

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3205

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PAULINE B. RAEMISCH,

PLAINTIFF-APPELLANT,

V.

THE CITY OF MADISON, WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

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

PER CURIAM. Pauline Raemisch appeals an order for summary judgment dismissing her appeal of a special assessment. She claims that the trial court erroneously exercised its discretion when it disregarded two affidavits which showed there were material facts in dispute regarding whether the assessment benefited her properties. We conclude, however, that the affidavits were properly

disregarded and that there were sufficient undisputed facts to support the summary judgment. Accordingly, we affirm.

Raemisch owns two properties, including a trailer park, in the City of Madison along Packers Avenue. The City levied a special assessment against Raemisch in the amount of \$99,807.40 for improvements made to the road abutting her properties. Raemisch appealed the City's action under § 66.60(12), STATS., and the City moved for summary judgment.

Before the improvement project, the section of Packers Avenue abutting Raemisch's properties was a two-lane rural road with gravel shoulders and parallel drainage ditches. An affidavit from the county highway superintendent stated that the base under the asphalt of Packers Avenue had deteriorated causing pothole problems, and that the gravel shoulder frequently washed away where the city buses pulled over. An affidavit from a civil engineer in the City of Madison Engineering Division of the Department of Public Works stated that the City had repaved and widened Packers Avenue to four lanes along an approximately 1,600 to 2,000 foot stretch, extended the median at one end of the project and installed a traffic island at the other end, and added lights, storm sewers, drive aprons, curbs and gutters. She opined that the improvements provided a safer street, improved drainage and an improved appearance for Raemisch's properties.

The City apportioned 27.7% of the total project cost to property owners based upon their street frontage, with a certain forgiveness factor for corner lots, while the City and Dane County shared the rest of the bill. The City also submitted deposition testimony stating that four-lane roads are safer than two-lane roads because they allow greater maneuverability for turns, that gutters allow

better drainage, and that a smoother bus stop would increase safety. Finally, an affidavit from the City's appraiser stated that properties with curbs and gutters generally command a 6% higher price than those without.

Raemisch submitted materials disputing whether the project had actually improved drainage or created a better bus stop, and suggesting that the improvement was actually part of a larger highway expansion project going beyond the maintenance needs of abutting property owners. Raemisch also submitted two affidavits from real estate brokers and one from an engineer who had each examined her properties before and after the improvements, and concluded in a sentence or two¹ that the project had conveyed absolutely no benefit to the properties. However, the court disregarded the realtors' affidavits because they failed to set forth the factual basis for the broker's conclusions. Although it found that the engineer's affidavit had created material factual issues in certain instances, the court concluded that the engineer did not controvert the City's assertion that safety was improved, as was drainage and appearance, all of which benefited Raemisch and the residents of her trailer park.

It is well established that we apply the same summary judgment methodology as that employed by the circuit court. Section 802.08, STATS.; *State*

¹ For instance, Sherman Geib's affidavit stated in relevant part:

4. At the Plaintiff's request, I personally inspected her property, which is the subject of this lawsuit and the condition of Packers Avenue from Darwin Road north to the Madison City limits, both before and after the road construction was completed.
5. It is my professional opinion that the Packers Avenue road improvement conveys no benefit whatsoever, whether economic or otherwise, to the Plaintiff's lands abutting Packers Avenue or to the Oak Park Terrace Mobile Home Park.

v. Dunn, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *Id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *Id.* at 368, 570 N.W.2d at 617. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *Id.*

Here, it is undisputed that the pleadings properly stated a claim and joined issue. We consider, then, whether the City's affidavits established a prima facie case for summary judgment.

Pursuant to its police power, a city may properly impose a special assessment upon a landowner to recover the cost of a public improvement so long as the landowner's property is specially benefited and the assessment is made on a reasonable basis.² Section 66.60(1)(b), STATS.; *Gelhaus & Brost, Inc. v. City of Medford*, 144 Wis.2d 48, 50-51, 423 N.W.2d 180, 181-82 (Ct. App. 1988). A special benefit must confer some "uncommon advantage" beyond that shared by non-assessed property owners. *Goodger v. City of Delavan*, 134 Wis.2d 348, 352, 396 N.W.2d 778, 780 (Ct. App. 1986). However, the amount of the assessment is not limited to the value of the benefit realized by the property. *Village of Egg Harbor v. Mariner Group, Inc.*, 156 Wis.2d 568, 572, 457 N.W.2d 519, 521 (Ct. App. 1990).

² Raemisch also challenged the reasonable basis for the assessment before the trial court, but has abandoned that argument on appeal.

Under this standard, we have no difficulty concluding that the City has made a prima facie showing that the street improvement conferred a special benefit upon Raemisch's properties. According to the materials submitted by the City, the curbs and gutters increased the value of Raemisch's properties and the extra traffic lanes improved safety for vehicles turning into the trailer park. *See Sippel v. City of St. Francis*, 164 Wis.2d 527, 542, 476 N.W.2d 579, 586 (Ct. App. 1991).

We next consider whether Raemisch has established any material factual dispute which would entitle her to trial. Raemisch contends that the affidavits of her real estate brokers and engineer squarely contradict the City's assertion that the improvement project added value to her properties. However, affidavits asserting expert opinions must include the specific facts upon which the conclusions are based, or they will be disregarded. Section 802.08(3), STATS.; *Hopper v. City of Madison*, 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977). Raemisch cites *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991), for the proposition that this rule should not apply when the opinion given states a negative. *D'Huyvetter* held that lay opinion by the buyer of certain equipment that the value of equipment when purchased was \$0.00 was credible evidence of the value. This does not address the foundation requirement for an affidavit containing an expert opinion of the type offered by the realtors. The other case Raemisch relies on, *Preloznik v. City of Madison*, 113 Wis.2d 112, 120, 334 N.W.2d 580, 584 (Ct. App. 1983), also does not advance her position. There the affidavit that we held created a factual dispute concerning benefit contained the facts on which the appraiser based his opinion.

We conclude that the circuit court properly struck the realtors' affidavits because they did not comply with § 802.08(3), STATS. Furthermore, Raemisch does not dispute that the turn into her trailer park is now safer or that the appearance of her properties has improved, facts which were not controverted by the engineer's affidavit. These are both advantages beyond those shared by the general public. Therefore, summary judgment was correctly granted as there were sufficient undisputed material facts to satisfy the special benefit necessary to a special assessment.

By the Court.—Order affirmed.

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