

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2008

David R. Schanker
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. 2007AP2492

Cir. Ct. No. 2007CV7

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ENBRIDGE ENERGY, LIMITED PARTNERSHIP, A DELAWARE LIMITED
PARTNERSHIP,**

PLAINTIFF-RESPONDENT,

v.

**PETER A. JOHNSON AND KAREN A. JOHNSON PETERS, A/K/A
KAREN PETERS, A/K/A KAREN (JOHNSON) PETERS,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Peter Johnson and Karen Johnson Peters (collectively, Johnson) appeal a summary judgment granted in favor of Enbridge Energy. Johnson argues that Enbridge's use of land outside an easement and

construction of additional pipelines within the easement constitute a taking that calls for the commencement of condemnation proceedings. Alternatively, Johnson challenges the easement as unenforceable and against public policy. We reject Johnson's arguments and affirm the judgment.

BACKGROUND

¶2 Johnson owns two parcels of real property in Sawyer County. At the time Johnson acquired the property, it was encumbered by an easement that had been granted to Lakehead Pipe Line Company, Inc., Enbridge's predecessor in interest, in 1968. The initial pipeline was constructed on the property in 1968 and a second pipeline was constructed in 1997.

¶3 In 2006, Enbridge notified Johnson that it would be exercising its easement rights to construct a third and fourth pipeline parallel to the existing pipelines. Consistent with its interpretation of rights granted under the easement, Enbridge determined it needed to use a 100-foot strip of land immediately adjacent to the right-of-way during construction of the pipelines. When Johnson balked at Enbridge's use of the adjacent land, Enbridge obtained a temporary restraining order and filed the underlying declaratory judgment action. Johnson counterclaimed for inverse condemnation and trespass, asserting the easement is unenforceable. Following a hearing, the circuit court enjoined Johnson from interfering with construction of the pipelines. After additional discovery, the parties moved for summary judgment. The court granted summary judgment in favor of Enbridge and this appeal follows.

DISCUSSION

¶4 This court reviews summary judgments independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 Johnson argues that Enbridge’s use of the 100-foot strip of land adjacent to the right-of-way constituted a “taking,” thus requiring the commencement of condemnation proceedings. Condemnation proceedings are appropriate when an entity with condemning authority is occupying property “without the right to do so.” *See* WIS. STAT. § 32.10. Here, the easement conveys, in relevant part:

A right-of-way and perpetual easement to construct, operate, maintain, inspect (including aerial patrol), remove, replace and reconstruct one or more pipelines together with valves, fitting, protective apparatus and all other equipment and appurtenances as may be convenient in connection therewith for the transportation of oil, other liquid hydrocarbons, and any product or by-product thereof, or any material or substances which can be conveyed through a pipeline on, over, under and across [the subject property], together with the right to clear and to keep cleared the Right-of-Way so as to prevent damage or interference with its efficient operation and patrol. The Grantor further grants the Grantee the right of ingress and egress to and from the Right-of-Way for all purposes convenient or incidental to the exercise by the Grantee of the rights herein granted, *together with the right to use the lands immediately adjacent to each side of the Right-of-Way as is reasonably required during construction.* (Emphasis added).

Because the easement grants Enbridge the right to use land immediately adjacent to the right-of-way, condemnation is not necessary.

¶6 Johnson nevertheless challenges the easement as unenforceable and against public policy, claiming the ambiguity of the term “lands immediately adjacent” affords Enbridge unlimited access to Johnson’s property. On the contrary, the easement limits Enbridge to the “use of lands immediately adjacent ... as is reasonably required during construction.” If there were a disagreement between the parties over what amount of land was “reasonably required during construction,” that dispute could have been resolved by the circuit court. Here, Johnson does not contest Enbridge’s claim that 100 feet was reasonably required under the existing circumstances but, rather, challenges the general notion of what *may* be “reasonably required” under various hypotheticals not relevant to the present case. This court will not decide issues based on hypothetical or future facts. *Pension Mgmt., Inc. v. Du Rose*, 58 Wis. 2d 122, 128, 205 N.W.2d 553 (1973).

¶7 Next, Johnson asserts the parties could not have intended the use of “significant amounts” of land adjacent to the right-of-way because the easement contains “no method of compensation” for Enbridge’s use of those lands. The term “significant amounts,” however, is relative and, as noted above, any dispute over what is “reasonably required during construction” could be resolved by the court. In any event, with respect to compensation, the easement provides:

The Grantee shall ... pay to the Grantor *for the rights herein granted* the sum of \$130.00 which when added to the sum paid herewith shall be equivalent to \$33.00 per Acre for the Right-of-Way, which payments shall constitute full consideration for this conveyance. (Emphasis added).

Johnson cites the deposition testimony of Douglas Aller, Enbridge’s “supervisor of lands and right-of-way,” to support the proposition that the easement provides no method of compensation for the use of lands immediately adjacent to the right-of-way. Although Aller testified he did “not see an actual calculation for that in the easement,” Aller further testified that compensation for use of the adjacent lands was included in the \$33 per acre payment required by the easement. In any event, under the plain language of the easement, compensation is provided “for the rights therein granted,” which includes the right to use lands immediately adjacent to the right-of-way.

¶8 Citing *Lehner v. Kozlowski*, 245 Wis. 262, 13 N.W.2d 910 (1944), Johnson characterizes the subject conveyance as a “general easement” and argues that Enbridge’s rights under the easement have become “fixed and limited” by prior use. In *Lehner*, the grantee of a 1914 easement for a drainage ditch sought to relocate the ditch in 1941. In concluding the grantee did not have the right to relocate the ditch under the terms of the easement, the *Lehner* court acknowledged:

[W]here a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the rights, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits to the particular course or manner it had been enjoyed.

Id. at 266-67. *Lehner*, however, is distinguishable on its facts as the court there specifically noted that “neither under the terms of said contract nor by any act on the part of the defendant was the plaintiff given the right to construct more than one ditch upon defendant’s land nor to relocate the ditch installed in the year 1914.” *Id.* at 264.

¶9 Here, the easement provides: “The aforesaid rights and easement are granted as and from the date hereof *and for so long thereafter as the Grantee desires to exercise the same* on the following terms and conditions which are hereby mutually covenanted and agreed to by and between the Grantor and the Grantee.” (Emphasis added.) The easement further provides: “Should the Grantee *at any time* construct more than one pipeline hereunder, it will pay the Grantor, prior to construction *of each such additional pipeline*, the same consideration as is payable under this clause for the initial pipeline.” (Emphasis added.)

¶10 To the extent Johnson challenges Enbridge’s right to construct additional pipelines within the right-of-way, the clear language of the easement establishes that the parties contemplated the construction of additional pipelines. Moreover, by failing to contest construction of the second pipeline in 1997, Johnson’s own conduct demonstrates he did not believe Enbridge’s rights under the easement were limited to the construction of only the initial pipeline. Johnson likewise asserts Enbridge’s use of adjacent land is restricted to the amount of land used when the initial pipeline was constructed. However, unlike the easement in *Lehner*, the present easement anticipates future construction and grants Enbridge the right to use lands immediately adjacent to the right-of-way as is reasonably required “during construction.” The easement, therefore, does not limit Enbridge’s use of adjacent lands to that used during *initial* construction.

¶11 Finally, Johnson argues the easement is impermissibly exculpatory. Exculpatory contracts are defined as “contracts which relieve a party from liability for harm caused by his or her own negligence.” *Merten v. Nathan*, 108 Wis. 2d 205, 210, 321 N.W.2d 173 (1982). Based on his assertion that the easement grants Enbridge unlimited access to his property, Johnson contends the easement

effectively relieves Enbridge from liability for trespass or damage to the property. We disagree. As noted above, Enbridge's rights under the easement are not unlimited. Rather, Enbridge is limited to the right-of-way and lands immediately adjacent to the right of way "as is reasonably required during construction." Trespass, therefore, cannot occur unless Enbridge exceeds the scope of its easement. See *Gallagher v. Grant Lafayette Elec. Coop.*, 2001 WI App 276, ¶24, 249 Wis. 2d 115, 637 N.W.2d 80. Moreover, the easement includes an arbitration clause governing any disputes over damages that may arise from Enbridge exercising the rights conveyed. If the easement relieved Enbridge from liability, it would not include a provision for the arbitration of damages.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

