

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2007

David R. Schanker
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. 2006AP210

Cir. Ct. No. 2002CV1770

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF LAPRAIRIE,

PLAINTIFF-RESPONDENT,

V.

MULE HILL MATERIALS & NURSERY, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
R. A. BATES, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Mule Hill Materials & Nursery, Inc., appeals from an injunction and money judgment in a zoning case. We affirm.

¶2 The Town of LaPrairie commenced this action against Mule Hill with a complaint alleging that Mule Hill violated the Town's zoning ordinances by conducting a commercial gravel mining operation in a zoned agricultural district. As relief, the Town sought an injunction to cease operations and a per-day financial penalty. After trial and submission of post-trial briefs, the court issued a memorandum decision concluding that Mule Hill violated the ordinance and issued an injunction. After further briefing on financial penalties, the court issued an order setting fines at \$28,300, and the fines and injunction were then combined into a single judgment.

¶3 Mule Hill first argues that the court erred in finding that Mule Hill failed to prove that the extraction business was a nonconforming use that existed before the ordinance and continued since its enactment. In deciding that issue, the court focused on the period from 1977 to 1985, and found that Mule Hill failed to meet its burden of proof to show operation during that period. Specifically, the court found that Bill Hughes owned the property during that time. The court noted that Hughes' testimony showed that he did not operate a separate gravel business entity during that period. The court described the various business records Hughes presented from that time, including tax returns, and then stated:

The problem with the records from 1977 through 1986 [is] that they do not specify the income as being from gravel, mining, excavation or other operation. We are required to rely upon the memory and testimony of Bill Hughes. Similarly Mr. Hughes is not able, in general for those years, to testify whether or not the income came from the Town of LaPrairie or the City of Janesville operations.

¶4 Mule Hill argues that the court erred in the final sentence quoted above. Mule Hill appears to read that sentence as a statement by the court that it did not consider Hughes to have testified about whether extraction activities

occurred on the LaPrairie site. To demonstrate that such a statement would have been contrary to the evidence, Mule Hill describes substantial portions of the Hughes testimony about the property.

¶5 We do not agree with Mule Hill’s reading of the last sentence of the above-quoted passage. A sentence-by-sentence review of the full passage, considered in light of the evidence presented, reveals the court’s focus in the last sentence. In the first sentence, the court was referring to the various business records it had just described, and was noting that the records did not specify that certain miscellaneous income was derived from extraction operations. Instead, there was income in the records described as “other” income. In the second sentence, the court was noting that the only evidence of the asserted connection between the business records and extraction income was the memory and testimony of Hughes, rather than the records themselves.

¶6 In the last sentence, however, the court focused on a different topic. That topic was the lack of evidence as to whether the asserted income from extraction operations came from operations on the LaPrairie property at issue in this case, or instead on an adjacent property owned by Hughes in the City of Janesville, on which he testified extraction operations were also conducted during the relevant period. Contrary to Mule Hill’s argument that this sentence was a broad statement by the court disregarding much or all of Hughes’s testimony, it is clear that this statement was directed at a much narrower point, namely, the paucity of evidence about which of the two sites the asserted “other” income was derived from.

¶7 We turn then to the question of whether the court’s statement on this narrow point was inaccurate. It is possible that it was. While the court said

Hughes was “not able, in general for those years, to testify” about which property was the source of the asserted income, Hughes did state in his testimony about the business records that he believed certain specific entries were related to the LaPrairie site.

¶8 However, even if we were to conclude that the court erred in saying Hughes was not able to testify about this point, we would not reverse. The overarching question here is whether the court erred in finding that extraction operations did not occur on the LaPrairie site during a certain time period. That is a finding we must affirm unless clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).¹ The court’s finding in this case was not based solely, or even primarily, on its view of the narrow topic addressed in that disputed sentence. The memorandum decision reviewed the historical testimony, business records, and expert testimony about aerial photographs. The court’s finding that Mule Hill failed to meet its burden of proof was based on the entirety of that evidence. There is no reason to believe that the court would have reached a different determination if only it realized that Hughes gave testimony that some specific entries reflected extraction from the LaPrairie site.

¶9 In particular, we are satisfied that the court’s finding would have remained the same because of the way it regarded the other memory-based testimony by Hughes about income from extraction. It is clear from the ultimate finding of non-operation that, on the question of whether the vague business records showed income from extraction, the court did not find persuasive the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

“memory and testimony” of Hughes. Hughes’ testimony on the question of which specific site produced the income was likewise founded entirely on his memory, as demonstrated by some of his testimony.² There is no basis to believe that the circuit court would have found Hughes’ memory any more convincing on this point than it did on the first one.

¶10 Mule Hill next argues that we should reverse the injunction and financial penalties because the circuit court failed to consider equitable principles. This argument is in several parts. The first part is that the trial court denied Mule Hill’s right to raise equitable defenses against an injunction. Mule Hill appears to be arguing that, after the court found it to be in violation of the zoning ordinance, the court should have provided a separate round of argument before issuing the injunction that was based on that finding. For the proposition that such a second round is required, Mule Hill cites *Forest County v. Goode*, 219 Wis. 2d 654, 682-83, 579 N.W.2d 715 (1998), and *Town of Delafield v. Winkelman*, 2004 WI 17, ¶¶13 and 28, 269 Wis. 2d 109, 675 N.W.2d 470. Neither of these cases supports

² During cross-examination of Hughes, these exchanges occurred:

Q. And your tax records or business records didn’t distinguish what income came out of the Janesville operation as compared to whatever was going on in LaPrairie, did it?

A. No. There was no need to.

....

Q. Mr. Hughes, if you co-mingled income from various sources, how do we know what came out of LaPrairie and how do we know what came out of Janesville?

A. Uh, I guess you will have to take my word on it or we can go to the contractors. The closest jobs or where they went and the closest pit is where they came out of. You know, they don’t like to drive truck any farther than they have to.

the proposition. They stand only for the principle that the circuit court is not required to issue an injunction when a violation is found, but instead retains its equitable discretion to deny an injunction. These cases do not require any specific procedure.

¶11 Furthermore, we note that during argument after the trial, counsel for Mule Hill proposed a “bifurcated” briefing process in which the question of fines would be addressed later, but he did *not* propose to have separate briefing as to an injunction. Mule Hill repeated this separate-briefing request in its post-trial brief, again without mentioning an injunction.

¶12 Even in the absence of a separate procedure, it is clear that Mule Hill did have an opportunity to address whether an injunction should be issued. Injunctive relief was sought by the Town in the complaint, in argument at the end of the trial, and in its post-trial brief. Mule Hill did not raise any issue about the equitableness of an injunction in post-trial argument or its post-trial brief. Nor did Mule Hill attempt to raise any issue about the injunction after it was issued and while briefing still continued as to the financial penalty. In short, there is no merit to the argument that the circuit court deprived Mule Hill of a right to dispute injunctive relief.

¶13 Mule Hill also argues that the court failed to take into account certain equitable principles, such as laches, before granting the financial penalty. Mule Hill may be partly correct, at least to the extent that the court did not fully consider the arguments Mule Hill presented on this subject. In its memorandum decision finding a violation of the ordinance, the court gave Mule Hill “ten days” from the date of the memorandum decision to submit its position on a financial penalty. That decision was dated November 9, 2005. On November 22, 2005,

thirteen days later, the court issued its “order regarding fine.” The court began that order by stating that Mule Hill had not filed a response, and more than ten days had passed. However, the record shows that Mule Hill’s brief was filed on November 21, 2005, at 1:12 p.m. More importantly, the court appears to have erred in counting the number of days that had passed, because weekends and November 11 should not have been counted. *See* WIS. STAT. § 801.15(1). Although Mule Hill has not made these arguments on appeal, the circuit court arguably erred by deciding the financial penalty without reviewing Mule Hill’s brief.

¶14 However, we conclude that any such error was harmless. As to laches, it is important to recognize the method the court used to calculate the penalty. It set a penalty of \$100 per day for a period of 283 days. That period ran backward for approximately five months to the date where this court had reversed an earlier circuit court summary judgment decision in Mule Hill’s favor. The court stated that it did not believe Mule Hill should be penalized for operating during the period that the summary judgment decision had held their operations to be legal. Although the court did not break down the math, the court also imposed a financial penalty for a period of approximately four and one-half months *before* the summary judgment decision. That would mean the starting date for the penalties was approximately January 2004. The Town commenced this action in December 2002.

¶15 Mule Hill’s laches argument is that, by delaying enforcement of its zoning ordinance from the 1980s through to this case, the Town is now obtaining a windfall. In its statement of the law of laches, Mule Hill correctly states that, in addition to a lack of diligence by the party asserting its right, laches requires that the lack of diligence place the other party, here Mule Hill, at a disadvantage. Mule

Hill does not explain how it was disadvantaged by the delay in this case, or how the financial penalty was a windfall to the Town. The financial penalty period commenced well after the Town started this action, and Mule Hill was clearly on notice from that point that it faced potential financial penalties if it continued operation. This is not a case where the Town obtained financial penalties for a period preceding the lawsuit. We see no sense in which it can be argued that the financial penalties were enhanced by the Town's delay or otherwise resulted in a windfall.

¶16 Finally, Mule Hill argues that the financial penalties should be barred under the “clean hands” doctrine because the Town submitted a “fraudulent” affidavit during summary judgment proceedings. Mule Hill does not explain how there is any significant connection between this affidavit and the financial penalties.

By the Court.—Judgment affirmed.

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

