

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 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. 2014AP1214

Cir. Ct. No. 2013CV226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BRADLEY BAILEY AND CAROLINE BAILEY,

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County:
STEVEN G. BAUER, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Bradley and Caroline Bailey appeal the circuit court's judgment dismissing their takings claim against the Wisconsin Department of Transportation. The Baileys claimed that a change in access to their property as part of a Department taking by condemnation left them with an "uneconomic

remnant” under WIS. STAT. § 32.05(3m).¹ They argue that the circuit court erred in granting the Department’s motion for summary judgment. We reject the Baileys’ argument because they fail to demonstrate that they produced any evidence supporting their claim.

¶2 We review a grant of summary judgment de novo. *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis. 2d 42, 48, 561 N.W.2d 787 (Ct. App. 1997). Summary judgment is appropriate 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).

¶3 Here, it is undisputed that, as part of a highway construction project, the Department condemned two small sections of the Baileys’ property and reconfigured the Baileys’ driveway location and access point to the highway. The Baileys retained access to the highway at the new access point.

¶4 Nonetheless, the Baileys claimed that the Department’s taking left them with an uneconomic remnant under WIS. STAT. § 32.05(3m). That is, they claimed that, in the words of the statute, the “property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability.” *See id.* In granting summary judgment to the Department, the circuit court concluded that the Baileys produced no admissible evidence creating a genuine issue of material fact as to whether the access change caused the Baileys’ remaining property to have little value or substantially impaired economic viability.

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

¶5 On appeal, the Baileys’ primary argument is that the circuit court erred by granting summary judgment because the Department “failed to make a prima facie case that the Baileys’ property had reasonable access in [its] after condemnation condition.” The Department responds that a change in access plays no part in the analysis under WIS. STAT. § 32.05(3m). As we explain below, it is unnecessary to resolve the parties’ dispute as to whether “reasonable access” is part of the analysis under § 32.05(3m).

¶6 Our review of the summary judgment materials leaves us uncertain whether the Baileys’ primary argument on appeal matches their argument in the circuit court. For example, the Baileys summarized the issue in their summary judgment briefing in the circuit court as follows: “This case presents an extremely simple question. Does the DOT’s taking make the Baileys’ property of ‘little value or substantially impaired economic viability’?” Now, however, the focus of their argument is that the Department must affirmatively show that the Baileys retained reasonable access.

¶7 To the extent the Baileys mean to argue that there is a stand-alone “reasonable access” requirement under WIS. STAT. § 32.05(3m) that comes into play regardless of their property’s value or economic viability, their argument is forfeited and we address it no further. To the extent the Baileys instead mean to argue that the change in access rendered their property of little value or substantially impaired economic viability, their argument is preserved. In the remainder of this decision, we address this preserved argument.

¶8 Consistent with the circuit court’s decision, the Department contends that the Baileys failed to produce evidence supporting a finding that the change in access left their property with little value or of substantially impaired economic

viability. Thus, the Department argues, there is no material factual dispute preventing summary judgment, and the Department is entitled to judgment as a matter of law. We agree that the Baileys fail to show any factual dispute preventing summary judgment in favor of the Department.²

¶9 The Baileys submitted four affidavits: an affidavit by the Baileys' attorney, an affidavit by each of two witnesses whom the Baileys listed as experts, and an affidavit by Caroline Bailey. With one exception not pertinent here, the circuit court excluded everything in the attorney's and experts' affidavits based on a lack of foundation or other admissibility factors.

¶10 On appeal, the Baileys fail to make any developed argument that the circuit court erred in excluding the attorney and expert affidavits. The Baileys' only assertion in this regard is that the circuit court erred because there was an order in place allowing the Baileys to supplement their expert reports. However, the order plainly states that the Baileys could supplement their expert evidence only if the case was not resolved on summary judgment. Accordingly, we put to the side the factual assertions in the attorney's and experts' affidavits.

¶11 As to Caroline Bailey's affidavit, we see nothing to support a finding that the Baileys' remaining property is of little value or of substantially impaired economic viability. Caroline's affidavit states that the Baileys now share a driveway with a neighbor whom they find difficult and threatening, and with

² The Department asserts that the Baileys had the burden of proof on their economic remnant claim and that the Baileys therefore had to come forward with evidence to support a finding that their remaining property had little value or substantially impaired economic viability. Apart from arguments that have been forfeited, the Baileys do not respond to the Department's assertion with respect to burden and, therefore, without weighing in on its merits we treat that assertion as conceded.

whom they believe they will be unable to agree on driveway maintenance. While this affidavit may demonstrate that the Baileys' situation is undesirable and that the change in access could diminish the value of their property, the allegations are too general and speculative to support a finding that the Baileys' remaining property is of "little value or of substantially impaired economic viability." *See* WIS. STAT. § 32.05(3m).

¶12 In sum, for the reasons stated above, we affirm the circuit court's judgment dismissing the Baileys' claims.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

