COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2015

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. 2014AP2671 Cir. Ct. No. 2012CV316

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

ZOE ANN WESOLOWSKI,

PLAINTIFF-RESPONDENT,

V.

CAROL ANN COLTMAN,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

MELISSA ANN SURGES, JULIANNA WESOLOWSKI, HARRY ANDREW WESOLOWSKI, FRANCES WESOLOWSKI, CAROLYN WESOLOWSKI, GERALD A. BASKERVILLE, FRANK DOBRON, DECEASED, ANTOINETTE CHRISTENSON, BETTY TIPLER, DEAN J. DVORAK, ACTION REALTY I, LLC, ACTION REALTY II, LLC AND CINDY KOUTIK,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Door County: DAVID G. MIRON, Judge. *Judgment affirmed; order modified and, as modified, affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Carol Coltman, pro se, appeals a summary judgment in favor of her daughter, Zoe Wesolowski, on Wesolowski's eviction claim against Coltman and on Coltman's counterclaims.[1] Coltman also appeals an order dismissing her claims against various third-party defendants. We reject Coltman's appellate arguments and affirm the judgment. We modify the order to state that Coltman's third-party claims were dismissed without prejudice and, as modified, affirm.

BACKGROUND

¶2 On October 29, 2012, Wesolowski filed a small claims summons and complaint against Coltman, seeking eviction. In the complaint and attached documents, Wesolowski alleged she owned a pole barn in Baileys Harbor and had permitted Coltman to store personal property inside it. However, Wesolowski wrote to Coltman on September 25, 2012, asking her to remove her personal property from the barn within thirty days. Wesolowski's letter informed Coltman that, if she failed to remove her property during the prescribed time period,

[1] We refer to Zoe Wesolowski as "Wesolowski" throughout the remainder of this opinion. We refer to individual third-party defendants who share the surname Wesolowski by their full names.

In addition to representing herself on appeal, Coltman was also self-represented throughout the circuit court proceedings.

Wesolowski would charge Coltman for the sale, storage, or disposal of the property. Consistent with this letter, Wesolowski's complaint asked the court to award storage fees of $35 per day for sixty days beginning on October 28, 2012, and $70 per day thereafter.

¶3 On November 14, 2012, Coltman answered the complaint, asserting, among other things, that she was the owner of the pole barn. Coltman also asserted six counterclaims against Wesolowski: (1) a claim for damages under WIS. STAT. § 704.90(10)(a) and (12);[2] (2) a request for a declaration of ownership rights to the pole barn; (3) a claim for bringing a "frivolous action;" (4) a claim to collect on a $40,000 loan; (5) a claim for injunctive relief; and (6) a claim for the return of property from Wesolowski's home and the pole barn. Coltman also moved to have the case transferred out of small claims court. That request was granted, and the case proceeded under WIS. STAT. chs. 801 to 847.

¶4 Coltman subsequently filed a "summons and complaint" asserting additional counterclaims against Wesolowski and third-party claims against Melissa Surges (Coltman's daughter); Julianna Wesolowski, Harry Wesolowski, Frances Wesolowski, and Carolyn Wesolowski (Wesolowski's children); Gerald Baskerville; Frank Dobron (Frances Wesolowski's boyfriend); Antoinette Christenson (a therapist who allegedly treated Harry Wesolowski); Betty Tipler (a real estate agent); Dean Dvorak (Tipler's "supervisor"); Action Realty I, LLC (Tipler's "employer or associate"); Action Realty II, LLC (Tipler's "employe[r] or

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

… associate[]"); and Cindy Koutik (Tipler's "manager broker and supervisor"). Specifically, Coltman asserted claims for:

- Breach of contract against Wesolowski;
- Unjust enrichment against Wesolowski and Surges;
- Fraud against Wesolowski;
- Breach of fiduciary duty against Wesolowski;
- Battery against Wesolowski, Surges, Julianna Wesolowski, Harry Wesolowski, Frances Wesolowski, Carolyn Wesolowski, Baskerville, Dobron, Christenson, and Tipler;
- False imprisonment against Harry Wesolowski;
- False imprisonment, theft, trespass, and attempted burglary against unspecified parties;
- Abuse of the elderly against Wesolowski, Surges, Julianna Wesolowski, Harry Wesolowski, Frances Wesolowski, Carolyn Wesolowski, Baskerville, Dobron, Christenson, and Tipler;
- Abuse of legal process against Wesolowski and Surges;
- Mental distress against Wesolowski, Surges, Julianna Wesolowski, Harry Wesolowski, Frances Wesolowski, Carolyn Wesolowski, Baskerville, Dobron, Christenson, and Tipler; and
- Declaration of interest in real property against Wesolowski.

¶5 Wesolowski and the third-party defendants answered Coltman's "complaint." In addition, Tipler, Dvorak, Action Realty I and II, and Koutik moved to dismiss, asserting that Tipler, Dvorak, Koutik, and Action Realty II were not proper parties to the action and that Coltman had failed to state a claim on which relief could be granted against Action Realty I. Christenson also moved to dismiss, arguing, among other things, that she was not properly impleaded under WIS. STAT. § 803.05. Coltman filed briefs in response to these motions to dismiss.

¶6 Thereafter, Wesolowski moved for summary judgment on her eviction claim and on Coltman's counterclaims. As relevant here, the materials supporting Wesolowski's motion included a quitclaim deed, dated December 14, 2007, by which Coltman transferred the property containing the pole barn to Wesolowski. Coltman filed a brief and affidavit in response to Wesolowski's summary judgment motion.

¶7 An October 16, 2014 hearing was scheduled to address both Wesolowski's summary judgment motion and the third-party defendants' motions to dismiss. At the hearing, the circuit court dismissed all of Coltman's third-party claims, concluding the third-party defendants were not properly impleaded under WIS. STAT. § 803.05. The court then granted Wesolowski summary judgment on her eviction claim, reasoning Wesolowski "clearly" owned the pole barn, Wesolowski allowed Coltman to store her personal property in the barn pursuant to a tenancy at will, and Wesolowski's September 25, 2012 letter to Coltman constituted a proper notice of eviction.[3] The court also granted Wesolowski summary judgment on Coltman's counterclaims, stating there was "no factual support for them whatsoever."

¶8 Coltman moved for reconsideration, which the circuit court denied. On October 28, 2014, the court entered a written order dismissing without prejudice Coltman's third-party claims against Christenson. A written judgment granting Wesolowski summary judgment on her eviction claim and on Coltman's counterclaims was entered on October 30, 2014. On the same day, the court

[3] Despite granting Wesolowski summary judgment on the eviction claim, the circuit court declined to award her damages for storing Coltman's personal property.

entered an order dismissing all of Coltman's third-party claims with prejudice. Coltman now appeals.

DISCUSSION

I. Wesolowski's eviction claim

¶9 Coltman first argues the circuit court erred by granting Wesolowski summary judgment on her eviction claim. We independently review a grant of summary judgment, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶10 When reviewing a summary judgment motion, we decide only whether a genuine issue of material fact exists. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). We do not "decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts." ***Id.*** In addition, we draw all reasonable inferences in favor of the nonmoving party. ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 663, 574 N.W.2d 250 (Ct. App. 1997). However, summary judgment is proper where only one reasonable inference can be drawn from the undisputed facts. *See* ***Sawyer v. Midelfort***, 217 Wis. 2d 795, 815, 579 N.W.2d 268 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 124, 595 N.W.2d 423 (1999).

¶11 Under summary judgment methodology, the first step is to determine whether the complaint states a claim for relief. ***Hoida, Inc. v. M & I Midstate***

Bank, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. If the complaint states a claim for relief and the answer joins issue, we then examine the affidavits and other materials filed by the moving party to determine whether they establish a prima facie case for summary judgment. ***Id.*** If so, we examine the materials filed by the opposing party to determine whether there are genuine issues of material fact requiring a trial. ***Id.***

¶12 Here, Wesolowski's complaint and the attached documents clearly stated a claim for eviction. "A civil action of eviction may be commenced by a person entitled to the possession of real property … to remove therefrom any person who is not entitled to either the possession or occupancy of such real property." WIS. STAT. § 799.40(1). In her complaint, Wesolowski alleged that: (1) she was the owner of the pole barn; (2) she permitted Coltman to store personal property in the barn; and (3) she notified Coltman, by letter dated September 25, 2012, that Coltman needed to remove her property from the barn within thirty days of the letter's receipt. Although not explicitly alleged, the only reasonable inference from the facts alleged in the complaint is that Coltman did not remove her property within the specified time frame.

¶13 Next, Coltman's answer to the complaint joined issue. Coltman expressly denied that Wesolowski was the owner of the pole barn, and she also alleged Wesolowski's notice of eviction failed to comply with the relevant statutes.

¶14 Turning to the parties' summary judgment submissions, we conclude Wesolowski made a prima facie case for summary judgment on her eviction claim, and Coltman failed to identify genuine issues of material fact that would entitle her to a trial. As evidence that she owned the pole barn, Wesolowski relied on a

quitclaim deed by which Coltman transferred the property containing the barn to Wesolowski. In response, Coltman did not dispute the existence of this deed. The circuit court concluded the deed met the requirements set forth in the statute of frauds, WIS. STAT. § 706.02, and we agree. Thus, we conclude the deed provides undisputed evidence that Wesolowski owns the property containing the pole barn.

¶15 In support of her summary judgment motion, Wesolowski also asserted her September 25, 2012 letter to Coltman complied with the requirements of WIS. STAT. § 704.19 for termination of a tenancy at will. The facts set forth in Wesolowski's summary judgment submissions support this assertion. A tenant at will is "any tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent[.]" WIS. STAT. § 704.01(5). In her affidavit in support of summary judgment, Wesolowski averred, "Subsequent to my ownership of the property, [Coltman] stored personal belongings in the storage building for more than five years without complaint, disagreement, or objection by either party concerning the arrangements for voluntary storage of property." Nothing in Wesolowski's submissions indicates that a valid lease existed or that Coltman paid Wesolowski rent. Accordingly, the only conclusion that can be drawn from the factual assertions in Wesolowski's summary judgment submissions is that Coltman was a tenant at will.

¶16 In response to the summary judgment motion, Coltman asserted she was not a tenant at will. However, whether Coltman qualified as a tenant at will is question of law, *see* ***Sheppard v. Jensen***, 2004 WI App 216, ¶22, 277 Wis. 2d 260, 689 N.W.2d 667, and we disregard legal conclusions contained in affidavits on motions for summary judgment, ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶20 n.12, 259 Wis. 2d 181, 655 N.W.2d 718. Coltman provided no

evidentiary support for her conclusory assertion that she was not a tenant at will. She did not assert, or provide any evidence, that she had a valid lease allowing her to store property in the pole barn. Further, Coltman conceded in a separate pleading that she never paid Wesolowski rent. Coltman therefore failed to establish a genuine dispute of material fact regarding her status as a tenant at will.

¶17 Pursuant to WIS. STAT. § 704.19, a tenancy at will can be terminated by either the landlord or the tenant upon written notice to the other party. *See* § 704.19(2). As relevant here, notice must be given at least twenty-eight days before the date of termination. *See* § 704.19(3). In this case, it is undisputed that Wesolowski sent Coltman a letter providing notice of termination on September 25, 2012. The letter informed Coltman her tenancy would terminate the thirty-first day after Coltman received the letter. Coltman does not dispute that she received the letter, and the record contains a certified mail receipt for the letter bearing her signature. On these undisputed facts, we conclude Wesolowski provided Coltman with proper notice of termination of her tenancy. Consequently, the circuit court properly granted Wesolowski summary judgment on her eviction claim.[4]

[4] We also observe that Coltman wholly fails to present a developed argument on appeal that the circuit court erred by granting summary judgment on Wesolowski's eviction claim. Instead, Coltman simply incorporates by reference a letter brief she filed in the circuit court. Coltman's attempt to incorporate circuit court submissions into her appellate brief by reference is unacceptable. *See* ***Bank of Am. NA v. Neis***, 2013 WI App 89, ¶11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527; ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). An appellate brief requires an argument that demonstrates why the litigant should prevail, accompanied by supporting legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We could reject Coltman's challenge to the circuit court's summary judgment ruling on this basis alone. *See* ***Flynn***, 190 Wis. 2d at 39 n.2; *see also infra*, ¶¶20-21. Although Coltman is pro se, she is bound by the same rules that apply to attorneys on appeal. *See* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

II. Coltman's counterclaims

¶18 Coltman next argues the circuit court erred by granting Wesolowski summary judgment on Coltman's counterclaims. At the outset, we note our concern with the manner in which the circuit court granted summary judgment on these claims. The court failed to analyze each of the counterclaims individually and apply the material undisputed facts to each claim, and it provided little reasoning in support of its decision, beyond stating there was "no factual support" for the counterclaims. Our review is also made more difficult by the fact that Wesolowski failed to file a respondent's brief on appeal.

¶19 Nevertheless, we affirm the summary judgment dismissing Coltman's counterclaims because Coltman has failed to develop an argument that the circuit court's decision was erroneous. Coltman wholly fails to explain on appeal why the court erred by granting Wesolowski summary judgment on the counterclaims. Instead, she merely incorporates by reference the brief and affidavit she filed in response to Wesolowski's summary judgment motion. As explained above, this practice is impermissible. *See supra*, ¶17 n.4. Moreover, the circuit court filings Coltman cites do little to aid our analysis. Nowhere in those documents does Coltman identify the elements of her counterclaims or explain how the allegations in her affidavit relate to those elements.

¶20 We need not address undeveloped arguments, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), and we decline to do so here. Our review of a grant of summary judgment is de novo. *See* ***Smith***, 212 Wis. 2d at 232. However, in order to perform our independent review in this case, we would have to search the record, with no assistance from Coltman, to determine whether, with respect to each of her many counterclaims:

(1) Coltman's complaint stated a claim on which relief could be granted; (2) Wesolowski's answer joined issue; (3) Wesolowski made a prima facie case for summary judgment; and (4) Coltman demonstrated the existence of genuine issues of material fact requiring a trial. In essence, we could be required to develop Coltman's arguments for her in their entirety.

¶21 "[W]e will not abandon our neutrality to develop arguments[.]" ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. As we explained in ***Pettit***, 171 Wis. 2d at 647,

> the Court of Appeals of Wisconsin is a fast-paced, high-volume court. There are limits beyond which we cannot go in overlooking [deficiencies in appellate briefs]. Pettit's brief is so lacking in organization and substance that for us to decide his issues, we would first have to develop them. We cannot serve as both advocate and judge.

Stated differently, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). For these reasons, we affirm the grant of summary judgment on Coltman's counterclaims, despite our misgivings regarding the circuit court's analysis.

III. Coltman's third-party claims

¶22 Finally, Coltman argues the circuit court erred by dismissing her third-party claims. The court determined the third-party defendants were not properly impleaded, pursuant to WIS. STAT. § 803.05. The interpretation and application of that statute present a question of law that we review independently. *See* ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶14, 309 Wis. 2d 541, 749

N.W.2d 581; ***Glaeske v. Shaw***, 2003 WI App 71, ¶44, 261 Wis. 2d 549, 661 N.W.2d 420.[5]

¶23 WISCONSIN STAT. § 803.05(1) provides, in relevant part:

> At any time after commencement of the action, a defending party, as a 3rd-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party, or who is a necessary party under s. 803.03.

Thus, under the statute, two categories of persons may be impleaded as third-party defendants: those who may be liable to the defendant for all or part of the plaintiff's claim, and "necessary part[ies]" under WIS. STAT. § 803.03. The third-party defendants in this case do not fit into either of these categories.

¶24 First, we are aware of no theory on which the third-party defendants could be liable to Coltman for all or part of Wesolowski's claim against her. Wesolowski sued to evict Coltman from a pole barn. Coltman does not allege that any liability she has to Wesolowski on that claim is due to conduct of the third-party defendants. Her claims against the third-party defendants—which range from battery to abuse of legal process—are factually and legally unrelated to the

[5] Christenson argues our review of the circuit court's decision to dismiss the third-party claims is discretionary. Christenson cites two cases in support of this proposition, but both are inapt. The first case, ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463, applied a discretionary standard of review to a circuit court's denial of a motion to amend the pleadings under WIS. STAT. § 802.09(1). The second case, ***Industrial Roofing Services v. Marquardt***, 2007 WI 19, ¶¶39, 41, 299 Wis. 2d 81, 726 N.W.2d 898, involved the dismissal of a party's claims as a sanction for discovery violations. Neither case addressed the standard of review applicable to the dismissal of third-party claims for failure to properly implead third-party defendants under WIS. STAT. § 803.05.

eviction action. They have nothing to do with the ownership of the pole barn or whether Wesolowski provided proper notice of eviction.

¶25 Second, the third-party defendants are not necessary parties under WIS. STAT. § 803.03. Section 803.03(1) provides:

> A person who is subject to service of process shall be joined as a party in the action if:
>
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
>
> (b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:
>
> 1. As a practical matter impair or impede the person's ability to protect that interest; or
>
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

Coltman has not made any showing that complete relief cannot be accorded between herself and Wesolowski in the eviction action in the absence of the third-party defendants. *See* § 803.03(1)(a). Again, Coltman's third-party claims are factually and legally unrelated to the issue of whether Wesolowski is entitled to evict her. In addition, none of the third-party defendants "claims an interest" in the subject of the eviction action. *See* § 803.03(1)(b). Consequently, the third-party defendants are not necessary parties under § 803.03. We therefore agree with the circuit court that they were not properly impleaded.

¶26 Coltman argues the circuit court violated her right to due process by dismissing the third-party defendants. She observes that not all of the third-party defendants filed motions to dismiss, and only some of them were present at the

October 16, 2014 hearing during which the circuit court dismissed her third-party claims. She contends she had no notice the court would "sua sponte" dismiss all of the third-party defendants on procedural grounds, and she was therefore deprived of the opportunity to "prepare for that assault on [her] case."

¶27 Coltman's due process argument lacks merit. "The fundamental requirements of procedural due process are notice and an opportunity to be heard." ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). Both of these requirements were satisfied in the instant case. While Coltman contends she had no notice the circuit court would dismiss all of the third-party defendants "sua sponte" during the October 16 hearing, the record belies that assertion. Before the hearing, two motions to dismiss were filed by some of the third-party defendants. One of the motions—that filed by Christenson—specifically raised WIS. STAT. § 803.05 as a ground for dismissal. Coltman filed a written response to Christenson's motion, in which she expressly addressed the argument that Christenson was not properly impleaded.

¶28 A telephone status conference was then held on July 11, 2014. During that status conference, the court scheduled a motion hearing for October 16. On August 7, the court entered a scheduling order stating, in relevant part:

> 6. Motions to dismiss the third[-]party complaint filed on behalf of Defendants Antoinette Christenson, Betty Tipler, Dean Dvorak, Action Realty I, LLC, Action Realty II, LLC and Cindy [Koutik] shall be heard by the Court on **October 16, 2014**. Third-party plaintiff shall have until **August 1, 2014** to voluntarily dismiss all claims against third-party defendants with prejudice in order to avoid a motion for sanctions to be filed on behalf of said defendants. Otherwise, third-party plaintiff shall file a responsive brief by **September 1, 2014**, and third-party defendants shall file a reply brief by **October 1, 2014**.

> 7. Third-party defendants who have not previously filed motions to dismiss shall be permitted to file motions to dismiss by **September 1, 2014**. However, for just cause, the Court may, in its discretion, consider motions to dismiss on behalf of said Defendants *sua sponte* to be heard by the Court on **October 16, 2014**.

In light of this scheduling order, Coltman cannot argue she lacked notice that the court would address the pending motions to dismiss during the October 16 hearing or that the court might, in its discretion, dismiss the other third-party defendants sua sponte if it determined Coltman had failed to state claims against them.

¶29 Coltman was also given an opportunity to be heard regarding the motions to dismiss. As noted above, Coltman filed a written response to Christenson's motion to dismiss that specifically addressed WIS. STAT. § 803.05. Coltman does not contend she was prevented from presenting argument on this issue during the October 16 hearing. On these facts, we reject Coltman's argument that the circuit court violated her right to due process by dismissing her third-party claims.

¶30 Coltman also argues the court should not have dismissed her third-party claims with prejudice. We agree with Coltman on this limited point. In its oral ruling, the court did not specify whether it intended to dismiss the third-party claims with or without prejudice. Thereafter, the court entered one order on October 28, 2014, dismissing Coltman's claims against Christenson *without* prejudice, and a second order on October 30, 2014, dismissing Coltman's claims against all of the third-party defendants *with* prejudice. We see no reason why the court would have intentionally treated Coltman's claims against Christenson differently from her claims against the other third-party defendants. All of the claims were dismissed on procedural grounds; none were decided on the merits. Under these circumstances, dismissal without prejudice was appropriate. Pursuant

to our authority under WIS. STAT. § 808.09, we therefore modify the October 30, 2014 order to state that Coltman's claims against the third-party defendants were dismissed without prejudice and, as modified, affirm.

By the Court.—Judgment affirmed; order modified and, as modified, affirmed.

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