COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2016

Diane M. Fremgen
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. 2015AP824 **Cir. Ct. No. 2014CV82**

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

DENNIS J. MITCHELL,

PLAINTIFF-APPELLANT,

KATHLEEN SEBELIUS,

INVOLUNTARY-PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT-RESPONDENT,

SARAH A. DEMPSEY AND ACUITY,

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Dennis Mitchell, pro se, appeals an order distributing settlement proceeds and dismissing Mitchell's personal injury action against Sarah Dempsey and her insurer, American Family Mutual Insurance Company. Mitchell argues the circuit court erred by enforcing the settlement agreement. We reject Mitchell's arguments and affirm the order.

BACKGROUND

¶2 In February 2011, Mitchell sustained injuries in an automobile crash, while he was driving a Fox Valley Cab. Mitchell subsequently filed a personal injury suit against the driver of the other vehicle, Sarah Dempsey, and her insurer, American Family Mutual Insurance Company. Because Mitchell had received both Medicare and worker's compensation payments, the United States Secretary for the Department of Health and Human Services, along with the workers compensation insurer—Acuity, a Mutual Insurance Company—were named as subrogated parties in the action.

¶3 The matter proceeded to mediation. Mitchell's counsel averred that on the morning of mediation, he explained to Mitchell his case had a value of between $150,000 and $200,000. Counsel further explained they would begin the negotiation with an opening demand of $400,000, with the expectation the parties would go "back and forth" many times. According to counsel, Mitchell ultimately asked the mediator if he thought American Family would pay $175,000, and counsel informed Mitchell he would net roughly $40,000 to $50,000 from that settlement amount. Mitchell's counsel further indicated that because American Family's adjuster was not then available, the mediator "directly asked [Mitchell] for his assurance that if American Family offered $175,000, he would accept it.

[Mitchell] gave [the mediator] his authority to accept $175,000 if it was offered." Counsel added: "[A]round 1:30 p.m. that afternoon, I received a call from [the mediator] advising the case had settled for $175,000." Counsel then called Mitchell to inform him of the settlement and, according to counsel, Mitchell expressed no objection to the settlement.

¶4 The mediator also submitted an affidavit regarding his recollection of the negotiations. The mediator averred that he asked Mitchell if he would settle his case for $175,000 and Mitchell replied he would. The mediator then asked counsel for American Family to confer with the claims representative and confirm whether the matter could be settled for $175,000. When the mediator received confirmation from American Family, the mediator produced a written settlement agreement that was signed by counsel for American Family, Mitchell's counsel, and the mediator. On the line reserved for Mitchell's signature, his counsel wrote "Authority to settle for $175,000 given to mediator during session by Dennis Mitchell."

¶5 Mitchell subsequently filed a "Motion Regarding Non-Settlement of Claim," seeking to vacate the settlement agreement. In an affidavit in support of the motion, Mitchell averred that he did not agree to settle his claim at the mediation. During the hearing on Mitchell's motion, the parties did not offer sworn testimony but, rather, made arguments consistent with submitted affidavits. Mitchell also submitted a phone call log from the day of the mediation to establish a timeline of events that day. The circuit court denied the motion to vacate the settlement agreement and entered an order consistent with the agreement's terms. This appeal follows.

DISCUSSION

¶6 Mitchell argues the circuit court erred by enforcing the settlement agreement because Mitchell never approved the settlement terms nor signed the written agreement. Pursuant to WIS. STAT. § 807.05,[1] however, a settlement agreement is binding where, as here, the agreement is signed by a party's attorney. The statute provides:

> 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*.

Section 807.05 (emphasis added).

¶7 Mitchell nevertheless contends he never authorized his attorney to enter into the agreement on his behalf. After considering the parties' affidavits and the arguments made at the motion hearing, the circuit court found otherwise, concluding "there was an agreement, that [Mitchell] did give authority to [his counsel] to settle the claim, and that he did indicate to [the mediator] that he did wish to settle the claim for $175,000."[2] On appeal, Mitchell, in effect, asks this court to reject the circuit court's findings by making a credibility determination in Mitchell's favor. Credibility determinations, however, are made by the trier of fact. *See* ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 62, 252

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Mitchell did not object to the circuit court's procedure of weighing credibility based on affidavits and argument. Because he did not object in the circuit court nor raise the issue on appeal, we do not review the propriety of deciding the case in this manner.

N.W.2d 81 (1977). An appellate court will substitute its judgment for that of the trier of fact only when the fact-finder relied on evidence that was incredible as a matter of law—the kind of evidence that conflicts with the uniform course of nature or with fully-established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Here, the sworn affidavits of Mitchell's counsel and the mediator were not incredible as a matter of law; therefore, the circuit court's findings of fact based on this evidence will not be set aside, and we will affirm the order enforcing the settlement agreement.

¶8 To the extent Mitchell alternatively argues the circuit court permitted hearsay at the motion hearing, the argument is conclusory and undeveloped as it fails to even identify the alleged hearsay. We need not address undeveloped arguments. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶9 Likewise, we need not address Mitchell's undeveloped claim that the circuit court did not allow him to finish presenting his case. *See* ***id.*** Even on its merits, the record shows Mitchell was given ample opportunity to present his arguments and any exhibits. The court prevented Mitchell from interjecting additional argument after the court began its oral pronouncement. Mitchell contends on appeal that he had two witnesses prepared to testify regarding his physical recovery since the crash. Mitchell, however, failed to make an offer of proof in the circuit court as required under WIS. STAT. § 901.03(1)(b). Moreover, Mitchell fails to establish that his additional witnesses would have altered the outcome, as testimony regarding Mitchell's "recovery" has questionable relevancy

to determining the validity and enforceability of the settlement agreement.[3] *See* ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698 (improper admission or exclusion of evidence not grounds for reversal unless there is reasonable possibility error contributed to outcome).

By the Court.—Order affirmed.

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

[3] We note that many of Mitchell's arguments on appeal relate to grievances with his attorney's conduct, most of which are not relevant to the issue on appeal regarding the validity and enforceability of the settlement agreement.