COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2339 **Cir. Ct. No. 2007CV569**

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

ROBERT E. LEA, JR. AND SHAWN L. LEA,

PLAINTIFFS-APPELLANTS,

V.

GROWMARK, INC. AND RICHARD PAVELSKI,

DEFENDANTS-RESPONDENTS,

FS COOPERATIVE AND FRONTIER FS COOPERATIVE,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. This appeal concerns claims by Robert and Shawn Lea related to alleged contamination to the groundwater beneath their land. The Leas allege that activity at a fertilizer facility near their land caused this groundwater contamination. In particular, the Leas contend that Richard Pavelski, a former president of the company operating the fertilizer facility, is personally liable. In addition, the Leas contend that Growmark, Inc. is liable for subsequent failures to abate contamination and to stop certain contaminating activities. The circuit court granted summary judgment in favor of Pavelski and partial summary judgment in favor of Growmark. We affirm.

Background

¶2 Robert and Shawn Lea own approximately 153 acres of land near the fertilizer facility owned at various times by Pavelski Enterprises and Growmark. The Leas allege that in 2003 they discovered that the groundwater beneath their land was contaminated with harmful chemicals, decreasing the value of their land and giving rise to remediation costs. The Leas contend that this contamination is attributable to activities at the fertilizer facility where certain chemicals and fertilizers were mixed, handled, stored, and transported. The Leas brought suit against several defendants associated with this fertilizer facility.

¶3 The present appeal concerns two of these defendants—Richard Pavelski and Growmark. Pavelski was president and sole shareholder of a corporation that once operated the fertilizer facility, Pavelski Enterprises, from about 1980 to 1990. During this time, Pavelski Enterprises operated on land in part owned by the corporation and in part owned by Pavelski. In 1990, FS Cooperative purchased Pavelski Enterprises and the land owned by Pavelski.

¶4 The Leas' allegations against Pavelski relate to Pavelski's personal involvement in the fertilizer facility's activities during the 1980's. Denying any personal role in causing the contamination and pointing to a lack of contrary facts, Pavelski sought summary judgment. The circuit court granted Pavelski's summary judgment motion on the Leas' negligence and nuisance claims.

¶5 The Leas' allegations against Growmark stem from the purchase of Pavelski Enterprises by FS Cooperative. Growmark, a cooperative that supplies various agricultural products and services, is owned, at least in part, by smaller independently incorporated farm cooperatives, one of which was FS Cooperative. Growmark loaned FS Cooperative the money to purchase Pavelski Enterprises, later acquired FS Cooperative stock as repayment for this loan, and remained involved in FS Cooperative's ongoing operations in various other ways. In 2005 FS Cooperative began a dissolution process, and in 2006 Growmark purchased a portion of FS Cooperative's remaining assets.

¶6 As pertinent here, the Leas allege that Growmark was liable for contamination occurring prior to 2006, suggesting that Growmark helped operate the facility's relevant activities in conjunction with its then-owner, FS Cooperative. Growmark moved for summary judgment. The circuit court, agreeing with Growmark that there was no basis for their pre-2006 liability, granted partial summary judgment in favor of Growmark on the Leas' negligence and nuisance claims. The court denied summary judgment as to Growmark's potential continuation of a nuisance after its 2006 purchase.

¶7 The Leas appeal the granting of summary judgment to Pavelski and partial summary judgment to Growmark. We reference additional facts as needed below.

Discussion

¶8 We review summary judgment decisions *de novo*, applying the same methodology as the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325, *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225. "[W]e examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial." ***Id***. (citations omitted). The summary judgment statute provides that "[s]upporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3).[1]

A. Summary Judgment In Favor Of Pavelski

¶9 The Leas pursue two claims against Richard Pavelski—negligence and private nuisance—both related to the fertilizer facility's operation when owned by Pavelski Enterprises. Pointing to their summary judgment submissions, the Leas contend that the circuit court erred in granting summary judgment in favor of Pavelski on these claims. We disagree.

1. Pavelski's Negligence

¶10 The Leas' negligence theory is that Pavelski, personally, was negligent in his acts or omissions. *See* ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 692, 273 N.W.2d 285 (1979) ("A corporate agent cannot shield

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

himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity….”). In particular, the Leas assert that Pavelski was personally negligent by omission because he allowed polluting activities to occur at Pavelski Enterprises. To address this contention, we first examine the Leas’ characterization of Pavelski’s role in Pavelski Enterprises. Second, we examine the Leas’ assertions related to Pavelski’s knowledge of and failure to stop contamination.

a. Pavelski’s Role

¶11 The Leas first point to Pavelski’s general role in Pavelski Enterprises’ operation. Some aspects of Pavelski’s role are not contested—for example, that Pavelski was president and sole shareholder of Pavelski Enterprises. The Leas, however, add the assertion that Pavelski was involved in “the day-to-day operation of Pavelski Enterprises *as the Manager*” (emphasis added). Pavelski, on the other hand, challenges this assertion as contrary to the evidentiary facts and, in particular, contends that this statement is improper because its source is an affidavit from the Leas’ attorney. We agree with Pavelski that we may not rely on the factual assertions of the Leas’ attorney. *See, e.g.*, ***Fifer v. Dix***, 2000 WI App 66, ¶3 n.3, 234 Wis. 2d 117, 608 N.W.2d 740 (“To the extent that the attorney’s affidavit goes beyond verifying the authenticity of the deposition excerpts, by presenting purported facts which could only be based on the attorney’s ‘information and belief’ from his review of the deposition testimony, it was an improper summary judgment submission.”).

¶12 Looking instead to the underlying Pavelski deposition, we observe that it does not support a finding that Pavelski was a day-to-day operations manager. Rather, Pavelski describes his work as “in the office” and states that his

"primary responsibilities were in the area of government relations, purchasing materials, and finance." The deposition further reveals that, contrary to the Leas' non-evidentiary assertion, Pavelski Enterprises had two managers during the relevant time frame, an operations manager and a sales manager, neither of which was Pavelski.

¶13 In sum, the record does not support the Leas' assertion that Pavelski had relevant day-to-day managerial duties.

b. Pavelski's Knowledge Of And Failure To Stop Contamination

¶14 The Leas point to various allegedly undisputed facts to support their central premise—that Pavelski knew about activities causing their groundwater contamination and negligently allowed the activities to occur or continue. We address each of these asserted facts in the following paragraphs.

¶15 First, the Leas point to a letter from the Department of Agriculture to Pavelski outlining various violations of administrative code provisions found during an inspection. The Leas assert that this letter "provides evidence that Richard Pavelski at least had knowledge of negligent operation of the fertilizer plant." We do not agree.

¶16 The letter cites violations relating to the absence of certain vents in pesticide containers, the need for better security provisions, the presence of cracks in a secondary containment wall, and various inadequacies in the facility's written response plans and in its recordkeeping. The letter concludes that "no problems are anticipated," although continued violations "may necessitate further action."

¶17 Contrary to the Leas' suggestions, the Department's letter does not show that Pavelski knew about activities that caused the Leas' groundwater

contamination. The letter does not say that any contamination was occurring, and the Leas do not explain any connection between the code violations and any contamination, much less their particular groundwater contamination.

¶18 Second, the Leas point to statements in an affidavit by a former fertilizer facility employee. Statements in this affidavit, the Leas assert, show that "Pavelski not only had knowledge of, but was involved in, the water pollution." More specifically, the Leas rely on the averments that Pavelski regularly inspected "various parts of the operation" and "was very involved in the operation" and that he may have witnessed the following: (1) the washing of equipment with chemicals on it, with the water then accumulating in a cement pit in the floor of a building and eventually draining via a pipe; (2) constant fertilizer dust, coming from fertilizer mixing towers, that landed on machines and the ground and then flowed into a gully when it rained; and (3) fertilizer spills in an unloading area that occurred at times when fertilizer was being unloaded.

¶19 The problem here is that nothing in the affidavit or anywhere else makes the necessary connection between the events Pavelski witnessed and the contaminated groundwater.[2] For example, the Leas refer us to an expert opinion that a contaminant plume originated at the fertilizer facility and flowed to underneath the Leas' land. But there is no evidentiary basis for a finding that any

[2] The Leas point to some statements that, on their face, do not show that the statements are based on personal knowledge as required by the summary judgment statute. *See* WIS. STAT. § 802.08(3). For example, the former employee states that "[h]e *believes* that Richard Pavelski saw the [wash water] drain pipe pouring water with chemicals into [a large natural gully] on many occasions" (emphasis added). Regarding this and similar statements, the Leas assert that a basis in personal knowledge is clear, but neither the affidavit nor the Leas provide that basis. But even if we considered this and similar statements, the result would be the same because, as with the evidence we discuss above, the Leas do not connect the dots.

activity that Pavelski witnessed, such as the fertilizer dust runoff, was a substantial cause of the "contaminant plume."

¶20 The Leas seemingly assume that the cause and effect in this situation is obvious. We disagree. It is not enough to show that activities or omissions had some causal effect, however slight. Rather, the Leas have the burden of showing that negligence was a "substantial factor" in producing the alleged injury. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978) ("The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result.").

¶21 In a different groundwater contamination case, we noted with approval a party's concession that "the migration of contaminated groundwater is an extremely complicated, technical matter, and ascertainment of it requires considerable expertise." ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995). In ***Kinnick***, we concluded that, "[b]ecause appellants lack the necessary expert testimony, ... no factual issues remain to be tried." ***Id.*** We reach the same conclusion here because the causation issue in this case is "'outside the common knowledge and ordinary experience of an average juror.'" *See* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 578, 547 N.W.2d 592 (1996).

¶22 Third, the Leas point to a Department of Agriculture file that they assert contains documents related to investigations of subsurface pollution under the Pavelski Enterprises' facility. In particular, the Leas point to a series of four contact forms from 2004 that indicate that a neighboring landowner reported

hearing from a friend that there was a place where chemicals had been dumped.[3] Also, it appears that a Department of Agriculture meeting occurred after these contacts took place, and the Leas point to meeting notes from that 2004 meeting. Specifically, the Leas highlight a portion of the notes indicating that, apparently sometime in the 1980's, Pavelski once told a neighboring business owner that there were chemicals in a puddle near the fertilizer facility. It appears then that, prior to the 2004 Department meeting, the business owner had told someone at the meeting about this conversation he had with Pavelski.

¶23 Putting aside the readily apparent hearsay problems with this information,[4] we observe that neither the contact forms nor the meeting notes implicate Pavelski personally or indicate the types or amounts of chemicals that were dumped. Rather, at most, the contents of the notes support a finding that Pavelski knew of some unknown quantity of unknown chemicals in a puddle.

¶24 Next, we address the Leas' reliance on the fact that Pavelski owned a portion of the land on which Pavelski Enterprises operated. Pointing to this, the Leas allege that Pavelski "allowed" buildings to be constructed and used in the fertilizer operation on his land. The Leas do not, however, point to any specific polluting activities that Pavelski knew about or "allowed" in addition to those that we have already addressed. Put another way, the Leas simply point to the general

[3] Dates are not specified, but it is apparent that this dumping is alleged to have occurred when the fertilizer facility was operated by Pavelski Enterprises. Also, according to these documents, the contact's friend apparently did not know what particular fertilizers or chemicals were dumped.

[4] Pavelski asserts that the documents may not be considered for several reasons, including a lack of firsthand knowledge. The Leas do not suggest a solution to this hearsay problem.

fact that facility operations occurred, at least in part, on land Pavelski owned, but do not develop a separate personal negligence argument based on Pavelski's status or knowledge as a landowner.[5]

¶25 At bottom, the Leas are asserting that common sense dictates that the person with macro-level control over a facility that produces pollution should be held liable. However, this is essentially a legal proposition amounting to a strict liability rule. The Leas offer no supporting authority for this legal proposition.

¶26 We conclude, therefore, that the Leas do not provide a basis on which a reasonable jury could find that Pavelski's personal acts or omissions were a substantial cause of the Leas' groundwater contamination.[6] *See* ***Cefalu v. Continental W. Ins. Co.***, 2005 WI App 187, ¶9, 285 Wis. 2d 766, 703 N.W.2d 743 ("Whether negligence was a cause-in-fact of an injury is a factual question for the jury if reasonable people could differ on the issue, and the question only becomes one of law for judicial decision if reasonable people could not disagree.").

[5] The Leas contend that there is a material dispute about whether the land was leased by Pavelski to Pavelski Enterprises. The circuit court, however, correctly noted that the Leas offered no evidence contradicting Pavelski's averment that the land was leased.

[6] The Leas also contend that the res ipsa loquitur rule of circumstantial evidence should apply. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶33, 241 Wis. 2d 804, 623 N.W.2d 751 ("Res ipsa loquitur is a rule of circumstantial evidence that permits a fact-finder to infer a defendant's negligence from the mere occurrence of the event."). This contention, however, fails to overcome the flaw in the Leas' negligence claim—that they provide no reasonable basis for the inference that Pavelski's personal negligence was a substantial factor in producing the groundwater contamination.

2. Pavelski's Private Nuisance

¶27 The Leas also challenge summary judgment on their private nuisance claim, tying their private nuisance argument to Pavelski's status as a landowner. Here again, because their argument is that the owner of land is liable for nuisance on his land regardless whether he personally created the nuisance, the Leas' theory amounts to an assertion that Pavelski should be held strictly liable. And, once again, the Leas do not adequately support their legal premise.

¶28 The Leas point to the cases we list in this paragraph, but do not explain how the cases support their landowner-strict-liability-nuisance theory. At best, these cases show that in some circumstances a landowner *may* be liable for harm emanating from his or her land. *See* ***Prah v. Maretti***, 108 Wis. 2d 223, 230, 321 N.W.2d 182 (1982) (stating that "an owner of land does not have an absolute or unlimited right to use the land in a way which injures the rights of others"); ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 676, 476 N.W.2d 593 (Ct. App. 1991) ("Chemicals seeping or percolating through groundwater can constitute an invasion."); ***State v. Mauthe***, 123 Wis. 2d 288, 290, 366 N.W.2d 871 (1985) (not addressing a nuisance claim, but rather addressing landowner remedial responsibility under a statutory scheme); ***Jost v. Dairyland Power Coop.***, 45 Wis. 2d 164, 172-74, 172 N.W.2d 647 (1969) (indicating that a nuisance claim need not be premised on elements of negligence).

¶29 Accordingly, we conclude that the Leas provide no basis for reversing summary judgment on their nuisance claim against Pavelski.[7]

[7] The Leas suggest that Pavelski may have leased the land to a shell corporation in an effort to avoid liability for pollution. Beyond this assertion, however, the Leas do not develop the (continued)

B. Summary Judgment In Favor Of Growmark

¶30 The Leas' second set of arguments concerns the granting of partial summary judgment in favor of Growmark.[8] The Leas assert that, between 1990 and 2005, Growmark helped operate the fertilizer facility together with its owner, FS Cooperative. They also assert that, during that time, Growmark was negligent by omission for failing to address the facility's contaminating activities. It follows, according to the Leas, that Growmark may be held liable for the Leas' groundwater contamination.[9]

¶31 For purposes of our discussion, we assume, without deciding, that Growmark's relationship with FS Cooperative during the relevant time frame was such that it could give rise to liability.[10] However, as we explain below, the Leas' arguments regarding Growmark fail for essentially the same reason they fail

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argument or point to supporting facts or case law, and we decline to consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[8] Although the circuit court granted partial summary judgment on both the Leas' negligence and nuisance claims against Growmark, we note that the Leas do not develop a nuisance argument on appeal that is separate from their negligence arguments. The Leas merely suggest in passing that nuisance liability may be based on an omission.

[9] The Leas also discuss a theory of joint and several liability, "concerted action," as found in ***Richards v. Badger Mutual Insurance Co.***, 2008 WI 52, 309 Wis. 2d 541, 749 N.W.2d 581. The Leas concede, however, that under ***Richards*** their "concerted action basis for liability requires … that Growmark was causally negligent under substantive law." The substantive negligence that the Leas then point to is Growmark's negligence by omission.

[10] For example, the Leas point to Growmark's role as a consultant; its loan to FS Cooperative and other involvement in the purchase of Pavelski Enterprises; its subsequent acquisition of FS Cooperative stock; their ongoing business relationship as "partners"; and Growmark's active involvement in FS Cooperative audits, board of director meetings, and the recruitment of employees. The Leas also note that, while Growmark's loan to FS Cooperative was outstanding, FS Cooperative could not employ or discharge its general manager without the approval of Growmark.

against Pavelski. That is, the evidence the Leas rely on does not show a causal connection between Growmark's acts or omissions and the groundwater contamination.[11] In the following paragraphs, we set out and reject each of the Leas' specific arguments.

1. Past Contamination

¶32 The Leas point to the deposition of a Growmark engineer who explained that Growmark received environmental evaluation reports of testing conducted at or near the time when FS Cooperative purchased Pavelski Enterprises. The Leas then highlight the fact that Growmark did nothing to discover the specific cause of the contamination or attempt to change facility practices.

¶33 Beyond pointing to Growmark's knowledge of these reports and their subsequent inaction, the Leas do not provide further facts showing how or if Growmark's failure to act in light of these reports mattered. For example, the Leas rely on the expert opinion we have already discussed asserting that a contaminant plume originated under the fertilizer facility and flowed toward the Leas, contaminating their groundwater. But the Leas do not point to additional technical information or facts that show how or to what extent Growmark's

[11] In their brief, the Leas state that in 2004 Growmark "leased the fertilizer and pesticide plant" and, prior to becoming a direct owner of a portion of the facility in 2006, ran the plant "on its own." The record appears to indicate that this 2004 lease solely regarded the dry fertilizer aspect of the facility and that Growmark then subleased the dry fertilizer part of the facility to another entity. In any event, the Leas do not return to this fact in their negligence argument and, therefore, we do not understand the Leas to argue that this 2004 leasing arrangement has independent significance.

particular acts or omissions caused the relevant plume or the Leas' groundwater contamination.

2. Ongoing Activities

¶34 The Leas also assert that Growmark received subsequent environmental reports. In this regard, the only specific report that the Leas rely on is a June 2008 groundwater monitoring update report showing increased concentrations of certain chemicals in the groundwater. The report itself is not part of the submissions. Rather, this information comes solely from a Growmark engineer's deposition, but the deposition does not support a finding that Growmark's acts or omissions are related to this report's contents. Similarly, the Leas do not identify evidence explaining how 2008 contaminant levels relate to the pre-2006 time period at issue here.

¶35 The Leas point to the fact that a Growmark engineer visited the fertilizer facility on multiple occasions and observed bulk piles of fertilizer on a cement floor. However, beyond highlighting these visits and the observation of the bulk pile, the Leas do not draw a connection to their groundwater. Similarly, the Leas note that the engineer met with a Department of Agriculture environmental enforcement specialist six to twelve times, during which soil and potential groundwater impacts were discussed, but the Leas fail to explain how these meetings demonstrate cause and effect.

¶36 Finally, the Leas rely on seven Department of Natural Resources spill reports ranging from the years 1991 to 2007. The spill reports mention "Ag Chemicals," endosulfan, and atrazine, and two reports note some sort of "Soil Contamination." However, as with the Leas' other evidence, these reports do not explain how this minimal information relates to the larger relevant context. For

that matter, several of these reports indicate that some of the spills were subsequently contained or recovered.

¶37 We do not summarize every piece of evidence that the Leas rely on. Suffice it to say that in each instance the Leas fail to point to evidence showing how or to what extent the alleged act or omission contributed to the groundwater contamination under their property.[12] We conclude, therefore, that the Leas fail to provide a reasonable basis for a conclusion that Growmark's acts or omissions were a substantial cause of the Leas' groundwater contamination. *See* ***Cefalu***, 285 Wis. 2d 766, ¶9 ("Whether negligence was a cause-in-fact of an injury is a factual question for the jury if reasonable people could differ on the issue, and the question only becomes one of law for judicial decision if reasonable people could not disagree.").

¶38 Finally, we note that, as with Pavelski, the Leas' underlying liability theory regarding Growmark is that, because Growmark exercised some degree of macro-level influence over the FS-Cooperative-owned facility, it must therefore be held strictly accountable for damages caused by the facility. And, as with their Pavelski argument, the Leas offer no support for this legal theory. We therefore conclude that partial summary judgment in favor of Growmark was proper.

[12] With respect to Growmark, the Leas again assert that res ipsa loquitur applies. We conclude, however, that this argument fails here for the same reason it fails when aimed at Pavelski. *See* n.6, *supra*. We are unsure, but it may be that the Leas also seek to present a separate theory of liability premised on assistance or encouragement Growmark gave to FS Cooperative while knowing that FS Cooperative was acting negligently. The Leas, however, do not point to additional facts that might support causal negligence related to this assistance. To the extent that the Leas might have something else in mind, they do not adequately explain their legal theory.

Conclusion

¶39 For the reasons stated above, we affirm the circuit court's judgment granting summary judgment in favor of Pavelski and affirm the circuit court's order granting partial summary judgment in favor of Growmark.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.