COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0976
99-1607

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

No. 99-0976

STEVEN F. WEYNAND,

PLAINTIFF-APPELLANT,

V.

LUCILLE R. WEYNAND FOSTER, INDIVIDUALLY AND AS THE TRUSTEE OF THE LUCILLE R. FOSTER TRUST, NEIL P. HOERNKE AND SUSAN J. HAMMERMEISTER HOERNKE, LAWRENCE E. CALKINS AND DELORES CALKINS, AND BETTY R. WEYNAND,

DEFENDANTS,

KATHERINE A. WENBAN,

DEFENDANT-RESPONDENT.

No. 99-1607

STEVEN F. WEYNAND,

PLAINTIFF-APPELLANT,

V.

LUCILLE R. WEYNAND FOSTER, INDIVIDUALLY AND AS THE TRUSTEE OF THE LUCILLE R. FOSTER TRUST, NEIL P. HOERNKE AND SUSAN J. HAMMERMEISTER HOERNKE, KATHERINE A. WENBAN, AND BETTY R. WEYNAND,

DEFENDANTS,

LAWRENCE E. CALKINS, AND DELORES CALKINS,

DEFENDANTS-RESPONDENTS.

APPEALS from judgments of the circuit court for Sauk County: JOHN W. BRADY, Judge. *Judgment in No. 99-0976 affirmed; judgment in No. 99-1607 affirmed in part, reversed in part and cause remanded with directions*.

Before Vergeront, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Steven Weynand appeals two judgments which dismissed his claims against Katherine Wenban and Lawrence and Delores Calkins. Weynand contends that the trial court erred in granting Wenban's motion to dismiss for failure to state a claim, and in granting the Calkins's motion for summary judgment. We conclude that the trial court did not err in granting Wenban's motion to dismiss, and accordingly, we affirm the judgment in her favor. We also conclude that the Calkins were entitled to a summary judgment dismissing Weynand's claim against them for interference with his easement, but that Weynand was entitled to summary judgment on his trespass claim against the

Calkins. Thus, we affirm the judgment in favor of the Calkins in part and reverse it in part.

BACKGROUND

¶2 The seeds for the present litigation were sown in an earlier lawsuit in which Weynand's mother, Lucille Foster, had sued him seeking to void an access easement which benefits three parcels of land Weynand owns adjacent to Lake Wisconsin in the Village of Merrimac. Ms. Foster owned other land which "surrounds" Weynand's lots, on which she created a subdivision, Waterwood West, the plat of which included a dedicated roadway, Lu Foster Lane. Lu Foster Lane runs parallel and adjacent to Weynand's fifty-foot-wide access easement along most of its length, and the road connects the platted lots in the subdivision, as well as two of Weynand's parcels, to State Trunk Highway 78.

¶3 Weynand prevailed in the earlier litigation, obtaining a judgment which confirmed the continued existence of his fifty-foot access easement, which was declared to "be binding upon plaintiff, Lucille R. Weynand [Foster], and her heirs, successors and assigns." This July 1991 judgment further ordered Foster and her successors to "cooperate in all ways necessary to permit … Weynand, and his … successors … the full enjoyment and use of said access easements, including, specifically, [Foster] is required to cooperate in all ways necessary to permit [Weynand] to construct a road over his access easement…." Foster subsequently recorded her plat of Waterwood West and sold several of the lots in the subdivision to third parties, including Katherine Wenban, and Lawrence and Delores Calkins, who are the respondents in these two appeals.

¶4 Weynand's complaint alleges a number of specific grievances against his mother and several other owners of lots in Waterwood West. His

claims deal generally with alleged interference with his use of his access easement, the redirection of surface water drainage in a manner that allegedly erodes his easement and one of his lots, and other allegations of trespass or incursion onto Weynand's lands by the various defendants. We detail here only the allegations relevant to these appeals, those being Weynand's claims against Wenban and the Calkins.

¶5 Weynand alleges that Foster "constructed a culvert which drains the Waterwood West plat to Lake Wisconsin across the plaintiff's property." He further alleges that "[t]he culvert referred to herein also drains the property owned by Katherine A. Wenban." Regarding the Calkins, Weynand makes two claims. He first alleges that they placed the following items on his easement: "two wood pilings, two flags, a portion of a rock, a raised asphalt driveway at a different grade than the easement and a dirt pile." Additionally, Weynand claims that the Calkins covered the easement's "paved roadways" with dirt and grass. Later in his complaint, Weynand pleads a separate claim that the Calkins placed a piling, stones and boulders on one of his lots, Lot 1 of Certified Survey Map (CSM) No. 2304.

¶6 Several of the defendants whom Weynand initially named, including the State of Wisconsin and the Village of Merrimac, were dismissed from the litigation by stipulation. Most of the remaining parties filed dispositive motions, including Weynand, who moved for summary judgment in his favor; the Calkins, who moved for summary judgment dismissing the claims against them; and Wenban, who moved to dismiss the complaint for failure to state a claim.

¶7 In its decision on these motions, the trial court concluded that Weynand had established the existence and validity of his easement, but that the

nature and extent of any interference with his use of it, including the value of damages Weynand incurred, if any, presented questions of material fact that could not be decided on summary judgment. Thus, the court denied Weynand's summary judgment motion seeking an injunction and damages. The court similarly denied summary judgment motions for dismissal brought by several of the landowner defendants. The court made an exception, however, in the case of the Calkins, concluding that their submissions on summary judgment, consisting primarily of photographs of the easement as it crosses their lots, established "that the pilings, flags and stone do not interfere with vehicle travel on the easement." Thus, the court granted the Calkins's summary judgment motion, and later entered judgment in their favor.

¶8 The court also concluded that Wenban's motion to dismiss was well founded inasmuch as Weynand's complaint alleged nothing more than that Wenban owned a lot which was drained by a culvert that had been constructed by someone else. Because there were no allegations that Wenban had done anything on her land to divert or redirect surface water runoff, the court entered judgment in Wenban's favor, dismissing her from the litigation.

¶9 Weynand appeals the judgments which dismissed his claims against the Calkins and Wenban.

ANALYSIS

¶10 Wenban moved to dismiss Weynand's complaint for failure to state a claim against her.[1] We review the trial court's disposition of Wenban's motion

[1] This is the subject of Appeal No. 99-0976.

de novo, accepting as true the facts alleged and reasonable inferences drawn from those facts. *See* ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995). We are to liberally construe the complaint, and we will affirm the dismissal of a claim only if "'it is quite clear that under no conditions can the plaintiff recover.'" ***Id***. at 311 (citations omitted).

¶11 Weynand asserts that he has sufficiently pled a claim of private nuisance against Wenban. We disagree. The Restatement of Torts provides that a private nuisance arises when one landowner causes an invasion onto another's land which is either (1) "intentional and unreasonable," or (2) "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822 (1979); *see also* ***State v. Deetz***, 66 Wis. 2d 1, 16, 224 N.W.2d 407 (1974). Weynand's brief mention of Wenban in his multi-count complaint fails to allege these elements regarding the surface water which allegedly originates on Wenban's lot and invades Weynand's property via the culvert under Lu Foster Lane. That is, Weynand alleges neither an act nor an omission on Wenban's part, intentional or otherwise, that causes or contributes to the state of affairs of which Weynand complains.

¶12 Weynand argues that Wenban "has allowed water from her property to erode and damage the easement," and he cites Wenban's "failure to take any remedial actions in terms of the direction her runoff flows." One problem with these assertions in Weynand's brief is that neither is made in his complaint, which alleges only that the culvert in question "also drains the property owned by Katherine A. Wenban." More importantly, however, we agree with the trial court's conclusion that the mere ownership of land upon which rainwater falls cannot be the basis for nuisance liability. Wenban accurately rephrases

Weynand's allegations as "[y]ou own land, it rains on your land, a culvert which you are not responsible for drains your property, you are liable." That is an insufficient basis on which to bring a nuisance claim against Wenban.

¶13 The deficiency in Weynand's complaint is perhaps best illustrated in ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 384 N.W.2d 692 (1986), a case upon which Weynand wrongly relies. The defendants in ***Crest*** developed a previously unimproved, low-lying lot by land-filling it to a higher elevation than the plaintiff's adjacent lot, causing surface water to accumulate on the plaintiff's property. *See* ***id***. at 133-34. The trial court dismissed the plaintiff's action, concluding that the defendants had reasonably developed their property, and that any diversion of surface water was neither intentional nor unreasonable conduct on their part. *See* ***id***. at 135. The supreme court's analysis focused on the reasonableness of the defendants' conduct because there was no dispute that the defendants had engaged in intentional conduct (land-filling their property to divert surface waters) that caused damage to the adjacent land. *See* ***id***. at 138. Here, by contrast, Weynand has alleged no conduct on Wenban's part beyond her acquisition and ownership of nearby land onto which rain falls and flows in his direction.

¶14 Weynand, however, points out that "a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate … the invasion" qualifies as actionable conduct in a private nuisance claim. RESTATEMENT (SECOND) OF TORTS § 824 (1979). And, he points to the supreme court's discussion in ***CEW Management Corp. v. First Federal Savings & Loan Ass'n***, 88 Wis. 2d 631, 277 N.W.2d 766 (1979), as support for sustaining his complaint against Wenban. The supreme court in ***CEW Management*** sustained a complaint on the basis that a defendant landowner *with a duty to do so*

must act to "prevent the deleterious runoff of surface waters." *See* ***id***. at 636. The court, however, did not specify in the opinion what facts before it gave rise to a duty on the defendant's part to take action to prevent or abate the surface water runoff.

¶15 The complaint in ***CEW Management*** alleged that the defendant had "constructed a building on a small part of its property and stripped the remainder of vegetation." ***Id***. at 633. That conduct, under the unique circumstances present in the case, was not directly actionable, but we can only assume that the duty to abate the "deleterious runoff of surface waters" derived from the landowner's actions in altering the surface characteristics of its land. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 824, cmt. e (1979) (noting that, generally, one has "no liability to another merely because he has failed to take positive action to prevent another from being harmed"); *see also* RESTATEMENT (SECOND) OF TORTS §§ 838-39 (1979) (providing that a duty to act may arise where a landowner knows of and consents to an activity on the land which is causing a nuisance, or where the landowner knows of "an abatable artificial condition" on his land which causes a nuisance). Weynand's complaint alleges neither that Wenban had a duty to abate the runoff of surface waters from her land, nor any facts from which such a duty might be inferred.

¶16 Weynand also argues that Wenban should not have been dismissed from the litigation, because under WIS. STAT. § 803.03 (1997-98),[2] he was obligated to implead "all parties of interest" in the dispute. He claims that if he is successful in his action against Foster and the others in having the culvert removed

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

or altered, the drainage of Wenban's lot will be affected, and thus he was required to name her as a defendant. We can find no indication in the record that Weynand ever brought this alternative rationale for impleading Wenban to the attention of the trial court, and accordingly, we do not address it.[3] Moreover, Weynand argues in his brief that Wenban "shares liability with several other tortfeasors," and that the trial court "should have ordered her to abate the nuisance her water discharge creates and pay for any necessary repairs." These arguments are inconsistent with Weynand's assertion that he benignly impleaded Wenban so that she could "protect her interest" in the culvert.

¶17 Finally, we note that Weynand claims not only that the trial court erred in granting Wenban's motion to dismiss, but that the court also erred when it denied his motion for summary judgment against Wenban. In reviewing a trial court's granting or denial of a summary judgment motion, we independently employ the same summary judgment methodology as the circuit court. *See* WIS. STAT. § 802.08; ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). First, we examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it presents a material issue of fact or law. *See* ***id.*** If so, we next examine the moving party's affidavits and other evidentiary submissions to determine whether the movant has established a prima facie case for summary judgment. *See* ***id***. Finally, if the moving party meets its burden, we look to the opposing party's affidavits to determine whether any

[3] Weynand claims in his opening brief that the "circuit court should also have recognized" the necessity of his naming Wenban a defendant in the suit. This would be true only if he had brought this theory to the court's attention. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 829, 539 N.W.2d 897 (Ct. App. 1995) ("We will not … blindside trial courts with reversals based on theories which did not originate in their forum," and "the appellant [must] articulate each of its theories to the trial court to preserve its right to appeal.").

material facts are placed in dispute, thus requiring a trial. *See* ***id***. If no material factual dispute is present, we determine which party is entitled to judgment as a matter of law. *See* § 802.08(2) and (6).

¶18 We will not further address Weynand's arguments regarding his summary judgment motion. As we have noted above, the first step in our analysis of the summary judgment motion is to determine whether Weynand's complaint states a claim against Wenban. *See* ***Dunn***, 213 Wis. 2d at 368. We have concluded that it does not, and it is thus unnecessary for us to go on to consider Wenban's responsive pleading or the parties' submissions on summary judgment.

¶19 We turn next to the trial court's dismissal of Weynand's claims against the Calkins on summary judgment, focusing first on the issue of the Calkins's alleged interference with Weynand's access easement.[4] "An owner of property subject to an easement may make all proper use of the land, including the right to make changes in or upon it, but the owner may not unreasonably interfere with the use by the easement holder." ***Figliuzzi v. Carcajou Shooting Club***, 184 Wis. 2d 572, 588, 516 N.W.2d 410 (1994) (footnote and citation omitted). Whether facts in the record regarding a landowner's activities in the easement area constitute an unreasonable interference with the easement holder's use is a question of law. *See* ***id***. at 590.

¶20 The Calkins concede that Weynand has stated a claim against them for interfering with his easement, and that the pleadings join an issue of fact or law. We thus move on to a consideration of the parties' evidentiary submissions

[4] The dismissal of Weynand's claims against the Calkins is the subject of Appeal No. 99-1607.

on their competing summary judgment motions. The trial court concluded that the photographs submitted by the Calkins established beyond dispute that the pilings, flags, stone, grass and driveway, all of which the Calkins admitted to having placed in the easement, "do not interfere with vehicle travel on the easement." We agree.

¶21 Delores Calkins states in her affidavit that Weynand "can travel the length of the easement which runs across our property by foot or vehicle." Photographs accompanying her affidavit show that within the fifty-foot-wide easement across the Calkins' property, Weynand had constructed two "paved" lanes or paths, separated by a median strip containing vegetation rising to a height of several feet in some places. A survey diagram submitted by Weynand confirms that the easement area consists of two "old road beds" separated by a "grass strip." Weynand also states in an affidavit that "[w]hen bushes and branches grow onto or across my easement, I trim them to remove these obstructions to free passage over the easement." The photographs show quite clearly that the pilings, stones and flags placed by the Calkins are situated within the vegetation or "grass strip" areas of the easement, and they do not cross over or restrict travel along either of the "paved" old road beds.

¶22 The Calkins's asphalt driveway, and the seeded areas immediately adjacent to it, are shown in the photographs to cross Weynand's "paved" road beds. It is reasonable to infer from viewing the photographs that the slightly elevated driveway would require vehicles traveling on the "paved" lanes to slow down—functioning somewhat as do "speed bumps." The "paved" lanes, however, appear to consist of loose gravel, and perhaps some old asphalt, liberally interspersed with grass and vegetation. That is, the photos show the condition of the "paved" lanes to be such that vehicles would not likely be able to travel on

them safely at speeds much higher than passage over the Calkins's driveway would allow.

¶23 Opposing this photographic evidence, Weynand makes a general statement in one affidavit that "[e]ach of the landowners underlying my easement have placed obstructions on my easement." In another affidavit, he is more specific with respect to the Calkins's activities in the easement area:

> [T]he Calkins … have placed or allowed to be placed on the easement two wood pilings and have installed an asphalt driveway completely across the easement. The driveway creates a bump on the easement with a difference in grade of up to a foot. They have also placed or allowed to be placed dirt fill and grass seeding on both sides of their raised asphalt driveway directly on top of plaintiff's two paved roadbeds.
>
> In addition, they have apparently planted trees or a garden with the easement.

These averments do not dispute the evidence submitted by the Calkins showing that the items complained of do not impede vehicular or foot travel along the "paved" lanes within the easement area on their lots. In particular, none of Weynand's statements claim that the items placed or installed by the Calkins interfere, let alone unreasonably interfere, with Weynand's use of his easement for vehicular or pedestrian access to his lots. In addition, Weynand does not recount any specific instances where the Calkins's activities in the easement area have interfered with his use of the easement.

¶24 Thus, we conclude that Weynand failed to submit any evidence to dispute the fact, established by the Calkins's affidavits and photographs, that their activities in the easement do not encroach upon those portions of the easement actually used by Weynand for access to his lots. Accordingly, the trial court did

not err in concluding that the Calkins were not unreasonably interfering with Weynand's use of the easement.[5]

¶25 Finally, we turn to Weynand's claim against the Calkins for trespass. Weynand alleged in his complaint that the Calkins had placed "a piling, stones and boulders" across a lot line separating one of his lots from the Calkins's property. In their answer, the Calkins denied this allegation. Weynand restates the boulder-trespass allegation as an averment in an affidavit in support of his summary judgment motion, to which he attached a survey and a photograph purporting to show that a pile of "stones and boulders encroach two feet onto his property." Weynand further avers that he had never consented to the placement of the stones and boulders on his property.

¶26 The Calkins have not identified any item in the summary judgment record which refutes Weynand's averments regarding the encroaching boulders along the common lot line, nor have we located any contradictory evidence. Rather, the Calkins assert that Weynand "invited" the dismissal of the trespass claim because his counsel drafted and submitted an order which purports to

[5] The Calkins note in their brief that the supreme court has stated that "physical evidence," including photographs, "must control where it is in clear conflict with oral testimony." *See* ***Chart v. General Motors Corp***. 80 Wis. 2d 91, 111-12, 258 N.W.2d 680 (1977). Although the proposition may be a sound one, it applies only when a court reviews the factual determinations of a court or jury. In ***Chart,*** the court affirmed a trial court's decision to grant a judgment notwithstanding the verdict, based in part on the strength of photographic evidence which contradicted certain trial testimony. *See* ***id***. at 110-12. The court cited ***Burns v. Weyker***, 218 Wis. 363, 261 N.W. 244 (1935), which involved the review of an order for new trial based on the lack of credible evidence to support the original verdict.

When deciding summary judgment motions, however, a court may *not* make factual or credibility determinations. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). Here, we conclude that summary judgment in favor of the Calkins is warranted, not because their photographs are more credible than the statements in Weynand's affidavits, but because nothing in Weynand's affidavits contradicts what the photographs show to be true.

dismiss this claim. We disagree, however, with the Calkins's characterization of the dismissal of the boulder-trespass claim as constituting nonreviewable "invited error."

¶27 An appellate court will generally not review an error that was "invited" or induced by the appellant in the trial court. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). The concept of invited error is closely related to the doctrine of judicial estoppel, which recognizes that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). That is precisely what occurred in ***Shawn B.N.***, where the appellant had requested the trial court to order an evaluation and then attempted to argue on appeal that the court had erred in doing so. *See* ***Shawn B.N.***, 173 Wis. 2d at 372. The concept of invited error thus involves a deliberate change in a party's position as a matter of litigation strategy.

¶28 One of several orders and judgments entered by the trial court following its disposition of the various motions referred only to the dismissal of Weynand's claims against the Calkins regarding interference with his easement. These documents were apparently drafted by the Calkins's counsel. The court entered another order, however, which was apparently drafted by Weynand's counsel, and which includes, among numerous other matters, a provision which dismisses *both* the easement-interference and the boulder-trespass claims against the Calkins. This appears to have been an inadvertent error on the part of both Weynand's counsel and the trial court. The court had not specifically ruled on the boulder-trespass claim in its original decision, and its only reference to that claim

in a later decision on reconsideration was to the effect that the claim "was addressed" in its denial of Weynand's motion for summary judgment. We cannot conclude that because Weynand's counsel drafted an order that erroneously dismissed the boulder-trespass claim, Weynand "invited" the error. Weynand had nothing to gain from "inducing" the trial court to dismiss his trespass claim against the Calkins, and his counsel's role in causing that result was inadvertent, not deliberate.

¶29 We are thus not precluded from reviewing the issue, and we address the proper disposition of the boulder-trespass claim in light of the summary judgment motions before the trial court. Weynand asserts that the trial court did not specifically rule on the claim in question, and we agree that this appears to be the case. Even though the trial court did not rule on the viability of the boulder-trespass claim, our review is de novo, and we may therefore decide the issue independently on the record before us.

¶30 Weynand's submissions established a prima facie claim of trespass by showing that the Calkins had placed boulders over the lot line onto his property, without his consent.[6] The Calkins failed to submit any materials which placed these facts in dispute. The supreme court has explained the consequences of a party's failure to respond to a moving party's submissions on summary judgment:

> While it is the moving party's responsibility to initially establish a prima facie case for summary judgment, once it is established the party in opposition to the motion may not

[6] Trespass requires a plaintiff to show that the defendant entered land in the plaintiff's possession, or caused "a thing" to do so, and if raised as a defense, that the plaintiff had not consented to the entry. *See* ***Prahl v. Brosamle***, 98 Wis. 2d 130, 146-47, 295 N.W.2d 768 (Ct. App. 1980).

> rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial.… Where the party opposing summary judgment … fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment….

Board of Regents v. Mussallem, 94 Wis. 2d 657, 673-74, 289 N.W.2d 801 (1980) (footnote and citations omitted). After Weynand moved for summary judgment on the boulder-trespass claim and supported his motion with an affidavit, the Calkins could not "rest on their pleadings" by failing to submit any material that would establish the existence of a factual dispute.

¶31 Accordingly, with respect to the boulder-trespass claim, we conclude that Weynand is entitled to a judgment (1) declaring the boulders in question to be wrongly on his land, (2) directing the Calkins to remove them, and (3) enjoining the Calkins from any further encroachments onto his property. Weynand also asks that we order the Calkins to "pay for any physical repairs necessary." We decline to do so, however, and leave it to the discretion of the trial court, based on whatever further evidence on the matter the parties may present, whether relief other than an order for removal of the encroaching objects and an injunction against future encroachments may be appropriate.

CONCLUSION

¶32 For the reasons discussed above, we affirm the judgment in Appeal No. 99-0976 in favor of Katherine Wenban. We also affirm the judgment in Appeal No. 99-1607 insofar as it dismisses Weynand's claims against Lawrence and Delores Calkins relating to their alleged interference with Weynand's access easement. Insofar as the latter judgment or any order in the record dismisses

Weynand's claim against the Calkins for trespass onto Lot 1 of CSM No. 2304, it is reversed. On remand, we direct that judgment on the trespass claim be entered in Weynand's favor, consistent with the foregoing opinion. Wenban may obtain her allowable costs, but neither party is awarded costs in No. 99-1607. *See* WIS. STAT. RULE 809.25(1)(a)1 and 5.

By the Court.—Judgment in No. 99-0976 affirmed; judgment in No. 99-1607 affirmed in part, reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.