

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2520

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JEFFREY A. WEISMAN, CALLIE A. WEISMAN,
RESIDENTIAL DEVELOPMENT, INC., AND
THE JOHN W. BOWDEN TRUST,**

PLAINTIFFS-APPELLANTS,

v.

**THE TOWN OF MINOCQUA, EDWARD PROHASKA, AND
THE THIRSTY WHALE OF MINOCQUA, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County:
ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Jeffrey Weisman, Callie Weisman and the Residential Development Trust (collectively, Weisman) appeal a summary judgment dismissing their complaint to vacate part of Park Avenue in the Town of

Minocqua. They argue that the trial court erroneously: (1) utilized summary judgment procedure, (2) mis-applied § 236.43, STATS., governing the vacation of plats, (3) made unsupported factual determinations, (4) misapplied § 893.80, STATS., the "notice of claim" statute, and (5) granted the Town immunity from suit. We reject these arguments and affirm the judgment.

Weisman commenced this action for declaration of rights to a portion of the street in front of his home, known as Park Avenue. The 1888 plat map shows Lake Minocqua across the street from the Weisman property. An establishment known as The Thirsty Whale, located across the street from the Weisman property, is on the shore of the lake where Park Avenue widens due to a slight projection of land into the lake. Adjacent to north of the Thirsty Whale is a public boat landing.

The record contains a letter to Weisman from the Department of Natural Resources, dated October 17, 1997, indicating that The Thirsty Whale occupies a building that is actually located on pilings and rock placed on the lake bed.¹ The disputed portion of Park Avenue is located immediately in front of the Thirsty Whale and is used as a parking area. Weisman makes no claim to the traveled portion of Park Avenue lying between his property and the disputed property. The disputed parcel includes approximately 170 feet of shoreline.

Weisman's second amended complaint alleges two causes of action against the Town, the Thirsty Whale, and Dean Prohaska, the alleged owner of the building the Thirsty Whale occupies. First, the complaint claims that the disputed

¹ In its letter, the DNR stated that perpetual occupation of a public lake bed for nonpublic purposes is unreasonable and that it intends to regulate the structure as it would a boathouse and impose the 50% repair limitation found in WIS. ADM. CODE § NR 325.

portion of Park Avenue has not been opened, traveled or worked as a public highway within the meaning of § 80.32(2), STATS. It alleges that the property has been abandoned as a route of travel, no highway funds have been expended on it in five years, it has thereby been discontinued and "[b]y virtue of Section 80.32(3) Wis. Stats. the subject property belongs to the Plaintiffs."

The second cause of action contends that the property has been laid out as a street, road, other public way or public square within the meaning of § 236.43(1) and (2), STATS. It asserts that in 1888, the plat dedicated the property as part of Park Avenue, that the dedication was accepted by the public for public use, and that the plat was recorded more than forty years ago. It claims that the property was never developed or improved as a street or used as a public square and that in 1997, Weisman, joined by all adjacent property owners, applied to the Town to vacate the property. The Town denied the application. The complaint further alleges that the Town was negligent by refusing to open the property for public use and has therefore abandoned the property.² It requests judgment that the disputed portion of the Park Avenue be vacated and conveyed to Weisman.

² Specifically, the allegation states:

In the past, the subject property was required for public use, but was not opened for public use, and the Town acted with a manifest abuse of discretion at that time in refusing to open the subject property for public use. The Town was negligent and unreasonably delayed opening the subject property to public use and the same constitutes an abandonment by the Town. The subject property is no longer required for public use. Through its actions, including, but not limited to, allowing a private business building and parking lot to be built upon the subject property, and leasing the property to a private business, the Town has manifest its decision that the property is not necessary for public use and has abandoned the subject property for public use.

The Town moved to dismiss for failure to state a claim, for lack of notice of claim under § 893.80(1), STATS., and based on governmental immunity under § 893.80(4). Prohaska also moved to dismiss, attaching to his motion his affidavit that the property sought to be vacated is the only public highway access to The Thirsty Whale.

In opposition to the motions to dismiss, Weisman filed a brief with several attachments. These included copies of the application to the Town to vacate the property, two survey maps and the legal description. The Town, in turn, filed its brief, and Weisman filed a reply brief with additional attachments, including: Weisman's affidavit that the Town denied his application to vacate the property; Weisman's four-page letter to the town board setting forth factual and legal support for his application;³ another copy of the legal description and a map; a copy of a 1984 one-year lease between Prohaska and the Town for the land in question; the October 17, 1997, DNR letter; and minutes or notes from a Town board meeting, along with a partial transcription of minutes from a meeting.

The trial court considered the documents the parties submitted and interpreted the motion to dismiss as one for summary judgment. Section 802.06(3), STATS. It granted summary judgment of dismissal both on the merits and on procedural grounds. It concluded that Weisman was not entitled to relief under § 80.32, STATS., because the area sought to be vacated had not been entirely abandoned as a route of travel. It further concluded that Weisman failed to satisfy the requirements of § 236.43, STATS., because he failed to join all the owners of

³ The letter suggests that The Thirsty Whale building occupies an area that in 1904 or 1906 was occupied by a boathouse. It also states that the parking area has been blacktopped and that a fieldstone wall erected to prevent washout.

adjoining property in his application. In addition, the court determined that Weisman failed to comply with the notice of claim requirements in § 893.80, STATS., and, in any event, the Town was immune from suit under § 893.80(4).

Weisman argues that the trial court misapplied summary judgment methodology when it interpreted the motions to dismiss as summary judgment motions and considered matters outside the pleadings, without affording Weisman the opportunity to file additional materials. We disagree. Section 802.06(3), STATS., requires the court to utilize summary judgment methodology when confronted with a motion for judgment on the pleadings and matters outside the pleadings are submitted and considered by the court.⁴ Here, Weisman submitted numerous documents outside the pleadings thereby inviting the court to utilize summary judgment methodology. Accordingly, the court did not err by doing so.

Weisman contends, however, that the court failed to provide him with a reasonable opportunity to present pertinent materials. He claims that "neither the Weismans, nor the Town, nor Prohaska submitted *any Affidavits* intended to show the undisputed facts on the merits of the case." (Emphasis added.) The record does not support his claim. Weisman filed a brief and a reply brief with numerous documents, including an affidavit, to support his arguments.

⁴ Section 802.06(2)(b), STATS., provides in pertinent part:

If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

Prohaska supported his motion with an affidavit. Additionally, Weisman filed a motion to reconsider and a brief in support of his motion to reconsider. The record discloses sufficient opportunity to present pertinent materials.

Weisman further contends that the court should have provided him with notice and opportunity to supplement the record with all the materials pertinent to the motion. He insists that there is no way he could have known that he should submit detailed fact affidavits, unless the court put him on notice "with the required notice of hearing on summary judgment." Weisman does not disclose, however, what factual matter he would have presented had he been provided the opportunity to do so. Without asserting what factual matter he would have presented, he fails to show that he was prejudiced by the lack of opportunity to submit it. As a result, his argument does not present grounds for reversal. *See* § 805.18, STATS. Also, the court is not required to notify a party of a statutory procedure when consideration of the party's submissions require the use of that procedure. *See Soo Line R. Co. v. Commissioner of Transp.*, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992) (having invited the error (if error it is), the appellant may not complain that the error occurred).

In reviewing a summary judgment, we employ the same methodology as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment may be granted when the record discloses no dispute of material facts and the moving party is entitled to judgment as a matter of law. *Id.* If we conclude the trial court reached the right result, we may affirm the judgment on a different rationale than the trial court used. *See State v. Alles*, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982).

Weisman argues that the court erred when it concluded that he was not entitled to relief under § 80.32(2), STATS.⁵ We disagree. Section 80.32 governs the discontinuance of "[a]ny unrecorded road or any part thereof" *See* § 80.32(1), STATS. Here, Weisman seeks the vacation of a road that has been platted, and the plat has been recorded. As a result, relief is not available to him under § 80.32. Weisman must look instead to § 236.43, STATS., governing the vacation of plats and § 66.296, STATS., controlling the discontinuance of streets.

Section 66.296, STATS., governs the town board's powers to discontinue streets. Weisman fails to develop any argument why he is entitled to relief under this section. Because this issue was not briefed on appeal, we do not address it. *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306

⁵ Section 80.32, STATS., provides:

- (1) Any unrecorded road or any part thereof which has become or is in the process of becoming a public highway by user in any town may be discontinued in the manner hereinbefore provided. Any proceedings taken therefor shall not be evidence of the acceptance at any time by the town of such road or any part thereof.
- (2) Except as provided in sub. (5), every highway shall cease to be a public highway at the expiration of 4 years from the time it was laid out, except such parts thereof as shall have been opened, traveled or worked within such time, and any highway which shall have been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.
- (3) When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained; if not it shall be equally divided between the owners of the lands on each side thereof.

See 1997 Act 172, effective May 7, 1998, amending § 80.32(2) and (5), STATS., to provide that subsection (2) does not apply to any street that provides public access to a navigable lake. The parties do not address this subsection.

n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned).⁶

Weisman next maintains that the trial court erroneously denied his relief under § 236.43, STATS., which governs the vacation or alteration of parts of a plat dedicated to and accepted by the public for public use. The trial court concluded that Weisman had satisfied all the requirements of § 236.43(1), except for subsec. (d), which required joining adjacent land owners in the application. Weisman contends that he is entitled to relief because he complied with § 236.43(1)(d), STATS., "as a matter of law." We are unpersuaded.

Weisman's contention, that he complied with all requirements of subsection (1), including (1)(d), because all owners of the land in the part sought to be vacated joined in the application, is insufficient to grant him relief. Section 236.43(4)(a), STATS., provides that when a plat sought to be vacated in a town includes a street or public walkway, the necessary conditions include "[a] resolution is passed by the governing body requesting such vacation or alteration." Here, Weisman sought to vacate a portion of a town street or public way. Yet, his argument fails to develop the applicability of this section.⁷ See *Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995). Because his argument

⁶ Weisman states: "The Weismans therefore assume that the compliance of the petition under § 66.296, STATS., is not an issue in this appeal, and is not discussed in this Brief. If that is still an issue, the Court is referred to Plaintiff-Appellant's Brief on Motion for Reconsideration as to why the Court was incorrect on that issue." This statement does not constitute proper argument. See *Callaway v. Brown County*, 202 Wis.2d 736, 750-51, 553 N.W.2d 809, 815 (Ct. App. 1996).

⁷ Also, see 1997 Wis. Act 172, amending § 236.43(1)(d), STATS., enacted April 22, 1998 and published May 6, 1998, providing not only landowners must join in the application, but also "the governing body of the city, village or town in which the street, road or other public way is located" See also § 991.11, STATS. This amendment is not discussed by the parties.

does not develop this issue, we are not persuaded that the trial court erred when it denied relief under § 236.43.

Finally, we turn to Weisman's contention that the trial court erred because it made unsupported factual determinations. We agree that a court may not decide any issue of material fact on summary judgment. See *Poynter v. Johnston*, 114 Wis.2d 439, 446, 338 N.W.2d 484, 488 (1983). On review of summary judgment, however, we review the record de novo and apply the standards set forth in § 802.08, STATS., in the same manner as the trial court. *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis.2d 722, 733, 351 N.W.2d 156, 162 (1984). We therefore disregard any factual determinations made by the trial court and determine only whether there are material factual disputes that entitle a party to trial.

Here, the record discloses no material facts in dispute and demonstrates that the Town and Prohaska are entitled to judgment as a matter of law. Also, because Weisman fails to demonstrate a right to relief on the merits, we conclude that it is unnecessary to address the procedural claims of error pertaining to immunity and notice of claim.

By the Court.—Judgment affirmed.

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

