

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-2843

Cir. Ct. No. 99-CV-278

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**STEVE KUSKI, TAMMY KUSKI, FRED HENCKEL, SABINA
HENCKEL, RICHARD PEIGUSS, AND CATHERINE
PEIGUSS,**

PLAINTIFFS-RESPONDENTS,

v.

**JEREMIAH GEORGE, F/K/A GEORGE J. PIENKOWSKI AND
NANCY PIENKOWSKI,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Oneida County:
MARK MANGERSON, Judge. *Affirmed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jeremiah George and Nancy Pienkowski (collectively “the Georges”) appeal a judgment permanently enjoining them from hindering Steve and Tammy Kuski, Fred and Sabina Henckel and Richard and

Catherine Peiguss (collectively “the Kuskis”) from their use of an easement. The Georges argue that the trial court erred by: (1) concluding that the Georges had unreasonably interfered with the Kuskis’ use of the easement; and (2) sanctioning the Georges under WIS. STAT. § 814.025 for pursuing a frivolous defense.¹ We reject these arguments and affirm the judgment. Further, because the trial court properly determined that the underlying defense was frivolous, we award costs and reasonable attorney fees for a frivolous appeal and remand to the trial court to determine the award.

BACKGROUND

¶2 The following facts are undisputed. The parties own adjoining lots along Goodyear Lake in Oneida County. In 1976, the parties were granted an easement for the purpose of ingress and egress via an access road that traversed their respective properties. In 1986, in conjunction with the sale of one of the lots, the parties entered into an easement agreement clarifying that each party, their heirs and assigns were granted the right to use the easement for ingress and egress. The agreement also noted that the easement was intended to run with the land for the benefit of the parties and obligated the parties to “cooperate relative to the maintenance of said roadway as they have in the past.”

¶3 In November 1999, the Kuskis filed suit alleging that the Georges had interfered with their use of the easement. The trial court ultimately concluded that the Georges had unreasonably interfered with the Kuskis’ easement rights.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Consequently, the Georges were permanently enjoined from interfering with these rights and sanctioned for pursuing a frivolous defense. This appeal followed.

ANALYSIS

¶4 The Georges argue that the trial court erred by concluding that they had unreasonably interfered with the Kuskis' use of the easement. "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). When an injunction enjoins an unreasonable interference with an easement, a mixed question of law and fact is presented. *Id.* We uphold a trial court's findings of fact unless they are clearly erroneous. *Id.* at 589. 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 that we review independently. *See id.* at 590.

¶5 Here, the trial court found that the Georges had abridged the Kuskis' easement rights in various ways. Specifically, the Georges prevented a school bus from using the easement. The Georges also placed a cable across the road to restrict access and used trees on either side of the easement to secure a chain and stop sign over which vehicles had to travel. Finally, the Georges hung signs reading, "Enter if you dare," and "To hell with the dog, beware of the owner." The Georges nevertheless argue that despite any obstructions they created with respect to the easement, the evidence at trial failed to establish that the Georges' actions actually interfered with the Kuskis' easement rights. The Georges additionally argue that the Kuskis effectively abandoned their easement rights

when they began using an alternate route for ingress and egress. We are not persuaded.

¶6 The Georges mistakenly interpret the term “unreasonable interference” to mean “successful obstruction.” As the trial court noted, the Georges’ use of periodic blockages, signs and threats created an uncertainty for the Kuskis that effectively interfered with their easement rights. With respect to the Georges’ abandonment argument, the trial court, consistent with the terms of the easement agreement, noted that the easement runs with the land. Thus, the Kuskis’ use of an alternate route does not establish an abandonment of the easement but, rather, evinces a reaction to the Georges’ conduct. *See Millen v. Thomas*, 201 Wis. 2d 675, 679, 550 N.W.2d 134 (Ct. App. 1996) (It is well-settled that easements by express grant cannot be extinguished by the existence of an alternate route.). We conclude that the evidence supports the trial court’s findings and judgment that the Georges’ activities in the easement area constituted an unreasonable interference with the Kuskis’ use of the easement.²

² The Georges argue that the subject easement should be construed as an easement of necessity that need not continue indefinitely, especially where an alternate route is available. Although the Georges acknowledge that it is well-settled that easements by express grant cannot be extinguished by the existence of an alternate route, *see Millen v. Thomas*, 201 Wis. 2d 675, 679, 550 N.W.2d 134 (Ct. App. 1996), they nevertheless contend that a reasonable argument may be made for a modification of this law. However, they do not dispute the Kuskis’ allegation that this argument for a modification of the law was never presented to the trial court. We therefore decline to consider this issue. *See Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974) (As a general rule, we will not decide issues that have not first been raised in the trial court.).

¶7 The Georges additionally argue that the trial court erred by sanctioning them for pursuing a frivolous defense.³ We disagree.

¶8 In order to impose sanctions against a party for a frivolous defense under WIS. STAT. § 814.025(3) the court must find one of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶9 The inquiry into whether a defense is frivolous under the statute is a mixed question of law and fact. *See Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). A trial court's findings of fact will be affirmed unless they are clearly erroneous. *See Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996); *see also* WIS. STAT. § 805.17(2). However, "the ultimate conclusion of whether the facts cited fulfill the legal standard of frivolousness is a question of law" that this court reviews de novo.

³ The Georges initially claim that the Kuskis did not properly request attorney fees pursuant to WIS. STAT. § 814.025 because the motion was not made in the complaint or pre-trial brief. The Georges are mistaken. In *Booth v. American States Ins. Co.*, 199 Wis. 2d 465, 476, 544 N.W.2d 921 (Ct. App. 1996), this court held that "[a] party may timely file a motion for costs and attorney fees after reading the opponent's pleadings, briefs, affidavits and other documents as long as the sanctions motion is filed prior to the entry of judgment." Here, the Kuskis timely made their motion during the trial.

The Georges also contend that WIS. STAT. § 814.025 is aimed at "assertive action, not self-defense." On the contrary, § 814.025 specifically applies to a "defense ... used or continued in bad faith."

Stern, 185 Wis. 2d at 236. Further, “[a]n appellate court must accept a reasonable inference drawn by the trial court from established facts if more than one reasonable inference may be drawn.” *Id.* at 237. However, “[w]hether an inference is reasonable is itself a question of law.” *Id.*

¶10 Here, the Georges argue that they merely attempted to defend themselves based on the facts of the case. The trial court determined that the Georges failed to cite any law that would either undermine the easement’s continuing existence or otherwise allow the Georges to interfere with the Kuski’s easement rights. Because there was no legal basis for the Georges’ claimed defenses, we conclude that the trial court properly awarded attorney fees and costs pursuant to WIS. STAT. § 814.025.

¶11 The Kuskis also move this court for fees and costs for frivolous appeal. Our conclusion that the trial court correctly adjudged the matter frivolous renders the appeal frivolous per se.” *Belich v. Szymaszek*, 224 Wis. 2d 419, 435, 592 N.W.2d 254 (Ct. App. 1999). Consequently, the Kuskis are also entitled to a further award on appeal without a finding that the appeal itself is frivolous under WIS. STAT. RULE 809.25(3). We therefore grant the motion for costs and reasonable attorney fees and remand to the trial court to determine the proper amount to be awarded. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

By the Court.—Judgment affirmed and cause remanded.

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

