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DISTRICT I

April 4, 2023

To:

Hon. Pedro Colon
Circuit Court Judge
Electronic Notice

Bradley J. Ayers
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Appeals Division
Electronic Notice

Ryan Ray Graff
Electronic Notice

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

2022AP206

Crissey Irrevocable Family Trust v. Auto-Owners Insurance Co.
(L.C. # 2021CV5402)

Before Brash, C.J., Dugan and White, 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).

Auto-Owners Insurance Company (Auto-Owners) appeals, pursuant to our leave, an interlocutory order in which the circuit court denied a motion seeking both to bifurcate claims filed by the Crissey Irrevocable Family Trust (Crissey) and to stay discovery. As to both aspects of this motion, Auto-Owners contends that the circuit court erroneously exercised its discretion.¹ Auto-Owners argues that Crissey's claim for breach of contract should proceed separately from

¹ Auto-Owners repeatedly asserts in its appellant's brief that the circuit court "abused its discretion." In 1992, Wisconsin replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion" for purposes of discussing a circuit court's discretionary action. See *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

Crissey’s claim for bad-faith denial of insurance benefits; and Auto-Owners further argues that discovery related to the latter claim should be stayed until such time as Crissey establishes that it is entitled to insurance benefits. 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 (2021-22).² We summarily affirm.

Auto-Owners asserts in its briefs, and the circuit court docket entries confirm, that the circuit court resolved the motion at issue following a hearing at which the circuit court ruled from the bench. It is the appellant’s responsibility to provide this court with an adequate record to review that ruling. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Here, however, no transcripts are in the record. Instead, Auto-Owners relies on a partial transcript included in the appendix to Auto-Owners’ appellate brief.

On appeal, “[t]he appendix may not be used to supplement the record.” *Reznichek v. Grall*, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). Accordingly, we do not consider the portion of the transcript found only in the appendix to Auto-Owners’ brief.³

² All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

³ For the same reason, we do not consider the “Plaintiff’s Response to Defendant’s First Requests to Admit, Interrogatories and Request for Production of Documents,” that is included in Auto-Owners’ appendix as we are unable to locate in the appellate record. We add that Auto-Owners’ appendix also includes an unpublished 2011 Wisconsin Court of Appeals *per curiam* opinion that Auto-Owners cites in its brief. Although an unpublished, authored court of appeals opinion released after July 1, 2009, may be cited for persuasive value if a copy of that opinion is filed and served, *see* WIS. STAT. RULE 809.23(3)(b)-(c), a *per curiam* opinion is not an authored opinion, *see* RULE 809.23(3)(b). An unpublished *per curiam* opinion therefore may not be cited “except to support a claim of claim preclusion, issue preclusion, or the law of the case[.]” *See* RULE 809.23(3)(a). We remind appellate counsel that we expect compliance with the rules of appellate procedure. *Cf. Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 563-64, 327 N.W.2d 55 (1982) (imposing a \$50 penalty for improperly citing an unpublished court of appeals opinion in violation of the rules of appellate procedure).

Further, “[i]t is boilerplate law that, when an appeal is brought on a partial transcript, the scope of the review is necessarily confined to the record before the court.” *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). The absence of a complete record poses particular concerns when the appeal involves a challenge to the circuit court’s exercise of discretion. “[W]hen an appeal is brought on a partial transcript, the court will assume that every fact essential to sustain the trial judge’s exercise of discretion is supported by the record.” *D.L. v. Heubner*, 110 Wis. 2d 581, 597, 329 N.W.2d 890 (1983). Here, Auto-Owners has failed to ensure that the appellate record includes a full transcript of the hearing at which the circuit court denied the motion at issue. Pursuant to *D.L.*, we assume that the missing transcript supports the circuit court’s exercise of discretion.⁴ *See id.* at 597. Accordingly, we affirm the order of the circuit court.

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

IT IS FURTHER ORDERED that the stay imposed by this court is lifted effective on the date that this matter is remitted to the circuit court.

⁴ We note that even if Auto-Owners were to supplement the record with the partial transcript included in the appendix, we would affirm the circuit court’s discretionary decision. On appeal, we search the record to determine whether the circuit court properly exercised its discretion. *See D.L. v. Heubner*, 110 Wis. 2d 581, 597, 329 N.W.2d 890 (1983). Because we would be unable to conduct a complete search on a partial transcript, we would again assume that the entire record, if available, would support the circuit court’s discretionary decision. *See id.* Moreover, in the absence of a complete transcript, it is unclear what we should review. For example, although Auto-Owners relies on an insurance policy and an engineering report, those items were filed in the circuit court as attachments to a purported “affidavit” that was not signed, let alone sworn. *See* WIS. STAT. § 802.05(1) (providing that “[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party”).

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

Sheila T. Reiff
Clerk of Court of Appeals