COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1989

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

ELEANOR DELACH,

PLAINTIFF-APPELLANT,

V.

COUNTY OF PRICE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Eleanor Delach appeals a judgment dismissing her claim against Price County that sought contract rescission and reversion of title to real estate, and compensation for expenses allegedly incurred in the condemnation proceeding. She argues: (1) breach of a condition entitles her to rescind the contract and to have title to the property revert; (2) the County's failure to make a

jurisdictional offer does not preclude the award of expenses under § 32.06(2)(b), STATS.; and (3) assuming she may recover expenses, the County waived its defense of the sixty-day period under § 32.06(2)(b). We affirm the judgment.

This dispute involves two parcels of land that Delach conveyed to the County. The first parcel lies north of Jobes Dam on the Elk River. The second parcel is adjacent to the dam. The County, in contemplation of planned repairs to the dam, adopted a resolution authorizing condemnation of the second parcel. The County's attorney served Delach with a copy of the County's appraisal report and other documents which the County was required to serve at the commencement of a condemnation proceeding. Before making a jurisdictional offer pursuant to § 32.06(3), STATS., the County decided not to pursue condemnation.

Delach conveyed to the County the parcel of land north of Jobes Dam subject to certain conditions. The deed stated: "We grant Price County the above land as long as all the 6 restrictions are adhered to. Any violations of these restrictions will cause the land to revert back to grantors or current landowners." One condition stated:

> 3. Grantee agrees, at its own cost, to place fill in the immediate area north and west of the dike area and above-conveyed land *within two years.*

A second condition stated:

> 4. Grantee agrees to construct, at its own cost, a fence across the dike area 30 ft N. of dam. *Fence is to run from Long Lake waterfront to current landowner property line. Fence is to be permanent and is to be maintained by County. This fence is not to be removed.* immediately north of the portage to exclude the public from access to the dike area north of the portage [sic].

The italics represents a handwritten portion that Delach inserted onto the typewritten deed.

In a summary judgment proceeding, the trial court concluded that because the County made no jurisdictional offer pursuant to § 32.06(3), STATS., litigation expenses were not recoverable under § 32.28(3), STATS. After trial on the remaining issues, the court further determined Delach had not met her burden to prove that the County failed to substantially comply with the conditions in the deed. Judgment was entered in favor of the County and this appeal followed.

Delach argues that the County breached the condition requiring them to place fill in two areas: (1) north and west of the dike area; and (2) north and west of the conveyed land. She contends that no fill was placed pursuant to the agreement.

Delach's argument asks us first to interpret the parties' agreement. Delach argues that "a plain reading" of the deed shows that fill was to be placed in separate areas. First, fill was to go north and west of the dike area and second, fill was to go north and west of the conveyed land. The interpretation of an unambiguous contract is a question of law we review de novo. ***Schlosser v. Allis-Chalmers Corp***., 86 Wis.2d 226, 243-44, 271 N.W.2d 879, 887 (1978).

The County responds that Delach's interpretation is unreasonable. It points out that the deed uses the singular word "area," and not the plural word "areas." As a result, it contends that the court correctly construed the deed to require fill in only one area, that area lying "north and west" of the dike and conveyed land.

Conditions in a deed "will be strongly construed against the grantor and forfeiture will not be enforced unless clearly established." ***St. Clara College v. Madison***, 250 Wis. 538, 545, 27 N.W.2d 745, 748 (1947). The singular use of the word "area" supports the trial court's interpretation. As a result, we conclude that the condition unambiguously required the fill to be placed in an area to the north and west of the dike and conveyed parcel.

Next, we examine the record to determine whether it supports the court's finding that fill was placed in the area described in the condition. Determinations of weight and credibility are uniquely a trial court function and we do not overturn a finding of fact unless clearly erroneous. Section 805.17(2), STATS. At trial, Delach and her son testified that they knew of no fill placed pursuant to their agreement with the County. On the other hand, Robert Lepke, the dam keeper, testified that fill was placed on the property. The court noted that Lepke held the position of dam keeper for the past ten years and summarized his testimony:

> [H]e personally attended a meeting of the Dams Committee in July of 1992 at which the Dams Committee authorized the placement of approximately 150 yards of fill on the Delach property adjacent to Jobe's Dam. The County introduced into evidence the minutes of that meeting which showed that bids were opened for "gravel at the Jobe's Dam." According to the minutes the committee authorized 150 yards of fill and awarded the contract to the low bidder.
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> Lepke testified that he was personally present at the Delach property when the fill was placed. He testified that after approximately 150 yards had been delivered he had a discussion with either the late Mr. Delach or a family representative. As a result of that discussion he sought and received authorization from the Dams Committee to place more fill. Ultimately, Lepke testified, 308 yards of fill were delivered and leveled and the Delach family representative "said that was good and the chairman of the dams committee at that time spoke to him too in that

> general time frame of August or September that that was sufficient."

The court also noted Lepke's diagram of the filled area showing a "roughly circular area immediately to the north of the conveyed parcel extending from the dike to the west." Additionally, the court observed that photographs of the tree trunks growing in the area of the fill did not have the usual root flare where they met the ground, indicating to him that fill had been deposited around their base.

The record supports the court's findings. Because Lepke testified that he was personally present in August of 1992 when 308 yards of fill was placed in an oval area to the north and the west of the dike and conveyed parcel, the trial court could reasonably conclude that Delach failed to meet her burden of proof. "It is not enough to show in this way that the letter of the condition is violated, but it must appear that its true spirit and purpose have been willfully disregarded by the grantee." ***Id***. at 546, 27 N.W.2d at 748. The record falls far short of demonstrating a breach of the condition of placing fill.

Next, Delach argues that no fence was constructed within two years of the deed and, in any event, was not constructed in a reasonable length of time. Delach concedes that the condition does not set a two-year limit. However, she contends that because the fence was not built before the commencement of this litigation in October 1995, it was not built within a reasonable time frame. She further argues that the present fence is eighty to ninety feet north of the dam, and not thirty feet as the condition provides. We are unpersuaded.

The record discloses that in 1996, an eight-foot chain link fence with a barbed wire crown was constructed approximately 170 feet north of the dam.

Delach objected to the unsightly nature of the fence and its placement too close to her house. Subsequently, it was removed and a second fence was erected in approximately 1997. Her major complaints about the second fence were that it was erected too late, and too far north of the dam. She conceded that the deed did not require any specific deadline. However, she argues that the County was required to erect the fence within a reasonable time.

The trial court found that although the first fence did not fulfill the deed condition, the second fence, located approximately sixty feet north of the dam, complies with the spirit and, to the extent practicable, the letter of the condition. The court found that the portage route was in place for a considerable time prior to the deed so that, "one cannot, while giving a strict construction to the condition, read into the condition an obligation on the part of the County to relocate the portage route." It further found:

> Since the purpose of the fence was to enclose the portage area between the Delach property line and the shore of Long Lake so as to exclude portagers from access to the dike area north of the portage, a fence erected within 30 feet of the dam would not have accomplished that purpose given that the portage extends farther than 30 feet north of the dam. Unless the County were to relocate the portage, which they are clearly not required to do under the deed condition, the only practible alternative was to erect the fence more than 30 feet north of the dam so as to enclose the portage.

The court noted that the fence was entirely on the County's land and Delach acknowledged that it did not in any manner interfere with her use of her property. The court further found that the fence "specifically complies with the requirement that it extend from the shore of the lake to the plaintiff's property line" and that it is "located as near to the dam as is reasonably practicable while still enclosing the portage."

The record supports the trial court's findings and we agree with its analysis. Although the deed states that the fence is to be constructed across the dike area "30 ft. N. of dam," the deed also provides that it be placed "immediately north of the portage" to exclude the public from access to the dike area north of the portage. In view of this language, the trial court properly concluded that Delach failed to demonstrate that the location of the fence "willfully disregarded" the true spirit and purpose of the condition. ***St. Clara College***, 250 Wis. at 546, 27 N.W.2d at 748.

The court also concluded that while the fence could have been erected sooner, dam work beginning in 1995 would have required it to be dismantled and reerected when the work was completed in the fall of 1996. The court stated: "While it does not appear that such would have been impossible, the County's delay until after the completion of the dam work was not so egregious as to evidence an intent not to comply with the condition." Under the circumstances here, the court could reasonably conclude that Delach failed to show a willful disregard of the spirit and purpose of the condition.

Next, Delach argues that she is entitled to recover certain expenses incurred as a result of the condemnation process started, but later abandoned by the County. The trial court decided this issue on summary judgment. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Section 802.08(2), STATS. Our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-16, 401 N.W.2d 816, 820 (1987).

The recovery of litigation expenses is governed by § 32.28, STATS.[1] Delach's argument involves statutory construction, a question of law we review de novo. *See* ***Kluenker v. DOT***, 109 Wis.2d 602, 605, 327 N.W.2d 145, 147 (Ct. App. 1982). The primary source used to construe a statute is the language of the statute itself. ***Id***. "Statutes allowing the taxation of costs against the sovereign are in derogation of the common law and must be given a strict construction." ***Id***.

Kluenker examined the recovery of attorney's fees under § 32.28(1), STATS., and concluded that prior to a jurisdictional offer, there are no "actual or anticipated proceedings before the commission or the court" within the meaning of § 32.28(1). Therefore, ***Kluenker*** held that "the plain meaning of the statute precludes a condemnor from responsibility for attorney's fees incurred prior to the jurisdictional offer." ***Id***. We conclude that the same reasoning holds true for the recovery of appraisal fees under § 32.28, and, because there is no dispute that the

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[1] Section 32.28, STATS., provides in part:

> **Costs**. **(1)** In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter.
>
> **(2)** Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter. If the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnee shall be deemed the successful party under s. 814.02(2).
>
> **(3)** In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee ….
>
> (a) The proceeding is abandoned by the condemnor;

County never made a jurisdictional offer, the trial court correctly denied Delach recovery of her appraisal expenses.

Delach seeks to distinguish her claim from the holding of ***Kluenker***. She contends that ***Kluenker*** dealt with condemnation for sewers and transportation under § 32.05, STATS., rather than condemnation under § 32.06, STATS., dealing with "other matters." This argument was rejected, however, in ***Pelfresne v. Dane County Regional Airport***, 186 Wis.2d 538, 543-44, 521 N.W.2d 460, 462-63 (Ct. App. 1994), which held that the award of litigation expenses under § 32.28, STATS., upon abandonment of condemnation proceedings applies to all ch. 32, STATS., condemnations. Therefore, Delach makes an immaterial distinction.

Delach also contends that she is not seeking "litigation expenses" under § 32.28, STATS. Instead, she relies on § 32.06(2)(b), STATS., which provides that the "[t]he owner may obtain an appraisal … of all property proposed to be acquired, and submit the reasonable costs of the appraisal to the condemnor for payment." Delach is correct that this section of the statute does not require a jurisdictional offer.[2] Nonetheless, Delach's argument fails. It is undisputed that Delach failed to comply with the statutory requirement to submit her appraisal to

[2] Section 32.06(2)(b), STATS., provides:

> The condemnor shall provide the owner with a full narrative appraisal upon which the jurisdictional offer is based and a copy of any appraisal made under par. (a) and at the same time shall inform the owner of his or her right to obtain an appraisal under this paragraph. The owner may obtain an appraisal by a qualified appraiser of all property proposed to be acquired, and submit the reasonable costs of the appraisal to the condemnor for payment. The owner shall submit a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor's appraisal. If the owner does not accept a negotiated offer under sub. (2a) or the jurisdictional offer under sub. (3), the owner may use an appraisal prepared under this paragraph in any subsequent appeal.

the condemnor "within 60 days after the owner receives the condemnor's appraisal." ***Id***. Because Delach did not comply with the statutory requirements, she is not entitled to recover.

Nonetheless, Delach argues that the County should be estopped by relying on the sixty-day requirement because the County's appraisal was flawed and the County continued to work with her appraiser beyond the sixty-day time limit. We are unpersuaded. First, Delach's argument ignores our standard of review on summary judgment. In support of her asserted "facts" that the County's appraisal was flawed and that the County continued to work with her appraiser beyond sixty days, Delach refers us to correspondence that she attached to her memo in support of her motion to reconsider the summary judgment. As such, the correspondence does not qualify as "[s]upporting and opposing affidavits … made on personal knowledge" served at least five days before the summary judgment hearing. Sections 802.08(2) and (3) STATS. Because these alleged facts were not before the trial court at the motion for summary judgment, they cannot form a basis for demonstrating a dispute of material fact.

Second, Delach's argument would force an illogical construction of the statute. In every case where a potential condemnee disagrees with an appraisal, the condemnee could argue that the appraisal is flawed. As a result, the sixty-day limit would be virtually meaningless. We do not construe a statute to work an unreasonable result. ***Kluenker***, 109 Wis.2d at 607, 327 N.W.2d at 148.

Next, Delach contends that under § 32.06(9), STATS., expenses may be awarded whenever the condemnor abandons a condemnation action.[3] She argues that the County commenced condemnation proceedings when it passed a resolution authorizing condemnation of the land and by serving appraiser's report and other notices and information, and subsequently abandoning them.

In essence, Delach asks us to construe § 32.06(9), STATS., to provide that a condemnation proceeding may be abandoned before it is commenced within the meaning of § 32.28, STATS. In ***Kluenker,*** we determined that:

> prior to the date of making the jurisdictional offer, there were no "actual" proceedings before the commission or court. Nor could proceedings have been "anticipated" prior to that date.
>
> Since there is no official completive action in a condemnation case until the jurisdictional offer, it follows that a condemnee cannot be certain of a condemnor's position until that juncture.

Id. at 606, 327 N.W.2d at 148.

When statutes are contained in the same chapter and assist in implementing the chapter's goals and policy, "the statutes should be read *in pari*

[3] Section 32.06(9), STATS., provides:

> **(9)** ABANDONMENT OF PROCEEDINGS; OR PAYMENT OF AWARD. (a) Within 30 days after the date of filing of the commission's award, the condemnor shall petition the circuit court for the county wherein the property is situated, upon 5 days' notice by certified mail to the owner, for leave to abandon the petition for taking if the condemnor desires to abandon the proceeding. The circuit court shall grant the petition upon such terms as it deems just, and shall make a formal order discontinuing the proceeding which order shall be recorded in the judgment record of the court after the record of the commission's award. The order shall operate to divest any title of condemnor to the lands involved and to automatically discharge the lis pendens.

materia and harmonized if possible." ***State v. Amato***, 126 Wis.2d 212, 216, 376 N.W.2d 75, 77 (Ct. App. 1985). Here, we are unpersuaded that § 32.06, STATS., requires a different meaning than the language in § 32.28, STATS., as interpreted in ***Kluenker***, with respect to commencing a condemnation proceeding.

Delach seeks to distinguish ***Kluenker*** because here the County discontinued its pursuit of condemnation due to an engineering study mistake. Delach fails, however, to identify any statutory language or other authority that the County's reasons for no longer pursuing condemnation are material. As a result, we agree with the trial court's reasoning that the proceeding cannot be abandoned until it is actually commenced. Under the circumstances here, we must conclude that § 32.06(9), STATS., does not apply.

Delach further argues that the County conceded that it "abandoned" the condemnation proceedings, thus entitling her to costs. We disagree. In context, the County's use of the term "abandonment" was in a generic sense and not within the statutory meaning of § 32.06(9), STATS.

Generally, in the absence of a statute, no liability for the condenmee's expenses is incurred when eminent domain proceedings are abandoned by a governmental condemnor. *See* Herbert B. Chermside, Jr., Annotation, *What Constitutes Abandonment of Eminent Domain Proceeding so as to Charge Condemnor with Liability for Condemnee's Expenses or the Like,* 68 A.L.R.3d 610, 613 § 2 (1976). Statutes allowing taxation of costs against the sovereign are in derogation of the common law and must be given a strict construction. ***City of La Crosse v. Benson***, 101 Wis.2d 691, 697, 305 N.W.2d 184, 187 (Ct. App. 1981). "We cannot assume the legislature intended attorney's fees be recoverable in circumstances other than those expressly mentioned" in the

statute. ***Kluenker***, 109 Wis.2d at 606, 327 N.W.2d at 148. We have examined each of Delach's arguments and are satisified that they do not provide grounds for reversal.[4] Therefore, we reject Delach's attempts to circumvent the statutes and conclude that the trial court properly denied her recovery of appraisal costs.[5]

By the Court.—Judgment affirmed.

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

[4] Delach's three sentence argument that the statutes were amended in 1978 is inadequately developed and therefore not addressed. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

[5] Because of our disposition of this issue, we need not address the County's argument that Delach failed to provide notice of her claim against the County. *See* ***Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde***, 185 Wis.2d 377, 383 n.1, 518 N.W.2d 265, 266 n.1 (Ct. App. 1994).