COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP210 **Cir. Ct. No. 2005CV115**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LUKE P. THOMPSON,

PLAINTIFF-APPELLANT,

LISA A. THOMPSON,

PLAINTIFF,

V.

TOWN OF BROOKLYN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green County: WILLIAM EICH, Reserve Judge. *Judgment affirmed in part; reversed in part and cause remanded.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. Luke Thompson, pro se on appeal and pro se at times before the circuit court, appeals a circuit court judgment that dismissed his complaint against the Town of Brooklyn and awarded the Town $10,000 in attorney's fees as a sanction against Thompson for maintaining frivolous claims. Thompson's complaint arose from a road improvement project by the Town that Thompson claimed resulted in reduced access between the improved road and at least portions of his parcel of property.

¶2 Thompson advances numerous arguments, chief among them that the circuit court erred in: (1) granting summary judgment to the Town on his claims that the project's effects on access to his property constituted a compensable taking, and (2) imposing the $10,000 sanction for maintaining those claims. We reject all of Thompson's arguments, except his challenge to the sanction. We conclude that Thompson's claims were not frivolous based on the relevant legal precedents. We therefore affirm the part of the judgment dismissing Thompson's complaint but reverse the part imposing the sanction. Accordingly, we remand for the court to enter an amended judgment without the sanction.

¶3 In addition, the Town moves this court for sanctions against Thompson for maintaining a frivolous appeal. We deny the motion because we conclude that Thompson's appeal is not frivolous.

BACKGROUND

¶4 In 2003, the Town improved a road bordering a parcel of property that Thompson owns.[1] Thompson's parcel adjoining the improved road includes both residential property and cultivated fields.

¶5 Thompson sued the Town over the project in 2005, alleging claims that fell into two general categories. The first category pertained to alleged damage to an "ancient" fence, trees, and other vegetation on his property. We will refer to those claims as Thompson's damage-to-vegetation claims. The second category pertained to alleged changes in access from the improved road to and from Thompson's residence and particular fields within his parcel. We will refer to those claims as Thompson's access claims.

¶6 In 2007, the circuit court dismissed all of Thompson's claims on summary judgment, and Thompson appealed. In an October 2008 unpublished per curiam decision, this court reversed and reinstated the access claims. However, we concluded that the circuit court properly dismissed Thompson's damage-to-vegetation claims.

¶7 On remand, the Town moved in limine for an order, based on our decision, limiting the scope of trial to Thompson's access claims, excluding damage-to-vegetation claims. Thompson opposed the motion, arguing that he still had a viable claim for damage to vegetation that had been located outside the

[1] Thompson's wife is a co-owner of the property and was a party below, but she is not a party to this appeal. For the sake of simplicity, we refer only to Thompson, even when discussing ownership of the property or the circuit court proceedings to which Thompson's wife was a party.

Town's sixty-six-foot right-of-way. The circuit court disagreed and denied the motion.

¶8 Thompson moved for reconsideration, arguing that the circuit court should treat his unamended complaint as if amended to "conform to the evidence" under WIS. STAT. § 802.09(2) (2009-10)[2] or, in the alternative, for leave to amend his complaint under § 802.09(1). Thompson asserted that he could point to evidence showing that some of the vegetation on his property that was destroyed by the project was outside the Town's right-of-way. The circuit court denied Thompson's motion for reconsideration.

¶9 In the course of discovery, Thompson admitted that he retained "reasonable access" to his residence and to at least some of the cultivated field areas of his parcel, but he denied that he had "reasonable access" to other portions of the parcel. Thompson maintained that the Town declared two existing field access points "void" as a result of the road project and moved a third access point to a location on a permanent marsh that made it useless. According to Thompson, it would cost approximately $3,160 to reconstruct the access he had prior to the project.

¶10 The parties disputed whether Thompson's "reasonable access" admissions undermined Thompson's access claims. More specifically, the parties disputed whether Thompson's admissions established that, as a matter of law, there was no compensable taking because he retained "reasonable access" under ***National Auto Truckstops, Inc. v. DOT***, 2003 WI 95, 263 Wis. 2d 649, 665

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

N.W.2d 198. In addition, the Town argued that, under ***Sippel v. City of St. Francis***, 164 Wis. 2d 527, 476 N.W.2d 579 (Ct. App. 1991), if all that is at issue as a result of the government action is a change in access to private property, then in order to rise to the level of a compensable taking that change must deprive a property owner of all, or substantially all, beneficial use of the property, and therefore in this case Thompson's admission of some "reasonable access" rendered any form of takings claim meritless.

¶11 The circuit court granted summary judgment to the Town.[3] The court concluded that, because Thompson admitted to having reasonable access to his residence and some of his field areas, Thompson effectively conceded as a matter of law that he retained reasonable access to his property. In addition, the court concluded that the evidence showed as a matter of law that Thompson was not deprived of all, or substantially all, beneficial use of his property.

¶12 The circuit court also granted a Town motion for a sanction against Thompson for maintaining frivolous claims. Specifically, the court concluded that Thompson's access claims were frivolous and ordered Thompson to pay $10,000 of the Town's attorney's fees.

¶13 We reference additional facts as necessary to our discussion below.

[3] To be precise, the Town's motion that resulted in the judgment was styled as a motion in limine, not as a motion for summary judgment. The Town requested in that motion that the circuit court exclude "evidence that is … inconsistent with Plaintiff's admissions that he has reasonable access to his property." However, because the court granted the Town's motion and entered judgment dismissing Thompson's complaint after considering the parties' evidentiary affidavits, we agree with Thompson that the court in effect treated the Town's motion as a motion for summary judgment. Indeed, the circuit court acknowledged in its decision that the Town's motion might be considered a motion for summary judgment and that, if analyzed as such a motion, the Town would be entitled to judgment. Accordingly, the primary question in this appeal is whether summary judgment was properly granted.

DISCUSSION

¶14 As indicated above, Thompson advances several arguments, the main ones being that the circuit court erred in granting summary judgment to the Town on his access claims and in imposing the $10,000 sanction for those claims. Before reaching those arguments, we first address other arguments Thompson makes relating to his damage-to-vegetation claims.

1. Damage-to-vegetation Claims

¶15 Thompson makes three arguments relating to his damage-to-vegetation claims. We reject each.

¶16 Thompson first argues that: (1) his complaint, if construed liberally, alleges damage to vegetation on his property outside the Town's right-of-way, (2) our 2008 decision did not address or dispose of such claims and, therefore, (3) the circuit court should not have limited proceedings to Thompson's access claims after our 2008 decision and remand. However, even if we assume the first assertion to be true, the second is not accurate. Our 2008 decision disposed of all of the damage-to-vegetation claims in this case.

¶17 We concluded in our 2008 decision that Thompson could not maintain his "claims for damage to … vegetation." It is true that our decision did not expressly address whether Thompson might have a claim for loss of vegetation outside the Town's right-of-way. Rather we focused on whether Thompson owned land within the Town's right-of-way and whether the right-of-way was fewer than sixty-six feet in width. However, our decision was based on Thompson's fewer-than-sixty-six-feet argument, which we rejected. The implication of Thompson's argument for a smaller right-of-way area was that his

lost vegetation had been within the sixty-six-foot area, or at least that Thompson was not arguing to the contrary. Whether Thompson's complaint could be construed to include a claim for vegetation outside the sixty-six-foot right-of-way is beside the point, given the arguments he presented in the prior appeal.

¶18 If Thompson believed at the time of the previous appeal that summary judgment on his damage-to-vegetation claims was improper because some of the lost vegetation had been located outside the sixty-six-foot area in dispute at that time, he should have made such an argument then. We will not consider the argument now, because to do so would unfairly allow Thompson to re-litigate the previous appeal by making an argument that he should have made in that appeal. He forfeited that argument. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("[F]orfeiture is the failure to make the timely assertion of a right."). Thompson does not now suggest that we overlooked any such argument in the prior appeal.

¶19 Thompson's second argument relating to his damage-to-vegetation claims is that, after the remand from our 2008 decision, the circuit court should have treated his complaint as amended to include a claim for vegetation outside the sixty-six-foot right-of-way in order to "conform to the evidence" under WIS. STAT. § 802.09(2). For the reasons already discussed, we question whether this argument is properly before us in light of the arguments presented and resolved in our 2008 decision. However, even assuming without deciding that Thompson's conform-to-the-evidence argument is not precluded by that decision, for the following reason this argument is without merit.

¶20 WISCONSIN STAT. § 802.09(2) on its face is concerned with amendments to pleadings to conform to the evidence *at trial*, not, as Thompson

suggests, with amendments to conform to the evidence on summary judgment. The statute provides, in part, as follows:

> If issues not raised by the pleadings *are tried* by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the *trial* of these issues. If evidence is objected to *at the trial* on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended ….

Section 802.09(2) (emphasis added). Consistent with this statutory language, we have previously rejected argument that § 802.09(2) applies outside the trial context. *See* ***Thom v. OneBeacon Ins. Co.***, 2007 WI App 123, ¶¶24-25, 300 Wis. 2d 607, 731 N.W.2d 657. Thompson neither acknowledges ***Thom*** nor provides any authority to the contrary. We therefore consider his "conform-to-the-evidence" argument insufficiently developed and address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

¶21 Thompson's third argument relating to his damage-to-vegetation claims is that, after remand from our 2008 decision, the circuit court should have granted his motion for leave to amend his complaint to include a claim for loss of vegetation outside the sixty-six-foot right-of-way. For the following reasons, we conclude that the circuit court did not erroneously exercise its discretion in denying the motion.

¶22 The general rule is that a party may amend a pleading "by leave of court …, and leave shall be freely given at any stage of the action when justice so requires." *See* WIS. STAT. § 802.09(1). "Statutes governing amendment of

pleadings are to be liberally construed to permit the presentation of the entire controversy providing such amendment does not unfairly deprive the opposing party of an opportunity to meet the new issue." ***Zobel v. Fenendael***, 127 Wis. 2d 382, 393, 379 N.W.2d 887 (Ct. App. 1985).

¶23 The decision on whether to grant leave to amend is a discretionary one for the circuit court. *See* ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. We uphold an exercise of discretion as long as the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***

¶24 Here, the circuit court acknowledged the proper legal standards, including the general rule liberally permitting amendments. However, the court reasoned that more than four years had passed since Thompson had filed his complaint; that Thompson had made no prior effort to amend the complaint; and that Thompson failed to point to facts that would tip the balance in favor of allowing an amendment at such a late date. In addition to the factors cited by the circuit court, we observe that Thompson did not move for leave to amend until a year after our 2008 remand of Thompson's case to the circuit court. The point is not obscure or complex. So far as the record reveals or Thompson now argues, from the first day of this litigation he could have identified the areas of allegedly lost vegetation. All of these facts support the reasonableness of the court's decision to deny Thompson's motion at the time it was made.

¶25 Thompson's basis for arguing that the circuit court acted unreasonably in denying his motion is somewhat unclear. He appears to assert that the reason he did not move for leave to amend earlier was that he believed, based in part on unspecified "actions" of the Town, that a live dispute regarding

vegetation remained to be tried after our 2008 decision. However, Thompson does not explain with adequate citations to the record or legal authority what Town actions he is referring to, or why this belief was reasonable based on any such actions. Therefore, Thompson fails to persuade us that the circuit court erroneously exercised its discretion.

¶26 Having rejected each of Thompson's arguments relating to his damage-to-vegetation claims, we turn to his arguments relating to the summary judgment on his access claims.

2. Summary Judgment on the Access Claims

¶27 Thompson makes two arguments relating to the circuit court's grant of summary judgment in favor of the Town on Thompson's access claims. One argument goes to the procedure that the circuit court followed and the other goes to the merits of the court's summary judgment decision. We reject each argument in the sections that follow.

a. Summary Judgment Procedure

¶28 Thompson argues that the circuit court should not have granted summary judgment to the Town because the procedure that the court followed failed to comply with WIS. STAT. § 802.08(1) and (2). Section 802.08(1) and (2) provide, in relevant part, as follows:

> **(1)** AVAILABILITY. A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order … move for summary judgment ….
>
> **(2)** MOTION. Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing ….

¶29 It is undisputed that the Town's motion failed to comply with the eight-month time limit in WIS. STAT. § 802.08(1) and that there was no applicable scheduling order in place. Based on those undisputed facts, Thompson argues that the circuit court lacked the discretion to grant summary judgment. Thompson further argues that, even if the court had such discretion, the court could not properly exercise its discretion without giving Thompson notice under § 802.08(2) that the Town's motion would be treated as one for summary judgment. According to Thompson, the court should have set a schedule for summary judgment under which he would have had additional time to make submissions.

¶30 Even assuming, without deciding, that the circuit court erred by following the procedure it did, we are not persuaded by Thompson's argument because we see no reason to conclude that Thompson's substantial rights were affected by this assumed error. *See* WIS. STAT. § 805.18.[4] The record shows that Thompson submitted evidentiary affidavits and argument opposing the Town's motion and that the circuit court addressed Thompson's evidence and argument. *Cf.* ***Larry v. Harris***, 2008 WI 81, ¶43, 311 Wis. 2d 326, 752 N.W.2d 279

[4] WISCONSIN STAT. § 805.18 provides as follows:

> **Mistakes and omissions; harmless error. (1)** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.
>
> **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

(suggesting that the concern with a court's sua sponte grant of summary judgment without statutorily required notice is that it deprives parties of the opportunity to submit evidence). Our conclusion on this issue is further supported by the fact that Thompson does not now explain what additional evidence he might have submitted that would have been material to the summary judgment decision.

b. Merits of the Summary Judgment Decision

¶31 Thompson argues that the circuit court's summary decision was wrong on the merits and that the issue of "reasonable access" should have been tried. For the following reasons, we disagree and conclude that the circuit court properly granted summary judgment in favor of the Town on Thompson's access claims.

¶32 We review summary judgment de novo, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). We need not repeat all of those standards here; it is sufficient to say that 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. *See* ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984).

¶33 The parties dispute whether summary judgment was proper in light of the standards for a compensable taking of access rights as set forth in ***National Auto*** and ***Sippel***. As discussed further below, it appears to us that ***National Auto*** narrowly addresses the question of whether a party in a partial taking involving a fee interest retains "reasonable access," *see* ***National Auto***, 263 Wis. 2d 649, ¶19, while in contrast ***Sippel*** addresses the question of whether a change in access resulting from government action that does not involve a fee interest deprives a

property owner of "all, or substantially all, of the beneficial use" of property, *see* ***Sippel***, 164 Wis. 2d at 538. We conclude that the ***Sippel*** deprivation-of-substantially-all-beneficial-use standard applies here and uphold the circuit court's summary judgment decision on that basis. It appears to us that ***National Auto***'s discussion of reasonable access is limited to the context of partial takings of fee interests under WIS. STAT. § 32.09(6), which is a context different than this one, and Thompson fails to provide a persuasive argument that ***National Auto*** should be read more broadly.

¶34 ***Sippel*** involved a municipality's improvements to a road abutting an apartment complex. ***Sippel***, 164 Wis. 2d 530-32. Perpendicular to the road at issue were twenty parking stalls that were partly on the apartment owner's property and partly on the municipality's right of way. ***Id.*** at 531. The improvements effectively blocked access to the property owner's parking stalls from the road. ***Id.*** at 531-32, 538. The issue was whether the improvements constituted a taking of access rights. ***Id.*** at 533. In addressing this issue, we first observed that there had been no condemnation or other taking of any fee interest in property. ***Id.*** at 536. We considered whether we should apply WIS. STAT. § 32.09(6)(b), a provision in the partial takings statute which provides that the damages award in a partial taking may take into consideration the "[d]eprivation or restriction of existing right of access to [a] highway from abutting land." *See* ***id.*** at 536-37 (quoting § 32.09(6)(b)). We determined, however, that § 32.09(6)(b) was inapplicable because an alleged taking of access rights, without a corresponding taking of a fee interest in property, is not a partial taking within the meaning of § 32.09(6).[5] *See* ***id.*** We further observed in ***Sippel*** that it was unclear

[5] WISCONSIN STAT. § 32.09(6) provides, in pertinent part, as follows:

(continued)

whether the municipality had acted pursuant to a duly authorized exercise of its police power, a fact which might have affected our analysis given language in § 32.09(6)(b) that "nothing herein shall operate to restrict the power … to deprive or restrict … access without compensation under any duly authorized exercise of the police power." *See* ***id.*** at 537 & n.9.

¶35 Having decided in ***Sippel*** that WIS. STAT. § 32.09(6) did not apply, and finding no case with analogous facts, we turned to general principles from prior federal and Wisconsin takings cases. *See* ***id.*** at 537. We explained that the law in Wisconsin is "that a claim for just compensation must be supported by a taking of property," and that "[i]ncidental damage[s] to property resulting from governmental activities … is not considered a taking of the property for which compensation must be made." ***Id.*** (quoting ***Howell Plaza, Inc. v. State Hwy.***

> In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:
>
> (a) Loss of land including improvements and fixtures actually taken.
>
> (b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

Comm'n, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979)). In contrast, a taking occurs when a "property owner has been deprived of 'all, or substantially all, of the beneficial use of [the] property.'" ***Id.*** (quoting ***Howell Plaza***, 92 Wis. 2d at 81). Applying these principles, we concluded that the property owner had not shown that it was denied substantially all beneficial use of its property. ***Id.*** We further concluded "[t]he restriction of access to parking with no taking in fee does not rise to a compensable taking." ***Id.***

¶36 Here, the situation is much like the one in ***Sippel***. The Town, like the municipality in ***Sippel***, improved a road abutting private property in a manner that reduced, but did not eliminate, the property owner's access to the road. Thompson, like the property owner in ***Sippel***, has asserted that this government action constituted a taking. As in ***Sippel***, there is no condemnation or other taking of a fee interest in land. Therefore, under the reasoning of ***Sippel***, there is no partial taking and WIS. STAT. § 32.09(6)(b) does not apply. Finally, it is unclear in this case, as it was in ***Sippel***, whether the governmental authority was acting pursuant to a duly authorized use of its police power.[6]

¶37 Accordingly, we conclude that we should apply the ***Sippel*** standard and ask whether the Town's road improvement project deprived Thompson of all, or substantially all, of the beneficial use of his property. This conclusion is

[6] Without record or legal citations, the Town makes a one-sentence assertion in its brief that its actions were an exercise of its police power. Thompson disputes this assertion by the Town. However, it does not appear that the parties' current, fleeting dispute regarding police power was squarely presented to the circuit court and in any case it was not resolved by that court. Moreover, it is not necessary to resolve this issue here, just as it was not necessary to resolve it in ***Sippel v. City of St. Francis***, 164 Wis. 2d 527, 476 N.W.2d 479 (Ct. App. 1991), under circumstances that Thompson is now unable to meaningfully distinguish from the circumstances here.

dispositive on the question of whether Thompson's access claims should have survived summary judgment because Thompson does not argue that his admissions and the other evidence in this case can be reasonably viewed as showing that he was deprived of substantially all beneficial use of his property, nor do we see how Thompson could make such an argument given his admissions.

¶38 Rather, as we have already indicated, Thompson argues that the ***National Auto*** "reasonable access" standard applies. Under that standard, Thompson argues that summary judgment was improper for two related reasons. First, ***National Auto*** states that the question of whether a property owner retains reasonable access is typically a fact question for the jury. *See* ***National Auto***, 263 Wis. 2d 649, ¶¶20-22. Second, Thompson submits that his admissions to reasonable access to *portions* of his property do not establish as a matter of law that he retains reasonable access to his property, as the concept of reasonable access is discussed in ***National Auto***.

¶39 We need not decide whether Thompson is correct in his interpretation of the reasonable access standard or whether, if the standard applied, his access claim should have gone to the jury. This is because we conclude that ***National Auto*** does not apply to the facts of this case. ***National Auto*** involved a partial taking of a fee interest in property—0.27 acres of a larger parcel. When the court in ***National Auto*** discussed the reasonable access standard, it was interpreting and applying WIS. STAT. § 32.09(6)(b). *See* ***id.***, ¶¶17-19.[7] Based on

[7] A brief summary of ***National Auto Truckstops, Inc. v. DOT***, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198, reveals that its focus was the interpretation of WIS. STAT. § 32.09(6). The question was whether the owner of a truck stop was entitled to compensation under § 32.09(6)(b) based on a taking in connection with a highway project. ***Id.***, ¶¶14-22. The DOT had condemned a portion of the truck stop owner's frontage property along the highway for a project that involved widening the highway and building a frontage road on the condemned property. ***Id.***, ¶4. (continued)

Sippel, however, § 32.09(6) does not apply to Thompson because there is no underlying taking of any fee interest.

¶40 We recognize that there are isolated statements in ***National Auto*** that might, at first glance, suggest that the reasonable access standard applies outside the context of WIS. STAT. § 32.09(6). In particular, the court stated at one point, without qualification at that juncture, that "[t]he essential inquiry is whether a change in access is 'reasonable.'" ***National Auto***, 263 Wis. 2d 649, ¶21. However, we conclude that when the ***National Auto*** opinion is read as a whole, any such statements are correctly understood as addressing only what § 32.09(6)(b) requires.

¶41 Thompson argues that ***Sippel*** may be controlling as to the taking of "property," but not as to the taking of an "existing right of access." He argues that ***National Auto***, not ***Sippel***, provides the standard for a taking of "access." It is not clear what Thompson means when he refers to "property" in this context, but what he seems to mean is a fee interest in property. Therefore, his argument is

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The truck stop previously had two points of direct access to the highway; following the highway project, the truck stop had no direct highway access. ***Id.***, ¶5. After the project, the only access to the property was by way of the new frontage road off the highway, which could be accessed only at an intersection some distance from the truck stop. ***Id.***

The ***National Auto*** court explained that the central question was "whether the changed access constitute[d] a 'deprivation' or 'restriction' of National Auto's right of access" under WIS. STAT. § 32.09(6)(b). ***Id.***, ¶18. It reiterated the well-established doctrine that "a person who owns property abutting a public street has a right of access, or right of ingress or egress, to and from the street. Although this right is subject to reasonable regulations in the public interest, it is a property right, the taking of which requires compensation." ***Id.***, ¶19 (citation omitted). It also stated that "deprivation of direct access to a highway does not constitute a taking of property provided reasonable access remains." ***Id.*** (citation and emphasis omitted). The court then held that a jury question remained as to whether the DOT's change to the truck stop's highway access—from direct access to access only via the frontage road—was reasonable. ***Id.***, ¶¶20-22.

unpersuasive because ***Sippel*** involved a right of access. *See* ***Sippel***, 164 Wis. 2d at 533, 538.

¶42 Thompson also argues that any conflict between the supreme court's ***National Auto*** opinion and this court's ***Sippel*** opinion must be resolved in favor of ***National Auto***. This is certainly true, but Thompson fails to persuade us that such a conflict exists. The court in ***National Auto*** did not state, contrary to ***Sippel***, that WIS. STAT. § 32.09(6)(b) applies in all cases involving access rights. While, as we have already suggested, there is an argument that isolated statements in ***National Auto*** could be read to implicitly overrule ***Sippel*** without saying so, it is more reasonable to conclude that the ***National Auto*** court had no reasons to overrule or address ***Sippel*** because the ***National Auto*** court's analysis was limited to partial takings under § 32.09(6), while ***Sippel*** addressed a different category of adverse governmental impact on private property.

¶43 In sum, for the reasons stated, we conclude that the circuit court properly granted summary judgment to the Town under the approach used in ***Sippel***. We next turn to Thompson's argument that the circuit court should not have imposed the $10,000 sanction and to the Town's motion for sanctions on appeal.

3. Sanctions

¶44 As indicated above, the circuit court concluded that Thompson's access claims were frivolous and imposed a $10,000 sanction, representing a portion of the Town's total attorney's fees. The parties' disagreement regarding the propriety of the $10,000 sanction turns on whether Thompson's claims were frivolous because they were not "warranted by existing law or by a nonfrivolous argument for the extension … of existing law" or were lacking in "evidentiary

support." *See* WIS. STAT. § 802.05(2)(b) and (c). Stated more simply, the question is whether Thompson's claims had any reasonable basis in law or in fact.

¶45 When we address whether a claim is frivolous, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *See* ***Brunson v. Ward***, 2001 WI 89, ¶27, 245 Wis. 2d 163, 629 N.W.2d 140. However, the ultimate question of whether a claim is frivolous is a question of law that we review de novo. *See* ***id.*** Here, there are no disputed material fact findings, so our analysis is de novo.

¶46 The alleged frivolousness of a claim is "an especially delicate area of the law." ***Id.***, ¶28. "We resolve any doubts against a [conclusion] of frivolousness." ***Id.*** This approach encourages both law development based on "creative and innovative" advocacy as well as zealous representation of clients' interests by their attorneys. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994).[8]

¶47 In imposing the sanction, the circuit court appeared to reason that, even if the court applied the ***National Auto*** "reasonable access" standard, Thompson's admissions that he retained reasonable access to his residence and to at least some areas of his parcel established that his access claims lacked a reasonable basis in law or in fact. The Town's argument on appeal largely echoes

[8] We recognize that the policy goals expressed in ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994), contemplate professional advocacy by attorneys, but these goals still have relevance in the context of a pro se litigant, which was Thompson's status at times before the circuit court and now on appeal. Law development may sometimes benefit from a creative pro se argument, and pro se litigants should not be unnecessarily discouraged from zealously seeking to protect their legal interests and rights.

the court's reasoning. The Town asserts that "there … is no good faith argument that Thompson was unaware that he retained reasonable access to his property."

¶48 We disagree with the circuit court and Town on the frivolousness issue because we conclude that (1) Thompson reasonably argued, albeit incorrectly, that ***National Auto*** applies to these circumstances, and (2) if ***National Auto*** applies, then Thompson reasonably argued that the question of "reasonable access" was a disputed fact issue for the jury to decide and the case was not appropriate for summary judgment.

¶49 First, although we have concluded that ***Sippel***, not ***National Auto***, applies to these circumstances, Thompson reasonably argued that ***National Auto*** applies. As suggested by our discussion in the previous section, there is a reasonable, although we conclude incorrect, argument that isolated statements in ***National Auto*** imply that the reasonable access standard applies generally to any alleged "taking of access" and is not limited to the context of a partial taking of a fee interest under WIS. STAT. § 32.09(6). Similarly, there is a reasonable, although incorrect, argument that ***National Auto*** implicitly overruled ***Sippel***.

¶50 Second, if ***National Auto*** applied to these circumstances, Thompson reasonably argued that the question of reasonable access was a disputed fact issue for the jury to decide. Thompson correctly pointed out that ***National Auto*** makes clear that reasonable access is typically a jury question. The Town's position is apparently that Thompson's admissions were enough, if ***National Auto*** applied, to take the question from the jury and decide the reasonable access question against Thompson as a matter of law. However, ***National Auto*** does not make clear whether the Town's position is correct.

¶51 For these reasons, we conclude that Thompson's access claims were not frivolous.[9]

¶52 Finally, the Town moves this court for sanctions against Thompson under WIS. STAT. RULE 809.25(3)(c) for maintaining a frivolous appeal. "To award costs and attorney fees, an appellate court must conclude that the entire appeal is frivolous." ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. It should be apparent from our discussion above and from the fact that Thompson has prevailed on the issue of the $10,000 sanction that Thompson's appeal is not frivolous. We therefore deny the Town's motion.

CONCLUSION

¶53 For all of the reasons stated, we affirm the part of the circuit court judgment dismissing Thompson's complaint but reverse the part of the judgment imposing the $10,000 sanction. We remand for the circuit court to enter an amended judgment without the sanction. Finally, we deny the Town's motion for sanctions on appeal.

By the Court—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

[9] Given our conclusion that Thompson's access claims were not frivolous, we need not and do not address several other arguments that Thompson raises in challenging the sanction. Those arguments include that the Town's motion for sanctions was untimely, that the motion was not "made separately" as required by WIS. STAT. § 802.05(3)(a)1., that the motion was not sufficiently specific, that the sanction was excessive, and that Thompson should not have been sanctioned personally because he was represented by counsel at relevant times.