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**DISTRICT III**

February 14, 2023

To:

Hon. Lamont K. Jacobson  
Circuit Court Judge  
Electronic Notice

Kelly Schremp  
Clerk of Circuit Court  
Marathon County Courthouse  
Electronic Notice

Ryan Lister  
Electronic Notice

Kellie O'Connor  
940 S. 6th Street  
Cottonwood, AZ 86326

James Pingel  
P.O. Box 8400  
ASPC Florence South  
Florence, AZ 85132

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

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2022AP384

Kellie O'Connor v. James Pingel  
(L. C. No. 2001FA216)

Before Stark, P.J., Hruz and Gill, 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).**

Ryan Lister, pro se, appeals from an order that disbursed \$10,608.95 to Kellie O'Connor in a divorce action between O'Connor and her former husband, James Pingel.<sup>1</sup> Lister argues that he is entitled to those funds because they are the proceeds from the sale of O'Connor and Pingel's home, and Pingel granted Lister a mortgage on the home to secure payment of legal fees that Pingel owed to Lister. Based upon our review of the briefs and record, we conclude at

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<sup>1</sup> Kellie O'Connor was formerly known as Kellie Pingel. For consistency, we refer to her as "O'Connor" throughout this summary disposition order. O'Connor and Pingel are pro se respondents in this appeal.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>2</sup> We summarily affirm the order disbursing the funds to O'Connor.

Pingel and O'Connor were married in 1987. In March 2001, Pingel was charged with sexually assaulting O'Connor's children, who were Pingel's stepchildren. Pingel retained Lister to represent him in that criminal case. On April 6, 2001, Pingel executed a "Fixed Rate Mortgage Note" promising to pay Lister \$20,000 for his legal services. To secure payment of that amount, Pingel also granted Lister a mortgage on O'Connor and Pingel's home. O'Connor did not sign either the note or the mortgage. Lister contends that Pingel currently owes him \$22,124.89 in attorney fees and disbursements.

O'Connor filed for divorce from Pingel on April 10, 2001. On September 12, 2002, Banner Banks commenced a foreclosure action against Pingel and O'Connor, seeking to foreclose a mortgage on their home. Lister was included as a defendant in the foreclosure action due to his mortgage on the same property. On November 7, 2002, Lister signed a "Stipulation for Judgment in Favor of Plaintiff," by which he agreed that Banner Banks "may have Judgment of Foreclosure and sale as prayed for in its Complaint." The stipulation provided, however, that Lister did not "waive any right, title or interest in the subject premises pursuant to his real estate mortgage from James E. Pingel, dated April 6, 2001." A foreclosure judgment in favor of Banner Banks was later entered on December 10, 2002. The judgment acknowledged that Lister "claims an interest in the subject real estate as alleged in the Complaint, which is inferior and subordinate to [Banner Banks'] mortgage."

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

A written judgment of divorce was entered in O'Connor and Pingel's divorce case on May 9, 2003. The judgment provided that the proceeds from the sale of the parties' home would be paid first to Banner Banks in payment of "all mortgages, penalties and interest" and any "broker's commission, closing costs, prorated real estate taxes, and other expenses of closing." O'Connor was to receive one-half of the remaining proceeds from the sale, and Pingel's half of the net sale proceeds would be applied to his child support arrearage. The judgment stated, however, that "any such net proceeds to either party shall be held in a trust account until the issue of [Lister's] attorney fee lien is decided by a Marathon County court." Relatedly, the judgment provided that "[a] future Marathon County Court hearing shall decide the validity and the amount, if any, that [Lister] may claim under the previously filed action or actions." According to Lister, O'Connor and Pingel's residence was sold on May 15, 2003.

Attorney Kenneth Andraski represented O'Connor in the divorce action. In October 2021, Lister learned that Attorney Andraski had approximately \$10,608 in his trust account from the proceeds of the sale of O'Connor and Pingel's home. On November 11, 2021, Attorney Stuart Rottier filed a limited notice of appearance in the divorce case on behalf of O'Connor for the purpose of "completing the distribution of real estate proceeds pursuant to the Judg[.]ment of Divorce." The circuit court scheduled a hearing on January 24, 2022, to address the disbursement of the funds.<sup>3</sup> Before the hearing, Lister filed a memorandum, with attached exhibits, asserting that he had a valid lien on Pingel's half of the net proceeds from the sale of the parties' home. Lister further asserted, based on information and belief, that the \$10,608 in

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<sup>3</sup> Attorney Andraski passed away before the scheduled hearing. The funds in Attorney Andraski's trust account were ultimately deposited with the Marathon County clerk of courts pending the circuit court's decision as to how those funds should be disbursed.

Attorney Andraski's trust account represented Pingel's half of the net proceeds from the sale. Lister therefore asked the court to enter an order awarding him that amount.

During the January 24, 2022 hearing, O'Connor testified that she had not received any proceeds from the sale of the home that she and Pingel formerly owned. She specifically testified that she had not received any payment from Attorney Andraski's office "of any proceeds relative to that sale." Following O'Connor's testimony, the circuit court ordered the parties to file simultaneous briefs setting forth their respective positions regarding the disbursement of the funds from Attorney Andraski's trust account. Both O'Connor and Lister filed their briefs on February 11, 2022. Along with her brief, O'Connor submitted various documents that were not introduced into evidence during the January 24 hearing.

Lister submitted a letter to the circuit court in response to O'Connor's brief. He asked the court to "accept this brief response" to O'Connor's brief because O'Connor had the opportunity to respond to the arguments that Lister had made in the memorandum that he submitted before the January 24 hearing, and Lister "would like that opportunity as well." Lister then asserted that O'Connor was "trying to relitigate issues that were resolved in the divorce judgment of more than fifteen years ago." Lister continued by responding to O'Connor's argument that Pingel's debt to Lister represented waste of the marital estate. In conclusion, Lister's letter stated: "If the court would like additional response regarding property division issues, please advise the parties and we will file a formal reply brief."

On March 8, 2022, the circuit court issued a written decision and order regarding the distribution of the home sale proceeds, without giving the parties an opportunity to submit additional briefs. The court determined that the mortgage Pingel had granted to Lister was void

under WIS. STAT. § 706.02(1)(f), because it affected homestead property but was not signed by O'Connor. Accordingly, the court held that the mortgage "could not give rise to a valid lien." The court further held that, contrary to Lister's argument, no prior court case had addressed the validity of Lister's lien. The court then concluded that, under the divorce judgment, O'Connor was entitled to half of the net proceeds from the sale of the home, and she was also entitled to receive Pingel's half of the net proceeds "as a payment toward his child support arrearage." The court therefore ordered that the entire amount of the funds from Attorney Andraski's trust account be disbursed to O'Connor.

Lister now appeals, raising three arguments.<sup>4</sup> First, Lister argues that the circuit court violated his right to due process when it "did not allow [him] the opportunity to be heard regarding the new facts and arguments raised in O'Connor's brief." We conclude that Lister has forfeited this argument because the record shows that he never asked the court for an opportunity to submit a further response to the arguments raised in O'Connor's brief. Instead, the record shows that during the January 24, 2022 hearing, the court ordered the parties to file simultaneous

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<sup>4</sup> O'Connor did not file a respondent's brief in this appeal. Although Pingel filed a respondent's brief, his brief does not address the substantive arguments raised in Lister's brief-in-chief. Instead, Pingel asserts that the circuit court's disbursement of the home sale proceeds was erroneous because the court incorrectly determined the amount of Pingel's child support arrearage. This argument is not properly before us because Pingel did not file a notice of cross-appeal from the order disbursing the sale proceeds to O'Connor. *See* WIS. STAT. RULE 809.10(2)(b). In any event, Pingel concedes that he owes \$13,734 in "back child support," which exceeds Pingel's half of the net proceeds from the sale of the parties' home. Thus, even accepting Pingel's calculation of the amount of child support owed, the court properly determined that Pingel's half of the net sale proceeds should be disbursed to O'Connor as payment toward Pingel's child support arrearage.

In his reply brief, Lister argues that because the respondents have failed to file any substantive responses to his arguments, this court should summarily reverse the circuit court's decision. The record conclusively shows, however, that Lister's appellate arguments were either forfeited or lack merit. Under these circumstances, we deny Lister's request for summary reversal.

briefs, and Lister did not raise any objection to that procedure. Lister and O'Connor filed their briefs on the same day, and Lister then submitted a letter to the court as a "brief response" to O'Connor's brief. In the letter, Lister responded to one of the arguments raised in O'Connor's brief and then concluded by stating: "*If the court would like additional response* regarding property division issues, please advise the parties and we will file a formal reply brief." (Emphasis added.)

Thus, Lister did not *ask* the circuit court for an opportunity to file an additional response addressing any new arguments raised in O'Connor's brief. Rather, he *offered* to file a reply brief *if* the court desired an additional response. The court did not deem an additional response necessary, and it therefore resolved the parties' dispute based upon the briefs that they had already submitted. Lister was given the opportunity to be heard both at the January 24, 2022 hearing and through the filing of written briefs. He did not ask the court for any additional opportunity to be heard, nor did he argue that due process required the court to allow him to file an additional brief.

"Arguments raised for the first time on appeal are generally deemed forfeited." *Tatera v. FMC Corp.*, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810. Moreover, to preserve an issue for appeal, "[a] litigant must raise [the] issue with sufficient prominence such that the [circuit] court understands that it is being called upon to make a ruling." *Bishop v. City of Burlington*, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656. Here, Lister agreed to the parties' joint submission of briefs, and none of Lister's actions would have communicated to the circuit court that Lister believed he was entitled to file an additional brief in response to O'Connor's arguments. In particular, Lister never informed the court that he believed due process required the court to give him an additional opportunity to respond. Under these

circumstances, Lister cannot fault the court for issuing a decision based upon the briefs that the parties had already submitted.

Lister next argues that the circuit court erred by considering “hearsay evidence” in O’Connor’s brief, to which Lister had “no opportunity” to object. As an initial matter, we reject Lister’s claim that he lacked an opportunity to object to any hearsay evidence contained in O’Connor’s brief. Again, after O’Connor filed her brief, Lister submitted a letter to the court responding to one of O’Connor’s arguments. In that letter, Lister could have objected to the court considering any hearsay evidence contained in O’Connor’s brief, but he did not do so. On this record, Lister has forfeited his argument that the court erred by considering hearsay evidence. *See Tatera*, 328 Wis. 2d 320, ¶19 n.16.

Regardless, even absent Lister’s forfeiture, we would conclude that Lister is not entitled to relief on this basis because the circuit court’s decision regarding the validity of Lister’s lien did not rely on any hearsay evidence contained in O’Connor’s brief. Instead, the court concluded that Lister’s lien was invalid because O’Connor had not signed the mortgage, which was therefore void under WIS. STAT. § 706.02(1)(f). Lister himself submitted a copy of the mortgage to the court prior to the January 24, 2022 hearing. Thus, Lister cannot argue that the court erred by relying on that document.<sup>5</sup>

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<sup>5</sup> To the extent Lister argues that the circuit court erred by relying on a copy of the “Fixed Rate Mortgage Note” that was attached to O’Connor’s brief, we observe that Lister had already submitted a copy of the note to the court before the January 24, 2022 hearing. In addition, the court did not rely on the note in reaching its decision that the mortgage was void.

(continued)

Finally, Lister argues that the circuit court erred by “failing to consider [t]he issue of [l]aches.” “A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches.” *Dickau v. Dickau*, 2012 WI App 111, ¶9, 344 Wis.2d 308, 824 N.W.2d 142. “The elements of laches are: ‘(1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay.’” *Id.* (citation omitted). The reasonableness of the party’s delay and the existence of prejudice are questions of law, albeit based upon factual findings. *Id.*

We reject Lister’s laches argument for three reasons. First, we are not convinced that laches can operate to bar O’Connor’s claim to the proceeds of the home sale under the circumstances of this case. The mortgage that Lister relies upon to support his claim to the proceeds was void from its inception. Lister therefore has no entitlement to those funds, regardless of whether O’Connor unreasonably delayed in asserting her right to them.

Second, we do not agree that Lister has established all three of the elements of laches. With respect to the first element, Lister asserts that O’Connor’s eighteen-year delay in asserting her entitlement to the home sale proceeds was unreasonable because O’Connor knew that there were net proceeds from the sale of the parties’ home and had “full knowledge” that the proceeds

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Lister also appears to challenge the circuit court’s reliance on a document attached to O’Connor’s brief purporting to show the amount of Pingel’s child support arrearage. However, the amount of Pingel’s arrearage went to the issue of how the proceeds from the sale of O’Connor and Pingel’s home should be divided between O’Connor and Pingel *after* the court determined that Lister was not entitled to any portion of the sale proceeds. Thus, the court’s reliance on the document related to child support did not affect Lister, and he therefore lacks standing to challenge the court’s reliance on that document. As noted above, the issue of whether the court properly calculated Pingel’s child support arrearage is not before us in this appeal.



were in Attorney Andraski's trust account. Lister does not, however, cite any evidence in the appellate record to support his bald assertions regarding O'Connor's knowledge that the funds existed and were being held in Attorney Andraski's trust account. We need not consider arguments that are unsupported by citations to the appellate record. *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

As for the third element of laches, there is no support in the record for a conclusion that Lister has been prejudiced by O'Connor's delay in asserting her right to the home sale proceeds. Lister claims that he has suffered prejudice because it is "impossible for [him] to recreate any of the records in this matter" and because he has not yet been paid for work completed in 2002. Lister does not explain, however, what records he is unable to recreate or how those records would support his claim to the home sale proceeds. It is undisputed that O'Connor did not sign the mortgage that Pingel executed in favor of Lister. The mortgage is therefore void under WIS. STAT. § 706.02(1)(f), and, consequently, Lister has no valid claim to the home sale proceeds. We can conceive of no way in which additional records would allow Lister to prevail on his claim to those funds. In addition, while it appears to be undisputed that Lister has not been paid for the legal services that he provided to Pingel, that fact does not compel a conclusion that Lister must be compensated for that work from the net proceeds from the sale of O'Connor and Pingel's home.

Third and finally, even if the elements of laches are met, a court has discretion not to apply the doctrine in a given case. See *Dickau*, 344 Wis. 2d 308, ¶9. Here, the circuit court could reasonably weigh the equities and determine that O'Connor should not be barred from asserting a claim to the net proceeds from the sale of the parties' home. Specifically, the court could consider that: (1) O'Connor never signed the mortgage that Pingel granted to Lister;

(2) Pingel’s debt to Lister was for legal fees for defending Pingel against charges that he had sexually assaulted O’Connor’s children; (3) O’Connor testified that she had never received any of the proceeds from the sale of the home; (4) Pingel owed O’Connor a significant amount of child support; and (5) although the 2003 divorce judgment expressly contemplated additional court proceedings to determine the validity of Lister’s claim to the home sale proceeds, Lister made no effort to initiate such proceedings until 2021. Given these facts, the court could reasonably decide not to apply the doctrine of laches in this case, regardless of whether Lister had satisfied the elements of that doctrine. See *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 (When the circuit court fails to explain its reasoning, “we may search the record to determine if it supports the court’s discretionary decision.”).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

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*