COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2515

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

WENDELL KLEIN AND CARLTON KLEIN,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF TREMPEALEAU,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

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

PER CURIAM. Wendell and Carlton Klein appeal from a judgment dismissing their lawsuit against the Town of Trempealeau, after a trial to the court. The Kleins sought an injunction to make the Town change a culvert contributing to flooding on their farm land. The Town had enlarged the culvert during road construction, and the Kleins claimed that the flooding caused a drop in their crop

production. The trial court found that the surface water retention by the Kleins' land was not "unreasonable" within the meaning of § 88.87(1), STATS., and that they therefore had not proven their case against the Town. On appeal, the Kleins make four arguments: (1) the statute requires only "unreasonable" diversion of water, not both "unreasonable" diversion and retention; (2) the evidence showed "unreasonable" surface water retention; (3) the trial court wrongly dismissed the suit with prejudice; and (4) the costs award was improper. We reject these arguments and affirm the trial court order.

Interpretation of a statute is a question of law, and the court must give the statute's words their ordinary meaning. *See* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 201, 496 N.W.2d 57, 60 (1993). The statute gives landowners legal recourse against "unreasonable diversion or retention of surface waters due to highway" construction. *See* § 88.87(1), STATS.[1] Applying a common sense reading of this statute, the term "unreasonable" serves a dual role, modifying both "diversion" and "retention." Any other reading is untenable. The legislature could not have intended the statute to give landowners whose land

[1] Section 88.87(1) provides the following:

> **Road grades not to obstruct natural drainage, landowners not to obstruct highway drainage; remedies.** (1) It is recognized that the construction of highways and railroad grades must inevitably result in some interruption of and changes in the preexisting natural flow of surface waters and that changes in the direction or volume of flow of surface waters are frequently caused by the erection of buildings, dikes and other facilities on privately owned lands adjacent to highways and railroad grades. The legislature finds that it is necessary to control and regulate the construction and drainage of all highways and railroad grades so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway or railroad grade construction and to impose correlative duties upon owners and users of land for the purpose of protecting highways and railroad grades from flooding or water damage.

sustains what amounts to "reasonable" surface water retention to have recourse against local governments. Rather, the legislature wanted courts to examine all aspects of the flooding for reasonableness, including its inception, duration, and degree. As a result, the Kleins could obtain an injunction against the Town only if either the water's diversion or retention was unreasonable.

We next uphold the trial court's finding that the surface water retention was reasonable. We may reverse trial court factual findings only when they are clearly erroneous. *See* ***Brandt v. Witzling***, 98 Wis.2d 613, 618, 297 N.W.2d 833, 836 (1980). The trial court determines the weight of the testimony and the credibility of witnesses. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Here, evidence supports the trial court's findings. The Kleins' expert witness, Rod Saxe, stated that fields often have standing surface water in the spring before thawing. Dave Pronchinksi viewed the land on two occasions; he saw water running through the culvert and saw no standing water. George Walski viewed the land on several occasions after heavy rains; he saw no ponding, no standing water, and a working culvert. Darwin Bradley viewed the land four or five times after heavy rains and saw no ponding. Wendell Klein himself complained only of flooding during spring thaw and one heavy rain in June. Carlton Klein conceded that the Kleins always had some water in the fields during spring thaw. This proof tended to show that the Kleins' property did not experience extraordinary surface water retention as a result of the roadwork. Rather, the surface water retention tended to fall within a legislatively acceptable range. In light of this evidence, the trial court's findings were not clearly erroneous.

We next agree with the trial court's decision to dismiss the lawsuit with prejudice. This has the effect of barring the Kleins from suing the Town

again on each future flooding. We have already addressed the same question in a published decision. *See* ***Pruim v. Town of Ashford***, 168 Wis.2d 114, 121-22, 483 N.W.2d 242, 245 (Ct. App. 1992). We held that the legislature, by enactment of the statute, sought to end repetitive common law nuisance lawsuits each time roadwork caused flooding. *See* ***id***. The legislature sought to protect municipal governments from repetitive lawsuits making the same basic allegations each and every time flooding took place. This decision has statewide precedential effect, *see* ***Cook v. Cook***, 208 Wis.2d 166, 186, 560 N.W.2d 246, 254 (1997), and we discern no reason for departing from it here. Further, the Kleins are not without a remedy. As noted in ***Pruim***, the Kleins are free to bring an inverse condemnation proceeding, *see* 168 Wis.2d at 121-22, 483 N.W.2d at 245, and nothing in the trial court's ruling precludes that remedy. The trial court's dismissal with prejudice foreclosed further lawsuits for equitable relief to force rebuilding of the culvert. Nothing in the record indicates that the trial court's dismissal with prejudice forecloses inverse condemnation actions for compensation.

Last, we decline to address the Kleins' challenge to the costs. They argue that they had inadequate notice of the Town's costs request. They also seem to argue that the trial court cannot award costs in a proceeding in equity. Their counsel was relocating his law office at the time, and this prevented him from receiving adequate notice. If the Kleins believe they received insufficient notice of the costs proceedings, they should file a motion to reopen the matter in the trial court under § 806.07, STATS., for excusable neglect. In other words, they must bring such an issue to the trial court's attention first before they argue it in this court. We note that they have cited no precedent to support their opposition to all costs in equity proceedings, and the statutes suggest otherwise. For example, the frivolous action statute allows costs if the action has no reasonable basis in law or

equity. *See* § 814.025, STATS. Likewise, § 814.02(2), STATS., seemingly permits costs in equitable proceedings up to at least $100. *See also* MCCORMICK ON DAMAGES § 63, at 239-40 (1935) (equity cost rules generally follow the rules for cases at law). The trial court awarded costs of $389.04. In any event, we express no opinion on the validity of the Kleins' legal position, and the issues they raise are for the trial court.

By the Court.—Judgment affirmed.

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