

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2002

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. 01-2792
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-1027

**IN COURT OF APPEALS
DISTRICT III**

HENRY P. COPS AND GERADUS L. COPS,

PLAINTIFFS-APPELLANTS,

v.

**CITY OF KAUKAUNA, WAUSAU UNDERWRITERS INSURANCE
COMPANY, AND WISCONSIN DEPARTMENT OF
TRANSPORTATION, DISTRICT 3,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. *Affirmed in part; reversed in part and cause
remanded.*

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

¶1 CANE, C.J. Henry and Geradus Cops appeal a summary judgment in favor of the City of Kaukauna and Wausau Underwriters Insurance Company.

They also appeal the dismissal of their inverse condemnation claims against the City and the Wisconsin Department of Transportation. The Copses brought claims against Kaukauna, its insurer Wausau, and the DOT for negligence, nuisance and inverse condemnation. The Copses alleged flooding in the basement of their building resulted from the improper reconstruction of a bridge in Kaukauna by the City and the DOT. The DOT moved to dismiss the inverse condemnation claim after the Copses voluntarily dismissed their other claims against the DOT. In addition, the City and Wausau¹ moved for summary judgment on the claims against them. The court dismissed the inverse condemnation claims against the City and the DOT, concluding the Copses' complaint failed to state a claim upon which relief could be granted. The court also granted the City summary judgment on the nuisance and negligence claims. We determine the Copses' complaint states a claim for inverse condemnation against the DOT and the City. In addition, we conclude the City is entitled to summary judgment on all of the claims. Accordingly, we affirm the trial court's grant of summary judgment, reverse its dismissal of the inverse condemnation claim against the DOT and remand for further proceedings.

BACKGROUND

¶2 In July 1998, the DOT began reconstructing the Highway 55 bridge over the Fox River in Kaukauna. The Copses own a building adjacent to the bridge. In July 1999, the Copses experienced substantial flooding in the basement of their building, something that had never previously occurred. Believing the

¹ The City argued and briefed the inverse condemnation claim while Wausau addressed the negligence and nuisance issues on behalf of the City. We will refer to both as "the City."

flooding was a result of the rebuilding of the bridge, the Copses brought suit against the City, Wausau, and the DOT. The Copses sought recovery for negligence, nuisance and inverse condemnation.

¶3 In their complaint, the Copses alleged the City and the DOT were negligent in reconstructing the bridge and, as a result, the Copses suffered damage to their basement. The Copses said they had not experienced flooding before the renovation. After the renovation, however, the Copses stated their basement had flooded on several occasions after the opening of a nearby dam. In addition, they alleged their tenants had become ill as a result of mold and mildew from the flooding. They also claimed they would continue to experience the flooding and that it had deprived them “all, or substantially all, practical uses of the Property.” The Copses did not allege how the water was getting into the basement.

¶4 The Copses voluntarily dismissed their negligence and nuisance claims against the DOT. The DOT then moved to dismiss the inverse condemnation claims on the grounds the complaint failed to state a claim upon which relief could be granted. It argued the complaint failed to allege facts showing (1) that a taking had occurred and (2) that the damage had destroyed the building’s substantial utility. The court granted the DOT’s motion.

¶5 In addition, the City moved for summary judgment on the inverse condemnation, nuisance and negligence claims. Its arguments regarding the inverse condemnation claim were similar to the DOT’s, and the circuit court dismissed the claim. As to the negligence and nuisance claims, the City argued it was not liable because it did not have anything to do with the construction of the

bridge or the opening of the dam and, even if it did, it would be immune from suit, at least for the negligence claim, under WIS. STAT. § 893.80(4).² Although the Copses argued a statutory exception to the City's immunity applied, the court determined it did not and granted the City summary judgment on the negligence and nuisance claims.

DISCUSSION

¶6 The circuit court's resolution of this case was based on motions to dismiss for failure to state a claim and for summary judgment. We review both of these motions de novo, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987); *Wikel v. DOT*, 2001 WI App 214, ¶6, 247 Wis. 2d 626, 635 N.W.2d 213. When reviewing a motion to dismiss, we must accept as true the facts as stated in the complaint, along with any reasonable inferences that may be drawn from them. *Wikel*, 2001 WI App 214 at ¶6. We liberally construe the pleadings, dismissing only if it is quite clear that under no conditions can the plaintiff recover. *Lane v. Sharp Pkg. Sys.*, 2001 WI App 250, ¶15, 248 Wis. 2d 380, 635 N.W.2d 896.

¶7 In reviewing a summary judgment, we first determine whether the plaintiff's complaint states a claim upon which relief can be granted. *Green Spring Farms*, 136 Wis. 2d at 314-15. If, taking all the facts as pled and all inferences arising from them as true, it does not appear the plaintiff can recover, summary judgment is appropriate. *Id.* If the complaint does state a claim, then we look at the affidavits and other supporting documents to determine if a genuine

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

issue of material fact exists. *Id.* at 315. Summary judgment is appropriate when there are no factual issues in dispute and one party is entitled to judgment as a matter of law. *Id.*

I. Inverse condemnation

¶8 The circuit court dismissed the inverse condemnation claims against the City and the DOT because it concluded the Copses' complaint failed to allege the building had no substantial utility as a result of the flooding. We conclude the court erred. In order for a taking to be compensable, the property owner must be deprived of all, or practically all, of the beneficial use of the property or of any part. *Maxey v. Redevelopment Auth.*, 94 Wis. 2d 375, 389, 288 N.W.2d 794 (1980). The complaint alleges the City's and the DOT's actions have taken the Copses' property without compensation. It also alleges the City and the DOT are government actors and their actions deprived the Copses of "all, or substantially all, practical uses of the Property." The complaint says the building's tenants have become sick as a result of mold from the flooding, the basement is uninhabitable, and that the Copses have been told it would cost \$145,582.13 "to clean up and attempt to restore the Property."

¶9 The Copses' complaint states a claim for inverse condemnation. It alleges the elements of the claim under WIS. STAT. § 32.10 and WIS. CONST. art. I, § 13. *See Maxey*, 94 Wis. 2d at 388. The City and the DOT argue the complaint fails to allege the Copses have been deprived of all beneficial use of their building. We disagree. While the allegation that the Copses have been deprived of "all, or substantially all, practical uses of the Property" may not technically be the correct standard, other facts in the complaint, such as the tenant illness and uninhabitability, give rise to a reasonable inference the building has no

beneficial use. If we liberally construe the factual allegations, it is a reasonable inference that the property has no beneficial use if its tenants are becoming sick merely by being in the building. We do not decide at this stage whether these facts can be proved and actually deprived the Copses of all beneficial use of their building but merely whether they state a claim upon which relief can be granted. *Wikel*, 2001 WI App 214 at ¶15.

¶10 The DOT also argues that because the Copses alleged the property could be restored, the property was merely damaged, and there was no taking. The Wisconsin Constitution only compensates taking, not damage. *Menick v. City of Menasha*, 200 Wis. 2d 737, 744, 547 N.W.2d 778 (Ct. App. 1996). The Copses, however, did not allege the property can be restored; they merely said it would cost \$145,582.13 to *attempt* to restore the property. This suggests restoration may or may not be successful. If the attempt fails, the flooding may constitute a taking, and if it can be repaired, it may be mere damage. This issue is more appropriately resolved on summary judgment or at trial, not on a motion to dismiss. The Copses' complaint states a claim for inverse condemnation against both the DOT and the City.

II. The City's summary judgment motion

¶11 The Copses also alleged the City was negligent in reconstructing the bridge and that its actions eventually created a nuisance. The City argued it could not be liable for these claims because it had almost nothing to do with the bridge reconstruction and, therefore, neither had a duty to the Copses nor caused any damage to their building. Even if it were found liable, the City argued, it would be immune from suit. We conclude the circuit court properly granted summary judgment because the City was not involved in any aspect of the reconstruction

that may have caused the Copses' injuries.³ In addition, we determine the City would have been entitled to summary judgment on the inverse condemnation claim had it not been dismissed by the circuit court.

¶12 Assuming the Copses' complaint states claims for negligence, we cannot say the documents supporting and opposing the summary judgment motion give rise to any factual dispute regarding the City's lack of duty or that the City caused any damage to the building. Four elements must exist to maintain a cause of action for negligence: (1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Rockweit v. Senecal*, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995). The City argues it had no duty to the Copses and did not cause their damages. In support of its motion, the City submitted the affidavit of its engineer, in which he averred the City was neither involved in the design or reconstruction of the bridge nor a party to any related contracts. The City, he said, only contributed four percent of the bridge's total funding. In support of the engineer's affidavit, the City submitted the design contract between the DOT and an engineering firm. The City also included a State/Municipal Agreement that apportioned the costs of the project. This agreement shows most of the City's financial contribution was spent on the bridge's railings and sidewalks.

³ The Copses contend their claim falls under WIS. STAT. § 88.87(2), which they argue is an exception to governmental immunity under WIS. STAT. § 893.80(4). The circuit court determined that § 88.87(2) did not apply. We conclude there is no genuine issue of fact regarding the City's lack of involvement in any aspect of the bridge reconstruction that might have caused damage to the Copses' building. Consequently, we need not determine the applicability of § 88.87(2). See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶13 There is nothing in the supporting documents to dispute the City's limited role in the reconstruction. Although the Copses' complaint alleges the City was negligent in the reconstruction, this is a legal conclusion. Documents in support of a summary judgment motion must contain evidentiary facts that will be admissible in evidence, and conclusions of law will be disregarded. *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977). Nothing in the record contains factual assertions suggesting the City was involved with the design or reconstruction of the bridge or how it was in any way negligent. The complaint also alleges the Copses suffered flooding after the opening of a nearby dam. While this could be an additional basis for finding the City responsible, the complaint does not allege, nor does anything else suggest the City has anything to do with the dam.⁴ Because no factual dispute exists, we affirm the circuit court's granting the City summary judgment on the Copses' negligence claim.

¶14 The circuit court did not specifically state why it granted summary judgment on the nuisance claim. A nuisance is a material and unreasonable impairment of the right of enjoyment or the individual's right to the reasonable use of his or her property or the impairment of its value. *Anhalt v. Cities & Villages Mut. Ins. Co.*, 2001 WI App 271, ¶18, 249 Wis. 2d 62, 637 N.W.2d 422. Governmental immunity does not entitle a municipality to create or maintain a nuisance. *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 438, 400 N.W.2d 493 (Ct. App. 1986).

¶15 Despite not giving its reasons, we conclude the circuit court's granting of summary judgment on the nuisance claim was proper because of the

⁴ According to the parties' briefs, the Army Corps of Engineers operates the dam.

absence of a factual dispute in the record regarding the City's limited role with the bridge reconstruction. The Copses allege the City's negligent actions caused the nuisance. There is no factual dispute about the City's actions, negligent or otherwise, regarding the bridge's construction. The City did not play a role that could have caused injury to the Copses. The court properly granted summary judgment on the Copses' nuisance claim.

¶16 In addition, this same analysis leads us to conclude the City is entitled to summary judgment on the inverse condemnation claim. If the City's actions could not have led to the Copses' injuries, then the City cannot have taken the property.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded. Costs awarded to the Copses from the DOT; Costs awarded to the City from the Copses.

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