

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 110071-U

Filed 9/6/11

NO. 4-11-0071

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARTY WATROUS, DONNETE WATROUS,)	Appeal from
GARY MAHAFFEY, CAROLYN MAHAFFEY,)	Circuit Court of
RANDY WADDELL, MARY JEAN WADDELL,)	Piatt County
KEVIN PHIPPS, DEBRA PHIPPS, LARRY KLEM,)	No. 07CH53
and MARILYN KLEM,)	
Plaintiffs,)	
v.)	
DARLA COULTER,)	
Defendant,)	
and)	
DARLA COULTER,)	
Third-Party Plaintiff-Appellee,)	
v.)	Honorable
RICKY G. BENTLEY,)	John P. Shonkwiler,
Third-Party Defendant-Appellant.)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Statements made by a nonparty witness while testifying are not judicial admissions, even where the nonparty witness is later joined as a third-party defendant.

¶ 2 Third-party defendant, Ricky G. Bentley (Bentley), appeals from an order of the circuit court of Piatt County finding statements Bentley made as a nonparty witness while testifying at a preliminary injunction hearing were judicial admissions. Plaintiffs, Marty Watrous, Donnete Watrous, Gary Mahaffey, Carolyn Mahaffey, Randy Waddell, Mary Jean Waddell, Kevin Phipps, Debra Phipps, Larry Klem, and Marilyn Klem, sought injunctive relief against defendant, Darla Coulter (Coulter). Following the preliminary injunction hearing,

Coulter filed a third-party action against Bentley. This court allowed this appeal pursuant to Supreme Court Rule 308 (eff. Feb. 26, 2010) to address the following questions certified by the trial court:

I. Can sworn testimony by a material witness in open court, who is later joined as a party to the *same* case, be held as a judicial admission against that party in the *same* proceeding case (when it involves a different claim arising out of the *same* underlying facts), if the testimony otherwise qualifies as a judicial admission?

II. Did the Trial Court correctly grant Coulter the judicial admissions delineated in the Trial Court Opinion and Memorandum Order, as judicial admissions, rather than evidentiary admissions?

III. Did the Trial Court err, after the Trial Court granted Coulter the aforementioned judicial admissions in not granting Coulter Summary Judgment as to liability, for Count (1) negligent misrepresentation?" (Emphasis in original.)

¶ 3 Plaintiffs are homeowners in a subdivision developed by Bentley. Coulter purchased a lot in the subdivision and began construction of a residence. On November 9, 2007, plaintiffs sought injunctive relief against Coulter alleging the residence violated subdivision covenants. At a preliminary injunction hearing on May 14, 2008, Coulter called Bentley to testify as a nonparty witness. Following the hearing, the trial court granted plaintiffs a preliminary injunction and set a "final hearing" for August 12, 2008.

¶ 4 Coulter secured leave to file a third-party complaint and on September 12, 2008,

filed a complaint against Bentley, alleging (1) negligent misrepresentation, (2) a violation of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 through 12 (West 2006)), and (3) common-law fraud. On March 29, 2010, Coulter moved for partial summary judgment on count I, the negligent misrepresentation count, alleging among other things that statements Bentley made as a nonparty witness while testifying at the preliminary injunction hearing were judicial admissions. In a memorandum order filed July 7, 2010, the trial court found Bentley's statements were judicial admissions but denied the motion for summary judgment finding issues of material fact remained. On January 7, 2011, the trial court certified three questions for interlocutory appeal, pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). We agreed to answer the three questions. After closer examination, we have decided to answer only one of them, the question that asks whether statements Bentley made as a nonparty witness while testifying at the preliminary injunction hearing were judicial admissions because Coulter later filed a third-party complaint against Bentley. We hold they were not.

¶ 5 Coulter called Bentley to testify as a nonparty witness at the preliminary injunction hearing on May 14, 2008. Following the preliminary injunction hearing, Coulter filed a third-party action against Bentley. Section 2-406(b) of the Code of Civil Procedure provides that "[w]ithin the time for filing his or her answer or thereafter by leave of court, a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406 (West 2008).

¶ 6 "Judicial admissions are defined as deliberate, clear, unequivocal statements *by a party* about a concrete fact within that party's knowledge." (Emphasis added.) *In re Estate of*

Rennick, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998). A judicial admission binds the party who made the admission. If the admission is merely an evidentiary admission (instead of a judicial admission), the party may contradict or explain it. *Williams Nationalist, Ltd. v. Matter*, 271 Ill. App. 3d 594, 597, 648 N.E.2d 614, 616-17 (1995).

¶ 7 Clearly, Bentley was "a person not a party to the action" when Coulter called him to testify at the preliminary injunction hearing. Bentley was in the same position as other nonparty witnesses called to offer testimony. The testimony of a nonparty witness does not constitute a judicial admission. Bentley's testimony could not have constituted a judicial admission because Bentley was a nonparty witness whose testimony could not bind him.

¶ 8 The case relied upon by Coulter, *Konstant Products, Inc. v. Liberty Mut. Fire Ins. Co.*, 401 Ill. App. 3d 83, 929 N.E.2d 1200 (2010), is readily distinguishable. In that case, a truck driver employed by a scrap company was injured when he was pinned by his own truck while loading scrap at a fabricated metal products manufacturer. *Konstant Products*, 401 Ill. App. 3d at 85, 929 N.E.2d at 1202. The truck driver brought a personal injury action against the manufacturer and its employee, who accidentally drove the truck forward while attempting to back it away from the driver. *Konstant Products*, 401 Ill. App. 3d at 85, 929 N.E.2d at 1202. After the manufacturer's commercial general liability insurer settled the truck driver's claim, the insurer brought an action against the scrap company's auto insurer. The insurer sought a declaration that the manufacturer's employee was a permissive driver under the scrap company's policy, so that the auto insurer had a duty to defend, and seeking reimbursement of the settlement costs. *Konstant Products*, 401 Ill. App. 3d at 85, 929 N.E.2d at 1202-03.

¶ 9 In the truck driver's original complaint, he alleged the employee did not have

permission to drive the truck. *Konstant Products*, 401 Ill. App. 3d at 86, 929 N.E.2d at 1203.

The truck driver's second amended complaint was identical to the original complaint, except that the paragraph stating the employee did not have permission to drive the truck was omitted.

Konstant Products, 401 Ill. App. 3d at 86, 929 N.E.2d at 1203. The trial court found the truck driver's allegation in the original verified complaint that the employee did not have permission to drive the truck was a binding judicial admission that "did not go away" merely by filing an amended complaint, and the appellate court agreed. *Konstant Products*, 401 Ill. App. 3d at 86, 929 N.E.2d at 1203.

¶ 10 In this case, the alleged judicial admissions are statements made by a nonparty witness at a preliminary injunction hearing and not a statement made by a plaintiff in his original verified complaint. One cannot transform a statement made as a nonparty witness into a judicial admission by later filing a third-party action against the nonparty witness.

¶ 11 However, statements Bentley made during his testimony at the preliminary injunction hearing could be considered evidentiary admissions and, as such, offered into evidence by Coulter, subject to contradiction or explanation. See *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558, 836 N.E.2d 640, 659 (2005) (evidentiary admissions must be offered into evidence and are subject to contradiction or explanation).

¶ 12 Question No. 2 is as follows: "Did the Trial Court correctly grant Coulter the judicial admissions delineated in the Trial Court Opinion and Memorandum Order, as judicial admissions, rather than evidentiary admissions?"

¶ 13 Because we hold that a statement made by a nonparty witness cannot be transformed into a judicial admission by later filing a third-party action against the nonparty witness,

the second certified question is moot. See *Santiago v. Casper*, 133 Ill. 2d 318, 330, 549 N.E.2d 1251, 1257 (1990).

¶ 14 Question No. 3 is as follows: "Did the Trial Court err, after the Trial Court granted Coulter the aforementioned judicial admissions in not granting Coulter Summary Judgment as to liability, for Count (1) negligent misrepresentation?"

¶ 15 Count I of the complaint forms the basis for the certified question, which asks us to assume the existence of certain facts. Although the matter is framed as a question of law, we believe that any answer here would be advisory and provisional, for the ultimate disposition of count I will depend on the resolution of a host of factual predicates. For proof that factual issues remain, we need look no further than the trial judge's ruling on Coulter's motion for summary judgment on this count; in denying the motion, the trial court stated that issues of material fact remained, which precluded entry of summary judgment.

¶ 16 For the foregoing reasons, we answer the first of the circuit court's certified questions in the negative. We decline to answer the second and third of the court's certified questions as moot and advisory, respectively, and dismiss that portion of the appeal. We remand this case for further proceedings.

¶ 17 Certified question No. 1 answered; appeal dismissed as to certified question Nos. 2 and 3; cause remanded.