

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP403

Cir. Ct. No. 2008CV26

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FRONT STREET PROPERTIES, LLC,

PLAINTIFF-APPELLANT,

v.

MAIN STREET INGREDIENTS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
TODD W. BJERKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Front Street Properties, LLC, appeals an order dismissing its suit against Main Street Ingredients, LLC. The dispositive issue is whether Main Street improved an easement in a way that unreasonably burdened Front Street's property. We affirm.

¶2 At the conclusion of a trial to the court, the circuit court found that in 2004 Front Street granted an easement to adjacent property owner Main Street for use of a fifty-foot strip of Front Street's property that abutted the Main Street property. The easement document stated that the purpose of the easement was "for ingress and egress to" the Main Street property. Later in 2004, Main Street built a "ramp" on the easement to improve access to its own property by trucks. Before that, trucks had used a "field road that ran along the easement route." Construction of the ramp involved use of fill to raise the elevation of part of the easement area to the level of the Main Street property.

¶3 In 2008, Front Street sued Main Street, alleging that the ramp interferes with Front Street's use and enjoyment of its property, and seeking an injunction for removal of the ramp. The circuit court concluded that the improvements to the easement are reasonable and do not interfere with Front Street's use and enjoyment.

¶4 On appeal, the parties appear to agree that the applicable legal test is that a holder of an access easement is permitted to improve a roadway to facilitate access, as long as the improvements do not unreasonably burden the servient estate. See *Hunter v. Keys*, 229 Wis. 2d 710, 715-19, 600 N.W.2d 269 (Ct. App. 1999). Front Street does not appear to dispute that Main Street's ramp was an improvement to facilitate access. Front Street argues only that the ramp unreasonably burdens the servient estate.

¶5 Neither party provides any authority establishing whether the reasonableness of the burden on the servient estate is an issue of fact, or instead one of law or discretion. In *Hunter* we stated that the "meaning and scope of language created in a deed is reviewed as a matter of law without deference to the

trial court's determination.” *Id.* at 715. We then went on to review, among other issues, whether the easement holder created an unreasonable burden by improvements to a roadway, *id.* at 715-16, and by the filling in of wetlands. *Id.* at 717. In the first discussion we described the circuit court as having “concluded” that the action was reasonable, and in the second discussion we did not discuss the circuit court's ruling at all. Neither discussion was written in a way that defers to the circuit court, and both appear to have been a *de novo* review. Accordingly, given the lack of specific authority cited by the parties, we will apply a *de novo* standard here.

¶6 Front Street first argues that the circuit court “overlooked” one of the burdens on its estate, namely, that the existence of the ramp prevented Front Street from making a business transaction in 2005 with a company that was interested in building a warehousing facility. However, Front Street's description is vague about how the ramp “prevented” the transaction. Front Street's brief cites to certain testimony by its owner, Steven Johnson. In that testimony, Johnson states that the ramp is in a place that trucks would have to use to get in and out of a loading dock. However, Johnson further testified that the transaction did not occur because the other party found other space.

¶7 Front Street also argues that the existence of the easement prevented it from selling the property to Frank Liquor in 2007. However, Johnson himself testified that, while Frank Liquor originally sought removal of the ramp, it ultimately did not follow through on the transaction because, “instead of just the ramp being an issue, they told me that as long as the easement is still there they were not interested in buying the property ‘cause they didn't want to deal with that easement.”

¶8 As to both of these potential transactions, we note that the circuit court found that Front Street owns a significant amount of land on other sides of its own warehouse that would be suitable for future development or expansion of the business, despite the Main Street easement and ramp. We also note that the grantor of an easement cannot reasonably expect that the existence of the easement, or the existence of permitted improvements by the easement holder, will not be a factor in how other potential users regard the property. It should be apparent to any landowner that easements are an encumbrance on property that have the potential to affect the value or marketability of property. Where, as in this case, the granting of the easement was voluntary and negotiated, that effect is something that the grantor of the easement has had an opportunity to consider and to obtain compensation for.

¶9 Therefore, we do not doubt that the easement, and possibly the ramp, is, in some sense, a burden on the servient estate. However, the reasonableness of the easement itself is not before us. The only question here is whether the burden caused by *the additional improvement* is unreasonable. In light of the circuit court's findings, and the easement holder's right to make improvements on the easement consistent with its purpose, we are not able to say that these two failed transactions, or the potential limits on future transactions, establish that Front Street's estate is unreasonably burdened.

¶10 Finally, Front Street argues that it is entitled to relief under WIS. STAT. § 844.01(1)-(3) (2007-08),¹ which provides in part:

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

(1) Any person owning or claiming an interest in real property may bring an action claiming physical injury to, or interference with, the property or the person's interest therein; the action may be to redress past injury, to restrain further injury, to abate the source of injury, or for other appropriate relief.

(2) Physical injury includes unprivileged intrusions and encroachments; the injury may be surface, subsurface or suprasurface; the injury may arise from activities on the plaintiff's property, or from activities outside the plaintiff's property which affect plaintiff's property.

(3) Interference with an interest is any activity other than physical injury which lessens the possibility of use or enjoyment of the interest.

According to *Front Street*, this statute creates a cause of action in which *Front Street*, as a "person owning ... an interest in real property," may bring "an action claiming ... interference with, the property or the person's interest therein." The circuit court held that this statute protects only against "unprivileged intrusions and encroachments," and that the easement in this case is a "privileged intrusion and authorized encroachment" not subject to suit under this statute. According to *Front Street*, this analysis was erroneous because the language in WIS. STAT. § 844.01(2) limiting relief to cases of "unprivileged intrusions and encroachments" relates only to claims of physical injury, rather than to a claim, like *Front Street's*, of interference under § 844.01(3), which does not have such language about privilege.

¶11 In response, *Main Street* points out that we have summarized case law regarding this statute, and concluded that it does not form the basis for a cause of action, but is only remedial and procedural. *Schultz v. Trasher*, 2002 WI App 4, ¶¶24-29, 249 Wis. 2d 722, 640 N.W.2d 130. We agree.

¶12 The statute does not authorize relief to Front Street unless Front Street establishes some other substantive claim. Furthermore, even if it did create a cause of action, we note that the statute would also authorize a counter-suit by Main Street against Front Street to protect itself from interference with its easement. That is because the phrase “interest in real property” includes not only an ownership interest, as Front Street is seeking to defend, but also easements. WIS. STAT. § 840.01(1). The statute does not provide a substantive basis to resolve such competing claims, which further supports the conclusion that it does not create a substantive cause of action.

By the Court.—Order affirmed.

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

