COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0963

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEANSOILS WISCONSIN, INC.,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. CleanSoils Wisconsin, Inc., appeals the circuit court's grant of partial summary judgment determining that CleanSoils violated Department of Natural Resources rules and a judgment assessing a forfeiture. CleanSoils makes three basic arguments. First, it contends that the circuit court

erred by granting partial summary judgment because: (1) the DNR cited CleanSoils with violating an approved plan of operation that did not apply to it; (2) it did not need a DNR license or an approved plan of action because the location where it stored contaminated soil was land without structures and was therefore not a solid waste facility; and (3) it is exempt from licensing and DNR plan approval. CleanSoils also contends that "[in a DNR forfeiture action] selective enforcement is a valid defense … and that [it] is entitled to a trial on the dispute[.]" Finally, CleanSoils claims that the court erred by imposing forfeitures upon it.

¶2 We determine that the circuit court appropriately granted partial summary judgment. The statutes and rules unambiguously provide that land without buildings or structures used to store solid waste is a solid waste facility and the potential exemptions contained in the rules apply only to responsible parties, not commercial remediators. CleanSoils had no license or approved plan of operation permitting it to store solid waste and, therefore, violated the applicable statutes and rules. Next, we decide that CleanSoils failed to demonstrate a prima facie case of selective enforcement. Finally, we determine that, as a matter of law, the circuit court was required to assess a forfeiture and it did not erroneously exercise its discretion by setting the forfeiture amount. Therefore, we affirm the judgments.

¶3 CleanSoils is a commercial soil remediator. As a part of its operations, it thermally treats petroleum-contaminated soil. It began operating in Wisconsin in 1994 and obtained a solid waste facility license from the DNR. The license permits it to operate mobile soil remediation units "subject to and conditioned upon compliance with the provisions of chapter 144 Wis. Stats., and chapters NR 500-520 Wis. Admin. Code …."

¶4 In December 1993, a different entity, CleanSoils, Inc. (C.I.), obtained conditional approval of a plan of operation from the DNR to thermally remediate soils with mobile units. The plan required that processing of contaminated soils occur at remediation sites: C.I. was not permitted to transport the soil to its portable unit, but rather the equipment was to be brought to the contamination site.

¶5 In 1997, CleanSoils contracted with Albert Radtke to process petroleum-contaminated soil from his property in Oconto County. CleanSoils leased land in the Town of How, Oconto County, to store, treat and recycle contaminated soils. CleanSoils removed the soil from Radtke's property and transported it to the leased location. It planned to landspread Radtke's soil in accordance with DNR regulations and claims that it was awaiting approval to do so; CleanSoils had no thermal treatment machinery in Oconto County and did not intend to thermally process the soil.

¶6 The State initiated this litigation in 1998 alleging that CleanSoils had violated its license, its approved plan of operation, WIS. STAT. § 289.31[1] and WIS. ADMIN. CODE § NR 502.05 by transporting approximately 800 cubic yards of Radtke's contaminated soil to the Town of How and storing it. The State claimed that CleanSoils had created a nuisance and failed to properly collect and handle runoff. The State sought injunctive relief and monetary forfeitures.

¶7 The State moved for partial summary judgment on the issue whether CleanSoils had violated the applicable statutes and administrative rules. The

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

circuit court granted the motion in April 1998 and ordered CleanSoils to take certain remediation action regarding the stored soil and the soil in the surrounding area.[2] The court left open the issue of forfeitures.

¶8 In January 1999, the court found that CleanSoils had violated the court's earlier order by failing to conduct a site investigation at the Town of Hull premises. It ordered a forfeiture of approximately $27.50 per day[3] for a total in forfeitures and assessments of $13,300. The court justified the amount of the daily forfeiture on the grounds that (1) CleanSoils had made attempts to comply with the court's order but had not made as much progress as it could have; (2) the violation, although not egregious, had serious aspects; and (3) the DNR was more interested in compliance than forfeitures. The court also ordered CleanSoils to pay a $250 daily forfeiture beginning May 1, 1999, if it failed to complete a site investigation and perform any necessary environmental cleanup.

¶9 In March 1999, CleanSoils filed a motion to reconsider the partial summary judgment and the judgment imposing forfeitures. Approximately one week later, before the motion was heard, CleanSoils filed this appeal.

STANDARD OF REVIEW

[2] Among other things, the court ordered CleanSoils to: (1) not accept any additional contaminated soil at the site; (2) ensure any water contacting the soil be treated as leachate; (3) immediately remove all contaminated soil and properly store or dispose of it; and (4) hire a qualified environmental consultant to determine the extent of any soil or water contamination and provide the DNR a workplan for that investigation within thirty days.

[3] The statutory range for the forfeiture is "not less than $10 nor more than $5,000 for each violation. Each day of continued violation is a separate offense." WIS. STAT. § 289.96(3)(a).

¶10 We initially review the partial summary judgment that CleanSoils violated the relevant statutes and administrative rules. We review summary judgment rulings de novo, *see* ***Burkes v. Klauser***, 185 Wis. 2d 308, 327, 517 N.W.2d 503 (1994), applying the same methodology set out in WIS. STAT. § 802.08(2) as applied by the circuit court. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). Under WIS. STAT. § 802.08(2), 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.

¶11 Resolution of the issues raised involves the construction of statutes and administrative rules. These are questions of law that we decide de novo. *See* ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The purpose of statutory interpretation is to discern the legislature's intent. *See* ***id***. at 406. To do so, we first consider the statute's language. Sections of statutes should not be read in a vacuum, but must be read together in order to best determine the statute's plain meaning. *See* ***In re J.L.W.***, 143 Wis. 2d 126, 130, 420 N.W.2d 398 (Ct. App. 1988). If the statute's language as a whole clearly and unambiguously sets forth the legislative intent, we apply it to the case at hand and do not look beyond the statutory language to ascertain its meaning. *See* ***Setagord***, 211 Wis. 2d at 406. The rules of statutory construction apply equally to interpreting administrative rules. *See* ***Kennedy v. DHSS***, 199 Wis. 2d 442, 448, 544 N.W.2d 917 (Ct. App. 1996).

¶12 In certain instances, we accord an agency's interpretation some deference. *See* ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). The deference accorded the DNR's interpretation in this matter is, however, immaterial. Our conclusions would be the same under any standard of review.

ANALYSIS

1. PARTIAL SUMMARY JUDGMENT

¶13 The DNR alleged that CleanSoils violated WIS. STAT. § 289.31(1), the pertinent administrative rules and the approved plan of operation by storing solid waste without the required license or approved plan.[4] WISCONSIN STAT. § 289.31(1) provides that "[n]o person may operate a solid waste facility … unless the person obtains an operating license from the department." A solid waste facility includes a "facility for solid waste … storage." WIS. STAT. § 289.01(35). WISCONSIN ADMIN. CODE § NR 502.05 regulates solid waste storage facilities. It provides, in relevant part:

> (1) GENERAL. (a) Unless exempt under sub. (2) or (3), owners and operators of solid waste storage facilities shall comply with all of the following:
>
> 1. The requirements specified under s. NR 502.04.
>
> 2. Obtain approval of a plan of operation as specified in sub. (8) and an operating license from the department.
>
> ….
>
> (8) PLAN OF OPERATION. No person may establish or construct a solid waste storage facility or expand an existing facility unless the person has obtained a plan of operation approval from the department.

¶14 Initially, we examine whether CleanSoils was permissibly operating under the terms of an approved plan and operating license. CleanSoils had a license, but it extended only to the operation of portable thermal remediation units, not to the storage of contaminated soils for landspreading. CleanSoils makes no

[4] There is no dispute that the Radtkes' contaminated soil is included within the definition of solid waste. *See* WIS. STAT. § 289.01(33).

arguments based upon its license. Therefore, we conclude that it was not operating under the terms of its operating license.

¶15 CleanSoils concedes that it did not have an approved plan of operation. Based on this concession, we conclude that CleanSoils was not operating under the terms of an approved plan. Because CleanSoils offered no evidence or argument that it was operating pursuant to any DNR approved plan or license, we conclude that if WIS. ADMIN. CODE § NR 502.05(1)(a)'s requirements regarding solid waste facilities applied to CleanSoils, it was in violation.

¶16 We now examine whether the Town of How property where CleanSoils stored the contaminated soil constituted a solid waste facility. WISCONSIN STAT. § 289.01(35) defines "solid waste facility" as, in pertinent part:

> [A] facility for solid waste treatment, solid waste storage or solid waste disposal … includes commercial, industrial, municipal, state and federal establishments or operations such as, without limitation because of enumeration, sanitary landfills, dumps, land disposal sites, incinerators, transfer stations, storage facilities, collection and transportation services and processing, treatment and recovery facilities. *This term includes the land where the facility is located.* (Emphasis added.)

¶17 CleanSoils contends that the Town of How location was not a solid waste facility under WIS. STAT. § 289.31(1), and it therefore was not required to have an operating license and a plan of approval. The essence of CleanSoils's argument is that a solid waste facility requires a building or structure of some sort. Why else, it argues, would the definition refer to the "land where the facility is located" if the land itself can be a facility. We are not persuaded.

¶18 The statute is not ambiguous. When construed in context, "facility" refers to a location or operation. It encompasses places that do not require a

structure or building such as landfills, dumps and land disposal sites. It applies to collection and transportation services. "Facility," therefore, unambiguously includes the location where solid waste is stored. The land in question here was used to store solid waste and therefore falls within that definition. Accordingly, it is a solid waste facility.[5] Given that conclusion, we now examine whether any exemptions apply.

¶19 CleanSoils claims that the record presents a dispute of material fact whether it is exempt from the requirement of having a license and an approved plan of operation under WIS. ADMIN. CODE §§ NR 502.05(3)(h)[6] and NR 718. CleanSoils asserts the record permits the inference that it complied with the requirements of § NR 718, and in particular, the provisions of WIS. ADMIN. CODE § NR 718.05.[7] We disagree.

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[5] Aside from the statute's plain language, we find support for this construction in two earlier cases. In ***DeRosso Landfill Co. v. City of Oak Creek***, 191 Wis. 2d 46, 51-52, 528 N.W.2d 468 (Ct. App. 1995), *rev'd on other grounds,* 200 Wis. 2d 642, 650, 547 N.W.2d 770 (1996), a pond in which clean fill was placed was treated as a solid waste facility subject to DNR regulations. In ***State v. Edward Kraemer & Sons***, 170 Wis. 2d 646, 652, 489 N.W.2d 708 (Ct. App. 1992), a yard used to store barrels of solid waste was similarly treated as a regulated solid waste facility. Although neither case squarely addressed the issue of what constitutes a solid waste facility, both cases contemplated a reading of the statute that does not require a structure or building.

[6] WISCONSIN ADMIN. CODE § NR 502.05(3)(h) provides:

> The following storage facilities are exempt from all requirements of this section, except as specified.
> ….
> (h) Contaminated soil storage facilities in compliance with ch. NR 718.

Section NR 502.05(3)(h) thus directs us to WIS. ADMIN. CODE § NR 718.

[7] WISCONSIN ADMIN. CODE § NR 718.05, provides in part:

> (1) EXEMPTION FROM SOLID WASTE PROGRAM REQUIREMENTS. Sites or facilities where less than 2,500 cubic yards of excavated

(continued)

¶20 WISCONSIN ADMIN. CODE § NR 718.01 provides in pertinent part:

> This chapter establishes minimum standards for the storage, transportation, treatment and disposal of contaminated soil and certain other solid wastes excavated during response actions conducted in accordance with the requirements of

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> contaminated soil are stored by responsible parties for a period not to exceed 6 months, in accordance with all of the requirements of this section, are exempt from the solid waste program requirements for the storage of contaminated soil in ch. 289, Stats., and chs. NR 500 to 536.
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> (2) GENERAL STORAGE REQUIREMENTS. Except as provided in sub. (3) or (4) [not applicable here], the requirements in this subsection apply to the storage by responsible parties of excavated contaminated soil at sites or facilities that are not licensed solid waste storage facilities.
>
> (a) *Location standards*. …
>
> ….
>
> (b) *Exemptions from location standards*. …
>
> ….
>
> (c) *Impervious base*. Responsible parties shall place contaminated soil on base material impervious to the contaminant and to water, such as concrete, asphalt, plastic sheeting or an impervious construction fabric.
>
> (d) *Cover and anchoring*. Responsible parties shall ensure that all contaminated soil in a storage area is sloped and graded to eliminate depressions in the surface and is covered. The cover shall be in place at all times when the soil is not being transferred. The cover shall be constructed and maintained in accordance with all of the following requirements:
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> 1. The cover shall be constructed of an impervious material, such as plastic sheeting, impervious construction fabric, or another flexible impervious material. The cover shall be formulated to resist degradation by ultraviolet light.
>
> 2. The cover material shall be anchored in place, by means such as weights, ropes, cables, cords, chains or stakes to prevent the contaminated soil from being exposed.
>
> (e) *Surface water control*. Responsible parties shall construct a storage area to prevent surface water contact with the soil including the construction of berms if necessary. Any water which has been in contact with contaminated soil shall be contained and may be replaced in the storage pile, or shall be collected and treated as leachate as required by chs. NR 500 to 536.
>
> (f) *Signs*. …
>
> (g) *Inspections.* ….
>
> (h) Notification that soil is being transported to another property. …

> chs. NR 700 to 726. Where responsible parties have chosen to comply with the requirements of this chapter, the responsible parties are exempt from the storage, transportation, treatment and disposal requirements in ch. 289, Stats., and chs. NR 500 to 536, except where solid waste program requirements are specifically referenced in this chapter.

¶21 The exemptions contained in WIS. ADMIN. CODE § NR 718 are available only to "responsible parties" who undertake a "response action."[8] A response action is "any action taken to respond to a hazardous substance discharge or to environmental pollution, including emergency and non-emergency immediate actions, investigations, interim actions and remedial actions." WIS. ADMIN. CODE § NR 700.03(50). A responsible party is "any person who is required to conduct a response action or is liable to reimburse the department for the costs incurred by the department to take response action under s. 292.11, 292.31 or 292.41, Stats." WIS. ADMIN. CODE § NR 700.03(51).

¶22 These exemptions do not apply to CleanSoils because it is not a responsible party, but rather an operator of a commercial treatment unit or facility under WIS. ADMIN. CODE § NR 718.03(4).[9] It was not required to conduct a

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[8] The explanatory note to WIS. ADMIN. CODE § NR 718.01 further confirms its limitation to responsible parties undertaking response actions:

> This chapter exempts responsible parties who conduct specific types of response actions from obtaining site-specific approvals from the state's solid waste program, when the response actions are conducted in accordance with this chapter.

[9] WISCONSIN ADMIN. CODE § NR 718.03(4) provides:

> "Commercial treatment unit or facility" means a unit or facility that is operated for a profit by entities that are paid for providing the service. The term does not apply to a unit or facility operated by several responsible parties who pay a share of jointly incurred expenses, including consultant fees.

response action in connection with the contaminated soil on Radtke's property, nor was it liable to reimburse the DNR for the costs the DNR incurred in taking a response action. Thus, CleanSoils is not exempt under § NR 718.[10]

¶23 Nonetheless, CleanSoils claims that the WIS. ADMIN. CODE § NR 718 exemptions are not, or should not be limited to responsible parties undertaking response actions. It first asserts that the exemption in WIS. ADMIN. CODE § NR 502.05(3)(h)

> is not, on its face, limited to "responsible parties." … Because that plain language does not limit the exemption to "responsible parties," the court cannot read a limitation into the exemption that does not exist. … If NR 502.05(3)(h) is judicially revised to apply only to responsible parties, the references to "responsible parties" in other provisions of the NR 500 and NR 700 rules would be rendered superfluous.

¶24 CleanSoils misconstrues WIS. ADMIN. CODE § NR 502.05(3)(h); it exempts only "Contaminated soil storage facilities in compliance with ch. NR 718." The reference to WIS. ADMIN. CODE § NR 718 is the very limitation that CleanSoils claims is missing from § NR 502.02(3)(h). To comply with § NR 718, one must first be a responsible party. *See* WIS. ADMIN. CODE § NR 718.01. CleanSoils's construction would have us ignore § NR 718's expressly stated purpose of providing exemptions to responsible parties undertaking responsive actions. We decline to adopt such an interpretation. *See* ***State v. Mauthe***, 123 Wis. 2d 288, 299, 366 N.W.2d 871 (1985) ("[A] statute should be interpreted in light of its purpose."). Additionally, that a chapter dealing with responsible parties

[10] Indeed, WIS. ADMIN. CODE § NR 718.05(2), with which CleanSoils claimed it complied, is limited by its terms to storage by responsible parties. *See* note 6.

does not repeat that term at every opportunity is not irreconcilable with the chapter's clearly stated scope.

¶25 CleanSoils's interpretation also violates the rule of construction that "where the legislature specifically enumerates certain exceptions to a statute, this court presumes that the legislature intended to exclude other exceptions based on the rule *expressio unius est exclusio alterius*." ***In re Angel Lace M.***, 184 Wis. 2d 492, 512, 516 N.W.2d 678 (1994). Under this maxim, if a statute specifies one exception to a general rule, other exceptions are excluded. *See* ***id***. We conclude that the exceptions contained in WIS. ADMIN. CODE § NR 718 are limited to responsible parties; they do not apply to commercial remediators like CleanSoils.

¶26 CleanSoils next argues that WIS. ADMIN. CODE § NR 502.05(3)(h) is a remedial provision that should be liberally construed. It claims that the exemption is designed to "streamline the process of soil remediation and make it more cost-effective." We disagree. Remedial rules "afford a remedy, or improve or facilitate remedies *already existing* for the enforcement of rights and the redress of injuries." ***State v. Jason J.C.***, 216 Wis. 2d 12, 15, 573 N.W.2d 564 (Ct. App. 1997) (citation omitted) (emphasis in original). Section NR 502.05(3)(h) is not a remedial rule; it neither addresses a right or injury nor affords a remedy or improves or facilitates an existing remedy. Section NR 502.05(3)(h) is a limited exemption from otherwise applicable solid waste rules that exist to protect public health and safety.

¶27 Even if exemptions under WIS. ADMIN. CODE §§ NR 502.05(3)(h) and NR 718 applied to CleanSoils, it failed to comply with the requirements of § NR 718. WISCONSIN ADMIN. CODE § NR 718.05(2)(c) and (d) require that the contaminated soil be placed on an impervious base and completely covered by an

impervious material.[11] The State's evidence included photographs that depicted contaminated soil uncovered in spots and spilling over the base. CleanSoils did not dispute the violations depicted at the hearing on the summary judgment motion, but rather, offered to correct them. Based on the record, we cannot say there was a material issue of disputed fact; CleanSoils admittedly failed to fully comply with the requirements of § NR 718.05.

¶28 The court properly granted partial summary judgment. No material facts were in dispute. CleanSoils was required to have a license and an approved plan of operation for operating a solid waste facility at the Town of How site.

2. SELECTIVE ENFORCEMENT

¶29 CleanSoils contends that the affirmative defense of selective enforcement is available to it.[12] It asserts that the State was not prosecuting similarly situated competitors and was treating CleanSoils differently because CleanSoils "raised questions about the proper interpretation of the administrative rules."

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[11] *See* note 6 for the text of WIS. ADMIN. CODE § NR 718.05(2)(c) and (d).

[12] CleanSoils's evidence of this defense was appended to its motion for reconsideration. The State claims that the motion, filed more than 20 days after the judgment was entered, was not timely under § 805.17(3), STATS. We decline to address this contention, or whether the motion might be construed as a § 806.07, STATS., motion, because ultimately the evidence does not further CleanSoils's position.

The circuit court did not address the reconsideration motion, presumably because CleanSoils filed its notice of appeal approximately one week after filing the motion. CleanSoils therefore asks this court to address its motion and supporting evidence for the first time on appeal. Although we generally decline to address issues first raised on appeal, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), we do so here for several reasons. First, we resolve the issues against CleanSoils. Moreover, selective enforcement issues raised in the reconsideration motion otherwise meet the criteria set forth in ***Wirth*** for considering issues raised on appeal for the first time. Because there is no trial court decision, we consider this argument de novo.

¶30 In ***County of Kenosha v. C & S Mgmt.***, 223 Wis. 2d 373, 400-01, 588 N.W.2d 236 (1999), our supreme court said:

> [P]rosecutorial discretion is not wholly unfettered, having, instead, some constitutional limitations. ***Wayte v. United States***, 470 U.S. 598, 608 (1985); ***Locklear v. State***, 86 Wis. 2d 603, 609, 273 N.W.2d 334 (1979) (the constitution forbids the discriminatory enforcement of laws). The decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion," or the exercise of protected statutory or constitutional rights. ***Wayte***, 470 U.S. at 608 (citations omitted). Under ***Wayte***, a court may judge a discriminatory prosecution claim according to ordinary equal protection standards. ***Id***. These standards require a petitioner to show that the prosecution "had a discriminatory effect and ... was motivated by a discriminatory purpose." ***Id***. at 598.
>
> Before it is entitled to a full evidentiary hearing, [appellant] must first present a *prima facie* showing of discriminatory prosecution. *See* ***State v. Nowakowski***, 67 Wis. 2d 545, 565-66, 227 N.W.2d 697 (1975) …. A *prima facie* showing requires that at a minimum the defendant prove that he or she has been singled out for prosecution while others similarly situated have not, and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or the exercise of constitutional rights. ***Kerley***, 787 F.2d at 1148.

CleanSoils must initially show that similarly situated persons are generally not prosecuted for the same conduct and that the State's prosecution was motivated by CleanSoils' questioning the DNR's rule interpretation and application.

¶31 We determine that CleanSoils has failed to make the required showing under either prong.[13] CleanSoils has not directed us to a similarly situated class. The other thermal processors it asserts are in the same class had

[13] The parties dispute whether selective enforcement is a valid defense to this action. We decline to address that issue because our conclusion that CleanSoils has failed to make a prima facie case is dispositive. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

approved plans of operation. CleanSoils either had no approved plan or was violating its terms and is therefore not similarly situated. Additionally, CleanSoils does not explain why it is in the thermal processors class when it had no intention of thermally treating Radtke's soil. Moreover, CleanSoils has not provided evidence that other thermal processors had not questioned the DNR's interpretation and application of its rules.

¶32 CleanSoils has also not shown that it is part of a protected group. It claims that it is protected because its speaks out against the DNR's regulations. This is merely a self-serving characterization: CleanSoils has provided no documentation of its claim.

3. FORFEITURE IMPOSITION

¶33 CleanSoils asks that we determine that the forfeiture imposed "goes beyond simple deterrence and acts as a punishment or a confiscation [and that] the award of forfeitures under the circumstances of this case smacks of debtors' prison." Although CleanSoils recognizes that WIS. STAT. § 289.96(3)(a) mandates imposition of a forfeiture, it nonetheless contends that because CleanSoils is insolvent, the circuit court should not have ordered a forfeiture.[14] We reject its arguments.

¶34 WISCONSIN STAT. § 289.96(3)(a) provides:

[14] Although CleanSoils provided affidavits and supporting financial material to document its insolvency, that information was incomplete. The financial statement failed to include a value for any buildings or equipment, yet the tax returns reflected depreciation taken for those items. The circuit court further inquired, but was unable to obtain from counsel, an answer as to what assets CleanSoils owned.

> Except for the violations enumerated in sub. (1), any person who violates this chapter or any rule promulgated or any plan approval, license or special order issued under this chapter shall forfeit not less than $10 nor more than $5,000 for each violation. Each day of continued violation is a separate offense. While an order is suspended, stayed or enjoined, the penalty does not accrue.

¶35 CleanSoils recognizes that the circuit court is without discretion and must impose a forfeiture. Yet, CleanSoils refers us to ***State v. Schmitt***, 145 Wis. 2d 724, 736, 429 N.W.2d 518 (Ct. App. 1988), as authority for the proposition that the court may disregard the law if its application would result in a confiscatory forfeiture. In ***Schmitt***, this court declined to consider the defendant's argument that the forfeitures assessed were confiscatory because it was first raised on appeal. *See* ***id***. This is not authority for the proposition that a court may not impose a confiscatory forfeiture. The argument simply was not considered.

¶36 Our supreme court has recently recognized that the authorization of penalties of up to $5,000 per day "serves at least in part to punish offenders of the Solid Waste Law." ***State v. Chrysler Outboard Corp.***, 219 Wis. 2d 130, 153, 580 N.W.2d 203 (1998). It expressed no reservations concerning the prospect that the forfeiture structure could serve to punish a violator. We perceive no prohibition against a forfeiture in an amount that tends to punish, and CleanSoils refers us to no authority other than its unfounded reliance on ***Schmitt***. We decline to abandon our neutrality and develop CleanSoils's argument for it. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). We cannot conclude that, as a matter of law, no forfeiture should have been awarded here.

¶37 CleanSoils next contends that the court erroneously exercised its discretion by imposing a forfeiture of approximately $27.50 per day. It claims that the forfeiture amount should not have exceeded the minimum because it was

insolvent and had little culpability because it believed it fell within the exemptions.

¶38 We will sustain a discretionary act if the circuit court examined the relevant facts, applied a proper view of the law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Schmitt***, 145 Wis. 2d at 729. Courts have wide discretion in fixing the amount of a forfeiture. *See* ***Chrysler***, 219 Wis. 2d at 174. There are no statutorily mandated factors the circuit court must consider. Instead, the circuit court "is permitted to use the limits provided by [WIS. STAT. § 289.96] to fashion an appropriate forfeiture based on the facts of the individual case." ***Id***. Factors the circuit court could and did consider included the extent of CleanSoils's compliance with the court's injunctive orders, the degree of CleanSoils's culpability and the DNR's desire for compliance.

¶39 The court focused on CleanSoils's failure to comply with its order, as opposed to the underlying violation. Although CleanSoils had complied with portions of the court's order, it had not yet conducted a site investigation, despite good weather and adequate time. Because CleanSoils did not conduct the site investigation, the court did not know whether the stored soil caused further soil or groundwater contamination. The court considered the violation serious, although "not the most serious." The court properly exercised its discretion. It examined the relevant facts, applied appropriate factors and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

¶40 In conclusion, we determine that the circuit court appropriately granted partial summary judgment. The statutes and rules unambiguously provide that land without buildings or structures used to store solid waste can be a solid

waste facility and that the potentially applicable exemptions contained in the rules apply only to responsible parties, not commercial remediators. CleanSoils had no approved plan of action permitting it to store solid waste, and it therefore violated the applicable statutes and rules. We decide also that CleanSoils failed to prove a prima facie case of selective enforcement. Finally, we conclude that as a matter of law the court was required to assess a forfeiture and that it did not erroneously exercise its discretion by setting the forfeiture amount. Accordingly, the judgments are affirmed.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.