

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-3032

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

KATHY DELAMATER AND ROLAND DELAMATER,

**PLAINTIFFS-APPELLANTS-CROSS-
RESPONDENTS,**

v.

SEARCH BEYOND ADVENTURES, INC.,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

v.

ELDER CARE OF DANE COUNTY,

**THIRD-PARTY DEFENDANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from an order of the circuit court
for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 DYKMAN, P.J. Kathy and Roland Delamater appeal from the part of an order dismissing their claims for breach of contract against Search Beyond Adventures, Inc. (Search Beyond), after Search Beyond successfully moved for summary judgment. The Delamaters argue that whether a tour guide provided by Search Beyond was “experienced” as the contract promised, presented an issue of disputed material fact. Search Beyond cross-appeals, arguing that the Delamaters’ claims were properly dismissed on additional grounds and that the trial court erred in dismissing Search Beyond’s third-party claim. We conclude that there is no issue of disputed material fact as to the terms of the contract. Therefore, we do not reach the cross-appeal, and we affirm.

I. Background

¶2 Kathy Delamater is physically disabled and uses a wheelchair. Her husband, Roland, also has physical limitations. Search Beyond is a company that provides travel and tour services for people with disabilities. Search Beyond hires tour guides to lead trips for individuals such as the Delamaters and to assist them with their needs during the trip. In the fall of 1995, Elder Care of Dane County (Elder Care) contacted Search Beyond on behalf of the Delamaters, and Search Beyond arranged a driving tour to Missouri for them. One of Search Beyond’s tour guides, Michelle Norris, accompanied the Delamaters on their trip.

¶3 With the help of Roland or some other assistant, Kathy would usually move from her wheelchair to a bed by the use of a device called a Hoyer lift. During the trip, one of the hotels at which Norris and the Delamaters stayed contained a pedestal bed that made use of the lift difficult. Norris and Roland

worked together to operate the lift and move Kathy into the bed, but the lift slipped, and Kathy fell. She broke multiple bones in her legs as a result of the fall.

¶4 The Delamaters sued Search Beyond, alleging breach of contract and misrepresentation and requesting damages for Kathy's injuries and medical expenses and for Roland's loss of society and companionship. Search Beyond filed a third-party complaint against Elder Care, alleging breach of contract and negligence. Search Beyond moved for summary judgment, and the Delamaters filed a second amended complaint that included a claim against Search Beyond for a breach of its good faith obligation under the contract.¹ About two months later, the circuit court granted Search Beyond's motion and ordered all of the Delamaters' claims dismissed. In its order, the circuit court also dismissed Search Beyond's third-party claim against Elder Care as moot.² The Delamaters appeal the circuit court's order only as to the breach of contract claims. Search Beyond cross-appeals.

II. Analysis

¶5 As a preliminary matter, we address Search Beyond's argument that Roland's appeal should be dismissed because he failed to file a statement on transcript and comply with other requirements of the Rules of Appellate Procedure

¹ The Delamaters had already amended their complaint once, about two weeks after Search Beyond filed its third-party complaint.

² The circuit court's order, dated September 24, 1999, dismissed both the Delamaters' and Search Beyond's claims. The court subsequently entered an order for judgment dated November 10 and an additional order for judgment and judgment dated November 12. Because the September 24 order meets all finality requirements under WIS. STAT. ch. 808 and the relevant case law, we consider both the Delamaters' appeal and Search Beyond's cross-appeal to be taken from the September 24 order. This decision does not otherwise affect the merits or outcome of the case.

in WIS. STAT. ch. 809. During the course of this action, Roland retained separate counsel, but the Delamaters continued to file most documents jointly. They also filed a notice of appeal jointly. Both the Delamaters' names appear on the docketing statement as appellants, although it was signed only by Kathy's attorney. The statement on transcript is also signed only by Kathy's attorney. The covers of the appellants' (or rather, the *appellant's*, as the case may be) briefs refer only to Kathy and her counsel. Search Beyond therefore argues that Roland has not complied with WIS. STAT. RULE 809.19 (1997-98)³ by failing to file either joint briefs or briefs separate from Kathy's.⁴

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. RULE 809.19 provides in relevant part:

(1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal.

....

(4) REPLY BRIEF. The appellant shall file within 15 days of the service of the respondent's brief a reply brief or statement that a reply brief will not be filed.

(5) CONSOLIDATED AND JOINT APPEALS. Each appellant in consolidated appeals or a joint appeal and each co-appellant may file a separate brief or a joint brief with another appellant or co-appellant. A joint brief must not exceed the page allowance for a single appellant.

....

(9) BRIEF COVERS. Each brief or appendix shall have a front and back cover. The front cover shall contain the name of the court, the caption and number of the case, the court and judge appealed from, the title of the document and the name and address of counsel filing the document.

⁴ Search Beyond also argues that Roland failed to file a docketing statement and statement on transcript. We need not address these contentions separately because they deal with the same issue as Search Beyond's argument that Roland failed to file a brief.

¶6 Under WIS. STAT. RULE (2),⁵ we may dismiss an appeal where a party fails to comply with the Rules of Appellate Procedure. We agree with Search Beyond that Roland has failed to comply with some requirements of WIS. STAT. ch. 809. However, we are not required to dismiss his appeal under RULE 809.83(2). See *State v. Smythe*, 225 Wis. 2d 456, 468, 592 N.W.2d 628 (1999). Whether Kathy’s briefs are solely hers or shared by Roland is of no consequence because neither of the briefs contain argument in support of his claim for loss of society and companionship. This was his only basis for damages in excess of Kathy’s. Since he has not presented any argument on his claim, it is deemed abandoned. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998).

¶7 The Delamaters’ principal argument on appeal is that summary judgment was improper because Norris’s experience with physically disabled individuals was a disputed material fact. They point out that a contract between Elder Care and Search Beyond promised that Search Beyond would provide the Delamaters with an “experienced” tour guide.⁶

⁵ WISCONSIN STAT. RULE 809.83(2) reads:

NONCOMPLIANCE WITH RULES. Failure of a person to comply with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

⁶ Generally, a contract cannot be enforced by a person not a party to it, but there is an exception to this rule where a contract is specifically made for the benefit of a third party. See *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994). Because Elder Care contracted with Search Beyond specifically to benefit the Delamaters, we assume that the Delamaters are third-party beneficiaries of the agreement between Elder Care and Search Beyond.

¶8 “Summary judgment allows controversies to be settled without trial where there are no disputed material facts and only legal issues are presented.” *Poppy v. Muehlenberg*, 215 Wis. 2d 58, 61, 571 N.W.2d 914 (Ct. App. 1997). “Any reasonable doubt as to the existence of disputed material fact is resolved against the moving party.” *Gray v. Marinette County*, 200 Wis. 2d 426, 434, 546 N.W.2d 553 (Ct. App. 1996). We review a grant or denial of summary judgment de novo, using the same methodology as the circuit court. *See id.*

¶9 Using summary judgment methodology, we first examine the complaint to determine whether it states a claim, and then the answer to determine whether it presents a material issue of law or fact. *See Guenther v. City of Onalaska*, 223 Wis. 2d 206, 210, 588 N.W.2d 375 (Ct. App. 1998). The Delamaters’ second amended complaint states a cause of action for breach of contract. Search Beyond’s answer to the second amended complaint denies most of the allegations and asserts affirmative defenses. Therefore, the pleadings raise material issues of fact and law.

¶10 We next turn to the affidavits and other proof submitted by Search Beyond to determine whether it has made a prima facie case for summary judgment. *See Swatek v. County of Dane*, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995). In determining whether the affidavits and other proof of Search Beyond make out a prima facie case for summary judgment, we must consider the nature of the Delamaters’ claim. Their cause of action is for breach of contract, which requires that they prove Search Beyond violated a particular term of the contract. *See St. Francis Sav. & Loan Ass’n v. Hearthside Homes, Inc.*, 65 Wis. 2d 74, 78, 221 N.W.2d 840 (1974). The term at issue is the one providing that Search Beyond’s tour guides would be “experienced.” Norris’s affidavit states that she performed various job duties at Trade Winds Rehabilitation Center in Indiana

between 1985 and 1998. The employment application that Norris submitted to Search Beyond in 1994 corroborates her employment at Trade Winds. Norris's affidavit also states that between 1985 and 1988, she was responsible for assisting physically handicapped individuals on a daily basis, including between seven and nine people restricted to wheelchairs. Norris has conducted approximately thirty-eight tours with Search Beyond, and on many of these tours, she worked with physically handicapped individuals. We conclude that Search Beyond has made a prima facie case for summary judgment because it is clear from Search Beyond's proof that Norris was experienced in working with physically disabled persons.

¶11 We next examine the Delamaters' proof to determine whether it places the fact of Norris's experience in dispute. *See Swatek*, 192 Wis. 2d at 62. The only proof the Delamaters offered in support of their contention that Norris was not experienced with physically disabled persons was Roland's affidavit and Kathy's deposition testimony stating that, immediately after Kathy's fall, Norris told Kathy and Roland that she had never worked with physically disabled people or individuals in wheelchairs. We are not convinced that this puts the material fact of Norris's experience in dispute. While there may be a dispute about what Norris said after Kathy's fall, there is no dispute as to Norris's actual experience. Even if we assume that the Delamaters accurately recall Norris saying that she had not worked with physically disabled individuals, there is still no dispute as to the fact of Norris's actual qualifications.

¶12 The Delamaters next argue that the trial court erred in dismissing their claims because Search Beyond's agreement that it would provide an "experienced" tour guide meant that the tour guide would be familiar with the use of a Hoyer lift. We disagree. The construction of a written contract is a question of law. *See Leitzke v. Magazine Marketplace, Inc.*, 168 Wis. 2d 668, 673, 484

N.W.2d 364 (Ct. App. 1992). We conclude that, as a matter of law, the contract did not contain any terms providing that Norris would know how to use a Hoyer lift. The Delamaters refer to a variety of documents as containing contractual terms that support their argument. However, even if these documents are all part of the contract, a proposition we question, none of them contain any reference to a Hoyer lift or similar device.

¶13 The Delamaters next argue that Wisconsin common law reads a covenant of good faith and fair dealing into the performance of every contract, and that factual issues remain as to whether Search Beyond violated this covenant of good faith. An implied covenant of good faith is violated only where the conduct of a party to the contract is “arbitrary and unreasonable.” *Chase Lumber & Fuel Co. v. Chase*, 228 Wis. 2d 179, 194, 596 N.W.2d 840 (Ct. App. 1999). In *Foseid v. State Bank*, 197 Wis. 2d 772, 541 N.W.2d 203 (Ct. App. 1995), we cited the RESTATEMENT (SECOND) OF CONTRACTS in elaborating on the standard:

Subterfuges and evasions violate the obligation of good faith in performance A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Foseid, 197 Wis. 2d at 796-97 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981)). In contending that Search Beyond breached its good faith obligation, the Delamaters only repeat their other breach of contract arguments: the meaning of “experienced” and whether Norris was experienced. The Delamaters have not offered any proof that Search Beyond engaged in the sort of conduct that is a breach of good faith, nor did they allege any facts in their

complaint sufficient to state a claim that Search Beyond has breached this obligation. Therefore, we conclude that the Delamaters' breach of good faith claim cannot even survive the first step of summary judgment methodology. *See Guenther*, 223 Wis. 2d at 210.

¶14 Finally, in its cross-appeal, Search Beyond argues that any and all of the Delamaters' claims were barred by the applicable statute of limitations, that their claims were also barred by estoppel, waiver, and release; and that the trial court erred in dismissing Search Beyond's third-party claim against Elder Care. Because we have already concluded that the Delamaters' claims were properly dismissed on other grounds, we need not reach any of these issues.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

