

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2001

Cornelia G. Clark
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.

No. 01-0543-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GAMBER-JOHNSON, LLC,

PLAINTIFF-RESPONDENT,

v.

TRANS DATA NET CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Trans Data Net Corporation appeals¹ from a judgment requiring it to pay damages to Gamber-Johnson, LLC for breach of

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

contract. Trans Data Net claims the trial court erroneously exercised its discretion by excluding from evidence a series of e-mails that the parties had exchanged prior to the initiation of litigation. We conclude that the evidentiary decision was not an erroneous exercise of the trial court's discretion and affirm.

¶2 Trans Data Net ordered 1000 units of a customized computer cradle part from Gamber-Johnson. Arrangements were made to have portions of the order delivered on a series of dates rather than all at once. After 600 of the units had been shipped and paid for, a design change rendered the customized units obsolete for Trans Data Net's purposes. Trans Data Net contacted Gamber-Johnson to see whether the remaining units could be produced with certain modifications, but Gamber-Johnson informed Trans Data Net that it had manufactured all 1000 units at the same time. Gamber-Johnson sent the next 100 units on schedule. Trans Data Net paid for that shipment but refused to accept delivery or pay for the remaining 300 units.

¶3 Gamber-Johnson eventually sued for breach of contract. Trans Data Net maintained that the parties had an understanding that delivery would be on a requirement basis only, and that it was therefore not required to purchase the remaining items. At trial, Trans Data Net attempted to introduce into evidence a series of e-mails written by Tom Townsend of Trans Data Net and Jeff Greene of Gamber-Johnson. In the e-mails, Townsend indicated his belief that there had been a misunderstanding about when the units would be delivered and stated his understanding that Gamber-Johnson would be willing to delay future deliveries until Trans Data Net had customers lined up. Greene's memo stated in relevant part:

Per our conversation and your memo of 2/25/99, I thought we agreed to work something out regarding the additional

100 units shipped to bring our account current. In your memo below, I believe you phrased it this way—“We need to bring Gamber current on payment of the shipped units. As far as the 100 overage maybe we can work something out on that”?

Tom, I was under the impression that by agreeing to hold onto the remaining 300 units until your release, or the last quarter of “99,” our account would be brought current. This was a reasonable and acceptable concession considering the confusion on both parties behalf. Could you please look into this matter and let me know what arrangements can be made for payment. We will continue to hold the remaining inventory until we receive your approval for release.

The trial court excluded the evidence. It viewed the e-mails written by Townsend to be of marginal relevance because it concluded they were little more than self-serving documentation of Trans Data Net’s position, while it viewed Greene’s e-mail as representing an inadmissible offer to compromise.

¶4 Trans Data Net challenges the trial court’s determination that Greene’s e-mail represented an offer to compromise. We review evidentiary determinations under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶5 An offer to furnish or accept a settlement of a disputed claim is not admissible to prove liability for a claim or its amount. WIS. STAT. § 904.08. Statements made in compromise negotiations are also inadmissible. *Id.*

¶6 Trans Data Net cites 29 AM. JUR. 2D *Evidence* § 509 (1994) and *Heritage Bank of Milwaukee v. Packerland Packing Co., Inc.*, 82 Wis. 2d 225, 262 N.W.2d 109 (1978), for the proposition that an offer to compromise requires

the existence of: (1) a claim, (2) which is disputed as to validity or amount, (3) where the purpose of offering the evidence is to prove the validity or invalidity of the claim or its amount, and (4) valuable consideration is furnished or accepted or offered to be furnished or accepted. Trans Data Net contends that Greene's e-mail does not qualify as an offer to compromise because: (1) the misunderstanding between the parties had not crystallized into a claim with a threat of litigation; and (2) there was no offer of consideration to settle a dispute.

¶7 We are satisfied that the trial court could reasonably find all of the elements of an offer to compromise. Townsend's e-mails could be read to show that Trans Data Net did not believe it was obligated to pay for the most recently shipped 100 units. Greene's e-mail could be read to show that Gamber-Johnson believed that it had a claim for payment on the 100 units that had been most recently shipped, but that it was willing to delay shipment and payment on the remaining 300 units if Trans Data Net kept and paid for the 100 units most recently shipped, rather than attempting to return them. In other words, Gamber-Johnson's offer to delay shipment of the remaining units represented consideration for settlement of the disputed claim over payment for the 100 units most recently shipped, as well as those manufactured but not yet shipped. We see no misuse of discretion in the trial court's decision to exclude the e-mails.

By the Court.—Judgment affirmed.

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

