility determination. A few facts were undisputed: that Tritschler had in fact signed the promissory note for \$10,000, and that he had made a partial payment toward the debt of \$2,000. The remaining facts were hotly contested. Tritschler testified at trial that Becker owed him legal fees, that he had made an additional payment of \$3,000, and that Becker had agreed to cancel the note in exchange for the partial payment, forgiveness of outstanding legal fees, and additional legal services. In contrast, when Becker testified, he denied having received any additional payments toward the loan, he denied having reached the agreement that Tritschler set forth and he averred that any legal fees owed were satisfied and/or that Tritschler had never actually performed the legal services.

In rendering its decision, the trial court believed Becker's version of the facts and found Tritschler's testimony to be incredible. The Tritschlers argue on appeal that Tritschler's testimony was credible and that Becker's testimony was not. We are not persuaded by the Tritschlers' arguments and cannot say that the trial court's findings are clearly erroneous. Our decision is based on several factors. First, where the trial court acts as the finder of fact, it is the ultimate arbiter of both the credibility of the witnesses, *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977), and the weight to be given to each witness's testimony. *Milbauer v. Transport Employees' Mut. Benefit Soc'y*, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973). The theory behind this principle is simple: the trial court is in a better position to make such assessments because it has the opportunity to observe the witnesses first hand as they testify.

Second, the record documents support for the trial court's findings. At trial, Tritschler made several claims and presented documents which damaged his credibility. He presented what were labeled "duplicate billings" for legal work allegedly performed for Becker when in fact he had recreated these documents immediately prior to the trial in an effort to corroborate his testimony. In addition, Tritschler did not present any documentary evidence, such as correspondence or contemporaneous billing files, to support his claim that Becker owed him money for unpaid legal services dating back to 1987. Further, Tritschler did not have any documentary evidence to support his claim that Becker had agreed to cancel the promissory note. Finally, Tritschler's credibility was blemished by the disclosure that his license

to practice law had been suspended, based in part on misrepresentations made to a client, and that Tritschler continued to practice law despite the suspension.

Based on the foregoing, we conclude that the trial court's credibility determination has ample support in the record. Accordingly, its findings of fact are supported by Becker's testimony and Tritschler's lack of credible testimony. Therefore, we decline to set aside the trial court's findings because they are not clearly erroneous. We also conclude that the trial court's legal conclusion can be properly and reasonably drawn from its findings of fact. Accordingly, we affirm the judgment.

By the Court. – Judgment affirmed.

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