COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1227 **Cir. Ct. No. 2009CV1583**

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

WILLIAM HONEYAGER, ELAINE HONEYAGER AND WED DEVELOPMENT LLC,

PLAINTIFFS-APPELLANTS,

V.

CITY OF NEW BERLIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Reversed and cause remanded for proceedings not inconsistent with this opinion.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J William and Elaine Honeyager and WED Development, LLC, sued the City of New Berlin for breach of the duty of good

faith in a development agreement. On the morning of trial, at the City's request, the trial court effectively changed the Honeyagers'[1] claim from one of breach to one of property overassessment. Having changed the claim for relief, the court then dismissed the action on the grounds that the Honeyagers had not used the proper statutory procedure for making an overassessment claim. But the law only allows trial courts to amend the parties' pleadings to conform to the evidence under WIS. STAT. § 802.09(2) (2009-10).[2] Here, no evidence was taken. Rather, the court amended the Honeyagers' pleadings without their consent, at the behest of the City, and then only because it considered part of the Honeyagers' trial brief in support of the breach of contract claim to be similar to an argument often made during an assessment review. The trial court had no authority to do what it did. We reverse.

¶2 The Honeyagers and the City entered into a development agreement on November 2, 2005. As part of the contract, the Honeyagers agreed to construct a sanitary sewage system for their eight lots that would also benefit seven[3] already developed lots across the street. In consideration for this agreement, the City promised to specially assess and charge the owners of the properties across the street for part of the cost of the improvements, the proceeds of which would go to the Honeyagers.

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[1] The plaintiffs will be referred to collectively as "the Honeyagers" throughout this opinion.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] The Honeyagers' complaint and brief state that there were seven benefitted properties on the other side of the street. Much of the paperwork in the record seems to reflect that there were six properties that were specially assessed. The precise number is irrelevant to our analysis.

¶3 The Honeyagers assert that when they signed the development agreement with the City, their understanding was that the City would attempt to collect 7/15 of the total cost of the improvements, or approximately $38,000, from the seven properties across the street from them. According to an affidavit signed by William Honeyager, that understanding was based in part on a neighborhood meeting before the contract was signed where the city engineer announced that the properties across the street would be "collectively assessed half of the cost of the sewer main and individually assessed for the full cost of the sewer laterals connecting their respective properties to the sewer main." But, subsequently, the City chose a different method of assessment than what was recommended by the city engineer, which resulted in other property owners being charged approximately $19,000.

¶4 Once the total compensation amount was known to them, the Honeyagers filed a civil lawsuit against the City for breach of the duty of good faith and fair dealing in contract. The City moved for summary judgment, but the trial court denied that motion, stating that there were genuine issues of material fact.

¶5 Between the City's summary judgment motion and trial, the Honeyagers filed a trial brief with some proposed jury instructions. In it, they pointed out that the City "chose a rare and hardly ever used method of assessment whereby the Honeyagers' lots were charged almost three times per lot as much … as each of the pre-existing homes." They argued that, by law, the City was supposed to assess the properties reasonably and in a way that would achieve uniformity between similarly situated properties. Then, their proposed jury instructions asked the jury to find a breach if they found that the special assessment was not fairly apportioned between the properties.

¶6 That is when the City moved to dismiss for lack of subject matter jurisdiction, claiming that the Honeyagers' proposed trial arguments were actually a challenge to the special assessments that could have and should have been brought under WIS. STAT. § 66.0703(12). The City pointed out that under ***Bialk v. City of Oak Creek***, 98 Wis. 2d 469, 472, 297 N.W.2d 43 (Ct. App. 1980), failure to comply strictly with § 66.0703(12) means that courts lack subject matter jurisdiction to hear the case. The trial court agreed that it had no subject matter jurisdiction and dismissed. The Honeyagers appeal.

¶7 Whether the court had subject matter jurisdiction over this case is a question of law, which we review de novo. ***Van Deurzen v. Yamaha Motor Corp. USA***, 2004 WI App 194, ¶ 9, 276 Wis. 2d 815, 688 N.W.2d 777. We analyze this case on the assumption that, at least initially, the Honeyagers adequately laid out a breach of duty of good faith claim against the City. The City based its contractual obligations on the assessments of the neighbor's property; in doing so, it consented to bringing the assessment analysis into the contract. Therefore, although the parties frame it somewhat differently, we deem the issue to be whether the Honeyagers, through their proposed trial arguments, effectively amended their valid breach of duty of good faith claim by turning it into a WIS. STAT. § 66.0703(12) special assessment appeal.

¶8 As we observed in ***Autumn Grove Joint Venture v. Rachlin***, 138 Wis. 2d 273, 277, 405 N.W.2d 759 (Ct. App. 1987), trial courts may amend pleadings to conform to proof under WIS. STAT. § 802.09(1) and (2). But that discretion has limits. ***Autumn Grove***, 138 Wis. 2d 273, 277. Section 802.09(2) states that "[i]f issues not raised by the pleadings are *tried* by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." (Emphasis added.) Put simply, that subsection does not apply

here because no issues were "tried" in this case. *See* ***Thom v. OneBeacon Ins. Co.***, 2007 WI App 123, ¶¶24-25, 300 Wis. 2d 607, 731 N.W.2d 657 (stating that "tried" requires a trial). Section 802.09(1) is also inapplicable because it addresses when a trial court may grant leave to amend a complaint, which was not done here.

¶9 Nor can it be said that the Honeyagers impliedly amended their pleadings by virtue of their pretrial brief and proposed instructions. The Honeyagers' complaint alleged that the City breached the duty of good faith by unilaterally choosing a manner of assessment that violated their understanding that the City would obtain 7/15 of the development costs from the neighbors. As we read the Honeyagers' pretrial brief, they sought only to illustrate how they were harmed by the City's bad faith. They divided the development into fifteen parcels, eight of which they owned. They then argued that they were effectively being over assessed for their eight parcels and the neighbors were being under-assessed for their seven parcels. This illustration in no way amounts to an implied changing of the Honeyagers' pleadings. Rather, it purported to allegorize its breach of contract claim in this way. In other words, it was the Honeyagers' way of "drawing a picture." So, while it is true that their allegory sounded a lot like the arguments that property owners make when objecting to their assessments, the fact of the matter is that the Honeyagers' intent was merely to illuminate the harm done to them.

¶10 It is irrelevant whether the Honeyagers *could have* pursued a WIS. STAT. § 66.0703(12) action. *See* ***Daughtry v. MPC Systems, Inc.***, 2004 WI App 70, ¶37, 272 Wis. 2d 260, 679 N.W.2d 808 (explaining why a party could litigate an issue as factual backdrop for a claim even though it would not have had standing to litigate the issue on its own). Evidence of the City's allegedly unusual

assessment method in this case affects the strength of the Honeyagers' breach of contract claim.

¶11 In ***Autumn Grove***, the trial court persuaded the defendant to change his counterclaim from tort to contract on the morning of trial. ***Autumn Grove***, 138 Wis. 2d at 274, 277. We reversed because the last minute switch prejudiced the defendant. ***Id.*** Here, the trial court dismissed a claim altogether based a theory that the Honeyagers' pretrial argument and proposed instructions changed the nature of their complaint. Though the facts differ slightly, in both cases the trial court changed the nature of a claim on the morning of trial in a way that prejudiced a party. If the trial court thought the Honeyagers' proposed jury instructions were inappropriate, it had the discretion to reject them. But it did not have the authority to use those proposed instructions and the pretrial brief accompanying them as the springboard to change the name of the game.

By the Court.—Order reversed and cause remanded for proceedings not inconsistent with this opinion.

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