



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT IV

February 20, 2025

To:

Hon. Ryan D. Nilsestuen
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Daniel Murphy
Electronic Notice

Allen C. Schlinsog Jr.
Electronic Notice

Lynn Stathas
Electronic Notice

Robert Jacob Welcenbach
Electronic Notice

Anna V. Fay
Suite 311
Welcenbach Law Offices SC
933 N. Mayfair Road
Milwaukee, WI 53226

John A. Franke
Gass Turek LLC
Suite 300
241 North Broadway
Milwaukee, WI 53202

Danielle E. Marocchi
Reinhart Boerner Van Deuren
Suite 1700
1000 North Water Street
Milwaukee, WI 53202

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

2024AP580

Brittany D. Clarke v. SSM Health Care Corporation
(L.C. # 2019CV1630)

Before Kloppenburg, P.J., Blanchard, and Graham, JJ.

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).

Brittany Clarke appeals a circuit court order dismissing Clarke’s action against SSM Health Care Corporation. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition.¹ *See* WIS. STAT. RULE 809.21 (2021-22).² We summarily affirm.

In June 2019, Clarke filed this action on behalf of herself, and on behalf of a putative class of similarly situated individuals, for damages based on claims that SSM had improperly charged fees to provide copies of requested healthcare records. In August 2023, SSM moved to dismiss on grounds that, under *Fotusky v. ProHealth Care, Inc.*, 2023 WI App 19, 407 Wis. 2d 554, 991 N.W.2d 502, Clarke did not have a valid claim against SSM. Clarke filed a brief opposing the motion to dismiss. In her brief, Clarke moved the circuit court to: (1) stay the matter pending the outcome of the petition for review in *Fotusky*; or (2) in the alternative, deny the motion to dismiss and allow Clarke the opportunity to substitute a new class representative. In September 2023, SSM filed a reply brief arguing that it was premature for the court to consider whether it would be

¹ We note that Clarke’s briefs do not comply with the following rules and remind counsel of the obligation to comply with these rules. First, Clarke’s briefs refer to the parties by their status on appeal, and not by their names, contrary to WIS. STAT. RULE 809.19(1)(i). Use of these designations can easily create confusion that is an unnecessary burden for this high-volume court. Second, Clarke’s briefs do not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use “Arabic numerals with sequential numbering starting at ‘1’ on the cover”). The reason for this rule is that briefs are now electronically filed in PDF format and are electronically stamped with page numbers when they are accepted for eFiling. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief “will match ... the page header applied by the eFiling system, avoiding the confusion of having two different page numbers” on every page of a brief. S. CT. ORDER 20-07 cmt. at x1. Finally, both parties are reminded that factual assertions in their briefs must be supported by proper citations to the record. *See* RULE 809.19(1)(d). SSM is reminded that citations to the appendix are insufficient. *See id.*

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

appropriate to allow Clarke to substitute a new class representative. SSM argued that the court would need to consider that issue only if, and after, it dismissed Clarke's claims.

In January 2024, the circuit court denied Clarke's motion to stay and granted SSM's motion to dismiss for failure to state a claim. The court determined that Clarke's claims were barred under *Fotusky* and that the petition for review in *Fotusky* was not persuasive. The court did not address Clarke's argument that she should be allowed the opportunity to substitute a new class representative. Clarke appeals the order dismissing this action.

Clarke contends that, rather than dismissing this action, the circuit court should have granted leave for Clarke to substitute a plaintiff to represent the purported class. Clarke concedes that there is no Wisconsin case compelling that outcome, but argues that it is supported by federal law. SSM responds that Clarke did not properly raise in the circuit court the issue of whether she should be allowed to substitute a new class representative because she never moved that court to substitute a new class representative. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 ("It is well-established law in Wisconsin that those issues not presented to the [circuit] court will not be considered for the first time at the appellate level."). Clarke replies that she properly raised her request for leave to substitute the class representative in her brief opposing SSM's motion to dismiss, and that nothing in the record indicates that the court was unaware of the issue when it issued its order dismissing this action.

We conclude that Clarke has not established that the circuit court erred by failing to grant Clarke leave to find a substitute class representative. SSM moved to dismiss Clarke's claim on August 10, 2023, but the court did not dismiss it until January 16, 2024. During the time that the motion to dismiss was pending, Clarke did not identify a proposed substitute class representative

or seek to file an amended complaint with a new class representative. Clarke does not explain why five months was an insufficient amount of time for her to identify a new proposed class representative or why she failed to do so before this action was dismissed.

Moreover, Clarke does not address in her reply brief SSM's argument that Clarke was required to move for reconsideration to preserve her argument that the circuit court should have allowed her additional time to identify a substitute class representative after the court dismissed Clarke's claims. We therefore take that argument as conceded. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (holding that appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession).

Even if Clarke had not conceded the argument, we agree with SSM that, on the specific facts of this case, Clarke has failed to preserve her argument that the circuit court should have allowed her additional time to identify a class representative for this action. To repeat, Clarke opposed the motion to dismiss and sought, in the alternative, leave to identify a substitute class representative. SSM argued that the issue of whether a substitute class representative could be appointed would be ripe to address only if the court dismissed Clarke's claims. The court then dismissed Clarke's claims without addressing Clarke's request to find a substitute class representative. If Clarke believed that it was error for the court to dismiss the action without addressing her request for an opportunity to identify a substitute class representative, she was required to bring that error to the court's attention to preserve that argument for appeal. See *Paape v. Northern Assurance Co.*, 142 Wis. 2d 45, 53, 416 N.W.2d 665 (Ct. App. 1987) (claim that circuit court decision was in error forfeited on appeal when the appellant "made no effort to point out the error or move for reconsideration thereby affording an opportunity for the [circuit] court to correct the error").

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals