COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1022 **Cir. Ct. No. 2014SC481**

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

ERIC WIMBERGER,

PLAINTIFF-APPELLANT,

V.

BROWN COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: D. T. EHLERS, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Eric Wimberger appeals an order granting Brown County's motion for summary judgment. Wimberger argues summary judgment was inappropriate because material facts were at issue in his breach-of-contract

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

claim and the circuit court's decision should not preclude him from proceeding on two of his claims. We disagree and affirm the order.

BACKGROUND

¶2 This case involves a dispute between Wimberger and Brown County over legal fees arising from Wimberger's court-appointed representation of a client. Wimberger accepted a ***Dean*** appointment in a 2011 case.[2] The client's 2011 case was dismissed on the morning of the scheduled trial, and the State refiled the same charges against the client under a 2012 case number the same day. Wimberger received $3,000 for providing legal services in the 2011 case.[3]

¶3 On August 28, 2012, Wimberger appeared on behalf of his client at a "BAIL/BOND HEARING."[4] During the hearing, the circuit court addressed Wimberger's request to be appointed as the client's counsel in the 2012 case at the County's expense. The court observed that the client had not made any payments towards Wimberger's legal fees in the 2011 case and questioned why it would appoint Wimberger again if the client does not have the ability to pay. The court

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[2] *See* ***State v. Dean***, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). Under ***Dean***, if a criminal defendant does not qualify for counsel through the state public defender, the circuit court has the inherent authority to appoint counsel at county expense. ***State v. Kennedy***, 2008 WI App 186, ¶10, 315 Wis. 2d 507, 762 N.W.2d 412.

[3] Wimberger does not challenge the payment he received for the 2011 case.

[4] The Honorable Donald R. Zuidmulder presided over the 2012 criminal case through the jury trial and the subsequent hearing on Wimberger's invoice. Wimberger filed an Application and Order for Specific Judicial Assignment, requesting a judge from outside the county preside over his small claims action. The Honorable D. T. Ehlers was assigned to Wimberger's small claims action.

Wimberger refers to the August 28, 2012 hearing as a "***Dean*** appointment hearing." The cover page to the transcript of the hearing identifies it as a bail/bond hearing.

ordered Wimberger to have the client evaluated for state public defender representation and, if the client did not qualify for public defender representation, to file a petition setting forth the client's assets.

¶4 The court explained:

> Well, you're in Branch I, and I ... require documentation, and ... I make hopefully a thoughtful, fair record of what I'm ... required to do. So I'm open to all of that. So if you can demonstrate all that or whatever you want to do, but I intend to find out whether or not he has assets that will permit me to appoint you, and if he has those assets, I am going to seize them or freeze them because I am not going to let the county be in a situation where they already have a $3,000 bill which they've paid which has not had one cent repaid on it and then run up another bill [where the client] has a constitutional right to an attorney. I'm not complaining about that, *but this is a complicated case as I see it, and if this case is tried, I assume your bill will be at least five to ten thousand dollars, ... Mr. Wimberger, and I don't begrudge you that because I used to do the same work you're doing. I'm all in favor of you getting paid, don't get me wrong, but on the other hand, I have a responsibility to the community to ... discharge these duties in a way that if somebody looks at what I'm doing here can say, yeah, well, that all makes sense.*

(Emphasis added.) The court emphasized it did not have any information at that time that would allow it to act "in a responsible way" regarding Wimberger's appointment request. The court scheduled another hearing for August 31, 2012, to "take up the bail and the appointment."

¶5 At some point, the circuit court appointed Wimberger to represent the client.[5] The 2012 case proceeded to a five-day jury trial, which culminated in

[5] Wimberger claims he was appointed on August 28, 2012. However, Wimberger does not provide a record citation to support that assertion, and, as discussed above, the transcript from the August 28, 2012 hearing reflects that he was not appointed during that hearing. *See supra* ¶¶3-4.

a not guilty verdict for the client on all counts. Wimberger later billed the County $13,853.48, which consisted of $11,683.00 in fees for 166.9 billable hours at a rate of $70 per hour, and $2,170.48 in costs. Following a hearing on Wimberger's invoice, the circuit court ordered the County to pay $2,800 in fees and $1,805.48 in costs—$9,248 less than Wimberger had billed—in strict adherence with the County's guidelines for ***Dean*** appointments.[6]

¶6 Wimberger filed a small claims action against the County for $9,248, alleging three causes of action: (1) breach of contract; (2) unjust enrichment; and (3) implied contract and quantum meruit. The County subsequently moved the circuit court for summary judgment on all claims. On June 23, 2014, the court issued a written decision, granting the County's motion. The court later entered an order on February 12, 2015, dismissing Wimberger's claims in their entirety with prejudice. Wimberger appeals.

DISCUSSION

¶7 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate when "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). "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving

[6] Wimberger did not provide a transcript of this hearing.

party." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294. "A 'material fact' is one that is 'of consequence to the merits of the litigation.'" ***Id.*** (quoting ***Michael R.B. v. State***, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993)).

¶8 In determining whether a factual dispute exists, we consider "whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. We draw all reasonable inferences from the evidence in favor of the nonmoving party." ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (citation omitted). "An inference is reasonable if it can fairly be drawn from the facts in evidence." ***Thiery v. Bye***, 228 Wis. 2d 231, 249, 597 N.W.2d 449 (Ct. App. 1999) (quoting ***State ex rel. N.A.C. v. W.T.D.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988)).

¶9 It is undisputed that Wimberger entered into a contract with Brown County, in which Wimberger agreed to provide legal services to the client and the County agreed to compensate him for those services pursuant to the terms of the agreement. The "Dean Appointments" agreement, which Wimberger signed, states in relevant part:

> I understand I will be compensated according to the attached schedule. I agree to abide by all its terms and conditions. NOTE: I will not exceed the guidelines unless I have prior permission by the appointing Court to do so. I agree not to submit for payment my work not so authorized.

The underlying criminal case fell within the category for class G felonies on the schedule that is attached to the agreement. According to the schedule, the maximum hours Wimberger could bill was 40 hours at a rate of $70 per hour. The

schedule specifies, "These are the MAXIMUM hours to be billed and are not cumulative .... ATTORNEYS CANNOT EXCEED THESE GUIDELINES WITHOUT PRIOR AUTHORIZATION OF THE COURT." The schedule further provides, "Attorneys may not retain investigators or experts nor incur other expenses WITHOUT PRIOR AUTHORIZATION OF THE COURT[,]" and "[a]ttorneys will not be reimbursed for travel time or mileage WITHOUT PRIOR AUTHORIZATION OF THE COURT."

¶10 The County argues there is no evidence Wimberger sought authorization to exceed the guidelines or that the circuit court authorized him to do so. Therefore, the County contends it was not obligated to pay Wimberger in excess of the guidelines and summary judgment dismissing his claims is appropriate. The County relies in part on an affidavit from the Honorable Donald R. Zuidmulder, in which Judge Zuidmulder averred: the Brown County Circuit Court has adopted a local rule setting forth guidelines for court-appointed attorneys in criminal matters; Wimberger agreed to the guidelines in connection with his representation of the client in the 2012 case; Wimberger did not apply for authorization to exceed the guidelines; and because Wimberger did not apply for authorization to exceed the guidelines, Judge Zuidmulder could not approve a bill exceeding the guidelines. Judge Zuidmulder further averred, "I did not order Brown County to pay fees or expenses in excess of those permitted by the guidelines."

¶11 Wimberger argues he was authorized to exceed the guidelines. He cites the circuit court's statements made during the August 28, 2012 bail/bond hearing as evidence he had prior authorization. *See supra* ¶4. However, Wimberger takes the court's statements out of context. During the August 28, 2012 hearing, the court was concerned about the client's unpaid legal bill in the

2011 case, and it did not want the County to unnecessarily incur more expense if the client could not afford to repay the attorney fees. The court made no mention of the guidelines and was not responding to a request from Wimberger for authorization to exceed the guidelines. Further, the court had not yet appointed Wimberger to the 2012 case when it made those statements, as stated it did not have enough information available at that time to act in a responsible way regarding the appointment request.

¶12 In any event, the circuit court did not expressly authorize Wimberger to exceed the guidelines during the August 28, 2012 hearing, and the court's August 28, 2012 statements do not lead to a reasonable inference that Wimberger was authorized to exceed the guidelines. Wimberger was required under the appointment agreement to obtain prior authorization from the circuit court to exceed the guidelines. Wimberger fails to offer any evidence to rebut the assertions in Judge Zuidmulder's affidavit so as to raise a genuine issue of material fact.

¶13 Wimberger also argues a "material fact at issue is the definition of authorization." In particular, he asserts the County failed to provide any evidence concerning what it means to be authorized, including "a description of a process for authorization that Honorable Donald Zuidmulder asserted in the affidavit, a description of how one is to properly apply for authorization, or a description of what binding words or document makes the fee deviation 'authorized.'" He also argues the definition of authorization "was not unambiguous and limited to signed court orders, but included any type of permissive statements from the [c]ircuit [c]ourt." (Formatting changed.) Accordingly, Wimberger claims that interpretation of the term "authorization" should have been left to the fact finder.

¶14 Wimberger, however, does not cite to, and we cannot find, any evidence in the record to show he sought authorization, in any sense of that word, from the circuit court to exceed the guidelines. Likewise, we are unable to locate any evidence in the record, either directly showing or supporting a reasonable inference, that the court authorized payment beyond the guidelines in the form of a permissive statement or in a written order. In other words, even assuming the term "authorization" includes permissive statements as Wimberger contends, the record does not show a genuine issue as to a material fact. The circuit court properly granted summary judgment on his breach-of-contract claim.

¶15 Finally, Wimberger argues the circuit court's decision was limited only to his contract claim and did not preclude him from proceeding on his "unjust enrichment and detrimental reliance" claims.[7] (Formatting changed.) We acknowledge the court did not separately address each of Wimberger's claims. However, Wimberger does not provide a developed argument as to why summary judgment on his remaining two claims was otherwise improper. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review inadequately briefed arguments).

¶16 Additionally, the County responds that the circuit court properly concluded it was entitled to dismissal of Wimberger's complaint as a matter of law, including his claims for unjust enrichment and implied contract. Specifically, as to Wimberger's claim for unjust enrichment, the County, relying on

[7] Wimberger asserted three causes of action in his complaint: (1) breach of contract; (2) unjust enrichment; and (3) implied contract and quantum meruit. Although Wimberger argues the circuit court did not address his "unjust enrichment and detrimental reliance" claims, we understand him to be referring to the other two causes of action in his original complaint—unjust enrichment and implied contract/quantum meruit.

Continental Casualty Co. v. Wisconsin Patients Compensation Fund, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991), contends "[t]he doctrine of unjust enrichment does not apply where the parties have entered into a cont[r]act." According to the County, it is undisputed that a valid, enforceable contract existed between the parties; therefore, it was entitled to dismissal of that claim as a matter of law.

¶17 As to Wimberger's implied contract claim, the County argues summary judgment dismissing that claim was proper because

> [t]here are no indications that the parties, either in writing or verbally, entered into any other agreements with respect to Wimberger's representation. There is no evidence that the agreement was amended. By all indications, the parties did exactly what the agreement called for. Wimberger represented the criminal defendant, and the County compensated him pursuant to the guidelines. There is simply no evidence of any additional agreements, or that Wimberger provided other services than what was called for in the agreement. Under those circumstances, the [circuit c]ourt acted properly when it dismissed the implied contract claim. *See* ***Stack Construction Co. v. Chenenoff***, 28 Wis. 2d 282, 137 N.W.2d 66 (1965).

¶18 Wimberger failed to file a reply brief and respond to the County's arguments. We therefore deem them conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).[8] It is evident Wimberger provided substantial and successful services. However, his failure to obtain advanced approval for his services and expenses, and his failure to properly

[8] Both parties include a copy of Wimberger's invoice and a copy of Wimberger's WIS. STAT. "§ 893 CLAIM FOR DAMAGES" in their appendix. These documents are not part of the record on appeal. We remind the parties that the appendix may not be used to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

advance his claims on appeal prevent his compensation for the fees and expenses over and above those for which he contracted.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.