COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2440 **Cir. Ct. No. 2009CV2258**

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

CHARLES TSAMARDINOS AND SUZANNE TSAMARDINOS,

PETITIONERS-APPELLANTS,

V.

TOWN OF BURLINGTON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Charles and Suzanne Tsamardinos have appealed from an order granting the Town of Burlington's motion for summary judgment

and dismissing their petition against the Town.[1] In their petition, the Tsamardinoses alleged that the Town had occupied their property by discharging storm water onto it and using it as a drainage facility, that the Town created a nuisance and trespassed by allowing water to drain onto their property, and that the Town caused damage to their property. Because we conclude that the Tsamardinoses' action is time barred, we affirm the order granting summary judgment.

¶2 The Tsamardinoses own property located at 30821 Cedar Drive in the Town of Burlington. The property has a single-family residence and a garage. According to the Tsamardinoses' petition, water drains from Cedar Drive, a town road, and traverses the eastern side of their property until it is deposited in Brown Lake. In their petition, the Tsamardinoses alleged that while there has always been some level of drainage from Cedar Drive across their property, the volume, scope, and nature of the drainage has increased. The Tsamardinoses further alleged that drainage from a subdivision located to the northeast of their property has added to the drainage from Cedar Drive.

¶3 In their petition, the Tsamardinoses requested condemnation proceedings pursuant to WIS. STAT. § 32.10 (2009-10),[2] alleging that they were entitled to compensation for inverse condemnation because the Town was occupying their property. Alternatively, they alleged that they were entitled to compensation on the ground that the Town's use of their property for a storm

[1] The Tsamardinoses filed their petition against both the Town of Burlington and the City of Burlington. The action against the city was dismissed by stipulation of the parties.

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

water drainage facility constituted a taking of their property without compensation. They also alleged that the Town's use of the property constituted a nuisance, causing them damage. In addition, they alleged that the Town was trespassing on their property by diverting storm water onto it without their permission or consent.

¶4 The Town moved for summary judgment on multiple grounds, alleging that the Town had not occupied or taken the property, that the Tsamardinoses did not provide notice of claim as required by WIS. STAT. § 893.80(1)(a), that the Town was entitled to immunity, and that the Tsamardinoses' claims were time barred under WIS. STAT. §§ 88.87(2)(c) and 893.89(2). The Tsamardinoses opposed summary judgment and moved for a finding that the Town was occupying their property pursuant to WIS. STAT. § 32.10, requesting a referral to the condemnation commission for a determination of just compensation.

¶5 The trial court granted summary judgment on the grounds that the Town had not occupied the property as required for relief under WIS. STAT. § 32.10 and had not taken the Tsamardinoses' property. The trial court also concluded that the Tsamardinoses failed to give notice of claim within 120 days as required by WIS. STAT. § 893.80(1)(a) and that their claims were barred by statutes of limitation. Because we agree that the Tsamardinoses' claims are time barred by

WIS. STAT. §§ 88.87(2)(c) and 893.89(2), we affirm the trial court's order granting summary judgment.[3]

¶6 We review a trial court's grant or denial of summary judgment de novo. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Upon review, we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08. ***Krier***, 317 Wis. 2d 288, ¶14. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.*** Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶7 On appeal, as in their petition, the Tsamardinoses contend that storm water from Cedar Drive traverses through a culvert and runs down their property until it is deposited in Brown Lake. As in their petition, they also allege that the Villa Heights Subdivision 1st Addition adds to the drainage collecting on Cedar

[3] Because we conclude that the Tsamardinoses' claims are time barred, we need not address the other arguments raised by the parties. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1993) (if this court resolves an appeal based on one issue, it need not decide the other issues).

Drive and eventually draining onto their property. They allege that by its actions, the Town has incorporated part of their property into its storm water management system and is using their property for a drainage facility.

¶8 In support of their trial court motion and in opposition to the Town's motion for summary judgment, the Tsamardinoses relied on two expert reports, one prepared by Hey and Associates, Inc. (the Hey report) and the other prepared by Jendusa Design and Engineering, Inc. (the Jendusa report). The Hey and Jendusa reports indicated that the Tsamardinoses' residence was constructed in the 1930s and that they had lived in it for more than twenty years. The Hey report indicated that the water that drains along the east side of the Tsamardinoses' property comes from a thirteen-acre drainage area, which includes portions of the Villa Heights Subdivision 1st Addition. The Hey report stated that when the subdivision was graded in the mid-1960s, a series of drainage swales along the roadsides and in the backyards were installed. The report stated that today the drainage is directed to a culvert under Cedar Drive, which directs the drainage onto the Tsamardinoses' property. The report further stated that jurisdiction for the culvert under Cedar Drive and approval of the Villa Heights subdivision and its associated drainage network resided with the Town and Racine county.

¶9 The Jendusa report was dated May 11, 2010, and similarly described the drainage along the east side of the Tsamardinoses' property as resulting from excessive storm water coming through a culvert at the northeast corner of the property and from drainage along the roadway. It stated that over the past eight years, there had been noticeable flooding along the east side of the residence and stated that during heavy rain, a stream forms in a swale at the east property line. The Jendusa report also opined that the subdivisions that had been developed in

the past ten to thirteen years in the drainage area discharging onto the Tsamardinoses' property lacked proper storm water control.

¶10 Based upon this record, we conclude that the trial court properly granted summary judgment dismissing the Tsamardinoses' petition as time barred. WIS. STAT. § 88.87(2)(a) provides that whenever a town "has heretofore constructed and now maintains or hereafter constructs and maintains any highway or railroad grade in or across" any natural watercourse or natural or man-made channel or drainage course, it shall not impede the general flow of surface water in any unreasonable manner so as to cause an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands. It further provides that "[a]ll such highways and railroad grades shall be constructed with adequate ditches, culverts, and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage."

¶11 WISCONSIN STAT. § 88.87(2)(c) states that "[i]f a … town … constructs and maintains a highway or railroad grade not in accordance with par. (a), any property owner damaged by the highway or railroad grade may, within 3 years after the alleged damage occurred, file a claim" with the appropriate governmental agency. Section 88.87 applies when an adjacent landowner claims that a town's negligent construction and maintenance of a culvert and road shoulder created a channel of water and water damage on the landowner's property. *See* ***Pruim v. Town of Ashford***, 168 Wis. 2d 114, 117, 483 N.W.2d 242 (Ct. App. 1992). The time limit set forth in § 88.87(2)(c) for bringing a claim

based on flooding and water damage runs from the date the damage is first discovered, and does not begin every day the damage continues.[4] ***Id.***

¶12 It is undisputed that the culvert alleged to be the cause of the Tsamardinoses' water problems has been in place and unaltered for more than twenty-four years and that the last repairs or roadwork on Cedar Drive occurred in 1995. It is also undisputed that the Tsamardinoses' water problems began more than three years before they commenced this action. Pursuant to WIS. STAT. § 88.87(2)(c), the time permitted the Tsamardinoses for seeking relief based on the discharge of water onto their property via Cedar Drive and the culvert thus expired long before they commenced this action. *Cf.* ***Pruim***, 168 Wis. 2d at 122-23.

¶13 To the extent that the Tsamardinoses' claims are based on water runoff and drainage caused by the development of the Villa Heights subdivision, their claims are also barred. With some exceptions that are not relevant to this case, WIS. STAT. § 893.89(2) states:

> [N]o cause of action may accrue and no action may be commenced … against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property … arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property.

[4] WISCONSIN STAT. § 88.87(2)(c) (1991-92), which was the version of the statute in effect at the time ***Pruim v. Town of Ashford***, 168 Wis. 2d 114, 483 N.W.2d 242 (Ct. App. 1992), was decided, required a landowner to file a claim within ninety days after the alleged damage occurred. The current version of the statute provides for a three-year period.

¶14 WISCONSIN STAT. § 893.89(1) defines "exposure period" as the ten years immediately following the date of substantial completion of the improvement to real property. The purpose of § 893.89 is to protect individuals after a certain period of time from liability based upon actions that occur during their involvement in improving the property. ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶71, 283 Wis. 2d 1, 698 N.W.2d 794.

¶15 The summary judgment record indicates that Villa Heights Subdivision 1st Addition was recorded in 1948. It also indicates that a series of drainage swales were installed when the subdivision was graded in the mid-1960s. Because the improvements to the subdivision were thus substantially completed by the mid-1960s,[5] the Town's exposure period terminated long before this action was commenced and any claims against the Town for water runoff related to the subdivision are barred.[6]

¶16 In reaching this conclusion, we reject the Tsamardinoses' argument that, based upon WIS. STAT. § 893.89(4)(c), they were entitled to bring their action outside the ten-year time limit. Section 893.89(4)(c) provides that the ten-year

[5] The Hey report stated that as the Villa Heights Subdivision developed between 1960 and 2000, each new home added new impervious surfaces, such as rooftops and driveways, which gradually increased surface water runoff volumes. However, as noted above, the Hey report also stated that the subdivision was graded and drainage swales were established in the mid-1960s. Consequently, the record provides no basis to conclude that the Town's involvement in approving or developing the drainage system in the subdivision that allegedly contributed to the Tsamardinoses' water problems extended beyond the mid-1960s.

[6] WISCONSIN STAT. § 893.89 constitutes a statute of repose in actions for injuries resulting from improvements to real property. ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶19, 326 Wis. 2d 155, 785 N.W.2d 398. A statute of repose limits the time period within which an action may be brought based on the date of the act or omission, and therefore may bar an action before the injury is discovered or before the injury even occurs. ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶38, 283 Wis. 2d 1, 698 N.W.2d 794.

statutory bar does not apply to an owner of real property "for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property." However, the Tsamardinoses' claims of water problems are based on the design, planning, or construction of the culvert, roadway, and the drainage system in the subdivision, not on the maintenance of these improvements. Section 893.89(4)(c) applies when, after an improvement to real property is substantially completed, the owner or occupier is negligent in the maintenance, operation, or inspection of it, thus causing damage. ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶49, 326 N.W.2d 155, 785 N.W.2d 398. "It does not apply to *proper* maintenance of an improvement when it is the improvement itself that causes the injury." ***Id.*** Because the water problems alleged here arose from the design, planning, or construction of the culvert, roadway, and subdivision drainage system, and not from negligent maintenance of the subdivision drainage system by the Town following its substantial completion, § 893.89(4)(c) is inapplicable to this case. *See* ***Hocking***, 326 Wis. 2d 155, ¶¶47-50. The Tsamardinoses' action for relief based on drainage from the subdivision therefore is barred by § 893.89(2). The trial court's order is affirmed.

By the Court.—Order affirmed.

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