

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2006

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. 2006AP451

Cir. Ct. No. 2005CV32

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BARRY WILLIAMS AND PATRICIA WILLIAMS,

PLAINTIFFS-APPELLANTS,

v.

**TOWNSHIP OF GREENWOOD, KATHERINE GRANGER,
ALLEN STANEK AND CONTINENTAL WESTERN
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Barry and Patricia Williams appeal an order granting summary judgment to the Township of Greenwood, its insurer, Katherine

Granger, and Allen Stanek. In this proceeding, the Williamses alleged that the Town removed trees growing on the Williamses' property, thereby committing a trespass. The issue on appeal is whether the proofs offered on summary judgment establish that the trees did not grow on the Williamses' property, or whether a material fact dispute remains concerning their location. We affirm the summary judgment in the Town's favor.

¶2 The minimum width of a right-of-way on town roads is three rods or 49.5 feet. WIS. STAT. § 82.50.¹ In support of its summary judgment motion, the Town offered undisputed proof that a town road with a traveled portion approximately twenty-two feet wide ran through the Williamses' property. All of the removed trees lay within ten feet of the southern edge of the traveled portion, well within a 49.5 right-of-way. The Town also presented undisputed proof that all of the removed trees grew between the traveled portion of the road and a wooden fence erected by the Williamses, that lay approximately ten feet south of the roadway and ran parallel to it.

¶3 In opposition to summary judgment, the Williamses submitted the affidavit of Barry Williams to which he attached exhibits that purportedly showed an ancient fence line that lay between the traveled roadway and the removed trees. The Williamses argued that this ancient fence line was the true boundary of their property, such that the removed trees grew on their property rather than on the right-of-way.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 We review summary judgment de novo, using the same method as the trial court. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. If, as here, the complaint states a claim for relief and the pleadings establish a factual dispute, we determine whether the moving party has made a prima facie case for summary judgment. *Id.*, ¶22. If the moving party has made its case, we then examine whether the affidavits and proofs of the opposing party create material fact disputes or allow reasonable competing inferences. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). If they do not, the moving party is entitled to summary judgment. WIS. STAT. § 802.08(2).

¶5 The Town's proofs as to the location of the removed trees, within ten feet of the roadway and on the road side of the existing fence, establish a prima facie case that the trees grew on the right-of-way. We must therefore examine whether the Williamses' proofs establish a factual dispute as to whether an ancient fence line lies between the removed trees and the roadway (i.e., whether the removed trees were on the Williamses' property). See *Threlfall v. Town of Muscoda*, 190 Wis. 2d 121, 131, 527 N.W.2d 367 (existence of an ancient fence line within the presumptive right-of-way establishes the true boundary of the right-of-way).² On review of the Williamses' proofs, we find no evidence showing an ancient fence line in its alleged location. An ancient fence line simply does not appear in any of the photographic exhibits or the DVD exhibit showing the area where the Town removed trees. Nor is it identifiable on the maps submitted as proof except as lines drawn roughly parallel to the road but in an area well to the

² The presumptive width of an unrecorded town road is sixty-six feet. WIS. STAT. § 82.31(2).

west of where the removed trees grew, and west of the wooden fence. Furthermore, even if one could infer that the old fence line extended further east, the proofs do not allow an inference that the old fence line lay north of the removed trees, arguably placing them on the Williamses' property. The maps are not drawn to scale. And even if we assumed they were, the maps placed the old fence line no closer to the road than the wooden fence the Williamses erected to replace the old fence.³ The Williamses may have proved that their wooden fence effectively reduces the Town's right of way. But the affidavits and exhibits show without dispute that none of the removed trees grew to the south of that fence, which would be necessary to establish a trespass on the Williamses' property. The Town was therefore entitled to summary judgment.

By the Court.—Order affirmed.

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

³ In his affidavit, Barry Williams stated that he installed the wooden fence to replace the ancient fence. We note that on one of the Williamses' photograph exhibits the statement appears that the Williamses' wooden fence "was put in exactly where the old ancient barbed wire fence was...."

