

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2001

Cornelia G. Clark
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. 00-3301

Cir. Ct. No. 99-CV-327

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SKYCOM, INC.,

PLAINTIFF-APPELLANT,

V.

**TOWN OF ELBA TOWN BOARD, RUSSELL FARR, TOWN
BOARD CHAIRMAN, AND ALLEN LINK, SIDE BOARD
SUPERVISOR,**

DEFENDANTS-RESPONDENTS,

COLUMBUS MUTUAL TOWN INSURANCE COMPANY,

INTERVENOR-(IN T.CT.).

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Skycom, Inc., appeals from an order denying its “motion for relief from judgment” and motion to amend its complaint. The issues relate to the scope of this appeal and whether the circuit court erred in denying the motion to amend the complaint. We affirm.

¶2 The first issue concerns the extent to which the scope of this appeal is limited by Skycom’s failure to timely appeal from the original dismissal order. The circuit court entered an order dismissing Skycom’s complaint on August 31, 2000. On September 18, 2000, Skycom filed a “motion for relief from judgment” requesting reconsideration of that order and requesting authorization to amend its complaint. Skycom also submitted a proposed amended complaint. At the same time, the defendants gave notice of entry of order. Skycom filed a notice of appeal on November 1, 2000. The circuit court denied the motion for relief from judgment on November 3, 2000. The defendants moved for dismissal of the appeal as untimely. Skycom did not oppose that dismissal, and advised us that its intent had been to appeal from the circuit court’s failure to decide the motion for relief from judgment. Skycom advised us that it would file a new notice of appeal, so as to appeal from the November 3 order. We dismissed the first appeal. Skycom then filed a new notice of appeal on November 28, 2000, and that is the appeal now before us.

¶3 In its opening brief, Skycom argues several issues related to the substance of the case, but omits any mention of the dismissed untimely appeal, and does not acknowledge that our consideration of these issues may be limited by rules relating to the appealability of orders on reconsideration. However, the defendants argue that our review of the substantive issues is limited by those rules. In its reply, Skycom concedes that our review is limited to some degree. We address this issue first.

¶4 The first step in addressing this issue is to consider whether Skycom’s “motion for relief from judgment” was truly a motion for relief from a judgment under WIS. STAT. § 806.07 (1999-2000),¹ or simply a common law reconsideration motion. The difference could be significant because of the different legal standards and different standards of appellate review that apply to each type of motion. We have previously acknowledged that motions for reconsideration, although not authorized by statute except after trials to the court, “have become part of our common law.” *Fritsche v. Ford Motor Credit Co.*, 171 Wis. 2d 280, 294, 491 N.W.2d 119 (Ct. App. 1992).

¶5 The motion in this case was made within three weeks of the original order, and its content appears to be that of a typical motion for reconsideration. Although the motion described itself as a motion for relief from judgment, and cited to WIS. STAT. § 806.07(1)(h), the actual argument supporting the motion did not address the test that must be met by a motion under that subsection. *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549-50, 363 N.W.2d 419 (1985). Instead, the motion simply addressed various questions on the merits of the case, as if the circuit court possessed unlimited discretion to amend its original dismissal order. Under these circumstances, we conclude that Skycom’s motion should be viewed as one for reconsideration.

¶6 To be appealable, a reconsideration motion must present issues other than those determined by the original order or judgment. *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972). Skycom argues that one new issue it

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

raised was whether mandatory procedures for access to the Town of Elba zoning process gave Skycom a property right under 42 U.S.C. § 1983. However, Skycom concedes that this issue was thoroughly briefed and argued before the circuit court issued its original dismissal order. Still, Skycom argues that this issue should be considered “new” in its reconsideration motion because the circuit court did not expressly address the issue in the court’s first memorandum decision. We disagree.

¶7 The test is not whether the circuit court’s original order expressly addressed the issue, but whether the issue was “determined.” As Skycom acknowledges, one of the tests for deciding whether an issue was determined is whether the issue could have been raised in an appeal from the original order. *See Mack v. Joint Sch. Dist. No. 3*, 92 Wis. 2d 476, 485, 285 N.W.2d 604 (1979). Skycom offers no authority for the proposition that an issue must be expressly addressed to be appealable, and we are satisfied that it has no merit. Dismissal of a complaint is necessarily a rejection of *all* arguments that were made against dismissal. Consequently, all such arguments can properly be raised on appeal, even if the circuit court did not expressly address each one.

¶8 Skycom also argues that it raised a new issue by asking the circuit court to allow Skycom to amend its complaint. We agree that this issue is reviewable because Skycom had not previously sought to amend its complaint. Skycom argues that the court erroneously exercised its discretion in denying the motion because the amendment was intended to clarify certain points that the circuit court in its original dismissal decision indicated were unclear, and because of the well-established principle that leave to amend pleadings should be liberally granted.

¶9 This was not a typical motion to amend, however, because it was filed after the action was already dismissed. Skycom offers no case law suggesting that liberal amendment of pleadings should be allowed after dismissal. Once an action has been dismissed, a motion to amend a complaint will have no effect unless the movant also succeeds in persuading the court to vacate the dismissal. Therefore, we consider the motion to amend the complaint to be inseparable from Skycom's motion to reconsider. The movant's goal was to convince the circuit court to vacate the dismissal order by offering an amended complaint to respond to concerns noted by the court in its dismissal decision. In denying the motions, the court issued an order explaining why the proposed amendment did not affect its decision to dismiss. The court said, as it did in the original order, that it had given Skycom the benefit of the doubt on the confusing points, and that if the proposed amended complaint had any effect, it was to weaken Skycom's case, not improve it. This was a reasonable exercise of discretion.

By the Court.—Order affirmed.

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

