COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3145 Cir. Ct. No. 2003CV102

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

WILLIAM N. OSBERG AND JERRI S. OSBERG,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN,

INTERVENOR-PLAINTIFF-RESPONDENT,

V.

STEPHEN KIENITZ, DAN GRASSER, MICHAEL WENDT, THOMAS NELSON, ANN M. TURK, FOSTER & SMITH, INC., SENTRY INSURANCE, A MUTUAL COMPANY, PAGEL CONSTRUCTION COMPANY, INC., UNKNOWN INSURANCE COMPANY NO. 1, HIGHWAY LANDSCAPERS, INC. AND UNKNOWN INSURANCE CO. NO. 2,

DEFENDANTS-RESPONDENTS,

RICHARD SIMON, WISCONSIN PUBLIC SERVICE CORPORATION, UNKNOWN INSURANCE CO. NO. 3, CITIZENS COMMUNICATIONS COMPANY, UNKNOWN INSURANCE CO. NO. 4, K.L. ENGINEERING, INC. AND UNKNOWN INSURANCE CO. NO. 5,

DEFENDANTS,

WILLIAM N. OSBERG AND JERRI S. OSBERG,

INTERVENORS-DEFENDANTS.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed in part; reversed in part, and cause remanded for further proceedings*.

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

¶1 CANE, C.J. William and Jerri Osberg appeal from a summary judgment, dismissing their negligence claims. The Osbergs argue Pagel Construction Company and Highway Landscapers, Inc. are not eligible for immunity, and therefore the trial court erred when it dismissed their claims. Because both Pagel Construction and Highway Landscapers are eligible for immunity under WIS. STAT. § 88.87,[1] we disagree and affirm this portion of the judgment.[2]

¶2 The Osbergs also contend that material facts are in dispute, and therefore the trial court erred when it dismissed their negligence claims against

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Because we hold that Pagel Construction and Highway Landscapers are eligible for immunity under WIS. STAT. § 88.87, we need not address the Osbergs' argument that they are not eligible to immunity under WIS. STAT. § 893.04. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

Foster & Smith. Because material facts are in dispute, we agree and reverse this portion of the judgment.

Background

¶3 The Osbergs own approximately thirteen acres of land outside of Rhinelander in the Wisconsin River Valley. Prior to this matter, much of the land was wetlands. Their property includes two ponds, which previously were used for raising minnows. Much of the property surrounding the Osbergs' land is uphill.

¶4 Foster & Smith, a pet supply business, is one of the Osbergs' uphill neighbors. Prior to the summer of 2002, Foster & Smith constructed a new parking lot on its property. Shortly after the parking lot's construction, the Osbergs noticed an increase in the runoff of water and sediment onto their property and into their minnow ponds. The Osbergs claim that Foster & Smith's negligence in constructing its parking lot was a cause of the runoff.

¶5 Subsequently, the Wisconsin Department of Transportation (DOT) commenced a road construction project adjacent to the Osbergs' land. Pagel Construction was the general contractor, and Highway Landscapers provided landscaping and erosion control measures. All work was completed at the direction of the DOT according to its specifications. The Osbergs allege the State's construction resulted in further runoff of water and sediment onto their land during and after any rain. As part of the proceedings in this matter, the trial court declared the situation a public nuisance, and the Osbergs were required to allow the State to access the Osbergs' property to remediate the problem. The parties dispute the effectiveness of the remediation.

¶6 The Osbergs asserted claims of negligence against Foster & Smith because of its negligence in constructing its parking lot and against Pagel Construction, Highway Landscapers and six employees of the DOT, contending that the road construction had insufficient erosion control measures. Foster & Smith, Pagel Construction, Highway Landscapers and the individual DOT defendants moved for summary judgment, which the court granted.

Standard of Review

¶7 We review summary judgment without deference, using the same methodology as the trial court. ***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. WIS. STAT. § 802.08. Our summary judgment methodology is well documented, and it will not be repeated here. *See e.g.*, ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997).

Discussion

A. Claims against Pagel Construction and Highway Landscapers

¶8 The Osbergs contend the trial court erred by ruling WIS. STAT. § 88.87 immunity precludes the claims against Pagel Construction and Highway Landscapers. The application of a statute to a set of facts presents a question of law that we review without deference. ***Kamps v. DOR***, 2003 WI App 106, ¶11, 264 Wis. 2d 794, 663 N.W.2d 306. We agree with the trial court.

¶9 WISCONSIN STAT. § 88.87(1) provides:

> It is recognized that the construction of highways and railroad grades must inevitably result in some interruption

> of and changes in the preexisting natural flow of surface waters and that changes in the direction or volume of flow of surface waters are frequently caused by the erection of buildings, dikes and other facilities on privately owned lands adjacent to highways and railroad grades. The legislature finds that it is necessary to control and regulate the construction and drainage of all highways and railroad grades so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway or railroad grade construction and to impose correlative duties upon owners and users of land for the purpose of protecting highways and railroad grades from flooding or water damage.

¶10 We previously analyzed WIS. STAT. § 88.87 in ***Pruim v. Town of Ashford***, 168 Wis. 2d 114, 483 N.W.2d 242 (Ct. App. 1992). In our decision, we noted, "By this section the legislature has commanded that it will 'control and regulate' the protection of property owners." ***Id.*** at 118. We further stated, "In exercising its "control" and "regulation," the legislature explained exactly how property owners could act to protect themselves." ***Id.*** at 118-19. In pertinent part, WISCONSIN STAT. § 88.87(2)(c) states:

> If ... the department of transportation constructs and maintains a highway ... not in accordance ... any property owner damaged by the highway ... may, within 3 years after the alleged damage occurred, file a claim with the appropriate governmental agency .... The claim shall consist of a sworn statement of the alleged faulty construction and a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water-soaking. Within 90 days after the filing of the claim, the governmental agency ... shall either correct the cause of the water damage, acquire rights to use the land for drainage or overflow purposes, or deny the claim. If the agency or company denies the claim or fails to take any action within 90 days after the filing of the claim, the property owner may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable.

As the trial court correctly noted, if the legislature had intended to allow suits against government contractors, it could easily have done so. *See* ***Pruim***, 168

Wis. 2d at 119. Thus, the statute precludes claims for relief other than those stated in the statute. Here, the Osbergs' claim against Pagel Construction and Highway Landscapers is not stated in the statute, and therefore it is precluded.

¶11 The Osbergs do not contend that dismissal was inappropriate as to the individual DOT defendants, but argue it was inappropriate to extend the WIS. STAT. § 88.87 immunity to Pagel Construction and Highway Landscapers. However, we have previously extended government immunity to protect contractors. In ***Estate of Lyons v. CNA Ins. Cos.***, 207 Wis. 2d 446, 461, 558 N.W.2d 658 (Ct. App. 1996), we held that the conduct of a private contractor who was working under the direction of the DOT was protected by government immunity. Other jurisdictions facing a similar issue have responded in an analogous manner. For example, in ***Vanchieri v. New Jersey Sports & Expo. Auth.***, 514 A.2d 1323, 1326 (N.J. 1986), the New Jersey Supreme Court held that a statute granting immunity to public employees and entities could be extended to contractors when the contractor is performing tasks at the direction of the government. Further, "[t]he rationale for providing [governmental] immunity ... supports extending it to independent contractors who act at the direction of a state or municipal authority. .... [T]he tort process [is] an 'inadequate crucible' for testing the merits of choices made in the political arena." ***Estate of Lyons***, 207 Wis. 2d at 453. Because Pagel Construction and Highway Landscapers were eligible for immunity, the trial court properly granted their motions for summary judgment.

B. Claim against Foster & Smith

¶12 The Osbergs argue the trial court erroneously granted Foster & Smith's motion for summary judgment because material facts were in dispute. We

agree. Summary judgment is only appropriate when no material facts are in dispute. WIS. STAT. § 802.08.

¶13 The court granted Foster & Smith's summary judgment motion on two different theories. First, the court stated that the Osbergs failed to present sufficient evidence regarding the degree to which Foster & Smith's actions contributed to the damage to the Osbergs' property. The court declared:

> Finally, what is the responsibility of Foster & Smith? First of all, counsel for Foster & Smith correctly highlights the paucity of specific evidence as to the quantity of sediment and, as a result, the degree of contribution made to the plaintiffs' runoff problem by Foster & Smith's upland parking lot creation. I think that alone is sufficient to dismiss Foster & Smith from the lawsuit because there just isn't any evidence as to what they may have contributed. It's entirely speculative.

¶14 The trial court did not identify any authority to support this ruling. Further, we are unable to find, and counsel does not provide, any case law that concludes the Osbergs were required to present evidence as to Foster & Smith's "degree of contribution" to the runoff problem. Thus, it was error to dismiss the Osbergs' negligence action due to their failure to present this type of evidence. The Osbergs need only demonstrate that Foster & Smith's negligence was a contributing factor to the runoff. *See* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶11, 244 Wis. 2d 720, 628 N.W.2d 842.

¶15 Here, many material facts are in dispute. The first and foremost is Foster & Smith's contribution, if any, to the Osbergs' runoff problem. The trial court found the following: "[W]hile it may be that various of the private defendants contributed to the runoff problem by contributing sedimentary deposits during times of heavy rain, it is clear from the submissions that the State was by

far the major contributor ....” However, it is disputed how great a role the State played in the runoff.

¶16 Another example of a disputed material fact is how severe the rain has to be for runoff to occur. The Osbergs contend that heavy runoff occurs during any type of rain. In its ruling the trial court stated that the runoff occurs only during periods of heavy rain, which would indicate the runoff is less of a problem. Finally, the trial court found that the Osbergs were “the biggest obstruction” to remediation and repair of their property, which the Osbergs strongly dispute. Although there may be other material facts in dispute, the above examples are sufficient to preclude summary judgment.

¶17 Alternatively, the court granted summary judgment based on the reasonable use doctrine. The reasonable use doctrine states that “each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable.” ***State v. Deetz***, 66 Wis. 2d 1, 14, 224 N.W.2d 407 (1974) (quoting ***Armstrong v. Francis Corp.***, 120 A.2d 4, 8 (N.J. 1956)).

¶18 To determine whether a possessor makes reasonable use of his or her land, a fact-finder must consider multiple sections of the Restatement of Torts (Second). ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 138-41, 384 N.W.2d 692 (1986). A complete recitation of each section is unnecessary; however, it is pertinent to note that whether a possessor makes reasonable use involves application of numerous factors against the specific facts of each case. ***Id.*** Further, even if a possessor’s conduct has social utility, a finder of fact must still determine whether his or her conduct was reasonable. ***Id.*** at 144.

Application of the reasonable use standard generally requires a full exposition of all underlying facts and circumstances. *See* ***Prah v. Maretti***, 108 Wis. 2d 223, 242, 321 N.W.2d 182 (1982).

¶19 Here, summary judgment based on the reasonable use doctrine was inappropriate because the circuit court exclusively applied a social utility standard. In its ruling the court stated:

> Counsel's reference, in any event, to the reasonable use doctrine is entirely appropriate. I find as a matter of law that when the comparative utility of a pet store employing several employees, paying wages and paying taxes, is compared to the social utility of a defunct minnow pond, that the pet store wins hands down.

The court's analysis indicates that it considered only the social value of Foster & Smith's actions. As stated previously, the court was required to not only consider this aspect, but also whether Foster & Smith's actions were reasonable. *See* ***Crest***, 129 Wis. 2d at 144. Contrary to Foster & Smith's assertions, determination of the application of the reasonable use standard in this case requires a full exposition of the underlying facts and circumstances. *See* ***Prah***, 108 Wis. 2d at 242. Consequently, it was error for the trial court to rule as a matter of law that Foster & Smith's parking lot construction and the runoff it created were reasonable.

¶20 Finally, Foster & Smith argues that summary judgment is appropriate because the exclusive remedy for the plaintiffs' claims lies with WIS. STAT. ch. 88. We summarily reject this argument. This section provides that it is necessary for the State to regulate the construction of highway grades in the interest of controlling the flow of surface water, WIS. STAT. § 88.87(1), and it also limits the remedies available to landowners. WIS. STAT. § 88.87(2)(c). The statute applies only to the State, and Foster & Smith fails to support its contention

that it somehow relieves a private entity, acting independently from any state entity, from damages it allegedly caused due to the construction of a parking lot.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded for further proceedings.

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