

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 13, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2063

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**O.T. LUPINSKI, AS TRUSTEE OF THE O.T. LUPINSKI
LIVING TRUST DATED JULY 28, 1995,**

PLAINTIFF-APPELLANT,

V.

**CITY OF GLENDALE COMMUNITY DEVELOPMENT
AUTHORITY,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. O.T. Lupinski, the trustee of the O.T. Lupinski Living Trust (Lupinski), appeals the trial court's judgment dismissing his action

brought pursuant to WIS. STAT. § 32.05 (1997-98).¹ The issue is whether the trial court properly dismissed the case. We conclude that it did not and we therefore reverse.

¶2 The Community Development Authority of the City of Glendale (CDA) proceeded under WIS. STAT. ch. 32 to acquire Lupinski's property. The CDA made a jurisdictional offer to Lupinski and, after the statutory time period ran, the CDA filed and recorded an award of damages, thus acquiring title to the property.

¶3 Meanwhile, the CDA was negotiating with Lupinski about the amount of compensation he should receive and about a fence on the property. The CDA and Lupinski eventually entered into a settlement agreement which provided that Lupinski would receive \$17,000 and that "[t]he Authority shall grant a permit to [Lupinski] for the purpose of occupying the public [right of way] with fence and property." The agreement further provided that, *upon approval of the agreement by the CDA*, Lupinski would surrender the right to appeal for greater compensation under WIS. STAT. ch. 32.

¶4 The CDA granted Lupinski an occupancy permit for his fence, but the permit provided that the CDA could "terminate this permit upon (30) days written notice to the Occupant." Lupinski objected to the conditional nature of the permit and various correspondence ensued between the parties. Believing that the settlement agreement had fallen through, Lupinski appealed to the trial court pursuant to WIS. STAT. ch. 32. In response, the CDA brought a motion to enforce

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the settlement agreement. The trial court granted summary judgment in favor of the CDA and dismissed the case.²

¶5 We review a trial court’s decision to grant summary judgment dismissing a case using the same methodology as the trial court. *See Dobratz v. Thomson*, 161 Wis. 2d 502, 513, 468 N.W.2d 654 (1991). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See id.* If there are disputed material facts from which reasonable alternative inferences may be drawn, the opposing party is entitled to a trial to resolve those issues. *See id.*

¶6 A central issue in this case is whether the CDA approved of and complied with the settlement agreement entered into by the parties. Lupinski claims that the CDA did not approve of or comply with the agreement because, among other things, the CDA did not grant him “a permit ... for the purpose of occupying the public [right of way] with [his] fence and property.” Lupinski supports his argument by submitting a copy of the occupancy permit. The CDA, on the other hand, contends that it approved of and complied with the agreement because it issued a permit, albeit one subject to termination. The parties also dispute whether the CDA ever specifically approved the agreement.

¶7 It is well-established that “[s]ummary judgment procedure prohibits a court, trial or appellate, from deciding an issue of fact.” *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). This is because “[t]he methodology is intended to prevent a trial by affidavit or

² Though the CDA did not specifically request summary judgment in its motion to enforce the settlement agreement, the trial court treated the motion as a motion for summary judgment.

deposition....” *Id.* That is exactly what happened here. The trial court found that the parties had entered into an agreement and that Lupinski had repudiated it. Because the material presented to the trial court “is subject to conflicting factual interpretations or inferences,” summary judgment should not have been granted. *See id.* at 512. Therefore, we reverse the judgment dismissing this case and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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

