SUPREME COURT OF WISCONSIN

Case No.: 95-2353

Complete Title of Case:

Gordon J. Grube and Julie Grube,
Plaintiffs-Appellants,
v.
John L. Daun, Louis Achter and Secura Insurance,
Defendants-Respondents.

ON CERTIFICATION FROM THE COURT OF APPEALS

Opinion Filed: June 13, 1997
Submitted on Briefs:
Oral Argument: April 9, 1997

Source of APPEAL
COURT: Circuit
COUNTY: Calumet
JUDGE: Eugene F. McEssey

JUSTICES:
Concurred:
Dissented:
Not Participating:

ATTORNEYS: For the plaintiffs-appellants there were briefs by *Robert W. Lutz, Gary Jahn* and *Lutz, Burnett, McDermott, Jahn & King*, Chilton and oral argument by *Robert W. Lutz*.

For the defendant-respondent, John L. Daun, there was a brief by *William F. Fale* and *Fale, Fale & Hemsing Law Offices*, Sheboygan and oral argument by *William F. Fale*.

For the defendant-respondent, Louis Achter, there was a brief by *Michael S. Siddall, Richard T. Elrod and Herrling, Clark, Hartzheim & Siddall, Ltd.*, Appleton and oral argument by

Michael S. Siddall.

For the defendant-respondent, Secura Insurance Company, there was a brief by *Ronald G. Pezze, Jr.* And *Peterson, Johnson & Murray, S.C.*, Milwaukee and oral argument by *Ronald G. Pezze, Jr.*

Amicus curiae brief was filed by *John M. Van Lieshout, Colleen D. Ball,* and *Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C.*, Milwaukee for the Firstar Corporation.

Amicus curiae was filed by *Susan R. Tyndall* and *Hinshaw & Culbertson*, Milwaukee for the Civil Trial counsel of Wisconsin.

Amicus curiae brief was filed by *Lawrence E. Classen*, Madison for the Wisconsin's Environmental Decade, Inc.

No. 95-2353
NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 95-2353

STATE OF WISCONSIN : IN SUPREME COURT

Gordon J. Grube and Julie Grube,

Plaintiffs-Appellants,

v.

John L. Daun, Louis Achter and Secura Insurance,

Defendants-Respondents.

FILED

JUN 13, 1997

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

APPEAL from a judgment of the circuit court. *Affirmed*.

¶1 JON P. WILCOX, J. This case is on certification from the court of appeals following a jury trial in the Circuit Court for Calumet County, Eugene F. McEssey, Reserve Judge. Gordon and Julie Grube brought suit against the defendants, John Daun, Louis Achter, and Secura Insurance, for misrepresentation and negligence. The circuit court did not allow the Grubes to introduce evidence regarding Achter's alleged violation of Wis. Stat. § 144.76. The jury found that the defendants were not negligent, but did not consider the misrepresentation claims. We affirm the judgment of the circuit court.

¶2 We accepted two issues from the court of appeals on certification: (1) whether Subchapter IV of Chapter 144 of the Wisconsin Statutes creates a private cause of action for individuals who suffer damages from hazardous substance discharges, and (2) whether Wis. Stat. § 144.76 is a safety statute, violation of which is negligence per se.[1] We hold that Subchapter IV of Chapter 144 does not create a private right of action and that Wis. Stat. § 144.76 is not a safety statute.

¶3 The relevant facts are not in dispute. In 1974, Louis Achter bought a farm in Calumet County from his father. While either Achter or his father owned the property, an underground storage tank was installed to store gasoline for the farm. In 1978, Achter noticed that the underground storage tank was leaking. He had the remaining gasoline pumped out and did not use the tank again. Achter did not notify the Department of Natural Resources ("DNR") of the leak.

¶4 In 1984, Achter sold his farm to John Daun. Daun subdivided the land to create a parcel that consisted of a farmhouse, outbuildings and three acres. Daun then offered the parcel with the farmhouse for

[1] As the court of appeals stated in its request for certification, while additional issues were raised on appeal, those issues are controlled by our determination of the two certified issues. At oral argument, the parties focused on the two certified issues and a third issue concerning the effect of an "as is" clause in the offer to purchase. Due to our holding on the two certified issues, we do not consider what effect the "as is" clause has under these circumstances.

sale. This land, which included the underground storage tank, was purchased by Gordon and Julie Grube.

¶5 About three years after moving onto the property, the Grubes became aware of gasoline contamination while working on a well. They reported the contamination to the DNR and were informed that, as the current owners of the property, they were responsible for taking remedial action.

¶6 In December of 1988, the Grubes filed suit against Daun, and later added Achter and his insurance carrier, Secura, as additional defendants. The Grubes alleged negligent misrepresentation, breach of warranties, negligence by Achter in allowing the leak, negligence by Achter in failing to inform anyone of the leak, breach by Achter of his duty to keep the land environmentally safe for others, and strict liability for Achter's abnormally dangerous actions. Daun filed a cross-claim against Achter. Achter filed a third-party complaint against Secura demanding that he be provided with both a defense and insurance coverage under his farmowners policy. The defendants filed motions for summary judgment, and the circuit court dismissed a number of the Grubes' claims. The Grubes appealed that decision, and the court of appeals reversed in part the decision of the circuit court, reinstating some of the Grubes' claims. See Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992). A petition for review was denied by this court.

¶7 The case was tried to a jury in March of 1995. The Grubes sought to introduce evidence concerning the Achter's alleged violation of Wis. Stat. §§ 144.76(2) and (3)(1993-94).[2] Those sections provided in relevant part:

> **(2)** NOTICE OF DISCHARGE. (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department[3] immediately of any discharge not exempted under sub. (9).
>
> (b) Notification received under this section or information obtained in a notification received under this section may not be used against the person making such a notification in any criminal proceedings.
>
> (c) The department shall designate a 24-hour statewide toll free or collect telephone number whereby notice of any hazardous discharge may be made.
>
> . . .
>
> **(3)** RESPONSIBILITY. A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.[4]

The Grubes asked the circuit court to hold that § 144.76 was a safety statute and that Achter's alleged

---

[2] Unless otherwise indicated, all future statutory references are to the 1993-94 volume.

[3] The department as used in this section refers to the Department of Natural Resources. Wis. Stat. § 144.01(2).

[4] Chapter 144 has been recodified, effective January 1, 1997. See 1995 Wis. Act 227, § 1047.

violation of the statute constituted negligence as a matter of law. The circuit court held that the Grubes could not use § 144.76 as a standard of care and prohibited the Grubes from questioning witnesses about § 144.76. The court also refused to instruct the jury as to Achter's alleged violation of the statute and refused to give a that the special verdict question on Achter's violation. The jury found defendants were not negligent.

¶8 Although the Grubes have been identified by the DNR as a potentially responsible party, they have not yet been required to remediate the property or to incur any expenses. In addition, Achter has been notified in a letter from the DNR that he is responsible for remediation. The letter further requested that Achter retain an environmental consultant to conduct an investigation.

I.

¶9 The first issue we consider is whether Subchapter IV of Chapter 144 creates a private cause of action for individuals who suffer damages from hazardous substance spills. Our resolution of this issue is dependent on our interpretation of Chapter 144. Issues involving statutory interpretation are questions of law that this court reviews de novo. Wagner Mobil, Inc. v. City of Madison, 190 Wis. 2d 585, 591-92, 527 N.W.2d 301 (1995); Braatz v. LIRC,

174 Wis. 2d 286, 293, 496 N.W.2d 597 (1993). Accordingly, we owe no deference to the decision of the circuit court. Colby v. Columbia County, 202 Wis. 2d 342, 349, 550 N.W.2d 124 (1996).

¶10 The respondents assert that the language of Wis. Stat. § 144.76 and the structure of Chapter 144 lack the legislative intent necessary to create a private right of action. They contend that the court of appeals' case of Fortier v. Flambeau Plastics Co., 164 Wis. 2d 639, 476 N.W.2d 593 (Ct. App. 1991), supports their position. The Grubes maintain that Fortier is not relevant to our determination because that case concerned different sections of Chapter 144 than those at issue here. The Grubes further argue that Subchapter IV implicitly creates a private right of action.

¶11 We first consider whether the court of appeals' decision in Fortier is applicable to our decision. In Fortier, the court of appeals concluded that Wis. Stat. §§ 144.43 and 144.44 did not create a private right of action. Pursuant to these sections of Chapter 144, the DNR had adopted an administrative rule regulating the disposal of hazardous waste at landfills. The defendants violated that disposal rule by disposing of hazardous waste at an unlicensed landfill. The court held that the statutes in question did not create a private right of action because they did not contain an expression of legislative intention

to do so: "We infer from these provisions that the legislature intended that the violation of the DNR's solid waste disposal regulations is a public rather than a private wrong." Fortier, 164 Wis. 2d at 661. Although the court of appeals' holding is pertinent to this case, as it dealt with different sections of Chapter 144 we must independently determine whether Subchapter IV of Chapter 144 creates a private right of action.

¶12 A determination of whether a statute creates a private right of action is dependent on whether there is a clear indication of the legislature's intent to create such a right. Kranzush, 103 Wis. 2d at 79-80 ("the touchstone in the determination of [whether a private right of action is created] is the presence of an expression of legislative intent specifically to create such a right . . ."); McNeill, 55 Wis. 2d at 258. In McNeill we stated:

> The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. The nature of the evil sought to be remedied, and the purpose it was intended to accomplish, may also be taken into consideration. In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability.

Id. at 258-59 (citation omitted); see also Kranzush, 103 Wis. 2d at 74-75. Accordingly, a private right of

action is only created when (1) the language or the form of the statute evinces the legislature's intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public. The language and form of Chapter 144 do not suggest that the legislature intended to create a private right of action, but instead illustrate that this chapter was designed to provide general protection to the public.

¶13 The hazardous substance spill at issue in this case is governed by Subchapter IV of Chapter 144 which is entitled "*Solid Waste, Hazardous Waste and Refuse*." Wis. Stat. § 144.76 is part of the hazardous waste provisions of Subchapter IV. Thus, we begin our search for legislative intent by examining the declaration of policy for hazardous waste management contained in Wis. Stat. § 144.60(2):

> **(2)** DECLARATION OF POLICY. The legislature finds that hazardous wastes, when mismanaged, pose a substantial danger to the environment and public health and safety. To ensure that hazardous wastes are properly managed within this state, the legislature declares that a state-administered regulatory program is needed . . .

It is indeed rare to find such a clear expression of the legislature's intent. This section unequivocally illustrates that the intent of the hazardous waste management provisions was to protect the public in general. Additional evidence of this intent is found in Wis. Stat. § 144.62 which establishes the powers and

duties of the department. Wis. Stat. § 144.62(3) provides:

> **(3)** The department may, by rule, prohibit particular methods of treatment or disposal of particular hazardous wastes, upon a finding that restrictions on treatment or disposal methods are necessary to protect public health and safety or the environment.

¶14 The absence of a legislative intention to create a private right of action is also illustrated by provisions providing for enforcement by the state. For example, Wis. Stat. § 144.98 (1987-88) provided:

> **144.98 Enforcement; duty of department of justice; expenses.** The attorney general shall enforce this chapter and all rules, special orders, licenses, plan approvals and permits of the department. . . . For purposes of this proceeding where this chapter or the rule, special order, license, plan approval or permit prohibits in whole or in part any pollution, a violation is deemed a public nuisance. . . .

In addition, Wis. Stat. § 144.442(9)(d) and (f) empower the state to seek reimbursement from responsible persons for the cost of environmental remediation. Wis. Stat. § 144.76 makes provision for the state to perform remediation and seek contribution from a responsible person, § 144.76(7)(a) and (b), or pursuant to § 144.76(7)(c) the state may force a responsible person to fulfill their duty under § 144.76(3). Section 144.76(7)(c) provides in relevant part:

> (c) The department, for the protection of public health, safety or welfare, may issue an emergency order or a special order to the person possessing, controlling or responsible for the discharge of hazardous substances to fulfill the duty imposed by sub. (3).

Such clear provisions for state action without corresponding provisions for private action are strong evidence of the absence of legislative intent to create a private right of action.[5]

¶15 In light of the overwhelming evidence that Subchapter IV of Chapter 144 was designed to provide general protection to the public, the explicit provisions providing for enforcement of Chapter 144 by the state, and the absence of any indication that the legislature intended to create a private right of action, we find that Subchapter IV of Chapter 144 does not create a private right of action.

II.

[5] This court came to a similar conclusion concerning the intent of Wis. Stat. § 144.76(3) in State v. Mauthe, 123 Wis. 2d 288, 366 N.W.2d 871 (1985). In considering whether the legislature intended an owner of property containing contaminated soil to take remedial action, this court stated:

> Aldo Leopold, the great Wisconsin conservationist in his well-known work, *A Sand County Almanac*, (1948) at page 203 said:
>
> "Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong."
>
> The statutes under consideration are a legislative recognition that the discharge of hazardous substances is one form of despoliation. The legislature has enacted this law to correct that wrong.

Id. at 303.

¶16 We next consider whether Wis. Stat. § 144.76 is a safety statute, the violation of which is negligence per se. The Grubes maintain that Chapter 144 establishes a standard of care for the protection of the environment and is intended to protect Wisconsin residents from the dangers of environmental contamination. The respondents contend that the statutory language does not indicate that the legislature intended § 144.76 to be a safety statute.

¶17 Resolution of this issue is based on the interpretation of a statute which is a question of law that we review de novo. Wagner, 190 Wis. at 591-92; Braatz, 174 Wis. 2d at 293. Accordingly, we do not owe any deference to the decision of the circuit court. Colby, 202 Wis. 2d at 349. A statute should not be construed as changing the common law unless the intent to cause such a change is clearly expressed in the statute. Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 74, 307 N.W.2d 256 (1981).

¶18 Accordingly, we must first determine whether Wis. Stat. § 144.76(3) is a safety statute. Safety statutes are those legislative enactments that are designed to protect a certain class of persons from a particular type of harm. Bennett v. Larsen Co., 118 Wis. 2d 681, 693-94, 348 N.W.2d 540 (1984); Walker v. Bignell, 100 Wis. 2d 256, 268, 301 N.W.2d 447 (1981). A statute is not a safety statute if the legislature merely intended to protect the general public. See In

re Estate of Drab, 143 Wis. 2d 568, 570, 422 N.W.2d 144 (Ct. App. 1988).

¶19 Wis. Stat. § 144.76(3) provides that a person who possesses a hazardous substance that is spilled "shall take actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands, or waters of this state." In addition, the declaration of policy for hazardous waste management, found in Wis. Stat. § 144.60(2), provides in relevant part: "The legislature finds that hazardous wastes, when mismanaged, pose a substantial danger to the environment and public health and safety." From this language, it appears that the statute was designed to protect the public in general rather than a certain class of persons. Therefore, we conclude that Wis. Stat. § 144.76(3) is not a safety statute.

By the Court.—The judgment of the circuit court is affirmed.

SUPREME COURT OF WISCONSIN

Case No.: 95-2353

Complete Title of Case:

Gordon J. Grube and Julie Grube,
Plaintiffs-Appellants,
v.
John L. Daun, Louis Achter and Secura Insurance,
Defendants-Respondents.

ON MOTION FOR RECONSIDERATION
Previously Reported at: 210 Wis. 2d 682, 563 N.W.2d 523 (1997).

Opinion Filed: November 12, 1997
Submitted on Briefs:
Oral Argument:

Source of APPEAL
COURT:
COUNTY:
JUDGE:

JUSTICES:
Concurred:
Dissented:
Not Participating:

ATTORNEYS:

No. 95-2353
NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 95-2353

STATE OF WISCONSIN : IN SUPREME COURT

Gordon J. Grube and Julie Grube,

Plaintiffs-Appellants,

v.

John L. Daun, Louis Achter and Secura Insurance,

Defendants-Respondents.

FILED

NOV 12, 1997

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

¶20 PER CURIAM This case is again before the court in response to the plaintiffs' motion for reconsideration of our decision in Grube v. Daun, 210 Wis. 2d 682, 563 N.W.2d 523 (1997). In that opinion, upon certification from the court of appeals, this court affirmed the decision of the circuit court[6] and rejected the plaintiffs' contentions that a private right of action existed under subchapter IV of Wis. Stat. ch. 144 (1993-94).[7] We similarly rejected the plaintiffs' claims that violation of Wis. Stat. § 144.76, a nonsafety statute, constituted negligence per se.

[6] Circuit Court for Calumet County, Eugene F. McEssey, Judge.

[7] Unless otherwise indicated, all future statutory references are to the 1993-94 volume.

¶21 The plaintiffs' motion for reconsideration does not ask this court to revisit the two issues previously resolved. Instead, the plaintiffs ask this court to resolve eight additional issues raised before the court of appeals. Since the plaintiffs' motion for reconsideration does not challenge our resolution of the two certified issues, we deny the motion for reconsideration. However, because the additional eight issues raised by the plaintiffs in the court of appeals were not controlled by our decision on the two certified issues, we determine that the plaintiffs are entitled to appellate review of those eight additional issues. Accordingly, we deny the motion for reconsideration and address the additional issues. Upon review, we affirm the circuit court's disposition of these matters.

I. FACTS AND PROCEDURAL HISTORY

¶22 This dispute arises from the sale of a parcel of land contaminated by a leaking underground storage tank ("UST"). Defendant Louis Achter ("Achter"), who had lived on his family's farm in Calumet County all of his life, purchased the farm from his mother in 1974. To facilitate farm operations, Achter, at some point in the early 1970s, had installed an underground tank to store gasoline for use by farm machinery. In 1978, after refilling the UST and noticing a decreasing gas level, Achter discovered that gasoline was leaking from the tank. Achter then had the remaining gasoline pumped out of the tank and placed in a new above-ground tank. The old tank remained buried. Achter continued to live on the property after the leak. His family

and livestock also subsequently relied on drinking water from one of several wells situated on the property.

¶23 Defendant John Daun ("Daun"), also a farmer, purchased the 124-acre farm "as is" from Achter in early 1985. Daun then subdivided the land to create a "farmette." He offered the small parcel containing the farm buildings, three wells and the UST for sale. Plaintiffs Julie and Gordon Grube purchased the parcel, also on an "as is" basis, from Daun in December 1985, with the expressed intention of making extensive renovations.

¶24 Three years later, in the course of properly abandoning what was previously thought to be a dry well, the Grubes discovered groundwater gasoline contamination. The Grubes reported the contamination to the Wisconsin Department of Natural Resources ("DNR") on the advice of counsel. The DNR investigated the contamination and then responded by notifying the Grubes on October 3, 1988, and, later, defendant Achter, of their potential responsibility for the remediation costs of cleaning up the gasoline contamination.

¶25 The Grubes filed suit against Daun on December 16, 1988. Daun responded by filing a third-party complaint against Achter. The Grubes then amended their complaint several times to include Achter and his insurance company, Secura Insurance ("Secura"), as defendants and to ask, in the alternative, that their purchase agreement with Daun be rescinded due to mutual mistake in the formation of the contract. The Grubes alleged negligent misrepresentation, intentional misrepresentation, strict responsibility for misrepresentation, breach of warranty,

negligence by Achter in allowing the leak, negligence by Achter for not reporting the leak to the DNR, breach of Achter's duty to keep the land safe, violation of Wis. Stat. § 100.18 which prohibits fraudulent misrepresentations, and strict liability for conducting an abnormally dangerous activity.[8]

¶26 Daun cross-claimed against Achter, while Achter filed a third-party complaint against Secura demanding that Secura provide him with a defense and cover any judgments against him. The defendants also filed motions for summary judgment, which the circuit court granted in part, thereby dismissing many of the plaintiffs' claims. The plaintiffs appealed the circuit court's orders. The court of appeals reinstated some of the Grubes' claims. See Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992). The circuit court then dismissed the plaintiffs' claims for strict liability at a pretrial motion hearing in February 1995. Responding to further objections, the circuit court dismissed the Grubes' claims for rescission on the first day of trial on the grounds that the Grubes had waived that form of relief by affirming the contract. Finally, at a pre-verdict conference, the circuit court dismissed the misrepresentation claims due to a stipulation of counsel.

¶27 Ultimately, the jury only considered claims based on the negligence of Achter and Thiel. Because the plaintiffs' remaining misrepresentation claims against Daun were dependent

[8] In a separate lawsuit, the Grubes sued Daun's real estate agent, Jerry Thiel. The actions were later consolidated.

on agency principles, the parties agreed to determine Daun's vicarious liability through post-verdict motions if Thiel were found negligent.

¶28 The negligence claims were tried to the jury and the jury found Achter and Thiel not negligent. The jury also found that the Grubes were negligent in their purchase of the property. Post-verdict motions for relief were denied, with the circuit court expressly affirming the jury's verdict. The Grubes appealed the circuit court proceedings on ten grounds.

¶29 The court of appeals certified the private right of action and negligence per se questions to this court. See Grube v. Daun, 210 Wis. 2d 682 (1997). The court of appeals also noted in its certification to this court that all additional issues raised on appeal would be controlled by our resolution of the two certified questions. While this court accepted the appeal on all matters before the court of appeals, and the plaintiffs relied on and supplemented their briefs before the court of appeals, our previous opinion addressed only the two certified questions.

II. MOTION FOR RECONSIDERATION

¶30 The plaintiffs do not seek reconsideration of the two issues resolved by this court in Grube v. Daun, 210 Wis. 2d 682, 563 N.W.2d 523 (1997). Rather, the plaintiffs point to this court's acceptance of certification to hear all issues raised before the court of appeals. The plaintiffs also assert that the court of appeals' statement that the remaining eight

appellate issues would be controlled by our decision on the certified issues was in error.

¶31 This court will change a decision on reconsideration "only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record." Wisconsin Supreme Court Operating Procedures, II J. Since the plaintiffs do not challenge this court's resolution of the two issues disposed of in our earlier decision, reconsideration is not an appropriate remedy.

¶32 However, we determine that our reliance on the court of appeals' certification, stating that all other issues would be controlled by the two certified issues, was misplaced. The additional eight issues raised by the plaintiffs in the court of appeals were not controlled by our prior decision. We further determine that footnote 1 in Grube v. Daun, 210 Wis. 2d 682, 685 n. 1, 563 N.W.2d 523 (1997) should be withdrawn[9] and that the plaintiffs are entitled to appellate review of those eight additional issues. Accordingly, we respond now to the plaintiffs' initial appeal on these issues.

III. EVIDENCE OF COMMON LAW NEGLIGENCE

[9] In footnote 1 of Grube v. Daun, 210 Wis. 2d 682, we expressly declined to address the remaining issues based on the assertion that those issues were controlled by our resolution of the certified questions.

¶33 The plaintiffs' most vigorous challenge on appeal attacks the circuit court's repeated refusal to allow evidence of Achter's violation of Wis. Stat. § 144.76[10] to be admitted as evidence of a standard of care for common law negligence purposes. Evidentiary questions are properly resolved at the circuit court's discretion. See State v. Pharr, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Where this court is asked to review such rulings, we look not to see if we agree with the circuit court's determination, but rather whether "the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." State v. Pharr, 115 Wis. 2d at 342 (quoting State v. Wollman, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979)). If a reasonable basis for the circuit court's ruling exists, we will not disturb it. See State v. Harris, 123 Wis. 2d 231, 365 N.W.2d 922 (Ct. App. 1985). Our review of the trial record indicates that the circuit court properly exercised its discretion.

¶34 At trial, plaintiffs' counsel repeatedly insisted that it was the plaintiffs' "right" to enter evidence of Achter's

[10] Wis. Stat § 144.76(2) states in pertinent part:

> NOTICE OF DISCHARGE. (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge not exempted under sub. (9).
>
> (b) Notification received under this section or information obtained in a notification received under this section may not be used against the person making such a notification in any criminal proceedings.

violation of Wis. Stat. § 144.76 to show a standard of care for common law negligence since the statute was "the law of the land." However, absent a safety statute or an established private right of action, this court has never held that parties have an absolute right to admit evidence of violation of a civil statute to show a standard of care. Even were this court inclined to adopt the plaintiffs' position that a violation of a civil statute can be generally admitted for such purposes, a question we decline to address on this appeal, the circuit court's discretionary refusal to admit the evidence in this case had a rational basis in the law and facts of the case.

¶35 The record reflects that counsel for the defendants strongly objected to admission of Wis. Stat. § 144.76 as a standard of care. Counsel based his objection on the grounds that application of Wis. Stat. § 144.76, a mandatory DNR reporting requirement, was irrelevant to a third-party common law action based on Achter's possession and control of a UST. Counsel further objected to admission of the statute on the grounds that the plaintiffs effectively sought to use the statute to create a back door private right of action or negligence per se claim – a result unduly prejudicial to the defense.

¶36 Responding to defense counsel's objections, after hearing oral arguments on the issue at least seven times prior to and during the course of the trial, the circuit court barred evidence pertaining to the existence or violation of Wis. Stat. § 144.76. In doing so, we believe the circuit court properly

exercised its discretion to bar evidence with questionable relevancy that might also be unduly prejudicial under the facts of this case. See Wis. Stat. § 904.03.

IV. DISMISSAL OF MISREPRESENTATION CLAIM

¶37 The plaintiffs submit a one-paragraph argument appealing the circuit court's dismissal of the plaintiffs' claims based on misrepresentation against defendant Daun. In making this argument, the plaintiffs rely only on the bald assertion that they presented evidence concerning the misrepresentation claim at trial. Relying on Ollerman v. O'Rourke Co., Inc., 94 Wis. 2d 17, 24, 288 N.W.2d 95 (1980), the plaintiffs assert that a claim should not be dismissed unless "it is quite clear that under no conditions can the plaintiff recover."

¶38 In addressing this claim, we note that the record relating to this issue is incomplete. Material discussions relating to the positions taken by parties as to the disposition of the misrepresentation claims were conducted off the record. In addition, and more importantly for our purposes, the plaintiffs' appeal from the circuit court's dismissal of the misrepresentation claims is undeveloped. This court declines to address issues raised on appeal that are inadequately briefed. See McEvoy v. GHC, No. 96-0908, op. at 20 n.10 (S. Ct. November 12, 1997); State v. Flynn, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Accordingly, the circuit court's decision on this claim is affirmed.

V. DISMISSAL OF STRICT LIABILITY CLAIM AGAINST ACHTER

¶39 The plaintiffs next allege that "the leakage of [the underground storage] tank and the resulting substantial environmental contamination, combined with Achter's failure to take any action to minimize the damage, remediate it, or at least report it to authorities" constitutes an "abnormally dangerous activity" that subjects Achter to strict liability. See Brief of Pet. at 43-44. Looking to the definition of abnormally dangerous activities present in Restatement (Second) of Torts, §§ 519-20 (1977), adopted by this court in Bennett v. Larsen Co., 118 Wis. 2d 681, 703, 348 N.W.2d 540 (1984), the circuit court dismissed the plaintiffs' strict liability claims against Achter. Upon review, where the facts are undisputed, whether an activity is abnormally dangerous "is to be determined by the court, upon consideration of all the factors listed in sec. 520, and the weight given to each that it merits upon the facts in evidence." Fortier v. Flambeau Plastics Co., 164 Wis. 2d 639, 668, 476 N.W.2d 593 (Ct. App. 1991). Thus, a question of law is presented which we review de novo.

¶40 Restatement (Second) § 520 lists six factors for determining if an activity is abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;

> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

These factors are interrelated and should be considered as a whole, with weight being apportioned by the court in accordance with the facts in evidence. See Restatement (Second) of Torts, § 520 cmt.1 (1977).

¶41 As an initial matter, we reject the plaintiffs' assertion that the leakage and resulting contamination attributable to a UST is the appropriate activity to be analyzed under the Restatement. The contamination is the resulting harm, not the alleged ultrahazardous activity itself. Thus, we instead examine whether Achter's installation and use of a UST on a farm in the 1970s, without more, constitutes an abnormally dangerous activity that requires the imposition of strict liability in the event of harm to others. We conclude based on the facts of this case that Achter's use of a UST did not constitute an abnormally dangerous activity. Cf. Fortier, 164 Wis. 2d at 675 (holding that deposit of VOC contaminated waste in landfill was not an abnormally dangerous activity); Arlington Forest Assocs. v. Exxon Corp., 774 F. Supp. 387 (E.D. Va. 1991)(holding that storage and removal of gasoline from UST does not constitute an abnormally dangerous activity under Virginia law).

¶42 USTs, while admittedly disfavored under today's environmental laws, are not inherently dangerous. Absent negligence or application of an outside force, use of a UST does

not create a high degree of risk of harm to the person, land or chattels of another. Moreover, those risks that do exist can be minimized by the exercise of reasonable care by the owner or possessor of the tank. As one court has noted:

> If an activity can be performed safely with ordinary care, negligence serves both as an adequate remedy for injury and a sufficient deterrent to carelessness. Strict liability is reserved for selected uncommon and extraordinarily dangerous activities for which negligence is an inadequate deterrent or remedy.

Arlington, 774 F. Supp. at 390.

¶43 While USTs are not as popular today as they once were, as the testimony of Daun and Achter indicates, use of USTs on farms in the 1970s was a common occurrence. Such storage tanks were commonly placed near farm buildings, and thus near wells, to facilitate ready access by farm implements. All of these factors weigh against imposition of strict liability in this case.

¶44 We acknowledge in hindsight that the likelihood of harm resulting from use of a UST that leaks is significant and that such harm may today in certain circumstances outweigh the utility of using USTs. However, at the time the allegedly hazardous activity took place, the value to the community of having USTs was believed to outweigh any danger from their use. Cf. Fortier, 164 Wis. 2d at 674-75. Both the general community and the DNR were operating under the mistaken impression that the introduction of petroleum products into soil presented no threat. Accordingly, because the Restatement factors are to be considered as a whole, based on the facts at hand, we reject

application of strict liability in this case and affirm the circuit court's dismissal of the strict liability claim.

VI. ABSENCE OF CREDIBLE EVIDENCE

¶45 The plaintiffs attack the jury verdict for the defendants as lacking any "credible evidence." Jury verdicts will be sustained on appeal if there is any "credible evidence" to support the verdict. See Meurer v. ITT General Controls, 90 Wis. 2d 438, 449, 280 N.W.2d 156 (1979). Upon review, appellate courts must look for evidence to support the verdict, while "accepting any reasonable inferences favorable to the verdict that the jury could have drawn from that evidence." Staehler v. Beuthin, 206 Wis. 2d 609, 616, 557 N.W.2d 487 (Ct. App. 1996). Our presumption in favor of the jury verdict is particularly applicable where the circuit court has indicated its agreement with the verdict. See Herro v. Dept. of Natural Resources, 67 Wis. 2d 407, 413, 227 N.W.2d 456 (1975); McGuire v. Stein's Gift and Garden Center, Inc., 178 Wis. 2d 379, 397, 504 N.W.2d 385 (Ct. App. 1993).

¶46 The trial record indicates that the parties presented conflicting evidence on the issue of Achter's negligence in allowing the gasoline leak to occur and in failing to report the offending leak to the DNR. Achter presented evidence that he installed the gas tank following the regular procedures of the time and that he consulted with several members of the farming community who had previously installed similar USTs. He testified that he regularly checked the level of gasoline in the underground storage tank. When he discovered the leak, Achter arranged to have the tank emptied. He further presented evidence that other farmers and the DNR operated under the

belief (now known to be mistaken) that there was no danger of groundwater contamination arising from petroleum products being introduced into the soil.

¶47 Based on the evidence reflected above, we find that there was sufficient credible evidence to support the jury's finding that Achter was "not negligent." In so doing, we also acknowledge the added weight to be given to the verdict in light of the circuit court's finding in this case that:

> I think there's ample evidence from the jury to support the findings of the verdict, particularly as in question one, was Louis Achter negligent in respect, possession of an underground gasoline tank, they answered that no . . . . The jury could easily find that Louis Achter was not negligent and the Court so upholds.

See Herro, 67 Wis. 2d at 413. Accordingly, we sustain the jury verdict.

VII. ERRONEOUS EXERCISE OF DISCRETION BY USE OF WIS JI—CIVIL 1019

¶48 The plaintiffs appeal the circuit court's use of a modified version of Wisconsin Jury Instruction—Civil 1019 in instructing the jury on the "custom" of Wisconsin farmers. Specifically, the circuit court instructed the jury:

> Evidence has been received as to the custom regarding the practice of farmers regarding use of underground storage tanks in the 1970's. This evidence will be weighed and examined by you as it may bear upon whether the conduct of Mr. Achter measures up to the standard of ordinary care. This evidence of practice is not conclusive as to what meets the standard for ordinary care. What is generally done by farmers engaged in a similar activity has some bearing on what an ordinary prudent person would do under the same or like circumstances. A practice which is obviously

> unreasonable cannot serve to excuse a person from responsibility for carelessness.

¶49 The plaintiffs label this instruction an erroneous exercise of the circuit court's discretion. They claim impropriety because the testimony concerning custom was of insufficient weight. They assert that any custom instruction given to the jury should have been focused on the custom of maintaining a leaking UST. They argue that the allegedly misleading instruction confused the jury. Finally, the plaintiffs argue that the circuit court erroneously based its decision to give the instruction in part on its own knowledge and judgment.

¶50 Circuit courts have significant discretion when conveying instructions to the jury so long as the trial court "fully and fairly informs the jury of the rules and principles of law applicable to the particular case." Nowatske v. Osterloh, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996)(citing Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 24, 531 N.W.2d 597 (1995)). The circuit court must instruct the jury with due regard to the facts of the case. See Nowatske, 198 Wis. 2d at 428. The instruction should not be unduly unfavorable to any party. See id. Appellate courts must consider the challenged jury instruction as a whole to determine if the instruction was erroneous. See id. at 429. Finally, when a circuit court has given an erroneous instruction or has erroneously refused to give an instruction, a new trial is not warranted unless the error is prejudicial. See id.

¶51 We find that the circuit court properly tailored the standard jury instruction, Wis JI—Civil 1019, to the facts and claims of this case. The Grubes' sole remaining claim against Achter at trial centered on Achter's common law negligence in maintaining a UST on his farm in the 1970s. Custom is a valid indicator of a standard of care in common law negligence cases and circuit courts should not hesitate in appropriate cases to tailor standard jury instructions to the facts of the cases before them. See Buel v. LaCrosse Transit Co., 77 Wis. 2d 480, 492, 253 N.W.2d 232 (1977). Moreover, the plaintiffs' assertion that the custom instruction should have related to the custom of maintaining a "leaking" UST is inapposite. This argument is similar to the one we rejected in the plaintiffs' strict liability appeal. The relevant standard of care is the care an ordinary person would take under similar circumstances to maintain a UST in working order. Thus, the instruction given adequately covers the law and the facts and is not an erroneous exercise of the circuit court's discretion.

VIII. RESCISSION CLAIM

¶52 The plaintiffs' original complaint, filed in December of 1988, asked only for contract damages. Seven months later, in late July 1989, the plaintiffs amended their complaint to include a request, in the alternative, that the real estate sale contract with Daun be rescinded based on mutual mistake. On the first day of trial, defendant Secura objected to the alternative request for relief on the grounds that the Grubes had unduly delayed in asking for rescission, that the Grubes had affirmed

the contract by filing their initial suit only in damages, and that the Grubes had affirmed the sales contract by performing it and continuing to make renovations to the property after discovering the contamination.

¶53 In Wisconsin, a party damaged by a sales contract entered through fraud or mistake may choose between the alternative remedies of contract damages or rescission of that contract. See Weinhagen v. Hayes, 174 Wis. 233, 249, 178 N.W. 780 (1920). However, that party's right to chose between these remedies is waived if the party "unreasonably delays in asserting that right or affirms the agreement after learning of the fraud or mistake giving rise to the right of rescission." Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 319, 340 N.W.2d 704 (1983)(following Restatement of Restitution, §§ 64, 68 (1937)). Where the facts of a case are "practically undisputed," the question of waiver is one of law that this court can review independently. See Thompson, 115 Wis. 2d at 289 (citing Weinhagen 174 Wis. at 249). Upon review of the record we find that the Grubes unequivocally affirmed the contract of sale through their actions after discovering the contamination that they assert constitutes the mutual mistake entitling them to rescission.

¶54 The Grubes purchased the property in 1985. They did not discover the underground contamination until late August 1988. They obtained counsel in September 1988, and notified the DNR of the contamination that same month. The Grubes then filed their initial complaint against the defendant Daun in December

1988, asking only for contract damages.[11] The record reflects that after discovering the groundwater contamination, and after obtaining the advice of counsel, the Grubes continued to live on and make extensive improvements to the contaminated parcel of land.

¶55 Gordon Grube testified at his deposition that additional plumbing work was completed on the property in September 1988. In October and November, Grube purchased materials for and fixed the chimney on the home and replaced some of the windows and blinds. In January of the following year, more than four months after discovering the contamination, the Grubes continued to remodel the plumbing system. In May 1989, Gordon Grube purchased materials to landscape the curtilage of the property and poured a cement slab. In August 1989, Gordon Grube purchased and began replacing shingles that had blown off the house and other buildings. In October 1989, the Grubes installed an 8-foot by 24-foot cement patio along the edge of the kitchen porch they had built previously. Finally, we note that the Grubes did not abandon the property until four years after discovering the offending contamination. Even if we assume that there was a mutual mistake of fact that would have allowed the contract to be rescinded, we find the actions described above to be an affirmance of that contract, thus

[11] Because we determine that the Grubes affirmed the contract through their actions after discovering the groundwater contamination, we do not reach the question of the effect of the Grubes' failure to plead rescission until their Third Amended Complaint.

precluding relief based on rescission. The circuit court correctly dismissed the request for relief on that basis.

IX. NEW TRIAL IN THE INTERESTS OF JUSTICE

¶56 The plaintiffs assert that the circuit court erred in not granting a new trial in the "interests of justice." This court has inherent and express authority under Wis. Stat. § 751.06 (1995-96) to reverse a judgment if it appears that "the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Stivarius v. DiVall, 121 Wis. 2d 145, 151, 358 N.W.2d 530 (1984). Under this authority, we grant a new trial only with "reluctance and great caution." Id.

¶57 This appellate claim is raised by the plaintiffs as a sort of "catch-all" claim. Because we deny relief to the plaintiffs on each of their other appellate questions, and because we find it unlikely that a new trial under "optimum circumstances will produce a different result," Garcia v. State, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976), we deny the plaintiffs' request for a new trial in the interests of justice.

X. TAXABLE COSTS

¶58 Lastly, the plaintiffs appeal the circuit court's assessment of taxable costs. The plaintiffs allege that the defendants failed to itemize properly their bills of cost under Wis. Stat. § 814.10(2)[12] and that the circuit court taxed the

[12] Wis. Stat. § 814.10(2) provides: "Cost Bill, Service. All bills of costs shall be itemized and served with the notice of taxation."

costs prematurely, in violation of the procedures laid out in Wis. Stat. § 814.10(4).[13] Awards of costs are a matter of discretion for the circuit court, and will not be disturbed absent an erroneous exercise of discretion. See Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 13, 523 N.W.2d 197 (Ct. App. 1994).

¶59 The record indicates that the defendants sufficiently itemized their costs by category for purposes of application of § 814.10(2). The circuit court examined the itemized bills of cost and found that, after seven years of litigation, the costs incurred were reasonable. We do not believe the court erroneously exercised its discretion in this matter.

¶60 Finally, the circuit court explicitly acknowledged that its grant of taxable costs at the July 28, 1995, motion hearing disregarded the procedural requirements present in Wis. Stat. § 814.10. We note that the defendants correctly filed their bills of costs with the clerk and that the plaintiffs responded by filing their objections, all pursuant to statute. The circuit court then took up the matter of some of the bills

[13] Wis. Stat. § 814.10(4) states:

> Court Review. The clerk shall note on the bill all items disallowed, and all items allowed, to which objections have been made. This action may be reviewed by the court on motion of the party aggrieved made and served within 10 days after taxation. The review shall be founded on the bill of costs and the objections and proof on file in respect to the bill of costs. No objection shall be entertained on review which was not made before the clerk, except to prevent great hardship or manifest injustice. Motions under this subsection may be heard under s. 807.13.

of costs at a post-verdict motion hearing on July 28, 1995. Based on the written objections of the plaintiffs, and on oral arguments on the issue presented by counsel at that hearing, the circuit court denied the objection. The plaintiffs only then objected to the circuit court's failure to wait for their motion bringing their objections before the court within 10 days of taxation of the costs by the clerk. Because we find the circuit court's actions to be a mere technical violation of the statute that did not prejudice the plaintiffs in any way, the circuit court's actions were harmless error. See Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 131, 362 N.W.2d 118, 137 (1985).

¶61 Accordingly, the plaintiffs' motion for reconsideration is denied. After withdrawing footnote 1 in Grube v. Daun, 210 Wis. 2d 682, 563 N.W.2d 523 (1997), we affirm the remaining decisions of the circuit court.