COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2000

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

No. 99-1066

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. KELLEY AND PETER M. KELLEY,

DEFENDANTS-APPELLANTS,

ARNOTT TRUCKING, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. John and Peter Kelley appeal a summary judgment determining that they unlawfully placed fill on the bed of a navigable waterway,

contrary to WIS. STAT. §§ 30.12(1)(a), 30.15(1)(a) and 30.15(1)(d)[1] and imposing a $3,000 forfeiture and assessment against them. The Kelleys raise several issues that they argue constitute defenses to the violations. They contend: (1) "Title to land below streams and artificial water remains in the owner"; (2) "there was not any evidence that the ordinary high water mark [OHWM] of 113.5 … existed prior to the placement of the fill on the roadway, and as all the evidence shows that the OHWM did not exist for twenty years, there was not any issue as to prescription and the defendants were entitled to summary judgment;" (3) the dam is to be maintained at a pond level of 112.0 feet; (4) the Department of Natural Resources unlawfully supervised the dam causing the pond level to rise, resulting in flooding; and (5) this action violates their constitutional rights to due process and equal protection. We reject their arguments and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 The trial court determined that the following facts, derived from various affidavits and the parties' stipulation, were not disputed.[2]

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[1] All references to the Wisconsin statutes are to the 1987-88 version unless otherwise noted.

[2] The trial court's summary of the parties' stipulated factual statement, affidavits, and depositions is not challenged on appeal. The quoted facts are from the "Memorandum Decision" signed and dated by the trial court on August 21, 1995.

The Kelleys' statement of facts, however, combines factual assertions supported by record citation with assertions unsupported by record citation. We consider only those factual assertions supported by record citation. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 290-91 n.4, 453 N.W.2d 158 (Ct. App. 1990).

The case was originally scheduled for trial, and Dorothy Konkol was sworn and testified as a witness. After her testimony, the parties agreed that the material facts necessary to resolve the legal issues were undisputed and therefore the parties agreed to stipulate to the facts and issues to be decided on summary judgment.

(continued)

> This case involves Killarney Lake, a lake created by a dam on the Little Rice River in the Town of Little Rice in western Oneida County. A permit for this dam was issued to the Town of Little Rice in 1959, and the dam was completed in 1961. … No bulkhead line has been established for this lake.[3]
>
> The dam overflowed lands owned for many years by various members of the Kelley family. The defendant, John W. Kelley, holds title to the property in question at this time.
>
> This land contains certain old logging roads which, from time to time, would be flooded. One of these roads provided access to "Pete's Point" to the west of the main Kelley property, an area which, from time to time, was an island surrounded on all sides by water. In the fall of 1988, Peter Kelley, son of John W. Kelley, hired the defendant, Arnott Trucking, Inc., to place sand and gravel fill on three sections of this road. The three sections where fill was placed were 45 feet long by 22 feet wide, 80 feet long by 22 feet wide, and 200 feet long by 20 feet wide. In this latter area, it is stipulated that fill material was placed at some spots below the ordinary high water mark established by the DNR on June 25, 1990. (Footnote omitted).

The parties submitted the following issues to the court: (1) Does the permit issued to the town require the town to operate the dam to maintain the pond level at 112.0 feet; (2) does John Kelley own the periodically submerged lands; (3) do they have a right to place fill on the periodically flooded roads; (4) assuming the roads were flooded due to pond levels being maintained in excess of 112.0 feet authorized by the permit, do the Kelleys have the right to place the fill; and (5) if a land owner believes the water level is too high, what are his legal remedies.

[3] The quoted material below is n.3 from the "Memorandum Decision" signed and dated by the trial court on August 21, 1995:

> "Bulkhead line" is the term which replaced "shoreline" in previous statutes …. Sec[tion] 30.11 Stats., explains how a bulkhead line is established: Any municipality may establish such a line by ordinance, subject to DNR approval. While the line "shall conform as nearly as practicable to the existing shores" certain exceptions are allowed. Such lines are established by filing with the department a map indicating the line and the existing shore and a copy of the ordinance establishing the line. Thus, a bulkhead line is not merely the natural shoreline but is a line legislatively established by a municipality which may differ from the existing shore line. ***State v. McFarren***, 62 Wis. 2d 492, 497-98, 215 N.W.2d 459 (1974).

> Arnott Trucking, Inc. was paid $1,200.00 for its work on this project. The fill was taken from near-by lands owned by the Kelleys. It is agreed that no permit was applied for or issued pertaining to this work.
>
> Shortly after the fill was placed in the fall of 1988, Mr. and Mrs. Konkol, property owners on Killarney Lake, happened to be out canoeing when they observed the fill. They were concerned because they had previously been able to canoe through the westernmost section where the 200 feet of fill had been placed. After making their observations, they contacted the Department of Natural Resources, … the agency which investigated the matter and, ultimately, sought the filing of the present complaint.

¶3 The affidavits and depositions offered to support the Kelleys' motion for summary judgment included John Kelley's and those of his two sons, Peter and Joseph. At his deposition, John testified that at times water may have totally covered two of the sections where fill was placed. He testified that when it was flooded, "you could pull your way through there at the highest level" in a boat or canoe. In his affidavit in support of summary judgment, he stated that the filled area was not part of the lake but is "shown as 'marsh or swamp'" on a 1971 geological survey map. He stated that "[d]uring the dry fall of 1988" when the fill was placed on the logging road, the "low water had receded back from the road."

¶4 Peter estimated that he visited the area in question approximately fifty times in 1988. He stated that the water level would fluctuate, and on more than half the occasions there was water over the western area where he had placed fill. In the spring of the year, he was able to take a twelve-foot rowboat over the area.

¶5 Joseph testified that between 1986 and 1988, he camped on his father's land approximately twenty times. He stated that it was a common

occurrence to see water over the western area that was filled. He estimated the depth of the water to be several inches.

¶6 Dorothy Konkol testified that in 1969, she and her husband lived near Killarney Lake and that they would take their boat to Killarney Lake quite often. In 1985, they purchased a home on Killarney Lake and lived there until 1994. She and her husband canoed on the lake three or four times a week. She had canoed the area where the fill was placed "lots of times." "With … decent weather," she would canoe the area "at least two or three times a month." Before the fill was placed in the area, "it was plenty good for a canoe to go through and room enough for the paddle to work." At other times of the year, however, the area would be too shallow to canoe.

¶7 The trial court determined that periodic flooding of the area in question was sufficient to make the area navigable. The court concluded that WIS. STAT. ch. 30 prohibited the Kelleys from placing fill on periodically navigable water, even though they had title to the lakebed. The trial court granted summary judgment in favor of the State, finding that it had proved by clear, satisfactory and convincing evidence that the Kelleys violated WIS. STAT. §§ 30.12(1)(a),[4] and 30.15(1)(a) and (d).[5]

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[4] WISCONSIN STAT. § 30.12(1)(a) reads:

> **(1)** GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> (a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established ….

[5] WISCONSIN STAT. § 30.15(1)(a) and (d) reads:

(continued)

STANDARD OF REVIEW

¶8 We review a summary judgment de novo, applying the same standards as the trial court. *See* ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). We will affirm the trial court if the court reached the correct result, even if we disagree with its reasons. *See* ***Negus v. Madison Gas & Elec. Co***., 112 Wis. 2d 52, 61 n.3, 331 N.W.2d 658 (Ct. App. 1983).

¶9 Summary judgment is appropriate if the material facts are undisputed and the reasonable inferences lead to one conclusion. *See* ***id***. at 57-58. Summary judgment, then, is not to be granted "unless the material facts are not in dispute, no competing inferences can arise [from such facts], and the law that resolves the issue is clear." ***Lecus v. American Mut. Ins. Co***., 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977).

¶10 "Because a motion for summary judgment amounts to an explicit assertion that the material facts are undisputed, a party who moves for summary judgment is precluded from later asserting that disputed material facts entitle it to a jury trial." ***Fore Way Express v. Bast***, 178 Wis. 2d 693, 702, 505 N.W.2d 408 (Ct. App. 1993). We therefore conclude that when the Kelleys filed their motion for summary judgment, they waived their right to allege that disputed material facts entitle them to a hearing. *See* ***id***. Even on their merits, however, the Kelleys' claims fail.

> **(1)** OBSTRUCTIONS PENALIZED. Any person who does any of the following shall forfeit not less than $10 nor more than $500 for each offense:
>
> (a) Unlawfully obstructs any navigable waters and thereby impairs the free navigation thereof.
>
> ….
>
> (d) Constructs or places any structure or deposits any material in navigable waters in violation of s. 30.12 or 30.13.

¶11 The Kelleys argue that it was error for the trial court to refer to the State's standard of proof, i.e., "clear, satisfactory and convincing," and to refer to "findings" and "sufficient evidence," which are legal terms that are inconsistent with summary judgment methodology. We agree that summary judgment procedure precludes fact finding. The record discloses, however, that despite this inappropriate phrasing on the part of the trial court, its determinations were not of fact but rather conclusions of law. For example, the court could have found that undisputed facts met the standards it referred to. Thus, we are not persuaded that the court's references to various legal standards amount to reversible error.

¶12 The Kelleys also argue that "the uncontradicted evidence certainly creates an issue of fact as to the prior water levels and prescriptive rights." The Kelleys do not specifically identify any disputed fact that is material. Here, the issues are (1) whether the Kelleys violated WIS. STAT. § 30.12 that declares it unlawful "to deposit any material … upon the bed of any navigable water where no bulkhead line has been established" unless a permit has been granted and (2) whether they violated WIS. STAT. § 30.15(1)(a) by obstructing the waterway. The uncontradicted affidavits and testimony establish no dispute that, without a permit, the Kelleys placed fill in a navigable waterway where no bulkhead line had been established, and that the fill resulted in an obstruction to navigation. Nonetheless, the Kelleys claim that the following issues constitute defenses to the violations. For the reasons that follow, we reject their contentions.

DISCUSSION

1. Title to land below the OHWM

¶13 The Kelleys argue that title to land below the OHWM of a stream or an artificial waterway remains in the owner of the land. Both parties agree and the

trial court acknowledged that the Kelleys own the land in question. For purposes of this opinion, we accept without deciding that the Kelleys remain the owners of the submerged land. Nonetheless, we conclude that this proposition fails to raise a dispute of material fact. An owner's title to the bed of a navigable water is a qualified one and subject to the public right of navigation with all its incidents. *See* ***Muench v. PSC***, 261 Wis. 492, 53 N.W.2d 514 (1952).[6] A riparian's qualified title to the beds of navigable streams is "'subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in [the state] in trust for their use.'" ***Id***. at 502 (quoting ***Franzini v. Layland***, 120 Wis. 72, 81, 97 N.W. 499 (1903)). That the Kelleys may own the lake or stream bed in question has no bearing on whether the waterway is navigable.

¶14 Also, "whether the circumstances creating navigability were natural or artificial is irrelevant." ***DeGayner & Co. v. DNR***, 70 Wis. 2d 936, 946, 236 N.W.2d 217 (1975). "[W]e conclude that it is not essential that the navigability be caused by a natural condition." ***Id***. at 947.

¶15 The Kelleys rely on ***Haase v. Kingston Co-op. Creamery Ass'n***, 212 Wis. 585, 588-89, 250 N.W. 444 (1933), to support their contention that "a landowner may devote his land to any lawful purpose." This circular argument does not demonstrate that an owner's use of his private lands cannot be regulated by the State. "[T]here is nothing inconsistent in the doctrine of private ownership of beds of navigable streams subject to all the burdens of navigation and the

[6] The Kelleys do not claim to own all the land surrounding the lake. Artificial water located wholly on the property of a single owner "is his to use as he sees fit." ***Mayer v. Grueber***, 29 Wis. 2d 168, 176, 138 N.W.2d 197 (1965).

incidents thereof. [R]iparian owners … have only a qualified title to the beds thereof, which title is entirely subordinated to, and not inconsistent with, the rights of the state ….” ***Diana Shooting Club v. Husting***, 156 Wis. 261, 269, 145 N.W. 816 (1914).[7]

¶16 The Kelleys also seek to create an issue by arguing that the trial court blurred the distinction between lakes and streams. The Kelleys fail to demonstrate the materiality of their distinction. We are persuaded that, for purposes of our review of the violations alleged, any distinction between owners of lakefront property and owners of river and stream banks is of no consequence. “The property rights of both are subject to the paramount interests of the public trust.” ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State***, 740 F. Supp. 1400, 1425 (W.D. Wis. 1990).

2. Evidence of OHWM of 113.5 prior to placement of fill

¶17 Next, the Kelleys argue that there was no evidence that the OHWM of 113.5 existed before the fill was placed. They argue that because “all the evidence shows that the OHWM did not exist for twenty years, there was not any issue as to prescription and the [Kelleys] were entitled to summary judgment.” They contend that because the OHWM was first established in 1990, there is no evidence as to what the OHWM was at the time the fill was placed.

[7] Also, ***Haase v. Kingston Co-op. Creamery Ass’n***, 212 Wis. 585, 250 N.W. 444 (1933), must be distinguished from the present case on its facts. In ***Haase***, the millpond was formed by waters of a non-navigable stream, and the plaintiff owned “all of the lands so overflowed.” ***Id***. at 586. Here, there is no claim that the Little Rice River is non-navigable, and no claim that it overflows only on lands to which the Kelleys hold title.

¶18 The Kelleys were charged with violating WIS. STAT. § 30.12(1)(b), which prohibits the placing of fill without a permit in navigable water "where no bulkhead line has been established." The lack of an established OHWM is not a defense to an alleged violation of § 30.12(1)(b). "By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of … vegetation, or other easily recognized characteristic." ***Diana Shooting Club***, 156 Wis. at 272. If the high water mark is "ordinary," it is also "recurring." However, although OHWM determines lakebed, it does not necessarily determine navigability. *See* ***State v. Trudeau***, 139 Wis. 2d 91, 103-04, 408 N.W.2d 337 (1987).

¶19 A navigable water is defined as lakes, "streams, sloughs, bayous and marsh outlets, which are navigable in fact." ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 586, 412 N.W.2d 505 (Ct. App. 1987); *see also* WIS. STAT. § 30.10(1) and (2). The test for navigability is whether the stream is capable of floating any boat, skiff or canoe in the shallowest draft used for recreational purposes. *See* ***DeGayner & Co***., 70 Wis. 2d at 945-47. In ***DeGayner & Co***., evidence showed "that modern recreational canoes and kayaks could successfully be used for recreational purposes in as little as three inches of water." ***Id***. at 945. It is not essential that the capacity of the stream be continuous. *See* ***id***. A stream not navigable in its low stage, or even in its ordinary stage, but navigable only "during periodic rises of the stream, which varied in their duration from four to thirteen days" met the legal standard of navigability. ***Id***. at 945-46. Also, a "stream was held navigable despite the fact that it was navigable in fact only during the spring run-off period." ***Id***. at 946. Because the Kelleys cite no

authority suggesting that determination of navigability depends on ascertaining the OHWM, their argument is rejected.

¶20 The Kelleys suggest that the record is insufficient to determine that the fill was placed in the bed of a lake, stream, slough, bayou or marsh outlet because the 1971 geological survey map describes the area in question as marsh and not lake. As a DNR employee testified, the map indicated that the area in question was "unwooded swamp which could be anything from ankle-deep water with vegetation up to water over your head with vegetation in it." Therefore, the map fails to raise a material issue because a swamp, marsh outlet or a lake may be a navigable water. *See* WIS. STAT. § 30.10(1) and (2).[8] The Kelleys also seek to draw an analogy between the flooding caused by the operation of the dam and flooding of street gutters and backyards caused by spring run-off. We are not persuaded. Here, it is undisputed that the recurring flooding was caused by the rising waters of a navigable lake, not overflowing gutters and streets. Kelley's analogy does not apply.

[8] WIS. STAT. §§ 30.10(1) and (2), "**Declarations of navigability**" reads:

> **(1)** LAKES. All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.
>
> **(2)** STREAMS. Except as provided under sub. (4) (c), all streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

WEBSTER'S THIRD NEW INT'L DICTIONARY 2146 (Unabr. 1993), defines a slough as "a large wet or marshy place : SWAMP."

3. Prescriptive rights

¶21 The Kelleys also argue that the uncontroverted facts show that the State has no prescriptive rights in the waterway. They claim that the flooding of their land was permissive and not adverse to their title. They also contend that the fill does not unreasonably interfere with the use or operation of the dam. Whether a prescriptive right to a certain water level was acquired by the landowners or the State is irrelevant. Under WIS. STAT. § 31.02, the DNR may regulate water level in navigable waterways and does not need to acquire the right to change the water levels by adverse possession or prescription. The DNR's decision is based on present circumstances and present-day determinations to promote safety and protect life, health and property rights. *See* ***id***. We conclude that these arguments fail to raise material issues of fact or law.[9]

4. Pond level

¶22 The Kelleys argue that the dam permit required that the dam be maintained at a pond level of 112.0 feet. They contend that the DNR should be required to comply with the law set forth in WIS. STAT. § 31.13 before it allows the pond to be raised above the height of 112.0. They claim that the "DNR personnel knew what should be done, but conspired to not follow the law until the Kelley case was complete." They also argue that if the pond was maintained at 112.0 feet, the road would not be flooded.

[9] The Kelleys also argue: "If prescriptive rights would apply, the landowner could still repair the road." Because we conclude that proof of prescriptive rights is not relevant, we do not address this issue.

¶23 It is undisputed that water levels fluctuate. As previously noted, WIS. STAT. § 31.02 authorizes the DNR to regulate water levels in navigable waterways based on present circumstances and present-day determinations to promote safety and protect life, health and property rights. The Kelleys' argument is premised on the assumption that they are entitled to a constant pond level. While the findings of fact at the agency hearing for the dam permit evinced an intention to maintain a pond level at 112.0 feet, the Kelleys' argument concedes that the pond was not maintained at that level. The Kelleys, however, do not claim that they filed complaints with the DNR concerning water level. Also, there is no evidence that the level indicated in the permit could not be modified if circumstances changed. We conclude that a pond level maintained in excess of that indicated in agency fact findings fail to dispense with the permit requirements of WIS. STAT. §§ 30.12(1)(a) and 30.15(1)(a) and (d).

5. Due process and equal protection

¶24 Finally, the Kelleys argue that the "delay in bringing this action, the accrual of excessive forfeitures, the flooding of the road and land, and subsequent removal of the road improvement, violated the due process, property rights and equal protection rights of the defendants guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Section[s] Nine and Thirteen of the Wisconsin Constitution." The Kelleys contend that "[t]his action was commenced during November of 1993, FIVE YEARS after notice of the road was received by the DNR." They contend that the delay in bringing the forfeiture

action resulted in the potential imposition of excessive forfeitures which are calculated on a per diem basis.[10]

¶25 The parties, however, stipulated that the forfeiture should be imposed on the basis of 250 days of violations. The court imposed a total of $3,000 in forfeitures and assessments against the Kelleys. They fail to show that they were prejudiced by the potential of excessive forfeitures that were caused by the delay.

¶26 Next, the Kelleys argue that two important witnesses died in 1994, one in August and one in December, both of whom could have testified to the lake levels during the 1980s. The Kelleys fail to demonstrate that the delay prejudiced their ability to obtain testimony of these witnesses. The action was commenced in November 1993. The Kelleys do not explain why they did not attempt to preserve the witnesses' testimony during the nine and thirteen months between the commencement of the action and their deaths. Accordingly, they fail to show that they were prejudiced.

¶27 The Kelleys also argue that the constitution forbids taking property without just compensation and that the DNR's failure to supervise water levels resulted in a loss of use of the logging road, thus requiring a dismissal of the action. The cases cited support the proposition that landowners are entitled to compensation when government action deprives them of substantially all

[10] These arguments were not raised until after the court entered judgment against the Kelleys at which time they were brought by motion. The trial court concluded that constitutional claims cannot be waived. We disagree. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996) (even the claim of a denial of a constitutional right will be deemed waived unless timely raised in the trial court). Nonetheless, because the trial court addressed the issues, we do so here.

beneficial use of the property.[11] The record fails to reveal that the Kelleys filed any claim or counterclaim against the State seeking compensation for the alleged wrongful taking. The cases cited do not support the Kelleys' claim that regulatory action or inaction eliminates the permit requirements of WIS. STAT. §§ 30.12 and 30.15. We conclude that their argument fails to create a genuine issue of fact or law precluding summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

[11] The Kelleys rely on ***Zinn v. State***, 112 Wis. 2d 417, 428, 334 N.W.2d 67 (1983); ***Howell Plaza v. State Highway Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975); ***Just v. Marinette County***, 56 Wis. 2d 7, 15, 201 N.W.2d 761 (1972); and ***Bino v. City of Hurley***, 273 Wis. 10, 21, 76 N.W.2d 571 (1956).