

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2008

David R. Schanker
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. 2007AP2301

Cir. Ct. No. 2005CV115

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LUKE P. THOMPSON,

PLAINTIFF-APPELLANT,

LISA A. THOMPSON,

PLAINTIFF,

v.

TOWN OF BROOKLYN,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Green County:
WILLIAM D. JOHNSTON, Judge. *Reversed and cause remanded*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Luke Thompson appeals from an order dismissing his complaint against the Town of Brooklyn¹ and an order denying his motion for reconsideration. While we agree that certain claims were properly dismissed on summary judgment, we do not agree as to all of them. We therefore reverse and remand.

¶2 The case was decided on summary judgment. A party is entitled to summary judgment when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).² Summary judgment methodology is well established, and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. On review, we apply the same standards the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶3 Thompson's complaint can be divided into two groups of claims, and we do so for purposes of our analysis in this opinion. Thompson's first group of claims is based on factual allegations that, before the Town's 2003 Mortensen Road improvement project, there existed a fence, 92 trees, 95 bushes, and 14 vines on a stretch of land that was located on his and Lisa Thompson's property and within the presumed 66-foot right-of-way of Mortensen Road; and that the Town

¹ The notice of appeal indicates that it is an appeal by Luke Thompson and Lisa Thompson. However, the notice was signed only by Luke. There is no indication that Luke is an attorney. Non-attorneys are not permitted to sign notices of appeal on behalf of others, and their attempts to do so have no legal effect. *Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 562 N.W.2d 401 (1997). Therefore, only Luke is an appellant in this appeal.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

removed those items during the project without the Thompsons' consent. Thompson's second group of claims is based on factual allegations that the road improvement project caused changes to certain field access roads and a driveway. We examine each in turn.

A. Fence and Vegetation

¶4 On appeal and in the circuit court, the parties argued over several issues related to the first group of claims, but we conclude that one of them is dispositive. We conclude that Thompson cannot maintain claims for damage to the fence and vegetation because the deed by which he obtained title to the land did not convey land within the 66-foot right-of-way.

¶5 In reaching this conclusion, we begin by assuming that the Thompson complaint stated a claim for relief on these theories, and that the Town's answer raised issues of fact or law. It was the Town that moved for and was granted summary judgment; therefore we turn next to the Town's submitted proofs to determine if they show a *prima facie* case for summary judgment.

¶6 The Town's submissions included an affidavit of Michael Statz, who averred that he is an engineer who was the project manager for this project. He attached to his affidavit a copy of certified survey map number 3340, as recorded by the register of deeds. The Town also submitted, as an attachment to its attorneys' summary judgment brief, a copy of a deed transferring certain property shown on map 3340 to the Thompsons. This deed copy was not submitted by affidavit, but Thompson has not disputed its authenticity on appeal. The deed shows that the land being conveyed to the Thompsons was "Lot One (1) of Certified Survey Map Number 3340," as recorded by the register of deeds.

¶7 The survey map shows part of the north boundary of Lot One as running along and near the center line of Mortensen Road. However, the map also shows a right-of-way of 33 feet on each side of the road's center line. The legal description on the surveyor's certificate gives a metes and bounds description of the lot and concludes by stating that the lot is "subject to Legler Road and Mortensen Road *as shown*." (Emphasis added.) Based on these facts, the Town argues that Thompson cannot maintain claims for damages to objects within the right-of-way, because the deed under which he took title to the land did not convey property within the depicted right-of-way. We agree. The lot transferred by the deed was subject to a 33 foot right-of-way, "as shown," and therefore Thompson's property ends at that point.

¶8 Thompson makes a statutory argument that the right-of-way is only presumed to be a total of 66 feet, and that his evidence overcomes that presumption. However, that argument does not alter the deed conveyance. Even if it was true that before the survey map was drawn the right-of-way was narrower than 66 feet, the deed still conveyed to Thompson only the portion up to the depicted right-of-way. To avoid that result, the survey map used in the transfer would have to show the right-of-way at the narrower width Thompson now argues is the true width, or would have to rely only on the metes and bounds description of the property, which does not include a specific right-of-way width.

¶9 Based on the above, we conclude that the Town made a *prima facie* case for summary judgment. Thompson's arguments in response to the Town's motion do not appear to raise any factual dispute, but only legal issues. Therefore, we conclude that Thompson does not own property within 33 feet of the center line. This conclusion requires the dismissal of his trespass and inverse condemnation claims, which are based on damage to property located within that

right-of-way. Because our conclusion is dispositive of Thompson's first group of claims, we need not address arguments the parties made about the Thompsons' attempt to withdraw their consent during the project. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

B. Access Roads and Driveway

¶10 Thompson's second group of claims relate to factual allegations that the Town's road project caused changes to certain field access roads and to a driveway. The complaint sought damages for the cost of reconstructing one of the field access roads, and an order requiring the Town to restore the driveway and to "recognize the existence and legitimacy" of their three field access roads.

¶11 On appeal, Thompson argues that the circuit court's dismissal of these claims was improper because the Town did not actually move for summary judgment on them and did not present any evidence in support of judgment on them. The Town's brief on appeal does not address this issue. This, by itself, is a sufficient basis to reverse on this issue. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondent cannot complain if propositions of appellant which respondent does not undertake to refute are taken as confessed).

¶12 Beyond that, however, Thompson's description of the record appears to be accurate. The Town's summary judgment motion sought dismissal "as to certain claims." The motion then listed five arguments, which were also argued in an accompanying brief. Of those arguments, only the notice of claim argument appears to have the potential to lead to dismissal of the field access and driveway claims. However, the Town's reply brief conceded that its notice of claim argument was not legally sound. In addition, neither Thompson's brief opposing

the motion nor the Town's reply brief addressed the substantive merits of the field access and driveway claims, and instead both addressed these issues only in the context of compliance with the notice of claim statute. Further, the circuit court addressed the field access and driveway claims only briefly in a single paragraph at the conclusion of its 16-page decision. The court held,

There is no showing that the engineering for the culverts and road accesses was flawed. There is no basis shown to exist on which defendant would have a duty to plaintiff in doing the road project as to installation of the culverts and road accesses across the highway right-of-way to plaintiff's property.

As Thompson pointed out in his reconsideration brief, and again on appeal, the court's decision does not appear to be a proper application of summary judgment methodology. The court placed the burden on the non-movant, Thompson, to provide evidence or argument in support of his claim, without first determining whether the movant had demonstrated a *prima facie* defense. The court did not respond to this point in denying reconsideration.

¶13 In summary, as to the field access and driveway claims, we conclude a proper basis for granting summary judgment to the Town has not been presented in the Town's brief on appeal, in its summary judgment materials, or in the circuit court's decision. Therefore, we reverse and remand as to those claims.

By the Court.—Orders reversed and cause remanded.

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

