

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2011

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. 2010AP2092

Cir. Ct. No. 2008CV11434

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

EARL WIGGINS REVOCABLE TRUST,

PLAINTIFF-APPELLANT,

V.

TEEN CHALLENGE OF WISCONSIN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Dismissed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Earl Wiggins Revocable Trust appeals an order denying its motion for reconsideration. Because we lack appellate jurisdiction, we dismiss the appeal.¹

Background

¶2 The Trust filed a notice of appeal seeking review of an order denying its “motion for reconsideration following a motion for summary judgment.” The Record shows that the circuit court entered a final order granting summary judgment in favor of Teen Challenge of Wisconsin, Inc., and against the Trust, on February 19, 2010.

¶3 The dispute in this matter centered on the removal of a fence located on property owned by the Trust. Teen Challenge owns land adjacent to the Trust’s and removed the fence after receiving permission to do so from the Trust’s tenant, Lange Electric Company. A central issue in the case was whether Lange had the authority to permit Teen Challenge to remove the fence. Based on the Trust’s failure to dispute that Lange had this authority, the circuit court concluded that Lange was authorized to permit removal of the fence. In granting Teen Challenge’s motion for summary judgment, the court explained that the Trust “in effect has conceded, and I believe this goes directly to their claim for negligence and property damage, the [Trust] certainly would not be entitled to recover any

¹ In violation of the Rules of Appellate Procedure, both parties’ briefs are devoid of any Record citations. *See* WIS. STAT. RULE 809.19(1), (3)(a)2. (2009-10). We caution the lawyers to adhere to these Rules in the future.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

property damage for something that in effect they did previously authorize someone to—to accomplish.”

¶4 On March 9, 2010, the Trust moved for reconsideration, asserting: “[I]t is believed that the aspect of the valuation of the fence materials that were removed by the defendant, and never returned and never compensated for by the defendant to the plaintiff needs to be addressed by the court, thereby resulting in this motion for reconsideration.” The circuit court denied the motion by a written order that was entered on May 27, 2010. The notice of appeal was filed on August 24, 2010.

Discussion

¶5 In an order dated November 30, 2010, this court directed the parties to address the scope of this court’s jurisdiction as the first issue in their appellate briefs. We made this request after advising the parties that the February 19, 2010, summary judgment order is a final order from which an appeal as of right could be taken. *See* WIS. STAT. § 808.03(1). We further explained that because the order was entered upon a summary judgment motion, the Trust’s motion for reconsideration did not affect the time for appealing. *See Continental Casualty Company v. Milwaukee Metropolitan Sewerage District*, 175 Wis. 2d 527, 533–535, 499 N.W.2d 282, 284–285 (Ct. App. 1993) (WISCONSIN STAT. § 805.17(3) does not apply to reconsideration motions in a summary judgment context.). We wrote: “Because the Trust’s August 24, 2010 notice of appeal was filed more than ninety days after entry of the February 19, 2010 order, it appears that this court lacks jurisdiction to review the order. *See* WIS. STAT. RULE 809.10(1)(e).” The Trust acknowledges that the summary judgment order was a final order for

purposes of appeal. As such, we now definitively state that we lack jurisdiction to review it.

¶6 In our November 30, 2010, order, we went on to question whether we had jurisdiction to review the circuit court's May 27, 2010, reconsideration order. We explained that an appeal cannot be taken from an order denying a motion for reconsideration which presents the same issues as those determined in the order sought to be reconsidered. *See Silverton Enterprises, Inc. v. General Casualty Company of Wisconsin*, 143 Wis. 2d 661, 665, 422 N.W.2d 154, 155 (Ct. App. 1988). Although a party may move a circuit court to reconsider an order, the order denying reconsideration is appealable only if the reconsideration motion presents issues other than those determined by the original order. *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752, 755 (1972). To determine whether new issues exist, we must compare the issues raised in the motion for reconsideration with those disposed of in the original order. *See Harris v. Reivitz*, 142 Wis. 2d 82, 87, 417 N.W.2d 50, 52 (Ct. App. 1987).

¶7 In an effort to persuade this court that its reconsideration motion presented a new issue, the Trust asserts that the February 19, 2010, summary judgment order did not directly address the issue of property damages and that this was the focus of its motion for reconsideration. The fact that the circuit court may not have addressed the issue of property damages to the Trust's satisfaction does not, however, make the issue *new*. The court concluded during the summary judgment hearing—a decision that is not before this court on appeal—that the Trust waived its right to recover any property damages based on the authority it granted to its tenant, Lange, to allow for such things as removal of the fence. Thus, the issue of the Trust's alleged property damages is not a new issue that would enable it to extend the time to appeal from the original summary judgment

order.² See *Silverton Enterprises*, 143 Wis. 2d at 665, 422 N.W.2d at 156 (recognizing that a motion for reconsideration should not be used as a ploy to extend the time to appeal from an order or judgment when the time to appeal had expired). Accordingly, the notice of appeal was not timely filed and this court lacks jurisdiction.

¶8 Teen Challenge asserts that it is entitled to frivolous appeal costs and fees. As Teen Challenge points out, WIS. STAT. RULE 809.25(3)(a) provides that “[i]f an appeal ... is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees.” What Teen Challenge overlooks is that before this court can make such an award, a motion to recover frivolous appeal costs and fees had to have been made no later than the filing of its brief. See *id.*; see also *Howell v. Denomie*, 2005 WI 81, ¶19, 282 Wis. 2d 130, 147, 698 N.W.2d 621, 629 (“In order for parties before the court of appeals to have the proper notice and opportunity to be heard, parties wishing to raise frivolousness must do so by making a separate motion to the court, whereafter the court will give the parties and counsel a chance to be heard.”). Because Teen Challenge failed to file the requisite motion, this court denies its request for frivolous appeal costs and fees.

By the Court.—Appeal dismissed.

² Further support for our conclusion that the Trust did not present a new issue in its reconsideration motion can be found in the fact that the circuit court did not conduct an additional hearing on the Record prior to issuing its written order denying the Trust’s motion for reconsideration.

