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**DISTRICT IV**

April 2, 2013

To:

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

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2011AP2092

Phillip E. Bryson and Lana M. Bryson v. New Horizons Supply  
Cooperative (L. C. No. 2011CV53)

Before Higginbotham, Sherman and Blanchard, JJ.

New Horizons Supply Cooperative appeals a summary judgment in favor of Phillip and Lana Bryson for rental payments due under a commercial lease, and an order awarding attorney fees and costs and denying a motion to vacate. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and summarily affirm. *See* WIS. STAT. RULE 809.21.<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

On June 2, 2008, the Brysons executed a lease agreement with People's Community Oil Cooperative, which is now merged with New Horizons.<sup>2</sup> The premises were utilized as a gas station convenience store, and New Horizons maintained its business offices out of the location. The term of the lease was for thirteen years, and provided for rent in the amount of \$3,000, due on the first of each month. Among other things, the lease also provided for interest on past rent due, as well as the payment of attorney fees and costs incurred in the enforcement of the lease.<sup>3</sup>

New Horizons has been a tenant under the lease agreement since June 2008. Rental payments were made until January 1, 2011, when New Horizons failed to make the rent payments due. New Horizons has failed to make rental payments since that date.

On April 11, 2011, the Brysons commenced an action seeking a money judgment for past rent due and interest, together with costs and attorney fees.<sup>4</sup> The Brysons subsequently filed a motion for summary judgment. On the morning of the hearing, New Horizons faxed signature pages for an affidavit in opposition to summary judgment. The unsigned affidavit had been faxed to the court the previous day. The circuit court granted summary judgment and entered findings of fact, conclusions of law and judgment. The court also subsequently granted a request

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<sup>2</sup> People's Community Oil Cooperative merged with New Horizons on September 1, 2010. We refer to the entities collectively as "New Horizons" unless otherwise noted.

<sup>3</sup> The lease further provided that New Horizons pay \$50,000 for the acquisition of outside business property, including pumps, underground storage tanks, and canopies.

<sup>4</sup> New Horizons served an answer to the Brysons' complaint on May 22, 2011, but failed to file an answer with the circuit court. On the day of the summary judgment hearing, New Horizons faxed an "amended answer" to the court.

for attorney fees and costs, and denied New Horizons' motion to vacate the judgment. This appeal follows.

When reviewing summary judgment, we apply the same methodology as the circuit court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). That methodology is well-established and will not be repeated here. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

New Horizons argues that an issue of material fact exists as to whether the thirteen-year lease was approved by its board of directors, and asserts that the tenancy is "periodic and governed by statute rather than by the written agreement." In this regard, New Horizons relies upon its untimely filed "Affidavit of Former Directors of Peoples Community Oil Cooperative." The affidavit, purportedly signed by six former directors, avers that the board of directors never approved the lease. The affidavit further alleges that although the general manager executed the lease, he was not authorized to do so.

WISCONSIN STAT. § 802.08(2) provides that unless otherwise specified in the court's scheduling order, the party opposing summary judgment "shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing." Here, New Horizons neither filed its opposing affidavit within five days of the hearing, nor moved to extend the time period prior to

the hearing. In fact, an unsigned copy of the affidavit was faxed to the court the day prior to the hearing, and the purported signature pages were faxed the morning of the hearing.<sup>5</sup>

The circuit court thus had no alternative but to consider only the Brysons' submissions in determining whether to grant summary judgment. See *David Christensen Trucking & Excavating, Inc. v. Mehdian*, 2006 WI App 254, ¶20, 297 Wis. 2d 765, 726 N.W.2d 689. The circuit court correctly concluded that the Brysons' materials established entitlement to summary judgment.

The summary judgment materials reflect the following. Prior to the execution of the lease, Phillip Bryson met at the property with members of the board of directors of New Horizons and David Dearth, their general manager. The Brysons' attorney drafted a lease agreement and provided it to New Horizons' attorney. The attorneys negotiated the lease, and New Horizons' attorney subsequently provided two original executed leases, for a lease term of thirteen years, signed on its behalf by "David P. Dearth, C.E.O." New Horizons' attorney also prepared a memorandum of lease to be recorded.

New Horizons began occupation of the premises commensurate with the execution of the lease agreement, and continued to operate its business out of the property. New Horizons made monthly rental payments of \$3,000, per the terms of the lease, until January 1, 2011, when payments ceased.

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<sup>5</sup> Apparently, only the signature pages were faxed the morning of the summary judgment hearing.

The record demonstrates no genuine issue of material fact existed with regard to the Brysons' claim for past rent due under the terms of the lease. The Brysons were entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).<sup>6</sup>

Finally, New Horizons purports to appeal from the order awarding attorney fees and costs, and denying its motion to vacate judgment. However, New Horizons represented at the hearing on the record in open court, "Your honor, I have no objection to the motion for fees. I looked through the fee schedule and the expenses and I don't have any objection." Accordingly, New Horizons has waived any argument concerning the award of attorney fees and costs. Regarding its motion to vacate the summary judgment, New Horizons' argument on appeal is undeveloped and shall not be further considered. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>6</sup> We do not construe New Horizons' argument to dispute the amount of past rent or interest awarded.