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DISTRICT II

October 23, 2019

To:

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

2018AP1628 Perfection, LLC d/b/a Carl Krueger Construction, Inc. v. Edward
Cole, a/k/a Carl Cole d/b/a North Shore Station
(L.C. # 2014CV449)

Before Neubauer, C.J., Reilly, P.J., and Dugan, J.

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).

Edward Cole appeals pro se from an order denying his motion for a new trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate

for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm the order of the circuit court. In addition, we grant Perfection, LLC's motion to find this appeal frivolous and remand to the circuit court to assess reasonable attorney fees against Cole.

This case arises out of a fire loss that occurred at Cole's laundromat business on January 12, 2013. Cole retained a contractor (Perfection)² to perform restoration services. When he withheld payment for some of its work, Perfection sued him. A jury found Cole liable to Perfection for breach of contract and punitive damages.

After entry of judgment, Cole moved for a new trial. In it, he accused his trial counsel of ineffective assistance. He also claimed newly discovered evidence. Finally, he asked for a new trial in the interests of justice. Ultimately, the circuit court denied Cole's motion. This appeal follows.

On appeal, Cole contends that that the circuit court erred in denying his motion for a new trial. He renews his arguments regarding trial counsel's performance, newly discovered evidence, and the interests of justice. We address each one in turn.

With respect to Cole's claim of ineffective assistance of counsel, the issue is a nonstarter. A party has the right to effective assistance of counsel only where the right to counsel is guaranteed. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Cole had no guaranteed right to counsel in this civil case. *See Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 405,

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² Perfection was then doing business as Carl Krueger Construction. Carl Krueger Construction subsequently assigned its contractual rights to Perfection.

308 N.W.2d 887 (Ct. App. 1981). Accordingly, his retained counsel's alleged ineffectiveness does not warrant relief.

With respect to Cole's claim of newly discovered evidence, we are satisfied that the circuit court properly rejected it. Although the court did not expressly delineate the requirements for ordering a new trial under WIS. STAT. § 805.15(3), it explained why Cole was not entitled to one. The court viewed Cole's submission, which it aptly described as rambling, as an unpersuasive attempt to relitigate issues already resolved by the jury.³ On this record, we perceive no erroneous exercise of discretion. See *State v. Williams*, 2001 WI App 155, ¶9, 246 Wis. 2d 722, 631 N.W.2d 623 (a circuit court's ruling on newly discovered evidence is reviewed under the deferential erroneous exercise of discretion standard).

Lastly, with respect to Cole's interest of justice argument, WIS. STAT. § 752.35 allows this court to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." This discretionary reversal power is reserved for "exceptional cases." *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). This is not an exceptional case. Rather, as the circuit court observed, this is simply a case where "Cole refuses to accept that the jury did not reach the conclusion he desired." Accordingly, we decline to order a new trial.

As a final matter, Perfection argues that this appeal is frivolous. We agree. Upon careful review, we are convinced that Cole knew or should have known that the entire appeal was

³ For example, Cole submitted a document in support of his contention that he signed the subject contract on behalf of an LLC and not himself personally. The circuit court noted that Cole testified to that fact at trial, and the jury rejected his testimony.

without any reasonable basis in law and could not be supported by a good faith argument for extension, modification, or reversal of existing law. *See* WIS. STAT. RULE 809.25(3). We therefore grant Perfection’s motion and remand to the circuit court to assess reasonable attorney fees against Cole.⁴

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21, and remanded with directions.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁴ To the extent we have not addressed any other argument raised by Cole on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).