

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2010

A. John Voelker
Acting 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. 2009AP1355

Cir. Ct. No. 2006CV100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PJ VENTURES, INC., A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

FOREST COUNTY, A WISCONSIN POLITICAL CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

**LAKE SUPERIOR LAND COMPANY, INTERNATIONAL PAPER COMPANY
AND CF/FIA, LLC,**

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Forest County: NEAL A. NIELSEN III, Judge. *Affirmed; cross-appeal dismissed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. PJ Ventures, Inc., appeals a summary judgment dismissing its trespass action against Forest County, arguing the circuit court erroneously concluded WIS. STAT. § 893.80(4)¹ granted the County immunity, and the court improperly exercised its discretion when it refused to allow PJ Ventures to amend its complaint. Forest County filed a cross-appeal, arguing the court erroneously found a bridge constructed by the County belonged to International Paper Company or its successor in interest, CF/FIA, LLC. We affirm dismissal of the trespass action and the order denying the motion to amend the pleadings. We dismiss the cross-appeal for lack of jurisdiction.

BACKGROUND

¶2 In a series of transactions beginning in 2003, PJ Ventures purchased land from a subsidiary of International Paper. International Paper had granted permission for the County to maintain snowmobile trails and use a logging bridge spanning a creek for that purpose. Because the bridge was in disrepair, International Paper permitted the County to construct a new bridge for snowmobilers. The bridge was constructed by the County with funding from the Department of Natural Resources. In February 2005, the new bridge was installed and the old bridge was removed. PJ Ventures sought access to the bridge, which was on International Paper's property. The County, fearing use by larger vehicles would exceed the weight limit, barred access to the bridge and eventually put up a gate and blocked the bridge with boulders.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 In September 2005, PJ Ventures purchased an easement from International Paper's subsidiary to guarantee a pathway across International Paper's property to parcels PJ Ventures had previously purchased. The earlier sales agreements and the deeds did not mention an easement across the creek, although informal permission to traverse the property had been given. Although the bridge is located in the pathway described in the written easement, the bridge is not explicitly mentioned.

¶4 In May 2006, the County informed PJ Ventures it was closing the bridge permanently and planned to relocate the bridge. Shortly thereafter, International Paper sold the land in question to CF/FIA. In August 2006, PJ Ventures brought an action against the County seeking a declaratory judgment that it had easement rights to the bridge. While that action was pending, Forest County removed the bridge. PJ Ventures then amended its complaint and now seeks damages for trespass, naming the County, International Paper, its subsidiary and CF/FIA as defendants.

¶5 At a hearing held November 18, 2008, the court dismissed the action against International Paper, its subsidiary and CF/FIA. The court found the bridge was a fixture on International Paper's property and therefore the bridge belonged to International Paper or its successor. Written judgments dismissing the actions against International Paper, its subsidiary and CF/FIA were entered December 31, 2008. The County filed a motion for reconsideration. By stipulation and order entered March 4, 2009, the court again dismissed all claims against CF/FIA and ordered no costs against any party based on the stipulation. By order entered April 30, 2009, the court dismissed the action against Forest County based on governmental immunity.

DISCUSSION

¶6 The circuit court correctly concluded the trespass action against the County is barred by WIS. STAT. § 893.80(4). That statute unambiguously provides “No suit may be brought against any ... governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees” PJ Ventures does not challenge the County’s status as a governmental subdivision, nor does it characterize the removal of the bridge as something other than an intentional tort. It cites nuisance cases for the proposition that the government can be sued for interfering with property rights, but concedes it has not commenced a nuisance action. In addition, the cases it cites involve negligent creation of a nuisance, not intentional acts. *See, e.g., Milwaukee Metro. Sewage Dist. v. City of Milwaukee*, 2005 WI 8, ¶59, 277 Wis. 2d 635, 691 N.W.2d 658; *Hillcrest Gold & Country Club v. City of Altoona*, 135 Wis. 2d 431, 441, 400 N.W.2d 493 (Ct. App. 1986). PJ Ventures’ claim that removal of the bridge was “willful, malicious and intentional” states a claim for an intentional tort for which the County has been granted immunity.

¶7 After the County moved for summary judgment based on governmental immunity and after the court dismissed the actions against International Paper and CF/FIA, PJ Ventures requested leave to amend its complaint to make a claim under WIS. STAT. ch. 32, eminent domain. The circuit court denied the motion after concluding the amended complaint would fail to state a claim for which relief could be granted. Under WIS. STAT. § 802.09(1), a pleading may be amended only by leave of the court or consent of the adverse party if more than six months has elapsed since the filing of the initial summons and complaint. Whether to allow amendment is discretionary and the circuit court’s ruling will be upheld unless it failed to exercise its discretion or the facts

do not support its decision or the court applied the wrong legal standard. *Hess v. Fernandez*, 2005 WI 19, ¶12, 278 Wis.2d 283, 692 N.W.2d 655. When considering a party's request to amend the pleadings after summary judgment has been granted, the court must consider the reason the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments and the nature of the proposed amendment, as well as the effect on the defendant. *Mach v. Allison*, 2003 WI App 11, ¶27, 265 Wis.2d 686, 656 N.W.2d 766.

¶8 Here, after the circuit court granted summary judgment to the other defendants, and on the eve of its decision that the County was immune from its tort claims, PJ Ventures moved the Court (informally, in its Supplemental Brief in Opposition to Forest County's Motion for Summary Judgment) to amend its complaint. The complaint had been amended once before and the request was made more than two and one-half years after the initial complaint was filed. Absent justification, courts are reluctant to grant leave to amend pleadings once litigation has been under way for a significant time. *See, e.g., Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶13, 239 Wis.2d 406, 620 N.W.2d 463. Regardless whether an easement holder's rights are subject to eminent domain procedures, the trial court reasonably concluded the change in PJ Ventures' theory for recovery after two and one-half years of litigation constitutes a substantial change without appropriate justification. A party should not be allowed to test the waters with various theories for recovery and, on the eve of defeat, modify the complaint to raise a new theory.

¶9 We dismiss Forest County's cross-appeal for lack of jurisdiction. The notice of cross-appeal purports to appeal the order dismissing PJ Ventures' claim against the County and the order entered March 4, 2009 dismissing the

action against International Paper and CF/FIA without costs. The issue raised on cross-appeal relates to ownership of the bridge, which is not decided in either of these judgments. In order to appeal that decision, the County would have had to file a notice of appeal within ninety days of the December 31, 2009 judgment dismissing the action as to the alternative bridge owners, International Paper or CF/FIA. The December 31 judgments were final judgments under WIS. STAT. § 808.03(1) because they terminated the entire matter in litigation as to the alternative bridge owners. The County's notice of appeal was not timely to challenge that decision. The pendency of the County's motion for reconsideration did not extend the appeal time under WIS. STAT. § 805.17(3) because that statute does not apply to a summary judgment. *See Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶58, 265 Wis. 2d 703, 666 N.W.2d 38. Likewise, pendency of any request for any costs does not affect finality of a judgment for purposes of appeal. *Harder v. Pfitzinger*, 2004 WI 102, ¶17, 274 Wis. 2d 324, 682 N.W.2d 398. Therefore, the County was required to file a timely notice of appeal from the December 31 judgments in order to preserve the issue it raises in its cross-appeal.

¶10 The County cannot appeal the March 4, 2009, order for two reasons. First, it consented to the judgment. A party waives the right to appeal a judgment if it has consented or stipulated to entry of the judgment. *Cascade Mtn., Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 269, 569 N.W.2d 45, (Ct. App. 1997). Second, except for the question of costs, the judgment merely reiterates the dismissal that was already granted in the December 31, 2008 judgments. A party cannot induce the circuit court to repeat a final adjudication and appeal from the reiterated judgment. *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 24, 197 N.W.2d 752 (1971). Therefore, although the County persuasively argues the bridge was

not a fixture and was owned by the County, we lack jurisdiction to review that issue.

By the Court.—Judgment affirmed; cross-appeal dismissed.

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

