

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2010AP243

Cir. Ct. No. 2004CV3064

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**ARTHUR D. DYER, VERN MOELLER, THOMAS VITRANO,
RUSSELL MOELLER, RENEE VITRANO,
A/K/A RENEE LIPITT, BETTY VITRANO AND
ANTHONY VITRANO,**

PLAINTIFFS,

v.

**WASTE MANAGEMENT OF WISCONSIN, INC. AND
MUSKEGO SITE GROUNDWATER REMEDIATION GROUP,**

DEFENDANTS.

**WENDY REINOLDT, A/K/A WENDY DIEWALD,
MUSKEGO MOOSE FAMILY CENTER NO. 1057,
KRIS MAGESKE, JULIA MAGESKE AND
BONNIE L. ACKER, D/B/A R&B STAGECOACH,**

PLAINTIFFS,

v.

**WASTE MANAGEMENT OF WISCONSIN, INC. AND
MUSKEGO SITE GROUNDWATER REMEDIATION GROUP,**

DEFENDANTS.

WASTE MANAGEMENT OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT,

v.

RUSSELL MOELLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
PAUL F. REILLY, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 LUNDSTEN, J. This appeal concerns an abuse-of-process claim brought by Russell Moeller against Waste Management of Wisconsin, Inc. Moeller is a plaintiff in a groundwater contamination lawsuit against Waste Management relating to Waste Management's operation of a landfill. While that lawsuit was ongoing, Waste Management brought claims against Moeller, who had for a period of time hauled waste to the landfill. The claims were for trespass and for contribution in the event Waste Management was found liable for the groundwater contamination. Moeller counterclaimed for abuse of process, alleging that Waste Management brought its claims to intimidate him. The circuit

court dismissed Moeller's abuse-of-process claim at the summary judgment stage. Moeller appeals that decision. We affirm.

Background

¶2 In 2001, various landowners, including Russell Moeller, brought suit against Waste Management, which had operated a landfill in Waukesha County over a number of years. Also named as defendants in the suit were waste-generating entities that contributed waste to the landfill. Moeller and the other landowners alleged that pollutants leaking from the landfill traveled underground and eventually contaminated the groundwater under the landowners' properties. The landowners' claims included negligence, private nuisance, and trespass.

¶3 Waste Management brought the claims at issue in this appeal in December 2004 while the landowners' groundwater contamination case was ongoing. Waste Management sued Moeller for trespass and for contribution in the event Waste Management was found liable for the groundwater contamination. In general terms, Waste Management's claims related to allegations that Moeller had formerly hauled waste to the landfill and that Moeller, at times, "traveled through a restricted area of the property when the site was closed to dispose of wastes." Moeller counterclaimed for abuse of process, alleging that Waste Management brought its claims "to intimidate and/or deter [Moeller] from pursuing his own claims against [Waste Management]."

¶4 The circuit court granted summary judgment in favor of Moeller on Waste Management's trespass claim, concluding that the claim was barred by the

statute of limitations.¹ As to Waste Management's contribution claim, the circuit court concluded that a connection between Moeller's alleged acts and the groundwater contamination was lacking. The court granted summary judgment in favor of Moeller on the contribution claim and, at the same time, dismissed Moeller's abuse-of-process claim. Moeller appeals. We include additional facts as needed below.

Discussion

A. Abuse-Of-Process Claim

¶5 Moeller first argues that the circuit court erred when it granted summary judgment in favor of Waste Management on his abuse-of-process claim. We review summary judgment decisions *de novo*, applying the same method as the circuit court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).² We draw all reasonable inferences from the evidence in favor of the nonmoving party. *H&R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (Ct. App. 2007). Whether an inference is reasonable is a question of law. *Id.*

¶6 We begin by observing that, in his reply brief, Moeller has abandoned a significant portion of the arguments contained in his brief-in-chief.

¹ The court effectively adopted a summary judgment order issued by Judge Michael Skwierawski, acting as a special master.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Specifically, in his opening brief, Moeller argued that an independent reason to reverse was that the circuit court “spontaneously grant[ed] judgment” on his abuse-of-process claim. Moeller asserted that “[n]o party moved for summary judgment on Moeller’s abuse of process counterclaim, nor did the court notify any party it was considering that issue.” Moeller claimed that, as a result, he was not given sufficient opportunity to come forward with all of his evidence. In his reply brief, however, Moeller acknowledges that *he* moved for summary judgment on the abuse-of-process claim.

¶7 What remains is Moeller’s argument regarding the merits of the circuit court’s decision. Moeller contends that he has submitted evidentiary facts that create a material factual dispute that precludes summary judgment. We disagree.

¶8 The tort of abuse of process requires proof of two elements: “(1) a purpose other than that which the process was designed to accomplish, and (2) a subsequent misuse of the process.” *Strid v. Converse*, 111 Wis. 2d 418, 427, 331 N.W.2d 350 (1983). We conclude that Moeller’s argument fails under the second element.

¶9 In *Schmit v. Klumpyan*, 2003 WI App 107, 264 Wis. 2d 414, 663 N.W.2d 331, we explained that the second element requires a showing that the process was used to obtain a collateral advantage:

A key component of the second element is the requirement that the process be used to obtain a collateral advantage, an advantage that is “not a benefit to the suitor that the process was designed to secure.” The attempt to obtain a collateral advantage is an important component because the tort is characterized as an attempt to use process as a means of extortion. An early decision of the Wisconsin Supreme Court clarifies that the inquiry is “whether the process has been used to accomplish some

unlawful end, or to compel the defendant to do some collateral thing which he would not legally be compelled to do.”

Id., ¶9 (citations omitted).

¶10 Waste Management’s asserted basis for its claims against Moeller was that Moeller, for a period beginning in the mid-1970s, hauled waste to the landfill and that he did so at times “through a restricted area of the property when the site was closed.” Although Moeller highlights that Waste Management was unable to present facts at the summary judgment stage that go beyond this to connect Moeller to the groundwater contamination, Moeller acknowledges that he hauled waste to the landfill.

¶11 Moeller’s argument is, essentially, that additional facts show that Waste Management’s claims were a sham. That is, Moeller’s abuse-of-process theory is that “Waste Management started and continued its lawsuit to harass and intimidate Moeller, to punish the landowners for seeking appropriate responsive action to the contamination, and to dissuade potential witnesses from testifying.” Moeller argues that inferences stemming from the following facts support this theory:

- Waste Management singled out Moeller, who was merely “a single truck driver for a small waste hauler.”
- Moeller previously gave deposition testimony asserting that he did not deliver liquid waste to the landfill.
- Waste Management brought its claims after an unfavorable ruling related to the groundwater contamination claims.
- “Waste Management commenced its lawsuit twenty years after [it] first learned of the alleged evidentiary bases for that lawsuit.”

- Waste Management’s allegations did not point to any “causal connection between Moeller’s alleged negligence and the downgradient contamination.”
- Waste Management never provided an expert opinion to support causation.
- Waste Management took positions when pursuing its claims against Moeller that were inconsistent with some of the positions Waste Management took in the context of the groundwater contamination claims.
- Moeller “had no responsibility for designing or managing the landfill [etc].”³

¶12 We will accept for argument’s sake that some of these facts support a finding of an improper purpose under the first abuse-of-process element. However, an improper purpose, standing alone, is insufficient; there must also be an actual misuse of process. *See Thompson v. Beecham*, 72 Wis. 2d 356, 363, 241 N.W.2d 163 (1976) (stating that “[i]n order to maintain an action for abuse of process, the process must be used for something more than a proper use with a bad motive” and that “[t]he existence of an improper purpose alone is not enough, for this improper purpose must also culminate in an actual misuse of the process to obtain some ulterior advantage”).

¶13 Moeller does not clearly specify any improper use of process. He does not identify any specific connections between what Waste Management did and a “collateral advantage” sought or obtained with regard to the landowners’ groundwater contamination claims. *See Schmit*, 264 Wis. 2d 414, ¶9. For

³ In addition to this evidence, Moeller points to an opinion by an engineering expert that “the purpose of [Waste Management’s claims] is that it was harassment.” We question whether this is a proper evidentiary fact. Regardless, even if we were to consider this fact, it does not meaningfully add to Moeller’s argument and, accordingly, does not affect the result here.

example, so far as Moeller explains, he has no apparent reason not to both vigorously defend himself against Waste Management's claims *and* to simultaneously vigorously pursue his separate contamination claims against Waste Management. As to other potential witnesses, Moeller similarly provides no basis for his assertion that Waste Management pursued the claims "to dissuade potential witnesses from testifying." Moeller seemingly assumes that it is self-evident why Waste Management's action would cause witnesses to refrain from testifying, but it is not. For example, Moeller fails to provide any connection between particular witnesses and any possibility, much less an improper threat, of similar claims by Waste Management against those witnesses. Thus, Moeller fails to support a necessary aspect of his argument because he points to no specific collateral advantage sought or obtained by Waste Management.

¶14 Our conclusion is further supported by certain observations made by the circuit court. The circuit court commented that Waste Management's contribution claim against Moeller substantially tracks a theory that Moeller himself, along with the other landowners, pursued as part of Moeller's groundwater contamination claims. More specifically, Moeller and other landowners sued certain waste-generating entities, alleging that the entities contributed to the groundwater contamination by disposing of hazardous wastes at the landfill. We fail to perceive a meaningful difference between that theory and Waste Management's contribution theory, at least not for purposes of our analysis of Moeller's abuse-of-process claim. The theory as to Moeller, like the landowners' theory against other waste contributors, is that Moeller should be held responsible because he disposed of hazardous wastes at the landfill. Moeller does not persuade us that this theory, although properly pursued when it came to the other entities, somehow is an abuse of process when it comes to him.

¶15 Accordingly, we affirm the circuit court’s decision to dismiss Moeller’s abuse-of-process claim.⁴

B. Privileged Documents

¶16 Moeller asserts that certain relevant evidence was erroneously deemed privileged by the circuit court, depriving him of the ability to rely on this evidence at summary judgment.

¶17 We need not discuss the particulars of the evidence because, as Moeller ultimately acknowledges, we have already addressed and rejected the same challenge in *Dyer v. Blackhawk Leather LLC*, 2008 WI App 128, 313 Wis. 2d 803, 758 N.W.2d 167, a previous decision stemming from this litigation.⁵ *See id.*, ¶¶7-17. The law in Wisconsin is clear that we are bound by this prior decision. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Based on cases from other jurisdictions, Moeller asserts that we have the inherent authority to change or overrule our prior decisions if they are “demonstrably erroneous.” Moeller is wrong.

⁴ Moeller also complains that the circuit court “partly based” its decision on an incorrect assumption. Moeller characterizes this assumption as being that his abuse-of-process claim automatically failed because Waste Management’s claims were not frivolous. In our view, the comments by the circuit court that Moeller points to are ambiguous and we cannot conclude that the court incorrectly believed that a non-frivolous claim cannot be a basis for abuse of process. But, even if we assume for argument’s sake that the circuit court misapprehended the law, the result here would be the same. We would nonetheless affirm for the reasons discussed in the text above.

⁵ We note that, at one point, Moeller states that “[w]hile this Court addressed these issues in [*Dyer v. Blackhawk Leather LLC*, 2008 WI App 128, 313 Wis. 2d 803, 758 N.W.2d 167], they have never been considered in the context of Moeller’s abuse of process claim.” Having stated this, Moeller does not go on to explain how the present context differs in a way that matters to the privilege issues; rather, he proceeds to argue that *Dyer* was incorrectly decided.

¶18 Alternatively, Moeller states: “Given the number of novel legal issues and the Court’s prior opinion in [*Dyer v. Blackhawk Leather*], Appellant Moeller submits that certification [to the supreme court] would be appropriate.” Moeller, however, does not meaningfully expand on this assertion and, in particular, does not show that this case contains “novel legal issues” that would justify certification. We discern no issue worthy of certification.

Conclusion

¶19 For the reasons discussed, we affirm the circuit court.

By the Court.—Orders affirmed.

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