

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP42
STATE OF WISCONSIN**

Cir. Ct. No. 2003CV3318

**IN COURT OF APPEALS
DISTRICT I**

FORMULA FOUR, INC.,

PLAINTIFF-RESPONDENT,

v.

FIDELIS OMEGBU,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

v.

**STATE FARM INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY
COMPANY, ZURICH INSURANCE COMPANY, CONTINENTAL CASUALTY
COMPANY, FORMULA FOUR, INC., ASSURANCE COMPANY OF AMERICA
AND RICHARD BRUSS,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Fidelis Omegbu, *pro se*, appeals from circuit court orders entered on October 10, 2007, and November 21, 2007, following our remand of his earlier appeal, *Formula Four, Inc. v. Omegbu*, No. 2006AP24, unpublished slip op. (WI App Nov. 7, 2006) (*Omegbu I*). He also purports to appeal from the final orders of November 1, 2005, that we affirmed in *Omegbu I*. In *Omegbu I*, we considered Omegbu's objections to dismissals of his third-party claims against various entities and their insurance companies, including Formula Four, Inc., Richard Bruss, State Farm Fire and Casualty Company, State Farm Insurance Company, and Assurance Company of America. We affirmed all of the dismissals, noting that the circuit court had dismissed some entities, including Continental Casualty Company, earlier in the proceedings. We remanded with instructions to correct an error in the dismissal order that misidentified Assurance Company of America as Zurich Insurance Company. After remand, Omegbu moved the circuit court for summary judgment against two of the dismissed parties and for other relief. The circuit court entered orders amending its misidentification of Assurance and denying Omegbu's motions. We affirm.

BACKGROUND

¶2 Because this case was previously before us, we limit our review of the facts to those essential for understanding our resolution of Omegbu's current claims. Additional details may be found in *Omegbu I*.

¶3 Formula Four initiated this litigation by filing an eviction action against Omegbu. Omegbu counterclaimed, then added Formula Four's insurer, which he misidentified as Zurich Insurance Company. Omegbu subsequently entered into a written stipulation regarding the correct name for the insurer. The

stipulation provided, in pertinent part: “Zurich Insurance Company is not a legal entity. ... The correct insurance company is Assurance Company of America. The name of Assurance Company of America shall be substituted for ‘Zurich Insurance Company’ in all pleadings that mention ‘Zurich Insurance Company.’” The circuit court entered an order based on this stipulation requiring substitution of “Assurance Company of America” for “Zurich Insurance Company” in all pleadings.

¶4 In *Omegbu I*, we observed that, notwithstanding the stipulation and order, the circuit court granted summary judgment dismissing Omegbu’s claims against Assurance using the name “Zurich Insurance Company.” *Omegbu I*, No. 2006AP24, ¶5 n.4. We also stated that the Record reflects use of the name “State Farm Fire and Casualty Company” and the name “State Farm Insurance Company” to identify a single entity and that the circuit court used both names when dismissing Omegbu’s claims against this entity. *Ibid.* We affirmed the circuit court’s orders dismissing all of Omegbu’s claims; we remanded with directions to rectify the Record.¹

¹ Our directive to the circuit court provided:

[t]he record indicates that Zurich Insurance Company filed an answer. Later, it was determined that the correct name of the insurer for Formula Four was Assurance Company of America, and Assurance was substituted in for Zurich. The record also names State Farm Insurance Company as a party; however, the proper name of this party is State Farm Fire & Casualty Company, which was at times also referred to as a party in the record. The trial court, when signing the dismissal order, was apparently unaware of these substitutions and crossed out Assurance’s name, and incorrectly used the name State Farm Insurance Company. This error should be rectified on remand.

Formula Four, Inc. v. Omegbu, No. 2006AP24, unpublished slip op. ¶5 n.4 (WI App Nov. 7, 2006).

¶5 Following remand, Omegbu filed motions for summary judgment against both Assurance and Continental Casualty. In a written order, the circuit court denied Omegbu’s motions, explaining that neither Continental Casualty nor Assurance were parties to the case in its current posture.

¶6 The circuit court also addressed our directions on remand. The circuit court determined that *Omegbu I* required substituting “Assurance Company of America” for “Zurich Insurance Company” in the dismissal order and judgment. The circuit court amended the judgment and order accordingly. The circuit court further determined that *Omegbu I* did not require any amendment to the order dismissing both “State Farm Fire and Casualty Company” and “State Farm Insurance Company” from the litigation.

¶7 Omegbu moved twice for reconsideration. He then moved for relief from an oral ruling pronounced on October 17, 2005, pursuant to WIS. STAT. § 806.07(1)(a) and (2) (2005–06)² and FED. R. CIV. P. 60(b).³ The circuit court denied all of Omegbu’s motions, and this appeal followed.

DISCUSSION

¶8 We begin by determining the scope of our jurisdiction. *See Carla B. v. Timothy N.*, 228 Wis. 2d 695, 698, 598 N.W.2d 924, 925 (Ct. App. 1999) (court of appeals has a duty to consider its jurisdiction). Omegbu filed his notice of

² All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

³ Omegbu’s appellate briefs do not include any reference to WIS. STAT. § 806.07(1)(a) and (2) or FED. R. CIV. P. 60(b). We deem abandoned any potential issue regarding the application of this statute and rule to Omegbu’s claims for relief. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285, 292 (Ct. App. 1998).

appeal in this matter on January 2, 2008. In that notice, Omegbu recites that he is appealing from a “final judgment entered on November 1, 2005, then remanded,” and also from final orders entered on October 10, 2007, and November 21, 2007. The deadline for filing a notice of appeal from a final order or judgment entered on November 1, 2005, expired long ago. *See* WIS. STAT. § 808.04(1) (civil appeal must generally be filed no later than ninety days after entry of the order or judgment appealed from). Omegbu’s instant notice of appeal is ineffective to give this court jurisdiction over final orders or judgments entered on November 1, 2005. *See* WIS. STAT. RULE 809.10(1)(e) (court of appeals lacks jurisdiction when an appeal is untimely filed).

¶9 In light of the foregoing, we cannot review Omegbu’s contention that the circuit court erroneously granted summary judgment dismissing Omegbu’s claims by orders entered on November 1, 2005.⁴ Omegbu appealed from those orders in *Omegbu I*, and this court affirmed. Omegbu’s current appeal permits us to consider final orders entered by the circuit court after remand, but it does not bring the earlier final orders granting summary judgment back before this court. An appeal from a final judgment or order brings before the court “prior nonfinal judgments, orders and rulings ... not previously appealed and ruled upon.” *See* WIS. STAT. RULE 809.10(4). Thus, we do not consider Omegbu’s objection to the orders entered on November 1, 2005.

¶10 To resolve Omegbu’s remaining claims, we must consider whether, and to what extent, the conclusions that we reached in *Omegbu I* govern

⁴ Omegbu contends here, as he did in *Omegbu I*, that the circuit court may not grant summary judgment when the moving party supports its motion with only excerpts from depositions.

Omegbu's challenges to the circuit court's orders after remand. "A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts." *State v. Casteel*, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 459, 634 N.W.2d 338, 343. Whether *Omegbu I* established the law of the instant case presents a question of law. See *State v. Moeck*, 2005 WI 57, ¶24, 280 Wis. 2d 277, 288–289, 695 N.W.2d 783, 789. In resolving that question, we necessarily determine the meaning of our decision and order in *Omegbu I*. Interpretation of our earlier decision presents an additional question of law. See *State v. Walker*, 2008 WI 34, ¶13, 308 Wis. 2d 666, 676, 747 N.W.2d 673, 678. We consider questions of law *de novo*. *State v. Ploeckelman*, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 258, 729 N.W.2d 784, 788.

¶11 Omegbu asserts that the circuit court erred when it denied his motion after remand for summary judgment against Assurance. Omegbu is wrong. In *Omegbu I*, this court determined that the circuit court properly granted summary judgment dismissing all of Omegbu's causes of action against Assurance. See *Omegbu I*, No. 2006AP24, ¶¶1, 9, 10. That determination resolved a question of law. See *Biskupic v. Cicero*, 2008 WI App 117, ¶12, ___ Wis. 2d ___, ___, 756 N.W.2d 649, 654 (whether summary judgment is appropriate is a question of law). Consequently, our earlier determination is the law of this case and must be followed in the instant proceeding. See *Casteel*, 2001 WI App 188, ¶15, 247 Wis. 2d at 459, 634 N.W.2d at 343.

¶12 To the extent that Omegbu is contending that the circuit court improperly amended the order dismissing "Zurich" to reflect instead a dismissal of Assurance, that contention is meritless. In *Omegbu I*, we directed the circuit court to use Assurance's proper name in the order dismissing Assurance from the action.

See id., No. 2006AP24, ¶5 n.4. The circuit court was required to make this correction. *See* WIS. STAT. § 808.08(1) (circuit court must promptly execute an appellate court’s order to take specific action). Accordingly, the circuit court did not err in doing so.

¶13 Omegbu contends that he is entitled to continue pursuing claims against Zurich because the circuit court did not dismiss Zurich from the litigation. That contention is nonsense. Omegbu stipulated that Zurich is not a legal entity. The circuit court entered an order based on that stipulation directing the substitution of Assurance for Zurich. The doctrine of judicial estoppel precludes Omegbu’s efforts to resurrect claims against Zurich when he previously agreed that Zurich does not exist. *See Pollack v. Calimag*, 157 Wis. 2d 222, 234, 458 N.W.2d 591, 597 (Ct. App. 1990) (doctrine of judicial estoppel prevents party from asserting inconsistent positions at different stages of litigation).

¶14 Omegbu next contends that Continental Casualty remains a party to this action because it “failed to obtain an order from the trial court on dismissal.” Again, Omegbu is wrong. By order dated November 3, 2004, the circuit court struck the amended complaint with which Omegbu attempted to join Continental Casualty in this action. The circuit court thereby effectively dismissed Continental Casualty from this litigation. We so concluded in *Omegbu I*. *See id.*, No. 2006AP24, ¶6. Our interpretation of the circuit court’s order resolved a question of law. *See Park Manor, Ltd. v. DHFS*, 2007 WI App 176, ¶13, 304 Wis. 2d 512, 520, 737 N.W.2d 88, 91. Accordingly, our conclusion is the law of this case. *See Casteel*, 2001 WI App 188, ¶15, 247 Wis. 2d at 459, 634 N.W.2d at 343.

¶15 Omegbu also asserts that either State Farm Insurance Company or State Farm Fire and Casualty Company was not dismissed from the case, and he should be able to continue his suit against one or the other. In fact, Omegbu may not pursue claims against either. State Farm Insurance Company and State Farm Fire and Casualty Company filed a single motion for summary judgment dismissing all of Omegbu's claims. The circuit court granted the motion and dismissed all of Omegbu's claims against both State Farm Insurance Company and State Farm Fire and Casualty Company by order dated November 1, 2005. The clerk of circuit court entered judgment accordingly. This court affirmed. *See Omegbu I*, No. 2006AP24, ¶¶1, 9, 10. Our affirmance resolved a question of law. *See Biskupic*, 2008 WI App 117, ¶12, ___ Wis. 2d at ___, 756 N.W.2d at 654. Accordingly, it established the law of this case. *See Casteel*, 2001 WI App 188, ¶15, 247 Wis. 2d at 459, 634 N.W.2d at 343.

¶16 The circuit court concluded that our decision in *Omegbu I* did not require an amendment to the order and judgment dismissing both State Farm Insurance Company and State Farm Fire and Casualty Company. Omegbu does not argue that the circuit court reached that conclusion in error.⁵ Accordingly, any such argument is waived. *See Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (court of appeals does not consider arguments that the parties have not developed).

⁵ We observe that, in *Omegbu I*, we required the circuit court to correct the order and judgment misidentifying Assurance. The text of our mandate plainly did not require the circuit court to take more than one action. *See id.*, No. 2006AP24, ¶5 n.4 (“[t]his error should be rectified on remand”).

¶17 In his appellate brief, Omegbu includes a statement of issues as required by WIS. STAT. RULE 809.19(1)(b). The statement reflects that five issues are presented for our review. The argument sections of Omegbu’s appellate briefs, however, include many digressions, including an analysis of the law governing protective orders and a lengthy discussion concerning the direct action statute. These digressions generally lack a clear connection to the contentions in the statement of issues, and they fail to account for the effect of the prior appeal in this matter. We have limited our analysis to matters essential for a resolution of the questions in Omegbu’s statement of issues. ““An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”” *Turner v. DOR*, 2004 WI App 82, ¶7, 271 Wis. 2d 760, 765, 679 N.W.2d 880, 882 (citation omitted). To the extent that we have not addressed contentions that Omegbu raises in the body of his briefs, those contentions are rejected.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

