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**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  
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**DISTRICT IV**

April 24, 2018

To:

Hon. Gregory J. Potter  
Circuit Court Judge  
Wood County Courthouse  
400 Market Street, PO Box 8095  
Wisconsin Rapids, WI 54494

Jason T. Studinski  
Jennifer J. Kehoe  
Studinski Law, LLC  
2810 Gilman Dr.  
Plover, WI 54467

Cindy Joosten  
Clerk of Circuit Court  
Wood County Courthouse  
P.O. Box 8095  
Wisconsin Rapids, WI 54494

Catherine A. La Fleur  
La Fleur Law Office, S.C.  
826 N. Plankinton Ave., 5th Fl.  
Milwaukee, WI 53203

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

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2017AP2415-FT      Estate of Thomas Smith, by its Personal Representative, Cary  
Smith v. Delores Jean Agne (L.C. # 2012CV20)

Before Lundsten, P.J., Blanchard, and Kloppenburg, 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).**

Pursuant to this court's order of January 5, 2018, the parties have submitted memo briefs in an expedited appeal. *See* WIS. STAT. RULE 809.17 (2015-16).<sup>1</sup> Upon review of those memoranda and the record, we affirm.

Delores Jean Agne appeals a circuit court's oral ruling denying her post-verdict motion for sanctions following her successful defense of civil litigation brought by the Estate of Thomas

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Smith (“the Estate”). Agne argues that the circuit court should have awarded sanctions because the Estate denied a request for admission relating to whether Agne had committed the tort of abuse of process by communicating with law enforcement. Agne contends that her subsequent success at trial means that she proved the truth of the matter asserted and is therefore entitled to all attorney fees incurred after the denial. Because Agne has not demonstrated that the circuit court erroneously exercised its discretion in denying sanctions, we affirm.

The Estate filed a complaint against Agne alleging several causes of action, and subsequently amended the complaint to add an abuse of process claim. The circuit court granted Agne’s motion for summary judgment on the abuse of process claim, but then reinstated it on the Estate’s motion to reconsider. On the eve of trial, the Estate voluntarily withdrew most of its claims. The Estate’s abuse of process claim proceeded to trial, along with a claim for wrongful eviction. The jury rendered a defense verdict.

Following trial, Agne filed a motion for sanctions seeking awards of costs and attorneys fees from the Estate on four separate statutory grounds. In an oral ruling, the circuit court denied Agne’s motion for sanctions in its entirety. The sole issue in this appeal is whether the circuit court properly denied Agne’s motion for sanctions against the Estate for failing to admit a matter that Agne argues she eventually proved at trial. Specifically, Agne asked the Estate to admit that “Delores Agne did not commit the tort of abuse of process by placing any telephone call, or otherwise establishing communication, with any law enforcement agency, relating to Cary Smith.”<sup>2</sup> The Estate denied this request. Agne argues that because she ultimately prevailed on

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<sup>2</sup> Agne also sought sanctions for the denial of a request for admission that dealt with rent. Agne does not appeal this aspect of the circuit court’s ruling.

the Estate's abuse of process claim, Agne is entitled to attorney fees for all work performed after her request.

In its oral ruling denying Agne's motion, the circuit court explained that Agne had the burden of proof on her motion for sanctions. The court determined that the Estate's claim that Agne had committed the tort of abuse of process was an issue of fact for the jury to resolve. The court further noted that the factual basis for the Estate's claim was broader than the contacts with law enforcement specified in Agne's request for admission. The court also stated that it had no measure of damages, because Agne's sanctions motion did not provide a sufficient breakdown of the attorneys fees incurred with respect to the specific factual issue covered by the request for admission. The court explained that the Estate had advanced a number of legitimate claims, so the fact that Agne was taking an "all or nothing" approach to sanctions made it impossible to determine an appropriate award. Finally, the court noted the extreme litigiousness on both sides and expressed its hope that its post-verdict ruling would bring an end to the litigation, which seemed to be benefitting only the attorneys. Agne appeals.

The relevant discovery statute provides,

If a party fails to admit ... the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees.

WIS. STAT. § 804.12(3). The statute further provides,

[t]he court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail

on the matter, or (d) there was other good reason for the failure to admit.

***Id.***

“The decision to impose sanctions under ... WIS. STAT. § 804.12 lies within the trial court’s discretion.” See *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553.<sup>3</sup> For our review of discretionary decisions under Wisconsin’s discovery rules, “the burden is on the appellant to show that the trial court misused its discretion and we will not reverse unless such misuse is clearly shown.” *Hegarty v. Beauchaine*, 2006 WI App 248, ¶107, 297 Wis. 2d 70, 727 N.W.2d 857.

Agne argues that the circuit court erred because it failed to make any of the findings specified in WIS. STAT. § 804.12(3)(a)-(d) before denying her motion. A threshold problem with this argument is that the circuit court determined that it had no basis for making any award, because Agne’s motion took an “all or nothing” approach to sanctions and made no attempt to specify the reasonable expenses incurred in proving the truth of the matter that the Estate had denied. Agne contends that this determination was erroneous, because her brief in support of sanctions specified that she had incurred \$173,226 in fees following the Estate’s denial of the request for admission. This argument misses the mark entirely because the circuit court determined that these fees were incurred at a time when the Estate was advancing several legitimate claims, including the wrongful eviction claim that ultimately went to trial along with

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<sup>3</sup> Agne’s opening brief incorrectly states that our standard of review is de novo, arguing that it involves the application of WIS. STAT. § 804.12(3) to undisputed facts. However, the brief then correctly states that we can “independently review the record to determine if it provides a basis for the court’s exercise of discretion.” See *Mucek v. Nationwide Commc’ns, Inc.*, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98.

the abuse of process claim. Agne attempts to minimize the wrongful eviction claim as specious, de minimis, unsubstantiated, and not a claim that was “keeping Agne up at night.” However, such conclusory assertions are no substitute for a developed argument that the circuit court erred. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (the court may decline to consider conclusory and undeveloped arguments that are not adequately briefed). Nor do we see any developed argument to address the circuit court’s determination that the factual basis for the Estate’s abuse of process claim went beyond the contacts with law enforcement referred to in Agne’s request for admission. To the contrary, the record establishes that there were six different grounds for the Estate’s abuse of process claim, only one of which involved calls to law enforcement.

Agne argues in the alternative that we should remand to the circuit court for a hearing regarding the specific fees and costs incurred as a result of the Estate’s denial of the request for admission. However, as far as we can tell, Ange never requested such an opportunity in the circuit court, which means she has forfeited this argument. *See Townsend v. Massey*, 2011 WI App 160, ¶26, 338 Wis. 2d 114, 808 N.W.2d 155 (we decline to consider new arguments or theories when doing so would “seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party.”).

In addition, even if we were to address this argument, Agne has not pointed to any case law to support her argument that remand is required in this instance. Instead, Agne argues that we have the authority to order a remand. *See Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 154 Wis. 2d 407, 414-16, 453 N.W.2d 197 (Ct. App. 1990) (“*Chmill II*”). In *Chmill II*, we remanded a matter to the circuit court for a determination of the appropriate fee award under

Wisconsin's lemon law. *Id.* at 418. *Chmill II* is readily distinguishable from the current case, in that we had already remanded the matter once to the circuit court to calculate a reasonable award to a successful plaintiff. See *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 144 Wis. 2d 796, 808-09, 424 N.W.2d 747 (Ct. App. 1988). In our subsequent decision after remand, we determined that the circuit court erroneously exercised its discretion when it construed our instructions narrowly and declined to award the attorney fees incurred in litigating the fee award, as well as costs and disbursements. See *Chmill II*, 154 Wis. 2d at 412-14. Because the current appeal involves a circuit court's discretionary determination under a different statute, neither of our decisions in *Chmill* help Agne establish that the circuit court erroneously exercised its discretion in the present case.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit is affirmed.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*