

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 21, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 00-0290**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**FRED MYER,**

**PLAINTIFF-APPELLANT,**

**v.**

**CITY OF WESTBY, A WISCONSIN MUNICIPAL  
CORPORATION,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Vernon County:  
MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

Before Roggensack and Dillon,<sup>1</sup> JJ., and William Eich, Reserve  
Judge.

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<sup>1</sup> Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 DILLON, J. This is an action to determine the scope and extent of an easement. The appellant, Fred Myer, and the respondent, City of Westby, both requested the circuit court to construe the City's easement across Myer's land. In cross motions for summary judgment, the circuit court ruled in favor of the City that the easement permits a continuous stream of sewage effluent from the City's wastewater treatment plant to flow to and percolate into the ground on Myer's property. We reverse, grant appellant's motion for summary judgment, and remand for further proceedings.

### BACKGROUND

¶2 When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the practical effect is that the facts are stipulated and only issues of law are before the court. *Lucas v. Godfrey*, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991). Neither party disputes the affidavits of fact of the other, or requests a hearing to introduce extrinsic evidence.

¶3 A motion for summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980); WIS. STAT. § 802.08(2) (1997-98).<sup>2</sup> We review summary judgment rulings independent of the circuit court. *Grams*, 97 Wis. 2d at 338-39.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

## FACTS

¶4 For over fifty years, the City has discharged effluent from its wastewater treatment plant into a natural waterway which runs through a valley south of the City. In addition to effluent from the plant, the waterway also carries all runoff from a 1,710-acre watershed which includes the valley and the City.

¶5 In 1973, the City obtained easements from nine property owners in the valley, including one from John and Bonita Mannel which grants the City

a perpetual right-of-way, privilege, easement and authority to survey, lay, construct, operate, repair and maintain surface water dry runs and/or sewer pipe, for the transportation of sewage effluent over, through, upon, under and across

the real property described by the easement. The easement grants ingress and egress at convenient points

for any purpose necessary in connection with the surveying, laying, construction, repair, operation, inspection, maintenance, altering, replacing, moving or removing said surface water dry runs and/or sewer lines and the right to make such excavations on said premises as shall be necessary or requisite to accomplish such purposes.

It also grants the:

permanent right, privilege and authority to cut down, clear, or grub out any trees, brush or shrubs which in the opinion of the Grantee may interfere with or endanger the surveying, laying, construction, operation, repair, alteration or maintenance, inspection, replacement, moving or removing of said dry runs and/or sewer lines.

Finally, it provides that the grantor:

shall not construct or permit to be constructed anything upon the easement strip which would interfere with Grantee's exercise of the rights hereby conveyed, but may otherwise continue to use the surface of the easement strip

for travel or any other purpose not inconsistent with the rights herein granted.

¶6 When the easement was granted, the waterway was a dry run through which water flowed only intermittently, a condition which did not change for more than ten years. Myer purchased the Mannel farm in 1974 with knowledge of the easement.

¶7 In 1977, the DNR issued a permit to the City to allow continuous discharge of effluent through the waterway. The Westby Cooperative Creamery was also issued a permit to discharge effluent into the same drainage basin. In 1978, the Creamery constructed a treatment lagoon adjacent to the City's plant and began discharging its effluent into the waterway. In 1982, the City completed improvements to its plant. These developments increased the volume of effluent discharged into the waterway.

¶8 Since 1985, the flow of effluent into the waterway has been continuous, causing it to change from a grassy dry run to a small creek. Myer is no longer able to drive farm equipment across the easement, except at those locations where culverts have been installed. In 1998, the City regraded the easement to establish positive flow and prevent ponding. This restored the flow of water to a point where it percolates into the ground and disappears 200 or 300 feet from the edge of Myer's property.

¶9 Sinkholes have existed in the area of the effluent stream on a continual basis since 1987; the most recent appeared in 1995. According to the City's engineers, to solve erosion problems and prevent sinkholes, the best solution is the construction of a pipeline or paved ditch. In June 1997, city engineers recommended an underground pipeline be installed to transport the

effluent, saying there were sinkholes in the area and that discharge of the effluent and storm water drainage into the sinkholes was a recognized health hazard.

¶10 A pipeline was never installed. The easement is maintained today as an open creek of continuously flowing effluent to the point where it seeps into the groundwater on Myer's land. The continuous flow in the easement is the result of the City's effluent.

### **CIRCUIT COURT PROCEEDINGS**

¶11 The court based its decision upon excerpts from *Atkinson v. Mentzel*, 211 Wis. 2d 628, 637-638, 566 N.W.2d 158 (Ct. App. 1997) (citations omitted):

An easement is an interest in land which is in the possession of another. An easement creates two distinct property interests: the dominant estate, which enjoys the privileges granted by an easement; and the servient estate, which permits the exercise of those privileges. [The court] looks to the instrument which created the easement in construing the relative rights of the [parties]. The use of the easement must be in accordance with and confined to the terms and purposes of the grant. Construction of [the document creating the easement] to determine the grant's terms and purposes is a question of law unless there is an ambiguity requiring resort to extrinsic evidence.

The circuit court also based its decision on language from *Scheeler v. Dewerd*, 256 Wis. 428, 432, 41 N.W.2d 635 (1950):

Every easement carries with it by implication the right, ... of doing whatever is reasonably necessary for the full enjoyment of the easement .... [T]he unrestricted grant of an easement gives the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.

¶12 The circuit court found in favor of the City, reasoning,

the easement language clearly allows the city to do what it is doing at the present time. The undisputed facts do not establish that any of the city's actions have exceeded the rights granted to it under the easement; nor do they establish that it has violated any duty it may owe to the plaintiff. The easement and the city's increased use of it since 1985 have undoubtedly diminished Myer's ability to utilize his land; however, that is the nature of an easement. Myer could and should have foreseen the potential for an increased flow of effluent when he bought the property from the Mannels. He is not entitled to have the court now re-write the easement on more favorable terms.

### ANALYSIS

¶13 We conclude that the City has expanded its use of the land beyond its easement rights.

¶14 We look to the easement to construe relative rights of landowners. *Hunter v. McDonald*, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." *Id.* at 343. Construction of an easement is a question of law unless there is an ambiguity requiring resort to extrinsic evidence. *Edlin v. Soderstrom*, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978). Both parties agree there is no ambiguity.

¶15 The easement permits the City to use "surface water dry runs and/or sewer pipe" for the "transportation" of sewage effluent "over, through, upon, under and across" the property. The land today has an easement which is never dry, a constant creek of sewage effluent, and an effluent flow which is not transported "over, through, upon, under and across" the farm. Rather, the sewage flow comes to an end at the farm, percolating into the groundwater. For years after the easement was granted, fescue grew on the easement and was cut by Myer

to feed his cattle; the area could be crossed without the need for a culvert; and the volume of effluent was lower, and intermittent. It was only years later that the volume of the effluent became such as to cause a continuous flow and a never-ending creek. What is happening now on the land is not described in the easement. Were the effluent today transported by sewer pipe “over, through, upon, under and across” the land as allowed by the easement, there would be no sinkholes and no constant creek. The land would be much the same as it was during the first ten years after the easement.

¶16 The circuit court is correct that the original easement entitles the City to discharge an unlimited flow of effluent. But this conclusion interprets only a part of the easement language. The easement also limits the purpose of the use to the “transportation of sewage effluent.” The key word is “transportation.” The dictionary meaning (WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2430 (1993)) of “transportation” is “an act, process, or instance of transporting.” To “transport” means “to transfer or convey *from one ... place to another.*” *Id.* (emphasis added). Nothing in the easement language permits a use which does not transport the effluent to another place, but instead makes Myer’s property the final resting-place of the sewage, where it is continuously absorbed into the groundwater. Such a use violates the grant.

¶17 The DNR definition cited by both parties of “surface water dry run” is “a drainage pathway, either natural or artificial, with definable banks, which contains a confined flow during periods of runoff.” WIS. ADMIN. CODE § 113.03(16); *see also* WIS. ADMIN. CODE § N.R. 204.03(18).

¶18 Because of the City’s increased use, the “surface water” in the phrase “surface water dry runs” no longer remains on the surface since it goes, in a

continuous flow, into the ground, and the surface is never dry since the “surface water dry runs” are now a permanent creek.

¶19 Neither the Mannels nor Myer could not have predicted from reading the language of the easement that years later the City would change its wastewater plan to increase the flow of effluent such that what was once a grassy easement, intermittently dry, would become a permanent creek; that sinkholes would develop; and that the entire increased flow of sewage effluent would percolate into the ground on the farm itself.

### CONCLUSION

¶20 Summary judgment to the city is reversed and is granted to Myer as to the use of the easement. The case is remanded to the circuit court to determine damages on trespass and injunctive relief as may be necessary in accordance with the City’s violation of the easement.

*By the Court.*—Judgment reversed and cause remanded.

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