

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2002

Cornelia G. Clark
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 Nos. 01-0111
01-1939
STATE OF WISCONSIN**

Cir. Ct. No. 98 CV 5835

**IN COURT OF APPEALS
DISTRICT I**

No. 01-0111

UNIVERSAL FOODS CORPORATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ELIZABETH A. ZANDE,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT-CROSS-APPELLANT.

No. 01-1939

UNIVERSAL FOODS CORPORATION,

PLAINTIFF-APPELLANT,

V.

ELIZABETH A. ZANDE,
DEFENDANT-RESPONDENT,
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
INTERVENOR.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Milwaukee County: STANLEY A. MILLER and THOMAS R. COOPER, Judges. *Judgment reversed and cause remanded.*¹

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Universal Foods Corporation appeals from the trial court's grant of summary judgment in favor of Elizabeth A. Zande. The trial court found that Universal Foods's written settlement offer and Zande's conduct created a binding unilateral contract that required Universal Foods to dismiss its defamation suit. Universal Foods claims that the trial court erred because: (1) a binding unilateral contract was never formed because Zande did not accept the terms of its offer; and (2) its settlement offer was not an offer of a unilateral

¹ Universal Foods appeals from a judgment granting summary judgment in favor of Zande. Zande and American Family cross-appeal from an order denying their motion for attorney's fees. The Honorable Stanley A. Miller issued the judgment and the order. Universal Foods also appeals from an order denying its motion to strike an allegedly improperly filed affidavit. The Honorable Thomas R. Cooper issued the order. These claims have been consolidated into one appeal. See footnote two for further discussion of the orders.

contract that Zande could accept by performance alone.² We reverse for further proceedings.

I.

¶2 This case began when Universal Foods filed a lawsuit against “Jane Doe” alleging that an unknown individual posted three defamatory messages on a Yahoo! Message Board. Universal Foods claimed that these messages damaged Universal Foods’s “reputation, trade, and business.” Universal Foods discovered that the unknown individual was Zande, and Universal Foods’s attorney sent a letter to Zande on August 4, 1998, in an attempt to settle:

Our firm represents Universal Foods Corporation in connection with the above lawsuit. The lawsuit concerns certain defamatory statements posted to a Yahoo! Message Board over the last few weeks by an individual using the pseudonym ‘ufc_refugee.’ Discovery conducted in the lawsuit reveals that you are responsible for the posting of those statements. As a result, you are legally responsible for the damages the messages have caused to the business and reputation of Universal Foods Corporation and its officers.

This is to advise you that if there are no further defamatory postings made by you or anyone with whom you may have contact, we will proceed to dismiss the pending lawsuit without prejudice within a reasonable period of time. Should any postings of a defamatory character be made after such a dismissal, then Universal Foods would be free to pursue legal recourse for both the

² As stated in footnote one, Zande and American Family seek attorney’s fees, claiming that Universal Foods allegedly has no basis in the law for its argument that there was no unilateral contract. Universal Foods claims that an affidavit was improperly submitted with Zande’s reply memorandum supporting her motion for attorney’s fees. We conclude that there was no unilateral contract. Thus, Universal Foods’s position is not frivolous and Universal Foods’s motion to strike the affidavit is moot. Accordingly, we do not discuss the issues in the orders. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

new and old postings. In short, unless you desire to engage in this litigation process, you should refrain from participating either directly or indirectly in any further postings which contain defamatory material concerning Universal Foods Corporation or its officers or directors.

When Universal Foods's attorney learned that Zande was represented by counsel, Universal Foods's attorney sent a second letter to Zande's attorney on August 5, 1998:

Enclosed you will find a copy of the letter which was served on Ms. Zande this morning. After conferring further with our client it has been determined that efforts need to be made to assure that others involved in this activity are properly advised of Universal Foods's intentions should any further posting or dissemination of defamatory materials occur. Consequently, if Ms. Zande is willing (and does promptly proceed) to provide an affidavit to the effect that she has advised all individuals with whom she has previously had personal contact or other non-Internet communications concerning any of the subject matters conveyed in her Yahoo! Message Board postings as to Universal Foods's intentions with respect to this situation as described in our enclosed correspondence (specifically including Ms. Fran Smith), then we will proceed as indicated in that letter; otherwise we will be forced to proceed with initiation of appropriate discovery to address the situation.

Please get back to me no later than the close of business tomorrow, August 6, as to your client's willingness to proceed in this fashion and a timetable for such a certification to be furnished. If I do not hear from you by then, we will assume that Ms. Zande is not interested in this proposal and we will proceed as indicated. Thank you for your anticipated cooperation and assistance.

¶3 On August 6, 1998, Zande sent an e-mail to ten individuals with whom she had contact concerning Universal Foods. The e-mail informed the individuals that Universal Foods had filed a lawsuit against "a person who posted messages about UFC" and advised them to "lie low." Zande provided Universal Foods with a copy of the e-mail message six months later.

¶4 Zande's attorney responded in writing to Universal Foods's letter on August 13, 1998:

[W]e would like to have a release in writing... Ms. Zande is particularly concerned about UFC's intentions, given that on August 4, 1998[,] you represented to her that UFC would not pursue the lawsuit against her if no further alleged defamatory comments were posted on the internet, but then the next day demanded that Ms. Zande produce the affidavit to avoid having discovery initiated against her. A settlement agreement thus seems appropriate; otherwise, should UFC pursue litigation against Ms. Zande in spite of your representations and Ms. Zande's cooperation, she will defend the lawsuit vigorously and will file all appropriate counterclaims.

We thus propose that the parties agree to the following terms:

- Ms. Zande will not post any comments about UFC on any internet bulletin board for a reasonable period of time, say two years;
- UFC and Ms. Zande will mutually release each other from any claims they may have against each other as of the date of the settlement agreement; and
- UFC and its agents and attorneys will not disclose Ms. Zande's identity to anyone with respect to the Jane Doe lawsuit or the authorship of the subject e-mail statements.

Zande's attorney included an affidavit signed by Zande. The affidavit indicated that Zande had "informed" any individuals with whom she had contact of Universal Foods's "intentions with respect to this situation as described in [Universal Foods's] August 4 letter."

¶5 Universal Foods rejected Zande's August 13th terms in a letter dated August 18, 1998:

Your August 13, 1998 faxed correspondence and affidavit of Ms. Zande has been reviewed with our client....

[O]ur client is not satisfied with either the proposed affidavit or your client's suggested settlement terms....

We have therefore been instructed to proceed immediately with an amendment of the complaint in this matter, which we are filing today.

Two days later, Universal Foods filed and served an amended complaint. It named Zande as the individual who was responsible for posting defamatory messages about Universal Foods on the Yahoo! Message Board.

¶6 Zande filed a motion for summary judgment. Zande alleged in her reply brief that Universal Foods's August 4th and August 5th letters comprised an offer of a unilateral contract that Zande accepted when she sent the August 6th e-mail and prepared the August 12th affidavit. The trial court granted Zande's motion for summary judgment. It concluded that Universal Foods's letters comprised an offer that Zande accepted when she substantially performed by: (1) refraining from posting further messages about Universal Foods; (2) sending the e-mail that warned other individuals that Universal Foods would sue anyone who posted a defamatory message; and (3) providing the affidavit.

II.

¶7 Our review of the trial court's grant of summary judgment is *de novo*, and we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). First, we examine the pleadings to determine whether or not a proper claim for relief has been stated. ***Id.***, 136 Wis. 2d at 315, 401 N.W.2d at 820. If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT.

§ 802.08(2) (1999-2000) sets forth the standard by which summary judgment motions are to be judged:³

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶8 In this case, the trial court erred as a matter of law when it determined that Universal Foods was bound by Zande’s alleged acceptance of its August 4th settlement offer.⁴ A contract is formed when there is a meeting of the minds as to the terms. *See Household Utils., Inc. v. Andrews Co.*, 71 Wis. 2d 17, 28–29, 236 N.W.2d 663, 669 (1976). When an acceptance varies the terms of an offer, it rejects the offer and is a counteroffer. *Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass’n*, 238 Wis. 39, 42, 298 N.W. 226, 227 (1941). No contract is formed unless the counteroffer is accepted. *See Leuchtenberg v. Hoeschler*, 271 Wis. 151, 155, 72 N.W.2d 758, 760 (1955). This rule holds true regardless of how slight the variance is. *Id.*

¶9 Here, Universal Foods’s August 4th letter was an offer to form a unilateral contract because Universal Foods promised to dismiss the lawsuit if Zande stopped posting defamatory messages: “if there are no further defamatory postings made by you or anyone with whom you may have contact, we will proceed to dismiss the pending lawsuit without prejudice within a reasonable

³ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

⁴ In its brief, Universal Foods wrote that “[i]n reviewing a summary judgment, this Court does not defer to the circuit court as factfinder.” A trial court, however, does not make determinations of fact when deciding a motion for summary judgment. *See* WIS. STAT. § 802.08(2).

period of time.” See *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 517 n.6, 319 N.W.2d 855, 858 n.6 (1982) (“A contract is considered unilateral where only one party has made a promise and only that party is subject to a legal obligation.”). Accordingly, Zande began performance of Universal Foods’s terms when she did not post further defamatory comments on the Yahoo! Message Board.

¶10 Before Zande’s performance could possibly be complete, however, Universal Foods added new terms to the contract when it sent the August 5th letter to Zande’s attorney. Specifically, Universal Foods requested that: (1) Zande provide an affidavit to confirm that Zande informed all individuals with whom she had contact that Universal Foods intended to pursue a defamation lawsuit; and (2) Zande provide a “timetable” for settlement proceedings. Instead of contending that Universal Foods was bound by the terms of the August 4th offer, Zande responded with new terms in the August 13th letter, namely: (1) that as part of the settlement agreement, Zande would be prohibited from posting defamatory messages for two years; (2) Universal Foods and Zande would mutually release each other from any claims; and (3) Universal Foods would not release Zande’s identity. Thus, Zande’s letter was a counteroffer superceding the August 4th offer. Universal Foods promptly rejected Zande’s counteroffer in its August 18th letter: “our client is not satisfied with either the proposed affidavit or your client’s suggested settlement terms.... We have therefore been instructed to proceed immediately with an amendment of the complaint in this matter, which we are filing today.”

¶11 Accordingly, Zande did not accept Universal Foods’s August 4th settlement offer even though she began performance. This is analogous to the classic law school hypothetical where a promisor offers to pay a promisee one hundred dollars to climb to the top of a flagpole. In order to accept the offer, the

promissee must perform as requested. There is no acceptance if the promisee climbs halfway up the flagpole and shouts down “I will climb to the top if you give me one hundred dollars and a new car.” The promisee has altered the terms of the contract by asking for a new car in addition to the promised one hundred dollars. See *id.*, 107 Wis. 2d at 517 n.6, 319 N.W.2d at 858 n.6 (a unilateral contract arises when, and if, the promisee performs the act). This is similar to what Zande did here when she proposed three new terms in the August 13th letter.

¶12 Accordingly, the trial court erred in granting summary judgment to Zande and dismissing Universal Foods’s defamation suit. We reverse.

By the Court.—Judgment reversed and cause remanded.

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

