COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2870

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

RONALD M. HUBBARD,

PLAINTIFF-RESPONDENT,

V.

PEOT CONSTRUCTION, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Peot Construction, Inc., appeals a summary judgment granting injunctive relief to Ronald Hubbard. The circuit court required Peot to prepare and implement an engineered drainage plan with a

twenty-five-year storm event capacity to transport water beyond Hubbard's property. It also restrained Peot from flooding Hubbard's land. Peot argues that (1) the circuit court erroneously granted summary judgment because there was no proof that there exists a sufficient probability that future flooding would occur; (2) the circuit court erred by granting an injunction because there has been no irreparable injury and Hubbard has an adequate remedy at law that he has pursued and settled; (3) Hubbard is not entitled to equitable relief as a matter of law; and (4) this court should exercise its discretionary power of reversal on the ground that the real controversy has not been fully tried.

¶2 Based upon our review of the contentions argued, we conclude that Peot has not demonstrated any dispute of material fact or that the trial court has made any error of law. Therefore, we affirm the summary judgment.

BACKGROUND

¶3 Peot and Hubbard are adjacent owners of vacant residential lots in a Town of Suamico subdivision. Peot dug a man-made lake, known as Lake Jessie, and developed the land north of Hubbard's parcels. This dispute arose after Hubbard's land was flooded. Hubbard claims that Peot constructed inadequate drainage systems that have caused and will continue to cause flooding over his lands.

¶4 It is undisputed that in 1997, Peot pumped water from Lake Jessie to permit shoreline grading work to be accomplished. This caused standing water on Hubbard's land until the fall of 1997. Hubbard claimed he was unable to market his lots as a result of this flooding. It is also undisputed that the flooding caused at least one sale to fall through. Nonetheless, there is no evidence of any flooding since 1997 and, in 1998, Hubbard's real estate agent acknowledged that the lots

were "dryer than a bone." There is no claim of any lingering physical damage or erosion to the lots as a result of the flood.

¶5 Hubbard retained the services of Robert Mach, who testified that most ditches and culverts in Suamico are designed to handle a twenty-five-year storm event.[1] He testified that the drainage for Lake Jessie was not designed to handle such an event. He believed the new ditch was too small and ran contrary to existing drainage patterns.

¶6 Mach also believed there was no permanent overflow management system that would deal with a rising lake level at a point before flooding began in surrounding homes. He stated: "[I]n the event that that would happen then they would have to resort to pumping down the lake through this outlet structure which flows to the ditch behind his property which has flooded his property which was the origination of this whole case."

¶7 Hubbard also retained the services of Terrence Tavera, a hydraulic engineer, who was critical of Peot for not constructing the subdivision with an engineered storm water management plan. Tavera had four specific criticisms: (1) there is no permanently configured outlet structure for Lake Jessie; (2) a ditch dug in 1998 had insufficient capacity; (3) the ditch was not permanently stabilized and was subject to erosion; and (4) the ditch ran counter to natural flowage patterns. Tavera believed the insufficiencies in the drainage plans could cause problems on the Hubbard property.

[1] The record is unclear as to the precise nature of his qualifications. Peot does not, however, challenge Robert Mach's credentials as an expert.

¶8 Hubbard's suit sought damages and a mandatory injunction requiring an engineered drainage system. The parties settled Hubbard's claim for damages based upon the 1997 flood. The settlement agreement provided: "IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the plaintiff's claims for equitable relief are not hereby dismissed." Based on the stipulation, the court dismissed Hubbard's claim for damages but its order provided "the plaintiff's claims for equitable relief are not hereby dismissed."

¶9 Accordingly, the case proceeded on Hubbard's claim for injunctive relief. Both parties moved for summary judgment. Peot contended that Hubbard's complaint should have been dismissed because he was unable to demonstrate a prima facie case. It asserted that there was no causal connection between its acts and Hubbard's damage claim and that there was no evidence of quantifiable damages. Hubbard, on the other hand, claimed that undisputed facts entitled it to an injunction as a matter of law.

¶10 After considering arguments at the summary judgment hearing, the circuit court took the motions under advisement. In a written decision, the court granted injunctive relief, explaining:

> I find that the defendant, with the consent of the plaintiff, installed a drainage culvert to allow drainage from Lake Jess[i]e. I find that when Peot commenced to lower the level of Lake Jess[i]e by pumping as observed by Mr. Shackelford that conduct resulted in flooding of plaintiff's property. It is undisputed that the natural drainage system was unable to accommodate said pumping for the purpose of lowering Lake Jess[i]e.
>
> I find that Lake Jess[i]e constitutes a water impoundment source which now contributes to the cfs capacity of down stream drainage systems. I direct that Peot Construction prepare and implement an engineered drainage plan which will permit a 25-year rain event to occur, and based on those calculations, have a design capacity to transport water

> discharged by Lake Jess[i]e beyond the property of Ronald Hubbard.
>
> I restrain Peot Construction from permitting a discharge of water from Lake Jess[i]e which has the effect of flooding plaintiff's property based upon the cfs created by a 25-year storm event.

STANDARD OF REVIEW

¶11 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.[2] The court does not find facts on summary judgment; rather, it determines whether there are material facts in dispute. Undisputed facts that give rise to conflicting inferences preclude summary judgment. *See* ***Rach v. Kleiber***, 123 Wis. 2d 473, 478, 367 N.W.2d 824 (Ct. App. 1985).

¶12 Injunctive relief "is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." ***Pure Milk Prods. Coop. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). We sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***City of Wisconsin***

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

Dells v. Dells Fireworks, Inc., 197 Wis. 2d 1, 15, 539 N.W.2d 916 (Ct. App. 1995). [3]

DISCUSSION

¶13 Peot contends that the circuit court erroneously granted summary judgment because there is no proof of sufficient probability that future flooding would occur. Peot correctly observes that injunctions look to the future, not to the past. *See* ***Sohns v. Jensen***, 11 Wis. 2d 449, 462, 105 N.W.2d 818 (1960). Their purpose is to prevent damage, not to compensate for it. *See* ***Lakeside Oil Co. v. Slutsky***, 8 Wis. 2d 157, 168, 98 N.W.2d 415 (1959). An injunction may be granted only when the court is convinced that the claimant's remedy at law would be inadequate. *See* ***Simenstad v. Hagen***, 22 Wis. 2d 653, 663-64, 126 N.W.2d 529 (1964). A plaintiff must show a sufficient probability that the defendant's future conduct will violate a right of and will irreparably injure the plaintiff in order to obtain a permanent injunction. *See* ***Pure Milk Prods***., 90 Wis. 2d at 800. The critical question for a court in deciding to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated. *See* ***id.*** at 802-03.

¶14 Peot claims that the record discloses only a single incident of flooding when the lake was pumped in 1997 to permit shoreline grading. It argues that there is no evidence that Peot intends to pump the lake in the future and, therefore, there is no support in the record for an injunction. Peot's contentions do

[3] Neither party complains that the exercise of discretion may be inconsistent with the court's role on summary judgment, indeed both parties moved for summary judgment. Accordingly, we do not address this potential issue. *See* ***Waushara County v. Graf,*** 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).

not withstand scrutiny. They fail to consider undisputed expert testimony that the drainage plan is insufficient to handle a twenty-five-year storm.

¶15 The court did not base the injunction solely on the isolated pumping incident, but rather on the proof of the existing inadequate drainage system. Hubbard presented expert testimony that there was no permanent overflow management system to deal with a rising lake level at point before flooding in surrounding homes. Mach stated: "[I]n the event that that would happen then they would have to resort to pumping down the lake through this outlet structure which flows to the ditch behind his property which has flooded his property which was the origination of this whole case." Peot offered no rebuttal and does not claim that flooding is a trivial or inconsequential result. Because the court based the injunction on undisputed testimony of a reasonable probability of future harm due to an inadequate drainage system, Peot's argument must be rejected.

¶16 Peot contends, however, that Tavera's testimony fails to support the injunction because, in an earlier portion of his deposition, Tavera stated:

> From the limited survey information I have I don't know what the elevations are here on the east side of the lake. I don't know which way [sic] would overflow, if it would overflow to the south or to the east or to the west or north. At this point I don't have enough survey information to see where that would overflow. But just from the capacity of the lake I would think that there would be enough storage in there for most of that water to be stored in the lake temporarily, although but I believe the houses around the lake would be damaged I guess.

¶17 We are unpersuaded. This section of Tavera's deposition testimony indicates that the lake will store most of the water temporarily, but when it overflows, he is unsure which direction overflow would take. This testimony supports the notion that there is not a sufficient drainage plan. It does not negate

other testimony that the overflow will require pumping, causing flooding of Hubbard's land. As a result, we conclude that this segment of Tavera's deposition fails to create a dispute of material fact.

¶18 Relying on ***Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.***, 33 Wis. 2d 98, 146 N.W.2d 447 (1966), Peot argues that because its pumping activity has ceased, Hubbard is not entitled to injunctive relief. ***Fromm*** held that because the acts sought to be enjoined had ceased, the issuance of an injunction would be error. *See* ***id.*** at 104. Here, however, the inadequate drainage plan is an existing condition, not an activity that has ceased.

¶19 Peot also relies on ***Shanak v. City of Waupaca***, 185 Wis. 2d 568, 518 N.W.2d 310 (Ct. App. 1994). In ***Shanak***, the court found that the plaintiff did not show the defendant would violate its rights in the future. ***Id.*** at 588. Here, undisputed expert testimony supports the court's finding of a reasonable likelihood of future harm. Thus, the ***Fromm*** and ***Shanak*** cases must be distinguished on their facts.

¶20 Also, ***Briggson v. Viroqua***, 264 Wis. 47, 58 N.W.2d 546 (1953), does not support Peot's contentions. ***Briggson*** involved a claim for damages and equitable relief due to the City of Viroqua's discharge of sewage across the plaintiff's farm. In discussing a variety of cases in which damages and equitable relief had been sought, ***Briggson*** noted it had been held that the court "will in a proper case, not only extend its equitable remedy, but will also permit the recovery of damages." ***Id.*** ***Briggson*** determined, however, that the trial "court had the power in the instant case to award damages … in lieu of granting injunctive relief." ***Id.*** at 57. "[T]he damages awarded by the trial court covered and contemplated the continuance of the discharge of effluent through the ditch which

had been worn across plaintiffs' farm." ***Id.*** at 59. Here, Peot makes no showing that the damages Hubbard received at settlement covered and contemplated future flooding across his land due to an inadequate drainage plan. Accordingly, ***Briggson*** must also be distinguished on its facts.

¶21 Next, Peot argues that the trial court erred by granting an injunction because there has been no irreparable injury and Hubbard has an adequate remedy at law that he has successfully pursued and settled. This argument suffers from a number of fatal flaws. First, the parties' settlement specifically reserved Hubbard's equitable claim.[4] Second, the purpose of an injunction is to prevent future harm, *see* ***Pure Milk Prods***., 90 Wis. 2d at 803, so a lack of past irreparable injury would not provide a defense. "[A]n injunction is designed to prevent injury, not to compensate for past wrongs, and that an injunction may issue merely upon proof of a sufficient threat of future irreparable injury." ***Id.*** at 802. Finally, a settlement for past damages does not preclude injunctive relief from the threat of future harm. *See* ***id.*** at 802-03.

¶22 Peot also argues that Hubbard is not entitled to an injunction because he is unable to adequately quantify his damages. This argument rallies in favor of injunctive relief, not against it. "In seeking an injunction it is not necessary to prove that the plaintiff has suffered irreparable damage, but only that he is likely to suffer such damage. The remedy at law may be inadequate because of the

[4] Peot does not suggest that he raised this issue before the trial court. Because the province of this court is to correct trial court errors, we decline to address the issue for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1979). Also, because Peot's brief ignores the settlement's and order's language preserving Hubbard's equitable remedies, we do not address the matter further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994) (This court declines to address issues raised on appeal that are inadequately briefed.).

difficulty or impossibility of measuring the damages." ***Simenstad***, 22 Wis. 2d at 664.

¶23 Alternatively, another interpretation of Peot's argument would be this: Hubbard's proofs fail to demonstrate that the harm caused by the reasonable probability of future flooding is irreparable. After all, Hubbard obtained adequate relief at law in the form of damages for the previous flood. Therefore, because the remedy of damages is available to compensate for future flooding damage, equitable relief in the form of an injunction is unavailable.

¶24 This argument would find no support in the law. Injunctive relief is justified where the damages for each day may not be significant but successive actions for damages would be costly, time consuming and hence impracticable. *See* 3 RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 420 at 34-231-33 (1981). Accordingly, the trial court correctly concluded that the reasonable probability of successive flooding posed a threat of irreparable harm.

¶25 Next, Peot argues that it should be granted summary judgment because Hubbard is not entitled to equitable relief as a matter of law. Peot bases this argument on the contentions it previously made. Because we were unpersuaded by its previous arguments, we conclude that it is not entitled to summary judgment as a matter of law.

¶26 Peot also requests that this court exercise its discretionary power of reversal on the ground that the real controversy has not been fully tried. It contends that equitable issues were not fully presented to the court because, after it had filed its summary judgment motion, Hubbard filed his motion with supporting documentation only two days before the hearing scheduled on Peot's summary

judgment motion. Peot claims this left it little time to respond to issues such as comparative costs.

¶27 First, Peot does not identify where in the record it objected to Hubbard's belated filings or asked the court for a continuance to offer proof of other factors such as comparative costs. This court does not scour the record for support for appellant's arguments. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). The absence of appropriate objection fails to preserve the issue for appellate review. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, ¶10, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***Id.*** "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." ***Id.***

¶28 Second, Peot's argument fails to take into account that summary judgment procedure permits the court to enter judgment for the opposing party even in the absence of a motion. WISCONSIN STAT. § 802.08(6) provides:

> JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

Therefore, a timely motion is not a prerequisite to the award of summary judgment to an opposing party.

¶29 Third, many of Hubbard's filings duplicated those items Peot proffered in support of its motion for summary judgment. In view of these

circumstances, we are not persuaded that the interests of justice require a reversal and new trial.

¶30 Finally, we note that in its statement of facts, Peot mentions that at the hearing for a temporary injunction, it submitted its affidavit asserting that its "development of Lake Jessie has not added any additional water to [Hubbard's] property" and, "[i]n fact, Lake Jessie acts as a retention area for water flow in the area." Peot also stated that "[t]he development of Lake Jessie and it[]s roads did not change the natural flow of rain water in any way" and that the lake is a "holding area for normal rain water flow." Peot does not suggest, however, that it relied on this affidavit in response to Hubbard's summary judgment motion. There is no suggestion that the affidavit was brought to the circuit court's attention during the summary judgment proceeding. Also, Peot does not argue that this affidavit creates a dispute of material fact. We assume, therefore, that Peot has abandoned this potential argument. *See* ***Reiman Assocs. v. R/A Adver.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

CONCLUSION

¶31 We confine ourselves to the issues raised and arguments made in the briefs submitted. *See* ***Waushara County v. Graf,*** 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992). Based upon our review of the contentions argued, we conclude that Peot has not demonstrated any dispute of material fact. Also, Peot has not demonstrated that the trial court has made any error of law. Therefore, we do not overturn its judgment on appeal.

By the Court.—Judgment affirmed.

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