

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 2010

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. 2009AP2901

Cir. Ct. No. 2008CV137

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN T. GULSO AND LAURA J. GULSO,

PLAINTIFFS-APPELLANTS,

V.

JAMES J. JESSIE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County:
THOMAS E. LISTER, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. This appeal arises out of a dispute between James Jessie, on the one hand, and John and Laura Gulso, on the other, regarding access easements James claims on the Gulsos' property. The circuit court granted summary judgment in favor of James, and the Gulsos appeal.

¶2 For the reasons we explain below, we affirm. We also deny James' motion for attorney fees.

BACKGROUND

¶3 The disputed easements are on land formerly owned by James and his ex-wife, Cindy Jessie. Upon their divorce, James quitclaimed to Cindy his interest in this land, which we will refer to as Lot One, and she quitclaimed her interest in the rest of their jointly owned real property to James. In December 2006, Cindy sold Lot One to the Gulsos. A dispute arose between the Gulsos and James, who claimed that in the divorce judgment he had been awarded three easements over Lot One.

¶4 The Gulsos filed this action alleging there was no conveyance of record granting James the three claimed easements and seeking a declaratory judgment to this effect. The complaint also alleged intentional trespass, based on the premise that James had no easements.

¶5 James filed a motion titled "motion to dismiss," accompanied by an affidavit of counsel with a number of documents attached. The affidavit averred that, pursuant to the judgment of divorce between Cindy and James, filed on August 13, 2002, Cindy was awarded approximately four acres and James was awarded real property, including three easements on the parcel awarded to Cindy. The affidavit further averred that the three easements referred to in the judgment of divorce were set forth in the Jackson County Certified Survey Map (CSM) No. 2330, which was recorded in the Register of Deeds office in Jackson County on August 15, 2002. One of the attached documents was a copy of page one and page thirteen of the marital settlement agreement between Cindy and James. Page one stated that, "in the event that the Court grants a divorce as prayed for in the

Petition as filed herein, the parties agree as follows....” The relevant portion on page thirteen stated:

Easements Granted: [James] shall be entitled to three (3) perpetual easements across the approximately four (4) acre parcel being awarded to [Cindy]. Such perpetual easements shall be as follows:

- (a) Easement No. 1: A sixty (60) foot easement in width between the existing fence on the parcel awarded to [Cindy] and the easterly survey line of the properties of [Cindy] as established by the Certified Survey Map. Such easement shall commence at the Town Road known as Norman Road and travel in a northerly direction over such properties of [Cindy].
- (b) Easement No. 2: An easement from the Town Road known as Norman Road across the entire circular drive on the properties to be awarded to [Cindy].
- (c) Easement No. 3: An easement over the now existing driveway that commences from the circular drive situated on the properties to be awarded to [Cindy] and with such easement route to travel over such existing driveway in a northerly direction to the north line of the properties awarded to [Cindy] herein.

Also attached was a quitclaim deed of property from Cindy to James; a quitclaim deed of Lot One from James to Cindy; the CSM, which maps Lot One and shows access easements; a real estate condition report signed by the Gulsos; and a warranty deed executed by Cindy conveying Lot One to the Gulsos.

¶6 James’ accompanying brief asserted that James’ easements ran with the land and the Gulsos had actual notice of the easements when they purchased Lot One, with the result that the Gulsos purchased Lot One subject to the easements. The submissions showing actual notice, according to James, are the warranty deed from Cindy to the Gulsos, which expressly states that the deed is subject to CSM No. 2330, and the real estate condition report signed by the

Gulsos, which identifies “[a]ccess easement to adjacent property owner” as an encumbrance on Lot One.

¶7 The Gulsos filed a brief opposing the motion but did not file any factual materials. The only argument presented in their brief was that the documents submitted by James did not establish compliance with WIS. STAT. § 706.02 (2007-08),¹ commonly referred to as the statute of frauds. In a supplemental letter brief, the Gulsos cited an unpublished per curiam opinion from this court that, they contended, supported their position on lack of compliance with § 706.02. This per curiam opinion ultimately granted equitable relief to the claimed easement holder under § 706.04, which provides that a transaction that does not satisfy the requirements of § 706.02 may be enforceable under doctrines of equity in certain prescribed circumstances.² The Gulsos’ letter brief asserted that “[w]hether [James] has a claim in equity is not a claim before the court.”

¶8 In response to this letter brief, James filed a letter brief arguing that the requirements of both WIS. STAT. § 706.02(1) and (2) were met and, in addition, discussing the equities as between the Gulsos and James. James also submitted his own affidavit addressing those equitable considerations.

¶9 The court held a hearing on the motion. In response to James’ argument on equitable relief, the Gulsos contended that only the issue of compliance with WIS. STAT. § 706.02 was before the court, not the issue of

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The cited per curiam opinion is not considered an authored opinion and therefore may not be cited for either its persuasive or precedential value. WIS. STAT. § 809.23(3)(b), *see* S. Ct. Order 08-02, 2009 WI 2 (eff. July 1, 2009). We therefore do not identify it or discuss it further.

equitable relief. They asserted that, if the court determined that the documents did not show compliance with § 706.02, an evidentiary hearing was needed on the issue of equitable relief. They also requested the opportunity to submit an affidavit opposing James' equitable arguments if the court decided to treat James' motion as one for summary judgment. James' position was that, when the parties had earlier agreed to cancel a scheduled trial, they had agreed that there were only legal issues to resolve.

¶10 At a later date the court rendered an oral decision that James was entitled to equitable relief under WIS. STAT. § 706.04. In the court's view, this made it unnecessary for it to rule on compliance with § 706.02, although the court made a tentative ruling that there was compliance because the conditions of § 706.02(2)(a) and (c) were met. The court also ruled that the Gulsos had actual knowledge of James' easements. The court did not address the Gulsos' request for an evidentiary hearing or for the opportunity to submit additional affidavits and argument on the issue of equitable relief.

DISCUSSION

¶11 On appeal the Gulsos contend that, in granting James relief under WIS. STAT. § 706.04, the circuit court improperly converted James' motion to one for summary judgment and considered matters outside the complaint without providing the notice required by § 802.06(2)(b). According to the Gulsos, this denied them an opportunity to present their position on the issue of equitable relief under § 706.04. They also contend that the court erred in dismissing their complaint because, they assert, the complaint states a claim for relief on the ground that there is no conveyance of record that grants James any easements. They ask that we remand to the circuit court either to put the parties on notice that

it will treat James' motion as one for summary judgment or to deny James' motion to dismiss.

¶12 James, now proceeding pro se, repeats the arguments his attorney made in the circuit court: that there is compliance with the statute of frauds and that the Gulsos had actual notice. He also contends the circuit court correctly decided that he was entitled to equitable relief under WIS. STAT. § 706.04.

¶13 We organize the parties' arguments into the following issues. (1) Did the circuit court properly convert James' motion to dismiss to one for summary judgment? (2) Did the documents James submitted show compliance with WIS. STAT. § 706.02, the statute of frauds? (3) Did the circuit court erroneously exercise its discretion in ruling on the issue of equitable relief for James under § 706.04 without additional argument or factual submissions from the Gulsos? (4) Do the undisputed facts show that the Gulsos had actual notice of James' easements?

¶14 We conclude: (1) the court properly converted James' motion to one for summary judgment; (2) the documents James submitted do not show compliance with WIS. STAT. § 706.02; (3) the circuit court did not erroneously exercise its discretion in ruling on equitable relief for James without additional argument or factual submissions from the Gulsos; and (4) the undisputed facts show the Gulsos had actual notice of James' easements.

1. Conversion of James' Motion to Motion for Summary Judgment

¶15 James’ motion sought an order “dismissing the action pursuant to Section 802.01(2)(a) Wis. Stats.,³ on the grounds that there is no basis in law or fact to support the contention of the Plaintiffs.” James’ brief accompanying his motion was not directed to the allegations of the complaint but to the affidavit and attachments, two of which—the portion of the marital settlement agreement and James’ quitclaim deed—were not attached to the complaint. Despite the title “motion to dismiss,” the substance of the motion is not directed to the allegations of the complaint but to the factual submissions accompanying the motion. Nonetheless, we will assume, as the Gulsos contend, that it is a motion to dismiss the complaint based on failure to state a claim for relief.

¶16 If, on a motion to dismiss for failure to state a claim for relief, matters outside the pleadings are presented to and not excluded by the court, the motion is treated as one for summary judgment pursuant to WIS. STAT. § 802.08, and “all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.” § 802.06(2)(b). As the Gulsos point out, we held in *CTI of Northeast Wisconsin, LLC v. Herrell*, 2003 WI App 19, ¶8, 259 Wis. 2d 756, 656 N.W.2d 794, that § 802.06(2)(b) requires notice of conversion from a motion to dismiss to a motion for summary judgment and an opportunity to present countervailing evidence. In the later case, *Alliance Laundry Systems LLC v. Stroh Die Casting Co.*, 2008 WI App 180, ¶20, 315 Wis. 2d 143, 763 N.W.2d 167, we explained that the requirement is one of “reasonable notice that [the court] will or might convert a motion to dismiss into a summary judgment motion ...” (citing *CTI*, 259 Wis. 2d 756, ¶¶5-6) (emphasis in

³ WISCONSIN STAT. § 802.01(2)(a) governs the procedure for motions generally and does not bear on the substantive nature of James’ motion.

original). “Reasonable notice is that which informs the nonmoving party of the conversion or likelihood of conversion so that they are not taken by surprise.” *Alliance Laundry*, 315 Wis. 2d 143, ¶20 (citation omitted).

¶17 The Gulsos contend they did not have reasonable notice and an opportunity to present additional materials before the court decided James’ argument based on WIS. STAT. § 706.04. Their argument confuses the opportunity to respond to James’ argument on equitable relief—whether with factual submissions or legal argument—with the requirement of reasonable notice that the court would or might consider matters outside the complaint. We address in section three of this opinion the question whether the court erred in deciding the issue of § 706.04. Here we address the issue whether the Gulsos had the requisite notice of conversion of James’ motion to one for summary judgment.

¶18 The Gulsos’ brief in response to James’ motion argued that there was no grant of the easements to James that complied with the statute of frauds. In their argument, the Gulsos specifically addressed averments in James’ counsel’s affidavit and addressed the marital settlement agreement and James’ quitclaim deed, documents that had not been attached to the complaint. While the Gulsos did not submit their own factual materials in response to the motion, it is evident they were not confining their argument to the allegations in the complaint and the documents attached to the complaint.

¶19 A hearing on James’ motion had been scheduled for January 14, 2009, and the Gulsos faxed their brief to James the day before. There is no transcript of the hearing in the record. However, a scheduling order issued as a

result of this hearing provided that the scheduled trial was cancelled and another hearing was set for June 5, 2009.⁴ This order established a schedule for the Gulsos to “file their legal Brief and Memorandum” and for James to file his response and stated: “If any facts are in dispute, respective counsel shall resolve any and all possible conflict(s) or alert the court in writing to any factual issues.”⁵ After this scheduling order was issued, the Gulsos submitted a supplemental letter brief and James, in response, submitted a letter brief and his affidavit addressing equitable relief.

¶20 At the rescheduled hearing on June 5, 2009, both parties accepted as fact certain averments in James’ counsel’s affidavit and attached documents, including the two that were not attached to the complaint. They argued over the legal significance of these facts under WIS. STAT. § 706.02 and statutory recording requirements. The Gulsos asked the court for an opportunity to submit additional material on James’ equitable application of § 706.04 if the court was going to consider that issue, but made no such request with respect to either the issue of compliance with § 706.02 or the issue of recording. On appeal the Gulsos refer to the divorce judgment and the terms of the marital settlement agreement, contending that they are insufficient to comply with the statute of frauds; they do

⁴ The scheduling order mistakenly described the motion to be heard on June 5, 2009, as a motion for declaratory relief. The motion heard on that date was James’ motion to dismiss, and there was no motion for declaratory relief.

⁵ James had objected to the court considering the Gulsos’ brief at the hearing because it was faxed to him late the day before the hearing. It appears that the court did not consider it at the hearing and, thus, the scheduling order started out with briefing by the Gulsos.

not contend the marital settlement agreement or counsel's affidavit, which describes the divorce judgment, was improperly before the circuit court.⁶

¶21 We conclude the Gulsos had reasonable notice that the circuit court was likely to consider matters outside the complaint and attached documents in deciding James' motion and had an opportunity to respond with their own factual submissions. Not only did they themselves rely on James' new factual submissions in their argument, but the scheduling order's direction that the court be apprised in writing of any unresolved factual issues was reasonable notice that the court was not confining its attention to the complaint and attached documents. In the absence of a transcript of the January 14, 2009, hearing, we assume the hearing supports the propriety of the circuit court's consideration of matters outside the pleadings. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.).

¶22 The hearing on June 5, 2009, also demonstrates that the Gulsos understood and had no objection to the court considering some matters outside the complaint and attached documents in ruling on James' motion. Their request that

⁶ We recognize that the title of section III of the Gulsos' main brief on appeal is: "The defendant's motion to dismiss should have been denied because the plaintiffs stated a claim on which relief could be granted: no conveyance of record exists which grants the defendant an easement." However, in this argument they discuss the portion of the marital settlement agreement attached to James' counsel's affidavit, which was not attached to the complaint. And, in an earlier portion of the brief, they argue that "[t]he only matter before the court therefore was whether the certified survey map and the judgment of divorce created easements on the Gulsos' land." Whether or not this is an accurate statement, it demonstrates that the Gulsos believe that matters outside the complaint concerning the divorce judgment (which is not referred to in the complaint nor attached thereto) were properly before the court.

they have the opportunity to submit affidavits and argument before the court decided the issue of equitable relief was limited to that issue. In the context of the entire record, this request is not a basis for concluding they did not have notice that the court was likely to consider matters outside the complaint in making its decision.

¶23 We do not agree with the Gulsos that the court committed itself to communicating with the parties before rendering a decision that considered matters outside the complaint and attached documents. The court’s final comment, “All right. I understand and I will obviously be communicating with counsel about this matter further,” is consistent with its earlier comment that the court was going to “take this under advisement ... read these cases and reread your briefs and ... render a decision on the motion.” It is also consistent with its subsequent rendering of an oral decision—that is, the court “obviously” was going to communicate with the parties further because it was going to rule on James’ motion at a later date.

¶24 Because the Gulsos had reasonable notice that the court might or would consider matters outside the complaint and attached documents and therefore had an opportunity to file their own factual materials, the court properly converted James’ motion to one for summary judgment.

¶25 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

2. Compliance with the Statute of Frauds, WIS. STAT. § 706.02

¶26 Although the circuit court rested its decision on WIS. STAT. § 706.04, we begin with § 706.02 because § 706.04 comes into play when “[a] transaction ... does not satisfy one or more of the requirements of s. 706.02” § 706.04.

¶27 The statute of frauds, WIS. STAT. § 706.02, applies to “every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity,” subject to certain exclusions. WIS. STAT. § 706.001(1). An easement is an interest in land within this definition. *See Rock Lake Estates Unit Owners Ass’n v. Township of Lake Mills*, 195 Wis. 2d 348, 373 n.15, 536 N.W.2d 415 (Ct. App. 1995) (citation omitted).

¶28 A transaction that comes within WIS. STAT. § 706.001 and is not excluded is void unless evidenced by a conveyance that satisfies the requirements of § 706.02(1). As relevant here, these requirements are that the conveyance:

- (a) Identifies the parties; and
- (b) Identifies the land; and
- (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
- (d) Is signed by or on behalf of each of the grantors; and
-
- (g) Is delivered....

WIS. STAT. § 706.02(1).

¶29 A conveyance may satisfy the requirements of WIS. STAT. § 706.02(1) by means of more than one writing if the requirements of § 706.02(2)

are met. *See also* § 706.01(4) (defining a “conveyance” as “a written instrument, evidencing a transaction [in land] that satisfies the requirements of s. 706.02...”).

¶30 James does not argue that any one document satisfies WIS. STAT. § 706.02(1), but instead asserts that several documents together do. We therefore consider only § 706.02(2), and, in particular, paragraphs (a) and (c), because these are the paragraphs the circuit court and James have referred to. Section 706.02(2)(a) and (c) provides:

(2) A conveyance may satisfy any of the foregoing requirements of this section:

(a) By specific reference, in a writing signed as required, to extrinsic writings in existence when the conveyance is executed; or

....

(c) By several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

¶31 The documents James has submitted do not satisfy either WIS. STAT. § 706.02(2)(a) or (c) for the reason that there is no writing signed by Cindy conveying any easement to James. Even if we assume that Cindy signed the marital settlement agreement despite the absence of the signature page from James’ submissions, her agreement does not grant James the three easements. Rather, she is agreeing that, if the court enters a divorce judgment, the court may

award James the three easements on the property that they agree the court may award to her.⁷

¶32 Cindy also signed the deed quitclaiming her interest in the jointly owned property “*except Lot One* of Jackson County Certified Survey Map No. 2330 as recorded in Volume 100⁸ of Certified Survey Maps, Page 306 as Document No. 310908 in the office of the Register of Deeds for Jackson County Wisconsin.” (Emphasis added.) This is plainly not a grant to James of easements on Lot One. The statement in this deed that Cindy’s grant is “[s]ubject to easements of record” cannot logically refer to easements on Lot One because that is the very property excepted from Cindy’s quitclaim to James and is the property that James quitclaimed to Cindy.

¶33 Although in 2006 Cindy signed the warranty deed to the Gulsos and signed the real estate condition report related to that transaction, these documents plainly do not concern any grant of easements to James in 2002.

⁷ James’ position, as expressed in his motion, is that the divorce judgment awarded him the easements. However, he did not include the divorce judgment in his submissions, only a portion of the marital settlement agreement. In reply to the Gulsos’ brief arguing a lack of compliance with the statute of frauds, James has continued to argue generally that the judgment of divorce awarded him the easements, but he also asserts there is compliance with the statute of frauds. If James’ position is that the statute of frauds does not apply because a divorce judgment granting an interest in land is excluded from the statute of frauds, he does not develop this argument, either factually or legally. Accordingly, we do not address it.

⁸ We note that the warranty deed conveying Lot One from Cindy to the Gulsos states that the CSM is recorded in “Volume Ten.” This discrepancy is not material to our resolution of the issues on this appeal.

¶34 The CSM, while it depicts the easements, is not signed by Cindy; it is signed by the surveyor. The quitclaim deed James executed conveying his interest in Lot One to Cindy is not signed by Cindy, only by James.⁹

¶35 Because no document signed by Cindy grants any easement to James, we need not decide whether any combination of the documents could meet the other requirements under WIS. STAT. § 706.02(1) through either § 706.02(2)(a) or (c).

3. Equitable Relief under WIS. STAT. § 706.04

¶36 Because James' documents do not show compliance with WIS. STAT. § 702.02(1) or (2), he must show that the undisputed facts entitle him to equitable relief under § 706.04 in order to be entitled to summary judgment.¹⁰ The

⁹ While James' quitclaim deed refers to the CSM, which depicts the easements, nothing in the deed refers to the easements or suggests that James is retaining any interest in them or in Lot One.

¹⁰ WISCONSIN STAT. § 706.04 provides:

Equitable relief. A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:

(1) The deficiency of the conveyance may be supplied by reformation in equity; or

(2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or

(continued)

circuit court decided that they did. The Gulsos assert the court erred in making this decision without giving them an opportunity to present argument on this issue. We note that in the circuit court the Gulsos' counsel asked the court for the opportunity to submit affidavits and argument in opposition to James' argument for equitable relief, while on appeal the Gulsos mention only the opportunity to present argument.

¶37 The Gulsos suggest that this error by the court involves the circuit court's exercise of discretion, and James does not disagree. We therefore assume without deciding that the standard of review for discretionary decisions is applicable: we affirm if the court applied the correct law to the relevant facts and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. See *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (1982). When, as here, a circuit court does not explain its reasoning, we may search the record to determine whether the record provides a reasonable basis for the court's decision. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

(3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:

(a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or

(b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

¶38 The Gulsos' position is that the issue of equitable relief was not properly before the court at the time of the hearing on June 5, 2009. The record does not support this conclusion. The Gulsos raised the issue of compliance with the statute of frauds in opposition to James' motion, which asserted that he had been granted easements in the divorce judgment. The complaint does not refer to the statute of frauds, so there is no basis for expecting or requiring James to address either WIS. STAT. §§ 706.02 or 706.04 in his motion. Once the Gulsos raised the statute of frauds, we see no reason why James could not respond that, even if there was no compliance with § 706.02, he was entitled to equitable relief under § 706.04. Under the scheduling order, James was permitted to respond.

¶39 The Gulsos' statement in their supplemental letter brief that the issue of James' entitlement to equitable relief was "not a claim before the court" was apparently in anticipation of James relying on WIS. STAT. § 706.04 after reading the per curiam opinion the Gulsos attached. Regardless of the Gulsos' reason for this statement, their statement does not limit the permissible scope of James' response.

¶40 It is true that the scheduling order did not provide for the Gulsos to file a response to James' letter brief and affidavit. However, James filed these on May 21, 2009, two weeks before the scheduled hearing. Nothing prevented the Gulsos from asking the court for permission to file an affidavit or legal argument in response. Similarly, nothing prevented the Gulsos from making their legal argument on this issue at the hearing and having an affidavit with them or at least explaining the nature of the factual showing they were prepared to make. For reasons the Gulsos do not explain, they did none of these things, but instead asserted at the hearing that the issue of equitable relief for James was not properly before the court.

¶41 No doubt it would have been preferable had the circuit court explained, either at the June 5, 2009, hearing or in its subsequent oral ruling, why it did not agree with the Gulsos that it was required to rule first on WIS. STAT. § 706.02 and only later take up the issue of equitable relief. However, the Gulsos have not demonstrated that the circuit court acted unreasonably in making its decision based on the briefs and factual submissions filed before the hearing and on the arguments made at the hearing.

¶42 In addition, even if the court did erroneously exercise its discretion in this regard, we would not reverse unless we were persuaded that the Gulsos' substantial rights were affected thereby. *See* WIS. STAT. § 805.18(2) (“No judgment shall be reversed or set aside ... for error as to any matter of pleading or procedure, unless ... it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse”). Because the Gulsos do not explain on appeal what legal argument or factual submissions they would have presented, we cannot conclude that any substantial right was affected.

¶43 The Gulsos do not challenge the substance of the circuit court's ruling on WIS. STAT. § 706.04 based on the factual submissions before the court. We take this as an implicit concession that, based on the undisputed facts before the circuit court, the court correctly ruled that James was entitled to equitable relief as a matter of law. We therefore do not further discuss this issue.

4. Actual Notice

¶44 The Gulsos' complaint and parts of their argument appear to conflate the issue of whether James has valid easements on Lot One with the issue of

whether the appropriate documents met any applicable recording requirements.¹¹ However, an unrecorded document is effective between the parties to the transaction. *State v. Barkdoll*, 99 Wis. 2d 163, 167, 298 N.W.2d 539 (1980). Recording statutes, generally, prevent those who do not record their interest from asserting title against persons who innocently purchase land from the record owner. *Id.* at 167 n.3. Thus, the issue of recording in this case does not concern the validity of the easements as between Cindy and James. Rather, it concerns the Gulsos' right, if any, to take title to Lot One free and clear of the easements, even if James is the holder of valid easements.

¶45 WISCONSIN STAT. § 706.08(1)(a) provides that “every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first.” If a claimant fails to meet these requirements, the recording statute provides no protection against prior unrecorded interests. *Barkdoll*, 99 Wis. 2d at 168.

¶46 “A purchaser in good faith is ‘one without notice, constructive or actual, of a prior conveyance.’” *Carolina Builders Corp. v. Dietzman*, 2007 WI App 201, ¶31, 304 Wis. 2d 773, 739 N.W.2d 53 (quoting *Kordecki v. Rizzo*, 106 Wis. 2d 713, 719-20, 317 N.W.2d 479 (1982)).

¶47 The undisputed facts here are that the Gulsos had actual notice of the easements James claims at the time they purchased Lot One from Cindy. The

¹¹ WISCONSIN STAT. § 706.05 governs the formal requisites for record. Section 706.05(1) provides that “every conveyance, and every other instrument which affects title to land in this state, shall be entitled to record in the office of the register of deeds of each county in which the land affected thereby may lie.”

warranty deed conveying Lot One to them states: “Subject to terms and conditions according to Jackson County Certified Survey Map No. 2330, recorded in Volume Ten of Surveys, Page 306, as Document No. 310908.” This CSM contains a map of “Lot 1,” which, according to the surveyor’s certificate, is a map of the attached legal description. The map depicts the location of access easements on Lot One. In addition, the real estate condition report identifies “[a]ccess easement to adjacent property owner” as an encumbrance on Lot One. The Gulsos did not in the circuit court and do not on appeal contend that they did not have actual notice of the easements or that, even if they did, on some other legal theory they nonetheless have title to Lot One free of the easements.

CONCLUSION AND ATTORNEY FEES

¶48 We conclude the circuit court properly dismissed the Gulsos’ action on summary judgment. Although we hold that James’ submissions do not show compliance with WIS. STAT. § 706.02, the circuit court concluded that the undisputed facts show that he was entitled to equitable relief from those requirements under § 706.04. The Gulsos’ only challenges to this ruling on equitable relief are that the circuit court improperly considered matters outside the pleadings and erroneously exercised its discretion in making this ruling before they had the opportunity to submit additional legal argument or affidavits. We reject both challenges. We also conclude the undisputed facts show that the Gulsos had actual knowledge of James’ easements.

¶49 James has moved for attorney fees pursuant to WIS. STAT. RULE 809.25(3) on the ground that the Gulsos’ appeal is frivolous because it has no reasonable basis in fact and law. We deny the motion. The Gulsos succeeded in their arguments on lack of compliance with § 706.02, and, although they did not

succeed on their challenges to the court’s ruling under § 706.04, we conclude their arguments on this issue were not frivolous. Because the entire appeal was not frivolous, we do not award attorney fees. *See Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621.

¶50 James also argues in his motion that the circuit court erred in denying his motion for attorney fees under WIS. STAT. § 802.05. Because a reversal of the circuit court’s ruling on this issue would be “a modification of the judgment or order appealed from,” James needed to file a cross-appeal from the court’s order. *See* § 809.10(2)(b). He did not do so and therefore the issue of attorney fees in the circuit court is not before us.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

