

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2012

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. 2011AP213

Cir. Ct. No. 2009CV8140

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JOHN DEVINE,

PLAINTIFF-APPELLANT,

V.

**GERMANTOWN MUTUAL INSURANCE CO.
AND ASSOCIATED BANK,**

DEFENDANTS-RESPONDENTS,

C C ELECTRIC, INC., RUSSELL HENLY AND SAMUEL HENLY,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 CURLEY, P.J. John Devine appeals an order granting summary judgment on his claims against Germantown Mutual Insurance Co. (“Germantown”) and Associated Bank. Devine claims that several issues of material fact preclude summary judgment on his claims against both entities. We disagree, and affirm.

I. BACKGROUND.

¶2 In February 2008, a frozen water pipe in Devine’s house burst. At the time, Devine had a homeowner’s insurance policy with Germantown. On March 18, 2008, Devine reported his loss to Germantown, who agreed to cover it.

¶3 Germantown sent a claims adjuster and a contractor to inspect the burst pipe and resulting damage. After inspecting Devine’s house, the adjuster told Devine that he needed to do something to mitigate the water damage. Devine was given the option of allowing Germantown’s contractor to do a “dry out” and subsequent repair work or to hire his own contractor.

¶4 Devine chose to hire his own contractor to repair his home. He hired C C Electric, owned by Samuel and Russell Henly.

¶5 Devine also hired a public adjuster, Willie Fowlkes, to assist him with the claim process. According to Devine, Fowlkes persuaded him to retain his services to ensure he would be accurately compensated for his loss. On April 24, 2008, Devine signed a document granting Fowlkes power of attorney for finances and property. The document gave Fowlkes authority to, among other things:

conduct business with financial institutions, including endorsing all checks and drafts made payable to my order and collecting the proceeds; signing in my name checks or orders on all accounts in my name or for my benefit; withdrawing funds from accounts in my name; opening accounts in my name collect[ing] and receiv[ing]

money, dividends, interest, legacies and property due or that may become due and owing to me.

¶6 For its part, Germantown hired John Waterbury, an independent adjuster, who determined that the net claim for Devine's loss was \$28,245.58.

¶7 C C Electric, on the other hand, provided Germantown with a repair estimate of \$123,643.89. Because this was significantly higher than Waterbury's estimate, Germantown sought an additional estimate. Germantown obtained that estimate from new contractor; it was \$82,437.58. The new estimate was higher than Germantown's earlier estimate because C C Electric had done a significant amount of demolition by the time it was prepared. Yet even after Germantown obtained its second estimate, C C Electric and Germantown were unable to reach an agreement regarding the loss for some time.

¶8 While the two parties were attempting to reach a compromise, Germantown, in July 2008, issued a check for \$28,245.58—Waterbury's original estimate—payable to Devine and C C Electric. Fowlkes endorsed that check as Devine's power of attorney; brought it to the Associated Bank near 43rd Street and North Avenue, where he had put a copy of Devine's power of attorney form on file; and it was negotiated with the proceeds going to C C Electric.

¶9 In September 2008, with the help of independent appraisers hired by Devine and Germantown, the parties agreed that Germantown would pay \$100,750 to cover the loss. Additionally, Germantown's appraiser, Dan Stojak, evaluated the work that C C Electric had already done on Devine's home and informed Germantown that eighty percent of the work had already been completed.

¶10 Having agreed to the amount of the loss, and having agreed that eighty percent of the work had been completed, Stojak faxed a letter to Devine, “c/o Sam Henly,” on September 16, 2008, enclosing a replacement cost agreement and a policyholder’s release for Devine to sign. In the letter, Stojak explained that once the forms were signed and returned, Germantown would send another check that would bring the total amount reimbursed to approximately \$80,750.00—or eighty percent of the agreed repair cost:

Once I receive these two forms back, I will forward them to Germantown Mutual Insurance Company. A draft of \$52,504.42 will be made payable to yourself and your contractor. This [combined with the check for \$28,245.58 sent in July] will make total payment of \$80,750.00. Once the [house] repairs are complete, I would appreciate if you and your contractor would contact me so we can verify the completion [of the repairs] and then we would be able to recover the final amount[] of \$20,000.00. Therefore, I will await the receipt of the Policyholder’s Release and the Replacement Cost Agreement.

(Some spacing omitted.)

¶11 That same day, both the replacement cost agreement and the policyholder’s release were notarized by an Associated Bank employee. Devine’s signature appeared on the replacement cost agreement, but not on the policyholder’s release.

¶12 On September 17, 2008, Germantown issued the check for \$52,504.42, made payable to Devine and C C Electric. As with the \$28,245.58 check, this check was endorsed by Fowlkes, taken to the Associated Bank near 43rd and North, and negotiated with the proceeds going to C C Electric.

¶13 As time passed and the repairs progressed, Devine became unhappy with everyone involved in the repair process. For example, by February 2009,

Devine noticed serious problems with the gas and electrical connections in his house, problems that he attributed to C C Electric, as well as Germantown, who, in his opinion, was responsible for ensuring that C C Electric performed all repairs correctly. Devine also became unhappy with Fowlkes, whom he claimed “manipulated” him and “took [him] through a spin on some stuff that [he] never knew nothing about.”

¶14 Devine consequently sued C C Electric and Germantown, and additionally sued Samuel and Russell Henly individually, as well as Associated Bank.¹ As pertinent to this appeal, Devine sued Germantown for breach of contract and conversion, and sued Associated Bank for negligence, conversion, and violating WIS. STAT. § 403.420 (2009-10).² Germantown and Associated Bank each moved for summary judgment on Devine’s claims against them, which Devine opposed and the trial court granted. Devine now appeals.

II. ANALYSIS.

¶15 On appeal, Devine challenges the trial court’s decision to grant summary judgment on his claims against Germantown and Associated Bank. “The methodology governing summary judgment is well-established and we need not repeat it in its entirety.” *Progressive N. Ins. Co. v. Jacobson*, 2011 WI App 140, ¶7, 337 Wis. 2d 533, 804 N.W.2d 838. We review the trial court’s decision to grant Germantown and Associated Bank’s motions for summary judgment *de novo*. See *Casper v. American Int’l S. Ins. Co.*, 2011 WI 81, ¶32, 336 Wis. 2d

¹ Devine did not sue Fowlkes.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

267, 800 N.W.2d 880. Summary judgment is appropriate when, viewing the facts in the light most favorable to the party opposing the motion, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751; WIS. STAT. § 802.08(2).

A. *The trial court properly granted summary judgment on Devine’s claims against Germantown.*

¶16 We begin by addressing whether summary judgment on Devine’s breach of contract claim against Germantown is appropriate. While Devine’s amended complaint alleges a breach of contract claim against Germantown as well as a conversion claim against *all* defendants, his brief and reply brief concerning his claims against Germantown only discuss his breach of contract claim. Devine makes no mention of any conversion claim against Germantown. Therefore, we will not consider whether any conversion claim Devine alleged against Germantown ought to stand, and we will discuss Devine’s claim against Germantown only with respect to his breach of contract claim. See *Madely v. RadioShack Corp.*, 2007 WI App 244, ¶22 n.8, 306 Wis. 2d 312, 742 N.W.2d 559 (we need not consider undeveloped arguments).

¶17 In evaluating Devine’s breach of contract claim, we must determine: (1) “whether a valid contract exists[;]” (2) whether Germantown has violated its terms; and (3) “whether any such violation is material such that it has resulted in damages.” See *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141. While there is no dispute that Devine and Germantown did have a valid contract, Devine has not set forth any facts showing that Germantown violated its terms, nor has he shown that he suffered any damages. See *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2001 WI App

148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59, *aff'd*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777 (party opposing summary judgment may not rely on conjecture but must affirmatively “counter with evidentiary materials demonstrating there is a dispute”). Therefore, we conclude that summary judgment on Devine’s breach of contract claim against Germantown is correct as a matter of law.

¶18 First, Devine has not established that Germantown violated the insurance contract. He claims that Germantown violated the contract in two ways: (1) by “handing out checks without [his] permission to Fowlkes and C C Electric,” and (2) by issuing “checks inconsistently with respect to payees listed on the checks”—in other words, by issuing some checks to payees including his mortgage company and by issuing others, like the two at issue in this case, to Devine and C C Electric but *not* to the mortgage company.³ Regarding the first violation, Devine points to no facts showing that Germantown actually gave the check to Fowlkes; rather, he establishes only that Fowlkes endorsed the check using the power of attorney that Devine himself signed. Consequently, there is no evidence that Germantown “handed” the check to Fowlkes. More importantly, Devine points to no part of the contract prohibiting Germantown from issuing the check to himself and to C C Electric, and no part of the contract requiring Germantown to deliver the check to himself individually and no other party. *See id.* Regarding the second violation, Devine points to no portion of the contract requiring Germantown to issue checks regarding Devine’s house repairs to his mortgage company. *See id.* Thus, there are no facts from which a factfinder could

³ The checks whose payees included the mortgage company are not at issue in this case.

conclude that Germantown violated any contractual terms. *See Lambrecht*, 241 Wis. 2d 804, ¶23; WIS. STAT. § 802.08(2).

¶19 Second, Devine has not shown damages. Devine states that Germantown’s alleged violations “led to immense and irreparable harm,” specifically, that he “arguably” lost his home to foreclosure. However, Devine does not explain how Germantown’s acts or omissions led to the foreclosure of his house; and he does not even point to any facts proving that his house was actually foreclosed upon. We must therefore reject this argument because it is inadequately developed. *See Madely*, 306 Wis. 2d 312, ¶22 n.8.

¶20 Moreover, the “issues of fact” that Devine claims foreclose summary judgment on his claim against Germantown are not material. For example, the purported issue of “to whom the checks could be issued” is not material because Devine points to no provision in the contract requiring the checks to be made payable to a particular party. For this same reason, the fact that Devine’s mortgage company is listed as a payee on some checks but not on others is not material. Additionally, the policyholder’s release is not material because, as Germantown points out, it “is a red herring.” Devine points to no contractual provision providing that Germantown was required to receive the signed policyholder’s release prior to issuing checks for his property loss claim. And, contrary to what Devine appears to argue in his brief, Stojak’s letter indicating that the checks would be released sometime after Devine signed and returned both the policyholder’s release and replacement cost agreement was *not* an enforceable contract. *See Kamikawa v. Keskinen*, 44 Wis. 2d 705, 710, 172 N.W.2d 24 (1969) (“The basic elements of a contract, of course, are an offer, an acceptance, and consideration.”). As Germantown points out, the language of the release makes clear that the release is for *Germantown’s* benefit, as it “release[s] and forever

discharge[s] Germantown ... from any and all actions and causes of action, suit, proceedings, demands,” etc., once it pays the agreed upon amount for the repairs. It does not obligate Germantown to wait until the signing and returning of the release to issue checks. Finally, Devine’s assertion that there is an issue of fact concerning whether Fowlkes presented information or documentation stating that he was representing Devine is not material to any claim he may have against Germantown. While Devine asserts that Fowlkes never presented Germantown with any information stating that he was representing Devine, Devine points to no record citation for this assertion, and it directly contradicts his deposition testimony that Fowlkes had in his possession a power of attorney signed by him (Devine) giving him the power to endorse checks on Devine’s behalf. Even if Fowlkes did somehow defraud Devine, those facts would concern a claim against Fowlkes, not whether Germantown breached its contract with Devine.

¶21 Therefore, because there are no material issues of fact and because Devine is unable to demonstrate that Germantown breached its contract with him as a matter of law, we affirm the trial court’s grant of summary judgment on Devine’s breach of contract claim against Germantown. See *Lambrecht*, 241 Wis. 2d 804, ¶23; WIS. STAT. § 802.08(2).

B. The trial court properly granted summary judgment on Devine’s claims against Associated Bank.

¶22 Turning next to Devine’s claims against Associated Bank, we note that all three claims that Devine has alleged—negligence, conversion, and violation of WIS. STAT. § 403.420—derive from the same alleged behavior on Associated Bank’s part: relying on an allegedly invalid power of attorney to

release funds issued by Germantown to Fowlkes and C C Electric.⁴ Devine argues that the power of attorney he signed, which gave Fowlkes the authority to endorse and cash checks in his name and which Devine never claims to have revoked, was invalid, and that therefore *his* consent was necessary to cash the checks. He argues the power of attorney was invalid for three reasons. First, the notary signature is not accompanied by the notary's seal. Second, the last page of the document, relating to whether the power of attorney would expire should Devine become disabled or incapacitated, was initialed in two places where it should have been initialed in only one. Third, the "Special Instructions" on the third page are initialed, but the lines where Devine would have left any special instructions are left blank.

¶23 However, regardless of whether Associated Bank relied on a power of attorney that was technically invalid, Devine has not demonstrated how that reliance resulted in damages. Devine does not dispute the fact that the work on his home was eighty percent complete by September 2008. Nor does he dispute that the two checks at issue—for \$28,245.58 and \$52,504.42, respectively—were issued expressly for the purpose of paying for the eighty percent of the work that was completed by that time. Devine does not dispute that C C Electric was the company responsible for completing the eighty percent of the work and he does not dispute that the money in fact went to C C Electric. Thus, we need not determine whether the document Associated Bank relied on was valid because Devine cannot show how the result, reimbursing C C Electric for work that it completed, harmed him in any way. *Cf. Physicians Plus*, 246 Wis. 2d 933, ¶48.

⁴ The trial court found that the power of attorney was valid.

¶24 Furthermore, we reject Devine’s argument that the policyholder’s release creates an issue of fact concerning his claims against Associated Bank. Devine argues that the fact that an Associated Bank employee notarized the policyholder’s release without his signature is evidence of Associated Bank’s negligence because the policyholder’s release is what authorized Germantown to issue the \$28,245.58 and \$52,504.42 checks. As we did with respect to Devine’s claims against Germantown, we must reject his argument because, for the reasons explained above, the policyholder’s release is not material; it was not required for Germantown to send the checks to Devine, and consequently the fact that an Associated Bank employee notarized it without a signature has no effect on Devine’s claims.

¶25 Therefore, because there are no material issues of fact and because a factfinder could not, as a matter of law, find Associated Bank liable for negligence, conversion, or violating WIS. STAT. § 403.420, we affirm the trial court’s grant of summary judgment in Associated Bank’s favor. *See Lambrecht*, 241 Wis. 2d 804, ¶23; WIS. STAT. § 802.08(2).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

