COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3013

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

WALGENMEYER CARPET & TILE CO.,

Plaintiff-Respondent,

v.

ROBERT SCHULTZ,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed.*

DEININGER, J.[1] Robert Schultz appeals from a small claims judgment for $1,049 plus costs in favor of Walgenmeyer Carpet & Tile Co.[2] Schultz claims the trial court erred by not applying WIS. ADM. CODE § ATCP 110.05, by failing to enforce a

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

[2] It appears that the correct name for Plaintiff-Respondent is "Walgenmeyer's Carpet and Tile Co." The caption for this appeal was determined from the Notice of Appeal and the parties were given the opportunity to correct the caption if they did not agree with it. Neither party requested a correction.

verbal stipulation for dismissal, and by not acting impartially. We reject these arguments and affirm the judgment.

BACKGROUND

In August 1995, Schultz contacted Walgenmeyer to order the installation of carpeting and vinyl flooring at a residence that he owned. The flooring was installed and Schultz was given an invoice for materials and labor totaling $1,749.

Several days after receiving the invoice, Schultz paid $400 against the amount due and stated in writing, "I'll pay in 4 installments. I think the house may be sold, in which case I'll pay it all."

No further payments were made on the account, and this action was commenced in April 1996, to collect the balance due. Schultz testified that after receiving the summons and complaint, he contacted Walgenmeyer and offered to pay $300 on the account in return for dismissal of the action. He testified that a principal of the business agreed to his proposal, and he then did pay an additional $300 on the account.

After a court commissioner found in favor of Walgenmeyer for the balance due of $1,049 plus costs, Schultz sought and obtained a trial de novo. Following testimony, the trial court granted judgment to Walgenmeyer, from which Schultz now appeals.

ANALYSIS

Schultz first argues that the trial court erred by not applying WIS. ADM. CODE § ATCP 110.05, to the transaction. ATCP 110.05, provides in relevant part as follows:

> (1) The following home improvement contracts and all changes in the terms and conditions thereof, shall be in writing:
>
> (a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.
>
> (b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.
>
> (2) If a written home improvement contract is required under sub. (1), or if a written home improvement contract is prepared using the seller's pre-printed contract form, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all terms and conditions of the contract ….

Schultz argued in the trial court that the invoice he received was a pre-printed home improvement contract that failed to comply with the requirements under WIS. ADM. CODE § ATCP 110.05(2). He now concedes that there was no written home improvement contract, but claims that a written contract was required for this transaction under ATCP 110.05(1). Schultz argues that since there was not a written contract, and one was required, he does not owe Walgenmeyer the balance due on his account.[3] WIS. ADM. CODE § ATCP 110.05(1), however, does not apply to this transaction because it is undisputed that: 1) no payment of money or other consideration was required of Schultz

[3] Schultz does not dispute, however, that he received goods and services for which he had agreed to pay or that a balance of $1,049 remains due on the account. He makes no complaint regarding the quality of the work.

prior to completion of the installation by Walgenmeyer; and 2) the contract was initiated by Schultz contacting Walgenmeyer to request an estimate and the installation.[4]

Schultz next argues that the complaint should be dismissed because Walgenmeyer failed to live up to its agreement to dismiss the suit upon his making a $300 payment. First, it should be noted that the trial court found that Walgenmeyer had made no such agreement. When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). We defer to the trial court's factual findings unless the record indicates they are clearly erroneous. Section 805.17(2), STATS. The record in this case supports no such conclusion.

Furthermore, it is undisputed that the alleged agreement to dismiss took place after this action had begun. Section 807.05, STATS., provides as follows:

> 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 s. 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.

General rules of practice, including ch. 807, STATS., apply to small claims actions unless an exception is stated in ch. 799, STATS. Section 799.04(1). Nothing in ch. 799 excepts or replaces the requirement that stipulations in pending actions be made in court or in writing, signed by the parties or their counsel. The alleged agreement for dismissal upon payment of $300, even if it had been made, was therefore not binding on the parties or

[4] Walgenmeyer argues that any affirmative defense under the consumer regulations was waived by Schultz because he failed to raise it in his written answer. Since we conclude that the code provision does not apply to the transaction, we do not address whether a defense based on the regulation was waived by Schultz.

the court. *See* ***Adelmeyer v. Wisconsin Elec. Power Co.***, 135 Wis.2d 367, 370-71, 400 N.W.2d 473, 474 (Ct. App. 1986).

Finally, Schultz claims that Judge Krueger did not act impartially. He claims that she was "terse, sarcastic and hostile" to him during the trial. We have reviewed the transcript of the trial court proceedings and find no basis to support Schultz's claims. It is true that Judge Krueger prefaced her findings and judgment with the following comment:

> Well, I have to say that I certainly have spent my time in better ways than listening to this. It seems to me that all I'm witnessing is an effort to dodge what is due to businessmen -- to a business that performed in good faith.

Just because a litigant does not prevail, or because a court finds little merit in a litigant's case, it does not mean that the court did not act impartially in the proceeding. The supreme court has commented as follows in response to a similar claim:

> We have examined the pages of the record cited as illustrative of impatience and boredom by the court with the plaintiffs' evidence and fail to find any such impatience or boredom, much less error. While a trial judge should conduct a trial free from prejudicial error, there is no requirement [s]he enjoy it.

Keplin v. Hardware Mut. Cas. Co., 24 Wis.2d 319, 328, 129 N.W.2d 321, 325 (1964).

Since we find no merit in any of Schultz's arguments, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.