

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 19, 1996

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.

NOTICE

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

No. 96-1134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

Michael A. Stauffacher,

Plaintiff-Respondent,

v.

Douglas E. Stoneman,

Defendant-Appellant,

Derek W. Borckmann,

Defendant.

APPEAL from an order of the circuit court for Milwaukee County:
FRANK T. CRIVELLO, Judge. *Affirmed in part; reversed in part and cause remanded.*

SCHUDSON, J.¹ Douglas E. Stoneman appeals from the trial court order entering judgment against him for \$5,828.35, following a bench trial in a small claims action.

On October 9, 1992, Stoneman and Derek W. Borckmann entered into a Confidential Settlement Agreement with Michael A. Stauffacher in which Stoneman and Borckmann each agreed to pay Stauffacher ten percent of their 1992, 1993, and 1994 adjusted gross income up to a maximum of \$2,000. With respect to Stoneman, the agreement provided, in part:

For consideration received, I, Douglas A. Stoneman ... agree to pay Michael A. Stauffacher ... ten percent of my annual adjusted gross income for 3 years (1992-1994), up to a maximum of \$2,000 total. Payments will be calculated and made annually on April 15th based upon Actual Federal Income Tax Return Adjusted Gross Income.

(Underlining in original.)

Neither Stoneman nor Borckmann made any payments to Stauffacher. As a result, on January 12, 1995, Stauffacher filed a small claims action alleging that Stoneman and Borckman "have acted and continue to act in bad faith with respect to the terms of the agreement and have failed to comply with the terms and intent of the agreement and that Defendants are therefore in breach of the agreement." Borckman stipulated to the entry of judgment against him; Stoneman proceeded to trial.

Stoneman, called adversely by Stauffacher, was the only witness who testified at the trial. Following his testimony, Stauffacher's counsel moved for judgment as a matter of law. The trial court, granting the motion, concluded in part:

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

[Y]our activities since signing this [settlement agreement] give a whole new and broader definition to the term bad faith. I am unable to find any good faith on your part in living up to this agreement, and to rule in your favor in this case would be to assist you in perpetrating a fraud upon [Stauffacher].

Stoneman argues that the trial court erred in granting judgment to Stauffacher because no evidence at trial contradicted his tax returns showing that he suffered losses in 1992, 1993, and 1994. Stoneman contended that he had no adjusted gross income and, consequently, no obligation to pay Stauffacher anything under the settlement agreement.

Although Stoneman's tax returns reflect losses and no adjusted gross income for the years in question, the trial exposed that there was more to the story. Stoneman conceded that in 1995 he amended his 1992 return which originally showed a negative adjusted gross income of \$308.55 to show an even greater loss in the amount of \$3,619.89. Stoneman, apparently without embarrassment, told the trial court:

[I]t is my right under Federal law to make any adjustments on my tax return that I so deem necessary for whatever reasons as long as it's of legal necessity or a legal objective or a legal adjustment. I then did so to avoid within the terms of the confidential settlement agreement that I signed. And on that basis my adjusted gross income is just that, my Federal adjusted gross income on Form 1040.

Further, despite advising the trial court in his opening statement that he would "show evidence that my actual adjusted gross income on Form 1040 has been negative or zero," Stoneman offered nothing other than the tax returns themselves.²

² Stoneman also complains that he was not required to show anything other than the tax returns

A trial court's findings of fact will be sustained unless they are clearly erroneous. See § 805.17(2), STATS. It is for the trial court to evaluate the credibility of witnesses and to weigh the evidence. *Estate of Wolff v. Town Bd. of Weston*, 156 Wis.2d 588, 597, 457 N.W.2d 510, 513-514 (Ct. App. 1990). Moreover, every agreement implicitly includes a requirement of good-faith compliance. See *In re Chayka's Estate*, 47 Wis.2d 102, 107, 176 N.W.2d 561, 564 (1970). Here, Stoneman's concessions provided ample basis for the trial court's conclusion that he had failed to act in good faith and comply with the agreement.

Stoneman next argues that the trial court “denied [him] a hearing by refusing to allow him to present evidence, call witnesses, and advance his case.” He points to his reply when, at the conclusion of his adverse testimony, the trial court asked, “Anything else you want to say?” Stoneman answered, “No, not until I get back to my case.” Immediately thereafter, the trial court heard and granted opposing counsel's argument for judgment.

Stoneman ignores two additional parts of the record. First, at the conclusion of his testimony, the trial court asked Stoneman, “Do you wish to make any statements in clarification of your adverse testimony?” Stoneman then offered further testimony. Second, following Stauffacher's counsel's argument on his motion for judgment, the trial court asked, “Want to be heard on that issue, Mr. Stoneman?” Stoneman again responded at length. At no point before the trial court did Stoneman seek to offer further testimony, call witnesses, introduce evidence, or object to the trial court rendering its decision on Stauffacher's motion for judgment. Thus, this court rejects Stoneman's argument that the trial court denied him a hearing.

(.continued)

because “it was not for the plaintiff, or even for the Trial Court, to determine whether the tax forms have been properly prepared, and to, in effect, perform an ‘audit’ of the Returns.” In an earlier proceeding before a different small claims judge, however, Stoneman's motion for a protective order to prevent discovery of the records on which his returns were based was denied. Before that trial court, Stoneman agreed to produce the records and, in his reply brief to this court, he claims that he produced them. Stauffacher maintains that Stoneman “has neither complied with discovery requests nor produced the records for trial.”

This court need not resolve this dispute. At the very least, the record confirms that Stoneman agreed to provide the records; that he did not appeal the trial court order denying his motion for a protective order; and that he produced no such records at the trial.

Finally, Stoneman argues that the trial court erred in awarding \$3,828.35 in costs and fees because the trial court “did not make a finding of frivolousness” under § 814.025, STATS. This court agrees.

The trial court did not even mention § 814.025, STATS. Additionally, Stauffacher's attorney did not argue the issue, instead asking only for “\$2,000 plus costs.” See *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis.2d 138, 147, 549 N.W.2d 714, 717 (1996) (“costs” means taxable or allowable costs; “The right to recover costs is not synonymous with the right to recover the expense of litigation.”).

Although the trial court addressed Stoneman's failure to comply with the covenant of good faith inherent in the settlement agreement, the trial court also specifically stated, “I agree with Mr. Stoneman's interpretation of the contract here, actual Federal income tax return adjusted gross income.” The trial court's conclusion that Stoneman's literal *compliance* with the settlement agreement amounted to a lack of good faith or “bad faith” does not *ipso facto* mean that the trial court found that Stoneman's *defense*, based on that compliance, was frivolous. Stoneman was entitled to present and defend his interpretation of the settlement agreement and that right does not amount to “bad faith” under § 814.025, STATS.

Therefore, this court affirms the trial court's award of \$2,000 against Stoneman, but reverses and remands for the order to be amended to include only *taxable* costs.

By the Court. – Order affirmed in part; reversed in part and cause remanded.

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