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DISTRICT III

July 6, 2023

To:

Hon. John M. Yackel
Circuit Court Judge
Electronic Notice

Marge Kelsey
Clerk of Circuit Court
Sawyer County Courthouse
Electronic Notice

Michael A. Kelsey
Electronic Notice

Curtiss N. Lein
Electronic Notice

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

2021AP231 Nelson Lumber & Home Inc. v. Mike Dunlop
(L. C. No. 2020SC94)

Before Gill, J.[1]

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).

Natasha and Mike Dunlop appeal an order dismissing their counterclaim under WIS. STAT. § 100.18. The Dunlops argue that the circuit court erred by finding that the home design contract in question was a consumer credit transaction under WIS. STAT. § 421.301(10) and that their counterclaim was subject to the Wisconsin Consumer Act (WCA), WIS. STAT. chs. 421-427. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition, and we summarily affirm the order. *See* WIS. STAT. RULE 809.21. We conclude that the Dunlops' counterclaim is barred due to an absolute

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

immunity defense, and therefore we do not reach the issue of whether the court erred by concluding that the contract was a consumer credit transaction.

Nelson Lumber & Home Inc. and the Dunlops entered into a written contract through which Nelson Lumber agreed to provide home design services to the Dunlops. The Dunlops paid a retainer to Nelson Lumber which, in turn, then provided design services to the Dunlops. When the bill for the services exceeded the Dunlops' paid retainer amount, Nelson Lumber sent the Dunlops several additional invoices. The first invoice, dated February 25, 2020, listed an amount due of $2,121.25. On March 25, 2020, Nelson Lumber sent another invoice listing a previous balance of $2,121.25 and an added service charge of $31.82.[2] Shortly thereafter, a third invoice dated March 30, 2020, was sent. The Dunlops did not pay any of these invoices.

Subsequently, Nelson Lumber stopped providing design services to the Dunlops, and in April 2020, Nelson Lumber sued the Dunlops for breach of the contract due to their nonpayment, seeking damages totaling $5,021.82, which included a service charge of $31.82. The Dunlops answered, arguing that Nelson Lumber had failed to state a claim upon which relief could be granted. The Dunlops later amended their answer to include a counterclaim, requesting damages, costs, and reasonable attorney's fees, pursuant to WIS. STAT. § 100.18(11)(b)2. The Dunlops argued that Nelson Lumber engaged in fraudulent behavior contrary to § 100.18 by publishing, in its complaint, that Nelson Lumber was owed a service fee at eighteen percent annually, when WIS. STAT. § 138.05(1)(a) and (3) limit annual interest rates to twelve percent.

[2] In various documents, the service charge is additionally referred to as an "interest fee," a "finance fee," and/or a "late charge." For consistency's sake, we will use the term "service charge" when referring to the fee at issue.

A bench trial was held. At the start of the trial, Nelson Lumber dismissed its claim for payment of the $31.82 service charge based upon the Dunlops' failure to pay the invoices in a timely fashion and instead sought only the amount associated with actual services provided, which totaled $4,990. Following the evidentiary portion of the trial, but prior to issuing any decisions, the circuit court requested additional briefing on how WIS. STAT. § 138.05(1)(a) and (3) applied to the Dunlops' counterclaim.

In its posttrial brief, Nelson Lumber argued that WIS. STAT. § 138.05(1)(a) did not apply because the contract at issue was "a consumer credit transaction" as defined in WIS. STAT. § 421.301(10) and was thus exempt from the provisions of § 138.05(1)(a)—which limit annual interest rates to twelve percent. The Dunlops disagreed, arguing that for the underlying contract to be considered a consumer credit transaction, the amount due must be payable in installments, the parties must agree to defer payment, and there must be evidence of a credit extension.

The circuit court determined that the Dunlops were liable to Nelson Lumber for the amount of the design services and awarded Nelson Lumber a monetary judgment of $4,990 plus statutory fees. The court further concluded that the contract at issue was a consumer credit transaction and that the WCA controlled. The court therefore determined that Nelson Lumber was not subject to a maximum limit on service charges and dismissed the Dunlops' counterclaim. The Dunlops now appeal.[3]

[3] While the Dunlops ask for the circuit court's entire order to be reversed, they provide no argument on appeal regarding anything other than the dismissal of their counterclaim. We therefore limit our analysis to whether the court erred by dismissing the Dunlops' counterclaim.

The Dunlops argue that they should be able to move forward with their counterclaim because the contract was not a consumer credit transaction and, therefore, the WCA does not control. We assume without deciding that the contract was not a consumer credit transaction, but we determine as a matter of law that the Dunlops' counterclaim fails. We may affirm an order supported by the record even if the circuit court may have reached the same result for a different reason. ***State v. Gaines***, 197 Wis. 2d 102, 109 n.5, 539 N.W.2d 723 (Ct. App. 1995); ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (holding that appellate courts may affirm on different grounds than those relied on by the circuit court).

The Dunlops' counterclaim alleged that Nelson Lumber violated WIS. STAT. § 100.18 because the "[p]laintiff made, published, or placed before one or more members of the public a lawsuit that claimed the right to pursue a claim against [the d]efendants." The counterclaim further alleged that Nelson Lumber's "representation in the lawsuit papers that it had the right to collect an unlawful amount from [the Dunlops] was untrue, deceptive, or misleading." As a result, the Dunlops alleged that Nelson Lumber had violated § 100.18 and that they "sustained damages" as a result of that violation. The counterclaim also alleged that the Dunlops are "entitled to double damages, costs and reasonable attorney fees for the violation."

Nelson Lumber responds on appeal by articulating three arguments: (1) that absolute immunity exists under Wisconsin law for statements made in a judicial proceeding; (2) that the circuit court did not err by concluding the transaction was a consumer credit transaction; and, (3) that WIS. STAT. § 135.08 does not apply to this case because Nelson Lumber is not a lender as defined by the relevant statutes. We agree that Nelson Lumber is entitled to absolute immunity in this case for the assertions it made in its complaint. As such, we address only that argument.

See ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (holding appellate courts should decide cases on the narrowest possible grounds).

Whether absolute immunity[4] applies is a question of law that we review independently. ***Churchill v. WFA Econometrics Corp.***, 2002 WI App 305, ¶8, 258 Wis. 2d 926, 655 N.W.2d 505. Absolute immunity applies to "pleadings in a judicial action." ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 900, 419 N.W.2d 241 (1988). Absolute immunity "covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." ***Id.*** (citation omitted). Statements covered by absolute immunity "must be made in a procedural context that is recognized as affording absolute" immunity and "must be relevant to the matter under consideration." ***Rady v. Lutz***, 150 Wis. 2d 643, 647-48, 444 N.W.2d 58 (Ct. App. 1989). The purpose of absolute immunity is "to provide litigants with freedom to access the courts 'to preserve and defend their rights and to protect attorneys during the course of their representation of clients.'" ***Ackerman v. Hatfield***, 2004 WI App 236, ¶16, 277 Wis. 2d 858, 691 N.W.2d 396 (citation omitted).

Nelson Lumber argues that it "cannot be held liable simply because it sought to argue its case in court." We agree. The assertions in Nelson Lumber's complaint with which the Dunlops take issue are afforded absolute immunity because they were statements made as part of the pleadings and were relevant to the case at hand. *See* ***Kensington Dev. Corp.***, 142 Wis. 2d at 900; *see also* ***Rady***, 150 Wis. 2d at 647-48. Because these assertions are afforded absolute immunity, the Dunlops' counterclaim fails as a matter of law.

[4] Absolute immunity is sometimes referred to as "absolute privilege." ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 900, 419 N.W.2d 241 (1988). For clarity, we adopt the term used by the parties.

The Dunlops argue that Nelson Lumber's absolute immunity defense should fail because Nelson Lumber waived that argument "by not arguing [it] until [their response] brief on appeal." The Dunlops confuse the applicable law. An *appellant* is prohibited from raising an issue for the first time on appeal or in a reply brief. *See* ***Green v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657; ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998) (holding that an appellant raising an issue solely in their reply brief goes against the rules of fundamental fairness). A respondent, however, may raise any argument that would permit us to affirm a circuit court's judgment, even if the argument was not raised in the lower court. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.

The Dunlops also argue that "Nelson Lumber is not entitled to 'absolute immunity' for a statement made in a remittance," i.e., the invoices, and "then copied into a small claims complaint." However, this argument is undeveloped, and therefore we decline to address this undeveloped argument in full. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review arguments that are undeveloped).

Even if we were to accept what we assume the Dunlops' argument to be, that the "remittance"—the invoices that Nelson Lumber sent to the Dunlops—were the original documents on which the Dunlops base their WIS. STAT. § 100.18 claim, their counterclaim still fails. To prevail on a claim pursuant to § 100.18, the Dunlops would have to show that Nelson Lumber had an "intent to sell, distribute, [or] increase the consumption of … service[s]" with an "intent to induce the public in any manner to enter into any contract or obligation relating to the purchase … of any … service[s]." *See* § 100.18(1). Then, the Dunlops would have to show that Nelson Lumber "published, disseminated, circulated, or placed before the public" a "statement or

representation" that was "untrue, deceptive, or misleading." *See* ***id.*** Lastly, the Dunlops would have to show that they suffered a "pecuniary loss because of a violation of" § 100.18. *See* § 100.18(11)(b)2.

While we acknowledge "that one person can be 'the public' for purposes of WIS. STAT. § 100.18(1)," we do not conclude that Nelson Lumber made the assertions in the invoices with the intent to sell services or to induce the Dunlops—or anyone else—to enter into a contract. Instead, the Dunlops clearly argue that they were unaware a service charge would be imposed as a result of their contract. If the Dunlops intended to say that there was inducement by *omission*, they failed to explicitly state that in their counterclaim. Furthermore, it is unclear how "publishing" assertions regarding a service charge in an invoice *after* the Dunlops had already entered into a contract with Nelson Lumber violates § 100.18(1).

Therefore,

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.

Samuel A. Christensen
Clerk of Court of Appeals