

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2011

A. John Voelker
Acting 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. 2010AP2690

Cir. Ct. No. 2010SC880

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BEAU SERCHEN AND JENA NELSON,

PLAINTIFFS-RESPONDENTS,

V.

DIANA ORNES PHOTOGRAPHY LLC AND DIANA ORNES,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Monroe County:
J. DAVID RICE, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ Diana Ornes Photography LLC and Diana Ornes (hereafter “Ornes”) appeal the circuit court’s judgment of \$1,696.50, with

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10) (small claims action). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

costs, following a bench trial, to Beau Serchen and Jena Nelson (hereafter “the couple”) in this small claims action. The case involves a dispute over a contract between the parties for Ornes to take and provide photographs of the couple’s wedding. For the reasons explained below, the judgment is affirmed.

Background

¶2 The parties entered into a written contract (using a form contract provided by Ornes) in January 2010, under which Ornes would photograph the couple’s wedding in October 2010 for \$1,600, including a \$500 nonrefundable retainer.

¶3 Separately, in May 2010, the parties entered into an oral contract under which Ornes was to produce invitations for the wedding. A dispute arose over Ornes’ work on the invitations.

¶4 Serchen testified that communications regarding the dispute included a June 16, 2010, telephone conversation between Serchen and Ornes, during which Ornes told Serchen that she was “done” with the couple, and they needed to “find a new photographer.” On June 20, 2010, the couple sent Ornes an email that including the following: “We are requesting all of the money that you have received from us minus the \$500.00 retainer fee as stated in your previous email,” totaling \$1,470.

¶5 Further communications included an email from Ornes to the couple on June 22, 2010, in which Ornes stated in part: “My understanding was that you no longer want me to provide your wedding services[,] [a]s that is exactly what it sounded like in the last email. You were demanding your money back and you

wanted to back out of the contract ... am I correct?? I just need in writing that you are for sure backing out, that way I can put it in your file.”

¶6 Nelson responded on the following day with a five-paragraph email, conciliatory in tone, which included the following:

So, depending on how you feel about all of this we can either honor the contract or we would agree to break our contract with you under the condition that you will sign a document stating you will pay back all of the money that we have given to you to date minus your 500 dollar retainer fee within 4 business days ... which would make our current contract void.

¶7 Ornes responded the same day by email, stating that Ornes “terminates this wedding Agreement, as per the clients['] request for their money being refunded.” Citing a provision in the contract that breach by the couple would entitle Ornes to keep the retainer and all other money paid to her by the couple, Ornes stated that she would refund only the \$370 paid for the invitation work.

¶8 The couple brought a small claims action for the \$1,600 held by Ornes on the photography contract, plus the filing fee of \$96.50. For an answer, Ornes asserted that the couple “cancelled their contract for wedding photography services,” and that under the terms of the written contract she was entitled to retain all payments made in advance of the breach.

¶9 At the bench trial, Serchen and Ornes testified. The court also received as exhibits a timeline created by the couple (to which was attached print outs of email communications between the parties), a copy of the check for the invitation work, additional emails, and a copy of the cashier’s check to the couple refunding the money paid for the invitation work.

¶10 The court concluded, after giving the parties an opportunity to adduce any evidence or make any argument they wanted to make, that Ornes had breached the contract by announcing on June 23, 2010, that she was terminating the contract. The court awarded the couple a judgment, against both Ornes and her business, for \$1,600 plus costs.

¶11 On appeal, Ornes makes three contentions, addressed in turn below.

The Couple's Demand for Refund as Alleged Breach

¶12 Ornes argues that the circuit court “erred in finding that the couple did not breach the contract” when, on June 20, 2010, they requested a refund of the money they had paid for the photography, less the retainer fee. While not well developed as an argument before the circuit court, the claim that the couple breached the contract was the substance of Ornes’ brief written answer to the small claims complaint. Ornes does not challenge any specific factual finding of the circuit court, but instead appears to challenge the court’s legal conclusion that the breaching party was Ornes. However, the record does not support Ornes’ claim that the couple’s refund request constituted a breach of the photography contract, and Ornes fails to present a developed argument to support her contention.

¶13 Whether the facts found by a trial court amount to a breach of contract is a question of law reviewed without deference to the circuit court. *See Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141.

¶14 The circuit court found that on June 23, 2010, the couple “told [Ornes] that they wanted [Ornes] to perform the service and [Ornes] told them no,

and they had to go hire somebody else.” While not explicit on the point, the circuit court impliedly found that the couple’s request for a refund on June 20, 2010, was not a breach but instead only an attempt to address Ornes’s prior statement to Serchen that Ornes was “done” with the couple, and that they needed to “find a new photographer,” which was itself an apparent repudiation of the contract in advance of the couple’s refund request. In addition, Serchen testified in substance that Ornes did not treat the June 20th refund request as a breach, but instead invited further discussion. The evidence suggested a course of conduct by Ornes in communicating with the couple inconsistent with the legal argument she now advances.

¶15 Ornes made the bare assertion in her answer that “Plaintiffs cancelled their contract for wedding photography services,” but failed to argue to the circuit court that the couple’s mere request of a refund constituted a breach of the contract between the parties (despite the fact that the couple’s request was met by Ornes’ own request for clarification and resulted in a continuing dialog between the parties). Now on appeal she briefly makes this argument, but fails to provide legal authority that supports it.² Ordinarily, this court does not address undeveloped arguments, and Ornes provides no reason to do so here. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶16 In sum, Ornes has failed to develop an argument that the record does not support the court’s conclusion that Ornes breached the contract, and accordingly we are without a sufficient basis to reach a different conclusion.

² Without benefit of a pinpoint citation to assist opposing counsel and the court, Ornes cites a single case dating from 1914 that is not on point.

Ornes' Alleged Entitlement to "Liquidated Damages"

¶17 In another undeveloped argument, Ornes apparently contends that the following contract provision should have been applied by the court to find that Ornes is entitled to “liquidated damages”: “In the event of any breach of this Agreement by client, [Ornes] shall be entitled to terminate this Agreement and retain the Retainer and any other monies paid by client hereunder.” The couple responds that this provision could not apply in light of the record facts demonstrating that it was Ornes who at least repudiated if not materially breached the contract, not the couple, as referenced briefly above. Ornes did not address this point in her brief-in-chief, except in the most conclusory way, and has not submitted a reply brief, and so the couple’s argument may be taken as conceded. *See Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590.

Alleged Error in Entering Judgment Against Ornes in her Personal Capacity

¶18 Ornes makes a very brief assertion that “the court erred in entering judgment against Ornes in her personal capacity,” as opposed to solely against Diana Ornes Photography LLC. However, the record indicates that the circuit court was never presented with this argument, and Ornes fails to argue otherwise on appeal. Issues not presented to the trial court are typically not considered for the first time on appeal. *See State v. Gove*, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989). “The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.” *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985).

¶19 The record reflects that Ornes had ample opportunity to present this argument to the trial court. It is likely that she would have raised the issue with

the circuit court—sometime between service of the summons and small claims complaint that named both her and her business, and entry of the judgment that also named both her and her business—if she thought there was a meaningful distinction to be made between herself and the business entity.

¶20 As with the “liquidated damages” issue, after the couple contended on appeal that Ornes forfeited the personal capacity issue by failing to present it to the circuit court, Ornes did not provide a reply brief supplying a basis for this court to conclude that it should address the personal capacity issue, despite her apparent forfeiture on this issue before the circuit court. Under these circumstances, it would be unfair to the opposing parties to address this issue for the first time on appeal.

Conclusion

¶21 For these reasons, this court concludes that: (1) Ornes has failed to develop an argument that the record does not support the court’s determination that Ornes breached the photography contract; (2) Ornes concedes, by lack of response, that the court did not err in failing to apply the “liquidated damages” provision; and (3) Ornes forfeited the argument that it was error to enter judgment against her in her individual capacity. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

