COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3395

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

BUTTE DES MORTS COUNTRY CLUB, INC.,

PLAINTIFF,

V.

CITY OF APPLETON AND WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANTS,

CENTURY INDEMNITY COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT,

TOWN OF GRAND CHUTE,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

OUTAGAMIE COUNTY AND TOWN OF GREENVILLE,

THIRD-PARTY DEFENDANTS-

RESPONDENTS,

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

THIRD-PARTY DEFENDANT.

APPEAL from an order and a judgment of the circuit court for Outagamie County: JOHN DES JARDINS, Judge. *Affirmed.*

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

MYSE, P.J. The Town of Grand Chute (the Town) appeals an order and a judgment dismissing its claims against two third-party defendants, Outagamie County and the Town of Greenville, and declaring that its intervening insurance company, Century Indemnity Company, owed no duty to defend. The Town argues that the trial court erred by dismissing its contribution claims against the third-party defendants because all share a common potential liability to the plaintiff. In the alternative, the Town argues that it is unjust to apply the rule precluding contribution to parties against whom intentional acts have been alleged because its intentional acts were not wrongful torts. The Town also contends that the trial court erred by concluding that there was no coverage duty owed under its insurance policy with Century. Because we conclude that the Butte Des Morts Country Club's complaint alleges intentional and not negligent wrongs, we hold that contribution is barred and that Century Indemnity owes no duty to defend. The judgment and order are affirmed.

This dispute began after club brought a lawsuit alleging that the Town and other parties caused an increased amount of water to run off into Mud

Creek. The club's complaint alleged that the creek had swelled from its original size of a maximum fifteen-foot width to a current range of fifteen- to sixty-foot width, and increased in depth from two feet to somewhere between three to four feet. Because the creek runs through club property, the increase in Mud Creek resulted in flooding of the property and other damage.

The Town thereafter filed a third-party summons and complaint joining Outagamie County and the Town of Greenville.[1] The Town alleged that these third-party defendants were liable for "indemnification and/or contribution" in the event that the Town was found liable. The trial court dismissed this third-party complaint for failing to state a claim upon which relief can be granted. The court concluded that the club's complaint alleged intentional and not negligent torts, and that the Town's action therefore was precluded by the rule denying contribution to parties against whom intentional torts have been alleged. In a separate decision, the trial court also decreed that the Town's insurer owed the Town no duty to defend under the relevant insurance policy because of its conclusion that the complaint alleged intentional torts.

The Town's Contribution Claim Against the Third-Party Defendants

The Town first contends that the trial court erred by dismissing its third-party contribution complaint.[2] We review a motion to dismiss for failure to state a claim de novo, accepting all the alleged facts and reasonable inferences as true. ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311-12, 529 N.W.2d 245,

[1] The Town also joined the State of Wisconsin Department of Natural Resources, which is not a party to this appeal.

[2] The Town also alleged in its complaint that it was entitled to indemnification, but this argument has been abandoned on appeal.

249 (Ct. App. 1995). The purpose of the motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. ***Id***. Since pleadings are to be liberally construed, a claim will be dismissed only if "it is quite clear that under no conditions can the plaintiff recover." ***Id***. at 311, 529 N.W.2d at 249 (internal citations and quotations omitted).

The doctrine of contribution rests on the principle that when parties stand in equal right the law requires equality and one party should not be obliged to bear the whole of a common burden. ***Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co.***, 8 Wis.2d 512, 515, 99 N.W.2d 746, 748 (1959).

> The doctrine is founded on principles of equity and natural justice. … The basic elements of contribution are: 1. Both parties must be joint negligent wrongdoers; 2. they must have common liability because of such negligence to the same person; [and] 3. one such party must have borne an unequal proportion of the common burden.

Wisconsin case law does not permit contribution to be applied to intentional torts. "A person whose liability to plaintiff arose from his intentional wrong is not entitled to contribution." ***Jacobs v. General Acc. Fire & Life Asssur. Corp.***, 14 Wis.2d 1, 5, 109 N.W.2d 462, 464 (1961) (footnote omitted).

The Nuisance Cause of Action

The Town raises several challenges to the trial court's dismissal of its contribution complaint on the club's nuisance action. First, the Town contends that the club's complaint is ambiguous and potentially alleges negligent nuisance as well as intentional nuisance. Therefore, the Town contends, the rule precluding contribution for intentional torts is inapplicable at this early stage in the proceedings. Second, the Town contends that the rule precluding contribution for

intentional torts should not apply in matters involving surface water drainage law when the harm is unintended.

We conclude that the club's complaint is not ambiguous and alleges only an intentional nuisance. Therefore, the general rule precluding contribution for intentional torts applies. We also reject the Town's invitation to carve out an exception to this general rule in surface water rights cases where the harm is unintended because the complaint alleges that the Town did in fact intend the harm caused, and further because we see no compelling public policy reason for such an exception.

Before we review the club's complaint to determine the nature of its cause of action, we begin by noting that in Wisconsin there are distinct claims for nuisance resulting from negligent conduct and for nuisance resulting from intentional conduct. ***Schiro v. Oriental Realty Co.***, 272 Wis. 537, 546, 76 N.W.2d 355, 359-60 (1956). The RESTATEMENT (SECOND) OF TORTS § 822 cmt. k. (1977), states one difference between the two torts:

> The Sections on intentional harm refer to the magnitude of the risk, rather than only the gravity of the harm. In unintentional invasions, it is the risk of harm that makes the conduct unreasonable. The risk is a product of the likelihood of injury multiplied by the prospective extent of the harm. When the harm is intended, on the other hand, it is necessary to look only at the gravity, or extent, of the harm actually suffered.

We acknowledge the Town's argument that Wisconsin jury instructions, in particular WIS J I—CIVIL 1920 (Private Nuisance) and 1922 (Municipal Nuisance), do not suggest a difference between an intentional nuisance

and a negligent nuisance.[3] A cause of action recognized in Wisconsin, however, is not abrogated by the absence of a patterned jury instruction. Despite the lack of patterned jury instructions, we therefore continue to recognize both an action for negligent nuisance, *see* ***Schiro***, 272 Wis. 537, 76 N.W.2d at 359-60, and intentional nuisance, *see* ***Crest Chevrolet-Oldsmobile-Cadillac v. Willemsen***, 129 Wis.2d 129, 138-39, 384 N.W.2d 692, 695 (1986).

Turning to the club's complaint, we conclude that it clearly alleges only an intentional nuisance. This section of the amended complaint in relevant part states:

> 19. The defendant Town amd [sic] City proximately caused the destruction of the Club's property, the interference with its business operations, the periodic flooding of its property, the pollution of its land, and creation of odiferous, obnoxious, unsightly and otherwise adverse conditions through the Town and City's intentional and deliberate actions in approving extensive development in the Town and City. The Town or City were each aware that their storm water would discharge into the Mud Creek and increase the water flow of the creek compared to the natural flow of the water. Plaintiff alleges that the Town and City intended to utilize the Club's property as part of the Town's storm water disposal system, and therefore, intended to produce the damages and harms identified in this claim.

Even under the most liberal construction permissible, there is no manner in which we could read this complaint to allege anything but an intentional nuisance. It

[3] WISCONSIN J I—CIVIL 1922 states that a municipality "is held to the same duty with regard to nuisances as any owner of private property or any operator of a private business." WISCONSIN J I—CIVIL 1920, Private Nuisance, states in relevant part:

> A nuisance is an unreasonable (activity) (use of property) that interferes substantially with the comfortable enjoyment of the life, health, or safety of another person. To be a nuisance, an (activity) (use of property) must cause significant harm.

alleges that the Town intentionally approved developments with the specific awareness of the resulting harm. More importantly, the complaint alleges that the Town intended to produce the damage and harm caused by its actions. In the absence of any language suggesting negligence, the club's complaint can only be interpreted as alleging intentional nuisance.

Having concluded that the allegation is only one in intentional tort, under the general rule the Town cannot collect contribution from the third-party defendants. *See* ***Jacobs***, 14 Wis.2d at 5, 109 N.W.2d at 464. The Town, however, contends that the general rule should not be applied in this case because the general rule should only bar contribution where the harm was intended, and further because there should be an exception to the rule for cases involving surface water runoff.

We reject both arguments. First, we conclude that this is not the proper case to consider the Town's argument that contribution should be permitted where there is an unintentional harm caused by an intentional tort. In this case, the allegation is that the Town intended to cause the harm. Thus, the situation falls squarely within the rule precluding contribution. Second, we reject the Town's invitation to abandon the general rule in water run off cases because we see no compelling reason to do so. The Town has failed to identify any distinguishing feature in water run off cases suggesting that a different rule is warranted.

The Town's final argument for allowing contribution despite the applicability of the general rule precluding it is that the club could potentially amend its complaint at trial and add a claim for negligent nuisance. We reject this argument. While under Wisconsin law efficiency concerns permit an action for contribution to be considered in the same proceeding as the underlying damages

claim, *see* ***Johnson v. Heintz***, 73 Wis.2d 286, 295, 243 N.W.2d 815, 822-23 (1976), we refuse to permit an action for contribution where the complaint unambiguously is based solely on an intentional tort.

We note that our decision does not leave the Town without a remedy in the event the club does attempt to amend its complaint to claim a negligent nuisance. However, because the club has already amended its complaint once it may only amend its complaint now either by leave of the court or by written consent of the adverse party. *See* § 802.09(1), STATS. While that statute requires that such leave shall be freely given by the court when justice requires, it will be proper for the trial court to consider any prejudice caused the Town by the club's failure to amend its complaint promptly despite its notice of this action and appeal. In addition, we note the Town could pursue a contribution claim against the other parties if the club ultimately does amend its complaint and then prevails on a negligence cause of action. The rule permitting an action for contribution to be considered at the same proceeding as the underlying claim is a permissive and not mandatory rule. *See* § 802.07(3), STATS. (a party "may" state a cross-claim for contribution).

Inverse Condemnation Claim

The Town next challenges the trial court's dismissal of its contribution complaint arising from the club's inverse condemnation claim. The club's inverse condemnation action alleged a violation of both the Fifth Amendment to the United States Constitution[4] and the just compensation clause of

[4] Although the club's complaint alleges a violation of only the Fifth Amendment, we read the complaint to allege a violation of the Fifth Amendment as incorporated by the Fourteenth Amendment because the defendant is not the United States government.

the Wisconsin Constitution, *see* WIS. CONST. art. I, § 13, and states in relevant part:

> 21. By diverting storm water into the Mud Creek, and therefore, onto the property of the Club, the Town and City have physically invaded and occupied the property of the Club without initiating condemnation proceedings. The Town and City have acted to utilize the property of the Club as part of its storm water drainage system without compensating the Club for that use.
>
> 22. The Club is entitled to relief pursuant to the Fifth Amendment of the United States Constitution, and the just compensation clause of the Wisconsin Constitution, Article I, Section 13, Wis. Const., in the form of damages for the Club's loss of exclusive use of said property during the term of the Town and City's unlawful occupation thereof; damages for the expense the Club will incur to repair the damage caused by the Town and City's actions; and for equitable relief compelling the Town and City to cease, desist, and remove its invasion of the property of the Club. The Club expressly disclaims any intent, purpose, or desire to proceed under Sec. 32.10, Stats., and asserts that in making this inverse condemnation claim, it in no way concedes that the Town or City has the lawful right, or that it is a matter of public necessity, for the Town or the City to acquire any estate in the lands now flooded as a result of the actions of [sic] omissions of the Town and/or City. With respect to this claim, the plaintiff alleges that the Town or City intentionally approved development which the Town and City knew, or should have known, would generate storm water which would be drained across the property of the Club. The Town and the City intended to expropriate the property of the Club for use in the Town and City's storm water system.

The club's cause of action for inverse condemnation does not require that the government permanently restrained its property. *See* ***Zinn v. State***, 112 Wis.2d 417, 427, 334 N.W.2d 67, 72 (1983). An inverse condemnation claim may be brought where the taking is temporary. ***Id***. at 435-36, 334 N.W.2d at 76. A taking occurs when the government restriction placed on property practically or substantially renders the property useless for all reasonable purposes. ***Id***.

The Town first contends that the trial court could not have used the rule precluding contribution for intentional torts to dismiss its complaint. Although the Town acknowledges that part of the club's complaint alleges an intentional act of inverse condemnation, it states that other language suggests a negligence claim. Thus, the Town contends, it is not "quite clear" from the complaint that its contribution action cannot succeed. *See* ***Christensen***, 191 Wis.2d at 311, 529 N.W.2d at 249.

We conclude that the club's complaint unambiguously alleges only an act of intentional inverse condemnation.[5] The potentially ambiguous sentence the Town refers to is "that the Town … intentionally approved development which the Town … knew, or should have known, would generate storm water which would be drained across the property of the Club." This sentence, however, does not contradict the sentence immediately following that the "Town … intended to expropriate the property of the Club for use in [its] storm water system." When these two sentences are read together they permit no other construction but that the Town intentionally expropriated the property for its storm water system while potentially being unaware that its development actions would create an excessive amount of water.

We therefore conclude that the club is alleging an intentional inverse condemnation claim against the Town. As a result, the general rule precluding contribution for intentional torts would appear to apply. Once again, however, the Town contends that the general rule should not apply because an intentional wrong is not alleged and because there should be an exception for surface water drainage

[5] Because the sufficiency of the club's complaint is not before us, we do not address whether there is a valid claim in Wisconsin for negligent inverse condemnation.

cases. For the reasons already identified, we reject this claim. The allegation that the Town intentionally utilized the club's property is an allegation of an intentional wrong and, furthermore, we see no reason to treat surface water cases any differently from other cases involving intentional wrongs. The trial court's dismissal of the Town's contribution action is affirmed.

The Declaratory Action on Century's Duty to Defend and Insure the Town

The Town also appeals the trial court's motion declaring that its insurer, Century, owes no duty to defend this action. The relevant provision in the insurance contract states:

> 2. Exclusions
>
> This insurance does not apply to:
>
> a. Expected or Intended Injury
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

The Town contends that it is entitled to coverage because there is an ambiguity as to whether the club's cause of action alleges negligence as well as an intentional tort. *See* ***Sola Basic Indus. v. USF&G***, 90 Wis.2d 641, 646-47, 280 N.W.2d 211, 214 (1979) (doubts as to existence of coverage are resolved in favor of insured).

The interpretation of an insurance policy is a question of law that is reviewed without deference to the trial court's determination. ***Monfils v. Charles***, 216 Wis.2d 322, 331, 575 N.W.2d 728, 732 (Ct. App. 1998). In construing the language of an insurance policy, the language is to be given the common and ordinary meaning it would have in the mind of a lay person. ***Id***.

The issues involved in this portion of the appeal are repetitive of issues already discussed and can be easily disposed of. The part of the club's complaint alleging nuisance alleges that the club intended to cause the harm. This falls within the exclusion for property damage expected or intended by the Town. In like manner, the part of the club's complaint alleging inverse condemnation alleges that the club intended to expropriate the property. Given this and the Town's concession at oral argument that its insurance policy with Century excludes coverage for governmental takings, the inverse condemnation allegation is excluded under the policy.

Conclusion

We conclude that the Town's third-party complaint for contribution was properly dismissed because the plaintiff's complaint against the Town alleges intentional wrongs and because we see no need to depart from the general rule precluding contribution for such conduct. We also conclude that the allegations of intentional wrongs and the Town's concession at oral argument clearly demonstrate that the conduct alleged is excluded from insurance coverage. Accordingly, we affirm the trial court.

By the Court.— Judgment and order affirmed.

Not recommended for publication in the official reports.