Appeal No. 2007AP1754 **Cir. Ct. No. 2006CV120**

WISCONSIN COURT OF APPEALS
DISTRICT IV

GLEN D. HOCKING AND LOUANN HOCKING,

PLAINTIFFS-APPELLANTS,

V.

CITY OF DODGEVILLE, LAURENCE E. SCHMIT, WALLACE ROGERS, SHAUN SERSCH, WENDY SERSCH AND GERMANTOWN MUTUAL INSURANCE COMPANY,

DEFENDANTS,

CHARLES C. O'ROURKE, JOAN R. O'ROURKE, AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND AMY CRUBAUGH-SHRANK,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

Can an uphill landowner who has done nothing to affect surface water flow be held liable to the owner's downhill neighbor for damages and injuries sustained as a result of the water flow? To answer this question, it is necessary to decide whether the supreme court's decision in ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee***, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658, which allows an action for negligently failing to abate a nuisance, applies to situations involving surface water runoff or whether the

"reasonable use" rule of ***State v. Deetz***, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), and its progeny remains the law with respect to surface water.

The pertinent facts are undisputed. The Hockings brought this action alleging damages and injuries for excessive surface water runoff from the property of their neighbors, who had just purchased the property when the action was brought and had done nothing to alter the surface water flow on their land. The Hockings also sued two prior owners of the same neighboring property. The Hockings' problems with the water flow began when the neighboring home was built thirteen years earlier as the City of Dodgeville developed the surrounding area and altered the landscaping.

Wisconsin common law has evolved over time in addressing whether a property owner is liable to another for surface water runoff. Initially, Wisconsin courts applied the "common enemy" doctrine, which allowed a property owner to manage surface water as the owner desired, without regard to the effect on others. *See* ***Deetz***, 66 Wis. 2d at 9. In ***Deetz***, the supreme court moderated this approach, adopting a "reasonable use" doctrine with respect to surface water. ***Id.*** at 18. That doctrine provides that "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." ***Id.*** at 14 (citations omitted). The court further explained that "[t]he reasonable use rule retains one aspect of the philosophical underpinning of the common enemy rule, a policy of favoring land improvement and development." ***Id.*** at 20.

The neighbors contend that the standard of care they owed the Hockings is defined by the "reasonable use" doctrine articulated in ***Deetz***. They

argue that they are not liable for any damages the Hockings have sustained because they did absolutely nothing to alter the surface water flow from their property. They contend that in ***Deetz*** and other cases finding liability for surface water runoff, there was some conduct by the defendant that increased the runoff onto the plaintiff's property. *See, e.g.*, ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen,*** 129 Wis. 2d 129, 133, 384 N.W.2d 692 (1986) (defendant acted unreasonably in diverting the flow of surface water from its property onto the plaintiff's property). In the alternative, they argue that public policy precludes imposing liability against them.

The Hockings argue that the neighbors are liable for negligently failing to abate a nuisance, relying on a recent supreme court case, ***Milwaukee Metropolitan***. This case involves damages caused by water in sewers and pipelines, not surface water. In ***Milwaukee Metropolitan***, the sewerage district brought a claim for maintaining a nuisance against the City of Milwaukee for damage to a sewer allegedly caused by a collapse of the city's water main. ***Id.***, ¶3. The supreme court cited with favor RESTATEMENT (SECOND) OF TORTS § 839, which imposes liability on a party who negligently fails to abate a nuisance condition. *See* ***id.*** The Hockings argue that the neighbors have not appropriately managed the surface water flow from their property and are thus subject to liability for negligently failing to abate this nuisance under ***Milwaukee Metropolitan***.

We certify this case to the supreme court to address whether the reasonable use doctrine articulated in ***Deetz*** and its progeny remains the law with respect to surface water or whether a party may be held liable for damages caused by surface water flow for negligently failing to abate a nuisance based on ***Milwaukee Metropolitan*** and RESTATEMENT (SECOND) OF TORTS § 839. Stated

differently, did the supreme court intend § 839 to apply only in the factual context of ***Milwaukee Metropolitan*** and leave surface water outside its scope? Or does a cause of action now lie for negligently failing to abate a nuisance under § 839 in cases involving surface water flow? Because there are policy issues involved in deciding the scope of the duty imposed in this situation, we think this case should be resolved by the supreme court. Pursuant to WIS. STAT. RULE 809.61, we certify this appeal to the Wisconsin Supreme Court for its review and determination.