

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 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. 2008AP356

Cir. Ct. No. 2007FO1861

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF JANESVILLE,

PLAINTIFF-RESPONDENT,

V.

FRANK SILHA & SONS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
R. ALAN BATES, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Frank Silha & Sons, Inc. appeals a judgment of the circuit court granting summary judgment in favor of the City of Janesville. Silha challenges the court's determination that no issue of material fact existed as to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

whether trucks owned by Silha violated JANESVILLE GENERAL ORDINANCE § 12.48.050 (April 2006)² when they traveled east on Tripp Road in the city limits of Janesville until reaching Afton Road, which is also within the limits of Janesville. We affirm the entry of summary judgment in favor of Janesville.

BACKGROUND

¶2 Silha is the owner and operator of a limestone quarry on Tracy Road in the Town of Rock in Rock County. On occasion, Silha transports mined materials within Janesville's city limits via trucks having a gross weight vehicle rating in excess of 30,000 pounds.³ The trucks do this by traveling north on Tracy Road until the road intersects with Tripp Road. The trucks then travel east on Tripp Road until the road intersects with Afton Road, also known as County Highway D, which is a designated truck route. Approximately the last one-quarter mile of Tripp Road before it intersects with Afton Road is located within Janesville city limits. Tripp Road is not designated by Janesville City Ordinance as a through arterial Street. *See* JANESVILLE CITY ORDINANCE § 10.16.010.

¶3 Janesville City Ordinances impose weight restrictions on vehicles traveling within the city's limits. JANESVILLE GENERAL ORDINANCE § 12.48.050 prohibits vehicles with a gross vehicle weight rating in excess of 16,000 pounds

² All references to the Janesville General Ordinances are to the April 2006 version unless otherwise noted.

³ WISCONSIN STAT. § 340.01(19r) defines "gross vehicle weight rating" as "the value specified by the vehicle manufacturer, including secondary or final stage manufacturer, as the loaded weight of the vehicle." The police report describing the ordinance violation states that "[t]he gross weight of these trucks using Tripp R[oad] is 73000 pounds." Silha does not contend that the gross weight of its trucks differs from this figure.

from driving on any street or highway except state or federal truck highways while making trips through Janesville.

¶4 In addition, JANESVILLE GENERAL ORDINANCE § 12.48.020 prohibits vehicles with a gross weight rating in excess of 16,000 pounds from operating on any street or highway in Janesville “unless such street or highway is designated as a through arterial street ... except as provided in subsections A, B, and C of this section.” Relevant to this appeal are subsections A and B.

¶5 Subsection A provides that persons operating vehicles with gross weight ratings in excess of 16,000 pounds but less than 30,000 pounds “may make pickups or deliveries at locations not on a through arterial street, provided that such operated vehicle leaves from and returns to a through arterial street at a point nearest to his immediate destination.” JANESVILLE GENERAL ORDINANCE § 12.48.020A. Subsection B provides that persons operating vehicles with gross weight ratings in excess of 30,000 pounds are subject to the requirements of subsection A and are also limited to making “only one delivery or pickup on each deviation” which is defined as “an interval in which a vehicle leaves and returns to a through arterial street by the shortest possible route.” Section 12.48.020B.

¶6 In June 2007, Janesville police officers observed Silha’s trucks traveling within Janesville’s limits on Tripp Road to and from Afton Road. Silha was cited for violating JANESVILLE GENERAL ORDINANCE § 12.48.050. Silha denied the violation and moved for declaratory judgment, arguing its drivers must use Tripp Road in order to access Afton Road. Janesville moved for summary judgment. Following a hearing on the matters, the circuit court granted Janesville’s motion and denied Silha’s motion. Silha appeals.

DISCUSSION

¶7 We review appeals of summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The party moving for summary judgment bears the burden of proving that there are no issues of material fact. *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶26, 308 Wis. 2d 258, 746 N.W.2d 447.

¶8 Silha first contends that Janesville failed to establish that it violated JANESVILLE GENERAL ORDINANCE § 12.48.050 and therefore the circuit court erred in entering summary judgment in Janesville’s favor.

¶9 JANESVILLE GENERAL ORDINANCE § 12.48.050 prohibits vehicles with a weight rating exceeding 16,000 pounds from operating on any street except federal or state truck highways “when making trips *through* [Janesville].” (Emphasis added). Silha first argues that Janesville failed to establish that Silha trucks were traveling “through” Janesville as opposed to “into” Janesville. Silha points out that Janesville submitted the affidavit of Bradley Cantrell, Janesville’s community development director. Cantrell attested that “[u]pon information and belief ... [Silha] sought to [] use the unlawful route past the residential homes and residents along the portion of Tripp Road in Janesville several times per day” to haul gravel from the quarry to a location in LaPrairie. Silha argues that because Cantrell’s affidavit was not made on personal knowledge, but instead “on information and belief,” the affidavit was insufficient to establish that Silha’s trucks were making trips through the city. Thus, Silha contends that the City failed to meet its burden to establish that no genuine issue

of material fact existed because a dispute remains as to whether Silha was traveling through the City when cited.

¶10 The City counters that Silha’s argument is raised for the first time on appeal and, therefore, we should not address it. Generally, arguments raised for the first time on appeal are deemed waived. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶11 At the hearing on the City’s motion for summary judgment, counsel for Silha stated, “[The City] contend[s] that this trip was a through—trip through the City of Janesville, and going elsewhere. I don’t believe that their paperwork supports that.” Silha asks us to construe this single statement as a challenge to Cantrell’s affidavit before the circuit court. The court, however, did not rule on the sufficiency of Cantrell’s affidavit and we do not view counsel’s statement as affirmatively placing the issue before the court. *See Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 (“A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling.”)⁴ Accordingly, we do not further address this issue.

¶12 Silha next argues that JANESVILLE GENERAL ORDINANCE § 12.48.020, which it claims must be read in conjunction with JANESVILLE GENERAL ORDINANCE § 12.48.050, authorizes Silha’s traversing of Tripp Road

⁴ Silha argues in his reply brief that *Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, 246 Wis. 2d 385, 630 N.W.2d 772, is distinguishable because, unlike the present case, it did not involve a motion for summary judgment. However, the rule requiring waiver on appeal of issues not sufficiently raised before the circuit court is not limited to a particular type of proceeding, and Silha offers no legal authority in support of its position.

within Janesville city limits. Silha argues that § 12.48.020A authorizes Silha's trucks to travel on Tripp Road until it intersects with Afton Road because the quarry is not located on a through arterial street and the shortest route to Afton Road, a through arterial street, is via Tripp Road. However, even assuming that this is a correct interpretation of the ordinance, subsection A applies only to vehicles having a gross vehicle weight rating of less than 30,000 pounds. Silha's trucks have a gross vehicle weight rating exceeding that amount, and subsection A is therefore not applicable.

¶13 Finally, Silha argues that its trucks are authorized to travel on Tripp Road until the trucks reach Afton Road under JANESVILLE GENERAL ORDINANCE § 12.48.020B, which provides that deviation from the through arterial street should be through the shortest possible route. Silha contends that Tripp Road is the shortest route from the quarry to a through arterial street, and Tripp Road "is built to heavy truck standards."

¶14 JANESVILLE GENERAL ORDINANCE § 12.48.020B provides that trucks with a gross vehicle weight in excess of 30,000 pounds are subject to the requirements in subsection A and, in addition, "shall make only one delivery or pickup on each deviation," which is defined as "an interval in which a vehicle leaves and returns to a through arterial street by the shortest possible route." Read together, subsections A and B authorize the use of roads in Janesville, which are not designated as federal or state truck highways, by trucks with a gross vehicle weight in excess of 30,000 pounds only if those trucks leave from and return to a through arterial street, which are specified in JANESVILLE CITY ORDINANCE § 10.16.010. Utilization of the shortest route to make pickup and deliveries is relevant under § 12.48.020 only if the thresholds of subsections A and B have been met. In this case, they have not. Tracy Road is not designated as a through

arterial street in § 10.16.010. Thus, when Silha's trucks leave Tracy Road and travel east on Tripp Road until they reach Afton Road, they are not leaving a through arterial street as is required by § 12.48.020B. We therefore conclude that § 12.48.020B. is also inapplicable.⁵

¶15 For the foregoing reasons, we affirm the judgment of the circuit court entering summary judgment in favor of Janesville.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁵ Silha also argues that because Tripp Road is built to heavy truck standards, its trucks should be permitted to travel on that road until they reach Afton Road. However, the durability of Tripp Road is irrelevant to the determination of whether Janesville City Ordinances permit travel on it.

