

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 25, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2012AP1173**

**Cir. Ct. No. 2010CV503**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**RONALD D. FISCHER, DAVID A. FISCHER AND CYNTHIA A. YEUNG,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ESTATE OF KAREN K. FISCHER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for Wood County: NICHOLAS J. BRAZEAU, JR., Judge. *Order affirmed; order affirmed in part, reversed in part and cause remanded.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Ronald Fischer, David Fischer and Cynthia Yeung (collectively, the Fischers), brought suit against the Estate of Karen Fischer and Barry Hansen, Karen's surviving husband, to recover for damages caused to real

property that Karen previously held a life estate interest in and in which the Fischers had remainder interests, and for property taxes and assessment on that property, which Karen failed to pay during the tenure of her life estate. The Fischers appeal an order dismissing Hansen from the suit, and an order of summary judgment in favor of the Estate. We affirm the order dismissing Hansen, but reverse the order of summary judgment in favor of the Estate.

### **BACKGROUND**

¶2 The following facts are taken from the summary judgment submissions and are not in dispute. In 1985, Bruce Fischer, Karen's spouse and the Fischers' father, died. Under the terms of Bruce's will, Karen was conveyed a life estate in real property located in Wisconsin Rapids, Wisconsin, and the Fischers were named as remaindermen. In July 2007, Karen contacted the Fischers through her attorney, who advised the Fischers that Karen was interested in terminating her life estate in the Wisconsin Rapids property. Ronald advised Karen's attorney that he and his siblings were willing to take possession of the property, but that they were not willing to take responsibility for unpaid taxes on it. In August 2007, Karen transferred the property to the Fishers via a quitclaim deed, which was signed by each of the Fischers. When the Fischers returned the signed quitclaim deed to Karen's attorney, they advised Karen's attorney:

Please be advised that we have signed the [quitclaim deed] with the following understanding ... We continue to refuse to accept responsibility for the personal debts of Karen Fischer or any property taxes that are the rightful responsibility of your client ... [And] [w]e are unwilling to release your client from any legal obligations that she may have as a result of her life estate interest.

¶3 Thereafter, Ronald sent a letter to Karen advising her that under her prior life estate she had been required to make repairs necessary to maintain the

property. Ronald listed the repairs he felt Karen needed to make and “offer[ed] [her] the opportunity to obtain and use [her] own contractors to make the repairs.” Ronald also advised Karen that she was obligated to pay those property taxes due for the time period in which she held a life estate in the property. It is undisputed that Karen did not make any of the requested repairs or pay the amount of taxes the Fischers claim Karen was obligated to pay.

¶4 In July 2010, the Fischers brought suit against Karen, alleging breach of duty of care, negligence, unjust enrichment, conversion, and waste, all regarding the property. In her answer, Karen asserted as an affirmative defense that the Fischers were estopped from seeking damages from her for damage caused to the property or for unpaid taxes because the Fischers had executed a quitclaim deed on the property. Karen died shortly thereafter and the Fischers amended their complaint to substitute Barry Hansen, as personal representative of the Estate of Karen Fischer, as the defendant. The Fischers also added Hansen, who is Karen’s surviving spouse, as a separate defendant in the action.

¶5 In December 2011, Hansen and the Estate moved the circuit court for judgment on the pleadings. Hansen argued that he had no legal interest in or legal obligation to the property for which the Fischers could pursue a claim for relief. The Estate argued that because the Fischers executed and accepted the quitclaim deed, they are now estopped from asserting that the Estate owes them money for damages caused to the property during Karen’s life estate. In January 2012, the circuit court granted the motion to dismiss only as to Hansen.

¶6 In March 2012, the Fischers moved the circuit court for summary judgment, and for reconsideration of the court’s order of judgment in favor of Hansen. The court denied the Fischers’ motion for reconsideration and their

motion for summary judgment, and entered summary judgment in favor of the Estate. The Fischers appeal. We address additional facts in the discussion below as necessary.

## DISCUSSION

¶7 The Fischers contend that the circuit court erred in dismissing Hansen as a defendant in this case, and in granting summary judgment in favor of the Estate.

### *A. Dismissal of Barry Hansen as a Defendant*

¶8 The Fischers assert a multitude of reasons for why the circuit court erred in entering judgment in favor of Hansen and dismissing him with prejudice as a defendant. These reasons include, but are not limited to: a failure by the court to abide by local court rules concerning dispositive motions; the court's failure to require Hansen to establish the absence of a genuine issue of material fact; Hansen was unjustly enriched by Karen's failure to use her financial resources to maintain the property; Hansen, by Karen's failure to maintain the property, wrongfully converted property ultimately belonging to the Fishers to his own; and the court failed to fully address each of their arguments.

¶9 The circuit court order dismissing Hansen, with prejudice, as a defendant in this action was entered on January 24, 2012, and was a final order from which an appeal as of right could be taken. *See* WIS. STAT. § 808.03(1) (2011-12).<sup>1</sup> The underlying matter is civil in nature and the ninety-day appeal

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

period in WIS. STAT. § 808.04(1) applied. Although the Fischers moved for reconsideration of the court's order dismissing Hansen, the motion did not affect the time for appeal of the January 24 order because the reconsideration motion was not filed after a trial to the court or other evidentiary hearing. *See Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.*, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993) (WISCONSIN STAT. § 805.17(3) does not apply to reconsideration motions in the summary judgment context). Because the notice of appeal was filed more than ninety days after entry of the January 24 order, this court lacks jurisdiction to review that order. *See* WIS. STAT. RULE 809.10(1)(e).

¶10 We now turn to the question of whether this court has jurisdiction to review the reconsideration order. An appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See Silverton Enters., Inc. v. General Cas. Co. of Wis.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). The concern is that a motion for reconsideration not be used “as a ploy to extend the time to appeal from an order or judgment” when that time has expired. *Id.* *See also Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972). The Fischers did not raise any issues in their motion for reconsideration that differ from those disposed of in the original January 24, 2012 order. Accordingly, we do not further address this issue.

### *B. Summary Judgment*

¶11 The Fischers contend the circuit court erred in denying their motion for summary judgment and entering summary judgment in favor of the Estate.

¶12 The circuit court entered summary judgment in favor of the Estate and dismissed “all of the [Fischers’] claims for damages.” The court did not set forth its reasoning in its written decision. At the summary judgment hearing, the court explained that the Fischers could not prevail on their claim for unjust enrichment because the submissions did not establish that the Fischers conferred a benefit upon Karen, an element of unjust enrichment. With respect to the Fischers’ remaining claims, including breach of duty of care, negligence, conversion and waste, the court provided the following explanation:

[T]he question is, when you accept a quitclaim deed from [Karen], does that limit your ability to go after other things from her in this case related to the real estate transaction? And I think it does. She gave you everything that she ha[d]. You could have—I agree with you, you couldn’t have demanded a warranty deed, it couldn’t have made sense, but you could have asked that title work be done; and when they refused, you could have demanded it and refused to accept such a deed until that was done, that would have shown you that the taxes were due and owing and that would have allowed you to make argument at that point that you weren’t going to accept the deed without having that resolved. You didn’t do that; you took the quitclaim deed. This all makes sense to me....

....

... You may have been frustrated in the sale of the real estate for the time that it took to get through that. In other words, there was a benefit to you also of accepting the quitclaim deed and moving forward, you call that settlement. And so the Court looks at that as though that were the settlement of this case ... that you chose to move forward in that fashion ... which looks to me to be a reasonable way to do it ....

¶13 Thus, the circuit dismissed the Fischers’ unjust enrichment claim for failure to make a showing that each of the elements of unjust enrichment were satisfied, and the Fischers’ remaining claims on what we construe the court’s explanation to be a waiver/equitable estoppel basis.

¶14 We review summary judgment de novo. *Pinter v. American Family Mut. Ins. Co.*, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when the affidavits and other submissions show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; WIS. STAT. § 802.08(2). When reviewing summary submissions, we must draw all reasonable inferences from the evidence in favor of the non-moving party, and may not grant summary judgment if more than one reasonable inference can be drawn from the facts. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987).

¶15 To recover for unjust enrichment, the Fischers bore the burden of proving the following three elements: (1) the claimants conferred a benefit upon the other party, in this case Karen; (2) the other party had an appreciation or knowledge of the benefit; (3) the other party accepted or retained the benefit acceptance and retention under circumstances that would make it inequitable for the other party to retain the benefit without payment of its value. *Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶7, 308 Wis. 2d 398, 747 N.W.2d 745. The Fischers argue that the benefit they conferred upon Karen was an ability for Karen to enjoy a higher standard of living because of her failure to maintain the property or pay the property taxes and assessments, which they claim eroded their “remainder interest” and “resulted in Karen ... enjoying a standard of living greater than [she] would have [otherwise] enjoyed.” We disagree. Karen’s ability to enjoy a greater standard of living by virtue of any failure on her part to properly maintain the property or stay current with the property’s taxes and assessments was not a benefit the Fischers conferred upon, or gave to, Karen. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 475 (1993) (defining “conferred” as “to

grant or bestow ... to give”). It was a benefit she took for herself, not one that she was given.

¶16 To prevail on their claim for conversion, the Fischers needed to establish three elements: (1) the defendant intentionally controlled or took property belonging to them, (2) without their consent, (3) resulting in serious interferences with their possessor rights to the property. See *Bruner v. Heritage Cos.*, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999); see also WIS JI—CIVIL 2200. We read the Fischers’ brief as arguing that they presented evidence, which viewed in the light most favorable to them, would show that Karen’s failure to pay taxes on or maintain the Wisconsin Rapids residence resulted in Karen reducing the value of their remainder interest in the property. The Estate argues that Karen did not, and could not, control or take property belonging to the Fischers during the period of her life estate because the Fischers held only a remainder interest in the Wisconsin Rapids residence during that time.

¶17 First, assuming without deciding that Karen did control or take property belonging to the Fischers, the summary judgment materials do not contain any evidence that Karen’s failure to maintain the property or her failure to pay the taxes and assessments was intentional. Second, the question of whether a person with a remainder interest in real property may bring a claim against the holder of a life interest in that real property for conversion is a question of law. After an admittedly nonexhaustive search, it is not clear to us that a cause of action for conversion lies between a remainderman and a life tenant in Wisconsin. Furthermore, we observed recently that it is also unclear, at best, whether conversion is a viable claim when the property alleged to be converted is real property and not personal property. See *Deutsche Bank Nat’l Trust Co. v. Pauk*, No. 2010AP1583, unpublished slip op. at ¶62 (May 31, 2012). The Fischers did



not present any legal authority to the circuit court and do not present any authority now, that a claim for conversion against Karen lies in the present situation. Accordingly, we decline to further address the issue. See *Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (“We need not consider arguments unsupported by reference to legal authority.”).

¶18 With regard to the Fischers’ final claims for breach of a duty of care, negligence, and waste, the Estate argues that when the Fischers signed the quitclaim deed, the Fischers were aware of the condition of the property and were aware that there were real estate tax and assessment liens on the property. The Estate’s sole argument is that because the Fischers accepted the quitclaim deed knowing these facts, they are now estopped from asserting these claims against the Estate. We disagree.

¶19 A quitclaim deed is one that conveys nothing more than the interest or estate of which the grantor is seized at the time, rather than the property itself. See WIS. STAT. § 706.10(4); *First Wisc. Trust Co. v. Taylor*, 242 Wis. 127, 129, 7 N.W.2d 707 (1943). See also 26A CJS Deeds, § 14. The quitclaim deed between Karen and the Fischers provides in relevant part:

[Karen] quit[ ]claims to [the Fischers] the following described real estate, together with the rents, profits, fixtures and other appurtenant interests, in Wood County, State of Wisconsin (“Property”) ....

LOTS 1 AND 2 OF BLOCK 1 OF NAYLOR’S ADDITION TO THE CITY OF WISCONSIN RAPIDS, WOOD COUNTY, WISCONSIN, EXCEPT THE WEST 62 FEET THEREOF.

THE PURPOSE OF THIS DEED IS TO RELINQUISH MY LIFE ESTATE INTEREST IN THE ABOVE DESCRIBED PROPERTY, SAID LIFE ESTATE WAS GRANTED IN A FINAL JUDGMENT IN THE ESTATE OF MY HUSBAND BRUCE D. FISCHER, AND

RECORDED IN VOLUME 539, AT PAGES 63-65,  
WOOD COUNTY RECORDS AS DOCUMENT #650558.

¶20 Karen quitclaimed her current life estate interest in the Wisconsin Rapids residence. However, nothing in the deed disclaims or waives any liability Karen may or may not have had as a result of a failure to pay property taxes or maintain the property during her life estate in the property. The Estate asserts in their brief that “[a]t no time did Karen indicate that she would be paying real estate taxes, special assessments, or repairs for the property.” However, even assuming that such a claim were established in the record, it is, as we explain in the following paragraph, beside the point.

¶21 The undisputed evidence in the summary judgment materials show that after they discussed with Karen’s attorney the possibility of Karen terminating her life estate interest in the property, the Fischers provided Karen’s attorney written notice that they were “unwilling to accept responsibility for,” and were unwilling to release Karen from, “any legal obligations that [Karen] may have as a result of her life estate interest.” The evidence in the record reflects that the Fischers signed the quitclaim deed, but that they also provided written notice to Karen’s attorney that they did so with the “understanding” that the Fischers “continue to refuse to accept responsibility for the personal debts of Karen Fischer or any property taxes that are the rightful responsibility of [her]” and that they “are unwilling to release [Karen] from any legal obligations that she may have as a result of her life estate interest.”

¶22 The Estate fails to point to undisputed evidence showing that Karen signed the quitclaim deed before the Fischers provided written notification to her attorney that they were unwilling to accept responsibility for any legal obligations she had arising out of her life estate. The Estate also fails to point to undisputed

evidence that Karen notified the Fischers that she was not willing to pay the unpaid taxes on the property, which arose out of her life estate, or whether she was unwilling to pay for any other liability she may have to the Fischers as a result of her former life estate interest in the property. Construing the evidence, as we must, in the light most favorable to the Fischers, we conclude that there remain genuine issues of material fact as to the Fischers' claims for breach of a duty of care, negligence, and waste.

### CONCLUSION

¶23 For the reasons discussed above, we affirm the order dismissing Hansen from the suit; as to the order of summary judgment in favor of the Estate, we affirm in part and reverse in part, and remand for further proceedings consistent with this opinion. No costs to any party.

*By the Court.*—Order affirmed; order affirmed in part, reversed in part and cause remanded.

Not recommended for publication in the official reports.

