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 I

December 6, 2022

To:

Hon. Carl Ashley
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

David G. Kingstad
Electronic Notice

Patrick Michael Roney
Electronic Notice

James C. Ratzel
Electronic Notice

Brandon Jon Robison
Electronic Notice

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

2021AP736 Maria Garcia v. Dale Gordon (L.C. # 2019CV6152)

Before Brash, C.J., Donald, 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).

Maria Garcia appeals an order that dismissed her claims against American Family Mutual Insurance Company, S.I. (American Family) and Keith Gordon. The circuit court concluded that the homeowner's insurance policy that American Family issued to Keith Gordon and his wife, Nancy Gordon, did not provide any liability coverage for their adult son, Dale Gordon, whose

dog allegedly injured Garcia.[1] The circuit court also concluded that Keith and Nancy did not own, keep, or harbor the dog. Therefore, the circuit court granted declaratory judgment in favor of American Family as to Garcia's claims regarding Dale's liability; and the circuit court granted summary judgment in favor of American Family and Keith as to all claims against them. Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] We affirm.

In September 2016, Bentley the dog jumped on Garcia while she was walking past Keith's and Nancy's duplex in Greenfield. Garcia fell and sustained injuries. She filed suit against Keith and Nancy, their son Dale, and American Family. Garcia alleged that Bentley was "the Gordon family's dog," that Keith, Nancy, and Dale were strictly liable for Garcia's injuries under WIS. STAT. § 174.02, and that Keith, Nancy, and Dale were negligent. Garcia further alleged that American Family provided liability coverage for Keith, Nancy, and Dale.

American Family moved for declaratory judgment, asserting that the homeowner's policy issued to Keith and Nancy did not cover Dale because he was neither a named insured nor a member of Keith's household. Separately, American Family and Keith moved for summary judgment on the ground that neither Keith nor Nancy owned Bentley the dog. Garcia opposed

[1] The record shows that Nancy Gordon passed away before Garcia filed suit in this matter. Accordingly, while Nancy Gordon is a named defendant in the lawsuit, the order underlying this appeal does not resolve the claims against her, and the parties treat those claims as moot. The issues that Garcia raises on appeal nonetheless implicate Nancy Gordon in some respects. Because three people relevant to this litigation have the last name "Gordon," we refer to those people by only their first names in the remainder of this opinion.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

both motions, and the parties submitted deposition transcripts and affidavits in support of their positions.

The uncontroverted evidence submitted in connection with the motions showed that, in September 2016, Keith owned the Greenfield duplex and that he lived in one of its side-by-side units with Nancy. Keith and Nancy had a homeowner's policy with American Family that provided coverage for the named insureds and members of their household. Keith and Nancy were the only named insureds.

For more than thirty-five years, Keith had rented the second unit of the duplex to various tenants. In 2016, Keith's son Dale was the tenant in the second unit, which Dale had been renting since his divorce in approximately 2013. The two units of the duplex had separate addresses, separate entrances, and separate utility connections. Dale paid Keith monthly rent of $600, and Dale received and paid the bills for all of the utility services for his rental unit.

Dale was forty-four-years old in 2016 and employed as a construction worker. He did not spend much time in Keith's unit of the duplex and never slept there. When Dale's three teen-aged children came to visit, they slept in their bedrooms in Dale's unit and did not sleep in Keith's unit. Dale and Keith sometimes ate together, although Keith testified that he could not recall precisely when they did so. Keith explained that such meals usually involved family gatherings and also included Keith's six other adult children. In regard to day-to-day interactions between Keith and Dale, Keith testified that Dale was "a grown man [who] takes care of himself," but that Dale would sometimes "give [Keith] a hand" with property maintenance tasks, including shoveling snow "when it was heavy" and cutting the grass.

Dale purchased Bentley the dog in approximately 2015. Keith discouraged the purchase because he "do[es]n't like dogs," and neither Keith nor Nancy contributed any money towards buying the dog. After Dale bought Bentley, Dale paid for Bentley's food and veterinary bills, walked Bentley, and otherwise provided his daily care. The dog almost never entered the unit where Keith and Nancy lived, Keith and Nancy rarely interacted with the dog, and they never looked after the dog or cared for it.

In September 2016, Garcia lived near Keith's duplex. She testified at her deposition that she had often observed Bentley the dog in the yard of the duplex prior to September 2016, and she had presumed that Dale owned the dog because she saw him with it. Garcia and her husband also each filed an affidavit stating that before Garcia's injury, they walked past the duplex "on many occasions" and saw Bentley "all around the yard." Garcia additionally submitted an affidavit from Keith's neighbor, who similarly stated that prior to the September 2016 incident, Bentley "had the run of the entire yard."

The circuit court concluded that, based on the undisputed facts and the applicable law, Dale was not a member of Keith's household in September 2016, and that Keith and Nancy did not own Bentley the dog. Accordingly, the circuit court granted the motions for declaratory and summary judgment and dismissed the claims against Keith and American Family. Garcia appeals.

The decision to grant or deny declaratory relief is within the circuit court's discretion. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. When, however, the exercise of that discretion turns on the interpretation of an insurance policy, which is a question of law, we independently review the circuit court's decision. *See* ***State Farm***

Fire & Cas. Co. v. Acuity, 2005 WI App 77, ¶6, 280 Wis. 2d 624, 695 N.W.2d 883. In such circumstances, we treat the declaratory judgment as an award of summary judgment. *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196.

We review summary judgment rulings *de novo*, using the same methodology as does the circuit court. *See* ***Heaton v. Mountin***, 2000 WI App 45, ¶8, 233 Wis. 2d 154, 607 N.W.2d 322. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2). "A 'material fact' is one that is 'of consequence to the merits of the litigation.'" ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294 (citation omitted). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *See* ***Baxter v. Wisconsin DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

We begin our analysis by considering whether the circuit court erred by granting declaratory judgment in favor of American Family on the ground that Dale was not an insured under Keith's homeowner's policy. We review the issue using summary judgment methodology. *See* ***Young***, 314 Wis. 2d 246, ¶6.

The American Family homeowner's insurance policy at issue provided, in pertinent part, that an "insured" was a person named on the policy or a named insured's relative who was also a resident of the named insured's household. Garcia does not dispute that, in September 2016, Keith and Nancy were the only named insureds on the homeowner's policy. The dispute is whether a fact finder could conclude that Dale was a resident of Keith's and Nancy's household

and therefore an insured under the policy. The circuit court correctly rejected Garcia's contention that the facts could support such a finding.

The terms "resident" and "household" are not defined in the American Family policy. The parties agree that the applicable test for household residency is set forth in ***Pamperin v. Milwaukee Mutual Insurance Co.***, 55 Wis. 2d 27, 197 N.W.2d 783 (1972). There, our supreme court determined that household residence turns on three factors:

> (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon.

Id. at 36-37 (ellipsis and quotation marks omitted). None of the three ***Pamperin*** factors is controlling; rather, they must "combine to a greater or lesser degree in order to establish the relationship." *See* ***id.*** at 37. Further, in applying ***Pamperin*** to determine a family member's residence, relevant considerations are: "(1) age of the person; (2) whether a separate residence is established; (3) self-sufficiency of the person; (4) frequency and the duration of the stay in the family home; and (5) intent to return." *See* ***Seichter v. McDonald***, 228 Wis. 2d 838, 845, 599 N.W.2d 71 (Ct. App. 1999) (citation omitted). The undisputed facts, viewed in light of the applicable factors, demonstrate that Dale was not a resident of Keith's household in September 2016.

Keith and Dale did not live "under the same roof." *See* ***Pamperin***, 55 Wis. 2d at 37. Keith lived in one unit of the duplex and Dale lived in the other. The two units were side by side, not stacked, and they were separated by a concrete wall with no interior connecting

doorway. Each unit had its own separate and distinct mailing address, entrance, and utility connections. The facts thus do not satisfy the first ***Pamperin*** factor.

The facts also do not satisfy the second ***Pamperin*** factor, which requires a "close, intimate and informal relationship." *See* ***id.*** Keith and Nancy had a formalized landlord-tenant relationship with Dale. Dale paid rent in a regular amount, and he separately received and paid the bills for electricity, heat, and water for his unit. Relatedly, Dale's living arrangement vis-à-vis Keith and Nancy was neither "close" nor "intimate." *See* ***id.*** Dale never slept in Keith's unit and did not spend much time there. Although Garcia emphasizes that Dale and Keith "shared meals," the undisputed testimony was that they hosted each other only "sometimes," and most commonly ate together outside at family gatherings when Dale's siblings were also present. As to the maintenance tasks that Dale performed, ***Pamperin*** reflects that a person with a home of his or her own does not become a member of a relative's separate household merely by being helpful and performing some chores at the relative's residence. *See* ***id.***, 55 Wis. 2d at 37-39.

Turning to the third ***Pamperin*** factor, the facts do not support a reasonable conclusion that Keith and Nancy would likely consider Dale when "contracting about ... insurance," given the nature of the relationship between the parties. *See* ***id.*** at 37. Keith's and Nancy's relationship with Dale was formalized, not close and intimate, and Dale lived apart from Keith and Nancy. *See* ***id.*** Accordingly, no long-standing "informal" living arrangement—either existing or anticipated—warranted consideration for insurance purposes. *See* ***id.*** To the contrary, a formalized rental arrangement had existed for several years before the incident in this case. Had Keith contemplated insuring Dale, Keith had substantial time to obtain such coverage. He did not do so.

The ***Seichter*** factors material to determining the residence of an insured's relative—age and self-sufficiency of the purported resident, existence of a separate household for the person, frequency and duration of the stay in the family homestead, and intent to return there—similarly combine to disallow any reasonable contention that Dale was a member of Keith's household in September 2016. *See* ***id.***, 228 Wis. 2d at 845. Dale was a self-supporting middle-aged man with three teen-aged children; he had his own separate residence in a rental unit; he rarely spent time in Keith's unit; and he exhibited no intent to live in Keith's unit in the future.

In sum, the only reasonable inference arising from the undisputed facts is that Dale and Keith resided in separate households at the time of the incident in this case. The circuit court therefore correctly entered a declaratory judgment that the American Family homeowner's policy did not provide coverage for Dale.

We next consider whether the circuit court properly granted summary judgment in favor of Keith and American Family on the ground that Keith and Nancy did not own Bentley the dog. According to Garcia, "[t]here was ample evidence from which a jury could conclude that Keith either 'kept' or 'harbored' B[ent]ley the dog and was therefore an owner under the applicable statute." The circuit court correctly disagreed.

WISCONSIN STAT. § 174.02, the statute at issue here, imposes strict liability on the owner of a dog for injuries that it causes. The statute provides, in pertinent part: "the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person[.]" *See* § 174.02(1)(a). In this context, "owner" is defined by WIS. STAT. § 174.001(5), to include "any person who owns, harbors or keeps a dog."

The words "keeps" and "harbors" are not defined in WIS. STAT. ch. 174, but Wisconsin courts have clarified the concepts for purposes of WIS. STAT. § 174.02. A keeper "must ... have custody, dominion or authority over the dog even though the keeper's dominion or authority is a limited one subject to being terminated by the owner; or [must] keep the dog at the person's dwelling and feed the dog." ***Pawlowski v. American Fam. Mut. Ins. Co.***, 2009 WI 105, ¶30, 322 Wis. 2d 21, 777 N.W.2d 67 (footnote omitted). Further, "[t]he casual presence of a dog will not transform a person into a keeper; there must be evidence that the person has furnished the dog with shelter, protection, or food or exercised control of the dog." ***Id.*** As to "harboring," that concept "lacks the proprietary aspect of 'keeping'" but "means something more than ... the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog." ***Augsburger v. Homestead Mut. Ins. Co.***, 2014 WI 133, ¶21, 359 Wis. 2d 385, 856 N.W.2d 874 (citation omitted).

We need devote little space to the question of whether a factfinder could reasonably conclude that Keith "kept" Bentley the dog. Although Garcia asserts throughout her appellant's brief that the facts would allow a jury to find that Keith "kept or harbored" the dog, she does not offer a stand-alone argument that Keith "kept" the dog, and she relies on case law regarding "harboring" dogs that she claims should govern the analysis here. In the reply brief, Garcia argues only that the "facts support an inference that Keith harbored Bentley the dog" and that in fact, "Keith harbored Bentley the dog." To the extent, if any, that Garcia intended to argue in the alternative that Keith "kept" the dog, her argument is too undeveloped for us to address. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, we observe only that nothing in the record shows that Keith ever fed, cared for, supervised, or

exercised control over the dog. Accordingly, no facts or inferences from the facts allow a reasonable conclusion that Keith was Bentley's "keeper." *See* ***Pawlowski***, 322 Wis. 2d 21, ¶30.

We turn to Garcia's claim that a jury could conclude from the facts that Keith "harbored" Bentley the dog. In support of her position, Garcia emphasizes that Keith did not exercise his authority as a landlord either to prohibit Dale from keeping a dog in the rental unit or to exclude the dog from the yard of the duplex.

The rule is now well-settled, however, that "a landlord does not become a harborer of a tenant's dog merely by permitting his or her tenant to keep the dog." *See* ***Malone v. Fons***, 217 Wis. 2d 746, 766, 580 N.W.2d 697 (Ct. App. 1998). Similarly, a dog's mere presence on the landlord's premises, even for a lengthy period of time, does not transform the landlord into a "harborer" of the dog. *See* ***id.*** at 765. Rather, the focus of the analysis is "on the amount of control the landowner exerts over the premises on which the dog is kept—whether the dog's legal owner is more akin to a houseguest or a tenant." *See* ***Augsburger***, 359 Wis. 2d 385, ¶30. Thus when, as in this case, "the tenant-owner of the dog occupie[s] and maintain[s] a separate residence from the landlord," the landlord has "limited control over the tenant's premises," a circumstance that separates a landlord from a "harborer" under WIS. STAT. § 174.02. *Cf.* ***Pawlowski***, 322 Wis. 2d 21, ¶¶52, 78 (distinguishing prior cases and applying § 174.02 to conclude that a homeowner "harbored" a dog where the dog's legal owner occupied a bedroom in the homeowner's residence).

Moreover, the familial relationship between Keith and Dale that Garcia repeatedly emphasizes throughout her appellate briefs has no independent impact on the landlord-tenant relationship and does not render Keith a "harborer" of Dale's dog. To the contrary, a parent's

ownership of land on which the parent's adult offspring resides in a separate residence does not render the parent a "harborer" of the offspring's dog. *See* ***Augsburger***, 359 Wis. 2d 385, ¶33.

Indeed, as in ***Augsburger***, the facts here match those in an example included in the RESTATEMENT (SECOND) OF TORTS (AM. LAW. INST. 1977), which provides: "a father, on whose land his son lives in a separate residence, does not harbor a dog kept by his son, although he has the power to prohibit the dog from being kept and fails to exercise the power." *See* ***Augsburger***, 359 Wis. 2d 385, ¶33 (citing RESTATEMENT (SECOND) OF TORTS §514). Like the ***Augsburger*** court, we acknowledge that the Restatement is not controlling, but we view it as helpful in conducting our analysis, given the similarity between the facts in the example and those at issue here. *See* ***Augsburger***, 359 Wis. 2d 385, ¶33 & n. 7.

Further, like several other contemporary Wisconsin courts required to determine whether a dog was "kept" or "harbored," we have considered the analysis in the early case of ***Hagenau v. Millard***, 182 Wis. 544, 195 N.W. 718 (1923). *See, e.g.*, ***Augsburger***, 359 Wis. 2d 385, ¶¶22, 25-26; ***Pawlowski***, 322 Wis. 2d 21, ¶¶23-25. The ***Hagenau*** court reversed a jury's finding that a tenant's landlords were the "keepers" of the tenant's three dogs. ***Id.***, 182 Wis. at 545-46. The evidence at trial showed that the tenant, a relative of the landlords, rented rooms in a building where the landlords had a restaurant, and the court characterized the arrangement as one where the tenant "occupied separate and distinct portions of the premises and maintained a separate and distinct home or place of abode." ***Id.*** at 545, 548. The court then determined, as a matter of law, that the landlords neither kept nor harbored the dogs, explaining: "where a ... tenant occupies a distinct portion of the premises of the master, where the dogs are kept, the master is not the keeper." ***Id.*** at 547. Notwithstanding that neighbors and patrons saw the dogs in the restaurant "on quite a number of occasions" and that the landlords occasionally interacted with the dogs,

see ***id.*** at 546-47, the ***Hagenau*** court concluded that no evidence existed from which the landlords "could be deemed to be harborers of the dogs; that they furnished [the dogs] with shelter, protection, or food, or that they exercised control over the dogs." ***Id.*** at 548.

So too here. The undisputed facts show that Dale occupied a separate unit of the duplex, that is, "a distinct portion of the premises." *See* ***id.*** at 547. He alone cared for Bentley the dog. Although the dog sometimes crossed into Keith's and Nancy's half of the yard, no facts in the record permit an inference that Keith and Nancy gave the dog lodging, shelter, refuge, protection, or food, or that they exercised control over the dog. Accordingly, Keith and Nancy did not harbor or keep the dog and thus did not own the dog within the meaning of WIS. STAT. § 174.02. *See* ***Pawlowski***, 322 Wis. 2d 21, ¶30; ***Augsburger***, 359 Wis. 2d 385, ¶21. The circuit court therefore properly dismissed Garcia's statutory claim of strict liability.

Finally, as Keith and American Family point out, Garcia does not include any argument in her brief-in-chief regarding the dismissal of her common-law negligence claim. We therefore conclude that Garcia abandoned that claim. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App 1998). We recognize that Garcia argues in her reply brief that the circuit court did not adequately address her negligence claim and that the matter should therefore be remanded for further proceedings. Garcia, however, cannot revive her abandoned negligence claim by discussing it in her reply brief. We do not consider claims presented to us for the first time in a reply brief. *See* ***id.*** at 492. Moreover, Keith and American Family offered substantive arguments in their respondent's brief as to why the circuit court properly dismissed Garcia's negligence claim. Garcia wholly failed to address those substantive arguments in her reply brief. We deem her failure a tacit concession. *See* ***United Coop. v.***

Frontier FS Coop., 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals