

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 8, 2002**

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. 01-2036  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-529**

**IN COURT OF APPEALS  
DISTRICT II**

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**PHILLIP KMIEC AND DIANA KMIEC,  
  
PLAINTIFFS-APPELLANTS,**

**V.**

**BYRON C. VIELEHR,  
  
DEFENDANT-THIRD-  
PARTY PLAINTIFF-RESPONDENT,**

**V.**

**MARJAN KMIEC AND DONNA KMIEC,  
  
THIRD-PARTY DEFENDANTS-  
FOURTH-PARTY PLAINTIFFS,**

**ED MICHAELS, RE/MAX REALTY 100, FLORA L.  
CAMERON AND THE PRUDENTIAL PREFERRED  
PROPERTIES, LIMITED PARTNERSHIP,**

**FOURTH-PARTY DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
PATRICK L. SNYDER, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Phillip Kmiec and Diana Kmiec (hereinafter the Kmiecs) appeal from the judgment dismissing their trespass claim against Byron C. Vielehr. The judgment followed a jury verdict finding that Vielehr had not trespassed on the Kmiecs' property. The issues on appeal are whether the circuit court properly denied the Kmiecs' motion for summary judgment, whether the circuit court properly instructed the jury about the effect of a stipulation between the parties, and whether the jury's verdict was contrary to the great weight of the evidence. We affirm the judgment of the circuit court.

¶2 Phillip Kmiec's father, Marjan Kmiec, owned two adjoining lots of property. He sold one lot to Vielehr and one lot to the Kmiecs. A portion of the driveway from Vielehr's lot went onto the Kmiecs' lot. After closing, Marjan Kmiec noticed that Vielehr was parking vehicles on this portion of the driveway, and sent him a letter which said in part: "While we have no adamant objection about your using the driveway apron located on our lot at this time, I believe it would be healthy for us to have a discussion about a potential driveway easement and use of the apron on an interim basis."

¶3 The discussions apparently were not successful because the Kmiecs brought an action for trespass. They also moved for a temporary restraining order prohibiting Vielehr from using the disputed portion of the driveway. At the hearing in March 1999, the parties entered into a stipulation in court. Pursuant to this stipulation, Vielehr was allowed to use the disputed portion of the driveway, and the Kmiecs agreed to have a utility company bore under the asphalt to bring

utility lines onto the Kmiecs' lot. Vielehr also agreed to pay part of the costs of boring. Shortly after the stipulation was entered into, the Kmiecs discovered that the utility company could not bore under the asphalt. The circuit court dissolved the stipulation in December 1999.

¶4 After the hearing on the temporary restraining order, Vielehr filed a third-party complaint against Marjan Kmiec seeking reformation of deed given by Marjan to Vielehr. Marjan and the Kmiecs then moved for summary judgment but the trial court denied both motions.

¶5 The case then went to trial. At trial, the court instructed the jury that it could not find that Vielehr trespassed between March and December 1999, the time the stipulation was in effect, because the stipulation provided that Vielehr was allowed to use the driveway. At the conclusion of the trial, the jury found, among other things, that Vielehr had not trespassed. The Kmiecs appeal on this issue.

¶6 The Kmiecs first argue that the circuit court erred when it denied their motion for summary judgment. Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 497.

¶7 We conclude that the circuit court properly denied the motion for summary judgment. At the time the Kmiecs brought this motion, Vielehr had a claim pending for reformation of the deed Marjan Kmiec gave to him. Had the

trial court ruled in Vielehr's favor on that claim, it would have mooted Vielehr's reformation claim against Marjan Kmiec. Given the pendency of Vielehr's claim, the circuit court properly denied the Kmiecs' motion for summary judgment.<sup>1</sup>

¶8 The Kmiecs next argue that the trial court erred when it instructed the jury that the stipulation was in effect from the time it was entered into in March 1999, until it was set aside by the court in December 1999. The Kmiecs argue that the stipulation was automatically revoked once the utility company said that it could not do the borings. The stipulation was entered into in court. WISCONSIN STAT. § 806.07 (1999-2000), provides that “[o]n motion and upon such terms as are just,” a party may obtain relief from a stipulation. Until the Kmiecs went to the circuit court to have the stipulation dissolved, the stipulation remained in effect. The trial court, therefore, properly instructed the jury that it could find that Vielehr had trespassed during the time the stipulation was in effect.

¶9 The Kmiecs further argue that the verdict on the trespass issue was against the great weight of the evidence. “If the challenge is to the sufficiency of the evidence to support the jury’s verdict—however the motion is designated by the parties (or the court)—the standard is the same for the trial court and for this court on appeal: whether there is any credible evidence, or reasonable inferences based on that evidence, to support the verdict.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 784, 541 N.W.2d 203 (Ct. App. 1995).

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<sup>1</sup> Since we conclude that the court properly denied summary judgment on this basis, we need not address the Kmiecs' additional arguments as to why summary judgment should have been granted to them.

¶10 The jury could reasonably find, based on the evidence presented at trial, that the Kmiec's granted Vielehr permission to use the driveway apron. We conclude that there was credible evidence to support the jury's verdict that Vielehr had not trespassed. For the reasons stated, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

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

