

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1056

Cir. Ct. No. 2010CV2888

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF RAYMOND,

PLAINTIFF-RESPONDENT,

V.

MARY JANE VOGT AND RAYMOND R. VOGT,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Pursuant to a court order, the Town of Raymond remediated alterations Raymond and Mary Jane Vogt made to a drainage ditch on their property without a permit. The Vogts challenge the trial court's finding that,

under a Town ordinance, their work was a “land-disturbing construction activity” that required a permit. They appeal the order that they pay the Town nearly \$62,000 in expenses, costs, daily forfeitures, and surcharges. We affirm.

¶2 A Town ordinance prohibits landowners from engaging in land-disturbing construction activities that cause runoff into state waters. *See generally* TOWN OF RAYMOND, WIS, MUN. CODE ch. 26, art. II (2007). Despite being denied an exemption and without applying for a permit, the Vogts performed grading and fill work on a drainage ditch between their and a neighbor’s property (the Siegel property). The Town alleged that the Vogts’ activities fit the definition of land-disturbing construction and violated the ordinance because they were undertaken without a permit and came under none of the exemptions. After a bench trial, the trial court agreed.¹ It retained jurisdiction and ordered that the Vogts allow Town agents to inspect the property and develop a remedial plan. The court approved the submitted plan and ordered prompt remediation at the Vogts’ expense, including, if necessary, imposing a special charge to be taxed against the Vogts’ real property. *See* WIS. STAT. § 66.0627(2), (4) (2011-12)²; *see also* TOWN OF RAYMOND, WIS, MUN. CODE § 26-39(a).

¶3 This court denied the Vogts’ petition for leave to appeal the interim remediation order and to stay its execution. After the remedial work was completed, the trial court awarded the Town \$16,676 for its expenditures and \$45,131.50 for daily forfeitures and costs. The Vogts appeal.

¹ The Town’s second cause of action, that the Vogts’ activities constituted a public nuisance, was dismissed after trial.

² All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶4 The Vogts contend the evidence supporting the finding that they engaged in land-disturbing construction activities was insufficient as a matter of law. Specifically, they argue that the Town failed to prove that their work was likely to result in greater runoff and increased erosion that would deposit silt into a state waterway, and that the activities were not done to clean and restore the existing drainage ditch. *See* TOWN OF RAYMOND, WIS, MUN. CODE § 26-34 (defining land-disturbing construction activity) and § 26-36(4) (cleaning and restoring existing drainage ditches is an exemption from the permit requirement).

¶5 On review of a matter tried to the court, “[f]indings of fact shall not be set aside unless clearly erroneous.” WIS. STAT. § 805.17(2). In reviewing the sufficiency of the evidence on appeal, we do not retry cases. *Maclin v. State*, 92 Wis. 2d 323, 332, 284 N.W.2d 661 (1979). Rather, we search the record for evidence to support the findings that were made, not for evidence to support contrary findings. *Becker v. Zoschke*, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). If there is conflicting evidence, the witnesses’ credibility and the weight of their testimony are solely for the trial court to determine. *Leciejewski v. Sedlak*, 116 Wis. 2d 629, 637, 342 N.W.2d 734 (1984).

¶6 Town Engineer Chris Stamborski testified that the Vogts removed vegetation and changed the topography, which restricted water flow and led to an increase in water on the Siegel property, and that employing proper soil erosion measures would have reduced the amount of water flowing from the Vogts’ property into the Root River, a state waterway. *See* TOWN OF RAYMOND, WIS, MUN. CODE § 26-34 (defining land-disturbing construction activity as “any man-made alteration of the land surface resulting in a change in the topography or existing vegetative or nonvegetative soil cover, that may result in runoff and lead to an increase in soil erosion and movement of sediment into waters of the state”).

Stamborski confirmed that Vogt used concrete to install two eight-by-twelve-foot steel plates in the ditch and opined that the steel plates “greatly affect[ed]” the Siegel property by causing water to be “held up” on it. Further, although Vogt called the structure “erosion control,” Stamborski understood the purpose to be a semi-permanent means for farm equipment to cross the drainage area and thought it actually could worsen erosion.

¶7 Stamborski agreed that some of the ditch work could qualify as restoration but testified that the filling and grading within seventy feet of the property line resulted in a “more permanent elevation” that caused water to back up and disturb about 14,600 square feet of land. *See* TOWN OF RAYMOND, WIS, MUN. CODE § 26-36(2), (4) (exemptions available for land-disturbing construction activity that affects surface area of less than 10,000 square feet or is done to clean and restore existing drainage ditches). Exhibit 14, a photograph Raymond Vogt took, showed flooding at the location of the vertical steel plate near Siegel’s property line. Stamborski testified that, as in the exhibit, when he visited the property he saw “water basically standing in [Siegel’s] ditch to the point where it was actually starting to cross the driveway and actually start impacting other areas than the waterway through his property.”

¶8 Raymond Vogt testified that he removed weeds and thistles, excavated to vertically install a large steel plate five to eight feet from the neighbor’s property line, and filled a ten-by-twenty-foot area of the ditch with gravel and four or five truckloads of dirt to enhance existing drain tile. Both Vogt and Stamborski testified that the surface grade or topography was changed by more than a foot. *See* TOWN OF RAYMOND, WIS, MUN. CODE § 26-36(6) (excavation or filling resulting in surface grade change of one foot or more

exemptions does not constitute exception from permit requirement). They also both testified that runoff from the Vogt property goes into the Root River.

¶9 The Vogts essentially contend that they intended their activities to reduce erosion. Perhaps so. Under the ordinance, however, a party's activities determine whether a permit is necessary to proceed. The trial court found that the Vogts performed clearing, excavating, filling, and grading on the property without having obtained a permit to do so. These findings are not clearly erroneous. We conclude that the evidence sufficiently proved that the Vogts' work constituted non-exempt land-disturbing construction activities.

By the Court.—Order affirmed.

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

