

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2004

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. 04-0805-FT
STATE OF WISCONSIN**

Cir. Ct. No. 99CV000146

**IN COURT OF APPEALS
DISTRICT III**

GARY REISSNER, AND CINDI REISSNER,

PLAINTIFFS-APPELLANTS,

V.

CITY OF PRESCOTT,

DEFENDANT-RESPONDENT,

**BERTON A. BROWN, BETTY J. BROWN, AND
G. ROBERT SHEFFERS AND ASSOCIATES, INC.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gary and Cindi Reissner appeal a summary judgment dismissing their action against the City of Prescott to recover attorney fees they claim they incurred because of the City's wrongful act. Specifically, the Reissners argue they are entitled to attorney fees because the City failed to properly obtain approval for the subdivision of certain property, making it necessary for them to obtain legal counsel to defend their property interest. We reject this argument and affirm the judgment.

BACKGROUND

¶2 Berton and Betty Brown retained land surveying services in connection with the subdivision of riverfront property they owned along the St. Croix River. The surveyor prepared a certified survey map dividing the property into two lots, one including a single-family residence and the other standing vacant. In September 1991, the City of Prescott Plan Commission and City Council approved the subdivision as described in the certified survey map.

¶3 The Browns subsequently sold one lot to the Reissners and the vacant lot to Michael and Joan Gresser. In May 1996, the Gressers applied for setback and lot size restriction variances. The Wisconsin Department of Natural Resources objected to the variance requests, arguing it had never been notified of the certified survey map, as required under the terms of the City's ordinances. The Prescott Zoning Board of Appeals consequently found that the lots created by the map were rendered illegal, void and non-existent.

¶4 After various administrative appeals, the board ultimately granted the Gressers a conditional use variance request, consistent with the original subdivision. The DNR brought suit in circuit court, seeking review of the board's decision. Although the Reissners were not named or otherwise impleaded in the

suit, they nevertheless chose to intervene. After a DNR administrative rule change, the City and the DNR reached a settlement maintaining the original subdivision. The Reissners brought the underlying suit to recover attorney fees incurred to protect their property interest. The circuit court ultimately granted the summary judgment motions filed by both the Browns and the City, effectively denying the Reissners' action for attorney fees. This appeal follows.¹

DISCUSSION

¶5 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 “[P]arties to litigation are generally responsible for their own attorney fees unless recovery is expressly allowed by either contract or statute, or when recovery results from third-party litigation.” *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 571, 547 N.W.2d 592 (1996). However, this court has recognized the inequity involved when an individual is forced to defend his or her interests in a lawsuit in which the individual does not properly belong because of a wrong committed by someone else. *See Bank One v. Koch*, 2002 WI App 176, ¶14, 256 Wis. 2d 618, 649 N.W.2d 339. Therefore, an exception to the “American rule” permits the award of attorney fees “if the wrongful acts of a defendant have

¹ From the Reissners' notice of appeal, it appears they are appealing only that part of the summary judgment granted in favor of the City.

involved a plaintiff in litigation with others, or placed him [or her] in such relation with others as to make it necessary for the plaintiff to incur expenses to protect his [or her] interest.” *Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002 (1922).

¶7 Citing *Meas v. Young*, 142 Wis. 2d 95, 101, 417 N.W.2d 55 (Ct. App. 1987), which applied the *Weinhagen* exception to the American rule, the Reissners claim that the City’s failure to obtain DNR approval of the subdivision placed them in a position that necessitated incurring legal expense to protect their property interest. We are not persuaded.

¶8 The *Meas* court acknowledged that applied broadly, the equitable exception would swallow the traditional rule that each party must pay for its own attorney fees. *Id.* at 106. The application of the exception in *Meas* was therefore limited to the “exceptional circumstances” of that case. *Id.* The facts of *Meas* are distinguishable from the present case. Significantly, in *Meas*, the party seeking attorney fees was impleaded into the litigation unlike here, where the Reissners chose to intervene in the action.

¶9 To the extent the Reissners claim their decision to intervene was necessary to protect their interest, the City and the DNR were adversaries in the litigation. Although there is some indication in the record that the Reissners actually opposed the ultimate validation of the subdivision, regardless whether they sided with the DNR or the City, arguments for and against validity of the subdivision were made by the respective parties. Although the Reissners may have thought their intervention was wise, they have failed to establish that it was necessary. We therefore decline to apply the *Weinhagen* exception to the American rule.

By the Court.—Judgment affirmed.

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

