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**DISTRICT II**

February 22, 2017

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Fond du Lac County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2016AP543

Town of Eldorado v. John C. Gray (L.C. # 2015CV260)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

John and Peggy Gray appeal from a summary judgment in favor of the Town of Eldorado on the town's claims arising from the multiple vehicles kept on the Grays' property. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16). We conclude that the summary judgment record does not establish the absence of disputed material facts. Therefore, the circuit court erroneously granted summary judgment. We reverse and remand.<sup>1</sup>

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<sup>1</sup> The appellant's brief cites throughout to the appendix to the brief rather than to the record on appeal. The Rules of Appellate Procedure require citations to the record. WIS. STAT. RULE 809.19(1) (2015-16). Future briefs filed in this court shall comply with the Rules of Appellate Procedure.

The Town of Eldorado prohibits public nuisances. Eldorado, WI Ordinance Prohibiting Public Nuisances (July 12, 1995). Section 2.2(h) deems a public nuisance “[d]issembled, dismantled, partially dismantled, inoperable, junked, wrecked, or unlicensed motor vehicles, truck bodies, tractors, trailers, boats, or campers in such state of physical or mechanical ruin as to be incapable of propulsion or of being operated upon the public streets, highways, or waters.”

The town also prohibits the storing of “junked vehicles.” Eldorado, WI Ordinance Regulating The Parking Or Storing Of Junked Motor Vehicles (February 14, 1984). Section II of the junked vehicle ordinance prohibits:

[D]issembled, dismantled, partially dismantled, wrecked or non-operable or unlicensed motor vehicle, motor vehicle accessories, farm machinery or farm implements shall be stored or allowed to remain in the open upon private property within the town ... for a period of more than 48 hours unless [in connection with a business being conducted on the property]....

The town brought an action against the Grays to abate what the town claims is a public nuisance arising from the presence on their property of a number of motorized and non-motorized vehicles and a violation of the junked vehicles ordinance. The town sought summary judgment, which the Grays opposed. The circuit court granted summary judgment to the town and imposed forfeitures on the Grays. The Grays appeal.

We review the circuit court’s grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514

N.W.2d 48 (Ct. App. 1994).<sup>2</sup> “We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.” *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994). We will reverse a decision granting summary judgment if material facts were in dispute. *Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

In support of its October 29, 2015 summary judgment motion, the town submitted the affidavit of town chairman Gary Miller. Attached to the affidavit were photographs Miller took of the Grays’ property on October 13, 2015.<sup>3</sup> The town did not submit any other evidence addressing the condition of the vehicles depicted in the photographs.

In opposition to summary judgment, the Grays filed affidavits offering Wisconsin registration information for what they allege is a fully functioning 1989 GMC truck they use for hunting and cutting wood and a fully operational 1978 motor home.<sup>4</sup> The Grays averred that they also own (1) a twenty-foot flatbed double axel trailer used to haul wood and other goods, (2) a car dolly they use as needed, and (3) a tow camper they use seasonally. The Grays denied that any junked, wrecked, abandoned, dismantled or unlicensed vehicles are kept on their

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<sup>2</sup> Contrary to the Grays’ suggestion, summary judgment is not a discretionary act of the circuit court. The Grays’ view has not been the law in Wisconsin for many years. *Wright v. Hasley*, 86 Wis. 2d 572, 578-79, 273 N.W.2d 319 (1979).

<sup>3</sup> The record does not indicate when the photographs attached to the town’s June 1, 2015 complaint were taken.

<sup>4</sup> At the summary judgment hearing, the town indicated that it did not consider the Grays’ 1994 Chevrolet truck to be a nuisance or junked vehicle.

property. The Grays allege that the town's photographs do not depict the property's actual condition.

In its summary judgment brief and at the summary judgment hearing, the town relied upon Miller's photographs to establish the presence of junked, wrecked, unlicensed, disassembled, dismantled or inoperable vehicles on the Grays' property. The town did not explain how it determined that these vehicles fall into any of these categories.

Citing *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777, the circuit court relied upon the town's photographs to grant summary judgment against the Grays. We conclude that the circuit court erred in the manner in which it applied *Physicians Plus* to this case.

In *Physicians Plus*, the court addressed whether it was appropriate to determine on summary judgment that tree branches obstructing a stop sign at a highway intersection constituted a public nuisance. *Id.*, ¶3. The court noted that the photographs and video of the intersection were "convincing" because they depicted the tree and the stop sign in the condition they were on the day of the accident, depicted the same vantage point as the driver who claimed that the stop sign was obstructed, and showed that the branches obstructed the stop sign. *Id.*, ¶¶5, 34. The court noted that none of the defendants submitted evidence disputing the photographs and video. *Id.*, ¶35. The court held that the photographs depicted a public nuisance and summary judgment was appropriate. *Id.*, ¶36.

*Physicians Plus* is distinguishable in two important respects. First, in contrast to *Physicians Plus*, where the "physical evidence" (i.e., photographs), *id.*, ¶36, clearly depicted a stop sign obstructed by branches, the town's photographs of the Grays' vehicles do not establish

the vehicles' condition or a violation of the public nuisance or junked vehicle ordinances. Second, in contrast to the *Physicians Plus* defendants' failure to submit evidence disputing the photographs and video of the intersection with the obstructed stop sign, *id.*, ¶35, the Grays satisfied their obligation as the nonmoving parties to "oppose summary judgment by advancing specific facts showing the presence of a genuine material dispute." *Id.*, ¶35. The Grays' affidavits averred that all of the vehicles on their property were operable and currently or seasonally used and titled where allowed as evidenced by the registration information submitted by the Grays. The summary judgment record contains material factual disputes about whether the vehicles on the Grays' property constitute a public nuisance or violate the junked vehicle ordinance. On this record, the standards for granting summary judgment are not satisfied.

Our de novo review of the record reveals material factual issues that preclude summary judgment. The circuit court's summary judgment ruling is reversed and the cause is remanded.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and the cause is remanded.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*