COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1651-FT **Cir. Ct. No. 2011CV3368**

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

TOWN OF MUKWONAGO,

PLAINTIFF-APPELLANT,

V.

RALINDA L. HOWARD AND ALH IRREVOCABLE TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Waukesha County: MARIA S. LAZAR, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.[1] The Town of Mukwonago appeals from a judgment and two orders which held ALH Irrevocable Trust and Ralinda L.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Howard in contempt for violating a stipulation and a provision of the Town's zoning code by having "kept" more than seven horses on ALH's property on three occasions. The circuit court sanctioned ALH and Howard together, $500 for each of the three violations and made them jointly and severally liable. The Town complains that the circuit court should have found twenty-four separate violations and that the sanction should be imposed against ALH and Howard separately.[2]

BACKGROUND

¶2 The subject property, nearly ten acres large, is located in the Town of Mukwonago, Waukesha County, and is owned by ALH. Howard resides at the property and is the owner of several horses that also reside on the property. The property is zoned R-H Rural Home District. The R-H Rural Home District permits the use of "[p]rivate stables … provided that not more than one horse or other head of livestock are *kept* for each full open acre over two acres of open lot area." MUKWONAGO, WIS., ZONING § 82-110(11) (2006) (emphasis added).[3] The parties agree that under § 82-110(11), seven horses are permitted to be kept on the property.

¶3 In 2011, the Town sued ALH and Howard, alleging that they kept more than seven horses on the property in violation of MUKWONAGO, WIS.,

[2] While the Town argues both that the circuit court should have found twenty-four or twenty-five separate violations, the difference is irrelevant to our decision.

[3] MUKWONAGO, WIS., ZONING § 82-4 (2006) defines a "private stable" and a "commercial stable." A "private stable" is "[a] tract of land on which horses or other livestock are kept for noncommercial use of the persons residing on the tract of land." The parties agreed before the circuit court that ALH and Howard maintained a private stable on the property.

ZONING § 82-110(11) (2006) on twenty-three separate dates between June and September 2011.

¶4 The parties settled the matter, entering into a stipulation and order which provided, among other things, that ALH and Howard "shall be permanently enjoined from violating or permitting the violation of the provisions of Section 82-110(11) of the Town of Mukwonago Zoning Code." The stipulation gave the Town the authority to inspect the property.

¶5 In October 2015, the Town moved for sanctions, pursuant to WIS. STAT. § 785.04, and for contempt of court arising from violation of the stipulation and order, against ALH and Howard. The Town alleged that the Town's building inspector observed more than seven horses being kept on the property on fourteen different dates between August 19, 2015, and September 29, 2015. The Town requested as relief, pursuant to § 785.04(1)(a):

> the award of a monetary judgment in favor of the Town … and against defendants jointly and severally in an amount sufficient to reimburse the Town for the costs and expense, including, but not limited to, attorneys' fees, incurred in preparing and prosecuting this motion, and incurred in enforcing any remediation ordered.

Attached to the motion was an affidavit from the building inspector attesting that beginning August 19, 2015, he "commenced periodic observations" of the property and, in table format, he listed the number of horses he saw and on which dates.

¶6 In opposition, Howard submitted an affidavit admitting that on twenty-five dates between August 13, 2015, and October 1, 2015, there were more than seven horses on the property. However, she argued, the term "kept" under MUKWONAGO, WIS., ZONING § 82-110(11) (2006) meant "animals that continue to

reside on the property on a full-time basis," in contrast to an animal that made "a one-time visit." Howard continued:

> As a horse owner, I have a stallion that is to be used for breeding purposes and also have mares that are brought to my property on a one-time basis to be seen by my veterinarian and bred to a stallion for reproductive purposes. Otherwise, my horses that exceed seven in number are boarded off grounds at a stable. That on the particular days in issue in Plaintiff's Motion, the horses that were apparently "observed" by Town of Mukwonago officials were there for videography filming purposes only and the horses that exceeded seven in number were not kept on [the subject] property on a continual full-time basis, but only for the one-time purpose of the videography filming and those that exceeded seven (7) in number were on a daily basis moved to stables where those horses are boarded.

Howard conceded, however, that on three occasions more than seven horses were boarded on the property overnight.

¶7 At the request of the court, the parties briefed the meaning of "kept." Thereafter, the court issued a written decision finding that Howard and ALH had committed only three violations of MUKWONAGO, WIS., ZONING § 82-110(11) (2006). In doing so, the court examined the meaning of "kept." It pointed out that § 82-110 did not define "kept," and there were no cases directly on point. The court looked to dictionary definitions of "kept," but, because the definitions were too varied, the court could not rely on them alone.

¶8 The court then examined ***Pawlowski v. American Family Mutual Insurance Co.***, 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67, which the court found "instructive and highly persuasive." The court equated keeping with "exercising a measure of care, custody, or control over the horse," and concluded

that "maintaining 17-19 horses for over twenty-four hours, three times in a one month span," met the definition of "kept."

¶9 The court, however, on the record provided, refused to find that the other instances when more than seven horses were observed at the property constituted violations of the stipulation. The Town had not presented any evidence about how long these additional horses were on the property, whether for a few or twenty hours. While both parties admitted that extra horses were seen on the property, there was no evidence as to "how long they were maintained there under the Defendants' control." The court said there was a legitimate question about whether ALH and Howard were aware precisely when they were violating the stipulation.

¶10 Following further briefing on the issue of the appropriate sanctions for the three contempt violations, the court awarded the Town $8900.15 in attorney fees and costs. The court then imposed a $500 sanction for each violation or $1500, but made ALH and Howard "jointly and severally" liable; in other words, the sanction would "not be doubled."

¶11 Judgment was entered in the Town's favor in the amount of $10,904.65. The Town appeals from the two orders and the judgment.

DISCUSSION

Interpretation and Application of "Kept"

¶12 A finding of contempt of court requires intentional disobedience of a court order. WIS. STAT. § 785.01(1)(b). In a civil or remedial contempt proceeding such as this, the burden of proof is on the person against whom

contempt is alleged to show that he or she was not in contempt. ***State v. Rose***, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992).

¶13 "The rules for the construction of statutes and municipal ordinances are the same." ***Bruno v. Milwaukee Cty.***, 2003 WI 28, ¶6, 260 Wis. 2d 633, 660 N.W.2d 656 (citation omitted). Interpretation of an ordinance begins with its language. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the ordinance is clear, the analysis ordinarily stops there. ***Id.*** The language of the ordinance is given "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** The ordinance language is interpreted in the context of the ordinance in which it is used and in relation to closely related ordinances. ***Id.***, ¶46. Absurd and unreasonable results are to be avoided. ***Id.***

¶14 The exercise of the circuit court's contempt power is within its discretion. ***Monicken v. Monicken***, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). Thus, review of the circuit court's use of its contempt power is for an erroneous exercise of discretion. ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). We will search the record for a reason to sustain a discretionary determination. ***Board of Regents-UW Sys. v. Decker***, 2014 WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112. "Underlying discretionary determinations may be findings of fact and conclusions of law." ***Monicken***, 226 Wis. 2d at 125. The circuit court's factual findings will not be disturbed unless clearly erroneous, but questions of law, such as the interpretation

of an ordinance, is reviewed de novo.[4] ***Bruno***, 260 Wis. 2d 633, ¶6; ***Monicken***, 226 Wis. 2d at 125.

¶15 In discerning the meaning of "kept" under MUKWONAGO, WIS., ZONING § 82-110(11) (2006), the circuit court referred to several dictionary definitions and relied on ***Pawlowski***. In that case, the plaintiff, Colleen Pawlowski, was bit by a dog while it was on the defendant's property. ***Pawlowski***, 322 Wis. 2d 21, ¶11. The legal owner of the dog was an acquaintance of the defendant's daughter, whom the defendant had been allowing to live on the property for several months with his dogs when one of the dogs bit Colleen. ***Id.***, ¶¶9-11, 19. The question was whether the defendant harbored or kept the dog so as to make her a statutory owner under WIS. STAT. § 174.001(5). If so, then the defendant was strictly liable under WIS. STAT. § 174.02. ***Pawlowski***, 322 Wis. 2d, ¶18. Reviewing the case law, the supreme court said a person keeps or is a "keeper" of a dog when he or she exercises "some measure of custody, care or control over the dog." ***Id.***, ¶30 (citation omitted). The extent of the care, custody or control is relevant: in other words, "[t]he casual presence of a dog will not transform a person into a keeper; there must be evidence that the person has furnished the dog with shelter, protection or food or exercised control of the dog." ***Id.***

¶16 Both parties agree that the circuit court's reliance on ***Pawlowski*** for the meaning of "kept," as it relates to livestock or horses, was legally appropriate. However, the Town challenges the court's consideration of the duration of time

[4] The Town's argument is "based on respondents' admissions," and, at various points in its brief-in-chief and reply briefs, states that the facts are "undisputed."

the horses were on the property as inappropriately going beyond the scope of the care, custody or control analysis of ***Pawlowski***, by adding an additional "element." We disagree.

¶17 ***Pawlowski*** involved the interpretation of a statute that made the "owner" strictly liable in tort. The policy behind the strict liability statute is to assign "responsibility to those in a position to protect innocent third parties from dog bites." ***Fire Ins. Exch. v. Cincinnati Ins. Co.***, 2000 WI App 82, ¶17, 234 Wis. 2d 314, 610 N.W.2d 98. The extent of the care, custody or control informs the ultimate analysis of whether the individual had the ability to prevent injury, such that we hold that individual strictly liable in tort—the casual presence of a dog is not enough.

¶18 The circuit court recognized MUKWONAGO, WIS., ZONING § 82-110(11) (2006), by its terms, is concerned with unwanted conditions that might result when the uses permitted in R-H Rural Home District are exceeded. "We interpret zoning ordinances in light of their purpose." ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶21, 301 Wis. 2d 321, 733 N.W.2d 287. As the court noted, the ordinance addresses overpopulation and damage to the ecosystem. *See also* MUKWONAGO, WIS., ZONING § 82-111(10)f. (stating that if the "*keeping*" of a hobby kennel, whether of dogs or potbellied pigs, becomes a nuisance, the use must be terminated or the nuisance abated (emphasis added)), and § 82-111(11) (requiring that for private stables a "written refuse disposal plan" be submitted); *see also* ***Kalal***, 271 Wis. 2d 633, ¶46 (stating that ordinance language is interpreted in the context of the ordinance in which it is used and in relation to closely related ordinances).

¶19 Thus, in determining whether Howard and ALH intentionally violated the stipulation, the circuit court appropriately considered the extent of custody or control—the length of time Howard's horses were maintained under Howard's control on the property, in violation of the ordinance's limit. Several of the dictionary definitions cited by the circuit court also encompass the concept of time—such as "to cause to remain in a given place, situation, or condition;"[5] "to have or retain in one's power or possession;"[6] or "hold," "maintain," or "retain" in possession;[7] to "continue having or holding something."[8]

¶20 Howard does not dispute on appeal that the continual presence of more than seven of her horses overnight on the property met the definition of keeping. On the other dates, however, as the circuit court said, were the additional horses "there for a few hours, for twenty hours or somewhere in between?" In support of the Town's motion for sanctions, it provided an affidavit from its building inspector who outlined in table format the dates he saw in excess of seven horses on the property and the number of horses observed. The table the building inspector provided amounted to no more than a momentary observation of the presence of more than seven horses at the property. Howard, meanwhile, related that outside the three overnights, the additional horses were moved off the property within the same day.

[5] *Keep*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1981).

[6] *Keep*, BLACK'S LAW DICTIONARY (5th ed. 1983).

[7] *Keep*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

[8] *Keep*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

¶21 With no proof showing Howard's interactions with the horses, including no proof from the Town as to how long the additional horses were on the property, and Howard's proof suggesting that the additional horses were there for only a limited duration, the circuit court did not erroneously exercise its discretion in determining that ALH and Howard did not intentionally violate the stipulation. As previously noted, a finding of contempt of court requires intentional disobedience of a court order. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or *is aware that his or her conduct is practically certain to cause that result*." ***Shepard v. Circuit Court***, 189 Wis. 2d 279, 287, 525 N.W.2d 764 (Ct. App. 1994). The circuit court said that without the benefit of this litigation, there was "a legitimate question" as to whether ALH and Howard "were aware precisely when they were violating the [s]tipulation." In sum, we cannot say that the circuit court's finding of a lack of intent on the part of ALH and Howard to violate the ordinance was erroneous.

Sanctions

¶22 Under MUKWONAGO, WIS., ZONING § 82-269(a) (2009):

> Any person who violates, disobeys, omits, neglects, or refuses to comply with, or who resists the enforcement of, any of the provisions of this chapter, shall be subject to a forfeiture of not less than $10.00 and not to exceed the sum of $2,000.00 for each offense, together with the costs of the action, and in default of the payment thereof, shall be imprisoned in the county jail, for a period of not to exceed six months, or until such forfeiture and the subsequent costs have been paid. Each day that a violation is permitted to exist shall constitute a separate violation and be punishable as such.

¶23 Based on MUKWONAGO, WIS., ZONING § 82-269(a), the Town argues that the circuit "court should have imposed individual judgments" against

both ALH and Howard. In other words, if ALH and Howard committed three violations, then ALH and Howard should each pay $1500.[9]

¶24 ALH and Howard counter that a trust, such as ALH, is not a person.[10] This argument, however, lacks merit, since a trust is treated as a person. WIS. STAT. § 701.0103(17) (including a "trust" within the definition of "person"); MUKWONAGO, WIS., GENERAL PROVISIONS § 1-2 (applying person to, among other things, "all entities of any kind capable of being sued unless plainly inapplicable").

¶25 ALH and Howard also note that the Town specifically requested joint and several liability in its motion for sanctions. When specifically asked to address the amount of sanctions that should be imposed, the Town proposed $1000 "against each defendant" for "each day of violation" of the Town's zoning code.

¶26 We decline to disturb the sanctions the circuit court imposed. Notably, even under MUKWONAGO, WIS., ZONING § 82-269(a) (2006), the Town does not make a textual argument that the circuit court had no discretion and had to impose a separate forfeiture, but, rather, the Town says the court "should have imposed" separate forfeitures. Indeed, the Town argues that the court's decision not to impose separate forfeitures was "an [e]rroneous [e]xercise of [d]iscretion." Generally, the circuit court has wide discretion in fixing the amount of a forfeiture

[9] Neither party challenges the circuit court's award of attorney fees to the Town, which the court based on WIS. STAT. § 785.04(1)(a), and its finding of contempt.

[10] This argument is raised for the first time on appeal and, in support, ALH and Howard rely only on Black's Law Dictionary.

based on the individual facts of the case. ***Forest Cty. v. Goode***, 219 Wis. 2d 654, 666 n.8, 579 N.W.2d 715 (1998). As noted, § 82-269(a) permits a forfeiture of at least $10 but not more than $2000 "for each offense." The $1500 forfeiture the circuit court did impose could have been split so that both ALH and Howard were liable for three violations at $250. In either case, the amount of the forfeiture would be within the range authorized by § 82-269(a). The circuit court expressed that the sanction would "not be doubled," that is, "held against each Defendant individually." It may have been that ALH and Howard were essentially the same person or that ALH was an owner in name only, with no knowledge of what Howard was doing on the property. We know not the answer because no one has explained the relationship between Howard and ALH.[11] In short, we see no erroneous exercise of discretion.

CONCLUSION

¶27 In interpreting the meaning of "kept" and applying that term to the facts of this case, the circuit court properly construed the meaning of "kept" and did not erroneously exercise its discretion in limiting its finding of contempt to three violations of MUKWONAGO, WIS., ZONING § 82-110(11) (2006). Further, the circuit court did not err in sanctioning ALH and Howard together in the amount of $500 for each violation.

[11] A tax document in the record, which neither party cites, indicates that the property is owned by "ALH … C/O Ralinda Howard."

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.