COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP697 **Cir. Ct. No. 2005SC4422**

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

BRIAN THOMAS,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. PRINGLE, JR. AND JULIA A. PRINGLE,

DEFENDANTS-APPELLANTS,

LON WIENKE AND BEAR REALTY PADDOCK LAKE, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Robert D. and Julia A. Pringle appeal from an order denying their motion for reconsideration of a small claims judgment entered in favor of Brian Thomas. Thomas sued the Pringles to recover a $2364.39 tax penalty assessed against him under WIS. STAT. § 74.485 when land he had purchased from them was deemed to have changed from agricultural to nonagricultural use during his ownership. At trial and on reconsideration, the circuit court determined that the Pringles were the owners of the property when the use changed and that they had not given Thomas notice of the potential tax penalty as required by § 74.485(7). We agree that Thomas was not given the required notice and therefore affirm.

¶2 Most of the facts are undisputed. The Pringles subdivided a parcel of farmland they owned into a nine-lot residential development called Hazeldell Estates, each lot five to ten acres in size. For years, the entire parcel had been assessed under WIS. STAT. § 70.32(2r) as agricultural land. Hazeldell Estates' Declaration of Restrictions, Covenants and Easements recited that it was the Pringles' intent to develop the property into single-family lots and that "[n]o Lot shall be used for any purpose except for single-family residential purposes …." The Declaration was recorded on January 19, 2004, about the same time that the property was rezoned from A-1 agricultural to R-1 residential.

¶3 Thomas bought his five-acre lot, the fifth to be sold, in March 2004. A local farmer was using some of the subdivision land, including Thomas' lot, for agricultural purposes at the time of the purchase. During negotiations, Thomas

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

evidently asked the selling agent if the farmer could continue working the land to maintain the beneficial tax assessment.

¶4 Several documents provided to Thomas by the Pringles or their agents informed Thomas that the lot was the subject of "use-value assessment."[2] For example, he received a copy of the title insurance commitment, which explains use-value assessment and the potential for a tax penalty should the land's use change. In addition, Thomas received and signed a Real Estate Condition Report indicating that "[l]and sold with the property has been valued under WIS. STAT. § 70.32(2r) (use-value assessment)." This statement was followed by three choices, "yes," "no" and "unsure." The Pringles circled "yes" but added nothing in the space provided for explanations of "yes" or "unsure" answers. The Condition Report Thomas signed was a 2001 version instead of the more detailed 2002 version which had replaced it.

¶5 The active farming of the property ceased sometime thereafter.[3] During his ownership, Thomas did not make any improvements to the land or obtain a building permit.[4] On July 1, 2005, the Kenosha County Treasurer notified

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[2] In Wisconsin, the assessment of each parcel of agricultural land is its use-value. WIS. ADMIN. CODE § TAX 18.08 (Sept. 2006). Under use-value assessment, agricultural land is valued "according to the income that could be generated from its rental for agricultural use." ***Mallo v. DOR***, 2002 WI 70, ¶3, 253 Wis. 2d 391, 645 N.W.2d 853 (quoting WIS. STAT. § 70.32(2r)(c)). This method of assessment aims to reduce urban sprawl, preserve farmland and reduce the conversion of farmland to other uses. *See* WIS. STAT. § 73.03(49)(a), (c).

All references to the Wisconsin Administrative Code are to the September 2006 version.

[3] The Pringles' listing agent observed at trial that "when it becomes a weed patch, it is no longer an agricultural use, and so the assessor goes out and checks …."

[4] Thomas sold the land during the latter part of 2005.

Thomas that the assessor had determined that Thomas' lot no longer was devoted primarily to agricultural use and, "[a]s owner at the time of the change in use," he was being assessed a penalty of $2364.39.

¶6 Thomas paid the penalty and, then, acting pro se, filed the instant small claims action against the Pringles and their real estate broker and listing agent to recover the $2364.39, alleging a lack of "[c]omplete and proper disclosure." The circuit court agreed with Thomas, ruling that use of the land changed when the Pringles filed the Declaration, reinforced by the zoning change, and that using the Real Estate Condition Report would have put Thomas on notice of a potential penalty. The Pringles' motion for reconsideration was denied and they now appeal.[5] We will recite additional facts as required by our discussion of the appellate issues.

¶7 The Pringles argue that *use* of the land determines its assessment. Because the farming activities ceased after Thomas bought the lot, the Pringles contend that it was he, not they, who converted the parcel's use from agricultural to nonagricultural, thus triggering the penalty. The circuit court agreed with the Pringles that the pivotal inquiry is who owned the property when it no longer was "devoted primarily to agricultural use." *See* WIS. ADMIN. CODE §§ TAX 18.05(4), 18.06(1) (defining the phrase "devoted primarily to agricultural use"). The court

[5] The circuit court dismissed without costs the claims against Bear Realty and Realtor Weinke. The Pringles did not seek reconsideration of that portion of the decision.

After the Pringles appealed, we remanded the matter to the circuit court for supplemental findings as to whether the Title Commitment Report provided Thomas with the statutory notice. The court ruled that it did not.

agreed with Thomas, however, that the land's use was altered when it was subdivided and rezoned, making the Pringles the liable owners.

¶8 Stripped to its barest, we read the Pringles' stance and the circuit court's framing of the issue as a critique of the correctness of the assessor's determination. However, Thomas did not raise that challenge. Rather, his claim was grounded in misrepresentation, and focused on whether the Pringles sufficiently informed him pursuant to WIS. STAT. § 74.485(7) that he potentially faced a penalty. We therefore confine our discussion to that issue.

¶9 Negligent misrepresentation has four elements:

> (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, i.e., failure to exercise ordinary care in making the representation or in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury.

Hatleberg v. Norwest Bank Wisconsin, 2005 WI 109, ¶40, 283 Wis. 2d 234, 700 N.W.2d 15; *see also* WIS JI—CIVIL 2403. Failure to disclose a fact may be misrepresentation if the nondisclosing party has a duty to disclose that fact. *See* ***Lecic v. Lane Co.***, 104 Wis. 2d 592, 604, 312 N.W.2d 773 (1981).

¶10 Thomas admits he knew that his lot was valued for tax purposes as agricultural use land and that it was accorded favorable tax treatment. What he claims he did not know was that he himself faced the prospect of a real estate tax penalty without so much as pulling a building permit. He did not know, he contends, because the Pringles failed to inform him of that fact despite having a duty to do so pursuant to WIS. STAT. § 74.487(7).

¶11 A duty to provide notice arises by virtue of WIS. STAT. § 74.485. It states in relevant part:

> **Penalty for converting agricultural land.**
>
> ….
>
> **(2)** PENALTY. Except as provided in sub. (4) [regarding exceptions and deferrals], a person who owns land that has been assessed as agricultural land under s. 70.32(2r) and who converts the land's use so that the land is not eligible to be assessed as agricultural land under s. 70.32(2r), as determined by the assessor … [,] shall pay a penalty [to the entity and in the amount hereinafter described].
>
> ….
>
> **(7)** NOTICE. A person who owns land that has been assessed as agricultural land under s. 70.32(2r) and who sells the land *shall notify* the buyer of the land of *all* of the following:
>
> (a) That the land has been assessed as agricultural land under s. 70.32(2r).
>
> (b) Whether the person who owns the land and who is selling the land has been assessed a penalty under sub. (2) related to the land.
>
> (c) Whether the person who owns the land and who is selling the land has been granted a deferral under sub. (4) related to the land.

Sec. 74.485 (emphasis added). We must decide, then, whether the information Thomas did receive about the assessment of his lot satisfies the mandates of § 74.485(7). The interpretation and application of a statute to a given set of facts presents a question of law subject to independent appellate review. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶8, 251 Wis. 2d 45, 640 N.W.2d 764.

¶12 Compliance with WIS. STAT. § 74.485(7) requires a seller to give notice of three things: (1) that the land has been assessed as agricultural land

under WIS. STAT. § 70.32(2r); (2) whether the seller has been assessed a penalty; and (3) if so, whether the penalty has been deferred. The Pringles clearly satisfied the first requirement because Thomas received a copy of the 2001 version of the Real Estate Condition Report and of the title insurance commitment, each of which alerted him to the use-value assessment of the property. The Pringles basically assert that their duty ends there because they never had been assessed a penalty or had one deferred. Requiring notice of a nonevent, they suggest, cannot constitute misrepresentation. We see it differently.

¶13 The three-prong notice requirement of WIS. STAT. § 74.485(7) ensures that all parties are aware of the potential implications and consequences of the valuation method conferred by WIS. STAT. § 70.32(2r). The owner of land used for agricultural purposes receives favorable tax treatment under this statute. That owner, or a subsequent one, will owe a penalty when that use is changed. By selling lots in a single-family residence development, the Pringles had to have known the land use would cease to be "primarily devoted to agricultural use." *See* WIS. ADMIN. CODE § TAX 18.05(4). The obvious purpose of the statute is to provide notice to a prospective buyer of the prospect of a tax penalty triggered by a change in the use of the property. From that it follows that the buyer's duty does not end with simply giving notice that the property has received the favorable tax treatment conferred by § 70.32(2r). To the contrary, the buyer must also be notified whether the property has been assessed a penalty pursuant to § 74.485(2) and, if so, whether the penalty has been deferred. The legislature's use of the word "whether" invites a "yes" or "no" response. Notice that a penalty had not *as yet* been assessed would have alerted Thomas that one might be assessed in the future and that he would be liable for it.

¶14 Of course, the required information might have been imparted in other ways, and the various forms used by the Pringles did dance around this requirement to differing degrees. For example, Paragraph 19 of the 2001 version of the Condition Report affirmatively advised Thomas that "[l]and sold with the property has been valued under WIS. STAT. § 70.32(2r) (use-value assessment)." But neither this language nor the text of § 70.32(2r) alerted Thomas to the actual or potential penalty regarding the *particular land* he was contemplating to purchase. Moreover, the Pringles did not elaborate on their answer despite the form's unequivocal directive that "yes" answers be explained in the space provided.

¶15 Besides being incomplete, the Pringles' 2001 Condition Report also was outdated. They should have used the 2002 version, which differs in a few salient respects. The relevant portion of the 2002 Condition Report provides:

> *(19) Land sold with the property has been assessed as agricultural land under WIS. STAT. § 70.32(2r) (use-value assessment).**
>
> *(20) Land sold with the property has been assessed a penalty under WIS. STAT. § 70.32(2) (use-value assessment).*
>
> *(21) Land sold with the property has been assessed a penalty under WIS. STAT. § 70.32(4) (use-value assessment) which has been deferred.*

¶16 The new paragraph 19 expands and clarifies the language of the comparable paragraph in the 2001 form. Instead of the less clear "valued under WIS. STAT. § 70.32(2r) (use-value assessment)" on the 2001 form, the revised paragraph 19 advises that the land "has been assessed as agricultural land under WIS. STAT. § 70.32(2r) (use-value assessment).*" The asterisk signals an additional explanation of use-value assessment and the possibility of a penalty, and provides a telephone number and Website where one can access more

information. The revised form also adds two new paragraphs, 20 and 21, which, with paragraph 19, mirror the notice requirements of WIS. STAT. § 74.485(7). Finally, in contrast to the regular typeface on the old form and elsewhere on the new one, paragraphs 19-21 are italicized, emphasizing them.

¶17 Similarly, the title commitment report explains the use-value method of assessment and alerts the "then-current owner" who converts the land's use to nonagricultural that he or she "must pay a penalty." In its supplemental findings, the court concluded that the title commitment report merely paraphrased the statutory language about use-value assessment and was inadequate notice as to the *particular land* that was the subject of the parties' negotiations and agreement.

¶18 We agree. The title commitment report spans two pages and twenty-one paragraphs. The relevant paragraph speaks generally about use-value assessment and a possible penalty. This information does not satisfy WIS. STAT. § 74.785(7)(b) or (c) because it does not advise whether the Pringles ever had been assessed a penalty or had one deferred. Thomas purchased a lot in a subdivision zoned residential. The Pringles plainly set forth in the Declaration that the sole allowable purpose to which a lot in the subdivision could be put was "single-family residential." Unless expressly told, a buyer of land subject to these zoning and subdivision restrictions could reasonably remain unaware that the lot remains encumbered, so to speak, with a latent penalty which will ripen into reality at some point. That, of course, is exactly what happened in this case.

¶19 This explains, we conclude, why WIS. STAT. § 74.485(7) mandates that a seller of land assessed as agricultural "shall notify" the buyer of *all* three statutory scenarios: the agricultural assessment, any penalty and any deferral. Notice only that land is assessed as agricultural is incomplete. An informed buyer

also needs to know whether or not a penalty for conversion has issued, and, if so, whether the penalty has been deferred. The legislature has made the policy decision to place the burden on the seller to notify the buyer of these matters.

¶20 Our conclusion is supported by the amplified, italicized language of 2002 Condition Report which tracks WIS. STAT. § 74.485(7), and requires an answer of "yes," "no" or "unsure" to each and explanations of any non-"no" answers. It also explains why the potential penalty was a bargaining chip in negotiations between the Pringles and other Hazeldell Estates lot buyers who, according to the Pringles' listing agent, "negotiated a settlement in the penalty" such that the Pringles paid some or all of it at closing. Here Thomas never had that bargaining opportunity.

CONCLUSION

¶21 The title commitment and the outdated and incomplete Condition Report fail to provide Thomas sufficient notice of a potential penalty. WISCONSIN STAT. § 74.785(7) requires that a buyer be advised that the seller has not been issued a penalty or granted a deferral so as to put the potential, if not likelihood, of a penalty more squarely in front of the buyer. Failing to inform that no penalty or deferral had issued was more than not reporting an event that did not happen. Here, it constituted misrepresentation by omission, causally resulting in a significant penalty of which Thomas theretofore was unaware that he faced. We uphold the order denying the Pringles' motion for reconsideration.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.