

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2012

Diane M. Fremgen
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 No. 2011AP1849

Cir. Ct. No. 2009FA501

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN RE THE AWARD OF ATTORNEY FEES IN IN RE THE MARRIAGE OF :
LISA M. ZIMMERMAN V. WALTER E. ZIMMERMAN:**

WALTER E. ZIMMERMAN,

APPELLANT,

v.

CHARLES I. PHILLIPS, LAW OFFICES OF PHILLIPS & GEMIGNANI,

RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Walter Zimmerman appeals an order of the circuit court granting a money judgment against him and in favor of attorney Charles

Phillips and the Law Offices of Phillips & Gemignani for legal fees. We affirm the order of the circuit court.

BACKGROUND

¶2 Zimmerman is a patent attorney who signed a contract in August of 2009 to hire another attorney, Charles Phillips, to represent Zimmerman in his divorce. The contract states that Phillips' hourly rate will be \$295.00 per hour, and that the client will receive a monthly billing statement. The contract also states:

If client disputes any fee, client shall, within 30 days of statement, notify attorneys of the objection and its nature, in writing, or such objection is waived. If the dispute cannot be resolved between the parties, the parties irrevocably agree to submit the dispute for fee arbitration under the auspices of the Wisconsin Bar Association fee arbitration rules and committee.

Zimmerman admits that he did not read the agreement closely when he signed it. Zimmerman was billed by Phillips monthly for legal services rendered from August 2009 through April 20, 2011.

¶3 In April 2011, Phillips moved to withdraw as counsel for Zimmerman and for an order granting Phillips judgment under WIS. STAT. § 767.264 (2009-10)¹ in the amount of \$23,976.50 for legal fees he asserted were owed to him by Zimmerman. On May 24, 2011, the circuit court held a hearing on the motion. At the hearing, the circuit court stated that Zimmerman was unable to point to any specific written objections disputing the fees he had been billed by

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Phillips. After the hearing, Zimmerman sent Phillips an email and a letter objecting to what Zimmerman called the “ultimate professional fee” or “final fee” set forth in the billing statement he received from Phillips in May 2011. The billing statement sent by Phillips to Zimmerman in May 2011 included legal fees in the amount of \$1,622.50, for services rendered in April 2011.

¶4 The circuit court granted Phillips’ motion, and entered judgment in Phillips’ favor in the amount of \$22,354.00. The court did not include in the judgment amount \$1,622.50 in fees for legal services performed in April 2011 because, the court reasoned, Zimmerman had objected to those fees in writing within thirty days of receiving the statement in which those fees were billed. Zimmerman now appeals.

STANDARD OF REVIEW

¶5 This case involves the interpretation of a statute and a contract. Statutory interpretation and application of a statute to a given set of facts are questions of law that this court reviews de novo. *Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 591, 527 N.W.2d 301 (1995). Whether the facts as found by the circuit court constitute a breach of contract under a written document is also a question of law that we review de novo. *Prent Corp. v. Martek Holdings, Inc.*, 2000 WI App 194, ¶9, 238 Wis. 2d 777, 618 N.W.2d 201. However, we will not set aside the underlying factual findings made by the circuit court unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶6 Also at issue in this case is the reasonableness of the amount of attorney’s fees included in the order for judgment. Our review of a circuit court’s decision regarding the value of reasonable attorney fees is limited to whether the

circuit court properly exercised its discretion. *Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, ¶19, 281 Wis. 2d 66, 697 N.W.2d 73.

DISCUSSION

¶7 On appeal, Zimmerman argues that it was error for the circuit court to order a money judgment for legal fees in Phillips' favor under WIS. STAT. § 767.264(2)(a) because the parties' contract for legal services required that fee disputes be arbitrated. Zimmerman further challenges the circuit court's order on the basis that the legal fees charged by Phillips were unreasonable. For the reasons discussed below, we affirm the order of the circuit court.

¶8 WISCONSIN STAT. § 767.264(2)(a) states, in relevant part, that, upon making an order for dismissal of an attorney in an action affecting the family, "the court shall, prior to or in its order, grant separate judgment in favor of an attorney who has appeared for a party to the action ... for the amount of fees and disbursements to which the attorney ... is, in the court's judgment, entitled and against the party responsible for the fees and disbursements."

¶9 Zimmerman argues that Phillips is not entitled to any fees under WIS. STAT. § 767.264(2)(a) because, under the terms of the parties' contract, the fee dispute should have been submitted to arbitration. Zimmerman asserts that the written objections he sent to Phillips after the motion hearing in May 2011 served as objections to all of the legal fees billed by Phillips in Zimmerman's divorce case. Zimmerman further asserts that, because his objections were sent within thirty days of when his final bill was received, the objections were timely and triggered the arbitration provision in the contract.

¶10 We do not agree with Zimmerman’s position that Phillips’ failure to submit the fee dispute to arbitration constitutes a breach of contract. Although the record contains evidence indicating that Zimmerman sent Phillips objections by email and letter in May 2011, the record does not contain evidence of any written objections to the legal fees billed to him by Phillips in monthly statements before that point. Therefore, the circuit court did not err in inferring, based on the record before it, that no written objections were made by Zimmerman prior to May 2011.

¶11 Given the lack of timely, written objections by Zimmerman, we conclude that the arbitration provision in the contract was not triggered. The language of the parties’ contract states that a client has thirty days to dispute any fee and then, “[i]f the dispute cannot be resolved between the parties, the parties irrevocably agree to submit the dispute for fee arbitration.” Without evidence in the record that Zimmerman objected to any of the legal fees within thirty days of the monthly billing statements, with the exception of the statement for legal services rendered in April 2011, we cannot conclude, under the terms of the contract, that arbitration was required for disputes pertaining to fees billed prior to April 2011.

¶12 We turn next to the question of whether the circuit court properly exercised its discretion in entering judgment for legal fees in the amount of \$22,354.00. A circuit court properly exercises its discretion when it employs a logical rationale based on the correct legal principles and the facts of record. *Kohl v. DeWitt Ross & Stevens*, 2005 WI App 196, ¶28, 287 Wis. 2d 289, 704 N.W.2d 586.

¶13 Zimmerman argues that the circuit court never made a finding that Phillips’ fee was reasonable, and asserts that the amounts charged by Phillips were

unreasonable and should not have been awarded under WIS. STAT. § 767.264(2)(a).²

¶14 As to Zimmerman's argument that no specific finding of reasonableness was made, we note that a failure by the circuit court to make specific findings of fact is not necessarily reversible error. *See Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 394-95, 588 N.W.2d 67 (Ct. App. 1998). We may affirm the judgment of the circuit court if clearly supported by the preponderance of the evidence. *Id.* at 394. After reviewing the record here, we conclude that the great weight and clear preponderance of the evidence support the conclusion that Phillips' fee was reasonable, such that it was properly awarded by the court pursuant to WIS. STAT. § 767.264(2)(a).

¶15 The circuit court set forth on the record the reasons for its decision in its oral ruling of June 1, 2011. In determining the amount of fees to which Phillips was entitled under WIS. STAT. § 767.264(2)(a), the court considered the fact that Zimmerman is an attorney, and not simply a client unfamiliar with the legal system, and that Zimmerman signed a contract that set forth the terms for the payment of fees. The court noted that the contract provided Zimmerman with the opportunity to terminate Phillips' representation at any time if Zimmerman was unhappy with the services rendered, and that Zimmerman had terminated the services of his prior attorney in the same case. The court also reviewed the billing

² Zimmerman also argues that the factors stated in SCR 20:1.5 should be applied in determining whether Phillips' fees are reasonable. We will not address this argument because Zimmerman's reliance on SCR 20:1.5 is inapposite in this case, which is not a disciplinary proceeding. Paragraph 20 of the preamble to the Rules of Professional Conduct For Attorneys states, in relevant part: "The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule."

statements provided by Phillips, which reflect his hourly rate, number of hours worked, and description of work performed.

¶16 In determining the amount of a reasonable fee, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶28, 275 Wis. 2d 1, 683 N.W.2d 58. Phillips' hourly rate of \$295.00 per hour was set forth in the contract Zimmerman signed to engage Phillips' services. Nowhere in his appellate briefs does Zimmerman dispute with any specificity Phillips' hourly rate or the number of hours Phillips worked. Zimmerman merely expresses his dissatisfaction with the results obtained in the case, and asserts that the rate customarily charged for services in a case like this one within his locality is below the rate charged by Phillips. Zimmerman does not point to any specific facts in the record that support these assertions. We conclude, therefore, that it was not an erroneous exercise of discretion for the circuit court to apply the hourly rate of \$295.00 per hour to the number of hours shown on Phillips' billing statements, minus the hours shown on the billing statement sent in May 2011, and to order judgment in favor of Phillips in the amount of \$22,354.00 under WIS. STAT. § 767.264(2)(a).

By the Court.—Order affirmed.

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

