

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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No. 98-2547

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

PRODUCTION STAMPING CORPORATION,

PLAINTIFF-APPELLANT,

V.

MARYLAND CASUALTY COMPANY,

DEFENDANT-RESPONDENT,

**NORTHBROOK PROPERTY AND CASUALTY
INSURANCE COMPANY,**

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Production Stamping Corporation appeals from an order granting summary judgment in favor of Maryland Casualty Company. Production Stamping claims that the trial court improperly granted summary judgment based on its credibility evaluation of an affidavit of Production's attorney. This case involves whether Maryland Casualty is required to indemnify Production for monetary costs Production incurred under the terms of a settlement agreement executed in a federal cause of action to remediate damage caused by Production to an adjacent landowner's property. Because the trial court did not err in granting summary judgment, we affirm.

I. BACKGROUND

¶2 In March 1992, Dean A. Faber filed a lawsuit against Production in federal court, alleging that Production was responsible for environmental contamination on Faber's property. Production owned land adjacent to Faber's property. Production tendered the defense to its insurers, one of which was Maryland Casualty. Maryland Casualty provided comprehensive general liability and umbrella insurance to Production from November 24, 1980, to January 1, 1986. The insurers denied coverage and refused to defend. As a result, Production paid for its own defense and settled the Faber lawsuit.

¶3 In a separate state action, Production filed suit against its insurers seeking declaratory judgment that the insurance companies were required to provide coverage and defend the federal court suit. The trial court ruled that the insurers were not so obligated. On appeal of that decision, we held:

Maryland Casualty was obligated to defend Production Stamping in the federal-court action brought by the adjoining landowner [Faber], and is responsible for Production Stamping's reasonable expenses in defending that action as well as the amount paid by Production

Stamping in settlement. Maryland Casualty is not, however, liable for Production Stamping's costs in remediating its own property.

Production Stamping Corp. v. Maryland Cas. Co., 199 Wis. 2d 322, 328-29, 544 N.W.2d 584 (Ct. App. 1996).

¶4 The settlement of the Faber case is the crux of the dispute here. The settlement agreement provided:

Faber and Production Tool, for and in consideration of the following terms and conditions and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, do hereby agree as follows:

1. Faber and Production Tool agree to dismiss with prejudice all claims made by Faber and Production Tool in the case.
2. On or before August 17, 1992, Production Tool will pay Faber \$58,000 by certified check, made payable to Dean E. Faber.

¶5 Subsequent to the settlement, Production alleged that in addition to the \$58,000 obligation contained in the written settlement agreement, Production's attorney, Daniel J. Biederman, also orally agreed to "take whatever investigative and corrective action measures which were necessary as a result of the contamination that had migrated from the Production Stamping property onto the Faber property." Biederman filed an affidavit and gave deposition testimony swearing that this requirement was also a part of the settlement with Faber and that the settlement would not have occurred absent this oral provision. Biederman testified that the reason the oral agreement was not included in the written agreement was because he "believe[d] that it would have been a very time consuming task to draft language that memorialized Production Stamping's obligation to remediate the ground water."

¶6 When Maryland Casualty refused to pay the additional millions associated with the oral provision regarding remediation, Production filed suit seeking declaratory judgment from the trial court. The trial court initially denied Maryland Casualty's motion seeking summary judgment dismissing Production's claim, although acknowledging that Production's argument "ring[s] of incredulity" and that Production "just makes it" in defeating the motion. After discovery took place, Maryland filed another motion seeking summary judgment. This time the trial court granted the motion. The trial court found "overwhelming evidence that the Faber lawsuit was settled for \$58,000 and that all the correspondence leading up to the settlement is absolutely explicit in that respect." In addition, the trial court found "no documentation in -- or paper trail of any sort[,] including Board of Director minutes or internal corporate correspondence or notes of meetings or discussions[,] which support the current claim of Production Stamping that the settlement also included a promise by Production Stamping to do anything other than what it would be doing." The trial court concluded that "no reasonable jury could find the existence of that [the oral remediation] agreement ... [or that it] is an enforceable agreement." The trial court granted summary judgment in favor of Maryland Casualty. Production now appeals.

II. DISCUSSION

¶7 The issue in this case is whether the Biederman affidavit creates a genuine issue of fact regarding the terms of the Faber settlement. The trial court concluded that it did not create a genuine issue of fact. We agree.

¶8 In reviewing a grant of summary judgment, we employ that same methodology as the trial court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first examine the pleadings and affidavits

to determine whether a claim for relief has been stated. *See id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *See id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision granting summary judgment. *See id.*

¶9 We review the trial court's decision *de novo*. *See Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). The purpose of summary judgment is to "avoid trials where there is nothing to try." *Caulfield v. Caulfield*, 183 Wis. 2d 83, 91, 515 N.W.2d 278 (Ct. App. 1994). Once the moving party makes a prima facie case, summary judgment will be granted unless the non-moving party presents evidence upon which a jury could reasonably find in favor of the non-moving party. *See Pomplun v. Rockwell Int'l, Corp.*, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (Ct. App. 1996).

¶10 We have reviewed the evidence in the record. The correspondence leading up to the Faber settlement and the settlement documents all clearly reflect that the Faber federal case was settled for \$58,000. Biederman's letter of June 23, 1992, to Faber's counsel provided:

During our telephone conversation of today, I requested that you calculate a current settlement demand. While I have no information which indicates that you will be able to meet your burden of proof in this litigation, economics dictates that I pass on your demand to our insurance carrier.

Faber's counsel responded by letter of June 29, 1992:

This letter concerns our conversation of June 22, 1992, wherein you requested a settlement offer in the above entitled matter. In our conversation, you mentioned that one of the insurance carriers for Production Tool Company/Production Stamping Corporation has indicated a willingness to settle the above referenced matter. As a full and complete settlement of all claims made in the above

referenced matter, Mr. Faber offers the amount of \$58,000.00, paid to him by certified check, c/o Michael, Best and Friedrich.

Biederman accepted the offer, memorializing this in a letter dated July 2, 1992:

Please be advised that my client accepts your settlement offer communicated in your letter dated June 29, 1992. As communicated in your letter, Production Tool Company/Production Stamping will pay your client Fifty Eight Thousand Dollars exactly (\$58,000.00) as a full and complete settlement of all claims made in the above referenced matter.

Prior to Biederman's affidavit, nowhere is there any recording that the oral agreement to remediate was a condition of, or a part of, the Faber settlement.¹ The oral remediation agreement is undocumented in any correspondence or other writing regarding the settlement of the Faber case. Biederman's averment conflicts with the terms of the written settlement agreement, and was not disclosed to Maryland Casualty until after our decision in *Production Stamping*. We determined in *Production Stamping* that Maryland Casualty was only responsible to indemnify Production for the amount Production paid Faber to settle. *See id.*, 199 Wis. 2d at 329. It was only after our decision that the "oral promise to remediate" surfaced as an additional condition of the Faber settlement.

¶11 Given the history of this case, we must agree with the trial court's analysis of the Biederman affidavit. The affidavit is "troubling" in two respects. First, it is troubling because summary judgment is not supposed to judge the credibility of conflicting affidavits. The Biederman affidavit, at first glance, would suggest that a genuine issue of fact exists as to the terms of the Faber

¹ Such recording is statutorily required in order to bind parties to a stipulation. *See* WIS. STAT. 807.05 ("No agreement, stipulation, or consent between the parties or their attorneys, ... in an action ... shall be binding unless made in court ... and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.).

settlement. Second, the affidavit is troubling because it appears to be a self-serving attempt to circumvent our previous ruling in *Production Stamping*. The affidavit attempts to make remediation costs a condition of the Faber settlement so as to secure insurance coverage for these costs.²

¶12 Based on the foregoing, we conclude that the trial court did not err when it dismissed the Biederman affidavit as “incredulous” and granted summary judgment.³ Despite our hesitation to “judge the credibility” of an affidavit in the summary judgment posture, this case proves to be the exception to the rule. The overwhelming written documentation demonstrates that the Faber settlement involved the payment of \$58,000. This is the amount that Maryland Casualty, as the insurer, must cover.⁴

² Of course, there is another explanation for the troubling affidavit: perhaps the passage of time between the execution of the settlement agreement and the instant case caused Biederman to confuse verbal acknowledgment of Production’s legal responsibility to remediate the site it contaminated, with what actually constituted a “required term” of the Faber settlement. For the sake of the integrity of the bar in general, and Biederman in particular, we hope confusion, rather than an intentional attempt to circumvent our previous ruling, formed the basis for the affidavit.

³ Similarly incredulous is Biederman’s claimed reason for failing to include the oral representation in the written settlement document—it was too complicated to reduce the responsibility to writing. Production’s own appellate brief refutes that reason, explaining that the terms of the oral agreement to remediate are “simple and straightforward”: “In exchange for Faber’s dismissal of its lawsuit against Production Stamping, Production Stamping obligated itself to take all investigative and corrective action measures necessary as a result of the contamination which had migrated from the Production Stamping property onto the Faber property.”

⁴ We also acknowledge the trial court’s commitment to contain judicial resources and litigation expenses. In granting the motion for summary judgment, the trial court observed:

But I’ll tell you the worst part, that is this factor which concerns me even beyond that is that if I denied the motion for summary judgment today and allowed it to go to a jury ... and we had a trial, went through all that effort

[M]ore years of appeals.... Anyway it’s not fair. It would not be fair for me at this point to allow Production Stamping to incur

(continued)

¶13 The Biederman affidavit, then, does not create a *genuine* issue of material fact. In light of the overwhelming documentary evidence reflecting that the Faber settlement consisted solely of the \$58,000 payment, the Biederman affidavit cannot defeat the granting of summary judgment.

By the Court.—Order affirmed.

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all those additional legal costs when eventually Production Stamping is going to be held responsible for the remediation anyway.

The trial court found that, in light of the overwhelming documentary evidence, there was no reasonable jury that would believe Biederman's claim that an oral agreement to remediate was a part of the Faber settlement. Therefore, judging the "incredulity" of the Biederman affidavit, despite the summary judgment posture of this case, was appropriate for both parties and the judicial system.

