COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-0399

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

BUTTE DES MORTS COUNTRY CLUB, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

CITY OF APPLETON AND WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT,

CENTURY INDEMNITY COMPANY,

INTERVENOR-DEFENDANT,

TOWN OF GRAND CHUTE,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

OUTAGAMIE COUNTY, TOWN OF GREENVILLE AND STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

THIRD-PARTY DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Butte Des Morts Country Club appeals a judgment that dismissed its complaint for nuisance and inverse condemnation against the Town of Grand Chute. The club alleged that the town had mismanaged the increased volume in surface water arising from residential and commercial development. The significantly increased water flow in Mud Creek allegedly caused the club's land to flood and erode along that waterway. On appeal, the club makes two basic arguments: (1) the trial court erroneously had the jury, rather than the court, decide important legal questions; and (2) the trial court tried the case under an erroneous legal theory that relieved the town of any liability for an unintentional taking. We reject the club's arguments and affirm the judgment.

¶2 The club has shown no harm from the trial court's decision to submit the issues to a jury. We agree that juries should decide only factual issues, not legal issues. *See* ***DeChant v. Monarch Life Ins. Co.***, 204 Wis. 2d 137, 145, 554 N.W.2d 225 (Ct. App. 1996). Here, however, any error was harmless. First, the trial court took the jury's verdict as advisory and nonbinding. This meant that the trial court was the final arbiter of all questions, both legal and factual. *See* ***Grams v. Melrose-Mindoro Jt. S.D. No. 1***, 78 Wis. 2d 569, 576, 254 N.W.2d 730 (1977); *see also* WIS. STAT. § 805.17(2) (1997-98). Second, the trial court made its own rulings on all issues. We see no indication that the trial court just rubberstamped the jury's conclusions without its own independent analysis of the facts and legal principles. We note that the club has not argued the merits of the trial court's

rulings themselves, and we therefore have no cause to review those matters for substantive error.

¶3 The club also has shown no reversible error in the role "intent" played in the trial and jury instructions. The case was tried on an intentional taking theory, and the court instructed the jury that the town was not liable for an unintentional taking. The trial court's instructions must correctly inform the jury of the applicable legal principles. *See* ***Peplinski v. Fobe's Roofing***, 193 Wis. 2d 6, 24, 531 N.W.2d 597 (1995). Here, there is no basis for reversal. First, the club stipulated before trial that an intentional taking by the town was essential to the club's case. The club is therefore barred under judicial estoppel from claiming otherwise on appeal. *See* ***Godfrey Co. v. Lopardo***, 164 Wis. 2d 352, 363, 474 N.W.2d 786 (Ct. App. 1991). Second, the trial court ruled that there was no taking of any kind, either intentional or unintentional, making the town's intent irrelevant to the court's ultimate holding of no liability.

¶4 The trial court's no taking ruling concludes the club's case, and we therefore need not address either the club's claim on inconsistent verdicts or the town's cross-appeal on excluded evidence.

By the Court.—Judgment affirmed.

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