**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

OCTOBER 6, 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.**

**Nos. 96-3621**
**97-3379**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT II**

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**NO. 96-3621**

**GERALD T. NIEDERT,**

**PLAINTIFF-APPELLANT,**

**V.**

**DONALD GELLER AND LEE GELLER,**

**DEFENDANTS,**

**LORAMOOR PROPERTY OWNERS ASSOCIATION, INC.,**

**DEFENDANT-RESPONDENT.**

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**NO. 97-3379**

**GERALD T. NIEDERT,**

**PLAINTIFF-APPELLANT-**
**CROSS-RESPONDENT,**

**V.**

**DONALD GELLER AND LEE GELLER**

**DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS,**

**LORAMOOR PROPERTY OWNERS ASSOCIATION, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL and CROSS-APPEAL from judgments of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Gerald T. Niedert has appealed in these consolidated cases from judgments dismissing his amended complaint against the Loramoor Property Owners Association, Inc. (the Association) and Donald and Lee Geller. The Gellers have cross-appealed, contending that they should have been awarded litigation costs and statutory attorney's fees. We affirm the judgments in their entirety.

NIEDERT'S APPEAL

¶2 This action relates to a walkway on a twenty-foot wide easement separating the lakefront properties of Niedert and the Gellers, hedgerows planted by the Gellers along the easement and their property, a pier maintained by the Association which is accessed by the easement, and Niedert's complaint that his neighbors are driving golf carts on the easement. On appeal, Niedert also challenges the trial court's order denying his motion to file a second amended complaint and complains that the trial court's written findings of fact and conclusions of law do not accurately reflect its oral decision at the close of trial.

¶3 In his amended complaint against the Association and the Gellers, Niedert sought an injunction and declaratory judgment determining that the Gellers' hedgerows unreasonably restricted the lake view from his home in violation of § A, paragraph 2 of the Declaration of Restrictions of the Loramoor subdivision (the Declaration). The trial court dismissed this claim pursuant to motions for summary judgment filed by the Gellers and the Association. When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). An order granting summary judgment must be reversed if the trial court incorrectly decided legal issues or if material facts were in dispute. *See* ***id.*** The trial court may not decide an issue of fact and is limited to deciding whether a material factual issue exists. *See* ***id.***

¶4 Section A, paragraph 2 of the Declaration provides:

> No … hedges shall be maintained on any lot … that unreasonably restricts the view of other lot owners in the subdivision[.] [I]n the event that such … hedges shall be deemed to exist, they may be ordered to be removed, altered or trimmed by the Architectural Committee whose decision in such matters shall be deemed final.

¶5 Niedert argues that material issues of fact exist as to whether the Gellers' hedgerow unreasonably restricted his view. However, we agree with the trial court that, as a matter of law, the Architectural Committee's approval of the hedgerows is final and is not subject to judicial review. In support of their motion for summary judgment, the Gellers submitted a document dated August 14, 1996, and signed by Donald Geller and John Nolan, Jr., two members of the three-member Architectural Committee, stating that the Architectural Committee

granted its approval to the hedgerows planted by the Gellers adjacent to the easement.[1] Because Nolan and Donald Geller constituted a majority of the Architectural Committee and because the committee's decision was final under the express language of the Declaration, the trial court properly dismissed Niedert's challenges to the hedgerows.

¶6 Niedert argues that Donald Geller should not have been permitted to review a complaint concerning his own hedgerows. However, even if Donald Geller's approval is disregarded and the third member of the Architectural Committee would have voted that the hedgerows were unreasonable, a tie vote would remain between Nolan and the third member, preventing Niedert from obtaining a majority determination that the Gellers' hedgerows unreasonably restricted his view. No basis therefore exists to disturb the trial court's dismissal of Niedert's cause of action based upon the hedgerows. *Cf.* ***State ex rel. Reedy v.***

[1] The Gellers also filed a handwritten document dated June 5, 1993, signed by Donald Geller and another subdivision landowner, purporting to give Architectural Committee approval for the hedgerows. Niedert contends that Geller was not a member of the Architectural Committee at that time. We have not relied on this document and therefore need not address any issues concerning it.

***Law Enforcement Disciplinary Comm.***, 156 Wis.2d 600, 607-08, 457 N.W.2d 505, 509 (Ct. App. 1990).[2]

¶7 Niedert also alleges that the trial court erred in granting the Association's motion for summary judgment dismissing his demand for an injunction and declaratory judgment determining that the pier maintained by the Association adjacent to the easement was illegal under ch. 30, STATS., and applicable Wisconsin case law. Niedert filed a cross-motion for summary judgment on the issue. When, as here, both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. *See* ***Millen v. Thomas***, 201 Wis.2d 675, 682-83, 683 n.2, 550 N.W.2d 134, 137 (Ct. App. 1996).

¶8 The trial court determined that Niedert was estopped from challenging the pier based upon a contract executed by him in 1987 on behalf of Niedert Terminals, Inc., his predecessor in title. The contract referred to by the trial court was captioned "Easement Clarification." By its express terms, it

[2] Niedert also contends that the approval of Nolan should have been disregarded because Nolan had a history of hostility toward Niedert, and although he had seen the hedgerows while on the Gellers' property, he never viewed them from Niedert's property. These contentions fail to provide a basis for relief. Assuming arguendo that this court may consider whether a basis existed to disqualify Nolan from reviewing the hedgerows, the evidentiary material relied on by Niedert was insufficient to support a finding that Nolan was biased. Moreover, by purchasing his property, Niedert agreed to be bound by the Declaration of Restrictions. Because the Declaration provides that the decision of the Architectural Committee is final, neither this court nor the trial court could consider the quality and adequacy of the committee's review of Niedert's complaint. Niedert's claim that the finality referred to in the Declaration refers only to the Architectural Committee's election of remedies for dealing with an unreasonable hedgerow, rather than to the underlying decision as to whether the hedgerow unreasonably restricts a neighbor's view, is specious and will not be addressed further.

reduced to writing in recordable form an oral understanding regarding the existing easement over Niedert's land. It provided in material part:

> Said easement was created to provide access to a pier and boat slips extending into Lake Geneva from the easement. The above mentioned parcel owners possess the riparian rights to the Lake where the pier and boat slips are installed. They are herewith creating a perpetual right for the installation of the pier and boat slips.…
>
> The rights and conditions recited in this document shall constitute a covenant running with the two above described parcels and shall be binding on the parties hereto, their heirs … and assigns.

¶9 The easement clarification set forth limitations on the dimensions of the pier and the number of boat slips, and incorporated a revised survey plat depicting the pier. The trial court concluded that because others had relied on the agreement, Niedert could not come to court nine years after its execution and ask for relief from it. We agree.

¶10 Estoppel may be applied against a party whose action or inaction induced reliance by another in the form of inaction or action to the person's detriment. *See* ***Lohr v. Viney***, 174 Wis.2d 468, 475-76, 497 N.W.2d 730, 733 (Ct. App. 1993). The equitable doctrine of laches may be applied when there is: (1) unreasonable delay; (2) knowledge and acquiescence in the course of events; and (3) prejudice to the party asserting laches. *See* ***id.*** at 477, 497 N.W.2d at 733.

¶11 Prior to 1987, the Association had a pier on Lake Geneva adjacent to the easement and the Niedert property. By the express terms of the easement clarification, Niedert granted a perpetual right to the Association to install an expanded pier and boat slips. After execution of the easement clarification, the Association obtained permits from the Wisconsin Department of Natural Resources, the Department of the Army Corp of Engineers, and the Town of Linn,

and placed additional pier cribs on the bed of the lake. These undisputed facts established action by Niedert, reliance by the Association, and prejudice to the Association if Niedert was permitted to challenge the pier almost a decade after he executed the easement clarification consenting to it. The trial court therefore properly concluded that Niedert was precluded from seeking removal of the pier in this action.[3]

¶12 Niedert also contends that he initially refused to sign the easement clarification but ultimately did so for reasons that did not involve the legality of the pier. Although he argues that this gives rise to a factual issue as to the validity of the agreement, he presented no evidence in the summary judgment record indicating that the agreement was procured by fraud or mutual mistake. His reasons for signing the agreement therefore do not affect the propriety of the trial court's grant of summary judgment.

¶13 Niedert also argues that the trial court erred in granting summary judgment dismissing his request for an injunction and declaratory relief determining that the Association was required to enforce § B, paragraph 10 of the

[3] In a confusing argument, Niedert contends that the "Easement Clarification" is unenforceable and void, either because it was intended merely to delineate the revised location and shape of the pier or because it fails to satisfy the statute of frauds. We need not address this issue because we conclude that Niedert is barred from challenging the pier and the terms of the easement clarification based upon estoppel and laches.

We also reject Niedert's argument that the Association lacks "clean hands" and therefore cannot rely on equitable remedies because it applied for the pier permits "as a riparian property owner," when in fact it was not. *See* ***Hendricks v. M.C.I., Inc.***, 152 Wis.2d 363, 368, 448 N.W.2d 289, 292 (Ct. App. 1989). The DNR permit referred to by Niedert for this argument simply lists the Association as the applicant and says nothing about who owns the riparian land. Similarly, the letter from the Army Corp of Engineers relied on by Niedert says nothing about riparian ownership. Finally, while the application for a building permit from the Town of Linn lists the Association as "owner," the Association is the owner of the pier, and no basis exists to conclude that it was misrepresenting its ownership of riparian rights.

Declaration, which prohibits the operation of mechanical vehicles on the easement "except for grounds maintenance purposes and for removal or storage of pier and boat slips-shore stations." Both Niedert and the Association moved for summary judgment on this cause of action. The trial court dismissed the claim on the ground that § B, paragraph 10 of the Declaration was enforceable only by individual Association landowners against other landowners, and not by the Association itself.

¶14 Regardless of whether the trial court was correct in determining that the Association cannot enforce the provisions regarding use of mechanical vehicles on the easement, Niedert cites nothing in the Declaration, bylaws or Articles of Incorporation which require it to do so. While Article III of the Articles of Incorporation states that the purpose of the Association "shall be to maintain, operate, construct, provide for and establish walks, drives … and other amenities … for the benefit of member lot owners," nothing in this provision compels the Association to bring enforcement proceedings against lot owners who violate the prohibition on motorized vehicles. Moreover, Niedert's claim that he lacks any remedy absent enforcement action by the Association is false. Section C, paragraph 4 of the Declaration expressly provides that restrictions set forth in the Declaration, which includes the restrictions on the use of motorized vehicles, may be enforced by any owner of land in the Loramoor subdivision by an action brought for the enforcement of a restriction or abatement of a violation. Niedert

thus may personally commence an action to enforce the vehicle restrictions against other lot owners.[4]

¶15 Niedert's next argument is that the trial court erroneously exercised its discretion by denying his motion to file a second amended complaint adding individual Association lot owners as defendants on the claim regarding illegal use of golf carts on the easement. In the proposed amended complaint he also set forth a claim against Nolan based upon his approval of the hedgerows and set forth additional claims against the Gellers and the Association seeking removal of the hedgerows and enjoining the removal of cobblestones installed by Niedert on the easement.

¶16 A party may amend its pleadings once as a matter of course at any time within the six months following the filing of the summons and complaint. *See* § 802.09(1), STATS. The decision to grant or deny a motion to file an amended complaint after that time period has expired lies within the discretion of the trial court. *See* ***Read v. Read***, 205 Wis.2d 558, 573, 556 N.W.2d 768, 774 (Ct. App. 1996).

¶17 The trial court acted within the scope of its discretion in denying Niedert's motion. Niedert contends that amendment of the complaint to include individual lot owners as defendants was necessary based upon the trial court's determination on summary judgment that the Association had no authority to

[4] In his reply brief, Niedert contends that the Association is estopped from arguing that it is powerless to enforce the prohibition on vehicular traffic by its prior conduct of posting a sign and sending letters reminding lot owners of the prohibition. Issues raised for the first time in a reply brief need not be addressed by this court. *See* ***Swartwout v. Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (1981). In any event, Niedert does not explain how the Association's prior actions induced him to act or refrain from acting to his detriment.

enforce the prohibition on motorized vehicles. However, it was Niedert who determined the initial defendants and causes of action, and his failure to include individual lot owners or claims provides no basis for concluding that the trial court was compelled to grant his motion to file a second amended complaint.

¶18 In denying the motion to amend, the trial court concluded that good cause was not shown for the delay in raising the new theories or adding additional parties, and that the resolution of the litigation should not be delayed further. Its reasoning is supported by the record, which indicates that Niedert's motion to file a second amended complaint was filed more than a year after the filing of the summons and complaint and less than three weeks before the scheduled trial date. An earlier amendment of the complaint had already occurred, and Niedert offered no compelling reason for being permitted to amend his complaint once again. Under these circumstances no basis exists to conclude that the trial court erroneously exercised its discretion in denying the motion. *See* ***id.*** at 574, 556 N.W.2d at 774.

¶19 Niedert's final argument on appeal is that the written findings of fact, conclusions of law and judgment entered by the trial court following trial did not accurately reflect its oral decision at trial. Trial was held on Niedert's claim that the Gellers and the Association should be enjoined from removing a cobblestone walkway installed by Niedert on the easement.

¶20 We question whether this issue needs to be addressed because Niedert has not challenged the trial court's judgment permitting the Association and the Gellers to replace the cobblestone walkway built by Niedert, subject to compensating him and complying with certain other restrictions. In any event, Niedert does not establish that the trial court's written findings of fact and

conclusions of law conflict with its oral ruling or that its written findings are clearly erroneous. The trial court's written findings, conclusions and judgment may not be disturbed merely because they fail to incorporate all matters discussed by the trial court in its oral decision or to expand upon the issues in the manner desired by Niedert.

THE GELLERS' CROSS-APPEAL

¶21 In their cross-appeal, the Gellers assert that they requested costs and attorney's fees in their answers to the original complaint and amended complaint. Because they prevailed in the trial court, they contend that an award of costs and fees was therefore mandatory pursuant to § 814.03(1), STATS.

¶22 The Gellers' request for costs and fees fails because they did not make an application for costs and disbursements, with notice to Niedert, as required for taxation of costs pursuant to § 814.10(1), STATS. In addition, they failed to serve and file an itemized bill of costs as required by § 814.10(2) or any affidavits as required for certain costs under § 814.11, STATS. They therefore waived any right to costs and fees, including statutory attorney's fees.

¶23 Although we reject the Gellers' cross-appeal, we also deny Niedert's request that this court conclude that the cross-appeal was frivolous. Niedert makes his request in one sentence in the conclusion to his cross-respondent's brief. However, he sets forth no argument concerning the issue, nor does he set forth the standards to be applied in determining whether an appeal is frivolous or apply those standards to the Gellers' cross-appeal. This court will not address issues which are inadequately briefed, *see* ***State v. Pettit***, 171 Wis.2d 627, 646, 492

N.W.2d 633, 642 (Ct. App. 1992), and denies Niedert's request for costs and fees for a frivolous cross-appeal.[5]

*By the Court.*—Judgments affirmed.

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

[5] In a prior order, this court also held in abeyance Niedert's motion for an order determining that a motion filed by the Gellers and joined by the Association, seeking to strike Niedert's appellant's brief in case no. 97-3379, was frivolous. Niedert contended that the motion had no basis in law or fact and was filed in bad faith, solely for the purpose of harassing or maliciously injuring him.

In the order denying the motion to strike, we imposed a $50 sanction on the Gellers for filing an unnecessary motion. However, because jurisdictional issues of the type addressed in the motion are often confusing, we decline to determine that the motion was frivolous and deny Niedert's request for costs and attorney's fees related to its filing.