COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP552 **Cir. Ct. No. 2008CV251**

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

JOEL MARQUEZ A/K/A JOEL MARQUEZ-VALAZQUEZ AND KRIS MARQUEZ A/K/A KRIS ANN-MARIE MARQUEZ,

PLAINTIFFS-APPELLANTS,

V.

DON HERBECK A/K/A DONALD A. HERBECK D/B/A A-D WELL & PUMP SERVICE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. This is a contract and negligence action filed by homeowners Joel and Kris Marquez against contractor Don Herbeck. The parties

entered into a contract requiring Herbeck to "abandon," that is, to properly fill and cap, an existing potable water well on the Marquezes' property, and then drill a new well for the Marquezes. After a trial to the court, the court determined that Herbeck breached the construction contract by failing to complete the well project in a timely fashion, entitling the Marquezes to an offset against what they owed Herbeck for his work. The court also decided that the well that Herbeck eventually drilled was adequate and suitable. In response to post-trial motions from the Marquezes, the court determined that they are not entitled to amend their pleadings to conform to evidence of two previously unpleaded causes of action: a violation of WIS. ADMIN. CODE § ATCP 110 (June 2011)[1] (the home improvement code), and slander of title.

¶2 On appeal, the Marquezes argue that the court erred in denying their motion to amend the pleadings after trial to conform with the evidence. We apply ***Hess v. Fernandez***, 2005 WI 19, 278 Wis. 2d 283, 692 N.W.2d 655, to conclude that neither amendment is appropriate under the circumstances presented in this case, because Herbeck lacked actual notice that either claim was being raised during trial, and the Marquezes forfeited their opportunity to request the circuit court to allow either proposed amendment in the "interests of justice."

¶3 Separately, the Marquezes purport to raise an additional argument, to the effect that this court should determine that they owe Herbeck nothing, because the Marquezes withdrew their authorization for the project before Herbeck

[1] All references to the Wisconsin Administrative Code are to the updated June 2011 version unless otherwise noted.

performed any work. We conclude that this argument is too undeveloped for us to consider it.

¶4 Accordingly, we affirm the circuit court on each of these issues.

BACKGROUND

¶5 On July 23, 2008, Joel and Kris Marquez filed a small claims complaint against Don Herbeck, doing business as Well & Pump Service. The complaint would later be transferred to large claims court. Its allegations include the following.

¶6 The Marquezes and Herbeck entered into a contract under which Herbeck was to "abandon" an existing well and construct a new well for potable water on property owned by the Marquez family. The Marquezes paid Herbeck $7,050 up front. Herbeck performed some work after May 10, 2008, "but refuse[d] to return to finish the job." The Marquezes requested "a partial refund" of the down payment in order to hire another contractor to complete the unfinished project. Attached to the complaint was a copy of a two-page form, captioned "Contract and Lien Notice," signed by Herbeck and Kris Marquez, dated April 25, 2008. This form required the Marquezes to pay Herbeck 75 percent of the estimated cost before Herbeck would begin work. The form did not provide a start or completion date for the project.

¶7 On August 19, 2008, Herbeck filed an answer and counterclaim, asserting that he had completed the project. Herbeck contended that he had "commenced the performance of the contract in late May or early June 2008 and completed the performance of the work in accordance with the contract in early August 2008." As a result, Herbeck alleged, the Marquezes owed him $4,962 for

his performance under the contract, after crediting all payments already made to him. Herbeck attached an itemized invoice purporting to support these positions. The invoice reflected the signature of Kris Marquez, dated August 8, 2008, acknowledging "the satisfactory completion of the above described work."

¶8 On September 17, 2008, the Marquezes filed an amended complaint, which acknowledged that, shortly after Herbeck was served with the complaint referenced above, Herbeck had "reappeared at the job site" and completed the new well. However, the Marquezes' amended complaint also alleged that at some point in time (not specified in the complaint), Herbeck had told the Marquezes that he would complete the well "by mid-May of 2008."

¶9 Thus the focus of the complaint shifted from a claim of unfinished performance to a claim of unreasonable delay in completing the project. The amended complaint alleged that during the period May 10, 2008, to August 8, 2008, Herbeck "failed to complete the work that he promised to perform under the parties' contract," and during this period the Marquez family was "without safe drinking water at their residence." The Marquezes alleged that they suffered $4,372.50 in consequential damages as a result of expenses that included buying bottled water and traveling to a relative's house to take showers.

¶10 On October 21, 2008, Herbeck filed an amended counterclaim for the balance due under the construction contract. Herbeck demanded that Herbeck's construction lien, which had allegedly been served on Marquez, be declared a priority interest in the Marquez residence and that the Marquez residence be sold to satisfy the lien plus interest and collection fees. The Marquezes replied to the amended counterclaim with affirmative defenses.

¶11 On December 11, 2008, the Marquezes filed a second amended complaint, now including allegations of deficient performance in Herbeck's work. This complaint sought an offset against the balance due for the completed well, recovery for expenses associated with inspection of the well, and expenses to repair what they now alleged were defects in the completed well and for funds to cover future repairs and monitoring of the well.

¶12 After a one-day trial to the court on June 19, 2009, the court took the claims and counterclaims under advisement, and the parties submitted written final arguments and authorities.

¶13 Post-trial motions included one from the Marquezes under WIS. STAT. § 802.09(2) (2009-10)[2] to amend the pleadings to conform to the evidence that had been introduced at trial. The Marquezes sought to amend the pleadings to add causes of action to allege: (1) a violation of WIS. ADMIN. CODE § ATCP 110, permitting an award of double damages, costs, and attorney fees pursuant to WIS. STAT. § 100.20(5), and (2) slander of title pursuant to WIS. STAT. § 706.13.

¶14 The court issued a written decision and order that included the following findings and conclusions: (1) Herbeck breached the construction contract by failing to complete the new well in a timely fashion; (2) the new well is adequate and suitable, and does not require special monitoring beyond that recommended for all private wells by state officials; (3) the Marquezes are entitled to a $2,400.00 offset against the $4,962.00 balance due to Herbeck for his work to "reasonably compensate[] the plaintiffs for the actual expense and inconvenience

[2] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

of living in a household for many more days than were necessary without potable water"; (4) the construction lien is to be removed; (5) the Marquezes are not entitled to damages for slander of title, because "[n]either the facts nor the law support such a claim," and therefore amendment is not appropriate; (6) a violation of WIS. ADMIN. CODE § ATCP 110 "may well" have occurred, but the Marquezes "failed to prove up pecuniary loss and therefore are not entitled to double damages" and amendment is not appropriate; and (7) neither party is entitled to attorney fees or costs.

¶15 Additional relevant aspects of the trial record and specific findings of fact made by the court are referenced below as necessary.

DISCUSSION

I. Denial of Motion to Amend Pleadings Post-Trial to Conform to Evidence of Alleged Violations of WIS. ADMIN. CODE § ATCP 110 and Slander of Title.

¶16 Given the nature of the record, the arguments of the parties, and the applicable legal standards, we conclude that we may address and resolve together in this section of this opinion the two amendment-to-conform issues presented by the Marquezes on appeal.

¶17 The Marquezes contend that the court erred in denying their post-trial motions to amend the pleadings to conform to evidence to allege two rights of action against Herbeck: (1) a violation of WIS. STAT. § 100.20 and Agriculture, Trade & Consumer Protection (ATCP) 110,[3] and (2) slander of title.[4] For the

[3] WISCONSIN ADMIN. CODE ch. ATCP 110, entitled "Home Improvement Practices," was adopted under authority of WIS. STAT. § 100.20, the fair trade practices statute. Under § 100.20(5), double damages and attorney fees may be awarded to those injured by unfair trade (continued)

following reasons, we affirm the circuit court on this issue, but on grounds other than those cited by the court, as summarized above. "On appeal, we may affirm on different grounds than those relied on by the trial court. Furthermore, when we affirm on other grounds, we need not discuss our disagreement with the trial court's chosen grounds of reliance." ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (citations omitted).

A. Administrative Code Provision at Issue

¶18 Before addressing the proposal to amend to add both the administrative code provision and slander of title claims, we briefly clarify the administrative code violation or violations at issue. On appeal, the Marquezes allege two violations of the administrative code, but we conclude that only one is properly at issue. In its decision, the circuit court focused on the only administrative code violation alleged by the Marquezes in their post-trial motion, namely, a violation of WIS. ADMIN. CODE § ATCP 110.05(2)(d). This section of the code provides that if the buyer signs a written contract, the written contract "shall clearly, accurately and legibly set forth ... (d) The dates or time period on or within which the work is to begin and be completed by the seller." On appeal, however, the Marquezes assert that the trial record would support findings of a violation of not only § 110.05(2)(d), but also of WIS. ADMIN. CODE § ATCP

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practices that violate the administrative regulations. As a general matter, § 100.20 and § ATCP 110 are designed to encourage victims of improper home improvement projects to bring suits as private attorneys general, in part to vindicate and encourage respect for the public's rights. *See* ***Benkoski v. Flood***, 2001 WI App 84, ¶17, 242 Wis. 2d 652, 626 N.W.2d 851.

[4] A party may file a tort cause of action, slander of title, against a person who has submitted a false, sham, or frivolous filing related to any of a number of identified property interests where the filing impairs the party's title to the property at issue. WIS. STAT. § 706.13(1).

110.02(11), which prohibits sellers from making misrepresentations to obtain payment.[5]

¶19 For reasons of fairness and judicial economy, in order to preserve an issue for appeal a party must ordinarily identify and present the issue clearly enough to permit the circuit court to address it and render a ruling. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 (issues must be preserved in the circuit court to be raised on appeal as a matter of right, otherwise they are forfeited). We conclude that it would be unfair to Herbeck for us to entertain for the first time on appeal the argument of the Marquezes that the court erred in deciding not to allow amendment of the pleadings to conform to evidence of an alleged violation of the administrative code misrepresentation provision. The court presided over pretrial and trial proceedings, considered post-trial briefing, and issued detailed findings of fact and conclusions of law without being presented with this argument; it comes too late now.[6]

B. Amendment to Conform to Pleadings (Both Administrative Code Provision and Slander of Title)

¶20 Having established that the only alleged violation of the administrative code at issue involves Herbeck's failure to include a start and completion date on the contract, we proceed now to apply WIS. STAT. § 802.09(2) to the question of whether the circuit court erred in failing to amend the pleadings

[5] While details are not relevant to our resolution of this issue, the Marquezes argue on appeal that the Herbeck made misrepresentations to them in order to induce them to enter into the contract in violation of WIS. ADMIN. CODE § ATCP 110.02(11).

[6] The court did not purport to make any findings of fact to the effect that Herbeck made any untrue, deceptive, or misleading representation to the Marquezes.

to conform to proof supporting causes of action based on the administrative code and slander of title.

¶21 WISCONSIN STAT. § 802.09(2) in some circumstances allows, and in other circumstances requires, a court to treat issues that were not pleaded either before or during trial as if the issues had been raised before or during trial. It is undisputed that the Marquezes expressly tried their case exclusively on theories of breach of contract and negligence, and that it was only after trial that they raised for the first time the two new potential issues.

¶22 We conclude that the court should be affirmed on the grounds that, as a matter of law under ***Hess***, 278 Wis. 2d 283, there was no express or implied consent to try either of the two new claims, because the Marquezes failed to provide Herbeck with notice of either claim from the time they filed their first complaint to the close of evidence at trial. In addition, they forfeited their opportunity for amendment in "the interests of justice." ***Id.***, ¶23.

1. Express or Implied Consent

¶23 The Marquezes do not assert that Herbeck objected at trial to the admission of evidence on the ground that the evidence related to proof of an administrative code violation or slander of title. Had there been an objection, a separate portion of WIS. STAT. § 802.09(2) would have applied. Absent such an objection, the relevant portion of the statute reads as follows:

> (2) AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings *are tried by express or implied consent of the parties*, they *shall* be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even

> after judgment; but failure to so amend does not affect the result of the trial of these issues.

WIS. STAT. § 802.09(2) (emphasis added). By these statutory terms, as explained in ***Hess***, amendment would be required if the Marquezes were able to show that the issues were tried either by express or implied consent of the parties. *See* ***Hess***, 278 Wis. 2d 283, ¶14.

¶24 The Marquezes do not contend that Herbeck expressly consented to trial of the administrative code or slander of title claims. This leaves the question whether there was implied consent to try either issue.

¶25 To find trial of an issue by implied consent, there must have been actual notice. ***Id.***, ¶14. "[I]mplied consent exists where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is *aware that the evidence goes to the unpleaded issue*." ***Id.***, ¶21 (emphasis added) (citing ***State v. Peterson***, 104 Wis. 2d 616, 630, 312 N.W.2d 784 (1981) ("actual notice to the parties appears to be the key factor in determining whether there was implied consent"); *see also* ***Zobel v. Fenendael***, 127 Wis. 2d 382, 390, 379 N.W.2d 887 (Ct. App. 1985) (applying ***Peterson*** to hold that amendment not proper in context of evidence offered to prove pleaded issue, because defendant "may not have been aware" that plaintiffs "were raising a new unpleaded issue").

¶26 ***Hess*** teaches that the party seeking amendment under these circumstances must prove that the opposing party was "fully aware" that: (1) the party seeking amendment was "trying a claim" under the unpleaded theory, and (2) the opposing party "could be liable" under the unpleaded claim. *See* ***Hess***, 278 Wis. 2d 283, ¶22; *cf.* ***id.***, ¶52 (Abrahamson, C.J., dissenting) (contrasting outcome

in ***Hess*** to outcome in ***Gorton v. American Cyanamid Co.***, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995), in which amendment was allowed post-trial because new claims had been "fully aired" at trial, defendant not prejudiced by amendment, and record establishes that "no other evidence could have been presented during trial to rebut the amended claim").

¶27 The court in ***Hess*** explained that the requirement of actual notice rests on concern that when evidence is purportedly introduced to prove only those issues raised by the original pleadings, "'the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is made clear.'" ***Hess***, 278 Wis. 2d 283, ¶22 (quoting 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 1493 at 32-35 (1990)) (addressing FED. R. CIV. P. 15(b)(2)). Under this reasoning, it would be unjust for the court to entertain a new theory of recovery after trial where there has been no indication to the opposing party, by the time the relevant evidence is being introduced, that the party presenting the evidence intends to rely on the new theory.

¶28 Herbeck argues that the record does not provide any reason to conclude that he had actual notice of either of the two claims before the Marquezes filed their post-trial motion. The Marquezes fail to address this issue, and therefore concede the point as to each cause of action. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted."). Moreover, even if the point were not conceded, our own review of the record reveals that, while facts relevant to proof of the two issues were admitted, there appears to be no direct evidence that Herbeck was "fully aware" that the Marquezes intended to make a claim under the administrative code or of slander of title. From the time this action was commenced in small claims

court on July 23, 2008, to the close of evidence at trial on June 19, 2009, the Marquezes appear to have made no reference to either potential causes of actions.

2. "Interests of Justice"

¶29 We have concluded that the evidence was introduced without objection and there was no actual notice. If we had reached this same set of conclusions on these facts while acting in the role of a circuit court, we would next be required to consider, under WIS. STAT. § 802.09(1) and (2), whether amending the pleadings to conform to the evidence is in "the interests of justice." *See* ***Hess***, 278 Wis. 2d 283, ¶¶23-24. In other words, even without express or implied consent, is amendment still called for in the interests of justice?

¶30 This "interests of justice" analysis "often involves consideration of prejudice" to the opposing party, but can also "take into account a variety of factors including undue delay, motive, and prejudice." ***Id.***, ¶23 (citations omitted). "Amendment is thus within the discretion of the circuit court and the circuit court in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment." ***Peterson***, 104 Wis. 2d 616, 634.

¶31 However, the Marquezes have forfeited the opportunity to present this issue to the circuit court by failing to ask the court to undertake an "interests of justice" analysis. Appellate issues must be preserved in the circuit court. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved generally will not be considered on appeal). Moreover, in arguing on appeal for the first time that justice requires amendment, the Marquezes are not persuasive in explaining why the circuit court should have found that justice requires amendment, despite the court's factual finding that Herbeck's failure to

include a time frame for the project could not be shown to have resulted in monetary loss to the Marquezes.[7]

¶32 For all of these reasons, we conclude that the circuit court did not err in denying the Marquezes' motion to conform the pleadings post-trial to include the alleged administrative code violation, and that it also did not err in this same connection regarding the slander of title claim.

II. Arguments Related to Recovery for "Unauthorized" Work and/or Material and/or Substantial Breach.

¶33 In the table of contents and the statement of issues of the Marquezes' principal brief, the second issue is described as being whether the breaching party to a contract is "entitled to receive its entire billed amount for goods and services where the party continued to perform the majority of its work after its breach and after the other party had ordered it to cease work and remove itself from the premises." However, this issue description does not correspond to any argument heading in the contents of the brief.

¶34 We decline to review this issue because the Marquezes' principal brief is inadequate on this issue in multiple respects, assuming without deciding that the issue was not forfeited because it was not raised before the circuit court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court

[7] The circuit court was not obligated, as a matter of law, to identify and pursue this issue on its own. The court in ***Hess v. Fernandez***, 2005 WI 19, ¶23, 278 Wis. 2d 283, 692 N.W.2d 655, suggested that a circuit court, when presented with the issue by a party, "*has to* determine if such an amendment is in the 'interests of justice.'" (Emphasis added.) However, the court in ***State v. Peterson***, 104 Wis. 2d 616, 634, 312 N.W.2d 784 (1981), made clear that pursuing the issue is within the court's discretion by stating that "the circuit court *may* sua sponte under sec. 802.09(1), (2) amend the pleadings to conform to the evidence if the circuit court concludes that justice so requires." (Emphasis added.)

of appeals may decline to review inadequately developed issues); *see also* WIS. STAT. RULE 809.19(1)(e).

¶35 A search for argument on purported issue two reveals that the closest the Marquezes come is found on a single page, not set off by a heading, as part of the *first issue* addressed above in this opinion, introduced by this sentence: "The final question is whether the Marquezes double damages [under the administrative code] should be reduced as an offset to work done by Herbeck." The Marquezes then briefly assert, without benefit of citation to relevant legal authority[8] or to relevant portions of the record,[9] that the Marquezes withdrew their authorization for Herbeck to continue his work on the project, and therefore "arguably" "the contract ceased to exist."

¶36 It is not until the reply brief that we learn for the first time that this issue apparently involves arguments that the Marquezes owe Herbeck nothing based on one or some combination of the following three legal theories: that Herbeck committed a material breach, that Herbeck committed a substantial

[8] The only court opinion referenced on this page of the brief is cited for a proposition that does not advance any argument referenced by the Marquezes, even putting aside the fact that the proposition offered is not found on the page of the opinion to which the reader is directed.

[9] The Marquezes provide a citation to only one portion of the record for one decision of the circuit court. They provide additional references to the court's decision below, but without record citations, as required by WIS. STATE. RULE 809.19(1)(e). More significantly, there is no record citation for the factual assertion on which this fragmentary argument purports to rest, namely that the Marquezes withdrew their authorization for Herbeck to continue with his work. The court made no such finding in its decision, and the Marquezes fail to assert that they raised this issue with the circuit court in this context. As referenced above, as a general matter, appellate issues must be preserved in the circuit court. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Therefore, a first step in pursuing this issue would have been for the Marquezes to identify for this court how the circuit court was alerted to the "authorization withdrawal" issue, and what decision it made on the topic, or, if this did not occur, explaining our authority for concluding that the court's relevant decision was in error even in the absence of a circuit court decision on the basis now argued.

breach, and/or that equitable relief is not available to Herbeck because he was a trespasser on the land after the Marquezes told him to leave the property during the dispute. In the discussion of issue two in the principal brief, the Marquezes do not even use terms such as "material," "substantial," "trespass," or "equity," much less do they cite to legal authority on the topics of material or substantial breach of contract or the consequence of an alleged trespass under the circumstances presented here.

¶37 "We have consistently held that arguments made for the first time in a reply brief 'are in violation of the Rules of Appellate Procedure and will not be considered.'" ***Turner v. Sanoski***, 2010 WI App 92, ¶12 n.6, 327 Wis. 2d 503, 787 N.W.2d 429 (quoting ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995)).

¶38 For all of these reasons, the Marquezes fail to develop an argument in their principal brief related to their purported issue two that is sufficient to merit review on appeal, in part because it would be unfair to Herbeck for us to do so, and therefore we do not consider the topics referred to on that page of the brief.

III. Costs on Appeal

¶39 Herbeck moves for an award of costs and attorney fees under WIS. STAT. RULE 809.25(3) on the ground that all issues raised by the Marquezes on appeal are frivolous and they or their attorneys knew or should have known that each was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law as required by RULE 809.25(3)(c)(1)2.

¶40 This presents a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. Costs and attorney fees are appropriate only if an appellate court concludes that the *entire appeal* is frivolous. ***Id.*** Under WIS. STAT. RULE 809.25(3)(c)2., sanctions for a frivolous appeal are imposed if the court concludes that the "party or party's attorney knew, or should have known, that the appeal ... [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." "Since the standard is objective, an appellate court looks to what a reasonable party or attorney knew or should have known under the same or similar circumstances." ***Id.***

¶41 We deny the motion, having concluded that not all of the arguments presented by the Marquezes on appeal are frivolous. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1.

CONCLUSION

¶42 The circuit court did not err in denying the Marquezes' motion to conform the pleadings to reflect proof of an alleged administrative code violation or slander of title. The argument identified as issue two in the Marquezes' principal brief is too undeveloped for our consideration. The motion for costs on appeal is denied. Accordingly, we affirm the court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.