

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 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. 2011AP556

Cir. Ct. No. 2009CV5000

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HILDALE LAND COMPANY LLC,

PLAINTIFF-RESPONDENT,

v.

CORALIA HARN D/B/A STELLA'S FURNITURE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JUAN B. COLAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Coralia Harn, d/b/a Stella's Furniture, appeals from a judgment in favor of Hilldale Land Company, LLC. Harn argues that the circuit court erroneously granted summary judgment in Hilldale's favor and

improperly dismissed Harn's counterclaim. We reject her arguments and affirm the judgment.

BACKGROUND

¶2 In 2005, Harn signed a lease with Hilldale to open a furniture store at the Hilldale Mall in Madison. The lease term was October 1, 2005, through December 31, 2006. The monthly rent was \$3500.

¶3 In May 2006, Hilldale began a demolition and construction project across the hall from Harn's store. According to Harn, the construction made it difficult for customers to enter the store and Harn's business suffered. Harn did not pay rent for August through December 2006. She vacated the store in December 2006, at the end of her lease term.

¶4 On December 12, 2006, Hilldale notified Harn by letter that she owed \$17,500 in rent for the last five months of Harn's lease. Harn gave Hilldale a check for \$8750 dated December 22, 2006, but it was returned due to non-sufficient funds. Ultimately, Hilldale filed this lawsuit to collect the rent money owed by Harn.

¶5 In her answer, Harn identified several affirmative defenses, asserting that Hilldale had failed to: "fulfill its contractual obligations," "comply with its obligation to insure that the premises ... was clear from any interference during the tenancy," and "state a claim upon which relief can be granted." Harn also filed a counterclaim for "significant financial loss" that she claimed was caused by Hilldale's breach of the rental contract.

¶6 After the close of discovery, Hilldale moved for summary judgment. It argued that Harn breached the lease when she failed to pay rent and that Hilldale

was entitled to rent for August through December 2006. With respect to Harn's counterclaim, Hilldale argued that Harn had failed to produce evidence of lost profits. Hilldale noted that Harn had produced her tax returns, but asserted that the returns did not provide proof that, but for the construction at the Hilldale Mall, Harn would have made additional profits. Hilldale referred to Harn's own evidence that her monthly sales during the fifteen months she was at Hilldale ranged from \$10,559 to \$69,260 and that her average sales in 2006 were higher than in 2005.

¶7 Harn's brief in opposition to Hilldale's motion for summary judgment asserted, "This is a constructive eviction case." Harn argued that she was "released from the obligation to pay rent once the constructive eviction took place." Harn's brief explained:

[Harn] stopped paying rent due to the financial impact of the lost business and abandoned Hilldale Mall. The reduced business was directly caused by Hilldale's acts and failures. Hilldale alleges that [Harn] owes rent. [Harn] should not owe rent. On the contrary, [Harn] should be awarded damages for the rent [she] actually continued paying past the time the demolition began. In addition, [Harn] was entitled to withhold rent from the time the constructive eviction began, which was in May 2006.

¶8 With respect to her counterclaim, Harn argued that she "suffered an actual loss of \$69,000 for 2006" as a result of "reduced customer sales." In support, she referred to her tax returns and list of monthly sales. Her brief added:

While [Harn] currently doesn't have an expert calculation of lost profits, it reasonably follows that lost profits result from lost sales. Damages are readily ascertainable by an expert opinion which takes in account ... [Harn's] monthly sales ... by an analysis of other tenants at Hilldale, especially the stores nearest the construction site, [and] sales records of similar furniture stores in the area.

¶9 On the same day she filed her brief, Harn also faxed the circuit court a letter indicating that she was filing an additional exhibit that was not referenced in the brief or its accompanying affidavits. The new exhibit was an affidavit with supporting exhibits from an expert offering his opinions concerning Harn's lost sales and profits.

¶10 Hilldale moved to strike the expert's report and supporting exhibits on the grounds that they were not produced in response to discovery requests and the discovery deadline had passed. The circuit court granted the motion as a sanction against Harn for violating discovery and filing deadlines.¹

¶11 The circuit court subsequently granted Hilldale's motion for summary judgment, in a written decision. First, the circuit court concluded that Hilldale had made a *prima facie* case for unpaid rent. Further, it concluded that the defense of constructive eviction did not apply because "constructive eviction requires abandonment of the premises by the tenant during the term of the lease" and it was undisputed that Harn remained on the premises until the end of her lease (and had, in fact, signed a notice of intent to renew her lease on August 24, 2006).

¶12 Second, the circuit court rejected Harn's argument that Hilldale had breached the contract, concluding that Harn had failed to identify which lease provision had been breached. The circuit court added:

Even if the constructive eviction cases were read as holding that there are implied covenants of suitability for intended purpose or quiet enjoyment in a commercial lease, [Harn]

¹ On appeal, Harn does not challenge the circuit court's decision to strike the expert's report.

cites no authority for the position that non-payment of all rent is a remedy when the tenant chooses to remain in the premises.... Absent such authority, the breach claimed by [Harn], even if true, cannot be a defense to non-payment of rent.

¶13 Third, the circuit court concluded that Hilldale was entitled to dismissal of Harn’s counterclaim because Harn had failed to produce material facts to support her lost profit claim. The circuit court explained:

[Hilldale] offers sales tax data for [Harn’s] store showing that of the highest 10 months of sales, 5, including the second and third highest, were after demolition and construction were underway and points out there is no expert opinion in support of the lost profit claim. Once the party moving for summary judgment has sufficiently identified the basis for its contention that there is an absence of material facts to support an element on which the opposing party has the burden, the party bearing the burden of proof must establish at least a material issue of fact on that element.

[Harn] concedes [that she] “currently doesn’t have an expert calculation of lost profits.” ... [Harn] argues that lost profits can be proven by evidence of prior profits, analysis of sales of similar stores or neighboring stores and expert testimony. But discovery has closed and [Harn] has produced none of that evidence in support of its claim, either in discovery or in its supporting affidavits.

Notably, [Harn] doesn’t offer any evidentiary facts showing that any profits were lost, let alone what she would have to prove at trial: that there was a loss of profits in an amount reasonably certain caused by lost sales caused by the construction project.

(Citation omitted.) The circuit court concluded that Harn had “not met her burden of establishing a material issue of fact to avoid summary judgment on her counterclaim.”

¶14 Harn filed a motion for reconsideration with the circuit court. She argued that the circuit court had erroneously failed to consider a number of

uncontested material facts before granting Hilldale's motion for summary judgment on its claim for unpaid rent, including Harn's deposition testimony that Hilldale's representative told Harn "that she did not need to pay rent until 'this whole nightmare was behind us.'" Harn argued that in making this statement, Hilldale's representative had released Harn from her obligation to pay rent "until the construction was completed." Harn noted that Hilldale had not submitted any evidence countering Harn's evidence that Hilldale had released her from paying rent and had not presented evidence that it attempted to collect rent from August through mid-December 2006. Harn also took issue with the circuit court's conclusions concerning abandonment of the property and her counterclaim.

¶15 In response to Harn's argument that she was released from her obligation to pay rent, Hilldale asserted that Harn was improperly presenting a new argument in a motion for reconsideration. The circuit court agreed, concluding that Harn was advancing that argument for the first time on reconsideration and, therefore, it would not be considered. The circuit court also rejected Harn's other challenges to its decision and entered judgment in Hilldale's favor. This appeal follows.

DISCUSSION

¶16 Harn argues that the circuit court erroneously entered summary judgment in Hilldale's favor with respect to Hilldale's claims for unpaid rent and

Harn’s counterclaim.² Specifically, she contends: (1) the circuit court erroneously failed to consider Harn’s “uncontested deposition testimony that a Hilldale representative told her she did not have to pay rent until the construction was over”; (2) the issue of whether Hilldale constructively evicted Harn is a question for the trier of fact; and (3) the circuit court improperly made its own factual determination concerning Harn’s sales, rather than leaving that determination to a trier of fact. We consider each issue in turn.

I. Standard of review.

¶17 When we review a circuit court’s grant of summary judgment, we employ the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).³ In deciding if there are genuine issues of material fact, “[a]ll reasonable inferences drawn from the underlying facts contained in these documents that are in the record must be

² Although Harn’s notice of appeal references both the grant of summary judgment and the denial of her motion for reconsideration, on appeal she does not develop an argument that the circuit court erroneously exercised its discretion when it denied her motion for reconsideration. See *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶¶6, 44, 275 Wis. 2d 397, 685 N.W.2d 853 (“To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact,” and appellate court reviews circuit court’s decision on motion for reconsideration using erroneous-exercise-of-discretion standard.). Therefore, we do not discuss whether the motion for reconsideration should have been granted. See *Reiman Assoc., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned). Instead, this decision focuses on whether summary judgment was properly granted.

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

viewed in the light most favorable to the non-moving party.” *Johnson v. Rogers Mem’l Hosp., Inc.*, 2005 WI 114, ¶30, 283 Wis. 2d 384, 700 N.W.2d 27.

II. Oral release from rental contract.

¶18 Harn admits that she agreed to pay Hilldale \$3500 per month in rent and that she did not pay rent for August through December 2006. She contends that those facts, however, are “not enough for summary judgment [against Harn for unpaid rent] in light of Harn’s uncontested deposition testimony that a Hilldale representative told her she did not have to pay rent until the construction was over.” She asserts that the circuit court erred when it “ignored this fact and the competing inferences” and “failed to ‘examine the affidavits and other proof of the opposing party’ to determine whether a genuine issue of material fact exists.” (Quoting *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991)). She further explains the basis for her claim that a genuine issue of disputed fact concerning her liability to pay rent exists:

In support of her opposition to summary judgment, Harn submitted portions of her deposition testimony as well as other supporting documentation. Harn testified that ... a Hilldale official [] told Harn that she did not need to pay rent until “this whole nightmare is behind us.” [Harn’s] testimony also explained the devastating impact that the Hilldale Mall construction had on her business and use of the space she rented....

Reasonable inferences are that [Harn’s] use and enjoyment of the premises were being severely deprived, her business was damaged, Hilldale had notice of the problem, and Hilldale wanted [Harn] to stay and not abandon the remainder of her lease. The reasonable inference is that the “whole nightmare” which [the Hilldale representative] referred to was the entire demolition and construction project.... The reasonable inference is that Hilldale relieved Harn of her obligation to pay rent during all of the months that the mall was under construction, which included the months of August, September, October, November and December, 2006. The reasonable inference is that had the construction ended within any given period

of time, for example, October, 2006, then [Harn's] obligation to pay rent would resume at that time and for the remainder of the lease. But the facts in the record show that the time never came, and the lease expired prior to the time when the "nightmare" was over anyway.

(Record citations omitted.)

¶19 We are unconvinced that Harn was entitled to summary judgment based on the pleadings and the arguments she presented in opposition to the motion for summary judgment. Harn never advanced or explained the argument she now makes on appeal: that she was released from her obligation to pay rent by the Hilldale representative. Other than including the quotation from her deposition testimony and a citation to her deposition testimony in one of thirty-two paragraphs of the facts section of her brief, she did nothing to alert Hilldale or the circuit court that she was claiming she was legally and permanently released from the obligation to pay rent for August through December 2006. For instance, Harn never explained her interpretation of the representative's alleged statement or why such a statement would not mean that she was being given the opportunity to pay the rent later, without incurring late fees or interest.⁴ Further, she did not explain why, if she was released of her obligation to pay rent, she would have given Hilldale a check for \$8750 in December 2006. In addition, she failed to offer any legal authority for her theory that a lessor's representative can orally release a tenant from an obligation to pay rent without amending the commercial lease in writing.

⁴ There is evidence in the record that for at least several months in the summer of 2006, Hilldale told all mall tenants that they did not have to pay interest or late fees on late monthly rent payments "[i]n recognition of the difficulties that the construction process has created."

¶20 In short, Harn failed to present an argument in her response to the motion for summary judgment that she was legally and permanently released from her obligation to pay rent by Hilldale’s representative. She is barred from making that argument for the first time in a motion for reconsideration, *see Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141 (“[A] a motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials after the court has decided a motion for summary judgment.”), or on appeal, *see State v. Schulpius*, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (appellate court generally does not review an issue raised for the first time on appeal).

III. Constructive eviction.

¶21 Harn argues that Hilldale was not entitled to summary judgment on its claim for past due rent because Harn was constructively evicted. In response, Hilldale asserts that “[e]ven taking all credible facts raised in Harn’s opposition brief and appellate briefing ... as true, Harn cannot prevail on a constructive eviction defense under Wisconsin law” because she does not satisfy one of the elements of constructive eviction: that she abandoned the premises within a reasonable time. The circuit court agreed with Hilldale and so do we.

¶22 Our conclusion is based on the definition of constructive eviction that has been adopted by our supreme court, which requires the tenant to abandon the premises:

[A]ny disturbance of the tenant’s possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, *provided the tenant abandons the premises within a reasonable time.*

First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis. 2d 258, 268, 286 N.W.2d 360 (1980) (emphasis added; citations and two sets of quotation marks omitted). Harn did not abandon the premises until the conclusion of the lease. Indeed, she continued to sell furniture and experienced sales of over \$135,000 during that five-month period. It cannot be said that she was constructively evicted at any time from August through December 2006.

¶23 Harn disagrees with this conclusion, asserting:

Where the tenant has abandoned, then you look to the test of abandonment. But since abandonment is not the issue here, then abandonment is not the test. Hilldale’s argument that [Harn] had to abandon has no merit. There is nothing in the case law that requires [Harn] to leave. Hilldale’s reliance on the “abandonment” element is misplaced. Nothing requires a tenant who is being constructively evicted, to abandon the premises before constructive eviction can be found. Hilldale relies on [*Kersten v. H.C. Prange Co.*, 186 Wis. 2d 49, 520 N.W.2d 99 (Ct. App. 1994)] for the rule that a tenant must abandon the premises in order to meet the test for constructive eviction. Hilldale is wrong. It is true that *K[e]rsten* and [*Schaaf v. Nortman*, 19 Wis. 2d 540, 120 N.W.2d 654 (1963)] discuss abandonment, but it is only in the context of the facts of those cases. In those cases, abandonment is the primary issue.

....

... Harn acknowledges that abandonment is an element [of constructive eviction], but only in cases where the tenant abandons too soon or too late. [Harn] did neither. [She] was in her full right to continue to occupy the premises while she waited for Hilldale to be restored to good conditions. Nothing in the law required her to leave. Hilldale asked her to stay, so she stayed. Abandonment doesn’t apply here.

She further argues that “[i]t is for the trier of fact to decide whether a constructive eviction took place.”

¶24 We are not convinced by Harn’s arguments. *First Wisconsin* explicitly requires that the tenant abandon the premises in order for there to be a constructive eviction, and Harn has not cited any case law that holds otherwise. We do not agree that abandonment is an issue only where the parties disagree whether an abandonment occurred “within a reasonable time.” *See id.*, 93 Wis. 2d at 268 (citations and two sets of quotation marks omitted). Where there is no abandonment, there is no constructive eviction. *See id.* Harn cannot defeat summary judgment based on a constructive eviction defense.

IV. Dismissal of Harn’s counterclaim.

¶25 Harn argues that her counterclaim for lost profits should not have been dismissed.⁵ She asserts that the monthly sales figures she provided for October 2005 through December 2006 were sufficient to create a genuine issue of material fact on her counterclaim.⁶ She explains: “There are reasonable inferences which could be drawn from the fact that sales income continued to rise after the demolition began, for example, taking into account there are accounts receivable[] which are paid in over time, or that there could have been orders

⁵ Harn styles her argument in terms of what the circuit court did or did not do. In light of the applicable standard of review for reviewing a grant of summary judgment, we instead will focus on whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See* WIS. STAT. § 802.08(2); *see also Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987) (appellate court applies same methodology as circuit court when examining grant of summary judgment).

⁶ The sales figures noted the month and year and listed a single dollar amount of “sales” for each month. No other detail was provided.

placed months in advance, which were paid on delivery when the special orders arrived from the factory.”⁷

¶26 In response, Hilldale argues that Harn failed to produce sufficient evidence of proximate cause and damages. With respect to causation, Hilldale explains that in discovery, Harn did not produce “sufficient evidence for a jury to reasonably conclude that *but for* the alleged breach ... Harn would have made additional profits from selling furniture at the Leased Premises.” With respect to damages, Hilldale asserts that Harn “has failed to provide any evidence from which lost profits could be reasonably estimated.” (Capitalization and bolding omitted.)

¶27 We conclude that at a minimum, Harn did not produce sufficient information concerning the amount of her alleged damages to survive a motion for summary judgment.⁸ As we explained in *Lindevig v. Dairy Equip. Co.*, 150 Wis. 2d 731, 442 N.W.2d 504 (Ct. App. 1989):

Damages for lost profits need not be proven with absolute certainty, but the claimant must produce sufficient evidence, in this case, the books and records, on which to base a reasonable inference as to a damage amount. To establish lost profits, the claimant must produce evidence of the business’s revenue as well as its expenses. Assertions as to the amount of lost profits have no evidentiary value unless supported by figures showing profits and losses.

⁷ This appears to be the first time Harn has discussed the effect of accounts receivable and order placement on the monthly sales figures. She has not provided any record citations indicating that this evidence was offered in support of her counterclaim.

⁸ Because we conclude that Harn’s counterclaim was insufficient with respect to the amount of alleged damages, we do not discuss causation. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Cases should be decided on their narrowest grounds.).

Id. at 740 (citations omitted). Further, “where a new business has no previous profit history ... the party seeking lost profits must ‘present credible comparable evidence or business history and business experience sufficient to allow a fact finder to reasonably ascertain future lost profits.’” *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶38, 281 Wis. 2d 448, 699 N.W.2d 54 (citation omitted).

¶28 In this case, the lost profits evidence produced in opposition to the motion for summary judgment was simply a list of monthly sales figures and Harn’s tax returns. Harn’s motion in opposition to summary judgment indicated that at trial she could “use records of similar furniture stores in the area, market surveys and expert testimony,” but none of that evidence was produced during discovery. As a result of a lack of sufficient evidence concerning Harn’s lost profits, Harn failed to establish a *prima facie* case for damages and her counterclaim was properly dismissed.

By the Court.—Judgment affirmed.

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

