COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1139 **Cir. Ct. No. 2015CV427**

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

RONNIE LEE THUMS,

PLAINTIFF-APPELLANT,

V.

ROGER LEO THUMS, CAROL MARIE THUMS, WILLIAM R. SLATE, GERALD FOX, D.A. AND JUDGE THOMAS E. LISTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Ronnie Lee Thums, pro se, appeals from a judgment and orders of the circuit court dismissing his claims against three sets of defendants. He argues that the circuit court committed several errors requiring reversal. We reject his arguments and affirm.

BACKGROUND

¶2 Thums was convicted of plotting a murder for hire. As part of its sentence, the circuit court imposed the maximum fine of $45,000. The court explained that Thums was the beneficiary of a trust from his parents, and that the evidence demonstrated that he had proposed to use these assets to pay for the murders of his ex-wife and daughters. The court was convinced that the maximum fine was necessary in order to prevent Thums from using his financial resources to again hire someone to kill his family.

¶3 In this civil action, Thums alleges that the imposition and payment of this fine is part of a conspiracy to deprive him of his trust moneys. He names five defendants: Circuit Court Judge Thomas Lister, District Attorney Gerald Fox, Roger Leo Thums, Carol Marie Thums, and Attorney William R. Slate, who drafted the trust at issue. He alleges that the defendants conspired to violate a variety of civil and criminal statutes. He also alleges that Slate committed legal malpractice. In addition to a four-page complaint, Thums filed 113 pages of unlabeled exhibits.

¶4 Defendants Lister and Fox filed a motion to dismiss based on judicial immunity and prosecutorial immunity, respectively. Defendants Roger and Carol Thums filed a motion to dismiss for failure to state a claim on which relief could be granted. Defendant Slate filed a motion for summary judgment

arguing that he had no duty to Thums. After a hearing, the court granted all three motions. Thums appeals.

DISCUSSION

¶5 The bulk of Thums' arguments do not respond to the circuit court's specific grounds for dismissing his claims against each set of defendants, and therefore, we do not address them. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1., 268 Wis. 2d 628, 673 N.W.2d 716 (appellate courts need only address dispositive issues).

¶6 However, we can see, in Thums' brief, three sets of arguments directed at the circuit court's reasoning, which we reorder for the sake of convenience. First, he argues that the circuit court erred in determining that Fox and Lister were immune from suit. Second, Thums challenges the circuit court's decision to dismiss the conspiracy claims, arguing that the court improperly imposed a heightened pleading standard for these claims. Third, he argues that the circuit court erred in granting summary judgment to Slate on the ground that Slate had no legal duty to him. We address each of these arguments below.

¶7 Thums also points to fifteen more general errors in the circuit court's decision that he argues warrant reversal. Many of these arguments are wholly frivolous in the context of this civil action.[1] We do not address any patently

[1] For example, Thums refers to alleged violations of state antitrust law, violations of the law regarding charitable trusts, and claims under WIS. STAT. ch. 227, which relates to administrative actions. Thums also makes allegations about actions that have occurred after the court's dismissal of his suit, including alleged "pillag[ing]" of the trust by Roger and Carol Thums. We limit our consideration to the facts of record. *See* ***Van Deurzen v. Yamaha Motor Corp.***, 2004 WI App 194, ¶6, 276 Wis. 2d 815, 688 N.W.2d 777.

meritless arguments. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention"). Other arguments are unsupported by citations to the record or to legal authority. We reject these arguments as undeveloped. *See* WIS. STAT. RULE 809.19(1)(d) and (e) (2015-16)[2] (setting forth the requirements for briefs); ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (regarding arguments not supported by citations to the record), *abrogated on other grounds by* ***Wiley v. M.M.N. Laufer Family Ltd. P'ship***, 2011 WI App 158, 338 Wis. 2d 178, 807 N.W.2d 236; ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (regarding arguments unsupported by legal authority). To the extent we discern any non-frivolous arguments that are properly developed, we address them below in the context of the court's specific decision as to each set of defendants.

A. *Immunity for Lister and Fox*

¶8 Defendants Lister and Fox filed a motion to dismiss on several grounds, including judicial and prosecutorial immunity, respectively. The circuit court granted their motion, determining that both defendants were immune from suit.

¶9 Thums faces a high hurdle in convincing us to reverse the circuit court's determination. For Lister, the doctrine of judicial immunity provides broad protection from civil liability for "judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

corruptly." ***Stump v. Sparkman***, 435 U.S. 349, 355-56 (1978). A judge can only be held civilly liable under two circumstances: for non-judicial acts or for acts undertaken "in the complete absence of all jurisdiction." ***Mireles v. Waco***, 502 U.S. 9, 11-12 (1991).

¶10 Thums alleges multiple wrongful acts by Lister while presiding over Thums' criminal proceeding. But we see no argument that Lister acted in the complete absence of all jurisdiction. *See* ***id.*** Although Thums cites several federal decisions addressing judicial immunity, he cites no legal authority that would help him demonstrate that this exception applies here. In fact, the only case cited by Thums in which a court allowed a civil claim for damages to proceed against a judge acting in a judicial capacity is ***Harper v. Merckle***, 638 F.2d 848 (5th Cir. 1981). In ***Harper***, a judge conducted a sua sponte criminal contempt proceeding against the ex-husband of a friend, even though it was not related to any matter pending before the judge. ***Id.*** at 858-59. Notably, the contempt finding was reversed on direct appeal. ***Id.*** at 854. In holding that the judge was not entitled to immunity for these acts, the court cautioned that "our holding is exceedingly narrow and is tailored to this, the rarest of factual settings." ***Id.*** at 859. We see no argument from Thums that would suggest that this case involves similarly rare and narrow facts, particularly insofar as all of Lister's allegedly wrongful conduct occurred while he was presiding over Thums' criminal prosecution.

¶11 On the other hand, Thums does make a clear argument that Lister engaged in a non-judicial act. *See* ***Mireles***, 502 U.S. at 11-12. Specifically, Thums argues that Lister engaged in a non-judicial act when he told Thums on the record that Lister could sue Thums for defamation or libel for accusing him of having secret ex parte conversations with jurors. The only case Thums cites regarding civil liability for non-judicial acts is ***Archie v. Lanier***, 95 F.3d 438 (6th

Cir. 1996), in which a judge committed the criminal acts of stalking and sexual assaulting various victims. ***Id.*** at 439-40. In contrast, Lister's alleged threat involves a non-criminal act that occurred on the record during a judicial proceeding. As such, it bears no resemblance to the non-judicial conduct in ***Archie***. At any rate, we need not address whether the challenged statement by Lister was a non-judicial act. This is because Thums offers no authority to suggest that a judge's statement that he or she could sue someone for defamation or libel could give rise to a claim on which relief could be granted under Wisconsin law. Thus, even if this claim had not been dismissed on immunity grounds, it would be subject to dismissal for failure to state a claim on which relief can be granted.

¶12 In contrast to Lister, Thums' brief makes almost no mention of Fox and we can discern no argument that the circuit court erred in determining that Fox was immune from suit. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a brief is insufficiently developed "when an appellant ignores the ground upon which the [circuit] court ruled and raises issues on appeal that do not undertake to refute the [circuit] court's ruling."). However, in the interest of thoroughness, we note that a prosecutor is absolutely immune from civil damages for acts that are "intimately associated with the judicial phase of the criminal process." *See* ***Imbler v. Pachtman***, 424 U.S. 409, 430 (1976). The one reference to Fox's conduct that we see in Thums' brief relates to his on-the-record comments at trial. Such conduct is intimately associated with the judicial phase of the criminal process and, therefore, is not a basis for civil liability. *See* ***id.***

B. *Failure to State a Claim against Roger and Carol Thums*

¶13 We now turn to the circuit court's decision to grant the motion to dismiss in favor of Roger and Carol Thums. In granting this motion, the court

explained that Thums "theoretically has the greatest likelihood of making a cognizable claim" against these two defendants. However, in the court's view, Thums was so preoccupied with his allegations of a "gigantic conspiracy" that he had "failed almost completely to make a claim against these two defendants." The court concluded that it did not see any cognizable claim in Thums' submissions.

¶14 The issue of whether a complaint states a claim is a question of law, which we review de novo. ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint." ***Id.*** For that purpose, we accept as true the facts pleaded in the complaint as well as reasonable inferences that may be drawn from such facts. ***Id.*** However, we need not accept as true legal inferences or unreasonable inferences. ***Id.***

¶15 Thums argues that he has presented evidence from which a reasonable jurist could infer a conspiracy. He cites several numbered "exhibits" to his complaint, but these 113 pages of documents are not marked as exhibits. Without precise citations to numbered pages in the record, we have no basis for evaluating Thums' arguments about what a reasonable jurist could infer from particular documents.

¶16 More importantly, Thums also fails to demonstrate that he made any of these arguments to the circuit court in opposition to Roger and Carol Thums'

motion to dismiss.[3] The party raising a particular issue has the burden of showing where it was raised in the circuit court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). It's not clear which, if any, of these arguments were raised below. But it is clear that Thums expected the circuit court to pore through his 113 pages of attachments to the complaint and construct a legal theory for him. This is not the role of the circuit court, and Thums has given us no basis for questioning that court's determination that Thums failed to state a cognizable claim against these two defendants. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories.").

¶17 Aside from the conspiracy claim, the only other cause of action we see specified in Thums' brief is his allegation that Roger Thums "acted as an interested buyer seller," thereby harming Thums' interest. Thums' only citation to the record is a cryptic reference to "Memorandum #3 @ [page] 33." As was the case with Thums' 113 pages of unmarked attachments, we have no way of knowing what Thums is referring to here, and therefore no way of evaluating his argument. *See* ***Grothe***, 239 Wis. 2d 406, ¶6 ("'[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]'") (quoted source omitted). Nonetheless, we are confident that Thums has not stated a claim on which relief can be granted here, because he claims a

[3] Section IV of Thums' brief outlines his argument that there was a sufficient basis to infer that defendants engaged in a conspiracy, but this section relies almost entirely on arguments that he made in his opposition to the motion to dismiss filed by Lister and Fox. Arguments made in opposition to other defendants' motion to dismiss do nothing to help Thums establish that the circuit court erred in granting the motion to dismiss filed by Roger and Carol Thums.

violation of a statute that applied to charitable trusts and was repealed by 2013 Act 92. *See* WIS. STAT. § 701.10(2)(c) (2011-12). Nothing in the record suggests that a charitable trust is implicated here.

¶18 Thums also argues that the circuit court committed various procedural errors in granting the defense motions, but most of these arguments are unhelpful in the context of a motion to dismiss. For example, he contends that the court should have allowed him to conduct discovery. But a motion to dismiss tests the sufficiency of the complaint. ***Beloit Liquidating Trust***, 270 Wis. 2d 356, ¶17. In evaluating a motion to dismiss, the court only considers the pleadings, and not any information gleaned from discovery. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 468 n.6, 565 N.W.2d 521 (1997).

¶19 Thums also argues that the court did not give him enough time to explain his exhibits during the motions hearing. But Thums filed a brief in opposition to Roger and Carol Thums' motion to dismiss and was free to make any viable arguments in that brief. He has cited none of the arguments he made in that brief to us. *See* ***Caban***, 210 Wis. 2d at 604 (appellant has the burden of showing where an issue was raised below). Arguments not raised below are forfeited. ***Id.***

¶20 Finally, Thums contends that the court should have referred the matter to probate court. However, he does not point to any place in the record where he requested this, nor does he point to any authority that would require the court to make this referral sua sponte. In sum, we see no basis for concluding that the circuit court erred in granting the motion to dismiss the claims against Roger and Carol Thums.

C. *Summary Judgment for Slate*

¶21 The circuit court also granted summary judgment to Slate and dismissed the claims against him with prejudice. The court explained that Thums' allegations about Slate reflected significant confusion about Slate's role, which was merely to draft the trust created by Thums' parents. The court concluded that Slate did not have a duty to Thums.

¶22 Thums' brief makes passing reference to his malpractice claim against Slate. He contends in conclusory fashion that Exhibits 17-51 and 55-64 to his complaint establish that Slate had a legal duty to Thums. His reply brief also refers to several purported exhibits to his complaint. As discussed above, the 113 pages of attachments that Thums submitted with his complaint are not marked as separate exhibits. We decline Thums' invitation to pore through 113 pages of unmarked documents to figure out what he is referring to. Exhibits 55-73 were submitted later and are separately marked as exhibits, but Thums appears to expect us to use them to develop a legal theory for him. We cannot serve as both advocate and judge. *See* ***Pettit***, 171 Wis. 2d at 646.

¶23 Thums also argues that the circuit court misapplied the law when it concluded that Slate had no legal duty to Thums. He cites ***Scanlan v. Eisenberg***, 669 F.3d 838 (7th Cir. 2012) for the proposition that a trust beneficiary has standing under "article III" to sue the trustee and the trustee's lawyers for breach of fiduciary duty and legal malpractice. The Seventh Circuit's decision in ***Scanlan*** relies on Illinois trust law and, therefore, does not provide direct support

for Thums' argument that Slate had a duty to him under Wisconsin trust law.[4] *See* ***id.*** at 842-43. Even if we considered ***Scanlan*** as helpful persuasive authority, Thums must convince us that Slate, as drafter of the trust on behalf of Thums' parents, is also the lawyer for the trustees, Roger and Carol Thums.

¶24 Thums' strongest evidence in this regard is a letter from Slate to Thums that Slate submitted as Exhibit B in support of his motion for summary judgment. Thums argues that this letter proves that the circuit court failed to properly construe the facts when it concluded that Slate did not govern the administration of the trust. But the problem with Thums' argument is that he completely mischaracterizes the significance of this exhibit, contending that it contains an admission by Slate that he advised the trustees to take Thums' money for their legal defense. Exhibit B contains no such admission. Thums makes no other argument regarding how Exhibit B establishes that the circuit court erred, and we will not construct one for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (this court is not required to abandon its neutrality and develop arguments for the parties).

¶25 Thums also makes several general arguments relating to potential procedural errors in the circuit court's decision to grant summary judgment for

[4] In his reply brief, Thums cites ***Office of Lawyer Regulation v. Kostich***, 2010 WI 136, ¶16, 330 Wis. 2d 378, 793 N.W.2d 494, for the proposition that the existence of an attorney-client relationship is a question of fact that depends in part on the reasonable expectations of the person seeking legal advice. We generally do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Moreover, Thums' argument under ***Kostich*** suffers from the same infirmities as his other arguments, in that he cites 113 pages of unmarked documents. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (we need not consider arguments that are not adequately supported by record citations).

Slate. These arguments rely largely on federal case law governing summary judgment under Fed. R. Civ. P. 56. Thums' reliance on federal law and procedure is misplaced, because Thums opted to proceed in state court and therefore must look to Wisconsin law regarding the proper application of state summary judgment procedures under WIS. STAT. § 802.08.

¶26 Thums makes limited reference to Wisconsin's summary judgment procedures, and none of his arguments convince us that the court erred in granting summary judgment for Slate. For example, Thums contends that the circuit court did not follow WIS. STAT. § 802.08(2) and (3) when the court allowed Slate to file a copy of the trust document without the necessary signatures. But he does not show us that the circuit court relied on this document in determining that Slate had no duty to Thums. To the contrary, it appears that the circuit court recognized that there were factual issues regarding the provisions of the trust document. The court's determination that Slate had no duty to Thums was based on Slate's role being limited to drafting the trust document and did not depend on the contents of that document.

¶27 We also discern four arguments relating to Thums' efforts to oppose summary judgment. First, he argues that the circuit court failed to consider his evidence prior to granting summary judgment for Slate because the documents attached to his complaint should have been considered as business records. Thums does not tell us what documents he is referring to, why they qualify as business records, or how they would have helped him oppose summary judgment. We therefore have no basis for evaluating this argument.

¶28 Second, he contends that the circuit court should have sworn him in at the motions hearing so that he could present his own testimony as evidence to

oppose summary judgment. In-court testimony is not a specified method of opposing summary judgment. *See* WIS. STAT. § 802.08(2) - (3). We see no error in the fact that Thums did not testify under oath at the motions hearing.

¶29 Third, Thums argues that the circuit court erred by not granting him more time to conduct discovery in order to oppose Slate's motion. To the extent that Thums' argument is that the court should have denied summary judgment to allow further time for discovery under WIS. STAT. § 802.08(4), we reject it. Thums makes no argument about what additional discovery might reveal. Instead, he repeatedly contends that dozens upon dozens of attachments that he submitted with his complaint establish that Slate had a legal duty to him. The problem for Thums is not that he lacked access to information about Slate's interactions with him, but rather that he failed to construct a viable theory based on the information that he already had. Thums does not explain how additional discovery would remedy this fundamental failure.

¶30 Fourth, Thums argues that the court should have granted his motion to compel a complete and signed copy of the trust document. He does not make any argument to show that he was entitled to an order compelling this document. *See* WIS. STAT. § 804.12 (setting forth grounds for a motion to compel). More importantly, he makes no argument to show how this document would help him oppose summary judgment. We therefore reject this argument.

¶31 Finally, Thums argues that the circuit court erred in granting summary judgment to Slate on his harassment claim. It is not clear to us that Thums' claim for harassment was properly before the court, because it was first articulated in Thums' "Motion to Amend and Supplement Civil Complaint," and

no leave to amend was ever granted. But Thums argues that the court erred in not granting him leave to amend, so we will address this argument on the merits.

¶32 Here, Thums alleges that Slate sent him a printout of an article about an IRS penalty imposed on an inmate who attempted to shield assets in a Swiss bank account. "Thums describes this informational article as "reprehensible," "extremely disturbing," "mental torture," and "sadistic," and alleges that receiving it made him physically ill. It is clear to us that no reasonable jury could find harassment on Thums' evidence. Thus, even if the harassment claim were properly before the court, summary judgment would still be proper. *See* ***Nielsen v. Spencer***, 2005 WI App 207, ¶23, 287 Wis. 2d 273, 704 N.W.2d 390 (summary judgment is appropriate where the facts fail to raise a triable question for the jury).

CONCLUSION

¶33 For the foregoing reasons, we affirm the circuit court's decision to grant the motions to dismiss Fox, Lister, and Ronnie and Carol Thums. We also affirm the circuit court's decision granting summary judgment to Slate.

By the Court.—Judgment and orders affirmed.

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