COURT OF APPEALS DECISION
DATED AND RELEASED

June 26, 1997

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

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No. 96-3619

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

WILLIAM F. KELSEY,

PLAINTIFF-RESPONDENT,

V.

JENS OTTO LUEBOW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ROBERT DECHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. Jens Luebow appeals from an order approving a written settlement stipulation and denying his motion for relief from its terms. On appeal, Luebow argues that: (1) the trial court should not have approved the written stipulation because (a) it was preceded by—and varied from—an earlier oral in-court stipulation, and (b) he “withdrew” from the written stipulation before the

court approved it; and (2) the trial court should have granted him relief from the stipulation on grounds of mistake and/or excusable neglect.

We conclude that the parties' written stipulation is binding and that the trial court properly exercised its discretion in denying Luebow's request for relief. We therefore affirm the order.

William Kelsey, the owner of a veterinary clinic, sold his practice to Luebow in 1992. Two years later, Kelsey brought this action, alleging that Luebow defaulted on a promissory note given in connection with Luebow's purchase of the practice. He sought, among other things, recovery of the entire balance due on the promissory note. Luebow responded by raising various affirmative defenses and counterclaims.

The parties settled the case on the first day of trial and Kelsey's attorney summarized their agreement on the record:

> [T]he defendant [Luebow] agrees to pay to the plaintiff on or before December 1, 1996, the sum of $8,000 cash … and we will file a written stipulation with the court setting that forth. We would request the court adjourn this matter with the further agreement that, in the event the money is paid on or before December 1, 1996, a stipulation and order for dismissal on the merits without costs and with prejudice would be entered forthwith.

Both Luebow and Kelsey and their attorneys stated their agreement to the stipulation and the trial court "accept[ed]" it. The court then asked what would occur if the amount was not paid, and Kelsey's attorney replied: "We would simply apply for a trial date and go forward."

Nearly two months later, in March 1996, Luebow, Kelsey and their attorneys signed a written stipulation embodying the terms stated in court and

additional language as well. Kelsey's attorney prepared the initial draft of the document, and both attorneys contributed to the final draft. In addition to setting forth the $8000 payment referred to in the earlier in-court summary of the stipulation, the final draft provided that, upon Luebow's timely payment of the $8000, Kelsey would execute a mortgage satisfaction and drop the lawsuit; if the money was not paid on the December 1st due date, Kelsey could, on ten days' notice, obtain a default judgment against Luebow in the sum of $28,000, less any amount previously paid, plus statutory costs. The signed stipulation was filed with the trial court.

Five months later, in August 1996, Luebow filed a document with the court purporting to "withdraw" his assent to the written stipulation. Alternatively, he moved for "relief from the … stipulation," claiming that it contained terms in addition to those stated in court at the earlier hearing and that, when he signed the brief document,[1] he "mistakenly assumed" that it contained

[1] The document runs slightly more than one double-spaced page. It provides, in full, as follows:

> The above-entitled matter having come on for hearing this 16th day of January, 1996; plaintiff appearing in person and by his attorneys …; the defendant appearing in person and by his attorneys ...; and the parties having reached an agreement as a full and final compromise of all claims:
>
> NOW, THEREFORE, IT IS STIPULATED by and between the parties that the above-entitled matter shall be settled for the sum of Eight Thousand and no/100 ($8,000.00) Dollars payable by the defendant Jens Luebow to the plaintiff William Kelsey on or before December 1, 1996.
>
> IT IS FURTHER STIPULATED that the instant case shall be adjourned until the settlement monies are paid in full pursuant to this Stipulation or the date of December 1, 1996 arrives, whichever occurs first.
>
> IT IS FURTHER STIPULATED that in the event defendant defaults on said settlement payment of $8,000.00 and does not pay the same on or before December 1, 1996, the plaintiff shall,

only the orally stated terms. He claimed that, as a result, he was entitled to relief on grounds of "mistake, inadvertence, surprise and/or excusable neglect."

The trial court denied Luebow's motion and he appeals, arguing that the trial court should not have approved the written stipulation because it "was preceded and precluded by a completely proper, valid, and binding prior stipulation of the parties." He points to § 807.05, STATS., which provides that a stipulation is binding if it is "made in court ... and entered in the minutes or recorded by the reporter."[2]

We have no doubt that the oral stipulation, which was summarized and agreed to on the record by the parties and their counsel, comports with the

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> upon ten (10) days notice to the defendant, be entitled upon proof of service of the notice of default to have the court enter judgment for the sum of Twenty-eight Thousand and no/100 ($28,000.00) Dollars, less any amounts previously paid under this stipulation, together with interest, costs and statutory attorneys' fees.
>
> IT IS FURTHER STIPULATED that upon receipt of Eight Thousand and no/100 Dollars ($8,000.00), plaintiff shall forthwith execute a satisfaction of mortgage in recordable form satisfying the mortgage previously recorded on the real estate located at 2125 North Stoughton Road, Madison, Wisconsin and shall provide that satisfaction of mortgage to defendant.
>
> IT IS FURTHER STIPULATED that at the time the above described settlement is paid, the parties shall execute a final stipulation and the Court will enter an Order dismissing the instant case, on the merits, with prejudice, and without the award of costs to either party.

[2] Section 807.05, STATS., 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 ... 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.

statute and was binding on the parties. *See* ***Schmidt v. Schmidt***, 40 Wis.2d 649, 653-54, 162 N.W.2d 618, 621 (1968). Whether it precludes the court from approving a subsequent written stipulation adding two "new" terms is another matter.

Luebow begins by referring us to ***Steven G. v. Herget***, 178 Wis.2d 674, 681-84, 505 N.W.2d 422, 424-26 (Ct. App. 1993), as support for his broadly stated proposition that "[t]he parties should continue to be held to th[e] oral stipulation." The case offers little support for Luebow's position, however, for it says only that in-court stipulations complying with § 807.05, STATS., are enforceable. It says nothing about subsequent modifying agreements.

Luebow next argues that the trial court should have honored his "withdrawal" from the written stipulation, citing cases—notably ***Bliwas v. Bliwas***, 47 Wis.2d 635, 638, 178 N.W.2d 35, 37 (1970), and ***Phone Partners Ltd. v. C.F. Communications Corp.***, 196 Wis.2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995)—for the proposition that, until approved by the court, a stipulation is recommendatory only. Again, all ***Bliwas*** and ***Phone Partners*** say is that the trial court has discretion whether to accept or reject a stipulation presented to it by the parties, just as the court has discretion under § 806.07, STATS., to grant relief from a stipulation.[3] A stipulation of settlement, such as the one at issue here, has been said to have all the "essentials" of a contract. ***Illinois Steel Co. v. Warras***, 141 Wis. 119, 124-25, 123 N.W. 656, 658 (1909). While they are not contracts in the truest sense because their enforcement and revocation are dependent upon court

[3] In ***Phone Partners Ltd. v. C.F. Communications Corp.***,196 Wis.2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995), we said that approval of a stipulation is discretionary with the trial court because, "once approved, it becomes the court's judgment." We also said that such discretion is to be exercised in accordance with the general equitable standards set forth in § 806.07, STATS. ***Id***.

approval, contract law applies to—and can be dispositive of—stipulations of settlement reached under § 807.05, STATS. ***Kocinski v. Home Ins. Co.***, 154 Wis.2d 56, 67, 452 N.W.2d 360, 365 (1990).

Luebow's argument is that his representation that he wished to withdraw his signed assent to the written stipulation is enough, in and of itself, to require the court to void the document. He offers no authority for such a proposition, however. Indeed, the argument appears to fly in the face of well-established rules of contract law, such as the supreme court's recognition in ***Lakeshore Commercial Finance Corp. v. Drobac***, 107 Wis.2d 445, 458, 319 N.W.2d 839, 845 (1982), of the basic proposition that "any contract can be discharged or modified by the subsequent agreement of the parties." And we agree with Kelsey that by agreeing to the terms of the written stipulation the parties modified their earlier agreement—the oral stipulation—by "adding terms which would protect both parties"—the mortgage satisfaction to Luebow upon payment of the $8000 and Kelsey's right to take default judgment for the unsatisfied amount of the obligation should Luebow not make the payment.

Luebow next argues—again without citation to any supporting legal authority—that because there were "material variances" between the oral and written stipulations, the court "should not have approved" the latter agreement because it "was aware that no consideration was given between the parties for the … modification[s]." The law is, however, that even material alterations to an

existing contract are binding on assenting parties. ***Id***. at 458, 319 N.W.2d at 845-46.[4]

Finally, Luebow argues that the trial court erred in not relieving him from the terms of the written stipulation under § 806.07, STATS., on grounds of mistake and/or excusable neglect. His argument focuses on what he briefly described in an affidavit submitted to the trial court as his "mistake" in assuming that, because the introductory language of the written stipulation referred to the earlier court hearing, *see supra* note 1, "it incorporated what had been agreed to in court"—and no more. He states that, sometime later, he ascertained that the

[4] In addition to failing to cite legal authority for the underlying proposition, Luebow did not provide any citations to the record for his factual assertions concerning the lack of consideration and the matters asserted to be within the trial court's knowledge. We have often stated that we do not consider arguments unsupported by citations to legal authority, ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980), or by references to the record, ***Keplin v. Hardware Mut. Casualty Co***., 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964); ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988).

After Kelsey pointed out that Luebow offered no legal authority for the propositions he advanced—notably his brief reference to lack of consideration—Luebow attempted to rectify the omission in his reply brief by expanding a one-paragraph, unsupported assertion from his brief-in-chief into a multi-page argument, citing several cases for the proposition that satisfaction of a mortgage does not constitute new consideration.

We have often held that because raising arguments for the first time in a reply brief violates the Rules of Appellate Procedure, we will not consider them. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508-09 (Ct. App. 1995). Doing so, we have said, would "thwart[] the purpose of a brief-in-chief, which is to raise the issues on appeal, and the purpose of a reply brief, which is to reply to arguments made in a respondent's brief." ***Verex Assurance, Inc. v. AABREC, Inc.***, 148 Wis.2d 730, 734 n.1, 436 N.W.2d 876, 878 (Ct. App. 1989).

We see no reason to depart from that long-held rule in this case. We note only that: (1) we and the supreme court have held that no new consideration is required to support modification of a contract that is executory in nature—one which, as the stipulation does in this case, contemplates future activity that is not yet completed, *see*, *e.g.*, ***Smith v. Osborn***, 66 Wis.2d 264, 279, 223 N.W.2d 913, 921 (1974); ***State v. Paske***, 121 Wis.2d 471, 475, 360 N.W.2d 695, 697 (Ct. App. 1984); and (2) consent to dismissal of a *bona fide* cause of action has been held to constitute ample consideration to support a promise—in this case Luebow's promise to pay a settlement. ***Logemann v. Logemann***, 245 Wis. 515, 518, 15 N.W.2d 800, 801 (1944).

written stipulation "d[id] not encompass the terms … he had agreed to in open court," and he sought relief from the stipulation on that basis.

"Excusable neglect," as that term is used in § 806.07, STATS., is "that neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness." ***Price v. Hart***, 166 Wis.2d 182, 194-95, 480 N.W.2d 249, 254 (Ct. App. 1991). Relief will not be granted because in hindsight a party believes the agreement to have been a bad bargain. *See* ***Spankowski v. Spankowski***, 172 Wis.2d 285, 292, 493 N.W.2d 737, 741 (Ct. App. 1992). And while we have not been pointed to, nor have we found, any cases specifically addressing or defining the word "mistake" as it appears in § 806.07, we think the issue is better informed by cases, such as ***Price***, interpreting related provisions of the statute than by the two off-the-point nineteenth-century cases Luebow cites.[5]

As we noted above, the trial court has "wide discretion" in deciding whether to grant relief under § 806.07, STATS. ***Price***, 166 Wis.2d at 195, 480 N.W.2d at 254; *see* ***Phone Partners***, 196 Wis.2d at 709-10, 542 N.W.2d at 161. We will not reverse a discretionary determination if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl***

[5] Luebow points us to two cases purporting to define the word "mistake": ***Webber v. Quaw***, 46 Wis. 118, 49 N.W. 830 (1879), and ***Kowalke v. Milwaukee Electric Railway & Light Co.***, 103 Wis. 472, 79 N.W. 762 (1899). In ***Webber***, the court considered an 1873 statute fixing damages in actions brought to recover the value of logs wrongfully cut from the plaintiffs' lands at their highest market value, but providing also that the defendant "may relieve himself from the application of this rule … by serving upon the plaintiffs an affidavit, stating that such cutting was done *by mistake*." ***Webber***, 46 Wis. at 120, 49 N.W. at 831. In ***Kowalke***, which was contract-related and involved the formulation of a description of the type of mistake of fact warranting rescission of a contract, the court said that the most "philosophical definition" it could find was one stating a mistake to be "[a]n unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract." But we think § 806.07, STATS., and the cases decided thereunder mark a better starting point for a discussion of the type of mistake warranting relief from a judicial act—here, a stipulated judgment—under the statute.

v. Brosamle, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). And when we consider the court's decision to deny relief under § 806.07, "[w]e may sustain [that] decision … even though the … court's reasoning may have been erroneous or inadequately expressed. 'Whether the ground assigned by the trial judge is correct is immaterial if, in fact, the ruling is correct and the record reveals a factual underpinning that would support the proper findings.'" ***Schauer v. DeNeveu Homeowner's Ass'n***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995) (citation and quoted source omitted).

The written stipulation is brief and to the point. It contains only a few plainly worded provisions: (1) the trial is to be adjourned pending Luebow's payment of $8000; (2) if that payment is not made by December 1, 1996, Kelsey may take a default judgment, on ten days' notice to Luebow, for $28,000, less any amount previously paid; and (3) if Luebow makes the payment, Kelsey will provide a mortgage satisfaction and the case will be dismissed. As we also indicated, the parties' attorneys negotiated the final terms of the stipulation, and both Luebow and Kelsey attested to their agreement to those terms by signing the document.

In denying Luebow's motion for relief from the stipulation, the trial court made the following points:

> (1) the parties made the oral stipulation while "under the gun" on the morning of trial and the settlement was an effort to "avoid that for all parties";
>
> (2) several weeks later, the parties' attorneys negotiated the written form of the settlement, including the $8000 terms specified in court and, in an attempt to "finish this thing forever" and to avoid further

trial-related expenses on both sides, agreeing that if the money was not paid, a default judgment could be entered;

(3) if Luebow, after discussing this with his attorney, still did not understand it, "he should have been asking his attorney about it" rather than signing it;

(4) if, after all that, Luebow—or any party to an action—could repudiate a written settlement by stating simply that he—or she—did not understand it, "[t]here would never be any disposition of anything if someone could come into court and violate the spirit of an agreement … for whatever whim alleging that they don't understand."

We are satisfied that the trial court's decision was a proper exercise of discretion under the rules discussed above. The court considered the facts of the case and reached a decision that is both reasonable and legally sound. In large part, Luebow's case amounts to an assertion that he should somehow be excused from reading this short and plainly worded stipulation because, after seeing that its opening lines referred to the earlier court hearing, he assumed he need read no further, and he apparently signed the document on that basis. The law is, however, that "a contracting party, not otherwise disabled, is bound by the law to know and understand the terms of the document he or she signs." ***Kellar v. Lloyd***, 180 Wis.2d 162, 174, 509 N.W.2d 87, 91 (Ct. App. 1993) (quotations and quoted

source omitted).[6] Luebow has not persuaded us that the trial court erred in approving the written stipulation.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] Even where it is claimed—and Luebow makes no such claim in this case—that fraud induced a party to sign a contract, no such claim will lie if he or she failed to read the document before signing it. *See* ***Caulfield v. Caulfield***, 183 Wis.2d 83, 93, 515 N.W.2d 278, 283 (Ct. App. 1994) ("[B]y failing to read the contract before signing it, [plaintiff] was negligent as a matter of law and barred from proceeding on her claim that the [defendant] fraudulently induced her to sign the note.").