

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 14, 2007**

A. John Voelker  
Acting 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. 2006AP1412**

**Cir. Ct. No. 2003CV553**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**MCDONALD ENTERPRISES/FOND DU LAC LIMITED PARTNERSHIP BY  
MCDONALD FAMILY ENTERPRISES/FDL, LLC GENERAL PARTNER,**

**PLAINTIFF-APPELLANT,**

**v.**

**EXCEL ENGINEERING, INC. AND SIGNATURE HOMES BY  
ADASHUN JONES, INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. McDonald Enterprises/Fond du Lac Limited Partnership (McDonald) appeals from a summary judgment dismissing its claims

against Excel Engineering, Inc. and Signature Homes by Adashun Jones, Inc. Our independent review of the summary judgment record reveals that there are genuine issues of material fact and summary judgment was not appropriate. We reverse the judgment because the circuit court misapplied the summary judgment methodology. We remand for proceedings consistent with this opinion.

¶2 In its amended complaint, McDonald alleged that the actions of Signature Homes and Excel Engineering, the developer and engineering firm associated with an adjacent subdivision, caused contaminated water to drain from the subdivision to McDonald's property causing crop damage, long-term, adverse changes to the property, and a nuisance, among other claims. The circuit court granted summary judgment to Signature and Excel; McDonald appeals.

¶3 An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶4 Under our summary judgment methodology, "the court does not decide an issue of fact. The court decides only whether a genuine issue of fact exists. The court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts." *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991) (footnote and citation omitted). "The weight and credibility to be given to the opinions of expert witnesses are uniquely within the province of the fact

finder,” not the circuit court on summary judgment. *Ricco v. Riva*, 2003 WI App 182, ¶17, 266 Wis. 2d 696, 669 N.W.2d 193.

¶5 In discussing the summary judgment methodology, the circuit court correctly observed that the inquiry is whether the summary judgment record reveals a genuine dispute about material facts. However, the court misstated the summary judgment methodology when it went on to say that “the Court must engage in some weighing of the evidence.” The court further stated that its role was to “look very seriously at all the pleadings, the affidavits, the weight of what evidence it has before it, the weight of these various—of any factual evidence to see whether or not it’s a claim that—a case that does merit summary judgment.” Essentially, the court’s view of the summary judgment methodology is that it must weigh the credibility of the summary judgment proof.

¶6 The circuit court then applied its view of the summary judgment methodology. The court placed greater weight on the affidavits of former McDonald tenant Leroy Schmitz and engineer Matthew Stephan (for the summary judgment movants, Excel and Signature) than that of engineer John Davel (for the summary judgment opponent, McDonald). The court stated that it was not in a position to challenge engineer Davel’s credentials. Nevertheless, the court placed greater weight on the affidavits offered by “eyewitnesses,” defined by the court as parties who have had experience with the involved properties. The court concluded that the summary judgment record did not establish genuine issues of material fact to be determined at trial.

¶7 We independently review the summary judgment record, including Davel’s affidavits. Davel is a licensed civil engineer with more than twenty years of experience in designing and constructing drainage systems for subdivisions. Two

Davel affidavits are of record. The first affidavit was filed in September 2005 in opposition to a previous summary judgment motion filed by the Town of Fond du Lac.<sup>1</sup> In that affidavit, Davel stated that he viewed the subdivision many times and reviewed documents relating to its storm water management, site and grading plans. He offered a detailed, fact-based opinion that the subdivision's site and grading plans were erroneous or inadequate. He opined that the storm water retention and detention ponds in the subdivision were either missing, improperly designed and/or inadequate.

¶8 The second affidavit (dated February 2006) was submitted in opposition to the summary judgment motions filed by Signature and Excel. Davel opined that engineer Matthew Stephan's affidavit in support of summary judgment was flawed in a number of respects, particularly relating to Stephan's endorsement of the subdivision's drainage plans and his opinion that such drainage was not damaging McDonald's property. Davel reiterated some of the points made in his September 2005 affidavit about the site and grading plans, ponds and drainage problems. Davel also discussed the soil types in the area and how they affect drainage, made calculations relating to drainage from the subdivision to McDonald's property, and described areas of run-off damage on McDonald's property. Finally, Davel opined that if the drainage did not cease, McDonald's property would transition to wetlands in the next ten years and become property which cannot be developed.

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<sup>1</sup> At the hearing on the summary judgment motions of Signature and Excel, the circuit court took judicial notice of the proceedings held on the Town of Fond du Lac's successful summary judgment motion.

¶9 We conclude that Davel's February 2006 affidavit was sufficient to defeat summary judgment. The affidavit addressed the existence of drainage from the subdivision, the conduct of the developer and the engineering company in relation to the drainage, the impact of the drainage on McDonald's property, and the prospect that continued, uncontrolled drainage may convert McDonald's property into wetlands. Davel's affidavit countered Stephan's affidavit and raised genuine issues of material fact.

¶10 In addition, the affidavits of past and present McDonald property farmers raised genuine issues of material fact. Edward Montsma, a farmer who has leased and farmed the McDonald property, referred to the impact of drainage from the subdivision. The affidavit of a former tenant farmer, Leroy Schmitz, stated that there have not been any drainage problems on the property since the subdivision's development. These affidavits stand in counterpoint

¶11 In essence, the circuit court did not find credible the affidavits submitted by McDonald in opposition to summary judgment. However, this is a far cry from a permissible determination that an affidavit is incredible as a matter of law. *See, e.g., Ricco*, 266 Wis. 2d 696, ¶16. Assessing credibility in this fashion is not the function of the summary judgment court. The affidavits submitted by McDonald counter the showing made by Signature and Excel.

¶12 Signature and Excel argue that McDonald did not establish damages on summary judgment. First, Davel's affidavit alleges that unchecked drainage may convert McDonald's property to wetlands not fit for farming or development. This is an aspect of damages. Second, McDonald's amended complaint seeks not only damages, but an injunction to prevent future damage to the property due to drainage, an order requiring the construction of proper and adequate retention and detention

ponds, and an order enforcing applicable ordinances and statutes relating to drainage. The summary judgment record demonstrates material factual disputes about the drainage and its consequences for McDonald's property.

¶13 Summary judgment cannot be granted if there is a dispute regarding material facts or if different inferences might be drawn from the facts. *Leverence v. U.S. Fidelity & Guaranty*, 158 Wis. 2d 64, 74, 462 N.W.2d 218 (Ct. App. 1990), *overruled on other grounds by Wenke v. Gehl Co.*, 2004 WI 103, 274 Wis. 2d 220, 682 N.W.2d 405. The party seeking summary judgment has the burden of establishing the absence of a factual dispute and entitlement to judgment as a matter of law. *Grosskopf Oil, Inc. v. Winter*, 156 Wis. 2d 575, 581, 457 N.W.2d 514 (Ct. App. 1990). Based upon our independent review of the summary judgment record, Signature and Excel did not meet their burden. The circuit court erroneously granted summary judgment. We therefore reverse and remand for proceedings consistent with this opinion.

*By the Court.*—Judgment reversed and cause remanded.

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

