COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2173 **Cir. Ct. No. 2014CV1205**

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

LENA SARA HEISTAD,

PLAINTIFF-APPELLANT,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

JAMES OLSON AND DEAN OLSON,

DEFENDANTS.

APPEAL from orders of the circuit court for Outagamie County: JAMES A. DES JARDINS, Judge. *Affirmed.*

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

¶1 PER CURIAM. This appeal involves an order denying leave to file a third amended complaint, and the denial of a motion for reconsideration of that decision. We affirm.

BACKGROUND

¶2 On December 4, 2014, Lena Heistad commenced a civil negligence action against Dean Olson and "State Farm Insurance." The complaint alleged, "On or about November 29, 2014 … the plaintiff was involved in a motor vehicle accident with James D. Olson, defendant, Dean Olson's minor son." The complaint further alleged that Heistad suffered injuries as a result of James Olson's negligence. The defendants jointly filed an answer, affirmative defenses, and a motion to dismiss, together with an affidavit from James Olson. The affidavit averred that the accident occurred on November 29, 2011, and that James Olson was an adult at the time of the accident.[1]

¶3 The motion to dismiss the complaint was based on several grounds: (1) the complaint was filed more than three years after the date of the accident and, therefore, the negligence claim was barred by the applicable statute of limitations; (2) Dean Olson could not be held vicariously liable for the negligence of his adult son; and (3) there was no proper entity named "State Farm Insurance." Prior to the hearing on the motion to dismiss, Heistad filed an amended complaint, again alleging the accident occurred on November 29, 2014. The amended complaint again named Dean Olson as a defendant, and also named James Olson as an

[1] Heistad filed a letter brief to the circuit court in opposition to the motion to dismiss, contending "the accident that caused the plaintiff's injuries occurred on November 29, 2011; the lawsuit was filed on December 4, 2011."

additional defendant. The amended complaint also named State Farm Mutual Automobile Insurance Company (hereafter, State Farm) as a defendant.

¶4 During its oral decision on the motion to dismiss the initial complaint, the circuit court noted that Heistad argued the statute of limitations had been extended by a property loss payment. The court stated, "I believe that [] is the case law in the Case of [***Abraham v. Milwaukee Mutual Insurance Co.***, 115 Wis. 2d 678, 341 N.W.2d 414 (Ct. App. 1983)]." The court stated, "In this case the claim is that the statute of limitations was extended when State Farm made a property loss payment on December 7, 2011."[2] The court agreed with Heistad that "the statute of limitations was, in fact, extended by the payment that State Farm made." The court also found the amended complaint "correct[ed]" the denomination of State Farm as a proper party, which the court viewed as a technical defect that did not prejudice State Farm. In addition, the court dismissed with prejudice Dean Olson because "he can't be liable for an adult." The court then inquired of the defendants' attorney, "So an Amended Complaint was filed. Apparently, you didn't know about that?" The defendants' attorney responded, "I didn't."

¶5 Subsequently, State Farm moved to dismiss the claims alleged in the amended complaint on the basis that Heistad failed to plead sufficient facts, as opposed to bare legal conclusions, showing her entitlement to relief. State Farm also sought "compliance" with the circuit court's prior order dismissing Dean Olson with prejudice. Moreover, State Farm sought an order dismissing with

[2] The defendants had alleged in a reply brief in support of the motion to dismiss that Heistad's "letter alleges, but fails to support by affidavit, that State Farm made a payment to the Plaintiff on December 7, 2011."

prejudice James Olson "due to James Olson being added as a party after the running of the Statute of Limitations and the Plaintiff failing to achieve personal service of the Amended Complaint on him." Heistad filed a brief in opposition to the motion to dismiss the amended complaint, disputing its alleged factual insufficiency, but Heistad failed to present any argument regarding Dean Olson or James Olson.

¶6 Five business days prior to the hearing on State Farm's motion to dismiss the amended complaint, Heistad filed a motion seeking leave to file a second amended complaint. The motion contended that allowing a second amended complaint "would not add parties or causes of action, but instead, merely correct any legal deficiencies in the current Complaint and Amended Complaint." The proposed second amended complaint continued to name Dean Olson as a defendant, together with James Olson and State Farm.

¶7 On May 3, 2016, the circuit court heard State Farm's motion to dismiss the amended complaint. In its oral ruling, the circuit court found Heistad "did not present any justification for naming [Dean Olson] again in the Amended Complaint. And the Amended Complaint does not state a claim against Dean Olson. And Dean Olson should be dismissed again." The court also noted Heistad did not dispute that she failed to serve James Olson with the amended summons and complaint. The court found that James was not added as a party until May 5, 2015, which was long after the statute of limitations had expired on December 7, 2014. Accordingly, the court concluded it lacked personal jurisdiction over him. In addition, the court found there was no mistake as to whom the proper party was, as would justify application of the relation-back doctrine to James. Finally, the court found Heistad failed to set forth a sufficient factual basis for her negligence claim, and instead simply stated a legal

conclusion. Therefore, the court granted the motion to dismiss the amended complaint in its entirety.

¶8 At that point in the proceedings, Heistad insisted, "I have a pending motion then to amend the Complaint." The defendants' attorney indicated, "I don't think I [have it] yet." The court inquired whether the defendants' attorney desired time to respond to the motion seeking leave to file a second amended complaint, and the defendants' attorney indicated he "would like to take a look at it and submit something in writing …." The court then set a briefing schedule.

¶9 Heistad subsequently filed a motion for reconsideration of the circuit court's decision dismissing the amended complaint. The defendants' attorney filed a brief opposing leave to file a second amended complaint, and also opposing reconsideration of the decision dismissing the amended complaint. The court heard both issues on June 23, 2016. The court found that Heistad "did not move to amend in a timely fashion when she waited until a week before the [May 3] hearing." The court also reiterated that Heistad failed to add James as a party before the statute of limitations expired. Heistad's attorney then stated:

> For what it's worth, Your Honor, I am not really seeking to bring back either of the parties in my Amended Complaint attached. I -- by putting them in the caption, it was not an intent to bring them back in. I know the father isn't in at all because the driver was an adult. And I understand that the child has not been timely served. So the party that I am asserting the case should continue against is State Farm.

The court stated, "Well, at this point in time I'm satisfied that I have to rule against the Plaintiff." However, the court also stated that if Heistad "wants to file another motion, I will allow that and then [I] would render probably a written decision on the order." The court then set another briefing schedule.

¶10 On July 7, 2016, Heistad submitted correspondence to the circuit court "enclosing a proposed Third Amended Complaint in this matter" and requesting the court allow for its filing, but Heistad did not file a notice of motion or motion for leave to amend. Heistad also requested that the court "[p]lease consider this letter as the additional briefing you requested after the last hearing."

¶11 On July 12, 2016, the circuit court filed a written order incorporating its May 3, 2016 oral decision dismissing the amended complaint in its entirety. The court also filed a second written order on July 12, 2016, which memorialized its June 23, 2016 oral decision. This written order stated that Heistad's motion for leave to file her second amended complaint "was not timely filed." The order further stated "the court did not make a final ruling either granting or denying the Plaintiff's Motion for Leave to File Her Second Amended Complaint," and that "the Court did not make a final ruling either granting or denying the Plaintiff's Motion for Reconsideration." The written order further stated, "Plaintiff has elected to withdraw her Second Amended complaint, and concedes that Dean Olson and James Olson should not be named in the case."

¶12 On August 12, 2016, the circuit court issued a written decision and order denying Heistad's request to file a third amended complaint. The court noted that in its June 23, 2016 oral ruling, it had denied Heistad's motion for reconsideration of the decision dismissing the amended complaint, and it had also found Heistad's motion for leave to file the second amended complaint was not timely. The court further noted that Heistad had requested the opportunity to present further argument and to file a third amended complaint, and the court had granted Heistad that opportunity to present additional arguments as to why she should be able to amend her complaint at this stage of the proceedings. The court stated it had denied her motion for leave to file a third amended complaint because

Heistad did not present any argument as to why her amendments were timely, and her arguments on the merits were unconvincing and repetitive. The court stated:

> Given that the Court's ruling against Heistad's Second Amended Complaint was based on a finding that the amendment was not timely, the Court expected Heistad to present arguments on timeliness in support of her Proposed Third Amended Complaint. Heistad, however, simply restates the arguments she made in her Motion for Reconsideration of State Farm's Second Motion to Dismiss. These arguments focus on the lack of prejudice to State Farm, but Heistad also needed to provide some justification for failing to amend the problematic complaint before facing impending dismissal of her suit.

¶13 Heistad then filed a document entitled, "Motion to Reconsider," seeking reconsideration of the August 12, 2016 order, but she again failed to file a notice of motion, and the document also failed to contain any citation to legal authority. On September 20, 2016, the circuit court issued a written decision and order, in which it stated in part:

> Heistad makes two arguments on reconsideration to support her Motion for Leave to File the Third Amended Complaint: (1) the Court erred in finding her motion untimely when State Farm caused greater delay to the litigation by waiting over six months to file its Motions to Dismiss after the Complaint and Amended Complaint were filed and (2) Heistad did not realize the need for amending her Amended Complaint until additional research could be done. Both of these arguments could have and should have been raised in support[] of Heistad's motion when it was made on April 26, 2016, and when the Court granted Heistad the opportunity to present additional arguments after the May 3, 2016 hearing. As a result they cannot be relied upon to support a motion for reconsideration. *See* [***Rothwell Cotton Co. v. Rosenthal & Co.***, 827 F.2d 246, 251 (7th Cir. 1987)].

¶14 The circuit court's September 20, 2016 order also noted that it "did not deny Heistad's motion based on overall delay," but rather it denied the motion

"as untimely considering the stage of the litigation at the moment it was filed." It emphasized that Heistad did not present the court with a legally sufficient complaint until after the court had dismissed the case in its entirety. The court concluded:

> For that reason, the Court declined to exercise its discretion to allow amendment when no cause for the untimeliness of Heistad's Third Amended Complaint was provided. Although this result is harsh, Heistad had many opportunities to realize the deficiencies in her Complaint and to correct those deficiencies. She did not act in a timely manner, and she did not provide this Court with sufficient justification to overcome the need for finality once State Farm's Motion to Dismiss had been granted.

DISCUSSION

¶15 Heistad purports to appeal from "an oral ruling made on the record in open Court on June 23, 2016, and from orders which were entered by the Honorable John A. Des Jardins on August 12, 2016 and September 20, 2016." However, this court's order of January 30, 2017, limited Heistad's appeal to issues decided by the circuit court's August 12, 2016 and September 20, 2016 orders. As our January 30 order noted, the transcript of the June 23, 2016 oral ruling does not constitute a written judgment or order that has been entered such that an appeal can be taken from that decision. Moreover, and more importantly, the July 12, 2016 written order dismissing the amended complaint in its entirety was not timely appealed. Accordingly, this court lacks jurisdiction to review the dismissal of the action in its entirety, pursuant to the circuit court's July 12 order. The August 12, 2016 circuit court order denied Heistad's request to file a third amended complaint, and the September 20, 2016 order denied reconsideration of the denial

of leave to file a third amended complaint. Accordingly, we shall limit our discussion to the August 12 and September 20 orders.[3]

¶16 We first turn to whether the circuit court erroneously exercised its discretion by denying leave to file a third amended complaint.[4] A party may amend its pleading once as a matter of course any time within six months after the summons and complaint are filed or within the time set in a scheduling order. *See* WIS. STAT. § 802.09(1) (2015-16).[5] Otherwise, a party may amend the pleadings only by leave of court or by written consent of the adverse party. ***Id.*** Although the statute provides that leave shall be freely given at any stage of the action when justice so requires, this rule does not apply after dismissal of the action because of the countervailing interest in the need for finality. *See* ***Mach v. Allison***, 2003 WI App 11, ¶¶23-27, 259 Wis. 2d 686, 656 N.W.2d 766 (2002).

[3] Despite our January 30, 2017 order clearly stating that we lack jurisdiction to review the circuit court's dismissal of the defendants—and that Heistad must limit the issues in her brief to those decided by the August 12 and September 20, 2016 orders—Heistad's briefs largely continue to discuss numerous purported errors in prior orders that are not properly appealable. We will not address those arguments. As stated, our review is limited to the August 12 order denying leave to file a third amended complaint and the September 20, 2016 order denying reconsideration of the August 12 order. In addition, we shall not discuss the mootness argument raised by State Farm as only dispositive issues need be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938).

[4] A circuit court's decision on a motion for leave to amend a complaint, or a motion for reconsideration, is discretionary. ***Mach v. Allison***, 2003 WI App 11, ¶20, 259 Wis. 2d 686, 656 N.W.2d 766 (2002); ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. We uphold discretionary decisions if the court applied the correct legal standard to the facts of record in a reasonable manner. ***Mach***, 259 Wis. 2d 686, ¶20.

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

¶17 We stated in ***Mach*** that after a motion for summary judgment has been granted, there is no presumption in favor of allowing an amendment of the pleadings:

> The party seeking leave to amend must present a reason for granting the motion that is sufficient, when considered by the trial court in the sound exercise of its discretion, to overcome the value of the finality of judgment. The reasons why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments, and the nature of the proposed amendment are all relevant considerations, as is the effect on the defendant. However, the absence of specific prejudice to the defendant is not a sufficient reason, in itself, for allowing amendment, because that does not give appropriate weight to the value of the finality of judgment.

Id., ¶27.

¶18 We reiterated the ***Mach*** factors in ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶31, 275 Wis. 2d 650, 686 N.W.2d 675.[6] In this regard, our supreme court has cited with approval our decisions in ***Mach*** and ***Piaskoski***. *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶26, 303 Wis. 2d 94, 735 N.W.2d 418. In ***Tietsworth***, the court stated "the liberal policy embodied in WIS. STAT. § 802.09(1) does have limitations." ***Id.*** The court again stated that the presumption in favor of amendment applies logically only before the case has been dismissed. *See* ***id.***

[6] Although these cases addressed motions for leave to amend after a motion for summary judgment, the same rationale applies to motions for leave to amend following a grant of a motion to dismiss—i.e., both require the court to balance the reason to grant the leave to amend against the interest in finality.

¶19 In the present case, the circuit court considered the proper factors and came to a reasoned decision in denying Heistad's motion for leave to file a third amended complaint. The court noted the sequence of events leading to the decision dismissing the amended complaint. Despite having notice of significant and dispositive defects in the prior complaints, Heistad waited until five days prior to the hearing on the defendants' motion to dismiss the amended complaint to file her motion for leave to file the second amended complaint. The court appropriately found the motion for leave to file a second amended complaint untimely.

¶20 Given that finding, the court reasonably stated that it "expected Heistad to present arguments on timeliness in support of her Proposed Third Amended Complaint." However, Heistad "simply restate[d] the arguments she made in her Motion for Reconsideration of State Farm's Second Motion to Dismiss." The court found "Heistad did not take the defects in her Complaint seriously even after having them pointed out to her by State Farm in its motion and supporting brief." Meanwhile, the court did not err in finding that State Farm "has been prejudiced in having to continually defend this action and expend the time and expense of additional briefing after it demonstrated that it was entitled to a dismissal of Heistad's claims." In all, the court was well within its discretion in denying Heistad's motion for leave to file a third amended complaint.

¶21 Heistad does not discuss the factors set forth in ***Mach***, and she does not even cite ***Piaskoski*** or ***Tietsworth***. Rather, Heistad attempts to distinguish ***Mach*** by insisting that she filed her motion seeking leave to file a second amended complaint prior to the court dismissing her cause of action against State Farm. However, Heistad's motion seeking leave to file the second amended complaint was not heard—much less granted—prior to the dismissal of the amended

complaint. At the time the court heard the motion for leave to file a second amended complaint, the case had been dismissed in its entirety. The mere fact that Heistad had filed her motion seeking leave to file the second amended complaint prior to the dismissal of the amended complaint is no help to her.

¶22 Heistad improperly relies upon inapt case law involving run-of-the-mill amendments occurring prior to judgment. In addition, Heistad argues "in the case of ***Kitzman*** [v.] ***Kitzman***, 163 Wis. 2d 399, 471 N.W.2d 293 (Ct. App. 1991), the Wisconsin Court of Appeals held that the trial court abused its discretion in not allowing an amendment to pleadings which added a new plaintiff after the action had been dismissed."[7] In ***Kitzman***, the defendant argued the plaintiff should not be allowed to amend the complaint because the action had been filed by a party lacking the legal capacity to sue. *See* ***id.*** at 401. We held the plaintiff was entitled to amend the complaint, however, because the amendment would have been within six months of the filing of the complaint and nothing in the amended complaint changed except the name of the plaintiff. ***Id.*** at 402-03. Here, Heistad's correspondence enclosing the proposed third amended complaint merely asserted the third amended complaint "more clearly alleges factual information to support that James Olson was negligent in the operation of his motor vehicle." Furthermore, the motion for leave to file the third amended complaint was not within six months of the filing of the complaint. Accordingly, Heistad's reliance on ***Kitzman*** is misplaced.

[7] We note Heistad uses the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced that phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, n.9, 242 Wis. 2d 153, 624 N.W.2d 375.

¶23 We also conclude the circuit court did not erroneously exercise its discretion by denying the motion to reconsider the denial of the motion for leave to file the third amended complaint. The standard for granting a motion for reconsideration is strict. Reconsideration will generally be denied unless the moving party can point to newly discovered evidence or establish a manifest error of law or fact. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A party may not use a motion for reconsideration to introduce new evidence that could have been introduced earlier. *See* ***id.***, ¶46. Furthermore, a motion for reconsideration will not be granted where the moving party merely seeks to rehash old arguments or otherwise take umbrage with the court's ruling. ***Id.***, ¶44.

¶24 Here, the circuit court properly observed that Heistad made two arguments for reconsideration of the denial of her motion for leave to file the third amended complaint: (1) the court erred in finding her motion untimely when State Farm caused greater delay to the litigation by waiting to file its motion to dismiss the amended complaint; and (2) Heistad did not realize the need for amending the complaint until additional research could be done. However, Heistad made no showing why she could not have conducted additional research earlier. The court properly concluded Heistad should have conducted additional research when the court provided the opportunity to present additional arguments after the May 3, 2016 hearing. Instead, Heistad simply reiterated her previous arguments.

¶25 In addition, our review of the record in this case does not warrant blaming the defendants for delays occasioned by Heistad's failed pleadings and repetitive motions. Heistad insists she "had no reason to believe her complaint was legally defective until defendants filed their motion to dismiss and supporting brief …." Heistad also makes the bald and unsupported assertion that the motion

to dismiss the amended complaint was "untimely," and that the motion to dismiss "could have and should have been filed in the almost nine months after the amended complaint was filed." As mentioned, we will not revisit the dismissal of the amended complaint. We also will not address arguments unsupported by citation to legal authority. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, the circuit court noted that it did not deny Heistad's motion based on overall delay to the litigation, but rather as being untimely considering the stage of the litigation at the moment it was filed.

¶26 Finally, Heistad claims that the dismissal of her amended complaint was "in effect a sanction." We reiterate that this court lacks jurisdiction to review the dismissal of the amended complaint. However, we note State Farm never sought dismissal as a sanction, and the court's written orders are devoid of any mention of sanctions. In all, reconsideration was properly denied.

By the Court.—Orders affirmed.

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