COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2429 **Cir. Ct. No. 2009CV354**

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

TOWN OF PRESQUE ISLE,

PLAINTIFF-RESPONDENT,

V.

HOLLY IWAKIRI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BRUNNER, J.[1] Holly Iwakiri appeals a judgment of conviction for two violations of the Town of Presque Isle's boating ordinances. The circuit court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

found Iwakiri guilty of operating a motor boat at speeds greater than "slow-no-wake" within two hundred feet of shore and operating a motor boat while towing a water skier after 5 p.m. *See* TOWN OF PRESQUE ISLE, WIS., ORDINANCES §§ 501.03(3)(a), 501.03(4). Iwakiri argues the ordinances are invalid because the Town failed to comply with the substantive and procedural requirements of WIS. STAT. § 30.77. Specifically, she asserts the ordinances are invalid because (1) they were not properly published, (2) the ordinances are not lake specific, and (3) the Town failed to hold a public hearing pursuant to WIS. STAT. § 30.77(3)(aw) prior to enactment. She also contends that if we determine § 30.77 does not require a public hearing for lakes wholly within a municipality's borders, the statute violates her constitutional right to equal protection.

¶2 We conclude a factual dispute exists regarding the ordinances' publication, and we reverse in part for a factual determination. However, we also affirm in part, concluding WIS. STAT. § 30.77 does not require ordinances to specifically refer to individual lakes, the Town was not required to have a WIS. STAT. § 30.77(3)(aw) public hearing prior to enactment, and failure to have such a hearing did not violate Iwakiri's constitutional rights.

BACKGROUND

¶3 On June 14, 2009, Iwakiri received two motor boat citations for violating the Town's boating ordinances on Oxbow Lake, which is a lake wholly within the Town. *See* TOWN OF PRESQUE ISLE, WIS., ORDINANCES §§ 501.03(3)(a), 501.03(4). Iwakiri moved for summary judgment, attacking the validity of the ordinances.

¶4 The Town enacted its boating ordinances pursuant to WIS. STAT. § 30.77. Section 30.77 outlines the procedure a municipality must follow when

enacting boating ordinances. On October 6, 1996, Lorine Walters, the Town's clerk, wrote to the department of natural resources, requesting an advisory review of the Town's proposed boating ordinances. *See* WIS. STAT. § 30.77(3)(d). On October 31, 1996, the DNR responded, assigning the ordinances number 0480 and suggesting changes. The Town alleged it changed the ordinances to incorporate the DNR's suggestions. It adopted subchapter 501, the boating ordinances, on December 5, 1996. Carl Watras, a member of the Town's ordinance committee, averred in an affidavit that after the Town adopted the ordinances in 1996, it forwarded a copy to the DNR. *See* WIS. STAT. § 30.77(4). On January 10, 1997, the Town published its code of ordinances in the Lakeland Times newspaper. *See* WIS. STAT. § 60.80. Although the notice referred to subchapter 501, it failed to include the text of the ordinances.

¶5 On April 12, 2008, Watras emailed Walters asking if she had a copy of the signed ordinances from 1997. Watras explained the DNR was unable to locate its copy. Walters advised that she did not have a copy from 1997. On July 24, 2008, Walters had the Town Board sign a copy of the ordinances and sent that copy to the DNR.

¶6 In August 2008, the DNR wrote to the Town, advising it that the DNR was in receipt of the ordinances "adopted on July 24, 2008." The DNR requested proof that the ordinances were published. Walters responded to the DNR, informing it that the Town published the ordinances on January 10, 1997 in the Lakeland Times.

¶7 On November 20, 2008, the Town moved to repeal and reenact subchapter 501 with no changes. On November 26, 2008, the Town published a notice in the Lakeland Times, which read:

> At a regular Town Board meeting held November 20, 2008, Presque Isle Code of Ordinances, Subchapter 501. Motorboats was readopted with no changes by action of the Town Board to comply with 2007 Act 72. Subchapter 501 regulates speed of motorboats, water skiing, slow-no-wake areas and mooring. The ordinance is available in the Presque Isle Community Library, the Office of the Clerk, and on line at www.piwi.us.

According to the Town, it repealed and reenacted the ordinances without changes because it was concerned about potential challenges to the 1997 publication.

¶8 In her motion for summary judgment, Iwakiri argued the ordinances were invalid because they were not lake specific, there was no public hearing prior to enactment, and after enactment, the ordinances were not properly published. She also asserted the enabling statute, WIS. STAT. § 30.77, violated her right to due process.

¶9 The court determined that the ordinances were valid and denied Iwakiri's motion. It reasoned WIS. STAT. § 30.77(3) had no requirement that ordinances be lake specific and the Town was not required to have a WIS. STAT. § 30.77(3)(aw) public hearing prior to enactment. Regarding publication, the court determined:

> [T]he ordinance … was valid in its adoption, and to the extent it wasn't, it is rescued by [WIS. STAT. §] 889.04. Alternatively, [the 2008] reenactment and republication of the document, the refiling of that with the DNR avoids any question of that and all of those matters took place at a time prior to Ms. Iwakiri's receipt of the citations that she received here.

Finally, the court concluded Iwakiri's right to due process was not violated because, pursuant to § 30.77, the Town has the authority to regulate bodies of water. The court subsequently found Iwakiri guilty of the ordinance violations.

DISCUSSION

¶10 On appeal, Iwakiri argues the ordinances are invalid because the Town failed to comply with the requirements of WIS. STAT. § 30.77. Specifically, she argues the ordinances are invalid because they were not properly published, are not lake specific, and the Town failed to hold a public hearing pursuant to WIS. STAT. § 30.77(3)(aw) prior to enactment. She also contends that if we determine § 30.77(3)(aw) does not require a public hearing prior to enactment, the statute violates her constitutional right to equal protection.

I. Publication

¶11 Iwakiri argues the ordinance is void because the Town never properly published the ordinance and "the curative statutes do not remedy the defect." The circuit court determined WIS. STAT. § 889.04 corrected any publication defect that occurred in the 1997 publication. Alternatively, the court concluded the ordinances were properly published in 2008 after they were repealed and reenacted without changes.

¶12 WISCONSIN STAT. § 889.04 provides:

> Matter entered or recorded in any ordinance or record book under ss. 59.23(2)(b), 60.33(1) and (2), 61.25(3) and 62.09(11)(c) or printed in any newspaper, book, pamphlet, or other form purporting to be so published, entered or recorded by any county, town, city or village in this state as a copy of its ordinance, bylaw, resolution or regulation, is prima facie evidence thereof; and after 3 years from the date of such publication, entry or recording such book or pamphlet shall be *conclusive proof of the regularity of the adoption and publication of the ordinance, bylaw, resolution or regulation.*

(Emphasis added.)

¶13 In ***Stahl v. Town of Spider Lake***, 149 Wis. 2d 230, 232, 441 N.W.2d 250 (Ct. App. 1989), a town failed to properly publish an ordinance … within thirty days after its passage. However, the town published the ordinance in a pamphlet. ***Id.*** at 233. The court determined that this procedural error "is precisely the kind of procedural error that [WIS. STAT. §] 889.04 is intended to correct." ***Id.*** at 235. The court held that because "more than three years have passed since its passage in 1976, … publication in the pamphlet is *conclusive proof* of the regularity of its adoption and publication." ***Id.*** (emphasis added). Consequently, Stahl could not argue the ordinance was not properly published. ***Id.***

¶14 Iwakiri asserts WIS. STAT. § 889.04 cannot cure the publication defect because there is a genuine issue of material fact as to whether the ordinances were on the record books for three years prior to her 2009 citations. She argues there is nothing in the record, except Walters' conclusory statements, to prove the ordinances were on the record books for three years.[2] She contends such proof is not enough to survive a motion for summary judgment. Additionally, Iwakiri argues § 889.04 cannot apply to cure the defect because in 2008, the Town modified the ordinances and "three years ha[ve] not lapsed since the re-adoption of the ordinances." She also asserts that the modified ordinances were not properly published in 2008 because, pursuant to WIS. STAT. § 66.0103, the new ordinances were not available for public inspection for at least two weeks prior to enactment.

[2] The Town relied on Walters' affidavit to prove WIS. STAT. § 889.04 applies. In her affidavit, she stated the ordinance "was … recorded in [the Town's] ordinance and record book … for over three … years prior to the time the defendant received her Boating Ordinance violation citations."

¶15 The Town argues WIS. STAT. § 889.04 corrects any publication defect that occurred in 1997. The Town contends the ordinances at issue have remained unchanged since their enactment in 1996.[3] The Town explained that in 2008, it repealed and reenacted the ordinances without changes to correct any deficiencies that may have occurred with the 1997 publication process. Alternatively, the Town argues the ordinances were properly republished in 2008 because, as they were unchanged, they have been available for public inspection since 1996.

¶16 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). We view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. ***Novell v. Migliaccio***, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 783 N.W.2d 897.

¶17 We conclude there is a genuine issue of material fact as to whether the ordinances at issue were substantively changed in 2008 and whether the ordinances were published in the Town's record book for three years prior to Iwakiri's 2009 citations. In her brief supporting her motion for summary judgment, Iwakiri argued the 1996 ordinances differed from the 2008 ordinances.

[3] According to Walters, the only permanent change in subchapter 501 occurred in 1998, when the Board added a provision to allow regulatory markers on waters within the Town.

For comparison, she attached a copy of the ordinances sent to the DNR in 1996 and the copy sent in 2008.

¶18 In response, the Town acknowledged "there are certain facts … made in support of Iwakiri's motion for summary judgment that are either disputed facts, incomplete facts, and/or need further clarification." The Town stated the 2008 ordinances "were the same ordinances that were initially adopted in December of [199]6 and sent to the DNR in January [199]7." In support, the Town attached Walters' affidavit saying the ordinances at issue have not been changed since 1996 and have been on the record books for more than three years.

¶19 We agree the ordinances sent to the DNR for review in October 1996 differ from the ones sent in 2008. However, the record contains no copy of the 1996 enacted ordinances or any pre-2008 version. Therefore, we cannot say as a matter of law whether the ordinances were changed prior to enactment in 1996 or whether they were changed in 2008.

¶20 The resolution of this issue is imperative to determine whether WIS. STAT. § 889.04 applies. If the ordinances remained unchanged and on the record books three years prior to Iwakiri's citations, then § 889.04 applies to correct any defects that occurred in the publication. *See* ***Mequon v. Lake Estates Co.***, 52 Wis. 2d 765, 771, 190 N.W.2d 912 (1971) ("It is well settled that the effect of the repeal of a statute and its re-enactment at the same time … is to continue the statute in uninterrupted operation." (citations omitted)). Additionally, if the ordinances at issue have not been changed since the 1996 enactment and have been on the record books the entire time, then they were available to the public two weeks before the 2008 repeal and reenactment and thus were properly published. However, if the ordinances were modified in 2008, then the 1997 publication is no

longer relevant and the circuit court must determine whether the 2008 publication was proper.

¶21 Although we reverse and remand on the issue of publication, in the interest of judicial economy, we will nevertheless address Iwakiri's remaining statutory and constitutional arguments on the ordinances' validity.

II. Lake Specific

¶22 Iwakiri argues WIS. STAT. § 30.77 requires that any ordinances adopted must "be specific to each lake within a town's jurisdiction." She contends the ordinances are not lake specific because they "apply uniformly to every navigable body of water in the Town." Iwakiri cites a scattering of subsections that she contends reflect the lake-specific requirement. *See* WIS. STAT. § 30.77(3)(a), (ac), (am), (b), (cm). She also asserts the Town acknowledged the lake-specific requirement by adopting a separate set of ordinances for Big Lake, which is a lake not wholly within the Town.

¶23 Statutory interpretation presents a question of law that we review independently. ***State v. Cole***, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432. The goal of statutory interpretation is to give effect to the intent of the legislature. ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). We begin with the plain language of the statute. ***Id.*** If the meaning of the statute is plain, we stop the inquiry. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶24 Iwakiri first directs us to WIS. STAT. § 30.77(3)(a), asserting this paragraph reflects the requirement that ordinances be lake specific. Section 30.77(3)(a) provides: "Any town … may, in the interest of public health,

safety or welfare, including the public's interest in preserving the state's natural resources, enact ordinances applicable on any waters of this state within its jurisdiction …." We conclude there is no requirement in this paragraph that the ordinances be specific to each lake within a town.

¶25 Second, she references WIS. STAT. § 30.77(3)(ac), which provides:

> [N]o ordinance that pertains to the equipment, use or operation of a boat on an inland lake is valid unless one of the following occurs:
>
> 1. All towns, villages and cities having jurisdiction over the lake have enacted an identical ordinance.
>
> 2. At least 50% of the towns, villages and cities having jurisdiction over the lake have enacted an identical ordinance and at least 60% of the footage of shoreline of the lake is within the boundaries of these towns, villages and cities.

Iwakiri asserts the paragraph's use of "inland lake" in the singular reflects the requirement that any ordinance enacted must specifically refer to an individual lake.

¶26 The plain language of WIS. STAT. § 30.77(3)(ac) is unambiguous and indicates that it is only applicable to multijurisdictional lakes. Section 30.77(3)(ac) specifies that either all municipalities having jurisdiction over a particular lake must agree on a set of ordinances, or a majority of municipalities having jurisdiction over a lake must agree on the ordinances. Because the ordinances at issue only apply to lakes wholly within the Town, § 30.77(3)(ac) is inapplicable.

¶27 Further, WIS. STAT. § 30.77(3)(ac) also explains why Big Lake has its own set of ordinances. Contrary to Iwakiri's argument that Big Lake has its own set of ordinances because the Town recognized the requirement that

ordinances be lake specific, Big Lake has its own set of ordinances because it is not wholly within the Town. The ordinances were jointly adopted by the Town of Presque Isle and Town of Boulder Junction.

¶28 Third, Iwakiri argues WIS. STAT. § 30.77(3)(am) shows there is a lake-specific requirement. However, paragraph (am) refers to how a lake protection and rehabilitation district or town sanitary district may enact lake ordinances. The ordinances at issue here were not enacted by a lake protection and rehabilitation district or town sanitary district; therefore, paragraph (am) is inapplicable.

¶29 Fourth, Iwakiri cites WIS. STAT. § 30.77(3)(b) to prove the requirement. Paragraph (b) refers to how a county may enact "an ordinance applicable on any river or stream within its jurisdiction." Paragraph (b) does not discuss lakes, much less a lake-specific requirement. Additionally, it only applies to counties, not towns.

¶30 Finally, Iwakiri asserts "[t]he strongest indication of the lake-specific requirement appears in [WIS. STAT. § 30.77](3)(cm)." Paragraph (cm) outlines what the Town must *consider* when enacting ordinances.[4] There is no

[4] WISCONSIN STAT. § 30.77(3)(cm) provides:

> In enacting ordinances … for a given body of water, municipalities … shall take into account factors that include all of the following:
>
> 1. The type, size, shape and depth of the body of water and any features of special environmental significance that the body of water has.
>
> 2. The amount, type and speed of boating traffic on the body of water and boating safety and congestion.

(continued)

requirement within the paragraph that the Town must enact a separate set of ordinances for each individual lake.[5]

III. Public Hearing

¶31 Iwakiri next argues the ordinances are invalid because the Town failed to hold a public hearing as required by WIS. STAT. § 30.77(3)(aw)[6] prior to the ordinances' adoption. She argues "the plain language of [§ 30.77(3)(aw)] requires towns seeking to restrict use of public navigable waters to hold public hearings." She asserts that if we determine WIS. STAT. § 30.77 does not have a public hearing requirement, the statute violates her constitutional right to equal protection.

¶32 We conclude a WIS. STAT. § 30.77(3)(aw)1. public hearing was not required prior to the enactment of the Town's boating ordinances. A § 30.77(3)(aw)1. public hearing is only required if ordinances are enacted under § 30.77(3)(ac)2. As discussed above, § 30.77(3)(ac) only applies to multijurisdictional lakes. *See supra*, ¶26. Because the ordinances at issue apply to

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> 3. The degree to which the boating traffic on the body of water affects other recreational uses and the public's health, safety and welfare, including the public's interest in preserving the state's natural resources.

[5] In her reply brief, Iwakiri argues that summary judgment was inappropriate because there is a genuine issue of material fact as to whether the Town properly considered the factors outlined in WIS. STAT. § 30.77(3)(cm) when enacting the ordinances. She argues the circuit court erred by relying on Walters' affidavit that the Town considered the factors when enacting the ordinances. We do not address issues raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998).

[6] WISCONSIN STAT. § 30.77(3)(aw)1. provides in part: "If one or more towns, villages or cities propose to enact an ordinance for an inland lake under *par. (ac) 2.* … it shall hold a public hearing on the proposed ordinance at least 30 days before its enactment." (Emphasis added.)

lakes wholly within the Town, § 30.77(3)(ac) does not apply, and consequently, a § 30.77(3)(aw)1. public hearing was not required prior to enactment.

¶33 Iwakiri, however, argues that if we conclude the Town was not required to hold a WIS. STAT. § 30.77(3)(aw) public hearing, then WIS. STAT. § 30.77 violates her right to equal protection. To prevail on her equal protection claim, Iwakiri must demonstrate § 30.77(3)(aw) "treats members of similarly situated classes differently" and that there is no rational basis on which to support making a distinction between the classes. *See* ***Nankin v. Village of Shorewood***, 2001 WI 92, ¶11, 245 Wis. 2d 86, 630 N.W.2d 141.

¶34 Iwakiri asserts there is no rational basis why WIS. STAT. § 30.77(3)(aw) mandates a public hearing for users of "individual lakes regulated by two or more municipalities … while denying public hearing rights to similarly situated users … where only one municipality regulates the lake in question."

¶35 At the outset, Iwakiri improperly simplifies the WIS. STAT. § 30.77(3)(aw) public hearing mandate. First, her argument implies that without the § 30.77(3)(aw) public hearing requirement, a Town may enact boating ordinances in secrecy. Nothing in § 30.77 excuses the Town from any other hearing requirements it must follow when enacting ordinances.

¶36 Second and contrary to her assertion, a WIS. STAT. § 30.77(3)(aw) public hearing is not required for all "lakes regulated by two or more municipalities." Rather, pursuant to the statute, a § 30.77(3)(aw) public hearing is only required when an ordinance is enacted under the "majority rule" of § 30.77(3)(ac)2. A § 30.77(3)(aw) public hearing is not required if all municipalities having jurisdiction over a particular lake enact identical ordinances under § 30.77(3)(ac)1.

¶37 We conclude there is a rational basis for the WIS. STAT. § 30.77(3)(aw) public hearing requirement for ordinances enacted under § 30.77(3)(ac)2. The Legislative Reference Bureau's analysis of 1995 S.B. 252, which created the § 30.77(3)(aw) public hearing requirement, indicates the purpose of the § 30.77(3)(aw) public hearing is to give notice that an ordinance has been proposed for a lake without unanimous approval from all the municipalities with jurisdiction over the lake but with enough approval that the lake would become subject to the ordinance upon enactment. Therefore, the § 30.77(3)(aw) public hearing gives a voice, prior to the enactment of an ordinance based on less than unanimous approval, to any party having an interest in the affected lake.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.