

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2009

David R. Schanker
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. 2009AP685
STATE OF WISCONSIN

Cir. Ct. No. 2008SC719

**IN COURT OF APPEALS
DISTRICT IV**

ROBERT L. PERKINS,

PLAINTIFF-APPELLANT,

v.

BOS-MRS ENTERPRISES, INC.,

DEFENDANT-RESPONDENT.

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

¶1 VERGERONT, J.¹ Robert Perkins appeals the order denying his motion to reopen a small claims case based on his affidavit of noncompliance which asserted that BOS-MRS Enterprises, Inc., missed a payment required by the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

parties' stipulation to settle the case. He contends that the circuit court denied him equal protection and committed error by failing to grant him double damages based on BOS-MRS's deduction from his settlement check of eight dollars for uniform fees and failure to designate the payment as 2005 wages. He also contends that the court improperly denied him a jury trial and was biased against him. We conclude that the circuit court properly denied Perkins' motion and we affirm.

BACKGROUND

¶2 Perkins worked as a cleaning technician for BOS-MRS in 2004 and 2005. In 2006 he filed a complaint with the Wisconsin Department of Workforce Development, Labor Standards Bureau, alleging that BOS-MRS owed him unpaid wages. The complaint was denied. In 2008, he filed a small claims complaint in the circuit court, requesting double damages for the unpaid wages. Perkins requested a jury trial on his claim, which the court granted. However, before the trial date, the parties reached a stipulated agreement whereby BOS-MRS agreed to pay Perkins "\$995.08 in 2005 wages, designated as such, with appropriate income and social security taxes withheld and remitted as required by law, plus \$250.00 in lieu of costs." The stipulation also provided that if BOS-MRS "misses any scheduled payment by more than 6 days," Perkins could file an affidavit of noncompliance and order for money judgment for twice the amount of the 2005 wages—\$1,990.16—"without notifying the defendant(s)."

¶3 Both parties signed the stipulation and the court dismissed the case based on the stipulation. On August 12, 2008, BOS-MRS sent Perkins two checks, one for \$250 for "legal fees" and the other for \$995.08 in back wages. This second check withheld taxes as agreed in the stipulation, but also withheld

eight dollars for uniforms, which was not part of the stipulation. The check also indicated that the wages were for 2008, rather than for 2005, as the stipulation required.

¶4 Without notifying BOS-MRS of the errors regarding the uniform fee and 2008 wage designation, Perkins filed an affidavit of noncompliance and order for money judgment with the circuit court, claiming that BOS-MRS missed a scheduled payment which was due on August 15, 2008. The affidavit did not include any facts supporting the claim of missed payment, but asked the court to vacate the dismissal of the small claims case and enter a money judgment for Perkins for \$753.08, which was double the 2005 wages he claimed minus the amount BOS-MRS had already paid him. About that same time, Perkins cashed the two checks from BOS-MRS.

¶5 BOS-MRS responded by notifying the court that it had paid Perkins in full, and the court consequently refused to sign Perkins' affidavit of noncompliance and order for money judgment. BOS-MRS then filed a motion for sanctions against Perkins to pay its costs and attorney fees under WIS. STAT. § 802.05, claiming that Perkins had filed a frivolous affidavit of noncompliance simply to harass or needlessly increase the cost of the litigation.

¶6 At the hearing on BOS-MRS's motion for sanctions, Perkins again asked for a jury trial; this time on whether he violated WIS. STAT. § 802.05. The court did not grant the request. The court heard arguments on both Perkins' affidavit of noncompliance, which it considered a motion to reopen the small claims case, and BOS-MRS's motion for sanctions. The court denied both motions. The court concluded that BOS-MRS had substantially complied with the stipulation and that Perkins was "play[ing] games" by not communicating with the

other party when he realized the errors, and instead using the technicality to file an affidavit of noncompliance against BOS-MRS and request double damages. However, the court did not order sanctions against Perkins, a pro se litigant, although the court stated that if Perkins had been a lawyer, the court would have sanctioned him. BOS-MRS has apparently paid Perkins the eight dollars.

DISCUSSION

¶7 On appeal, Perkins first argues that the circuit court should have vacated its dismissal of the action and entered a money judgment in his favor. According to Perkins, by not doing so, the court denied him equal protection of the law and misconstrued the stipulation, which clearly stated that he need not notify BOS-MRS before filing his affidavit of noncompliance. BOS-MRS responds that the court's denial was properly based on evidence presented at the hearing and that Perkins' affidavit of noncompliance did not mention the eight dollars or 2008 wage designation errors, and the first time BOS-MRS learned about these errors was at the hearing.

¶8 In addressing Perkins' equal protection claim, we apply the undisputed facts found by the circuit court to the constitutional standard; this presents a question of law, which we review de novo. *State v. Nawrocki*, 2008 WI App 23, ¶17, 308 Wis. 2d 227, 746 N.W.2d 509. *Thorp v. Town of Lebanon*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59, sets out the constitutional standard for equal protection claims under both the Wisconsin and United States Constitutions. *Id.*, ¶35 n.11. "The Equal Protection Clause ensures that people will not be discriminated against with regard to statutory classifications and other governmental activity." *Id.*, ¶37 (citations omitted). If a statute or governmental activity applies to one of the protected classes or involves a fundamental right, "a

governmental entity must prove that the classification is necessary to promote a compelling governmental interest.” *Id.*, ¶38. (citations omitted). Otherwise, where a fundamental interest or suspect class is not involved, classifications are upheld if they are “rationally related” to the purpose of the legislation. *Id.*, ¶40.

¶9 Perkins has not shown that the equal protection clause is applicable here because there is no statute or legislation involved, just the court’s decision in this particular case. Nor has he shown that he is a member of a protected class or explained what the challenged “classification” is regarding the court’s decision.

¶10 Perkins also argues, as we understand it, that the court’s denial of his motion was error because the court did not properly construe the stipulation. A stipulation is a contract made in the course of judicial proceedings. *Johnson v. Owen*, 191 Wis. 2d 344, 349, 528 N.W.2d 511 (Ct. App. 1995). In construing a contract we look at the language of the contract and, if there is no ambiguity, we apply the plain meaning. *Erickson v. Gundersen*, 183 Wis. 2d 106, 117, 515 N.W.2d 293 (Ct. App. 1994). Determining whether a contract is ambiguous presents a question of law, *id.* at 115, as does the construction of an unambiguous contract. *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 244, 271 N.W.2d 879 (1978).

¶11 The stipulation in this case plainly does not say that failure to designate the payment as 2005 wages triggers the judgment for double damages. As for the eight dollar deduction for uniforms, it is unreasonable to construe the clause allowing for double damages to be entered for missing “any scheduled payment by more than 6 days” to permit Perkins not to mention the small discrepancy to BOS-MRS, to cash the checks, and to wait out the six days and then file his affidavit of noncompliance “without notifying the defendant.” We

conclude that the stipulation is not ambiguous on these points. Therefore, the circuit court did not erroneously construe the stipulation and did not violate Perkins' right to equal protection under the law.

¶12 Perkins next argues that the circuit court erroneously denied him a trial by jury on his motion to enforce the stipulation and on BOS-MRS's motion for sanctions. Perkins has provided no authority for the proposition that he is entitled to a jury trial on a procedural motion to enforce a stipulation, nor has he provided authority that he is entitled to a jury trial on whether or not he violated WIS. STAT. § 802.05(2).² Section 802.05(3) provides that “the *court* may impose an appropriate sanction upon the ... parties that have violated sub. (2)” if, after

² WISCONSIN STAT. § 802.05(2) provides:

Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

(a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

notice and a reasonable opportunity to respond, “the *court* determines that sub. (2) has been violated.” WIS. STAT. § 802.05(3) (emphasis added). We also observe that Perkins actually prevailed on the § 802.05 motion. Thus, it is not apparent why he believes he was prejudiced by not having a jury trial on this motion.

¶13 Next Perkins argues that the circuit court denied him equal protection and committed error by requiring him to complete an affidavit of mailing and serve it upon BOS-MRS, thereby notifying the company that he had filed an affidavit of noncompliance. As stated earlier, Perkins has not shown that he is a member of a protected class, nor has he identified the challenged statutory “classification” regarding the court’s requirement to provide notice to the opposing party that he had filed an affidavit of noncompliance. He thus provides no basis for an equal protection claim.

¶14 As we understand Perkins’ argument on circuit court error, he contends the requirement that he notify BOS-MRS of his filing of the affidavit of noncompliance is inconsistent with the stipulation, which allows him to file the affidavit of noncompliance “without notifying the defendant.” Perkins cites WIS. STAT. § 799.24(3), which provides:

Stipulated dismissal. Prior to the entry of judgment, upon stipulation of the parties to a schedule for compliance with the stipulation, the court or circuit court commissioner may enter a stipulated judgment of dismissal in lieu thereof. Any such judgment may be vacated without notice to the obligated party, and the unsatisfied portion thereof entered, upon application by the prevailing party and proof by affidavit of noncompliance with the terms of the stipulation.

WIS. STAT. § 799.24(3).

¶15 The question of the proper construction of the statute presents a question of law, which we review de novo. *State v. Cole*, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432. Section 799.24(3) allows for a stipulated dismissal of a small claims case such as the one at issue here. By using the words “may be vacated” rather than “shall be vacated,” the statute clearly allows the court discretion to vacate a judgment without notice to the obligated party, but does not require it. WIS. STAT. § 799.24(3). Thus, the circuit court may properly require notice to the other side if it has a question or concern about whether the stipulated judgment should be vacated.

¶16 Perkins next argues that the circuit court’s failure to find BOS-MRS’s motion for sanctions frivolous was a violation of equal protection and error. Our review of a circuit court’s decision that an action was commenced frivolously pursuant to WIS. STAT. § 802.05 is deferential. *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). We uphold any factual findings unless they are clearly erroneous and we uphold the overall discretionary decision of the circuit court if it is based on the correct law, the facts of record, and is reasonable. *Id.* at 548-49.

¶17 We find nothing in the record to show that Perkins ever brought a motion for sanctions against BOS-MRS under WIS. STAT. § 802.05. Moreover, we conclude the court reasonably ruled that Perkins’ motion to reopen could be considered a violation of WIS. STAT. § 802.05 and would have, had it been brought by an attorney. It follows that the court reasonably viewed BOS-MRS’s motion for sanctions as not being a violation of WIS. STAT. § 802.05.

¶18 Perkins’ final argument is that the circuit court showed bias against him, by saying that he was “play[ing] games,” and against pro se litigants in

general during the motion hearing, in violation of SCR 60.04(1)(e).³ It is not bias when a court makes reasonable inferences from a litigant's conduct, even if the inferences are negative. That is what the court did here. The court did not criticize pro se litigants. Rather, the court explained that if Perkins were a lawyer, the court would have sanctioned him—essentially applying a higher standard to lawyers.

¶19 We conclude that the circuit court properly denied Perkins' motion to reopen the small claims action against BOS-MRS. Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(4).

³ Supreme Court Rule 60.04(1)(e) provides:

A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

