COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP439 **Cir. Ct. No. 2007CV511**

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

DAVID HELING AND HEARTLAND HILLS GOLF COURSE,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF HOWARDS GROVE AND WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANTS-RESPONDENTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. David Heling and the Heartland Hills Golf Course appeal from a judgment dismissing their claim for damage to the land owned and occupied by the golf course allegedly caused by the installation of a storm sewer in the reconstruction of a road. The circuit court determined that under WIS. STAT. § 88.87 (2007-08),[1] Heling's claims against the Village of Howards Grove and the Wisconsin Department of Transportation are time barred. We affirm the judgment of the circuit court.

¶2 In 1980, before Heling's construction of the golf course, State Highway 32 bordering the property was reconstructed and a municipal storm lateral installed. Heling alleges that "[d]ue to the improper or defective installation of the Lateral, the Property has experienced periodic flooding since 1980 and through the filing" of this action. It is Heling's position that not until rainstorms occurring May 31, 2006, did the flooding of the property cause damage and impair the use of the golf course. He submitted a notice of claim on September 27, 2006. After the claim was denied, he commenced this action seeking compensation for a taking of his land due to the flooding and to require the Village and DOT to reroute the storm lateral and undertake certain repairs of the property.

¶3 The Village and DOT moved to dismiss the action on the ground that Heling had not given notice of his claim within three years of the first flooding experienced in the early 1980s. The parties incorporated Heling's discovery responses which included answers to interrogatories, an affidavit from

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Heling's mother, and correspondence between Heling and the Village from December 1981 to April 1982. Heling argues that because the Village and DOT referred to matters outside of the pleadings, the motions to dismiss were improperly converted to summary judgment motions without giving him notice of the conversion and a reasonable opportunity to present opposing summary judgment material. *See* WIS. STAT. § 802.06(3) (if on a motion to dismiss matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present pertinent material). He cites ***CTI of Northeast Wisconsin, LLC v. Herrell***, 2003 WI App 19, ¶¶9-10, 259 Wis. 2d 756, 656 N.W.2d 794, holding that the failure of the circuit court to give parties notice that it is converting a motion to dismiss to one for summary judgment violates due process and may require reversal if the party has not been provided a reasonable opportunity to respond.

¶4 We reject Heling's claim that the motions to dismiss were improperly converted to summary judgment motions. The circuit court did not rely on the additional materials submitted by the Village and the DOT but specifically confined itself to the allegations in Heling's petition.[2] *See* ***Wangard Partners, Inc. v. Graf***, 2006 WI App 115, ¶2 n.2, 294 Wis. 2d 507, 719 N.W.2d 523 (rejecting the contention that the submission of materials outside of the pleadings converted a motion to dismiss to a summary judgment motion where

[2] At the same time the motions to dismiss were pending, an insurer's motion for summary judgment on coverage was also pending. Although the circuit court recognized that the insurer's motion for summary judgment brought matters in from outside of the pleadings and that it made it "more difficult" to restrict the ruling on the motions to dismiss to the petition, its ruling on the motions to dismiss only referenced the allegations in the petition.

there was nothing in the record indicating that the circuit court considered the outside materials).

¶5 The motions to dismiss presented questions of law which we decide de novo. ***Kohlbeck v. Reliance Constr. Co., Inc.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. In doing so, we accept as true all facts pleaded by the plaintiff. ***Id.*** Dismissal at the pleading stage is appropriate only if it appears certain that under no circumstances can the plaintiff recover. ***Id.***

¶6 The type of claims that may be made by property owners against governmental entities regarding highway construction and repair and how those claims must be brought is controlled by WIS. STAT. § 88.87(2). *See* ***Pruim v. Town of Ashford***, 168 Wis. 2d 114, 122, 483 N.W.2d 242 (Ct. App. 1992). That section prohibits the construction or maintenance of roads that impedes "the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands." Sec. 88.87(2)(a). It requires that a property owner damaged by the highway grade file a claim with the appropriate governmental agency "within 3 years after the alleged damage occurred"[3] and gives the property owner the right to file suit for inverse condemnation or other equitable relief if the responsible agency denies the claim or takes no action in ninety days. Sec. 88.87(2)(c). Compliance with the statute is a mandatory condition precedent to

[3] In 1980 and until amendments enacted in 1994, the statute required notice within ninety days after the occurrence of damage. *See* ***Lins v. Blau***, 220 Wis. 2d 855, 860-61, 584 N.W.2d 183 (Ct. App. 1998). It makes no difference here if the three-year or ninety-day period applies so we look to the 2007-08 version of the statute.

filing a claim. ***Van v. Town of Manitowoc Rapids***, 150 Wis. 2d 929, 931, 442 N.W.2d 557 (Ct. App. 1989). Important here is that when the "damage is first discovered, the time begins to run." ***Pruim***, 168 Wis. 2d at 123.

¶7 Heling's petition states that he first experienced flooding on his property in 1980. That the flooding at that time was periodic, tolerable, or did not yet constitute a taking is not controlling. By regulating and strictly controlling the types of claims that may be made by property owners against governmental entities regarding highway construction and repair, WIS. STAT. § 88.87(2)(c) eliminates the possibility of repetitious actions for each new occurrence of flooding. *See* ***Pruim***, 168 Wis. 2d at 122-23. Thus, upon first discovery, the period for filing a notice of claim began to run. Heling did not file his notice of claim within ninety days or three years. He failed to meet the condition precedent to bringing his action.

By the Court.—Judgment affirmed.

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