

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2014

Diane M. Fremgen
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. 2013AP2337

Cir. Ct. No. 2013CV1655

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARINA CLIFFS PHASE I, INC.,

PLAINTIFF-RESPONDENT,

V.

WALTER MALECKI,

DEFENDANT,

EQUITABLE BANK AND UW CREDIT UNION,

DEFENDANTS-RESPONDENTS,

CHARLES MALECKI,

INTERESTED PARTY-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles Malecki, *pro se*, claims the circuit court erred when it denied his motion to substitute himself in place of his deceased father as the defendant in this foreclosure action, struck his answer to the complaint, and granted a default judgment of foreclosure to Marina Cliffs-Phase I, Inc. We affirm.

¶2 Marina Cliffs-Phase I filed a complaint seeking a judgment of foreclosure against Walter Malecki alleging that he had failed to comply with his obligations as a purchaser of a condominium unit. Some months later, Charles Malecki filed an answer purportedly on Walter Malecki's behalf, alleging that Walter Malecki is deceased and offering various affirmative defenses to the foreclosure action. The circuit court struck the answer, concluding, as relevant here, that Charles Malecki was neither a party to the action who could appear on his own behalf nor a licensed attorney who could appear on behalf of another.

¶3 Charles Malecki next filed a motion for substitution of parties pursuant to WIS. STAT. § 803.10(3) (2011-12).¹ Over the course of several hearings, he advised the circuit court that he is the son of the deceased defendant, Walter Malecki, that the deceased's estate had not been probated, but that Charles Malecki was the heir to the condominium unit. He further advised the circuit court that he was taking steps to transfer the title of the condominium unit into his name. Shortly before the final hearing date, however, the circuit court received a document titled "Motion to Be Heard," signed by John S. Malecki. The motion reflected that John S. Malecki is also a son of Walter Malecki, and that John S.

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

Malecki was “opposed to the transfer of title of the [condominium unit] to Charles P. Malecki.” At the hearing held a few weeks later, John S. Malecki appeared by telephone. He told the circuit court that he objected to “any kind of request to have the [condominium] property put in Charles’s name,” and he further explained that Walter Malecki had several children in addition to Charles and John Malecki. Charles Malecki conceded that he had siblings, but he asserted that they had expressed no interest in the condominium unit.

¶4 The circuit court denied Charles Malecki’s motion for substitution of parties, agreeing with Marina Cliffs that Charles Malecki is neither the sole heir to the condominium unit nor a proper representative for all of the heirs. The circuit court then granted Marina Cliffs a default judgment of foreclosure. Charles Malecki appeals. Whether to permit substitution of parties under WIS. STAT. § 803.10 rests in the circuit court’s discretion. See *Schwister v. Schoenecker*, 2002 WI 132, ¶19, 258 Wis. 2d 1, 654 N.W.2d 852. “[W]e will uphold a discretionary decision if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts.” *State v. Timblin*, 2002 WI App 304, ¶20, 259 Wis. 2d 299, 657 N.W.2d 89.

¶5 WISCONSIN STAT. § 803.10, entitled “substitution of parties,” provides, in pertinent part: “(1) DEATH. (a) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party[.]” The statute thus limits who may bring a motion for substitution following the death of a party to: (1) those who are already parties; and (2) those who are the successors or representatives of the deceased party. See *Schwister*, 258 Wis. 2d 1, ¶9.

¶6 Charles Malecki could not bring a motion for substitution as a “party” because he was not a party. He could therefore seek substitution only if he was either a “successor” or a “representative” of Walter Malecki. *See id.*

¶7 The words “successors” and “representatives” in WIS. STAT. § 803.10(1)(a) are not defined in the statute. Our supreme court, however, adopted § 803.10(1)(a) “copying almost verbatim” the language of a federal rule of civil procedure, specifically, Fed. R. Civ. Pro. 25(a)(1). *Schwister*, 258 Wis. 2d 1, ¶16. “When a Wisconsin rule of civil procedure is based on a federal rule, the decisions of the federal courts may be persuasive.” *Wheeler v. General Tire & Rubber Co.*, 142 Wis. 2d 798, 807, 419 N.W.2d 331 (Ct. App. 1987). Thus, in *Schwister*, our supreme court, while not required to determine who may move for substitution, looked to federal authority for definitions of the terms “successors” and “representatives” while resolving a related question arising under § 803.10(1). *See Schwister*, 258 Wis. 2d 1, ¶9 & n.9. The *Schwister* court observed:

“[r]epresentative” likely means a person who acts on behalf of another and probably refers to the legal personal representative appointed by the probate court. Similarly, “successor” likely means a person who succeeds to the rights and responsibilities of another. A successor might include, for example, heirs or beneficiaries of a will or distributees of an estate that had been distributed. *Rende v. Kay*, 415 F.2d 983, 984 (D.C. Cir. 1969).

Schwister, 258 Wis. 2d 1, ¶9 n.9. Similarly relying on *Rende*, another federal court explained:

Unless the estate of a deceased party has been distributed at the time of the making of the motion for substitution, the “proper” party for substitution would be either the executor or administrator of the estate of the deceased. “Successors” would be the distributees of the decedent’s estate if his estate had been closed. *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969).

Ashley v. Illinois Cent. Gulf R.R. Co., 98 F.R.D. 722, 724 (S.D. Miss. 1983).

¶8 Charles Malecki did not show that the probate court appointed him personal representative for Walter Malecki or his estate. Charles Malecki similarly did not show that he was the beneficiary under a will executed by Walter Malecki; rather, Charles Malecki affirmatively stated that Walter Malecki died intestate. Finally, Charles Malecki failed to show that he had received a distribution from the estate following administration of the estate, or that he held title to the condominium unit. To the contrary, he asserted that his efforts to transfer the property had been futile, and his brother appeared in circuit court by telephone to voice opposition to those efforts. Accordingly, the circuit court properly exercised its discretion in denying Charles Malecki's motion for substitution of parties.²

¶9 Next, we conclude that the circuit court properly prevented Charles Malecki from defending the claims against Walter Malecki and correctly struck Charles Malecki's proposed answer to the complaint. Except as provided in WIS. STAT. ch. 799, "[o]nly a member of the Wisconsin bar or someone accompanied by a member of the bar may appear on behalf of another in state courts." *State v. Olexa*, 136 Wis. 2d 475, 481, 402 N.W.2d 733 (Ct. App. 1987). The record is uncontroverted that Charles Malecki is not a licensed attorney, nor did he appear in circuit court accompanied by a member of the Wisconsin bar.

² Charles Malecki asserts in his appellate brief that he "should have been allowed to intervene under WIS. STAT. § 803.09(1)." We will not consider that contention because he did not file a motion to intervene in circuit court. See *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶83, 350 Wis. 2d 554, 835 N.W.2d 160 (we do not consider claims presented for the first time on appeal). In circuit court, he filed a "motion to substitute party." We recognize that at times the circuit court referred to his motion as one to intervene, but the record is clear that he made no such motion and that the references to intervention are misstatements.

¶10 Finally, because Charles Malecki is not a party to the foreclosure action and because he is not an attorney who may appear on behalf of another person or entity, we do not address his request on appeal that we reverse the default judgment of foreclosure against Walter Malecki. Charles Malecki does not have authority to litigate on behalf of Walter Malecki. *See id.* We affirm.

By the Court.—Judgment affirmed.

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

