COURT OF APPEALS
DECISION
DATED AND RELEASED

October 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-2390

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

SUBURBAN LABORATORIES OF WISCONSIN, INC.,

Plaintiff-Respondent,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellant.

APPEAL from orders of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

NETTESHEIM, J We previously granted the Department of Natural Resources' (DNR) petition for leave to appeal certain nonfinal orders favorable to Suburban Laboratories of Wisconsin, Inc. (Suburban-Wisconsin). The challenged orders: (1) denied the DNR's motion to dismiss the action, (2) granted Suburban-Wisconsin a temporary injunction preventing the DNR from

ordering the resampling of certain prior tests performed by Suburban-Wisconsin and from sending letters to Suburban-Wisconsin's customers questioning the accuracy of the test results, and (3) denied the DNR's motions for reconsideration.

On appeal, the DNR contends that the exhaustion of administrative remedies doctrine precludes Suburban-Wisconsin's action because a contested case hearing is presently pending on the administrative level. Alternatively, the DNR contends that the action should be dismissed because: (1) Suburban-Wisconsin failed to join necessary parties, and (2) the circuit court misused its discretion in issuing the temporary injunction. We reject the DNR's arguments. We affirm the nonfinal orders.

BACKGROUND

Suburban-Wisconsin is an analytical laboratory certified under the Wisconsin Laboratory Certification Program, WIS. ADM. CODE ch. NR 149, to perform chemical tests on soil and ground water samples submitted from leaking underground storage tank (LUST) sites. Suburban Laboratories, Inc. is a separate analytical laboratory located in Hillside, Illinois (Suburban-Illinois). While Suburban-Wisconsin and Suburban-Illinois share some common officers, the two are separate corporate entities and operate two distinct laboratories.

In 1993, the DNR received test results produced by Suburban-Illinois from a LUST site in Milwaukee. The DNR interpreted this data as producing inconsistent results, reading some of the data to say that the site was still contaminated and other data to say that the site was clean. As a result, the

DNR was concerned that Suburban-Illinois had used analytical methods which did not comply with the Wisconsin Administrative Code.

Following its review of the Suburban-Illinois data, the DNR issued Suburban-Illinois a notice of noncompliance on March 29, 1994. This notice stated that the data did not comply with WIS. ADM. CODE ch. NR 149. Apparently considering Suburban-Illinois and Suburban-Wisconsin as a single entity, or otherwise believing that the deficiencies in Suburban-Illinois' testing procedures were also present in Suburban-Wisconsin's procedures, the DNR also began writing letters to certain of Suburban-Wisconsin's customers whose site assessments were then under evaluation by the DNR. These letters variously advised the customers that "Suburban Laboratory" was in noncompliance, that the DNR was temporarily deferring action regarding the data, and that if the customer wished to resample using a different laboratory, the DNR would consider the new data for review.

Thereafter, during late May 1994, the DNR performed laboratory audits at both the Suburban-Wisconsin and Suburban-Illinois facilities. As a result, the DNR sent Suburban-Illinois a letter dated May 31, 1994, stating that the audits revealed that the data produced was inaccurate. The letter indicated that, in the future, the DNR would accept only those samples reported as "contaminated" and would reject those samples reported as "clean."

On July 14, 1994, both Suburban-Wisconsin and Suburban-Illinois petitioned the DNR for a contested case hearing as to the validity of the DNR's

actions. On August 3, 1994, the DNR granted the petition. That matter is presently pending before the DNR.

In addition, on August 8, 1994, Suburban-Wisconsin brought the instant action challenging the DNR's actions on a variety of grounds.[1] Suburban-Wisconsin sought a declaratory judgment regarding the validity of the DNR's actions and a temporary and permanent injunction barring the DNR from ordering resampling of Suburban-Wisconsin's laboratory samples previously submitted and from sending further letters to Suburban-Wisconsin's customers questioning the integrity of its laboratory and testing results.

At the hearing on the temporary injunction, the DNR moved to dismiss the action, contending that Suburban-Wisconsin had failed to exhaust its administrative remedies and to join necessary parties. At the conclusion of the hearing, the trial court denied the DNR's motion to dismiss and granted Suburban-Wisconsin a temporary injunction pending completion of the administrative proceedings. The trial court later denied the DNR's motions for reconsideration.

The DNR appeals. Additional facts will be recited as we address the appellate issues.

DISCUSSION

1. Temporary Injunction/Exhaustion of Administrative Remedies

[1] Suburban-Wisconsin alleged that the DNR: (1) deprived Suburban-Wisconsin of due process, (2) based its actions on improperly promulgated rules, (3) exceeded its statutory authority, (4) acted arbitrarily and capriciously, and (5) violated its own procedures.

The DNR first argues that Suburban-Wisconsin failed to exhaust its administrative remedies because the contested case proceeding before the DNR has not been completed. Thus, the DNR contends that the trial court was without jurisdiction in this case.

The exhaustion of administrative remedies is a doctrine of judicial restraint which provides that judicial relief will be denied until the parties have completed the administrative proceedings. ***Nodell Inv. Corp. v. City of Glendale,*** 78 Wis.2d 416, 424, 254 N.W.2d 310, 315 (1977). The basic premise of the exhaustion rule is that the administrative remedy is available relatively rapidly on a party's initiative and will protect the party's claim of right. ***Id.*** However, there are numerous exceptions to the rule. *See* ***id.*** at 424-25, 254 N.W.2d at 316. Courts may assume jurisdiction of a case notwithstanding a party's failure to exhaust its administrative remedies where the reasons supporting the requirement are lacking. ***Id.*** at 425-26, 254 N.W.2d at 316.[2]

The reasons a trial court might excuse the exhaustion requirement are the following:

(1) The agency has no jurisdiction to act in the matter.
(2) The administrative action is fatally void.
(3) A question of law is involved in which the administrative agency's expertise is not an important factor.

[2] The case law has not held that the failure to exhaust administrative remedies results in a trial court's loss of subject matter jurisdiction. ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis.2d 416, 425 n.11, 254 N.W.2d 310, 315 (1977). Unless exclusive jurisdiction is given to an administrative agency by a statute, a court has subject matter jurisdiction regardless of whether a litigant ought to exhaust the available administrative remedies before submission to the courts. ***Id.***

(4) A substantial constitutional question is involved.
(5) The administrative remedy is inadequate to avoid irreparable harm.
(6) Recourse to the administrative rule would be a futile or useless act.

Id. at 425 n.12, 254 N.W.2d at 316.

We now consider whether any of these exceptions applied in this case. However, we will answer this question by addressing another issue which the DNR raises: whether the trial court misused its discretion in choosing to issue the temporary injunction. We address these issues in a single discussion because one of the relevant factors on both issues was whether Suburban-Wisconsin would suffer irreparable harm if the injunction was not issued. If so, the issuance of a temporary injunction would be appropriate, and, at the same time, one of the recognized exceptions to the exhaustion doctrine would have been established.

The decision to grant or deny a temporary injunction is a discretionary determination for the trial court. ***Spheeris Sporting Goods, Inc. v. Spheeris on Capitol,*** 157 Wis.2d 298, 305-06, 459 N.W.2d 581, 585 (Ct. App. 1990). The party seeking the temporary injunction must demonstrate a reasonable probability of success on the merits, an inadequate remedy at law and irreparable harm. ***Id.*** at 306, 459 N.W.2d at 585; *see* § 813.02, STATS.[3] This

[3] Section 813.02, STATS., provides, in part:

Temporary injunction; when granted. (1) (a) When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is

case focuses on the irreparable harm factor. The requirement of irreparable harm is met by a showing that without the temporary injunction to preserve the status quo, the permanent injunction sought would be rendered futile. ***Werner v. A.L. Grootemaat & Sons, Inc.,*** 80 Wis.2d 513, 520, 259 N.W.2d 310, 314 (1977).

A trial court determination whether to apply the exhaustion of administrative remedies doctrine is also discretionary. *See* ***Town of Menasha v. B & B Race Car Eng'g,*** 172 Wis.2d 419, 424, 493 N.W.2d 250, 252 (Ct. App. 1992).

A trial court misuses its discretion when it fails to make a record of the factors relevant to this determination, fails to consider the proper factors or clearly gives too much weight to one factor. ***Spheeris,*** 157 Wis.2d at 306, 459 N.W.2d at 585. In this case, we conclude that the trial court did not misuse its discretion in refusing to adhere to the exhaustion doctrine and in choosing to grant the temporary injunction.

The parties did not offer formal evidence at the temporary injunction hearing. Instead, Suburban-Wisconsin stood on its pleadings, an affidavit of one of its officers and its brief, which included additional factual backdrop to the injunction request. Although the DNR opposed the temporary injunction request, it had not as of the time of the hearing filed any responsive pleading. Nor did the DNR present any counter-affidavits or dispute the

(..continued)

> about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

factual backdrop to the case as set out in Suburban-Wisconsin's brief. Instead, the DNR argued that the trial court should dismiss the action because Suburban-Wisconsin had failed to exhaust its administrative remedies and because Suburban-Wisconsin had failed to join certain necessary parties.

We summarize the information which Suburban-Wisconsin provided to the trial court in support of its motion for temporary injunction. The DNR had begun contacting Suburban-Wisconsin's customers questioning the validity of the test results before it had even audited the Suburban-Wisconsin laboratory. In addition to questioning the integrity of Suburban-Wisconsin's laboratory procedures, the letters suggested that Suburban-Wisconsin's customers might want to consider taking their business elsewhere. The DNR's later sampling of Suburban-Wisconsin's data involved less than .1% of the laboratory's projects, while the DNR's resampling order would affect thousands of LUST sites requiring the expenditure of millions of dollars. Finally, despite its actions, the DNR had not decertified the Suburban-Wisconsin laboratory.

Based on these facts, Suburban-Wisconsin argued that the continuation of the DNR's actions could potentially ruin Suburban-Wisconsin's business before the contested case or judicial proceedings were completed. The trial court agreed and issued the temporary injunction.

Given the economic peril to Suburban-Wisconsin, we see no misuse of discretion by the trial court in choosing to issue the temporary injunction. Such judicial intervention appeared necessary to maintain the status

quo and to prevent irreparable harm to Suburban-Wisconsin. The temporary injunction avoided the prospect of Suburban-Wisconsin's unnecessary economic collapse in the event of a favorable ruling in the contested case hearing. The injunction also served to make the future judicial review of the DNR's actions more meaningful. *See* ***Aqua-Tech, Inc. v. Como Lake Protection & Rehabilitation Dist.,*** 71 Wis.2d 541, 552, 239 N.W.2d 25, 31 (1975). Without the temporary injunction, any eventual success by Suburban-Wisconsin in the ultimate trial of this case would likely have been a Pyrrhic victory.

The DNR also argues that the temporary injunction was unnecessary. It bases this argument on its representation to the trial court that it had decided to take a different approach to the problem which it had not previously proposed to Suburban-Wisconsin. Under this approach, the DNR stated that it would await the completion of the contested case hearing before making any further decisions on site-closure requests by Suburban-Wisconsin's customers based on tests obtained before May 31, 1994.[4] In addition, the DNR stated that it would no longer initiate contact with Suburban-Wisconsin's customers. Thus, the DNR argued that the temporary injunction was unnecessary.

We see no misuse of discretion by the trial court's issuance of the temporary injunction despite the DNR's promises. Obviously, the trial court was not obligated to accept the DNR's promises to cease and desist from the

[4] When a party submits a closure plan, it is seeking a determination by the DNR that the site is not contaminated based on test data.

offending conduct. We conclude that the DNR's promises augured more for the injunction than against it.

We conclude that the trial court properly exercised its discretion in not applying the exhaustion of administrative remedies doctrine and in choosing to issue the temporary injunction.

The DNR also raises objections to the manner in which the trial court conducted the temporary injunction hearing. Specifically, the DNR contends that the trial court failed to take evidence, hear arguments or make findings of fact and conclusions of law, and applied the wrong legal standards when issuing the injunction.

As to the procedural aspects of these arguments, we deem them waived. As we have already noted, the DNR never objected to the manner in which the trial court conducted the hearing or received the relevant factual information. Instead, as we have noted, the DNR chose instead to defend on the basis of the exhaustion of administrative remedies doctrine and Suburban-Wisconsin's failure to join certain additional parties.

Moreover, even if we did not invoke waiver, we would affirm the procedure used by the trial court in this case. As to the taking of evidence, the law accords discretion to a trial court as to whether such is necessary in support of a motion for a temporary injunction. ***Bloomquist v. Better Business Bureau***, 17 Wis.2d 101, 104, 115 N.W.2d 545, 547 (1962). As to the hearing argument, we

observe that the entire proceeding consisted of attorneys' arguments with interjections and questions by the trial court.

On a substantive level, the DNR contends that the trial court failed to make formal findings of fact and conclusions of law in support of its decision pursuant to § 805.17(2), STATS. However, the Wisconsin Supreme Court has held that this statute is directive only and the failure to state separate findings of fact and conclusions of law is not reversible error. ***Hochgurtel v. San Felippo***, 78 Wis.2d 70, 85-86, 253 N.W.2d 526, 532 (1977). Although the trial court's ruling was not lengthy, the court clearly stated its legal conclusion that the temporary injunction was necessary to protect Suburban-Wisconsin from irreparable harm.

As to the lack of factual findings, we may affirm a trial court ruling if the record demonstrates that the court reached a result which the evidence would sustain if there was a specific finding. ***Id***. at 86, 253 N.W.2d at 533. Here, it is abundantly clear from the entire record that Suburban-Wisconsin had established the factual underpinning for the issuance of the temporary injunction. This is especially so where the DNR took no serious issue with the factual information presented, but rather defended on the grounds of exhaustion of administrative remedies and nonjoinder of necessary parties.

2. Joinder of Necessary Parties

Next, the DNR argues that the trial court did not have jurisdiction because Suburban-Wisconsin failed to join necessary interested parties to the action pursuant to § 806.04(11), STATS. The DNR contends that Suburban-

Wisconsin was required to join the various affected site owners, their environmental consultants[5] and Suburban-Illinois as added parties. The DNR bases its argument on § 806.04(11), which provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding."

The DNR contends that the site owners and environmental consultants should have been joined to the action because they "have a substantial interest in determining whether Suburban's laboratory data is reliable and acceptable to the DNR" and "whether resampling should be required." We disagree that the inclusion of this class was required in this case. When an administrative agency's actions are challenged, the declaratory judgment statute does not require that every person or entity whose interests are affected must be made a party. *See* ***Barry Lab., Inc. v. Wisconsin State Bd. of Pharmacy,*** 26 Wis.2d 505, 512, 132 N.W.2d 833, 836-37 (1965); *see also* ***North Side Bank v. Gentile,*** 129 Wis.2d 208, 215-17, 385 N.W.2d 133, 136-38 (1986) (creditors not necessary parties to action where their interests were sufficiently represented by bankruptcy trustee).

The law also holds that the number of potential additional parties implicated by the prospect of joinder is a relevant consideration. In ***White House Milk Co. v. Thomson***, 275 Wis. 243, 81 N.W.2d 725 (1957), the supreme court rejected the application for intervention by a dairy cooperative in a

[5] The DNR does not further advise who these "environmental consultants" are.

declaratory action challenging the constitutionality of a statute regulating dairy prices.[6] The court noted that if joinder was required, it could involve thousands of dairy farmers as parties. ***Id***. at 249, 81 N.W.2d at 729. The court said that such an interpretation of the joinder provisions of the statute "would render the Uniform Declaratory Judgments Act unworkable as a procedural device for securing a determination of the validity of a statute or ordinance." ***Id***.

The same reasoning applies here. The record reveals that the DNR resampling order could potentially affect thousands of Suburban-Wisconsin's customers. Joinder of that many parties would be unworkable.

White House Milk also holds that if a named party in a declaratory action can adequately represent the interests of those with similar or collateral interests, such is sufficient. *See* ***id***. at 249-50, 81 N.W.2d at 729. We see no reason why Suburban-Wisconsin is not fully capable of adequately representing the interests of its customers who wish to retain its services. Conversely, if there are Suburban-Wisconsin customers who now align themselves with the DNR on this question, we see no reason why the DNR cannot adequately represent those sentiments. We hold that Suburban-Wisconsin's customers were not necessary parties to this declaratory action.

The DNR also maintains that Suburban-Illinois should have been joined to this action because it is a party in the contested case hearing and

[6] In ***White House Milk Co. v. Thomson***, 275 Wis. 243, 247, 81 N.W.2d 725, 727 (1957), the supreme court was considering a predecessor statute which essentially contained the same language as that in the current § 806.04(11), STATS.

because, if not joined, the DNR may be required to relitigate the facts and legal issues if a separate action is brought by Suburban-Illinois. We are not persuaded, however, that the DNR ever raised this specific issue to the trial court.

The DNR's initial motion to dismiss the complaint generically alleged that Suburban-Wisconsin had failed to join all necessary parties. However, the motion did not specify those unjoined parties. At the hearing, the DNR made only casual reference to the absence of necessary parties, but it again never identified who the necessary parties were.[7] In its reconsideration motion and brief in support, the DNR renewed this challenge and, for the first time, identified these additional necessary parties as the site owners and their environmental consultants. Notably absent from this recital was Suburban-Illinois.

During the reconsideration hearing, the topic of Suburban-Illinois did arise. However, this was not in the context of any discussion concerning necessary parties to the action. Rather, the role of Suburban-Illinois arose when the DNR and Suburban-Wisconsin were debating whether the data which Suburban-Wisconsin had submitted to the DNR was in error. The DNR alluded to a Milwaukee site from which Suburban-Illinois had produced a suspect sample. Suburban-Wisconsin's attorney responded that the Illinois laboratory was not his client and that any defects in the Illinois laboratory did not establish

[7] This was because the DNR's argument focused on its exhaustion of administrative remedies challenge.

that Suburban-Wisconsin's samples were suspect. The DNR replied that the procedures in both laboratories were the same.

Despite the fact that this exchange suggested certain commonality between Suburban-Wisconsin and Suburban-Illinois, it was not offered in any context which addressed necessary parties to the action. A party must make an argument with sufficient prominence such that the trial court understands that it is being requested to make a ruling. ***State v. Salter***, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984). From our examination of the DNR's written submissions and oral statements to the trial court, we are not satisfied that the issue of Suburban-Illinois as a necessary party was ever raised with sufficient prominence such that the trial court understood that a ruling on that question was required. We deem the appellate argument waived.

CONCLUSION

We affirm the trial court's denial of the DNR's motion to dismiss this action. We affirm the trial court's issuance of the temporary injunction order. We remand for further future proceedings.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.