COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3843

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

HERITAGE MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

JAMES HEIKE, D/B/A HEIKE REALTY, AND ABC INSURANCE COMPANY,

DEFENDANTS.

BARBARA DAVIDSON AND LARRY DAVIDSON,

PLAINTIFFS-APPELLANTS,

V.

JIM HEIKE, D/B/A HEIKE REALTY, GENERAL CASUALTY INSURANCE COMPANY, CARPETLAND U.S.A., INC., D/B/A CARPETLAND OF EAU CLAIRE, ALADDIN MILLS, A/K/A ALADDIN MILLS CHICAGO, A/K/A ALADDIN MILLS GEORGIA, DEPENDABLE CHEMICAL COMPANY, INC., BUCKEYE UNION INSURANCE COMPANY, GARY FORT, MNO INSURANCE COMPANY, PARA-CHEM SOUTHERN, AND PQR INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

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

PER CURIAM. Barbara and Larry Davidson appeal judgments dismissing their claims and an order denying their motion for reconsideration. The Davidsons contend the trial court erred, first, by determining that they agreed to give up their appellate rights against all the defendants except Gary Fort and, second, by entering summary judgment in favor of Fort.[1] We conclude that the Davidsons bargained away their appellate rights after entering into an enforceable stipulation to surrender the right to appeal if the defendants waived costs, and that the trial court did not enter summary judgment in Fort's favor. The judgments and order dismissing the Davidsons' action against all the defendants except Fort are affirmed.

This is a personal injury case arising out of injuries Barbara allegedly suffered after a new carpet was installed at her workplace. All the defendants except for Fort moved for summary judgment. The trial court granted the motions, and dismissed the Davidsons' claims against all the defendants including their action against Fort. Subsequently, the Davidsons' attorney, Lisa

[1] The Davidsons also contend that, for various reasons, the trial court erred by granting summary judgment against them. Our conclusion that the Davidsons gave up their rights to appeal the trial court's decision renders resolution of these issues unnecessary.

Drill, wrote the following letter to each of the defendants' attorneys and to the defendant Fort, who was proceeding pro se:

> We have the Court's Order Granting Summary Judgment. We ask each of the defendants to waive costs in exchange for an agreement not to appeal the decision. Please advise.

The defendants Carpetland U.S.A., Aladdin Mills, Dependable Chemical Company, and Para-Chem Southern all replied accepting the terms of the letter. Neither Jim Heike nor Fort replied to this letter, however, and Drill sent this follow-up letter:

> I previously wrote you on 10-29-97 asking each of the defendants to waive costs in exchange for an agreement not to appeal the decision. Please advise.

Heike replied to this letter accepting the terms but Fort did not.

After all the defendants except Fort agreed to the terms of the letter, the Davidsons brought a motion to reconsider the summary judgment motion. The trial court denied this motion, concluding that the Davidsons entered into a binding stipulation to give up their appellate rights in exchange for the defendants' rights to costs. The court also concluded that "Technically, the case against [Fort] has not been dismissed, so he would not be in a position to waive costs."

The Davidsons argue that the trial court erred by concluding that they entered into a stipulation to forego their appellate rights. "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, 514 (Ct. App. 1995). A stipulation is binding if it is "made in writing and subscribed by the party to be bound thereby or the party's attorney." Section 807.05, STATS. We examine whether a binding

stipulation exists under a de novo standard of review. ***In re Estate of Cavanaugh v. Andrade***, 191 Wis.2d 244, 264, 528 N.W.2d 492, 499 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis.2d 290, 550 N.W.2d 103 (1996).

We conclude that Drill's letter to the defendants and the defendants' agreement constitutes a binding stipulation under § 807.05, STATS. The language used in the letter, "We ask each of the defendants to waive costs in exchange for an agreement not to appeal the decision. Please advise," is an offer to waive the Davidsons' appellate rights in exchange for the defendants' agreement to waive costs. When the defendants agreed to the terms, the stipulation became binding.

Our interpretation that Drill's letter was an offer and not an invitation to offer is further supported by the events occurring after the initial letter was sent. As we have noted, Drill received acceptances of the terms of her first letter from all but two of the defendants. Upon receiving their acceptances, however, Drill did not inform them that the first letter was a mere inquiry. In addition, after Drill received these acceptances she sent a second letter to the two defendants who had not yet agreed which stated, "I previously wrote you on 10-29-97 asking each of the defendants to waive costs in exchange for an agreement not to appeal the decision. Please advise." In this second letter, Drill makes it clear that the first letter was an offer and not merely an inquiry. Finally, we note that even after Heike agreed to the second letter, and after several defendants submitted their draft orders to the court that excluded costs, Drill did not inform any of the defendants that the letter she drafted was only an inquiry.

The Davidsons contend that Drill's letters merely reflected an inquiry into the defendants' positions because the letters did not state that the Davidsons consented to such an agreement. In ***Johnson***, this court accepted a

virtually identical stipulation which indicated that the client specifically authorized it. ***Id.*** at 348, 528 N.W.2d at 513. We conclude that the lack of a specific reference to a client's consent in a stipulation is of no consequence, however, because an attorney has apparent authority to enter into a stipulation. "No … stipulation … between the parties or their attorneys … shall be binding unless made in writing and subscribed by the party to be bound thereby *or the party's attorney*." Section 807.05, STATS. (Emphasis added.)

The Davidsons next contend that the agreement is invalid because they did not provide Drill with authority to dispense with their appeal rights. While neither side cites to a case directly on point, both cite to ***Balzer v. Weisensel***, 258 Wis. 566, 569, 46 N.W.2d 763, 765 (1951), for the proposition that a client can invalidate a stipulation by demonstrating to the court that his or her attorney exceeded the client's authority. Because both parties consider ***Balzer*** to state the applicable law, we accept without deciding that the rule stated therein is to be applied in this case.[2]

During the hearing on the Davidsons' reconsideration motion, Barbara testified that she had not given Drill authority to waive her appellate rights. Whether in fact she had done so in an initial conversation, however, was disputed by Barbara and Drill in a second conversation between the two, as the following testimony indicates:

[2] ***Balzer v. Weisensel***, 258 Wis. 566, 569, 46 N.W.2d 763, 765 (1951), involved a situation where an attorney settled a case without the defendant's presence. The court concluded that the defendant had clothed his attorney with apparent authority to settle a case for as little as he did. ***Id***. at 569, 46 N.W.2d at 765. The court went on to state that, "Certainly, if the attorney exceeded his authority by settling a case which his client wished to litigate, the defendant had the burden of demonstrating this …." ***Id***.

> Q [Drill] At the second conversation do you remember our discussion about taxation of costs?
>
> A [Barbara] Yes, I was surprised.
>
> Q Do you remember we had a little argument about that?
>
> A Yes, we did.
>
> Q Do you remember my discussion with you; what did I tell you?
>
> A You said that – that you had talked to me about it. And I said, no you hadn't ….

After listening to Barbara's testimony, the trial court found that Davidson authorized her attorney to enter into the agreement during the initial conversation but forgot about this by the time of their second conversation.

The Davidsons argue that the trial court erred because no evidence was presented to contradict Barbara's testimony that she had not given her consent. We affirm the trial court's decision. The Davidsons had the burden of proving that their attorney exceeded her authority, *see* ***Balzer***, 258 Wis. at 569, 46 N.W.2d at 765, and they failed to do so. On appeal, we give due regard to the trial court's superior ability to judge witness credibility. Section 805.17(2), STATS. Based on its implicit finding that Barbara's testimony was not credible, the Davidsons failed to meet their burden.

The Davidsons next argue that the trial court erred by refusing to exercise its equitable powers to void the stipulation. This court has previously recognized the "inherent judicial power to avoid a stipulation in equity." ***Johnson***, 191 Wis.2d at 350, 528 N.W.2d at 514. This power is a discretionary one. ***Id***. A proper exercise of discretion consists of the court applying the relevant law to the applicable facts in order to reach a reasonable conclusion. ***State v. Jackson***, 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994).

The Davidsons argue that given Barbara's testimony concerning her belief that Drill was not given authority to enter into the stipulation, and given the possible ambiguity in the letters Drill drafted, the trial court erred by not relieving them from the stipulation. We do not agree. The trial court enforced an unambiguous stipulation which it found had been authorized by the Davidsons. This was not an erroneous exercise of discretion.

The Davidsons next argue that we should overrule that part of ***Johnson***, which held that letters between counsel can act as binding written stipulations. We lack the authority to do so, however, because we are bound by all published opinions of the court of appeals. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997).

Finally, the Davidsons argue that the case should be remanded to continue proceedings against Fort. A remand, however, is neither necessary nor permissible because the case against Fort has not been dismissed, and he is not a proper party to this appeal. Although the trial court mistakenly entered summary judgment for him despite the fact that he had not made such a motion, the court later corrected itself in its decision on the Davidsons' reconsideration motion and noted that, "Technically, the case against [Fort] has not been dismissed." Because there is no final order dismissing Fort from these proceedings, he is not a proper party to this appeal. *See* § 808.03(1), STATS.[3]

[3] We note also that Fort did not submit a brief on appeal.

By the Court.—Judgments and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.