

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1891

Cir. Ct. No. 2012CV20

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JASON S. HILGER,

PLAINTIFF-RESPONDENT,

V.

**NICOLET HARDWOODS CORPORATION, PINE RIVER TRUCKING, LLC,
CONNOR TIMBER ASSOCIATES LIMITED PARTNERSHIP AND W.D.
FLOORING, LLC,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Forest County:
LEON D. STENZ, Judge. *Affirmed in part; reversed in part and cause remanded
with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Nicolet Hardwoods Corporation; Pine River Trucking, LLC; and Connor Timber Associates Limited Partnership (collectively, the Companies)¹ appeal a money judgment entered in favor of Jason Hilger. The Companies argue: (1) the circuit court erroneously denied a motion to dismiss Pine River and Connor Timber from the suit; (2) the court erroneously denied motions to dismiss Hilger’s two tort claims until after the close of evidence; and (3) the court erroneously failed to consider the Companies’ motions after verdict.

¶2 We agree that Pine River and Connor Timber were not parties to the employment contract and that the circuit court therefore erred by not dismissing the breach of contract claim against them. However, we reject the assertion that this error entitles Nicolet Hardwoods to a new trial. Rather, we remand for the court to remove Pine River and Connor Timber from the judgment. We reject the Companies’ remaining arguments.

BACKGROUND

¶3 Hilger was hired as Nicolet Hardwoods’ chief financial officer in April 2009, and executed a six-page employment contract. Immediately below the contract’s title, it stated: “THIS AGREEMENT is made and entered into ... by and between NICOLET HARDWOODS, INC., a Wisconsin corporation (the ‘Company’) and JASON HILGER (‘Employee’).”

¹ W.D. Flooring, LLC, is also listed in the caption as an appellant. However, W.D. Flooring was voluntarily dismissed from the suit prior to trial, and was not named in the judgment. We therefore do not address W.D. Flooring.

¶4 The contract's first numbered paragraph stated:

The Company employs Employee as the chief financial officer of the Company and Employee accepts such employment upon the terms and conditions set forth in this Agreement. Employee will also be performing work for companies affiliated with Company, including, but not limited to, WD, LLC, Pine River Hardwoods, LLC, Connor Timber Associates Limited Partnership, Sylvan Timber Partners Limited Partnership, and Connor Management Corporation.

The next paragraph provided:

Employee shall devote his full professional time and effort as chief financial officer of the Company and its affiliates and shall perform such duties as the Company or its affiliates may from time to time prescribe and shall not engage in any other business or practice requiring significant time without the prior written consent of the Company.

Additionally, the signature block at the end of the contract had a typewritten entry for "NICOLET HARDWOODS, INC." which was signed "BY" Gordon Connor, "President." The only other signature block entry, also typewritten, was "EMPLOYEE," and was signed by Hilger.²

¶5 Hilger's employment was terminated in November 2011. He sued the Companies in March 2012, alleging claims for breach of contract, wrongful discharge-public policy, and intentional infliction of emotional distress. Prior to trial, the Companies unsuccessfully moved to dismiss all defendants other than Nicolet Hardwoods because it was the only signatory to the contract. The Companies also moved to dismiss both tort claims, and the court took that matter under advisement.

² Additionally, Hilger's name was typewritten beneath his signature line.

¶6 The case proceeded to trial on all three claims. The Companies renewed their pretrial motions upon the close of Hilger's case in chief, with the same result. However, after the close of evidence, the court dismissed both tort claims for lack of evidence. The jury found the Companies breached the employment contract, and awarded Hilger's requested damages of \$188,125.85. The Companies appeal.

DISCUSSION

Breach of contract

¶7 The Companies first argue the circuit court erroneously denied their motions to dismiss Pine River and Connor Timber because they were not parties to the contract. Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms. *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶26, 348 Wis. 2d 631, 833 N.W.2d 586. Contract interpretation presents an issue of law subject to de novo review. *Ehlinger v. Hauser*, 2010 WI 54, ¶47, 325 Wis. 2d 287, 785 N.W.2d 328.

¶8 The Companies argue only Nicolet Hardwoods and Hilger were parties to the contract because (1) the contract stated at the outset that these were the two contracting parties, and (2) Nicolet Hardwoods and Hilger were the only parties who signed the contract. Hilger responds that the contract stated he would be doing work for various companies affiliated with Nicolet Hardwoods, some of which were named in the contract, and he did in fact work for various affiliates.

¶9 We agree with the Companies. The only reasonable interpretation is that Hilger and Nicolet Hardwoods were the only two parties to the contract. It is irrelevant that Connor was also the president of Pine River and a partner in

Connor Timber. While Hilger cites case law concerning Connor's actual or apparent authority to bind the affiliates, Connor did not attempt to do so under the contract language. Rather, the contract clearly and unambiguously states that the parties to the agreement were Nicolet Hardwoods and Hilger, and only those two parties signed it. The court therefore erred by failing to dismiss the contract claim against Pine River and Connor Timber.

¶10 Hilger also suggests the affiliates were bound by the contract because they were aware of it, assented to the arrangement, and received a benefit. This argument is inadequately developed. See *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed."). We note, however, that Hilger received his paychecks exclusively from Nicolet Hardwoods.

¶11 The Companies further argue that, if Pine River and Connor Timber were not parties to the contract, then their inclusion on the verdict renders the verdict perverse and entitles Nicolet Hardwoods to a new trial. We reject the argument as undeveloped. See *id.* Indeed, the Companies' argument is incomprehensible. The jury did not determine who was a party to the contract and would be named on the verdict; that was a legal issue decided by the circuit court.

Dismissal of the tort claims after the close of evidence

¶12 The Companies next argue the circuit court erred by denying its motions to dismiss the two tort claims until after the close of evidence at trial. Hilger disputes that the court erred, but further argues any error was harmless because the jury only awarded contract damages, and in exactly the amount Hilger itemized. See *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶152, 297 Wis. 2d 70, 727 N.W.2d 857 (error is harmless unless there is a reasonable

possibility that the error contributed to the outcome of the case). The Companies fail to meaningfully reply to Hilger’s argument, and are therefore deemed to have conceded it.³ See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded); see also *Flynn*, 190 Wis. 2d at 39 n.2.

Motions after verdict

¶13 Finally, the Companies argue the circuit court erroneously exercised its discretion by failing to consider their motions after verdict, and assert the error entitles Nicolet Hardwoods to a new trial.⁴ They argue “[e]ither a failure to exercise discretion or a lack of a reasonable basis for the decision constitutes” an erroneous exercise of discretion. See *Groh v. Groh*, 110 Wis. 2d 117, 128, 327 N.W.2d 655 (1983).

¶14 The Companies’ nearly one-page argument is inadequately developed because they fail to explicate the arguments underlying their postverdict motions or explain why the court’s mere failure to address the motions would entitle Nicolet Hardwoods to a new trial. See *Flynn*, 190 Wis. 2d at 39 n.2. Regardless, the court lacked competency to decide the postverdict motions because they were filed after the twenty-day deadline. See WIS. STAT.

³ The Companies merely respond that Hilger was permitted to testify regarding his emotional state following his termination and that “[t]his emotional testimony was not relevant to the breach of contract action and was prejudicial to the jury.”

⁴ The Companies inappropriately argue the circuit court abused its discretion. Wisconsin abandoned that terminology decades ago. See *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

§ 805.16(1).⁵ “The twenty-day time limit is strictly construed and the trial court lacks the ability to consider postverdict motions filed after the twenty-day deadline, unless the court has granted an extension within that time.” *Fakler v. Nathan*, 214 Wis. 2d 458, 464, 571 N.W.2d 465 (Ct. App. 1997). Furthermore, the court did not err by merely failing to address the postverdict motions, because a failure to do so within ninety days constitutes a denial. *See* WIS. STAT. § 805.16(3). Finally, the Companies failed to reply to Hilger’s arguments, and are therefore deemed to have conceded them. *See Charolais*, 90 Wis. 2d at 109.

¶15 In summary, we have determined that Pine River and Connor Timber were not parties to the employment contract and that the circuit court consequently erred by not dismissing the breach of contract claim against them. We have rejected the Companies’ remaining arguments. We therefore remand for the court to remove Pine River and Connor Timber from the judgment. No party may recover WIS. STAT. RULE 809.25(1) appellate costs.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁵ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

