COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 19, 1995

No. 95-1432

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

WILLIAM J. RHODE, D/B/A COUNTRY ROSE,

Plaintiff-Appellant,

v.

THE TOWN OF CENTER,

Defendant-Respondent.

APPEAL from an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. William Rhode appeals an order that enforced a stipulation settling Rhode's 42 U.S.C. § 1983 (West 1994) claim against the Town of Center. Because we conclude the stipulation is unenforceable, we reverse the order and remand the case for further proceedings.

Rhode operates The Country Rose tavern, which features burlesque entertainment. The Town denied Rhode's request to renew his liquor

license and Rhode filed a § 1983 action against the Town.[1] As the litigation progressed, the parties discussed settlement. On August 25, 1994, Rhode's attorney, Jeff Olson, attorneys for the Town and the trial court conducted a telephone conference and placed a stipulation on the record, pursuant to § 807.05, STATS.[2]

In December, the Town moved the trial court for an order enforcing the parties' stipulation. The parties did not dispute that placing their proposed agreement on the record satisfied the requirements of § 807.05, STATS. At issue before the trial court was whether the stipulation constituted a binding agreement between the parties. The trial court conducted a hearing on the Town's motion and concluded the stipulation was enforceable, as modified to reflect changes in the effective dates. Rhode now appeals.

The issue on appeal is whether the parties' August 25 stipulation is enforceable.[3] Whether the stipulation is enforceable is a matter of law we

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[1] 42 U.S.C.A. § 1983 (West 1994) states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Section 807.05, STATS., provides:

> STIPULATIONS. 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.

[3] Rhode in his brief also anticipated that the Town would argue that even if the August 25 stipulation did not create an enforceable agreement, a subsequent agreement was reached through the parties' correspondence. The Town never made this argument and thus, we do not reach this issue on appeal. Additionally, because we conclude the stipulation is not enforceable, we need not address Rhode's argument that any contract that may have been created should be voided on

review de novo by examining the nature of the agreement. *See* ***Kocinski v. Home Ins. Co.***, 154 Wis.2d 56, 65, 452 N.W.2d 360, 364 (1990). In ***Kocinski***, our supreme court noted that § 807.05, STATS., does not make enforceable as a contract a putative agreement that is not a contract, even if the formalities of that statute have been observed. ***Id***. at 67, 452 N.W.2d at 365. To determine whether a contract exists, this court must apply contract law to the undisputed facts: the stipulation transcript and the correspondence between the parties. *See* ***id***.

We begin with the stipulation transcript. After the parties stated the terms of the "proposed agreement," as it was referred to during the proceeding, the trial court stated:

> The understanding is that Mr. Olson will consult with his clients and confirm in writing and communicate by Fax their agreement to these terms, that will attempt to be done by noon tomorrow, and that the Town will attempt to convene a special meeting and act on a resolution to approve this agreement and then will promptly, upon receiving the application for liquor license, act to publish and grant that license.

Each of the three attorneys participating in the conference call agreed with this summation. Additionally, the trial court also stated:

> I ask that I be notified in writing sometime promptly following the Town special meeting to confirm that they approve so that if in fact they do not, we could put this back on the trial calendar and schedule it further; and by the same token, Mr. Olson, if you don't receive the authority from your client, if you'd let me know promptly in writing so that we can proceed.

In its ruling at the motion hearing, the trial court concluded that the stipulation became binding when Olson failed to inform the trial court

(..continued)
grounds of unilateral mistake.

"promptly in writing" that Rhode did not agree to the stipulation. Additionally, the trial court concluded that a letter Olson wrote to the Town on August 26 confirmed that the stipulation was agreeable to Olson's client.

Both parties agree that at the conclusion of the telephone conference, the stipulation was not binding on the parties. The Town argues that the stipulation became binding as soon as two conditions precedent were satisfied: (1) Olson's written confirmation of Rhode's approval of the agreement, and (2) the town board's approval of the agreement on August 29. The Town quotes 17A AM. JUR. 2D *Contracts* § 34 (1991), which provides that parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract. Furthermore, the Town notes, approval of an agreement to settle a lawsuit is recognized as a condition precedent to a binding agreement, citing ***Reed By and Through Reed v. United States***, 717 F.Supp. 1511, 1515 (S.D. Fla. 1988).

Rhode argues that the stipulation was nothing more than "the thinking of the parties' lawyers on how possibly to settle the case." Rhode states: "[T]he discussions on August 25 were purely tentative, not even constituting an offer, let alone an enforceable contract. Both attorneys may have recommended the terms of the proposed settlement agreement, but only the clients, the actual parties to the controversy, had the authority to offer and to accept settlement."

We agree in part with both parties, because we conclude that while a contract was not created on August 25, the stipulation provided conditions precedent to the making of a contract which, if satisfied, would have created an enforceable contract. The transcript reveals that the parties stipulated that two conditions to the making of an enforceable contract must be satisfied: Olson was to consult with his client and confirm in writing and communicate by fax the client's agreement to these terms and, second, the Town was to attempt to convene a special meeting and act on a resolution to approve the agreement.

The Town maintains that a letter Olson sent August 26 satisfied the first condition precedent to the making of a contract. Olson disagrees, arguing that the letter lacks any statement that indicates Rhode had reviewed

and approved the terms set forth in the stipulation.[4] The letter provided in relevant part:

> I am writing to confirm my understanding of the settlement agreement tentatively reached by my client and the town, subject to approval at a special meeting of the Town Board currently expected to take place on Monday, August 29, 1994.
>
> ....
>
> I would envision drafting this up slightly more formally, with particular references to ordinances an [sic] the case number, etc., but am a bit pressed for time at the moment. I wanted to [sic] you to have this now, to be certain that we have agreement on the substantive terms of the settlement.

The legal effect of these words is a question of law we review without deference to the trial court. *See* ***Delap v. Institute of America, Inc.***, 31 Wis.2d 507, 510, 143 N.W.2d 476, 477 (1966) (in certain cases where the evidence is documentary, the appellate court is not bound by inferences drawn therefrom by the trial court).[5] Similarly, whether the letter is ambiguous is a question of law. *See* ***Erickson By Wightman v. Gundersen***, 183 Wis.2d 106, 115, 515 N.W.2d

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[4] Rhode also argues that the trial court incorrectly concluded that Olson's failure to inform the trial court promptly in writing that Rhode did not accept the stipulation satisfied a condition precedent to the making of a contract. Rhode argues: "[T]he failure to notify a third party, in this case, the judge, that negotiations had broken down has never been held to cause a mere proposal to ripen into a binding agreement." The Town has not addressed this argument and does not argue in support of that part of the trial court's ruling. Consequently, we accept Rhode's argument and conclude that Olson's failure to notify the trial court did not satisfy a condition precedent to the making of a contract. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.").

[5] In accordance with binding Wisconsin case law, we review the document de novo. However, this author recently criticized this approach and continues to support instead appellate review using the "reasonableness standard of review." *See* Hon. Thomas Cane and Kevin M. Long, *Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts Into Fact-Finding Tribunals*, 77 MARQ. LAW REV. 475, 484 (1994). Applying the reasonableness standard of review, this author would conclude the trial court's conclusion that Olson's letter satisfied the condition precedent to the making of a contract was unreasonable.

293, 298 (Ct. App. 1994). We conclude the language of the letter is unambiguous and fails to satisfy the condition precedent required for the making of a contract between the parties. The letter does not indicate, implicitly or explicitly, that Olson consulted with his client and procured the requisite approval of the stipulation. We agree with Rhode that the letter simply provided a recitation, in writing, of the terms of the stipulation that had been discussed on the telephone one day earlier.

The Town has not argued that any other documents satisfied the condition precedent. To the contrary, the documents indicate that the parties almost immediately recognized there were some issues on which their clients did not agree. Because we conclude the condition precedent requiring that Rhode approve the stipulation and indicate his approval through his attorney was not satisfied, we need not discuss whether the other condition precedent to the making of the contract, the Town board's approval, was satisfied. We conclude no contract was created and, therefore, the stipulation did not become binding on Rhode and cannot be enforced against him.

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

Not recommended for publication in the official reports.

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MYSE, J. (*dissenting*). The majority concludes that the agreement tentatively reached at a settlement conference is unenforceable because the condition precedent requiring that William Rhode approve the stipulation was not satisfied.

The form of the approval of the terms of the stipulation will vary based upon the circumstances existing in each case. *See* ***Horton v. Haddow***, 186 Wis.2d 174, 182, 519 N.W.2d 736, 739 (Ct. App. 1994). In this case, Rhode's attorney assured opposing counsel and the court that he believed his client would accept the agreement. The court urged that counsel communicate his client's acceptance on the next day and counsel agreed. On the day following the conference Rhode's attorney reiterated the terms of the agreement and stated the following:

> I am writing to confirm my understanding of the settlement agreement tentatively reached by my client and the town, subject to approval at a special meeting of the Town Board currently expected to take place on Monday, August 29, 1994.

Under circumstances where he indicated the anticipated approval of his client and was specifically asked to advise the court if his client did not approve, the foregoing paragraph is sufficient to communicate his client's approval of the terms of the stipulation. Not only did he fail to advise the court that his client did not approve, but in reciting the terms of the agreement he no longer conditioned the agreement on his client's approval. Rather, the approval of the Town board at its next meeting was the sole condition reserved in counsel's letter. These circumstances persuade me that the court properly construed this letter as indicating his client approved the proposed agreement and that the only condition to ratification was the Town board's approval. The Town board did approve the terms of the agreement as set forth in this letter at its meeting. The two conditions subsequent for agreement have therefore been met and the agreement should be enforceable.

Even if there is ambiguity as to the meaning of this language the majority's conclusion that the agreement is unenforceable seems dubious. I believe a reasonable person would construe this letter as indicating his client's assent. At the very least it creates an ambiguity that should be resolved by the

trial court. Concluding as a matter of law that the agreement is not enforceable is inconsistent with what at the very least is an ambiguous letter in regard to Rhode's acceptance of the conditions.

Finally, it would appear that the letter if nothing else is an offer submitted by Rhode's attorney to the Town board which if accepted would result in a binding contract. The Town board at its meeting accepted the terms of the offer which should result in an agreement that is enforceable. The fact that the Town did not advance this theory of enforceability does not change the fact that the legal effect of the letter and the Town's acceptance is to create a binding contract. In the interest of justice this matter should be remanded for the necessary findings on this theory if we conclude that the parties are not bound as a result of counsel's letter of August 26. *See* Section 752.35, STATS.