COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2366 **Cir. Ct. No. 2016SC710**

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

BACKWOODS CONSTRUCTION, LLC,

PLAINTIFF-RESPONDENT,

V.

DAVID EVERSON AND PATRICIA EVERSON,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

KYLE R. TEWS,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County: VICKI L. CLUSSMAN, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.[1] David and Patricia Everson appeal the judgment awarding $5,350.23 to Backwoods Construction, LLC. I understand the Eversons to challenge the following: (1) the circuit court's denial of their motion for summary judgment based on lack of standing; (2) the circuit court's denial of their motion for default judgment against Kyle R. Tews, the owner of Backwoods, and dismissal of their claims against Tews, individually; and (3) the sufficiency of the evidence supporting the jury verdict. Respondents Backwoods Construction, LLC and Kyle R. Tews failed to file a response brief in this appeal. This court sent a notice of delinquency, warning Backwoods and Tews that failure to file a brief within five days may result in summary reversal under WIS. STAT. RULE 809.83(2). By order of March 9, 2018, this appeal was submitted to me "to determine whether the case may be decided based solely upon the appellant[s'] brief and the record." I determine that this case may be decided solely upon the appellants' brief and the record, and I affirm.[2]

BACKGROUND

¶2 Backwoods Construction, LLC filed a small claims action against David and Patricia Everson, alleging that the Eversons failed to pay for home improvements completed by Backwoods. Backwoods sought judgment for $4,931.72.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] An appellate court "may, at [its] discretion, summarily reverse if the respondent fails to brief an appeal if [the court] determine[s] that [the respondent] has abandoned the appeal or has acted egregiously or in bad faith." ***Daniels v. Wisconsin Chiropractic Examining Bd.***, 2008 WI App 59, ¶3 n.3, 309 Wis. 2d 485, 750 N.W.2d 951. However, upon my review of the record, I have chosen to address the merits of this appeal.

¶3 The Eversons denied the allegations in Backwoods' complaint, counterclaimed, and filed what they denominated a "third party complaint" against Tews individually.[3] The Eversons then moved the circuit court to grant default judgment with respect to the third party complaint and summary judgment in the principal action. The circuit court denied the Eversons' motion for default judgment with respect to the third party complaint and dismissed the Eversons' claims against Tews, denied the Eversons' motion for summary judgment in the principal action, and scheduled the matter for trial.

¶4 I recite certain facts taken from the trial, and relate additional facts as needed in the discussion section below. At trial, Tews testified that he is a self-employed general contractor and the owner of Backwoods. Tews testified that David called him requesting an estimate for crown molding repairs on the third story of his home. Tews testified that following the phone call, he went to the Eversons' home and David asked Tews if he had a machine lift in order to reach the third-story crown molding and whether Tews had time for the project. David testified that during this meeting Tews told him the cost of labor would be $35 per hour.

¶5 Tews testified that he began work on the crown molding on August 23, 2016, shortly after the in-person meeting with David. Tews testified that between August 23, 2016, and August 29, 2016, as the crown molding was being repaired, Patricia Everson requested that Backwoods complete several

[3] The "third party complaint" also named parties other than Tews as "third-party defendants," including the attorneys who filed Backwoods' small claims complaint, but the Eversons do not indicate that these other "third-party defendants" or the Eversons' claims against them are involved in this appeal.

additional home improvements. Tews testified that because of the growing number of additional projects Patricia requested throughout the week, he wanted to put the agreement in writing. Tews testified that on August 29, 2016, he prepared a contract, which he and Patricia signed. Although not specified in the contract, Tews testified that he told Patricia he charged $35 per hour for the first worker and $30 per hour for second and subsequent workers.

¶6 Patricia Everson testified that "[Tews] told me it would be 35 an hour," and that she believed this $35 per hour charge was flat, regardless of the number of workers. Patricia admitted that "Backwoods Construction, LLC" appeared on the bill given to her by Tews. However, the written contract that Patricia signed did not contain the LLC abbreviation. Patricia testified that when she received the bill from Tews she disputed his charge of the lift as part of the materials used and his calculation of the labor costs. Patricia testified that because Tews told her the labor would cost $35 per hour flat, and charged her $35 per hour for one worker and $30 per hour for a second worker, she felt as though he "duped" her.

¶7 The jury returned a verdict in favor of Backwoods, finding that the Eversons owed Backwoods $4,931.73 and that Backwoods did not make a false, deceptive, or misleading representation to induce the Eversons to enter into an improvement contract. The Eversons moved for judgment notwithstanding the verdict, which the circuit court denied. The Eversons appeal.

DISCUSSION

¶8 As stated, I understand the Eversons to challenge the following: (1) the circuit court's denial of their motion for summary judgment based on lack of standing; (2) the circuit court's denial of their motion for default judgment against

Tews and dismissal of their claims against Tews individually; and (3) the sufficiency of the evidence supporting the jury verdict. I address and reject each of the Eversons' challenges in turn, and I follow the Eversons' lead in grouping the arguments as they do with respect to each challenge.

I. Denial of Summary Judgment Based on Lack of Standing

¶9 The Eversons argue that the circuit court erred in denying their motion for summary judgment because Backwoods lacked standing to sue. We review summary judgment de novo, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Summary judgment methodology is well established and need not be repeated here. *See e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶10 "Whether a party has standing presents a question of law that we also review de novo." ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done. The law of standing should be liberally construed, and as such, standing is satisfied when a party has a personal stake in the outcome." ***Id.***, ¶20 (citation omitted).

¶11 In their motion for summary judgment, the Eversons argued that Backwoods lacked standing because "Backwoods has no legally protectable interest because it violated WIS. ADMIN. CODE [ch.] ATCP 110 and WIS. STAT.

[ch.] 423." The circuit court denied the Eversons' motion for summary judgment because "there certainly are genuine issues of material fact."

¶12 On appeal, the Eversons again argue that "Backwoods lacked standing to bring it's [sic] claim for money because it must show the injury is a legally protectable interest" and Backwoods failed to make that showing, for the following reasons: "Backwoods[']s complaint is bereft of factual allegations explaining what actions taken, or to be taken, by the Eversons, have injured, or will injure, Backwoods"; "Backwoods[']s complaint is void of a consensual agreement on which it basis [sic] it's [sic] claims and fails to reference any such agreement"; and "Backwoods[']s claims are merely subjective, conclusory, and a unsubstantiated allegation."

¶13 I reject the Eversons' argument because it attempts to impose specific pleading requirements upon the law of standing, which "should be liberally construed," and the Eversons fail to cite to any legal authority supporting the pleading requirements they seek to impose. To the extent that the Eversons are arguing that Backwoods' complaint fails to state a claim, I decline to consider that argument as undeveloped and unsupported by legal authority. *See* ***State v. Pettit***,

171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").[4]

¶14 Moreover, Wisconsin is a notice pleading state. ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). The small claims complaint alleged that the Eversons failed to pay for home improvements completed by Backwoods. That allegation sufficed to put the Eversons on notice that Backwoods was alleging that it "suffered some injury because of something that [the Eversons had] either done or not done." *See* ***Krier***, 317 Wis. 2d 288, ¶20 (quoted source omitted). In addition, on summary judgment, there was abundant evidence in the record indicating that Backwoods, which commenced this action to recover money from the Eversons for specific services performed, has "a personal stake in the outcome" of this controversy. *See* ***id.***

¶15 The Eversons also argue that Backwoods lacked standing because Backwoods failed to comply with WIS. STAT. § 183.1101. The Eversons' argument is refuted by the record. WISCONSIN STAT. § 183.1101(3) provides, "In an action brought on behalf of a limited liability company, the complaint shall describe with particularity the authorization of the member to bring the action and

[4] Throughout this discussion, I decline to consider several of the Eversons' arguments as "undeveloped." An argument is "undeveloped" when it does not contain citation to proper legal authority, or, the argument fails to apply or connect the cited legal authority to the facts in the record. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.,*** 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)). Here, and as is the case with respect to many of the Eversons' other arguments, it is simply not enough to cite pages of law followed by a conclusory statement of ultimate fact without explaining how that law fits with the facts in the record. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of [legal] concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories.").

the determination of the authorization." Backwoods' summons and complaint contained the following information: "The name and address of the creditor that the law firm represents is: Backwoods Construction, LLC Agent: Kyle Tews." The Eversons do not explain how that information fails to "describe with particularity the authorization of the member to bring the action" as required by WIS. STAT. § 183.1101.

II. Denial of Default Judgment and Dismissal of Claims Against Tews Individually

¶16 The Eversons argue that the circuit court erred in denying their motion for default judgment against Tews for his failure to answer their claims against him individually, and in dismissing their claims against Tews based on its ruling that Tews was not subject to individual liability. I first address the circuit court's denial of the motion for default judgment, and then I address the circuit court's dismissal of the Eversons' claims against Tews individually.

¶17 *Default Judgment:* Default judgments are strongly disfavored, and a circuit court's denial of a motion for default judgment is reviewed as an exercise of discretion. ***Estate of Otto v. Physicians Ins. Co. of Wisconsin, Inc.***, 2007 WI App 192, ¶10, 305 Wis. 2d 198, 738 N.W.2d 599 ("We affirm discretionary decisions provided they are based on the facts of record, the appropriate law, and the court's reasoned application of the correct law to the relevant facts."); ***Martin v. Griffin***, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984) ("the law views default judgments with disfavor").

¶18 As stated, the Eversons asserted their claims against Tews in what they denominated a "third party complaint" and moved for default judgment against Tews for failing to answer. The court denied the motion and dismissed the

claims because Tews was not subject to individual liability. In their appellants' brief, the Eversons cite the proper standard by which courts review denials of motions for default judgment and summarize the circuit court's decision as follows. "The circuit court's reasoning for not granting the motion for default, was the Eversons contracted with Backwoods, a limited liability company on the home improvements, and agreed with the comments of opposing counsel." The Eversons then proceed to address the merits of their argument as to Tews' individual liability.

¶19 Fatal to the Eversons' challenge relating to the denial of their motion for default judgment is the blending of two distinct issues: the denial of the motion for default judgment and the dismissal of their claims against Tews. More specifically, the Eversons do not explain how the circuit court erroneously exercised its discretion in denying their motion for default judgment, namely, that the court failed to base its decision on the facts of record, the appropriate law, and a reasoned application of the correct law to the relevant facts. *See* ***Otto***, 305 Wis. 2d 198, ¶10. Accordingly, I decline to consider their argument as to the denial of their motion for default judgment. *See* ***Pettit***, 171 Wis. 2d at 646 ("We may decline to review issues inadequately briefed."). I now proceed to address the Eversons' arguments that the court erred in dismissing their claims against Tews individually.

¶20 *Dismissal of Claims*: The Eversons argue that the circuit court erred in dismissing their claims against Tews and ruling that Tews was not subject to individual liability. Such an inquiry presents questions of law subject to independent appellate review. *See* ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36.

¶21 The question is whether the circuit court properly concluded that the Eversons could not sue Tews, the owner of Backwoods Construction, LLC, individually. WISCONSIN STAT. § 183.0304(1) provides that "debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company." With exceptions not relevant here, "a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager." WIS. STAT. § 183.0304(1); *See* ***Brew City Redevelopment Grp., LLC v. Ferchill Grp.***, 2006 WI 128, ¶41, 297 Wis. 2d 606, 724 N.W.2d 879 (explaining that, under WIS. STAT. § 183.0304, LLC members are not immune from personal liability for tortious conduct if the conduct was undertaken in a member's individual capacity and not as a member or manager of the LLC).

¶22 As previously stated, neither Backwoods nor Tews have filed responsive briefs in this appeal. In the absence of respondents' briefs, I look to the circuit court's decision and its reasons for its decision. The circuit court ruled that "you can't sue Mr. Tews individually because he is – he's the owner of Backwoods Construction, which is a limited liability corporation." I agree with the circuit court and conclude that WIS. STAT. § 183.0304(1) applies here to shield Tews from individual liability because the evidence in the record does not indicate that he acted outside the scope of his position as "member or manager" of the limited liability company. *See* WIS. STAT. § 183.0304(1). Moreover, the Eversons do not point to any evidence to the contrary. Rather, they appear to make the following three legal arguments, which I address and reject in turn.

¶23 First, the Eversons argue that the circuit court erred because "[t]he face of the contract fails to disclose Backwoods is a limited liability company," and "Tews signed the contract as an individual because the words 'Member' or 'Manager' are not referenced beneath or opposite his signature." However, the Eversons cite no legal authority to support their argument, and, therefore, I decline to consider it further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.,*** 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)). Nevertheless, I note that the record contains evidence that the Eversons knew, or had reason to know, of Backwoods' limited liability company status, namely, the bill for services rendered which contained "Backwoods Construction, LLC," and the checks Patricia Everson wrote payable to "Backwoods Construction LLC." *See* ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 850, 852, 470 N.W.2d 888 (1991) (explaining that an agent is not liable when a contracting party is aware of the principal's corporate status, and that courts have considered contracting parties to have notice of the principal's corporate status if the party knows, has reason to know, or should know of it, or has been given notification of the fact).

¶24 Second, the Eversons again argue that, contrary to WIS. STAT. § 183.1101, "Backwoods's complaint contains no admission or representation of the authority of Tews to act on behalf of the limited liability company." As I explained above in the context of Backwoods' standing, this factual assertion is unsupported by the record. Moreover, the Eversons' reliance on WIS. STAT. § 183.1101 to support their claims against Tews is misplaced. WISCONSIN STAT. § 183.1101 concerns only the ability of a member to bring suit on behalf of a

limited liability company. Thus, the statute is irrelevant to the issue here, whether the claims brought by the Eversons against Tews were properly dismissed.

¶25 Third, the Eversons argue that WIS. ADMIN. CODE § ATCP 110.05(2) allows for "the Eversons to sue Tews in this action and Tews could not use the corporation to shield himself from being held liable for the deceitful misrepresentations he committed." I reject this argument because WIS. ADMIN. CODE ch. ATCP 110, which articulates standards for home improvement practices, does not create a cause of action against individual members of a limited liability company or otherwise abrogate WIS. STAT. § 183.0304(1), nor could it. *See* ***Grafft v. DNR***, 2000 WI App 187, ¶12, 238 Wis. 2d 750, 618 N.W.2d 897 ("Where a conflict arises between a statute and an administrative rule, the statute prevails."). To the extent that the Eversons challenge the jury's determination as to whether Tews misrepresented the terms of the contract with the Eversons, I discuss that issue of fact in greater detail below.

¶26 In sum, the circuit court did not err in dismissing the Eversons' claims against Tews based on its ruling that Tews was not subject to individual liability.

III. Challenges to the Jury Verdict

¶27 The Eversons argue that the jury verdict is unsupported by evidence in the record and invalid as a matter of law. I address the Eversons' sufficiency of the evidence argument first and then their legal arguments.

¶28 "Our standard of review of a jury verdict is that the verdict will be sustained if there is any credible evidence to support it." ***Heideman v. American Family Ins. Group***, 163 Wis. 2d 847, 863, 473 N.W.2d 14 (Ct. App. 1991).

Because it is my duty to search for credible evidence to sustain the jury's verdict, I do not search the record for evidence to sustain a verdict the jury could have reached but did not. ***Id.*** at 863-64.

¶29 The jury returned a verdict in favor of Backwoods, finding that the Eversons owed Backwoods $4,931.73 and that Backwoods did not make a false, deceptive, or misleading representation to induce the Eversons to enter into a home improvement contract. My review of the record reveals that there is credible evidence upon which the jury could have relied in reaching its verdict. The following facts are undisputed: David Everson first solicited the home improvement services from Tews, as owner of Backwoods; Backwoods began work after discussions with David Everson; and Patricia Everson signed a written agreement with Backwoods after enlarging the scope of the projects originally solicited by David. Tews testified that he told Patricia that labor would cost $35 per hour for the first worker, and $30 per hour for the subsequent workers in the event the projects required more than one worker. Although in their testimony the Eversons and Tews disputed the labor costs, the verdict reflects the costs of labor described by Tews. "The weight and credibility of the evidence are left to the province of the jury." ***Hauer v. Union State Bank of Wautoma***, 192 Wis. 2d 576, 589, 532 N.W.2d 456 (Ct. App. 1995). Accordingly, I conclude that there is credible evidence to support the jury verdict relating to the costs awarded and to the finding that Backwoods did not make a false, misleading, or deceptive representation.

¶30 I understand the Eversons to make additional legal challenges to the jury verdict in two broad respects: (1) the underlying contract was unenforceable as a matter of law, and (2) no privity of contract existed between the Eversons and Backwoods. I address and reject each of these challenges to the verdict.

¶31 *Unenforceable Contract:* Notwithstanding the jury verdict, the Eversons argue that the contract at issue is unenforceable as a matter of law because it violates WIS. ADMIN. CODE § ATCP 110.05(2)(c),[5] it is indefinite as to the essential terms under the common law, and/or it violates public policy. I reject each of these arguments.

¶32 First, assuming without deciding that the partial written agreement does not comply with WIS. ADMIN. CODE § ATCP 110.05(2)(c) because it fails to specify in writing "the hourly rate for labor and all other terms and conditions of the contract affecting price," this alleged failure does not render the agreement per se unenforceable. *See* ***Baierl v. McTaggart***, 2001 WI 107, ¶19, 245 Wis. 2d 632, 629 N.W.2d 277 ("[a] violation of a regulation promulgated under § 100.20 does not result in per se unenforceability of a contract"). Rather, the court must determine whether the intent of WIS. STAT. § 100.20, which prohibits unfair methods of competition and unfair trade practices in business, was violated. ***Baierl***, 245 Wis. 2d 632, ¶19; *see* WIS. STAT. § 100.20(1). While it is true that the partial written agreement does not contain the cost of labor, as stated above, credible evidence from the record supports the jury's conclusion that no misrepresentation or deceptive practice occurred. Because I have upheld the jury's finding of fact that no misrepresentation occurred, I conclude that the intent of WIS. STAT. § 100.20 was not violated and reject the Eversons' challenge based on the contract's asserted noncompliance with WIS. ADMIN. CODE § ATCP 110.05(2)(c).

[5] The Eversons also appear to argue that the contract was not in writing in violation of WIS. ADMIN. CODE § ATCP 110.05(1), but they are inconsistent in how they present this argument. Regardless, the record shows that there was a written contract.

¶33 Second, I decline to consider the Eversons' argument as to the contract's indefinite essential terms under the common law because the Eversons do not identify which of the essential terms are indefinite and do not otherwise develop this argument. *See* ***Pettit***, 171 Wis. 2d at 646 ("Arguments unsupported by references to legal authority will not be considered.").

¶34 Third, I reject the Eversons' argument that "public policy that underpins ATCP 110 and WIS. STAT. § 100.20 bars Backwoods from recovery on it's [sic] claim for money" because, here, "Tews and Backwoods cannot recover on a claim for money when it involved violations of HIPA and intentional misrepresentations that induced Patricia Everson to sign the contract." As stated, my review of the record reveals that credible evidence exists to support the jury's finding that no misrepresentation occurred.

¶35 *No privity of contract:* The Eversons argue that Backwoods "could not show privity of contract with David Everson or Patricia Everson." In support of this argument the Eversons reason as follows: "a written contract was required [under § ATCP 110.05]"; "Tews presented a contract to Patricia Everson at her home, which was subsequently executed by Tews and Patricia Everson"; "Backwoods did not contract with David Everson, he did not sign the contract as mandated by [§ ATCP 110.05(2)]"; "[l]ikewise, Backwoods did not show it contracted with Patricia Everson, based on the face of the contract, no limited liability company is disclosed."

¶36 I reject the Eversons' argument as to privity of contract for at least the following reasons. First, the Eversons admit that Patricia and Tews, on behalf of Backwoods, executed and signed a written contract. The Eversons' argument that, nonetheless, there was no privity of contract is unsupported by legal authority

and the record, and, therefore, I decline to consider it further. *See* ***Industrial Risk Insurers,*** 318 Wis. 2d 148, ¶25 ("[a]rguments unsupported by legal authority will not be considered"); ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (the court of appeals may "choose not to consider … arguments that lack proper citations to the record").

¶37 Second, it is undisputed that David sought out the services of Backwoods and orally agreed to have Backwoods repair the crown molding, and Backwoods proceeded to repair the crown molding as requested by David. This is credible evidence from which the jury could conclude that David was party to the home improvement contract with Backwoods. Again, assuming without deciding that Backwoods' failure to include David in the modified written agreement violated WIS. ADMIN. CODE § ATCP 110.05(2), the Eversons do not explain how any alleged failure to include David Everson in the written agreement destroyed the existing privity of contract between Backwoods and David or otherwise violated the intent of WIS. STAT. § 100.20. *See* ***Baierl***, 245 Wis. 2d 532, ¶19. Accordingly, I decline to address this insufficiently developed argument further. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.").

CONCLUSION

¶38 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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