COURT OF APPEALS DECISION DATED AND RELEASED

JULY 2, 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(1), 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. 95-3186

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

GARY K. AUGUSTINE and SANDRA J. AUGUSTINE,

Plaintiffs-Respondents,

v.

DOUGLAS MAKOS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Oconto County: LARRY JESKE, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Douglas Makos appeals an order that enforced a stipulation settling a boundary line dispute between Makos and Gary and Sandra Augustine. Because we conclude the stipulation is unenforceable, we reverse the order and remand for further proceedings.

The facts are undisputed. Makos and the Augustines were involved in a declaratory action to determine boundary lines and ownership of

small parcels of property claimed by both parties. The matter was set for trial on March 14, 1995, and, in preparation for trial, attorneys for both parties attempted to settle the dispute through extensive negotiations. Finally, on March 10, the parties orally agreed upon a proposed settlement involving the exchange of property and declaration of property lines. The Augustines' attorney then proceeded to prepare the necessary transfer documents and a written stipulation conforming to the oral agreement with the understanding each party would sign the documents the following week. On the same day, both attorneys notified the trial court's judicial assistant that the case had been settled and, therefore, the case was removed from the trial calendar.

The next week, however, Makos changed his mind and told his attorney that he wanted the lawsuit continued. He refused to sign the stipulation and deeds. Meanwhile, the Augustines' attorney mailed a signed stipulation and deeds to Makos' attorney for Makos' signature. On April 10, Makos' attorney returned the documents unsigned to the Augustines' attorney and stated in the transmittal letter: "What once was agreed to and seemed so simple, now has again blown up."

In response, the Augustines moved the trial court for an order enforcing the parties' stipulation. The trial court found that the phrase, "What once was agreed to and seemed so simple, now has again blown up," was a sufficient writing to comply with a writing or memorandum confirming the stipulation under § 807.05, STATS. Makos appeals from that order.

Section 807.05, STATS., provides:

> 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.

The application of a statute to a particular set of facts is a question of law we review do novo. ***Estate of Cavanaugh v. Andrade,*** 191 Wis.2d 244, 251-52, 528 N.W.2d 492, 495 (Ct. App. 1995). Additionally, whether a stipulation was validly entered into is a question of law we review de novo. ***Id.*** at 264, 528 N.W.2d at 499. It is undisputed that the stipulation was not made in court and entered in the minutes or recorded by the reporter. The Augustines contend, however, that the letter from Makos' attorney with the admission suggesting that an agreement had been reached but was no longer agreeable to Makos satisfied the second part of the statute in that it was in writing and subscribed by Makos' attorney. We disagree.

The letter begins by confirming that "my client [Makos] will not agree to any settlement of the matter and wants to go to trial, I am returning to you the previously drafted documents:" The admission by Makos' attorney that "what once was agreed to" is no more than an admission that his client had once orally agreed to the stipulation, but had changed his mind. We reject the Augustines' argument that this reference to a past oral agreement that is no longer agreeable to Makos falls within the enforcement of a written agreement subscribed by the party's attorney.

We can understand the trial court's concern and frustration when it removes a case from its trial calendar believing the case has settled. However, § 807.05, STATS., is specific and provides that the agreement or stipulation shall not be binding unless made in court and entered in the minutes or recorded by the reporter or made in writing and subscribed to by the party to be bound thereby or the party's attorney. The transmittal letter certainly cannot be construed as a writing by Makos' attorney agreeing or subscribing to the stipulation. At most, we have an attorney's reference to an oral agreement that is unenforceable under the language of § 807.05.

Therefore, we reverse the trial court's order enforcing the agreement under the terms of § 807.05, STATS., and remand the matter for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.