

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2026

Samuel A. Christensen
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. 2025AP562
STATE OF WISCONSIN**

Cir. Ct. No. 2020CV108

**IN COURT OF APPEALS
DISTRICT III**

TERRY L. WATTERS,

PLAINTIFF-APPELLANT,

V.

DORRINE L. WATTERS AND KIMBERLY DILLENBURG,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County:
KATHERINE SLOMA, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Terry Watters appeals from a judgment for partition and judicial conveyance. On appeal, he argues that the circuit court erred

by denying his repeated requests for an access easement following the court's decision to partition the property. Watters also argues that the court was biased against him, in violation of his due process right to a fair and impartial judge. For the following reasons, we affirm.

BACKGROUND

¶2 Prior to 2020, Terry Watters, Dorrine Watters, and Kimberly Dillenburg jointly owned a 75-acre parcel of land in Shawano County, with Terry owning an undivided 50% interest and Dorrine and Kimberly jointly owning an undivided 50% interest.¹ In July 2020, Terry filed this partition action seeking a division of the parcel between himself and Dorrine. Terry attached to his complaint a map with his proposed division of the parcel. In addition, Terry demanded a perpetual easement for ingress and egress “via the current driveway, which is ... on [Dorrine’s] proposed portion.” For purposes of this appeal, it is sufficient to note that Terry’s proposed easement did not involve a logging road that ran eastward from a public road through Dorrine’s proposed land and continued into the eastside of Terry’s proposed land.

¶3 The circuit court held a bench trial on June 13, 2022. During the trial, Terry introduced an exhibit containing satellite images, photographs, and maps of the parcel that, in his words, “describes [his] idea of division of the

¹ Because two of the parties share a surname, we refer to the parties by their first names where appropriate. We refer to Dorrine Watters and Kimberly Dillenburg, collectively, as “Dorrine.”

property.”² The exhibit included the map depicting Terry’s proposed division that was attached to the complaint, and it also contained a second proposed division of the property, titled “Terry’s 2nd proposal.” (Formatting altered.) Terry testified that this second proposal would provide him road access north of an area called the “swamp hole.” The second proposal also depicted the logging road as running eastward from the public road through Dorrine’s proposed land and continuing into Terry’s proposed land. Terry’s proposed access north of the swamp hole did not involve the logging road, and the logging road was never mentioned at trial.

¶4 Following the trial, both parties submitted written closing arguments to the circuit court. In his submission, Terry again referenced his second proposal for the division of the parcel and discussed his requested road access north of the swamp hole. Terry’s written submission did not mention the logging road.

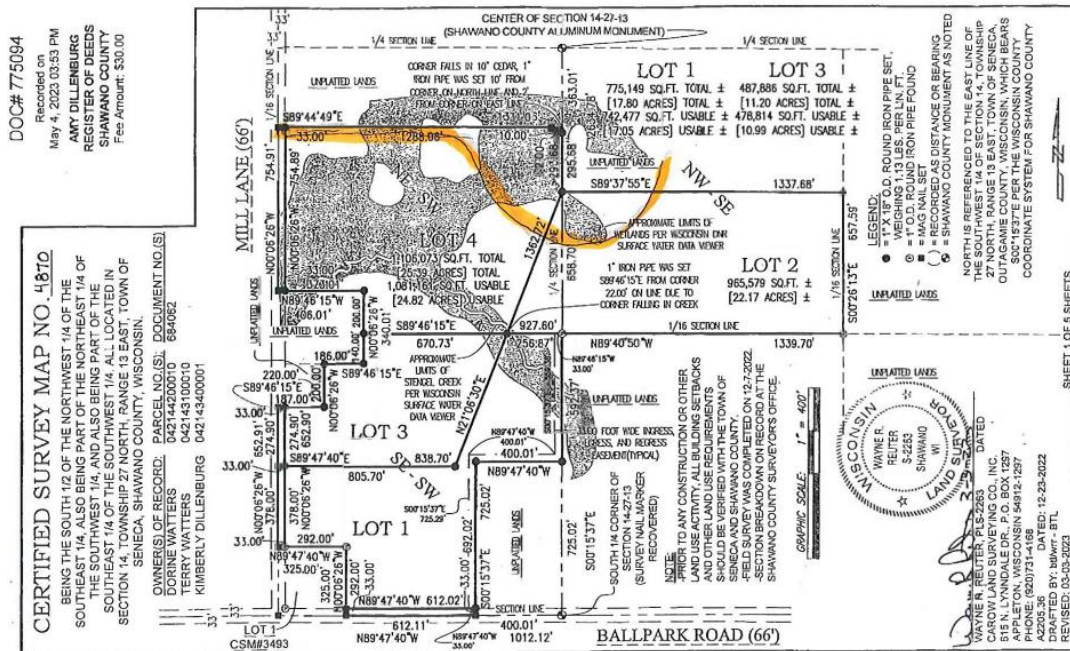
¶5 The circuit court issued a written decision granting Terry’s requested partition of the parcel “along those lines set forth in” Terry’s second proposal,³ stating that “additional surveys may be necessary to effectuate the exact boundary lines.” The court’s decision did not mention the logging road.

² The parties had an appraisal performed on the property in October 2020. Pursuant to a stipulation, the appraisal report was admitted at the bench trial without the need for authentication. The appraisal report stated that it was “subject to Extraordinary or Hypothetical Conditions,” which “may alter the final opinion of value.” In particular, the report noted that the “[c]onclusion of value assumes legal and vehicle permissible access to any land partitions that may result in the legal partition claim.”

Terry testified that he used the appraisal “to help” him create the exhibit.

³ In Dorrine’s written submission, she requested that the circuit court order judicial sale of the entire parcel, as opposed to partition.

¶16 Following the circuit court's decision, a certified survey map (CSM) of the property was completed and recorded by agreement of both parties. The CSM, depicted below, shows the logging road highlighted in yellow. The CSM contains an express easement that begins on Ball Park Road and runs along the eastern edge of Lot 1 to Lot 2.



Consistent with Terry's proposal, Lots 1 and 2 were partitioned to Terry, and Lots 3 and 4 were partitioned to Dorrine.⁴

¶17 Thereafter, Terry sent proposed quitclaim deeds to Dorrine. However, before the deeds could be executed, Terry contacted Dorrine, stating that the deeds "needed an express provision allowing [Terry] to use ... 'an existing right of way'"—i.e., the logging road. Dorrine refused to sign any deed

⁴ The road access north of the swamp hole that Terry sought in his second proposal was located off of Mill Lane and connected to Lot 1.

containing the logging road easement, and Terry refused to sign any deed without that easement.

¶8 Given this impasse, Terry filed two motions seeking a judgment to convey the partitioned parcels with the logging road easement. Terry asserted that “[t]here was an oversight by the surveyor in not delineating the [logging road] that has long been used to access what is now Lot 2 on the CSM.” According to Terry, “[w]ithout the necessary vehicular access [along the logging road], the [circuit court’s] entire decision becomes lopsided because [he] would have no vehicular[] access to Lot 2.” Terry further argued that because “vehicular access was assumed by the appraisal” (i.e., the “Extraordinary Assumption”), “which was central to the court’s decision, [Terry] must be granted the requested easement.”

¶9 In response, Dorrine argued, among other things, that Terry “waived or forfeited the right to his now desired easement by failing to present evidence of this easement at the hearing and by his acceptance of the CSM.” (Formatting altered.) Dorrine asserted that “[a]s the successful proponent who convinced the [circuit] court to adopt his partition lines, [Terry] is in a particularly poor position to now complain about the value of his partitioned lands.”

¶10 The circuit court denied Terry’s motions in an oral ruling on June 25, 2024, concluding, in pertinent part, that Terry had lost the right to assert an easement over the logging road by failing to raise the issue during the bench trial. The court explained that the property was partitioned the way that Terry “wanted the property divided. He got what he wanted.” Dorrine then filed a proposed order with attached quitclaim deeds. Terry objected to the proposed order, stating that he would not sign “any deeds without preserving his appellate rights.”

¶11 Terry then filed a motion for equitable contribution pursuant to WIS. STAT. § 842.14(4) (2023-24).⁵ The motion sought payment from Dorrine for Terry to remove trees and to construct a road and bridge to Lot 2. Terry also filed a motion for reconsideration of the circuit court’s June 25, 2024 decision.

¶12 The circuit court denied both motions in an oral ruling on January 9, 2025. As to the motion for reconsideration, the court reaffirmed its previous reasoning that Terry had failed to make a request at the bench trial for an easement over the logging road. As to the motion for equitable contribution, the court found that the value of the partitioned parcels was equal between the parties, and it denied Terry’s request for an evidentiary hearing on that issue. The court also ordered Terry to sign the quitclaim deeds without inclusion of the logging road easement.

¶13 The circuit court later entered written orders encompassing its June 25, 2024 and January 9, 2025 oral rulings. Terry again refused to sign the deeds without the logging road easement. In lieu of signed quitclaim deeds, the circuit court entered a “judgment for partition and judicial conveyance” on January 30, 2025. (Formatting altered.)

¶14 Terry appeals.⁶

⁵ All references to the Wisconsin Statutes are to the 2023-24 version.

⁶ Weeks after filing his notice of appeal from the circuit court’s January 30, 2025 judgment, Terry moved the circuit court for relief from the judgment, for a new trial, and for a stay of the judgment pending appeal. Terry also sought recusal or disqualification of the circuit court judge and demanded that the court void all adverse rulings made subsequent to the decision granting partition. The circuit court subsequently denied the disqualification motion and refused to void its previous orders.

(continued)

DISCUSSION

¶15 On appeal, Terry states that he is not challenging either the circuit court’s decision to partition the parcel rather than sell it, or the manner in which the property was divided. Rather, Terry challenges the court’s subsequent decisions denying his requests for him to be able to access Lot 2 via the logging road and for compensation under WIS. STAT. § 842.14(4).

I. Judicial bias claim

¶16 Terry first contends that the circuit court judge was biased against him, in violation of his due process right to a fair and impartial judge, and that this alleged bias “permeates every action by” the circuit court. We note that Terry’s recusal or disqualification motion is not before us. *See supra* note 6. In addition, Terry forfeited his judicial bias claim on matters preceding the entry of the final judgment by not raising this issue in the circuit court prior to filing his notice of appeal. *See State v. Klapps*, 2021 WI App 5, ¶28, 395 Wis. 2d 743, 954 N.W.2d 38 (2020) (recognizing that a claim of judicial bias is subject to the forfeiture rule).

¶17 Regardless, even if we were to exercise our discretion to review this claim, *see Estate of Miller v. Storey*, 2017 WI 99, ¶67, 378 Wis. 2d 358, 903

As this court stated in its June 26, 2025 order denying Dorrine’s motion to supplement the appellate record with the circuit court’s decision,

The notice of appeal ... brings before this court only matters that preceded the final judgment that is the subject of the appeal. Any subsequent proceedings are outside the scope of the present appeal. Moreover, our review is limited to considering whether the circuit court acted properly based upon the materials that were before it when it made the decision on appeal.

N.W.2d 759, we would reject it. Significantly, Terry appears to rely primarily on facts submitted with his recusal or disqualification motion to support his judicial bias claim, not facts that are properly before this court. Terry’s reliance on facts he asserts support his claims preceding the entry of the final judgment are based upon allegations that are entirely conclusory and undeveloped. For example, Terry simply argues that the circuit court judge “made repeated and obvious wrongful decisions in denying Terry vehicular access to one of his new parcels, even though vehicle access was required by stipulation.” Terry further contends, without specific reference to the record before us, that “many decisions below were based upon false arguments by [Dorrine] and the trial court simply accepted them without considering reality and the actual law independently.”

¶18 However, Terry fails to buttress his judicial bias claim with material and reviewable facts showing objective bias instead of mere disagreement with the court’s decisions. See *Miller v. Carroll*, 2020 WI 56, ¶16, 392 Wis. 2d 49, 944 N.W.2d 542 (“We presume that a judge has acted fairly, impartially, and without bias.”); see also *Liteky v. United States*, 510 U.S. 540, 555 (1994) (“[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.”). Accordingly, we deem Terry’s judicial bias claim to be undeveloped, and we reject the claim on that basis. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

II. Logging road easement and motion for contribution

¶19 Terry next argues that the circuit court erred by concluding that he lost the right to assert an easement over the logging road, or for contribution, by failing to raise the issues at the bench trial. We conclude that, following the partition trial, Terry was judicially estopped from moving the court for an

easement over the logging road or from obtaining contribution to remove trees and to construct a new road and bridge.⁷

¶20 “Judicial estoppel precludes a party from asserting one position in a legal proceeding and then subsequently asserting an inconsistent position.” **Mrozek v. Intra Fin. Corp.**, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54. “Judicial estoppel may be invoked where ‘(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position.’” **Id.** (citation omitted). “Because judicial estoppel is meant to prevent ‘cold manipulation and not unthinking or confused blunder, it has never been applied where plaintiff’s assertions were based on fraud, inadvertence, or mistake.’” **Clarke v. WEC**, 2023 WI 79, ¶49, 410 Wis. 2d 1, 998 N.W.2d 370 (citation omitted).

¶21 The three elements of judicial estoppel are easily satisfied here.⁸ Terry’s motions seeking a judgment to convey the partitioned parcels with the

⁷ Terry argues that Dorrine failed to raise a judicial estoppel argument in the circuit court, and, therefore, we cannot review the merits of this issue. We disagree. Dorrine, while phrasing her argument as one of waiver and forfeiture, responded to Terry’s motions by arguing that the circuit court had granted Terry’s proposed partition that did not discuss access via the logging road and that Terry approved the CSM. As we will explain, it is clear from the record that the circuit court essentially and impliedly applied judicial estoppel to Terry’s motions, consistent with Dorrine’s objection to the motions. Independently, “it is well-established law in Wisconsin that an appellate court may sustain a lower court’s ruling ‘on a theory or on reasoning not presented to the lower court.’” **Blum v. 1st Auto & Cas. Ins.**, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 (citation omitted). Importantly, “[w]e independently determine whether the elements of judicial estoppel are satisfied. If the elements are satisfied, the decision to estop a party is a discretionary decision for the first court addressing the matter,” which may be an appellate court. See **State v. Harrison**, 2020 WI 35, ¶21, 391 Wis. 2d 161, 942 N.W.2d 310; **Clarke v. WEC**, 2023 WI 79, ¶49, 410 Wis. 2d 1, 998 N.W.2d 370 (applying a judicial estoppel analysis despite the issue not being addressed in the circuit court); **State v. Petty**, 201 Wis. 2d 337, 346-47, 548 N.W.2d 817 (1996) (same).

logging road easement were filed after the partition bench trial, after the circuit court granted Terry’s requested partition of the parcel “along those lines set forth in” his second proposal, and after he agreed to the recording of the CSM. At no point prior to these events did either party raise the prospect of Terry having an easement over the logging road. In fact, both of Terry’s proposals—the first filed with his complaint, and the second introduced at trial and discussed in his written submission after trial—requested access to his properties along routes that did not involve the logging road, and the CSM granted him an easement far from the logging road. In addition, on direct examination at trial, Terry was asked whether he wanted to have road access. Terry testified that the second proposal would provide him road access north of the swamp hole and that, if not, “you can always build a new road. That’s not a big deal.”

¶22 As the circuit court stated in its June 25, 2024 ruling, in reference to Terry’s second proposal, “This is the way that [Terry] wanted the property divided. He got what he wanted.” The court further referenced Terry’s written submission following trial,

wherein he specifically footnoted that his intended use of the woods^[9] was for a donation to a forestry program at the school. Given the anticipated use, the Court was not concerned about school[-]aged children driving regularly on to the property. Based upon the testimony and the

⁸ We note that Terry does not contend that judicial estoppel cannot be applied in a single proceeding. See *Feerick v. Matrix Moving Sys., Inc.*, 2007 WI App 143, ¶23 n.4, 302 Wis. 2d 464, 736 N.W.2d 172. Given Terry’s lack of argument on this point, and the fact that Terry asserted two inconsistent positions—one before the partition trial and one after—based on the same facts, we conclude that the second element is satisfied under the facts of this case, and we limit our analysis to the first and third elements.

⁹ The “woods” are on Lot 2 of Terry’s partitioned property.

footnoted information in [Terry’s] closing argument, [Terry] was not concerned about it either.

The court further stated that it was not until Terry decided that he wanted to use the logging road as an easement that he declined to sign the quitclaim deeds. In other words, Terry had ample opportunity to raise the issue of road access to his proposed partitioned property via the logging road, but he not only failed to do so, he proposed road access by means other than the logging road. Terry’s request for an easement via the logging road was clearly inconsistent with his trial position that he convinced the court to adopt.

¶23 Furthermore, Terry does not argue that his assertions in the first or second proposal were based on fraud, inadvertence, or mistake. See *id.* Terry states on appeal that he requested the easement “along a 54-year-old logging road that was always used by the Watters family for vehicular access.” Therefore, Terry undoubtedly knew of the logging road prior to his filing of the partition action and knew that, under his own partition plans, the logging road would lie within the lands he wanted to be partitioned and conveyed to Dorrine. With this knowledge in mind, Terry made his partition proposals with road access to his property at different locations that did not include the logging road. Accordingly, as Dorrine argues, the circuit court “concluded, correctly, that after first obtaining a favorable ruling [Terry] was ... trying to gain something additional he never asked for.” See *Mrozek*, 281 Wis. 2d 448, ¶22 (stating that judicial estoppel is intended to protect against a litigant playing “fast and loose with the courts” by asserting inconsistent positions (citation omitted)).

¶24 Terry contends that he could not be judicially estopped from requesting an easement over the logging road after the circuit court’s partition decision because the court “clearly admitted” that “nobody could have known at

trial ... or before the ... decision whether any vehicular access easements would be needed by anyone.”¹⁰ We agree, however, with Dorrine that

[w]hat the court said was not some “admission” that [Terry] had no reason to request logging road access at the hearing. The trial court simply stated the obvious—that while no one could know in advance *how [the court] would decide*, [Terry] quite clearly knew *what he wanted*. He wanted and asked for a certain set of partitioned lands and put in evidence for vehicle access at the swamp hole. That was his entire case at trial. What the [court] told him is that if he wanted access via the logging road he should have asked for it at the hearing—at the same time he was asking for his partition.

¶25 Further, Terry argues that judicial estoppel does not apply to his motions for an easement over the logging road or contribution because the first clause of WIS. STAT. § 842.14(4) “presupposes more litigation and evidence after a partition decision.”¹¹ (Formatting altered.) According to Terry, § 842.14(4)

¹⁰ Terry refers to the following portion of the circuit court’s June 25, 2024 oral ruling when discussing the court’s alleged admission:

You’re right; you didn’t know what I was going to decide. I didn’t know what I was going to decide until I listened to everything. And afterwards, I studied everything, reviewed all the documents, reviewed ... the partition statute, and wrote a decision. But absolutely you should have been prepared to present what you wanted me to rule, what your proposal was. You didn’t know what I was going to do, but all of the information should have been presented. Never was there a request for vehicular access to all parts.

¹¹ WISCONSIN STAT. § 842.14(4) states:

(continued)

“exists so that any inequities created by the past partition decision, such as the lack of required vehicular access, may be rebalanced.” Terry asserts that *O’Connell v. O’Connell*, 2005 WI App 51, 279 Wis. 2d 406, 694 N.W.2d 429, supports his interpretation of § 842.14(4) as applied to this case.

¶26 In *O’Connell*, Gerald and Emmett O’Connell owned land as co-tenants in common. *O’Connell*, 279 Wis. 2d 406, ¶4. Gerald claimed that during their co-tenancy, he made substantial improvements to the property at his expense. *Id.* In 1994, Gerald and Emmett signed a warranty deed conveying a one-half interest in the property to Gerald and a one-quarter interest to each of Emmett’s two sons. *Id.* Five years later, the sons filed a complaint requesting an accounting from Gerald for profits derived from cutting trees on the property and a temporary injunction. *Id.*, ¶5. Gerald counterclaimed, seeking partition and reimbursement for unfairly borne expenses. *Id.*

¶27 Ultimately, the property was partitioned by stipulation and subsequently sold. *Id.* Pursuant to an earlier circuit court order, Gerald then filed an affidavit for reimbursement of disproportionately borne expenses. *Id.* The court denied Gerald reimbursement for any expenses or improvements undertaken

If partition is adjudged, and if it appears that it cannot be made equal between the parties without prejudice to the rights or interests of some of them, the court may provide in its judgment that compensation be made by one party to the other for equality of partition, according to the equity of the case; and where any party has with the knowledge or assent of the others or any of them, made improvements upon lands partitioned, the portion of such lands upon which such improvements have been made may be allotted to such party without computing in their value the value of such improvements.

before the 1994 warranty deed, concluding that Gerald “should have pursued the issue before rather than ‘raising it now.’” *Id.*, ¶¶5, 18.

¶28 On appeal, this court held, among other things, that Gerald could not have pursued equitable reimbursement before the partition action because “[t]here is no question of inequity in a partition action until after a judgment of division or an order to sell the property and divide the proceeds.” *Id.*, ¶18. Focusing on this particular quote from *O’Connell*, Terry argues, “That’s exactly our point: Inequities arising from a partition decision cannot be known until after the decision. An unknown inequity cannot be waived.”

¶29 We again agree with Dorrine and reject Terry’s argument with respect to WIS. STAT. § 842.14(4). Terry fails to explain how an easement that he did not request in his own partition proposal—a proposal which he attested was equitable—warrants “compensation” under the statute, particularly where Terry asked for and received road access at a different location than the logging road. Moreover, *O’Connell* is distinguishable from the case at hand because, unlike in that case where the property owner filed a counterclaim in the partition action for reimbursement for unfairly borne expenses, Terry did not seek access to the logging road or contribution until after partition was ordered. Instead, Terry asked for and received completely different road access. Accordingly, Terry was estopped from seeking an easement over the logging road or contribution to remove trees and to construct a new road and bridge.

¶30 Finally, Terry contends that “[a]ll of this ‘waiver’ nonsense is uprooted by the ancient, common-sense ripeness doctrine.”¹² Terry fails to explain the relevance of the ripeness doctrine, which generally goes to a court’s jurisdiction to hear a case, see *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶32, 309 Wis. 2d 365, 749 N.W.2d 211, to this partition action. Accordingly, we do not address ripeness further. See *Pettit*, 171 Wis. 2d at 646. To the extent that Terry is attempting to argue that his easement claim was not ripe prior to the circuit court’s partition decision, we have already rejected that argument.

¶31 Given the foregoing, we conclude that Terry was judicially estopped from moving the circuit court for an easement over the logging road following the partition trial—or for contribution to remove trees and to build a new road and bridge. Accordingly, we do not reach the merits of his arguments regarding the desired easement or contribution.¹³

¹² In his reply brief, and for the first time on appeal, Terry makes references to an implied easement argument made in the circuit court. To the extent Terry means to raise a new argument with respect to an implied easement, we consider this issue abandoned and will not address it further. See *A.O. Smith Corp. v. Allstate Ins.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998) (“[W]hen a party fails to argue an issue in its main appeal brief, the appellate court may treat the issue as having been abandoned, even though the issue was presented to the trial court.”).

¹³ We pause to note that Terry’s brief-in-chief fails to comply with two provisions of our Rules of Appellate Procedure. First, Terry’s brief fails to include proper record citations at several points, either by failing to include a record citation at all or by citing his appendix without an accompanying record citation. See WIS. STAT. RULE 809.19(1)(d)-(e); *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Second, Terry cites to an unpublished opinion issued before July 1, 2009, in violation of WIS. STAT. RULE 809.23(3). We admonish Terry’s counsel that future violations of the Rules of Appellate Procedure may result in sanctions. See WIS. STAT. RULE 809.83(2).

(continued)

By the Court.—Judgment affirmed.¹⁴

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

In addition, we admonish Terry’s counsel for the sarcastic and disparaging tenor of his briefing, both toward opposing counsel and the circuit court. For example, after providing his statement of the case, counsel wrote, “The above facts show what apparently happens when a judge uses cognitive dissonance to maintain a glaring post-partition inequity, rather than fulfilling her [WIS. STAT. §] 842.14(4) duty and opportunity to cure a glaring inequity.” Terry’s counsel further commented that the “court’s post-trial decisions were all tainted by her blind acceptance of defense counsel’s false and relentless waiver arguments.”

We remind counsel that SCR 62.02 requires judges and lawyers to maintain a cordial and respectful demeanor; to be civil in their dealings with one another; to abstain from making disparaging, demeaning, or sarcastic remarks or comments about one another; and to abstain from any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive. See SCR 62.02(1)(a)-(d). We caution counsel that appellate briefing that disparages opposing counsel or the circuit court does not constitute effective advocacy.

¹⁴ Prior to the case being submitted to this court for consideration and a determination on the briefs, Dorrine filed a motion to strike portions of Terry’s reply brief or permit the filing of a sur-reply brief. We held Dorrine’s motion in abeyance until after we had screened the case. Given our conclusion in this case in favor of Dorrine, we deny her motion to strike and her motion to file a sur-reply brief.

Separately, Terry filed a motion to consolidate this appeal with Appeal No. 2025AP1993. We dismissed Appeal No. 2025AP1993 on October 8, 2025, for lack of jurisdiction, and we therefore deny Terry’s motion to consolidate filed in this case as moot.

