COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2016

Diane M. Fremgen
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. 2015AP1185 **Cir. Ct. No. 2012CV327**

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

REGINALDO B. FLORES AND MARIA C. FLORES,

PLAINTIFFS-APPELLANTS,

V.

CITY OF WAUKESHA,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

ZURICH AMERICAN INSURANCE COMPANY, MANN BROS., INC., ARGONAUT INSURANCE COMPANY, D/B/A TRIDENT INSURANCE SERVICES AND WAUKESHA WATER UTILITY COMMISSION,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Neubauer, C.J., Hagedorn and Blanchard, JJ.

¶1 PER CURIAM. Reginaldo and Maria Flores paid for repairs to a sewer lateral (lateral) to a property they own on South Grand Avenue in the City of Waukesha, despite believing the obligation ultimately was the City's. Under controlling statutes and city ordinances, we conclude the circuit court properly granted summary judgment to the City.

¶2 The City contracted with Mann Bros., Inc., to install a new sewer main (main) on South Grand Avenue and to connect the main to the laterals that run to owners' buildings. The Waukesha Water Utility Commission installed some of the new laterals, including the one servicing the Flores property.

¶3 A rupture in the Flores lateral resulted in sewage backup in their property.[1] Unsuccessful at remedying the problem themselves, the Floreses hired a plumbing contractor. The Floreses sought to recoup from the City, the Water Utility, and Mann Bros. the $24,388.46 they paid for repairs to the lateral located beneath the street.

¶4 This appeal arises from the Floreses' Fifth Amended Complaint.[2] The instant complaint named only the City as a defendant and alleged only unjust enrichment. Both parties moved for summary judgment. The City argued that under state law and city ordinances, the Flores were responsible for maintaining their own lateral, and that the Floreses' claim was barred by the notice provisions

[1] It is unclear whether the lateral was damaged during the project by a backhoe or coincidentally failed after deteriorating over time.

[2] Their prior complaints failed to set forth a cognizable claim.

of WIS. STAT. § 893.80(1d)(a) (2013-14).[3] The Floreses argued that, under a common-law "dedication of easement" theory, the City is obliged to pay for repairs to the portion of the lateral beneath the street, such that their payment unjustly enriched the City.

¶5 The circuit court held that: (1) WIS. STAT. §§66.0911 and 62.18(1) unambiguously permit the City to require the Floreses to assume responsibility for the cost of installation and maintenance of laterals and repairs to the sewer system; (2) a city ordinance requires property owners to be responsible for the cost of installing and connecting a lateral to a main and for the cost of maintaining the lateral up to the main; (3) the sewer service charge the city levies on sewer frontage properties does not include paying for lateral maintenance; (4) the laterals are not part of the sewer system; (5) the City was not unjustly enriched when the Floreses paid for repairs to their own lateral; (6) the Floreses failed to give timely notice to the City before filing their lawsuit; and (7) even if rules associated with easements applied, frontage owners still have the obligation to maintain the laterals. The Floreses appeal, but concede the third and fourth points.

¶6 This case was determined on cross-motions for summary judgment based on undisputed facts. We review summary judgment de novo, following the same methodology as the circuit court. ***Apple Valley Gardens Ass'n, Inc. v. MacHutta***, 2009 WI 28, ¶12, 316 Wis. 2d 85, 763 N.W.2d 126; *see also* WIS. STAT. § 802.08. Interpretation of a statute or ordinance pose questions of law and are subject to our de novo review. ***Welter v. City of Milwaukee***, 198 Wis. 2d 636, 643, 543 N.W.2d 815 (Ct. App. 1995). If the language of a statute or ordinance is

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

not technical or specially defined, we give it its common, ordinary, and accepted meaning. ***Schwegel v. Milwaukee Cty.***, 2015 WI 12, ¶22, 360 Wis. 2d 654, 859 N.W.2d 78. We ordinarily stop the inquiry if the meaning is plain. ***Id.***

¶7 WISCONSIN STAT. § 62.18(1) provides:

> **Sewers. (1)** CITIES MAY CONSTRUCT. Cities shall have power to construct systems of sewerage, including a sewerage disposal plant and all other appurtenances thereto, to make additions, alterations and repairs to such systems and plants, and when necessary abandon any existing system and build a new system, and to provide for the payment of the same by the city, by sewerage districts or by abutting property owners or by any combination of these methods.

WISCONSIN STAT. § 66.0911 provides in relevant part:

> **Laterals and service pipes.** If the governing body by resolution requires … sewer … laterals or service pipes to be constructed from the lot line or near the lot line to the main or from the lot line to the building to be serviced, or both, it may provide that when the work is done by the city, village or town or under a city, village or town contract, a record of the cost of constructing the laterals or service pipes shall be kept and the cost, or the average recurrent cost of laying the laterals or service pipes, shall be charged and be a lien against the lot or parcel served.

City of Waukesha ordinance 29.06(2) provides:

> (2) COST OF SEWER CONNECTION. All costs and expenses incidental to the installation and connection of the building sewer shall be borne by the owner. The Owner shall indemnify the City from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer.

WAUKESHA, WIS., MUN. CODE ch. 29, § 29.06(2) (1999). "Building sewer" is synonymous with "sewer lateral." A statement on the City's website reflects the City's intent that property owners be responsible for lateral maintenance:

> **Sewer Maintenance**
>
> Employees of the City Garage under direction of the Public Works Department are responsible for the maintenance of the sanitary sewers. *Property owners are to maintain the*

> *laterals through their lots to the mains.* Questions regarding sewer line upkeep can be directed to the Department of Public Works. (Emphasis added; underscoring in original.).

¶8 The Floreses concede on the one hand that a lateral is not part of the sewer system. *See* WIS. STAT. § 281.01(14). They argue on the other, however, that, as the City holds title to the main and the street in trust for the citizenry, the portion of a lateral that lies under the street and connects to the main is a public improvement that provides city-wide benefits. They challenge whether the City can choose not to maintain "items of infrastructure located within its real estate." Requiring a property owner to pay for the cost of repair and maintenance of a public improvement, they posit, is "a veiled special assessment" and thus an unconstitutional taking of property for public use without just compensation.

¶9 The Floreses did not advance a takings claim in their complaint or before the circuit court beyond a passing reference to it in their summary judgment reply brief and did not argue it at the motion hearing. We generally do not address arguments not raised and argued before the circuit court, especially for a claim that a statute or ordinance is unconstitutional, *see* ***City of Mequon v. Hess***, 158 Wis. 2d 500, 506, 463 N.W.2d 687 (Ct. App. 1990), and we see no good reason to make an exception in this instance.

¶10 Second, the Floreses have not proved beyond a reasonable doubt that the ordinance is unconstitutional. *See* ***Village of Egg Harbor v. Sarkis***, 166 Wis. 2d 5, 13, 479 N.W.2d 536 (Ct. App. 1991). They offer no controlling legal support for their contentions that a lateral is a public improvement or that their obligation to bear the cost is a special assessment amounting to a taking. We may decline to address conclusory assertions and undeveloped arguments, ***Associates***

Fin. Servs. Co. of Wis., Inc. v. Brown, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56, and we do so here.

¶11 The language of the statutes and ordinance is plain. Under WIS. STAT. § 66.0911, if a municipality requires a property owner to connect a building on its property to the main, it also may require the owner to be responsible for the cost of constructing or servicing the lateral. Similarly, WIS. STAT. § 62.18(1) allows a municipality to require abutting property owners to pay for construction of and repairs to the municipal sewer system.

¶12 Consistent with WIS. STAT. § 66.0911, but more forcefully stated, ordinance 29.06(2) directs that costs associated with lateral installation and connection "shall be borne" by the owner of the property it serves. "[C]onnection of the [lateral]" reasonably contemplates reestablishing service between the property owner's building and the main after making necessary repairs.

¶13 As the circuit court observed, it is reasonable for the City to require individual property owners to be responsible for maintaining the lateral servicing their buildings. The property owner has control over how the laterals are maintained, the type of chemicals and waste placed into them, and the number and variety of trees or other plantings on the property, the roots of which may impede the lateral's function.

¶14 We turn to the Floreses' argument that their payment of the repair costs unjustly enriched the City. An unjust enrichment claim requires proof of three elements: "(1) a benefit conferred upon the defendant by the plaintiff, (2) knowledge or appreciation of the benefit by the defendant, and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for the [defendant] to retain [the benefit] without paying the

value thereof." ***Ludyjan v. Continental Cas. Co.***, 2008 WI App 41, ¶7, 308 Wis. 2d 398, 747 N.W.2d 745.

¶15 This argument fails for the same reasons that their statutory argument fails. The Floreses paid the costs associated with repair of a lateral servicing their property, as the statute allows and the ordinance requires. Honoring their obligation did not unjustly enrich the City. Accordingly, we need not address the issue of whether their notice to the City of their claim was timely.

By the Court.—Judgment affirmed.

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