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**DISTRICT II**

May 31, 2023

To:

Hon. LaKeisha Haase  
Circuit Court Judge  
Electronic Notice

Ramona Geib  
Clerk of Circuit Court  
Fond du Lac County Courthouse  
Electronic Notice

Dawn M. Sabel  
Electronic Notice

Ryan Jones  
161 Bischoff St.  
Fond du Lac, WI 54935

Knock Out Building Restoration, LLC  
161 Bischoff St.  
Fond du Lac, WI 54935

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

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2022AP1436

John Sabel v. Ryan Jones (L.C. #2020CV251)

Before Gundrum, P.J., Neubauer and Lazar, 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).**

John Sabel and Dawn M. Sabel appeal from an order denying their motion to reconsider the circuit court's decision denying their motion for summary judgment and their motion to have certain requests for admission deemed admitted. 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 (2021-22).<sup>1</sup> Because the Sabels did not satisfy their burden on summary judgment

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

of establishing the absence of a genuine issue of material fact and their entitlement to judgment as a matter of law, we affirm.

Before turning to the facts, we note that respondents Ryan Jones and Knock Out Building Restoration, LLC did not file a brief in this appeal despite two orders from this court directing them to do so and notifying them that failure to do so may be grounds for summary reversal. We have discretion to summarily reverse where the failure to file a response brief constitutes “egregious conduct, bad faith, or a litigant’s abandonment of the appeal.” *Raz v. Brown*, 2003 WI 29, ¶¶3, 14, 260 Wis. 2d 614, 660 N.W.2d 647; *see also* WIS. STAT. RULE 809.83(2). We could deem their failure to file a brief to be an abandonment of this appeal and summarily reverse on that basis, but we will not exercise our discretion to do so because the relevant facts are straightforward and we are reluctant to summarily reverse an evidently correct circuit court ruling.

According to an affidavit from Dawn Sabel filed in support of the Sabels’ summary judgment motion, the Sabels entered into two contracts with Knock Out to perform certain work at their property in Fond du Lac. One contract identified a price of \$48,120 for removing and relaying brick, tuck-pointing, applying sealant to the brick, and framing and installing windows and stone veneer. The other contract quoted a price of \$12,560 for framing space in the attic, removing brick and metal siding, cutting “deteriorated and cracked [m]ortar [j]oints on exterior of building,” and pressure washing “all brick and front of building.” Both contracts contained the following language beneath the bolded, all caps heading “**NOT INCLUDED**”:

If relaying of brick should exceed 400 sq. ft brick or large sections of wall must be opened up **NOT INCLUDING** the upper facade to re-secure and tie back into building, said conversation will be discussed with customer as final price could change.

The Sabels paid Knock Out a total of \$84,261.50 for the work, \$23,581.50 of which they claim was an overpayment. They commenced this action against Knock Out and Jones, its owner, alleging that Knock Out failed to complete the work and seeking to recover amounts paid in excess of the total contract price, additional damages for civil theft under WIS. STAT. §§ 895.446 and 943.20, and punitive damages.<sup>2</sup> Knock Out and Jones filed a letter entitled “Response to Complaint” in which they asserted that certain events had delayed Knock Out’s work, forcing Knock Out to incur additional costs, and that Knock Out was still owed approximately \$15,000.

The Sabels filed a motion for summary judgment/default judgment based on Knock Out’s and Jones’s failure to respond directly to the allegations in the complaint, failure to answer requests for admission, and failure to disclose witnesses as required under a scheduling order. The Sabels also filed a motion seeking to have the requests for admission deemed admitted and argued in their summary judgment motion that these admissions established the absence of any genuine issue of material fact. On the morning a bench trial was to begin, the circuit court denied the Sabels’ motions:

In taking into consideration the balance that the Court must make between litigants being able to litigate their claim, efficient use of the Court’s calendar, and expectations of compliance with the Court’s orders, a motion for summary judgment in this action would effectively grant judgment in favor of the plaintiffs and against the respondent. I do not believe that that is the correct balance that the Court must make and, therefore, I will deny the

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<sup>2</sup> Contrary to the allegation in the complaint that Knock Out had failed to complete its work, the Sabel affidavit states that Knock Out and Jones did finish the work but that they took more than eighteen months to do so despite telling the Sabels at some earlier point in time that the work “would be completed within 45 days.” Neither contract specifies a firm or estimated date of completion.

motion to deem the admissions admitted and the motion for summary judgment.<sup>3</sup>

The bench trial took place on January 25-26, 2022 and April 11, 2022. In March, between the second and third trial days, the Sabels filed a motion seeking reconsideration of the court's decision denying their motions. Following completion of the bench trial, the court concluded that the Sabels had not met their burden of proof, dismissed their claims, and denied their motion for reconsideration.<sup>4</sup>

As the appellants, the Sabels have the burden of convincing us that the circuit court erred. See *Gaethke v. Pozder*, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381. The Sabels focus on the court's denial of their motion for reconsideration, arguing that the court failed to apply Wisconsin's methodology for analyzing summary judgment motions. See WIS. STAT. § 802.08; *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶18, 294 Wis. 2d 397, 717 N.W.2d 760. Though the court did not invoke the summary judgment methodology in its oral ruling, our review of the summary judgment materials under that methodology confirms that the court was correct to deny summary judgment and the motion for reconsideration. See *Randy A.J. v. Norma I.J.*, 2002 WI App 307, ¶15 n.2, 259 Wis. 2d 120, 655 N.W.2d 195 (“[W]e may affirm an order supported by the record even though the trial court may have reached the same result for different reasons.”), *aff'd*, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630. We review summary judgment decisions de novo and, like the circuit court, draw all reasonable inferences

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<sup>3</sup> The Sabels filed a petition with this court seeking leave to appeal the circuit court's decision, which was denied on April 7, 2022.

<sup>4</sup> The order denying the motion for reconsideration and the order denying the Sabels' claims after the bench trial were entered on the same date.

in the light most favorable to the nonmoving party. *Pum v. Wisconsin Physicians Serv. Ins. Corp.*, 2007 WI App 10, ¶6, 298 Wis. 2d 497, 727 N.W.2d 346 (2006).

The Sabels argue that “no factual issues exist since [Knock Out and Jones] did not meet their burden of proof to show that there were any material issues of fact.” This argument overlooks that, as the moving parties, the Sabels had the initial burden of establishing a prima facie case for summary judgment—that is, the absence of a genuine issue of material fact and their entitlement to judgment as a matter of law. See *Kerl v. Dennis Rasmussen, Inc.*, 2003 WI App 226, ¶8, 267 Wis. 2d 827, 672 N.W.2d 71, *aff’d*, 2004 WI 86, 273 Wis. 2d 106, 682 N.W.2d 328.

The Sabel affidavit and the requests for admission (assuming they are deemed admitted) fail to meet this initial burden. The affidavit and the requests establish the existence of two contracts between the Sabels and Knock Out and state the total amount paid by the Sabels. The affidavit asserts that the Sabels overpaid Knock Out by \$23,581.50. But neither the affidavit nor the requests establish beyond genuine dispute that this amount was an overpayment. The requests for admission establish only that there were no other “signed contracts” between the parties. Neither the affidavit nor the requests state that there were no oral amendments to the contracts, or separate oral agreements, for additional work. They also do not state that the prices of both contracts did not change, a possibility that their terms expressly contemplated. Nor do they offer any facts that would explain why the Sabels paid Knock Out more than \$23,000 in excess of the total price of the two contracts. Absent evidence showing that Knock Out did not perform or get paid for work not itemized in the contracts or explaining why the Sabels paid Knock Out thousands of dollars more than the contracts required, the Sabels did not meet their burden of showing the absence of a genuine issue of material fact and their entitlement to

judgment as a matter of law on their claim to recover the purported overpayment. *See* WIS. STAT. § 802.08(2).<sup>5</sup>

The affidavit and requests for admission also fail to establish the absence of a genuine issue of material fact with respect to the civil theft claim. This claim is grounded in a check for \$1,900.00 that the Sabels issued to Knock Out. According to the Sabel affidavit, Jones “asked plaintiffs’ agent to cash the check for him, which the agent did, but then [Jones] stole the check when the agent wasn’t looking and subsequently cashed the check also, thereby securing an additional \$1,900.00 without plaintiffs’ consent.” One of the requests for admission states that “in addition to receiving cash for check# 2020, defendant also took the check and deposited it into his own account, so he received an additional \$1,900.00.”

To begin, the sequence of events outlined in the affidavit and request for admission is not entirely consistent or clear. The affidavit states that Jones cashed the check; the request for admission states that he deposited it in his bank account. In addition, the affidavit states that Jones cashed the check after the Sabels’ “agent” cashed it for him. The Sabels do not explain how this check could have been cashed twice. Moreover, neither the affidavit nor the requests for admission establish that the Sabels did not consent to Jones cashing the check or that Jones knew that he did not have the Sabels’ consent to do so. *See* WIS JI—CRIMINAL 1441 (identifying elements of theft under WIS. STAT. § 943.20(1)(a) including that the defendant “intentionally took and carried away movable property of another” without the owner’s consent and knowing

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<sup>5</sup> The failure of the Sabels’ summary judgment filings to establish the absence of a genuine issue of material fact distinguishes the present case from a case they rely on, *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983), in which the request for admission was “dispositive of the whole case and would effectively lay to rest all previously disputed factual issues.”

“that the owner did not consent”). Because the evidentiary materials submitted by the Sabels do not establish these elements of a civil theft claim beyond genuine dispute, they did not satisfy their initial summary judgment burden.<sup>6</sup> And because the Sabels did not demonstrate their entitlement to judgment as a matter of law, their request for punitive damages, which was grounded in the same conduct as the civil theft claim, also fails.

For these reasons, the circuit court was correct to deny the Sabels’ motion for summary judgment and motion to reconsider. Thus,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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*

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<sup>6</sup> The Sabels also rely on *CJ Management, LLC v. M&M General Contractors, Inc.*, No. 2006AP2597, unpublished slip op. (WI App Feb. 6, 2008). *CJ Management* is an unpublished per curiam opinion that is not citeable under WIS. STAT. RULE 809.23(3). Accordingly, we need not and do not consider it further.