

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 8, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0501

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM H. MITTON,

Plaintiff-Appellant,

v.

**WISCONSIN DEPARTMENT
OF TRANSPORTATION,**

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William Mitton and his sister, Susan Petru (the Mittons), appeal a summary judgment dismissing their action against the Wisconsin Department of Transportation in which they challenged the necessity of condemning their land for highway relocation. To overturn the DOT's determination of necessity, the Mittons had to show fraud, bad faith or gross abuse of discretion or that there was no reasonable ground to support DOT's

finding of necessity. See *Falkner v. Northern States Power*, 75 Wis.2d 116, 132, 248 N.W.2d 885, 894 (1977). Because the record establishes a reasonable basis for DOT's finding of necessity and the Mittons have failed to establish a factual basis for their allegation of bad faith, we affirm the judgment.¹

The DOT is constructing a bypass highway on state Highway 29 around the south side of the City of Shawano. After considering other alternatives, the DOT condemned 3.45 acres of the Mittons' property for the highway right-of-way. The department considered four alternative routes, the north, the near south route, the revised near south route, and the far south route. It selected the revised near south route resulting in condemnation of the Mittons' property.

The department gave reasonable grounds for selecting the revised near south alternative. It considered the damage to wetlands posed by each of the alternatives, the expense, traffic patterns and the potential needs of the city to expand. This court must sustain the DOT's necessity determination if reasonable minds could arrive at the same conclusion. *Ashwaubenon v. State Highway Comm'n*, 17 Wis.2d 120, 131, 115 N.W.2d 498, 504 (1962). Reasonable minds could conclude that the revised near south alternative optimized the various factors DOT considered. While the north route would have taken less wetlands, it would have cost \$8 million more. The near south alternative and far south alternative would have damaged more wetlands. It is the department's function, not the court's, to balance these competing interests.

The Mittons accuse the department of selecting their land for the sole purpose of acquiring the historical sites on the property which is rich in archeological deposits. They contend that the question of the department's motivation is a material issue of fact precluding summary judgment. The department's supporting papers establish a legitimate basis for its decision. Therefore, the Mittons must present affidavits or other proof of bad faith. See *Krezinski v. Hay*, 77 Wis.2d 569, 573, 253 N.W.2d 522, 524 (1977). A party opposing summary judgment cannot rest on mere allegations. *Board of Regents v. Mussallem*, 94 Wis.2d 657, 673-74, 289 N.W.2d 801, 809 (1980). The

¹ The trial court also concluded that this action is barred by the doctrine of *res judicata*. Because we uphold the DOT decision on the merits, we need not review that conclusion.

Mittons presented no direct proof of bad faith and their allegation that the department selected their land for the purpose of acquiring its historical sites cannot be reasonably inferred from the evidence.

By the Court. – Judgment affirmed.

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