

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 9, 2006**

Cornelia G. Clark  
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. 2005AP1999**

**Cir. Ct. No. 2003CV1052**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**JERRY TORBECK AND CYNTHIA TORBECK,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**CE LAND DEVELOPMENT, LLC,**

**DEFENDANT-RESPONDENT,**

**JOANN MAU, MAU REALTY AND GLADYS VERHAGEN,**

**DEFENDANTS.**

---

APPEAL from a judgment of the circuit court for Outagamie County: RAYMOND S. HUBER, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Jerry and Cynthia Torbeck appeal a summary judgment decision dismissing their private nuisance claim against CE Land Development. We affirm for the reasons discussed below.

### **BACKGROUND**

¶2 In 1973, Lawrence and Gladys Verhagen used loosely compacted clay containing refuse from an adjoining landfill to fill portions of the yard behind a house they were having constructed. In 1978, after discovering methane gas in the house, it was determined that the fill material used in the yard provided a potential path for methane gas to migrate from the decomposing refuse in the landfill to the Verhagen residence.

¶3 When the landfill closed that same year, the DNR ordered the landfill's owner to install an underground gravel-packed trench on the Verhagen property leading to a vent on the landfill property "to provide a cutoff for migrating gases" as one of the long-term care conditions for approving the closure. The order further required the landfill owner to monitor the gases along the trench until June of 1980 (or longer, if the plan were extended) to determine the effectiveness of the trench. Subsequent DNR reviews referred to ongoing gas monitoring responsibilities of CE Land Development, who bought the closed landfill in 2002.

¶4 The Torbecks bought the Verhagen property in 2001 without knowledge of the buried refuse or gas collection trench. Upon discovering that methane gas was seeping up through their yard, they filed suit seeking damages from Gladys Verhagen and the real estate agents involved in their purchase, and abatement of a private nuisance from CE Land Development. The trial court

granted CE Land Development's summary judgment motion to dismiss the nuisance claim against it.

## DISCUSSION

¶5 This court reviews summary judgment decisions de novo, applying the same method employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ... [Next,] we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

*Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted).

¶6 A private nuisance arises from “an interference with the use and enjoyment of land.” *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶27, 277 Wis. 2d 635, 691 N.W.2d 658. In order to impose liability for a nuisance, a complainant must establish that the defendant's conduct was the legal cause of the nuisance and was either intentionally or negligently tortious. *Id.*, ¶¶6, 32 and 49. Thus, when liability is predicated on a negligent failure to act, “there must be proof that the actor was ‘under a duty to take positive action to prevent or abate the interference with ... the private interest.’” *Id.*, ¶35.

¶7 The Torbecks alleged that the leaking volatile gases from the refuse buried under their property, combined with the malfunctioning gas collection trench, constituted a private nuisance interfering with their enjoyment of their

property. They further alleged that CE Land Development's predecessor in interest had partly caused the nuisance by placing refuse on their property, and that CE Land Development had itself negligently failed to maintain the gas trench that was supposed to vent the gases. These allegations are sufficient to establish the existence of a nuisance, but not that the CE Land Development's conduct constitutes a tort and is a legal cause of the nuisance.

¶8 First of all, we see no tort arising from the placement of the refuse-laden fill on the Verhagen property, since that was done at the Verhagens' own request. That leaves only the question whether CE Land Development's failure to maintain the gas collection trench was negligent.

¶9 The Torbecks argue that the DNR orders have essentially made the closed landfill owner fully responsible for all of the solid waste on the Verhagen property, imposing a duty of care to assure that the pipe is properly venting all gases from the Torbecks' property. We do not read the DNR orders that way. The original 1978 order specified that the purpose of the trench was "to provide a cutoff for migrating gases," which the refuse layer on the Verhagen property was allowing to be conducted from the landfill to the Verhagen residence. The gravel was intended to inhibit that migration, and the piping was intended to vent the collected gases.

¶10 The Torbecks' complaint does not allege that gases are still migrating from the landfill to their residence. Rather, it alleges that gases from the refuse layer on the Torbeck property itself are seeping through to the surface. We agree with the trial court that the summary judgment materials fail to establish that the landfill owner had any duty to control gases emanating from the Torbeck property itself, as opposed to gas migrating from the landfill. Absent any duty,

there can be no negligence. We therefore conclude that the trial court properly dismissed the nuisance claim against CE Land Development.

¶11 CE Land Development also requests an award of costs and attorney fees under WIS. STAT. RULE 809.25(3)(a) (2003-04).<sup>1</sup> While we ultimately reject the Torbecks' arguments, we do not deem them to have been frivolous. We therefore deny the motion for attorney fees without requiring further response. CE Land Development will be entitled to standard statutory costs as the prevailing party.

*By the Court.*—Judgment affirmed.

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

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

