COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1539 **Cir. Ct. No. 2004CV75**

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

STATE OF WISCONSIN, MARTIN LEVAKE, MADELINE LEVAKE, CHARLES LEVAKE, JOHN FAVELL, GERALD P. BLAKE, ROBERT ELLERBROOK, JAMES B. MILLER, JOAN L. MILLER, ALAN STEWART AND LOUIS THOMAS AUSTIN, III,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

RANDY SWANSON, JUDY SWANSON, BRANDON NOVAK AND MARK D. AVERY,

PLAINTIFFS,

V.

WILLIAM ZAWISTOWSKI A/K/A WILLIAM ZAWISTOWSKI, JR.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

RURAL MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Affirmed; cross-appeal dismissed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. This is a nuisance action brought by the State of Wisconsin and fourteen landowners on Musky Bay, a part of Lac Courte Oreilles in Sawyer County. (We will refer to the plaintiffs collectively as the State in most of this opinion.) The State alleged cranberry marshes owned by William Zawistowski were creating a nuisance by discharging phosphorus into the bay. After a bench trial, the circuit court concluded the State had failed to prove a nuisance, and dismissed the action.

¶2 The State appeals,[1] arguing the court applied an incorrect standard of law to its nuisance claims. Zawistowski cross-appeals, arguing the court erred in its interpretation of WIS. STAT. § 823.08,[2] the Right to Farm Act. We conclude the court applied the correct standard of law to the nuisance claims. Accordingly, we affirm the order, and need not reach Zawistowski's cross-appeal.

BACKGROUND

¶3 Zawistowski owns two cranberry marshes located on Musky Bay. To flood his cranberry beds, Zawistowski withdraws water from Musky Bay using a series of ditches and pumps. To drain the beds, he returns the water to Musky

[1] Appellants include only ten of the original fourteen plaintiffs.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Bay using the same method. This flushing process causes phosphorus to enter the bay. Some of this phosphorus is from fertilizer Zawistowski uses to fertilize his cranberry beds, while other phosphorus originates from fertilizer used on agricultural land adjacent to Zawistowski's marshes.

¶4 The State filed suit in June 2004, seeking an injunction barring Zawistowski from releasing phosphorus into Musky Bay and requiring him to restore the bay, together with money damages for the landowners. According to the State, the phosphorus "fed the growth of dense, choking aquatic plants and a thick, slimy, smelly green algal mat covering much of Musky Bay." The State alleged the plant growth was a public and private nuisance because it was interfering with the public's and the landowners' enjoyment and recreational use of the bay and was harming the aquatic ecosystem.

¶5 The court held a seven-day bench trial in September 2005. At the conclusion of the trial, the court made seventeen pages of fact findings. The court found:

> [T]he method Zawistowski uses to retrieve and discharge water to and from Musky Bay causes substantial amounts of nutrients, including phosphorus, to be discharged directly into Musky Bay. This intentional process is the primary source of phosphorus entering Musky Bay.

The court estimated these discharges accounted for forty to fifty percent of the phosphorus entering the bay, and "Musky Bay is essentially receiving more phosphorus than it needs, causing its plant and algae community to grow rapidly." In addition, "for at least the last several years, Musky Bay has shown a significant change in both its water clarity, [aquatic plant] production and algae growth during the summer months."

¶6 However, the court found the interference with recreational uses and the bay's ecology was limited:

> [T]he increased vegetative growth within Musky Bay and the increased growth of subsurface and surface algae, at certain times of the year, interferes with both the riparian owners' and the public's use of some portions of Musky Bay for some periods of time, primarily during the months of June, July, and August, in some years.…
>
> … The court cannot find that all of Musky Bay becomes inaccessible or unusable … even during times that algae growth is abundant. During most of the spring, fall and winter, the public's right to use Musky Bay is not infringed.
>
> ….
>
> [T]he court cannot find … that the increased phosphorus … is deteriorating the ecological health of Musky Bay to the point that the fish populations or aquatic vegetation growth is substantially harmed. The court can find that the ecology of Musky Bay is changing as a result of the increased nutrient loading. … Essentially, the aging process of Musky Bay has been accelerated.

¶7 The court concluded this did not amount to an "unreasonable interference,"[3] and therefore the State had failed to prove a nuisance:

> [T]his court cannot conclude that intermittent blooms of subsurface and surface algae, causing temporary periods of time in which portions of the waterway are inaccessible to the general public, is a public nuisance.…
>
> … Because there was little evidence indicating how many days per year the public was interfered with and what

[3] The Right to Farm Act, WIS. STAT. § 823.08, overlaps nuisance law in cases involving an agricultural use or practice. WIS. STAT. § 823.08(2)-(3). Zawistowski argued the Right to Farm Act required the individual landowners to meet a stricter "substantial threat to public health or safety" standard to prove a nuisance. *See* WIS. STAT. § 823.08(3)(a)2. The court rejected this argument, holding an "unreasonable interference" was equivalent to a "substantial threat to public health or safety" in cases involving navigable waters. That holding is the subject of Zawistowski's cross-appeal.

> proportion of the bay was generally inaccessible, this court cannot quantify the interference in objective terms.…
>
> … This court simply cannot determine, as a matter of law, that the amount of time and the overall scope of the interference is such that it is a public nuisance, under the present state of the law.[4]

DISCUSSION

¶8 The first step in a nuisance analysis is to determine whether a nuisance exists. ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶24, 277 Wis. 2d 635, 691 N.W.2d 658. This initial step deals with only the extent of the harm, not liability for that harm. ***Id.***, ¶25. A public nuisance is defined as "an unreasonable interference with a right common to the general public." ***Id.***, ¶28 (citations omitted). Or, put another way, a public nuisance is a "condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." ***Id.*** A private nuisance exists when the "interest invaded is the private use and enjoyment of land" rather than right common to the public. ***Id.***, ¶30.

¶9 The term "unreasonable interference" necessarily defies precise description due to the "infinitely variable" ways and combinations of ways in which interests in land may be invaded. ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 427, 548 N.W.2d 829 (1996). For example, stray voltage may be a nuisance in one situation but not another. *See* ***id.*** Construction of a building that blocks sunlight from reaching adjoining property may or may not be a nuisance depending on the surrounding circumstances. ***Prah v. Maretti***, 108

[4] In its reply brief, the State argues this does not amount to a finding that there was no nuisance, seizing on this last sentence. We disagree. This statement speaks for itself and is an unambiguous finding that the State did not prove a nuisance.

Wis. 2d 223, 240, 321 N.W.2d 182 (1982). For that reason, whether an unreasonable interference exists under the circumstances is a question "reserved for the trier of fact." ***Vogel***, 201 Wis. 2d at 427. We will uphold the circuit court's fact findings unless clearly erroneous. WIS. STAT. § 805.17(2).

¶10 The State does not directly challenge the court's finding that Zawistowski's actions were not an "unreasonable interference." Instead, it argues the court applied the wrong standard of law to its claim, in several ways.

¶11 First, the State argues the court applied an incorrect standard by basing its decision on the seasonal nature of the algae and aquatic plant growth in Musky Bay. The State suggests the court's decision reflects a belief that "the nuisance conditions must be constant, 365 days a year, to be actionable."

¶12 This argument misreads the court's decision. We have no quarrel with the State's position that a nuisance need not be constant to be actionable.[5] However, the circuit court did not impose any such requirement. The court recognized that "[s]ome interference with the public's right to use the waterways of this state is tolerable. The question remains, to what extent?" The court ultimately concluded that "the amount of time and the overall scope of the interference" was not significant enough to constitute an "unreasonable interference."

[5] Wisconsin courts have found a nuisance in situations where the nuisance was seasonal. *See, e.g.*, ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶38, 254 Wis. 2d 77, 646 N.W.2d 777 (deciduous tree leaves blocking stop sign); ***State v. Quality Egg Farm, Inc.***, 104 Wis. 2d 506, 509, 311 N.W.2d 650 (1981) (farm causing, among other things, a significant problem with flies).

¶13 In addition, the court began its analysis by noting the seasonal nature of the alleged nuisance and stated, "Obviously, during the winter months … the bay is accessible to the general public." Had the court been under the impression that only a constant interference could be a nuisance, there would have been no need for the court to continue to discuss the extent of the interference. We are satisfied the court did not reject the State's claims because it believed only a constant interference could be a nuisance.

¶14 Second, the State argues the court based its decision on a mistaken belief that it could not act to prevent a future nuisance. It relies on the following finding:

> It is a reasonable inference that should present conditions continue and discharges of phosphorus by Zawistowski continue, Musky Bay will exhibit additional increases in algae and other aquatic vegetation and that such increases, in the future, may cause greater portions of Musky Bay to become inaccessible to the riparian owners and the general public.

The State asserts this finding, as a matter of law, establishes that Zawistowski's phosphorus discharges will create a nuisance in the future, and the court should have enjoined Zawistowski from further phosphorus discharges on that ground.

¶15 Again, this argument misreads the court's decision. A court may issue an injunction to prevent a future nuisance "only where it clearly appears that a nuisance will necessarily result from the contemplated act or thing" to be enjoined. ***Wergin v. Voss***, 179 Wis. 603, 606, 192 N.W. 51 (1923). A "probable or contingent" injury is not sufficient. ***Id.*** at 607 (citation omitted). At the circuit court, the State did not allege the phosphorus discharges would result in a future nuisance; it argued the nuisance already existed. The State therefore never attempted to make the necessary showing that a nuisance would "necessarily

result" from Zawistowski's future phosphorus discharges. *See* ***id.*** at 606. Taken in this context, the court's statement simply recognized the possibility that a nuisance may arise in the future. It was not a finding that a nuisance will "necessarily result" from continued phosphorus discharges. *See* ***id.***

¶16 Third, the State argues the court should have analyzed the landowners' private nuisance claim separately from the public nuisance claim brought by the State. It argues a private nuisance includes "any disturbance of the enjoyment of property," and the court did not apply that standard to the landowners' claim. *See* ***Milwaukee Metro. Sewerage***, 277 Wis. 2d 635, ¶27.

¶17 This argument takes a single phrase in ***Milwaukee Metropolitan Sewerage*** out of context. It is well settled law that a private nuisance—like a public nuisance—requires proof of an "undue" or "unreasonable" interference with the use and enjoyment of land. ***Krueger v. Mitchell***, 112 Wis. 2d 88, 103, 332 N.W.2d 733 (1983); *see also* WIS JI—CIVIL 1920 (2008). In ***Milwaukee Metro. Sewerage***, the court clarified the relationship between public and private nuisance:

> [A] nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land or a public right. If the interest invaded is the private use and enjoyment of land, then the nuisance is considered a private nuisance. Conversely, if the condition or activity interferes with a public right or the use and enjoyment of public space, the nuisance is termed a public nuisance.

Milwaukee Metro. Sewerage, 277 Wis. 2d 635, ¶30. In other words, the standard for public and private nuisance—an "undue" or "unreasonable" interference—is the same. The difference between the two is whose interest is at stake.

¶18 In this case, the excess algae and plant growth in the bay affected both the public's and the landowners' use of the bay in virtually the same way. As the circuit court pointed out:

> [T]he use referred to in this case is intrinsically tied to the water and differs little from the general public's right of use. While the riparian owner exercises the authority over who may fish from his or her pier, the public in general can fish the same water which surrounds the pier. … [T]he riparian owners have a right to use and enjoy our navigable waterways, in the same manner, however more convenient, as the public in general.

Because the harm to the public and the landowners was essentially the same, the court did not err in analyzing the public and private nuisance claims together.

¶19 Fourth, the State argues the court's decision is based on unfounded reservations about acting in the absence of clearly established statutory or common law standard. The State points out that a nuisance can exist even though a practice is lawful, and in any event no statute governs cranberry growers' discharges. *See* ***Krueger***, 112 Wis. 2d at 103 (nuisance may exist even though offending use is lawful); *see also* 33 U.S.C. § 1362 (2006) (point source pollution does not include "return flows from irrigated agriculture"); WIS. STAT. § 283.11(2) (Wisconsin restrictions on most water pollution not to exceed federal restrictions).

¶20 However, the court here recognized:

> Certainly, cranberry owners cannot be given a free pass to do whatever they choose for the purpose of growing a healthy cranberry crop. Zawistowski's apparent position that he can, because it is legal to do so … may not be a reasonable exercise of a conferred statutory right.

The court's careful consideration of the effect of the phosphorus on recreation and Musky Bay's ecology underscores its awareness that the lack of statutory authority

was not controlling. Had the court believed otherwise, none of that analysis would have been necessary.

¶21 As for the lack of clear standards in nuisance law, the court found "there was little evidence indicating how many days per year the public was interfered with and what proportion of the bay was generally inaccessible" due to plant growth. A fair reading of the court's decision is that the State failed to "quantify the interference in objective terms," and absent that evidence, the "amount of time and the overall scope of the interference" was unclear. While the State produced abundant evidence that Musky Bay was changing—evidence the circuit court found convincing—it failed to prove the change resulted in significant interference with recreation or the bay's ecology. We are confident that the court's reluctance to find a nuisance was due to the inconclusive proof on the extent of the interference, not a misapprehension of the law.[6]

¶22 Finally, in its reply brief the State argues Zawistowski's discharges created a nuisance as a matter of law, relying on ***State v. Deetz***, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). This argument was first made in the State's reply brief, and therefore need not be considered. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

¶23 In any event, ***Deetz*** is readily distinguishable. In ***Deetz***, the defendants conceded their conduct amounted to a nuisance, but argued they

[6] In its amicus brief, the Wisconsin Association of Lakes argues the court should have used the health of Musky Bay itself, not only the bay's fitness for recreational uses, as its yardstick. However, the court found that the changes to Musky Bay essentially amounted to an acceleration of the natural aging process, without substantial harm to plant or animal life. The court did not find that the health of the bay was deteriorating.

nonetheless were not liable. ***Deetz***, 66 Wis. 2d at 8. The court therefore was not called on to determine whether the conduct in that case amounted to an "unreasonable interference" as a matter of law. Instead, ***Deetz*** dealt with the second step in the nuisance analysis—liability for the nuisance. ***Id.*** at 8-9; *see also* ***Milwaukee Metro. Sewerage***, 277 Wis. 2d 635, ¶25. ***Deetz*** therefore is not relevant to whether the plant and algae growth in Musky Bay is a nuisance as a matter of law.

By the Court.—Order affirmed; cross-appeal dismissed. No costs.

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