COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1272 **Cir. Ct. No. 02CV000221**

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

PAUL ELLSWORTH AND PATRICIA ELLSWORTH,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Paul and Patricia Ellsworth appeal an order dismissing their amended complaint, which sought a declaratory judgment to quiet title to their private lake. The Ellsworths contend that the circuit court erred when it determined that the Department of Natural Resources (DNR) had jurisdiction to

make the threshold navigability determination regarding the drainage ditch connection between the Ellsworths' private lake and the nearby Little Menomonee River. The circuit court found that the Ellsworths' pursuit of a declaratory judgment was inappropriate and premature because the DNR had not yet made any determination as to the navigability of the drainage ditch. We agree and affirm the order for dismissal.

FACTS

¶2 The Ellsworths own property on which Ellsworth Lake is located. They own all of the land surrounding the lake, which includes a drainage ditch connecting the lake to the Little Menomonee River. In 1961, Ellsworth Lake was a gravel pit leftover from a quarrying operation on the property. Over the years, the gravel pit filled with water to form an artificial lake. A shallow, intermittent drainage ditch formed as a result of overflow from the artificial lake, and this is the subject of the underlying action.

¶3 In 1982, Paul and Jane Ellsworth (parents of plaintiff Paul Ellsworth) considered purchasing the property and contacted the DNR regarding the lake. The DNR replied by letter, stating that "because there is no connection to the Little Menomonee River, [the lake] does not fall under the jurisdiction of our Department." Paul and Jane purchased the property in 1983, and subsequently transferred title to the Ellsworths (plaintiffs).

¶4 In March 1987, the DNR again reviewed the navigability of the drainage ditch on the Ellsworth property. The city of Mequon was seeking to determine whether Ellsworth Lake and the drainage ditch would be regulated under a new city ordinance and requested the DNR inspection. The DNR opined that it now considered the 1982 determination to be in error; however, "until such

time that the connections between the Little Menomonee River and the pit lake can be navigated in fact, the previous letter should take precedence, and the lake should be considered non-navigable." The DNR further stated that if the connection between Ellsworth Lake and the Little Menomonee River would become navigable in the future, the lake would "meet the definition of a navigable waterway." The DNR indicated that it would attempt to navigate the connecting channel again within the next couple of months.

¶5 Approximately one month later, a DNR employee performed a navigability test on the drainage ditch connecting Ellsworth Lake to the Little Menomonee River. The DNR failed to navigate the connection and the status of the lake remained unchanged.

¶6 In May 2002, DNR staff entered the property to conduct another navigability test. The Ellsworths allege that once there, the DNR decided not to perform the test because "DNR representatives knew that the navigability test would be futile."

¶7 Believing that the DNR would continue testing indefinitely, the Ellsworths brought an action in circuit court to quiet their title to Ellsworth Lake. Subsequently, the Ellsworths amended their complaint to include a request for a declaratory judgment to prevent the DNR from exceeding its jurisdiction. The DNR moved to dismiss based on the doctrine of sovereign immunity, exhaustion of administrative remedies and primary jurisdiction, unripeness, and failure to state a claim.

¶8 The circuit court granted the DNR's motion and the Ellsworths appeal.

STANDARD OF REVIEW

¶9 We review de novo the circuit court's granting of a motion to dismiss. ***Turkow v. DNR***, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998). In determining whether a party has stated a claim, we are concerned with the legal sufficiency of the complaint. ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 311, 529 N.W.2d 245 (Ct. App. 1995). We accept all alleged facts and reasonable inferences as true, but draw all legal conclusions independently. ***Id***. at 311-12.

DISCUSSION

¶10 The Ellsworths seek court intervention to prevent the DNR from continued navigability testing of the drainage ditch. They allege that the DNR's actions "throw doubt on the Ellsworths' title, and highlight its competing interest in their land." Further, if this situation is not addressed by court intervention, the Ellsworths contend they will be kept in "a constant state of suspense" and may be forever denied "the right to the exclusive use and enjoyment of their home."

¶11 The DNR challenged the circuit court's personal jurisdiction in this matter, raising sovereign immunity as a bar to the action. The DNR argued that, as a State agency, it cannot be sued unless it consents. *See* WIS. CONST. art IV, § 27. Sovereign immunity "is procedural in nature and, if properly raised, deprives the court of personal jurisdiction over the State as well as its agencies." ***Erickson Oil Prods., Inc., v. State***, 184 Wis. 2d 36, 43, 516 N.W.2d 755 (Ct. App. 1994).

¶12 The DNR argues here, as it did in ***Turkow***, that declaratory judgment is inappropriate because it improperly bypasses the exclusive means of

administrative review provided by the legislature. We agree. The mechanism by which an aggrieved party can bring suit against the DNR for exceeding its jurisdiction or making an improper navigability determination is set forth in WIS. STAT. ch. 227, which provides a procedure for judicial review of agency decisions. Chapter 227 embodies the State's sole expression of its consent to suit against a State agency. ***Turkow***, 216 Wis. 2d at 281-82. We have held that a declaratory judgment action is improper if the plaintiff has not pursued any remedies under ch. 227. ***Turkow***, 216 Wis. 2d at 283. The legislature provided that "*[a]dministrative decisions* which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter." WIS. STAT. § 227.52 (emphasis added). Here, there has been no administrative decision. The Ellsworths' action, therefore, is premature.

¶13 A plaintiff must point to a legislative enactment authorizing suit against the state to maintain his or her action. ***Turkow***, 216 Wis. 2d at 281. Because the Ellsworths have attempted to bypass the administrative review process set forth by WIS. STAT. ch. 227, and cite no other statute authorizing their action against the DNR, their claim was premature and properly dismissed.

CONCLUSION

¶14 We conclude that, absent an administrative decision properly challenged under WIS. STAT. § ch. 227, judicial intervention to address DNR jurisdiction over Ellsworth Lake or the drainage ditch connecting it to Little Menomonee River is unavailable.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶15 NETTESHEIM, J. (*dissenting*). In summarizing the circuit court's ruling, the majority opinion states: "The circuit court found that the Ellsworths' pursuit of a declaratory judgment was inappropriate and premature because the DNR had not yet made any determination as to the navigability of the drainage ditch. We agree and affirm the order for dismissal." Majority op. at ¶1.

¶16 This statement does not correctly represent the circuit court's ruling. In fact, the circuit court expressly addressed the Ellsworths' declaratory action claim that the DNR did not have jurisdiction to determine the navigability of the drainage ditch in question. In its written decision, the circuit court stated:

> The State's primary assertion in moving to dismiss is that the DNR maintains primary jurisdiction in determining the navigability of waterways in the State of Wisconsin … including the drainage ditch in question. The DNR has jurisdiction over a Wisconsin waterway if the waterway is navigable and public. In contrast, the DNR does not have jurisdiction if the waterway is artificially created, and on private land.
>
> The leading, and in this court's view the controlling, case is ***Klingeisen v. DNR***, 163 Wis. 2d 921, 472 N.W.2d 603 (Ct. App. 1991). This case establishes that the DNR has jurisdiction to deem an artificial body of water on private property a public waterway if the artificial body of water was directly connected to public navigable waters, and the connection between the waters was also navigable. The Court found this extension necessary to protect the purposes of the public trust doctrine.

¶17 The circuit court went on to discuss the history and purpose of the public trust doctrine, the ***Klingeisen*** rationale as to why the DNR's authority properly extended to artificial waters that connected to natural waters, and the

justification for conferring primary jurisdiction on the DNR. The court concluded this portion of its discussion with the following:

> The primary jurisdiction rule is invoked to promote proper relations between the courts and administrative agencies in order to promote comity and the interests of judicial administration. The rule is predicated on the basis that agencies are recognized as having a special role in fact-finding and policy-making in the field of their expertise. Where these considerations are paramount, the agency should be given the first review unless there is some valid reason for the court to intervene and exercise its jurisdiction.

¶18 It is thus clear to me that the circuit court substantively addressed and rejected the Ellsworths' contention that the DNR was without jurisdiction to determine the navigability of the drainage ditch. Having made that ruling, the court next held that the Ellsworths must await a DNR determination that the drainage ditch is navigable before they could challenge that determination in a WIS. STAT. ch. 227 proceeding.

¶19 I submit that the question of the DNR's authority to determine the navigability of the drainage ditch is a justiciable controversy between the parties and therefore is proper grist for the Ellsworths' declaratory action. We should employ the same procedure utilized by the circuit court and address this threshold question. I respectfully dissent from the majority opinion, which declines to address the Ellsworths' challenge to the DNR's jurisdiction.

¶20 The trial court's ruling rested squarely on ***Klingeisen v. DNR***, 163 Wis. 2d 921, 472 N.W.2d 603 (Ct. App. 1991). Before Klingeisen purchased the property, a channel had been constructed providing access to Lake Michigan from Green Bay. ***Id***. at 925. When Klingeisen sought to repair a boathouse located on the channel, the DNR intervened, determined that the channel was navigable, and

ordered the boathouse removed. ***Id***. at 926. Klingeisen challenged the DNR's jurisdiction to issue the order. ***Id***. The court of appeals held that the DNR had jurisdiction to issue the order "because the channel, although artificially created, is connected to and maintained by the waters of Green Bay." ***Id***. at 927. The Ellsworths contend that ***Klingeisen*** does not govern this case because Ellsworth Lake was artificially, not naturally, created. I make no judgment in this dissent whether ***Klingeisen*** controls this case. I simply contend that we, like the trial court, owe it to the parties to decide this jurisdictional question under these different facts.

¶21 The majority opinion cites to ***Turkow v. DNR***, 216 Wis. 2d 273, 576 N.W.2d 288 (Ct. App. 1998), where the court of appeals again rejected a jurisdictional challenge to the DNR's authority to make a navigability determination. The court stated that a WIS. STAT. ch. 227 review proceeding represented the exclusive method for obtaining review of an agency determination. ***Turkow***, 216 Wis. 2d at 281-82. However, as in ***Klingeisen***, the facts prompting that statement are markedly different from this case. In ***Turkow***, the property owner had failed to take an administrative appeal from a *prior* DNR determination that the waterway in question was navigable. ***Turkow***, 216 Wis. 2d at 282. Given that history, I can well understand why the ***Turkow*** court would make that statement. But whether that holding should apply in this case, where the DNR has not made a navigability ruling and the Ellsworths have not had a prior opportunity to test the DNR's jurisdiction, is a matter we should decide. Again, I make no judgment whether ***Turkow*** governs this case. Instead, as with the ***Klingeisen*** issue, I simply contend that we, like the trial court, owe it to the parties to answer the question under these different facts.

¶22 In ***Putnam v. Time Warner Cable***, 2002 WI 108, ¶39, 255 Wis. 2d 447, 649 N.W.2d 626, the supreme court considered whether the plaintiff's declaratory action challenging Time Warner's late fee assessment was premature because the plaintiffs had not actually incurred any such assessment. Ruling that the action was not premature, the court said:

> To the extent that the circuit court premised its decision solely on the lack of present harm to the [plaintiffs], it did not apply a proper standard of law. The purpose of the Uniform Declaratory Judgments Act (Wis. Stat. § 806.04), is to allow courts to anticipate and resolve identifiable … disputes between adverse parties. *See* Wis. Stat. § 806.04(12); *see also* ***Lister v. Bd. of Regents of Univ. Wis. Sys***., 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). "The underlying philosophy of the [Act] is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination *prior to the time that a wrong has been threatened or committed*." ***Lister***, 72 Wis. 2d at 307 (emphasis added). The ***Lister*** court went so far as to say that the "preferred view appears to be that declaratory relief is appropriate wherever it will serve a useful purpose." ***Id.***

Putnam, 255 Wis. 2d 447, ¶43 (footnote omitted).

¶23 The supreme court also noted that "the ripeness required for a declaratory judgment is different from the ripeness required in other actions." ***Id***., ¶44. The court cited with approval to an earlier case, which held that potential defendants "may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution." ***Id***.

¶24 In ***Pension Management, Inc. v. DuRose***, 58 Wis. 2d 122, 205 N.W.2d 553 (1973), the commissioner of insurance had notified the plaintiffs that he was of the opinion that the plaintiffs' business practices were in violation of the law. ***Id***. at 125. The plaintiffs responded with a declaratory judgment action in which they asked for a judicial declaration that the business operations did not

violate the statutes. ***Id***. The insurance commissioner sought dismissal, contending that no justiciable controversy existed and that the circuit court opinion would be only advisory. ***Id***. at 126. The supreme court rejected the commissioner's argument, stating, "The commissioner, by virtue of these powers, has placed in immediate and certain jeopardy appellants' business practices of long standing. Declaratory relief is, therefore, appropriate." ***Id***. at 131.

¶25 Here, as in ***Putnam*** and ***DuRose***, there is a present, sharp and identifiable dispute between the parties as to the extent of the DNR's authority to determine the navigability of the drainage ditch. In addition, the Ellsworths have legally protected interests which they are seeking to preserve. Although the DNR has not as yet determined that the ditch is navigable, it has clearly demonstrated its intent to monitor the situation. At a minimum, the prospect of a future determination of navigability impacts the present value of the Ellsworths' property. In addition, the DNR's assertion of jurisdiction puts the Ellsworths' quiet and exclusive enjoyment of Lake Ellsworth at potential risk. As ***Putnam*** teaches, the Ellsworths are not be required to await the imposition of actual harm before the question of the DNR's jurisdiction is resolved.

¶26 Therefore, I would employ the same procedure as that used by the circuit court. I would address the Ellsworths' declaratory judgment action on the merits as it relates to the DNR's jurisdiction. If we would affirm the circuit court's ruling confirming the DNR's jurisdiction, I would then also uphold the court's further ruling that the Ellsworths must await a further determination of navigability and challenge such a determination in a WIS. STAT. ch. 227 proceeding. However, if we would reverse the circuit court's ruling and conclude that the DNR is exceeding its jurisdiction, that would conclude the matter in dispute and both parties would know where they stand.

For these reasons, I respectfully dissent.