COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2438 **Cir. Ct. No. 2008CV19**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

GUSTAV WEBER,

PLAINTIFF-RESPONDENT,

V.

SECURA INSURANCE, A MUTUAL COMPANY, COMPETITIVE MACHINING, INC. AND TIMOTHY VOMASTIC,

DEFENDANTS-RESPONDENTS,

ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Zurich American Insurance Company appeals an order granting Secura Insurance's, Competitive Machining's, and Timothy Vomastic's motion to enforce a settlement agreement in this personal injury action commenced by Gustav Weber. The settlement in this action was contingent on Zurich's settlement of Weber's worker's compensation claim in Illinois. The circuit court determined that the purported settlement of the worker's compensation claim did not comply with WIS. STAT. § 807.05.[1] It nonetheless enforced both the worker's compensation settlement and the settlement in this action by applying the equitable estoppel doctrine. We conclude the following: (1) the record does not contain clear evidence of an agreement to settle the worker's compensation claim; (2) even if there was an agreement, it is unenforceable under § 807.05; and (3) the equitable estoppel doctrine does not apply. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

¶2 Weber was employed by the Earl M. Jorgensen Company. He was injured in Illinois while delivering a bundle of steel to Competitive Machining. The steel fell off a forklift driven by Vomastic and on to Weber's right leg. Weber's leg required amputation below the knee.

¶3 Weber commenced a worker's compensation action with the Illinois Industrial Commission. Zurich, Jorgensen's worker's compensation insurance carrier, was a party in the administrative proceedings through its third-party administrator, ESIS, Inc. Weber was represented in the worker's compensation

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

action by attorney Philip Turcy. Zurich was represented by attorney Martin Spiegel.

¶4 Weber commenced the present action against Competitive Machining and ESIS on January 16, 2008. The complaint was subsequently amended to add Vomastic and Secura, whose commercial liability policy afforded Competitive Machining with $500,000 in coverage. Zurich was named in place of ESIS. Weber was represented in the Wisconsin action by attorney Larry Weisman. Attorney John Claypool represented Vomastic, Competitive Machining, and Secura. Zurich retained attorney Richard Ceman.

¶5 On February 3, 2010, Spiegel contacted Turcy to discuss the settlement of Weber's worker's compensation claim. In essence, Spiegel offered to fully waive Zurich's lien for previously paid benefits in exchange for Weber's waiving his right to recover future worker's compensation benefits. Turcy rejected the offer on February 12, and the offer was formally rescinded by Spiegel on March 18.[2]

[2] Weber's counsel later explained the circumstances of the rejection:

> Now what [Zurich's offer] means is Zurich would waive any right to any potential third party recovery in this [Wisconsin] case. Which was, if Mr. Weber wins on liability, and if he gets the full policy, then it's 500 grand, [Zurich would] get back about $200,000. In consideration for that, Mr. Weber would agree to waive any future benefits under the worker's comp act which would include all future prosthetic devices for about $275,000. So it made a lot of sense. At the time, Mr. Weber's Illinois counsel couldn't accept that, because if this case didn't settle and he lost in this case, he would have waived any right to future medical care under the worker's comp act, and he couldn't take that risk.

¶6 On February 10, 2011, Secura filed a motion to enforce a settlement agreement.[3] The motion alleged that Turcy and Spiegel had reached an oral settlement of the worker's compensation claim on July 1, 2010. Secura and Weber also allegedly reached an oral settlement of the Wisconsin action for $440,000. Weber later joined in supporting the motion.

¶7 Secura's motion included an affidavit from Turcy, in which he described the circumstances of the purported worker's compensation settlement. Turcy averred that he contacted Spiegel on July 1, 2010, approximately six months after Spiegel's initial settlement offer and over three months after that offer was rescinded. Turcy asked Spiegel whether his client would reinstate the settlement offer. Turcy averred Spiegel responded that his settlement authority had not changed. Turcy apparently took Spiegel's response to mean that Zurich had reinstated its offer.

¶8 Secura's motion also included an affidavit from Weisman, Weber's attorney in the Wisconsin action. Weisman averred that sometime after July 1, Turcy advised that Zurich "agreed to fully waive the workers compensation lien in consideration for a full and final dismissal of the workers compensation case." Believing the worker's compensation matter settled, Weisman initiated settlement negotiations with Claypool. Weisman and Claypool agreed to settle the Wisconsin action for $440,000, contingent on settlement of the worker's compensation matter. Weisman called the circuit court clerk and advised that the Wisconsin

[3] For ease of reading, we will use "Secura" to refer to Secura, Competitive Machining, and Vomastic.

action had settled. Claypool cancelled several expert depositions scheduled for the following day.

¶9 Zurich opposed the motion and filed its own affidavits. Spiegel averred that Turcy contacted him on July 16, 2010. Turcy indicated he was prepared to accept the terms of Zurich's earlier settlement offer. Spiegel stated he would follow up with Zurich. Later that day, Spiegel told Turcy that Zurich would not agree to waive its worker's compensation lien.

¶10 Ceman, Zurich's Wisconsin attorney, also filed an affidavit. Ceman averred he first learned of the purported settlement in the Wisconsin action on July 20, 2010, when Claypool advised the case had settled in the "low $400,000s." Weisman called the following day regarding settlement. On July 29, Ceman advised Weisman that Zurich would not waive its right to recover past worker's compensation payments. Ceman repeated this to Weisman on August 10, 2010. On August 16, Ceman received an email from Weisman advising that the court clerk had been told the trial, which had originally been set for August 2010, would need to be rescheduled.

¶11 The circuit court heard Secura's motion on April 5, 2011. It first determined that the alleged worker's compensation settlement was unenforceable because it failed to comply with WIS. STAT. § 807.05's requirement that such agreements be written. The court nonetheless granted Secura's motion. It concluded that the elements of equitable estoppel, particularly detrimental reliance, had been met because the trial and depositions had been cancelled:

> First of all, we're dealing with experts who are traveling to Chicago. We have attorneys traveling to Chicago. These are people that are not easily dealt with, and they pretty much knew once this word came down that one of two things would happen. Either the August 17th [trial] date

> was no longer viable because you couldn't, as a practical matter, get everybody back together again. And then you'd have to do things later and that involves expense to many people. Not just inconvenience, real expense. Or you have to try and go to trial and you aren't sure you can be as prepared there.

The court ordered the parties to exchange releases and Secura to pay Weber $440,000. Zurich was barred from recovering any of its past payments from the settlement, and Weber was barred from seeking additional worker's compensation benefits.

DISCUSSION

¶12 Although the parties devote much of their argument to the applicability of WIS. STAT. § 807.05 and the principle of equitable estoppel, we perceive a more basic issue: whether there was an agreement to settle the worker's compensation claim in the first instance. Secura's motion to enforce was, after all, premised on the existence of a valid oral contract in that matter. Both offer and acceptance are necessary for the creation of a contract. ***Eisenberg v. Continental Cas. Co.***, 48 Wis. 2d 637, 652, 180 N.W.2d 726 (1970). "A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent." ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994).

¶13 We can discern no clear evidence of an agreement from the record. Turcy's and Spiegel's accounts of the settlement negotiations in the worker's compensation action vary wildly. Turcy averred that he contacted Spiegel on July 1, 2010 and asked whether Zurich would reinstate its settlement offer. According to Turcy, Spiegel's only response was that "his settlement authority had not changed." Spiegel, however, averred that Turcy contacted him on July 16

regarding settlement, and Spiegel said he "would follow up with my client and would get back to him." On this record, we cannot declare, as a matter of law, that a contract was formed.

¶14 This is true even if we were to accept Turcy's account of the negotiations. Spiegel's alleged response to Turcy's inquiry—that his "settlement authority had not changed"—is patently ambiguous.[4] An offer is "the manifestation of a willingness to enter into a bargain, made to justify another person's understanding that assent to that bargain is invited and will create a contract." ***Alliance Laundry Sys. LLC v. Stroh Die Casting Co.***, 2008 WI App 180, ¶32, 315 Wis. 2d 143, 763 N.W.2d 167. "[A]n offer must be 'sufficiently certain to enable a court to understand what is asked for, and what consideration is to mature the promise.'" ***Id.*** (quoting ***Oedekerk v. Muncie Gear Works***, 179 F.2d 821, 824 (7th Cir. 1950)). Whether Spiegel's alleged response to Turcy's inquiry represented a willingness to renew his offer under the same terms is not something susceptible to determination as a matter of law.

¶15 The absence of a settlement in the worker's compensation action renders the settlement in the present case invalid. Weber rejected Zurich's February 3, 2010 offer because it was too risky for Weber to forego benefits in the worker's compensation proceeding without knowing what would happen with his

[4] There is some suggestion in Secura's brief that, by failing to specifically refute Turcy's version of events, Spiegel has conceded that he told Turcy his settlement authority had not changed. This is a dangerous argument for Secura because Turcy failed to file a subsequent affidavit specifically refuting Spiegel's version of events. Thus, if we were to treat the absence of a specific denial as a concession (we do not), Secura has conceded that Spiegel told Turcy he would need his client to authorize a settlement. This would effectively preclude Secura's equitable estoppel argument. *See* ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶41, 326 Wis. 2d 155, 785 N.W.2d 398 (equitable estoppel requires reasonable reliance).

personal injury claim. Weber and Secura made the purported settlement of this action contingent on settlement of the worker's compensation matter. Because we cannot conclude the parties agreed to settle the worker's compensation action, it does not appear the parties have a valid settlement agreement in the present action.

¶16 Assuming, *arguendo*, that there was agreement to settle the worker's compensation claim, it did not comply with WIS. STAT. § 807.05. Interpretation and application of a statute are questions of law, which we review de novo. ***MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.***, 2010 WI 87, ¶26, 328 Wis. 2d 110, 786 N.W.2d 785. We give statutory language its common, ordinary, and accepted meaning. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, that is ordinarily the end of the inquiry. ***Id.***

¶17 We begin with the language of the statute. WISCONSIN STAT. § 807.05 states, in full:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under ss. 807.13 or 967.08 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.

The statute is in the nature of a statute of frauds; "it is designed to avoid the difficulties inherent in oral agreements." ***Kocinski v. Home Ins. Co.***, 147 Wis. 2d 728, 734, 433 N.W.2d 654 (Ct. App. 1988), *aff'd*, 154 Wis. 2d 56, 452 N.W.2d 360 (1990).

¶18 If the statute is to serve its purpose, it must be strictly enforced by the courts. ***Adelmeyer v. Wisconsin Elec. Power Co.***, 135 Wis. 2d 367, 372, 400

N.W.2d 473 (Ct. App. 1986). The purported agreement here was neither in writing nor subscribed by the party to be bound. *See* WIS. STAT. § 807.05. An agreement that does not comply with § 807.05 is not binding and is unenforceable. *See* ***Laska v. Laska***, 2002 WI App 132, ¶9, 255 Wis. 2d 823, 646 N.W.2d 393; ***American Cas. Co. of Reading, Penn. v. Western Cas. & Sur. Co.***, 19 Wis. 2d 176, 180, 120 N.W.2d 86 (1963).

¶19 Nonetheless, Weber and Secura argue WIS. STAT. § 807.05 is inapplicable to the worker's compensation settlement. They note WIS. STAT. ch. 807 applies only in circuit courts of this state. *See* WIS. STAT. § 801.01(2). They contend the settlement of a foreign claim need not comply with § 807.05, even if it forms the basis for a subsequent contract to which that statute is applicable.

¶20 We cannot agree. Weber's third-party personal injury action was filed in Wisconsin. Under WIS. STAT. § 803.03(2)(a), Zurich was required to be joined in this action based on its subrogation claim. Not only is Zurich a necessary party, it is an actual, named party in this action. Thus, any settlement of Weber's worker's compensation claim necessarily affected Zurich's rights in the present suit. As a result, the worker's compensation settlement concerned proceedings in this state's courts, and was required to comply with WIS. STAT. § 807.05.[5]

¶21 The circuit court, while correctly holding that the alleged agreement was unenforceable, nonetheless held the parties to their purported bargain by

[5] For this reason, we also reject Weber's argument that WIS. STAT. § 807.05 is inapplicable because his worker's compensation claim—an administrative matter—was not "an action or special proceeding" under the statute.

applying equitable estoppel. This approach was sanctioned by the supreme court in ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, 291 Wis. 2d 259, 715 N.W.2d 620. There, Affordable sued for payment under a contract to transport Neosho's equipment. ***Id.***, ¶5. Neosho counterclaimed for damages to its equipment, and both parties' insurers intervened. ***Id.***, ¶¶5-6. The parties' attorneys agreed to a settlement that would have Affordable's insurer pay damages. ***Id.***, ¶7. Affordable's attorney signed the agreement, but conditioned acceptance on approval from Affordable's owner. ***Id.***, ¶8. Neosho's insurer informed the circuit court that the case was settled, and settlement checks were issued, but Affordable's owner did not timely approve the settlement. ***Id.***, ¶¶8-10. The circuit court ultimately dismissed the case for failure to prosecute. ***Id.***, ¶¶12-13.

¶22 Our supreme court concluded that even though the purported agreement did not comply with WIS. STAT. § 807.05, it was nonetheless enforceable under the equitable estoppel doctrine. ***Id.***, ¶3. "[E]ven when the statute of frauds requires a contract be in writing, courts will employ the equitable remedy of estoppel in order to avoid an unjust result." ***Id.***, ¶32. When the elements of equitable estoppel are met, the equities of the situation take the transaction out of § 807.05's purview and the contract is enforced according to its terms. ***Id.***

¶23 As we have noted, we are not convinced that there was a meeting of the minds sufficient to form a binding oral agreement. Zurich argues this lack of agreement should preclude application of equitable estoppel to enforce the bargain. Zurich's position has some logical appeal, for if there is no contract, it cannot be enforced according to its terms. *See* ***id.***, ¶32. However, in ***Affordable Erecting***, the approval contingency was not satisfied, and there was therefore "no

valid written settlement agreement properly subscribed by all parties." ***Id.***, ¶30. Yet our supreme court applied the estoppel doctrine despite specifically determining that the parties failed to agree to a settlement. ***Id.***, ¶28. Accordingly, we cannot conclude the absence of a valid agreement bars application of the equitable estoppel doctrine.

¶24 Thus, we will address the merits of applying the estoppel doctrine in this case. "Equitable estoppel is established when one party demonstrates that it was induced by some action or non-action of another party, and reasonably relied to its detriment." ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶41, 326 Wis. 2d 155, 785 N.W.2d 398; *see also* ***Affordable Erecting***, 291 Wis. 2d 259, ¶33. Generally, when the facts are undisputed, or when the facts are disputed and the circuit court's factual findings are not clearly erroneous, this court reviews the application of equitable estoppel de novo. ***Affordable Erecting***, 291 Wis. 2d 259, ¶21. However, in this case the circuit court's decision was in effect a summary judgment based solely on affidavits. Accordingly, we will reverse if any material facts are disputed. *See* ***id.***

¶25 The first disputed element in this case is reliance. Secura and Weber contend they reasonably relied on the purported settlement of the worker's compensation claim by, among other things, commencing settlement negotiations in this third-party action and cancelling depositions and the trial date. While these activities no doubt demonstrate reliance, neither Secura nor Weber address whether that reliance was reasonable.

¶26 Determining whether a party's reliance was reasonable requires that we assess the conduct of the party against whom estoppel is asserted. *See* ***id.***, ¶40; ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 12, 571 N.W.2d 656 (1997).

Here, Secura's and Weber's actions in reliance were based on Spiegel's ambiguous July 1 statement that his settlement authority had not changed. When Turcy contacted Spiegel regarding the purported settlement later that month, Spiegel promptly informed Turcy that Zurich would not agree to waive its lien. On July 29, Ceman also informed Weisman that Zurich would not waive its lien. Ceman reiterated this on August 10. Six days later, Weisman informed the court clerk that the suit had not been settled and requested trial availability from the other attorneys in the litigation.

¶27 Those facts contrast sharply with the facts in ***Affordable Erecting***. Affordable's attorney assured Neosho that Affordable would approve the settlement, and later told Affordable's insurer that Affordable had approved. ***Affordable Erecting***, 291 Wis. 2d 259, ¶39. When its insurer sent payments and releases, Affordable did not attempt to clarify that it had not accepted the terms of the deal. ***Id.***, ¶39. Nor did Affordable speak up when the circuit court notified the parties it would dismiss the case for want of diligent prosecution. ***Id.*** This conduct gave rise to only one reasonable inference: that Affordable had accepted the terms of the settlement. ***Id.***, ¶40. Here, no assurances that Zurich would approve the agreement were given, and Zurich dispelled any notion that it had settled the worker's compensation claim fairly quickly.

¶28 The parties also dispute the degree of detriment suffered by Secura and Weber. Zurich asserts Secura and Weber were not harmed in any way, or only minimally by having to reschedule expert depositions and obtain a new trial date. Secura and Weber claim the parties will incur substantial expense rescheduling depositions and preparing for trial. In addition, Secura maintains that Weber and Vomastic will suffer emotional distress as a result of the purported settlement not being enforced.

¶29 A litigant must show more than that he or she suffered some hassle to establish detrimental reliance. "Detriment" is the equivalent of "prejudice" and requires proof of injury or damage. ***Nugent v. Slaught***, 2001 WI App 282, ¶31, 249 Wis. 2d 220, 638 N.W.2d 594. "This injury or damage must be 'actual and material or substantial, and not merely technical or formal.'" ***Id.*** (citing 28 AM. JUR. 2D *Estoppel and Waiver* § 83 at 508 (2000)).

¶30 Here, assuming Secura and Weber did reasonably rely on the purported settlement of Weber's worker's compensation claim, neither suffered substantial prejudice. The most obvious detriment to Weber and Secura was cancellation of expert depositions and the trial date. The circuit court apparently believed it would be difficult to reschedule these matters because of the number of lawyers involved in this litigation. Despite this difficulty, the parties were able to agree on a schedule once before; presumably, they can do so again. Scheduling difficulties in cases involving multiple parties are an inherent burden of all major litigation practices. Further, any emotional trauma Weber or Vomastic may suffer as a result of the delay does not qualify as "material or substantial" prejudice. ***Id.***

¶31 Again, ***Affordable Erecting*** is instructive for its analysis of the detriment element. Neosho, whose equipment had allegedly been damaged in transport by Affordable, had relinquished its legal claims against Affordable, including its right to sue Affordable for full restitution. ***Id.***, ¶46. Because Neosho believed Affordable had agreed to settle, it did not object to the circuit court dismissing the case without prejudice. ***Id.***, ¶47. This required it to defend against the same claim by Affordable in a second action filed over two years after the first action was initiated. Here, no releases were exchanged or signed, and the case was not dismissed. Although Weber maintains that he settled for less than the full

policy limits, he does not argue that the $440,000 represented less than full value for his claim.

¶32 We therefore conclude Secura and Weber have failed to establish the elements of equitable estoppel. The circuit court correctly determined that the purported settlement does not comply with WIS. STAT. § 807.05. Therefore, the agreement—if indeed there was one—is unenforceable. We remand for further proceedings, including a trial on Weber's claims, if necessary.

By the Court.—Order reversed and cause remanded for further proceedings.

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