

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 30, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**THOMSON REALTY OF
WISCONSIN, INC.,**

Plaintiff-Respondent,

v.

GERALD J. JOYCE,

Defendant-Appellant,

CITY OF BROOKFIELD,

Defendant.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Gerald J. Joyce has appealed from a judgment determining that a strip of land¹ lying between property owned by the

¹ Throughout this decision, we will refer to this strip of land as the "disputed strip."

respondent, Thomson Realty of Wisconsin, Inc., and the public right of way running adjacent to Hackberry Lane resulted from a surveying error. The judgment determined that the public right of way and Thomson's property therefore are coterminous. Joyce contends that the disputed strip is owned by him and that it was created by his parents as a spite strip to prevent Thomson's predecessors in interest from having access to Hackberry Lane. We affirm the trial court's judgment.

Joyce's first argument is that the trial court erred in denying his motion for summary judgment. In conjunction with this argument, he contends that the trial court erroneously permitted Thomson to file an untimely motion for summary judgment.

The timeliness or untimeliness of Thomson's motion provides no basis for relief to Joyce. The record indicates that Joyce filed a motion for summary judgment on September 21, 1992. On October 14, 1992, Thomson filed a response and affidavits in opposition to Joyce's motion. On November 9, 1992, which was seven days before the hearing scheduled on Joyce's motion, Thomson filed its own motion for summary judgment.

Pursuant to § 802.08(2), STATS., a party opposing a motion for summary judgment may file affidavits in opposition to the motion five days or more before the hearing on the motion. In addition, if it appears to the trial court that the party opposing summary judgment is entitled to it, the trial court may award summary judgment to that party even if it does not move for it. Section 802.08(6).

Because Thomson timely filed its response and affidavits in opposition to Joyce's motion, the trial court could have considered whether those materials entitled Thomson to summary judgment even if Thomson had not filed a motion explicitly requesting it. Moreover, relief on appeal may be granted only when a substantial right of a party is affected. Section 805.18(2), STATS. Since the trial court granted Joyce additional time to respond to

Thomson's motion and ultimately denied it, the filing of Thomson's motion did not impair a substantial right of Joyce.

Based on the materials filed by Thomson, we also conclude that summary judgment was properly denied to Joyce. On appeal, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *Coopman v. State Farm Fire & Casualty Co.*, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review the parties' submissions on summary judgment to determine whether there are any material facts in dispute which would entitle the opposing party to trial. See *Benjamin v. Dohm*, 189 Wis.2d 352, 358, 525 N.W.2d 371, 373 (Ct. App. 1994).

The parties' pleadings gave rise to an issue as to whether Joyce's predecessors in interest retained title to the disputed strip when Hackberry Lane² was dedicated as a public street in the mid-1950's, or whether title was vested in Thomson or the city of Brookfield. In his motion for summary judgment, Joyce contended that the disputed strip was intentionally created as a spite strip. In support of this claim, he attached affidavits from an attorney involved in platting Joyce's property, a registered land surveyor, and an attorney employed by a title company. Together, they supported a claim that the disputed strip had been created by Joyce's parents as a spite strip to prevent Thomson's predecessor in interest from having access to Hackberry Lane and that the Joyces had retained legal title to the disputed strip.

Thomson's affidavits disputed the contention that a spite strip was intentionally created by the Joyces and retained by them. Thomson submitted an affidavit of Stanley Potrykus, a land surveyor, who concluded that the disputed strip resulted from a surveying error and was intended to be part of the Hackberry Lane right of way. In reaching this conclusion, he attested that surveying errors were common, that the subdivision plat of the Joyces' land did not indicate that a spite strip existed, and that the width of the disputed strip varied. He indicated that a spite strip generally would be of uniform width. In addition, he noted that the disputed strip extended beyond the area it would have been confined to if it had been created as a spite strip.

² Hackberry Lane was known as Tu Lane at the time of its dedication.

Thomson also submitted an affidavit of Mark Ciborowski, the vice president of a title company. Based on his title search, he also concluded that the disputed strip was intended to be part of the public right of way and that the Joyces had no interest in it. He relied on some of the same factors considered by Potrykus, along with his search of the material records of title.

Based on these affidavits, a material issue of fact existed for trial as to whether the disputed strip was created and retained as a spite strip by the Joyces, or whether it resulted from a surveying error and was part of the public right of way.³ Summary judgment therefore was properly denied.

In reaching this conclusion, we reject Joyce's argument that the issue of whether the disputed strip was part of the public right of way could not be raised by Thomson on summary judgment because the city of Brookfield, which was originally named as a defendant in Thomson's complaint, had already been dismissed as a party. The city was dismissed by stipulation after it filed a motion disavowing any claim to ownership of the disputed strip. However, the mere fact that the city did not want to pursue a claim to the disputed strip did not prevent Thomson from claiming that the disputed strip belonged to the city rather than to Joyce. Thomson was entitled to present evidence and argument in support of this contention because it supported Thomson's allegation that the disputed strip did not belong to Joyce, which was the crux of its complaint. Thomson had standing to assert this claim because it had an interest in having access to Hackberry Lane, which would be impaired if the disputed strip was found to belong to Joyce.

For similar reasons, we reject Joyce's argument that the trial court improperly permitted Thomson to raise a new issue on summary judgment which was not raised by the pleadings. Thomson's complaint sought a declaration that the disputed strip did not belong to Joyce and a judgment

³ Joyce contends that the affidavits of Potrykus and Ciborowski did not give rise to an issue of fact because they had no personal knowledge of whether a surveying error occurred. However, a reasonable inference from the facts considered by them, including the varying width of the disputed strip and the length of the strip, was that a surveying error occurred. Similarly, even if the law did not mandate that a spite strip be depicted on a plat map, Ciborowski indicated that such strips were usually depicted anyway. Potrykus and Ciborowski therefore were entitled to consider the failure to include it in the plat map as evidence that the Joyces did not create and retain a spite strip.

permanently enjoining Joyce from claiming legal ownership or asserting an adverse claim to it. The complaint alleged that title to the disputed strip vested in either the city by virtue of the strip's location adjacent to the right of way, or in Thomson by deed or prescriptive or adverse rights. Thomson's affidavits indicating that the disputed strip resulted from a surveying error constituted evidentiary facts in support of these claims, and thus did not raise a new, unpleaded issue.

For the same reason, we reject Joyce's contention that the trial court should have granted his motion in limine prohibiting evidence at trial regarding a surveying error or public ownership of the disputed strip. Evidence that the disputed strip was the result of a mistake by surveyors laying out the boundary between the public right of way and the property belonging to Thomson's predecessor was relevant to Thomson's claim that the disputed strip was not owned by the Joyces. It supported a finding that the land within the strip belonged to either the public right of way or Thomson and that the boundaries of the right of way and Thomson's property were coterminous.

Contrary to Joyce's argument, raising these issues did not constitute "trial by ambush." Joyce was on notice after the summary judgment proceedings that Thomson claimed that a surveying error had occurred. The gist of this claim was that no gap would exist between the right of way and Thomson's property if an error-free survey had occurred, and that the disputed strip was in fact conveyed with the rest of the land surrounding it, thus negating Joyce's claim that it was retained by his family. This claim was asserted by Thomson two years before trial in its summary judgment materials and at trial, where Joyce had a complete opportunity to refute it.

Testimony from Potrykus reiterating his conclusions as to the inadvertent creation of the disputed strip was also presented at trial. As additional support for his conclusions, Potrykus indicated that it was common platting practice to designate or depict any remaining unplatted land retained by the owner. Testimony by Ciborowski also supported a finding that the disputed strip resulted from a surveying error.

Based on this testimony, the trial court properly denied Joyce's motion for a directed verdict. Because the testimony also provided credible

evidence to support the jury's finding that the disputed strip resulted from a surveying error, no basis exists to disturb the verdict on appeal. See *Heideman v. American Family Ins. Group*, 163 Wis.2d 847, 863, 473 N.W.2d 14, 21 (Ct. App. 1991).

We also reject Joyce's argument that he is entitled to a new trial because the trial court did not decide the ultimate issue of who owned the disputed strip. The jury found that the strip resulted from a surveying error rather than the retention of a strip of land by the Joyces. As concluded by the trial court, it follows from this finding that all of the land within the strip was conveyed by the Joyces and that the boundaries of the right of way and Thomson's property are coterminous. Whether the land within the strip belongs to the public right of way or Thomson is immaterial to this appeal, since under either scenario Joyce has no interest in the disputed strip and thus no basis to challenge the judgment further on appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.