

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2015

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. 2014AP1822

Cir. Ct. No. 2012CV291

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MARY PODGORAK, ANTHONY PODGORAK, MICHAEL PODGORAK, PETER
PODGORAK, STEVEN PODGORAK AND HELEN DUDECK,**

PLAINTIFFS-APPELLANTS,

v.

BARBARA A. ENGELKING,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Mary Podgorak¹ appeals an order dismissing without prejudice an action for adverse possession and money damages. We conclude Podgorak failed to plead facts sufficient to show entitlement to relief and therefore affirm.²

BACKGROUND

¶2 On August 16, 2012, a two-paragraph complaint was filed by counsel purportedly on behalf of Mary Podgorak, commencing this lawsuit. The allegations regarding adverse possession were as follows:

¹ The Notice of Appeal states the name of the party filing the appeal is “PLAINTIFFS – SEE ATTACHMENT.” However, the record contains no attachment. The caption on the notice of appeal states as appellant: “Mary Podgorak Et Al.” For ease of reference, we refer to the various appellants as “Podgorak” unless otherwise stated.

² Our review of this case has been unnecessarily complicated by the parties’ briefs. Podgorak’s briefs violate numerous requirements of WIS. STAT. RULE 809.19. Among other things, the principal brief lacks citations to the record on appeal, citing generally to “exhibits” purportedly contained in its Appendix, but no exhibits are identified in the Appendix, which itself does not reference the record on appeal. *See* WIS. STAT. RULES 809.19(1)(d), (2). Podgorak also fails to reference the parties by name as required by RULE 809.19(1)(i), but rather uses phrases such as “Plaintiff-Appellant.” Moreover, Podgorak cites repeatedly to an unpublished per curiam opinion of this court in violation of the rules of appellate procedure. *See* WIS. STAT. RULE 809.23(3)(b). In addition, Podgorak’s reply brief lacks page numbers. Both parties improperly cite to documents such as “Answers to Interrogatories” that were not properly presented to the circuit court, and which could have converted the motion to dismiss to one for summary judgment had they been, as they were outside the pleadings. *See* WIS. STAT. § 802.06(2)(b).

This court has a very heavy caseload, as do the circuit courts. The time that courts may devote to each case is limited. This case has placed an unwarranted burden on the courts and taken resources away from other matters. We remind attorneys and parties that rules of appellate practice are designed in part to facilitate the work of the courts.

Based on the citation to an unpublished per curiam opinion, in clear violation of WIS. STAT. RULE 809.23(3), we sanction Podgorak’s appellate attorneys and direct them to pay \$50 to the clerk of this court within thirty days of this decision. *See* WIS. STAT. RULE 809.83(2).

References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

- 1.) That Plaintiff has been openly, continuously, and notoriously for a period in excess of 20 years has used, maintained and treated the following described real estate as her own and exclusive property. That said real [sic] is in Douglas County and is described as:

Beginning at the east one-quarter corner of Section 10, Township 48 North, Range 14 West, thence north 280 feet, thence east 1351.45 feet, thence south 280 feet, thence westerly 1351.45 feet to the place of beginning.

¶3 One month later, an amended two-paragraph complaint was filed. This amended complaint was identical concerning the allegations of adverse possession, with the exception of changing the legal description of the property at issue.

¶4 On October 29, 2013, defendant Barbara Engelking filed a “Motion to Dismiss For Failure of Party Plaintiff,” contending Mary Podgorak “has been dead for a period in excess of twenty years.” The motion also contended that, at the time of the final pretrial conference, the case was “without a legal person as party plaintiff.”³

¶5 On December 9, 2013, yet another two-paragraph amended complaint was filed naming as plaintiff “Anthony Podgorak, Spec. Admin.,” together with five other plaintiffs who were identified only by their names in the caption; no facts regarding these plaintiffs were alleged in the body of the complaint. The allegations concerning adverse possession in this amended

³ Engelking contends in her brief to this court that Mary Podgorak died in 1987, claiming she determined that fact at a mediation in this case. Any mention of this alleged fact is conspicuously absent from Podgorak’s briefs on appeal. In any event, Podgorak does not refute this contention, and it is therefore deemed admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

complaint were identical to the previous complaints except it alleged that “Plaintiff [sic] collectively and/or individually” adversely possessed the property.

¶6 On March 19, 2014, Podgorak filed a “Motion To File Amended Complaint,” apparently seeking to again modify the complaint’s legal description of the subject property. Counsel for Barbara Engelking filed correspondence with the circuit court opposing the motion, arguing the matter was scheduled for trial in one month. Among other things, Engelking’s correspondence stated:

1. The proposed amended complaint fails to state the interest of the individuals named as plaintiff.
2. The complaint fails to state the dates of alleged adverse possession, although the named individuals have stated under oath in answer to interrogatories that the date commences in 1948.
3. The amended complaint fails to alleged [sic] the factual nature of the adverse possession, while outside of pleading the plaintiffs have contended possession rights both upon use of deer stands and at times outside the period of adverse possession.

¶7 After a hearing, the circuit court granted the motion to amend the complaint, but stated:

Quite frankly, if this was a motion to dismiss by the defendant, I would give that a certain amount of weight because the ... amended complaint, it doesn’t tell what the ownership interest is of any of the individuals. It doesn’t give the general who, what, when, where, why and how Who has what ownership interest and what part of the property? And there’s just some, in my opinion, even for notice pleadings there should be more there, more information given and [counsel] has touched upon some of those things. You know, what is the nature of it? From what period of time? We don’t have when.

....

So I'm allowing the amendment and I think it needs to be further amended to make sure that we hit all the who, what, where, when, why, how.

¶8 On May 2, 2014, Podgorak filed an “Amended Complaint For Adverse Possession Declaration for Interest In Real Estate,” now naming eight plaintiffs rather than the previous six plaintiffs. Podgorak purported to bring the action “both individually and collectively”

¶9 On May 30, 2014, Engelking moved to dismiss Podgorak’s amended complaint for failure to state a claim. A hearing was held on July 24, 2014, after which the circuit court granted the motion to dismiss, without prejudice. Podgorak now appeals.⁴

DISCUSSION

¶10 For purposes of reviewing a motion to dismiss, factual allegations in the complaint are accepted as true. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693. However, legal conclusions asserted in a complaint are not accepted, and legal conclusions alone are insufficient to withstand a motion to dismiss. *Id.* In order to satisfy WIS. STAT. § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief. *Id.*, ¶21. Factual assertions are evidenced by statements that describe: “who, what, where, when, why, and how.” *Id.*, ¶21 n.9.

⁴ On the same day the notice of appeal was filed, Podgorak filed another amended complaint for adverse possession. Only the circuit court’s August 13, 2014 Order for Dismissal, which dismissed Podgorak’s then-operative amended complaint, is before this court.

¶11 Podgorak concedes that a valid complaint “must show who, what, where, and why” However, Podgorak points to vague and conclusory allegations in the operative amended complaint, including, but not limited to, allegations of the plaintiffs herding cows, cutting grass, engaging in recreational activity, and maintaining roads on the property, as well as their “maintaining the real estate as the family property.” Podgorak argues “[a]ll of the above along with allegations of openly, continuously and notoriously using the real estate in excess of twenty years, more than adequately sets forth sufficient allegations” under notice pleading rules. We disagree.

¶12 Significantly, the amended complaint fails to allege, in any manner, when and how frequently the alleged adverse possession of any individual plaintiff occurred. Indeed, there are no factual allegations underlying Podgorak’s general statements regarding the plaintiffs’ alleged activity, collectively or individually, on the property at issue. Meanwhile, Podgorak insists answers to interrogatories establish 1948 as the year when Mary Podgorak (or her family) began exclusively using the property at issue. However, this assertion is outside of the pleadings and therefore is not considered with respect to the motion to dismiss on appeal. *See* WIS. STAT. § 802.06(3). In any event, there is no indication in the record that interrogatory answers were before the circuit court.⁵

¶13 We also note Mary Podgorak died in 1987, far more than twenty years prior to the commencement of the present action. The amended pleadings allege three of Mary’s children died since 2004, and that “Anthony Podgorak is

⁵ Even if Podgorak had presented an affidavit in opposition to the motion to dismiss to the circuit court, and it had not been excluded, the motion to dismiss would have been treated as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b).

the Special Administrator for and on behalf of Mary Podgorak in order to determine what if any interest she or her deceased three sons of aforesaid have in and to said real estate.” However, the operative amended complaint fails to reference letters of special administration, and it also fails to specify by what authority a special administrator was appointed, or the scope of powers and duties granted. *See* WIS. STAT. § 867.17. Furthermore, although mentioned in the amended pleadings, the deceased children are not denominated as plaintiffs in the amended complaint.

¶14 In addition, none of the plaintiffs resides at the location of the property in dispute.⁶ It serves no legitimate purpose to merely allege numerous siblings of Mary Podgorak, together with a grandson and his wife, have an unspecified interest in the property “both individually and collectively,” based upon an unspecified twenty-year period of alleged adverse possession. As the circuit court observed, based on the record before it, “Who has the ownership interest and what part of the property?”

¶15 Podgorak insists the claim is being brought “as a family.” However, this argument is undeveloped and we shall therefore not consider it further. *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 336 (Ct. App. 1988). We also note Podgorak improperly cites to an unpublished, per curiam decision of this court, *see* WIS. STAT. RULE 809.23(3)(b), which, at any rate, fails to support her position.

⁶ Engelking notes this fact is inferred from the mailing addresses in the caption. Podgorak fails to refute this assertion, and it is therefore deemed admitted. *Charolais Breeding Ranches*, 90 Wis. 2d at 109.

¶16 Podgorak also argues WIS. STAT. § 802.02(6) requires that “all pleadings shall be so construed as to do substantial justice.” This directive, however, does not absolve a party from meeting the basic pleading requirements under § 802.02(1). The motion to dismiss in this matter involved the third or subsequent iteration of the pleadings. The court specifically admonished Podgorak during the hearing that permitted the most recent amendment of the pleadings, “to make sure that we hit all the who, what, where, when, why, how.” Podgorak’s subsequent amended complaint failed to do so. On appeal, Podgorak continues her failure to tie the applicable legal standards for a complaint to survive a motion to dismiss—*i.e.*, well-pleaded facts that, if proven, show that the plaintiff is entitled to relief—to the allegations in her complaint. In all, we conclude Podgorak has failed under WIS. STAT. § 802.02(1)(a) to allege facts sufficient to set forth a plausible claim that, if true, would establish adverse possession.⁷

¶17 Finally, Podgorak’s pleadings request compensatory damages “in excess of \$10,000,” together with punitive damages. Engelking responds in her brief to this court that Podgorak does not allege “any ground upon which Barbara Engelking is liable for any money damages.” Podgorak fails to reply to this argument, and it is therefore deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

⁷ Engelking asks this court to “remit the matter with direction to dismiss with prejudice.” No authority is provided in support of this request, and we shall therefore not address it further. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

By the Court.—Order affirmed.

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

