COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2503 **Cir. Ct. No. 2002CV5434**

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

FRANK P. HOLZBERGER,

PLAINTIFF-APPELLANT,

V.

EVELYN C. HOLZBERGER, GARRET C. LANDAHL, GREGORY W. LANDAHL, LANDAHL FAMILY LLC AND LANDAHL INVESTMENT LIMITED PARTNERSHIP AND LANDAHL MANAGEMENT LIMITED PARTNERSHIP,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

¶1 KESSLER, J. Frank P. Holzberger appeals from an order granting Evelyn C. Holzberger's motion to enforce a settlement agreement related to a lawsuit Frank filed against Evelyn and others. He argues that no settlement agreement was ever created because: (1) not all parties to the litigation signed the Memorandum of Understanding prior to June 15, 2004; and (2) on June 15, 2004, Frank validly revoked his signature to the Memorandum of Understanding. Frank also argues that even if there were sufficient signatures to the Memorandum of Understanding, it is simply an "agreement to agree," which is not enforceable in Wisconsin. We conclude that the Memorandum of Understanding is a settlement agreement that is binding on those parties who executed it on June 14, 2004. Therefore, we affirm the order.

BACKGROUND

¶2 The background facts are undisputed. Frank and Evelyn, who are both in their eighties, have been married since 1973. Both have children from previous marriages to other people. A dispute arose over the significant assets accumulated by Frank and Evelyn. Frank filed this suit against Evelyn, her two adult sons from a previous marriage (Gregory and Garret Landahl), and three Landahl family business entities. The complaint sought declaratory judgment concerning the validity of documents Evelyn signed in the past (*e.g.*, her Will); it asserted that monetary transfers Evelyn made are invalid; and it alleged that Garret, Gregory and Evelyn "illegally conspired to surreptitiously remove assets" from Frank and Evelyn's Trust.

¶3 Evelyn has suffered from Alzheimer's disease for some time. During this litigation, she suffered a stroke that left her incapacitated. Thus, her financial affairs are now, and have been, managed by Gregory, who is Evelyn's

power of attorney for financial affairs. At the request of both parties, the trial court also appointed a guardian ad litem for Evelyn.[1]

¶4 During the pendency of this action, the parties engaged in mediation on three occasions. Their third attempt occurred on June 14, 2004. On that day, Frank, his two daughters from a previous marriage, his son-in-law, and two attorneys were present at the mediation on Frank's behalf. Gregory, Garret and an attorney representing them and the Landahl businesses also attended the mediation, as did an attorney representing Evelyn. The guardian ad litem and Evelyn were not present.

¶5 The parties met in various combinations with the mediator from approximately 8:30 a.m. to 6:30 p.m. During the course of the mediation, a Memorandum of Understanding was drafted. This document included the following preamble: "The parties, Plaintiff Frank Holzberger, Defendant Evelyn Holzberger, Defendant Gregory Landahl, Defendant Garret Landahl, Defendants Landahl Family LLC and related entities, hereby agree as follows…." Eleven paragraphs and signature lines for Frank, Evelyn (by Gregory, her power of attorney), Gregory and Garret followed.

¶6 Counsel for Frank provided handwritten changes to the draft Memorandum of Understanding, including changes to the preamble and to several

[1] Although the order appointing the guardian ad litem in this civil lawsuit does not define the guardian ad litem's specific role in this litigation, the trial court discussed this, at the hearing on the motion to enforce the settlement agreement. The trial court stated: [I]n my view his role was that of advisor to the court.… [H]e does not speak for her. He does not sign for her. His role is that of advisor to the court and what's in the best interests of Evelyn Holzberger." Frank does not specifically challenge these findings on appeal, although he argues that the guardian ad litem was required to sign the settlement on Evelyn's behalf. In the absence of argument and evidence that these findings are clearly erroneous, we will not disturb them.

paragraphs. Those handwritten comments also suggested adding signature lines for the three Landahl business entities and the guardian ad litem.

¶7 The second draft of the Memorandum of Understanding included the following preamble: "The parties, Plaintiff Frank Holzberger, Defendant Evelyn Holzberger, Defendant Gregory Landahl, Defendant Garret Landahl, Defendants Landahl Family LLC, Landahl Investment Limited Partnership, and Landahl Management Limited Partnership, hereby agree as follows…." There were seven signature lines: one each for Frank, Evelyn, Gregory, Landahl Family LLC, Landahl Management Limited Partnership, Landahl Investment Limited Partnership and the guardian ad litem. There was no signature line for Garret in this draft.

¶8 Frank executed the Memorandum of Understanding at the conclusion of the mediation on June 14. Gregory signed the document as well, in his individual capacity and on behalf of Evelyn and the three Landahl businesses. Garret never signed the document; indeed, there was no signature line for him.

¶9 The next morning, Frank instructed his attorney to revoke Frank's agreement to the Memorandum of Understanding. Counsel did so at 1 p.m. on June 15 by faxing a statement to that effect to opposing counsel. The next day, June 16, the guardian ad litem executed the Memorandum of Understanding.[2]

[2] At the motion hearing and in an affidavit provided to the trial court, the guardian ad litem explained that he was out of town on June 14 and orally approved the Memorandum of Understanding the morning of June 15 after talking with Evelyn's attorney. However, he did not have an opportunity to sign the original document until June 16.

¶10 Because Frank indicated he did not intend to be bound by the Memorandum of Understanding, Evelyn, by her counsel, filed a motion to enforce it. After considering the parties' briefs and hearing oral argument, the trial court granted the motion, and dismissed all claims and counterclaims between the settling parties.[3] This appeal followed.

DISCUSSION

¶11 At issue is whether the Memorandum of Understanding is enforceable as a settlement agreement. Frank argues that no settlement agreement was ever created because: (1) not all parties to the litigation signed the Memorandum of Understanding prior to June 15, 2004; and (2) on June 15, 2004, Frank validly revoked his signature to the Memorandum of Understanding. It is important to note at the outset that Frank did not argue, either at the trial court or on appeal, that he should be relieved from the effect of the judgment pursuant to WIS. STAT. § 806.07 (2003-04).[4] Thus, we must determine whether the settlement agreement was validly entered into, which is a question of law we review *de novo*. *See* ***Cavanaugh v. Andrade***, 191 Wis. 2d 244, 264, 528 N.W.2d 492 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis. 2d 290, 550 N.W.2d 103 (1996). To the

[3] Frank's claims against Garret, and Garret's defenses to Frank's claims, remain viable. They have not been discussed and are not the subject of this appeal. In addition, although Garret has not filed any counterclaims against Frank, theoretically he is not barred from bringing such claims (subject to applicable statutes of limitation and other limitations).

[4] Counsel for Frank acknowledged during oral argument that the basis of his appeal is Frank's assertion that, as a matter of law, no settlement agreement was ever created. Counsel explained that although the trial court considered some of the factors that are relevant in deciding a WIS. STAT. § 806.07 motion, no such motion was ever filed.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

extent we must consider any contested facts, we accept the facts found by the trial court unless they are clearly erroneous. *See* ***Walser Leasing, Inc. v. Simonson***, 120 Wis. 2d 458, 461, 355 N.W.2d 545 (Ct. App. 1984).

¶12 Frank also argues that even if there were sufficient signatures to the Memorandum of Understanding, it is simply an "agreement to agree," which is not enforceable in Wisconsin. We reject this argument without further discussion because it was not raised before the trial court. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (issues raised for the first time on appeal are generally not considered).[5]

I. Validity of the Memorandum of Understanding

¶13 Settlement agreements arising out of mediation, such as the Memorandum of Understanding at issue here, are enforceable pursuant to WIS. STAT. § 807.05 if they are "made in writing and subscribed by the party to be bound thereby or the party's attorney."[6] ***Id.*** Although there has been some

[5] Frank raised this issue in his opening brief. In response, Evelyn argued that this argument was waived. Evelyn noted that after the trial court granted her motion, Frank raised the "agreement to agree" argument in a motion for reconsideration. However, that motion was not considered by the trial court because the parties subsequently agreed that the trial court should not hear argument or rule on that motion. In his reply brief and during oral argument, Frank offered no reason why we should consider an argument that was not considered by the trial court. Accordingly, we decline to address it.

[6] WISCONSIN STAT. § 807.05 provides in its entirety:

> **Stipulations.** 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 s. 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.

dispute over whether contract principles apply to the interpretation of a stipulation, principles of contract law can clearly "'illumine our inquiry.'" *See* ***Kocinski v. Home Ins. Co.***, 154 Wis. 2d 56, 67-68, 452 N.W.2d 360 (1990) (citation omitted).

¶14 The rules of contract interpretation provide that the primary goal "is to determine and give effect to the parties' intention at the time the contract was made." ***Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444. "[W]e begin with the language of the contract, and if that is plain, we enforce those terms as written." ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶21, 265 Wis. 2d 703, 666 N.W.2d 38. "It is only when the contract on its face is ambiguous that we may look outside the contract to extrinsic evidence to determine the intent of the parties." ***Id.*** "Whether a contract is ambiguous is a question of law [that] we review de novo." ***Id.***

A. Whether Garret's and the guardian ad litem's signatures are required

¶15 We begin with Frank's argument that there is no valid settlement agreement because Garret and the guardian ad litem did not sign the Memorandum of Understanding prior to Frank's revocation. Frank argues that because the first sentence of the Memorandum of Understanding lists Garret as a party, Garret was intended to be a party to the settlement agreement. In contrast, Evelyn contends that when the initial draft was revised, Garret's signature line was removed because he had indicated he would not sign the Memorandum of Understanding and had left the building. She asserts that "out of pure oversight, Garret's name was left in the preamble." Because we conclude that the document is unambiguous, we need not determine how Garret's signature line came to be

removed from the signature page, and whether Frank knew that Garret would not be signing the Memorandum of Understanding.[7] *See* ***id.***

¶16 Citing ***Consolidated Water Power Co. v. Nash***, 109 Wis. 490, 85 N.W. 485 (1901), Frank contends: "The Wisconsin Supreme Court has held that where a contract, by its terms, intends to bind all of the parties by their signatures, such contract does not become binding upon any party until all have signed, allowing one party to withdraw his signature at any time before all parties have signed." In ***Nash***, the contract at issue "by its very terms, provided that it should not be binding upon either or any of the parties thereto until signed and executed by a list of persons and corporations named." 109 Wis. at 495. Despite its age, we do not doubt the continued validity of the proposition that parties can explicitly provide that an agreement is valid and enforceable against all parties only if all parties execute it.

[7] During oral argument before the trial court, counsel for Frank stated: "I don't even think there is a dispute on the facts. I think it happened the way everybody has sort of said it happened." However, the parties' briefs and their oral arguments before this court cast doubt on whether they agree on the crucial facts of what occurred at the mediation. It is undisputed that Garret left the mediation without signing the document, but whether Frank knew this before signing the document seems to be in dispute. This potential factual dispute is irrelevant, however, if we conclude that the document itself is unambiguous.

Moreover, we conclude that the trial court's finding that Frank was aware that Garret had not signed the Memorandum of Understanding is not clearly erroneous. The trial court stated: "So I think [Frank] had plenty of opportunity to say, ['Y]ou know what, I need to think about this. I need to take it home, think about it for a few days. I need to consider what this means that Garret isn't signing it and how mad does that make me feel.[']" This finding is not clearly erroneous, as it is supported by Frank's counsel's affidavit, which states that Frank's two attorneys were advised by the mediator that he would be "taking Garret into a separate room in an attempt to get his agreement to the memorandum of understanding" and that at the end of the day, there was "some discussion as to what would happen if Garret Landahl would not sign the agreement."

¶17 Nonetheless, ***Nash*** does not advance Frank's case because we conclude that the settlement agreement is unambiguous and, "by its very terms," did not require that all parties listed or provided a signature line would sign the Memorandum of Understanding.[8] "In situations where fewer than all the proposed parties execute the document we look to the intent of the parties as determined by the language of the contract to determine who may be liable under the agreement." ***International Creative Mgmt., Inc. v. D & R Entm't Co.***, 670 N.E.2d 1305, 1310 (Ind. Ct. App. 1996). "It should be assumed that all the parties who sign the agreement are bound by it unless it affirmatively appears that they did not intend to be bound unless others also signed." ***Id.*** at 1310-11; *see also* 17 C.J.S. *Contracts* § 75 (1999).

¶18 Here, the only evidence contained within the four corners of the Memorandum of Understanding that suggests Garret was intended to be a party to the settlement agreement is the first paragraph, which lists all the parties. Even assuming this suggests that the parties contemplated that Garret may participate in the settlement (an assumption belied by the lack of a signature line for Garret), the Memorandum of Understanding itself did not require that Garret sign before the settlement agreement could be enforced against the signing parties. There is no language substantially equivalent to: "This agreement shall not be binding unless signed by all parties hereto." In the absence of language in the document which "by its very terms, provided that it should not be binding upon either or any of the parties thereto until signed and executed by a list of persons and corporations

[8] It is well established that lack of agreement among all parties to a lawsuit does not prevent the settlement of claims among some of the parties. *See, e.g.*, ***Pierringer v. Hoger***, 21 Wis. 2d 182, 191-92, 124 N.W.2d 106 (1963).

named," *see* ***Nash***, 109 Wis. at 495; *see also* ***D& R Entertainment***, 670 N.E.2d at 1310, the settlement agreement binds only those parties who elected to participate in the settlement agreement, *i.e.*, Frank, Evelyn (acting through Gregory), Gregory and the Landahl businesses.

¶19 Likewise, although there is a signature line for the non-party guardian ad litem, there is no indication in the Memorandum of Understanding that it would be enforceable only if the non-party guardian ad litem signed it. Therefore, we affirm the trial court's order that the Memorandum of Understanding is enforceable as a settlement agreement against the signing parties.

B. Effect of Frank's revocation

¶20 Frank relies on ***Kocinski***, 154 Wis. 2d at 71, to support his argument that the settlement agreement is invalid because he revoked his acceptance of the Memorandum of Understanding before the guardian ad litem signed it. Assuming Frank's revocation was valid (an issue we need not decide), the result in this case is the same: the Memorandum of Understanding is enforceable against the parties who signed it prior to Frank's revocation. It is not binding (nor was it arguably intended to be) on the non-party guardian ad litem whose assigned role was to advise the trial court about Evelyn's best interests. It is also not binding with respect to Garret, who has never signed the Memorandum of Understanding.[9]

By the Court.—Order affirmed.

[9] Thus, Frank is free to continue to pursue his conspiracy claim against Garret, the sole basis for Garret's involvement in this case. The trial court has acknowledged this and has provided a procedure for Frank to continue his case against Garret if he so chooses.

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