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DISTRICT IV

February 13, 2025

To:

Hon. Michael P. Screnock
Circuit Court Judge
Electronic Notice

Carrie Wastlick
Clerk of Circuit Court
Sauk County Courthouse
Electronic Notice

Maximilian Buckner
Electronic Notice

James P. Heyn
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2024AP1766 Taylor L. Mills v. Diamond Concrete Construction
(L.C. # 2024SC113)

Before Nashold, J.[1]

Summary disposition orders 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).

Diamond Concrete Construction ("Diamond Concrete") appeals a judgment entered against it in the total amount of $1,530.25. On this court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1).[2] I affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

[2] WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

Taylor Mills filed a small claims action against Diamond Concrete, claiming that Diamond Concrete failed to pay him his full wages for his final week of work. A hearing was held at which Diamond Concrete appeared pro se through its owner, and Mills was represented by counsel.[3] The following facts are derived from hearing testimony and are undisputed unless otherwise noted.

Mills was an employee of Diamond Concrete. In June 2023, Diamond Concrete implemented a new policy. Pertinent here, under the new policy, if an employee failed to give a two-week notice before ending employment with Diamond Concrete or gave a two-week notice but missed work during the two weeks, the employee's remaining wages would be paid at minimum wage instead of the employee's full wage. Diamond Concrete implemented the policy after having issues with employees leaving with little or no notice. Diamond Concrete provided Mills with a notice of the policy on June 13, 2023, requesting that he sign the notice, but Mills refused to sign.

Mills gave Diamond Concrete his two-week notice in July 2023. At the hearing, the parties disputed the date on which Mills gave his two-week notice: Mills testified it was on July 10, whereas the owner of Diamond Concrete testified it was on July 12. If Mills gave notice on July 10, then applying a two-week notice would mean that his last work day should have been Friday, July 21, which was the last day that Mills worked. If Mills gave notice on July 12, then applying a two-week notice, his last work day should have been Tuesday, July 25.

[3] Diamond Concrete has retained counsel on appeal.

Based on its position that Mills was required to work July 24 and 25 in order to provide a full two-week notice, Diamond Concrete paid Mills the minimum wage of $7.25 per hour for his last paycheck, which included work from July 17 through July 21. Mills' regular wage was $26 per hour.

The circuit court ruled against Diamond Concrete, concluding that Mills should have been paid his full wage rather than minimum wage. The court declined to determine whether Mills provided a full two-week notice, reasoning that it made no difference because the court could not "fathom a scenario under which an employer can just dictate by policy that work that's already been accomplished will be paid at minimum wage." The court stated that it did not know "what legal theory would allow an employer to do that" and concluded that Mills was entitled to pay at his full rate for his final work week. It entered judgment against Diamond Concrete and in favor of Mills in the total amount of $1,530.25, which included $1,075.75 in wages owed, a filing fee and service costs in the amount of $154.50, and $300 in attorney fees.

On appeal, Diamond Concrete argues that the circuit court erred in determining that Diamond Concrete could not enforce its policy of reducing remaining wages under the circumstances here. Citing case law, Diamond Concrete argues that Mills was an at-will employee and that benefits, including compensation, can be changed unilaterally by the employer, provided that the change is related to work not yet performed. Diamond Concrete argues that the policy change was not retroactive and was therefore lawful because Mills was fully aware of the policy before he gave his two-week notice and before he performed the work for which wages were reduced.

The problem for Diamond Concrete is that none of these arguments were raised before the circuit court. In fact, Diamond Concrete did not argue that Mills was an at-will employee, much less that it was authorized to change Mills' rate of pay under these circumstances. Diamond Concrete offered no legal theory under which it could reduce Mills' wages, appearing to rely exclusively on its position that it was following its new policy.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. "Arguments raised for the first time on appeal are generally deemed forfeited." ***Northbrook Wis., LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851. Our supreme court has summarized the reasons for applying the forfeiture rule—specifically, to promote efficient and fair litigation:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (footnote omitted); *see also* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (We will not ... blindside [circuit] courts with reversals based on theories which did not originate in their forum.").

Although I am cognizant that Diamond Concrete appeared pro se in circuit court, the same reasons for forfeiture apply. Moreover, pro se litigants are generally bound by the same

procedural and substantive law as attorneys. *See* ***Larson v. Burmaster***, 2006 WI App 142, ¶47, 295 Wis. 2d 333, 720 N.W.2d 134; *see also* ***Townsend v. Massey***, 2011 WI App 160, ¶27 n.5, 338 Wis. 2d 114, 808 N.W.2d 155 (rejecting undeveloped argument that appellants' pro se status matters for purposes of forfeiture analysis). Accordingly, I conclude that Diamond Concrete has forfeited the arguments it raises for the first time on appeal and I therefore decline to consider them.

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals