COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2161-FT **Cir. Ct. No. 00-FO-1263**

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

POLK COUNTY,

PLAINTIFF-APPELLANT,

V.

JEFF A. BLANSKI AND DAWN M. BLANSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Reversed and cause remanded with directions*.

¶1 PETERSON, J.[1] Polk County appeals an order dismissing its complaint against Jeff and Dawn Blanski for violating POLK COUNTY, WIS., SHORELAND PROTECTION ZONING ORDINANCES, art. XII, § 12.3B (1991). The

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). This is also an expedited appeal under WIS. STAT. RULE 809.17.

ordinance prohibits more than one dwelling on a property. A violation is punishable by a forfeiture. A jury found that the Blanskis had not violated the ordinance. The County argues that the trial court erred by improperly instructing the jury as to the burden of proof and the definition of "dwelling." We agree and reverse and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND

¶2 In 1996, the Blanskis applied for a permit to construct a garage on their property. The application provided that the garage would be for "private storage only, no human habitation." The garage was constructed as a two-level structure, detached from the house.

¶3 The Blanskis furnished the first floor of the garage with a television, table and chairs. The second level was furnished with cupboards, three beds and a crib. Both levels had lighting. The garage did not contain a water source, kitchen facilities, or a refrigerator. However, it did contain a chemical toilet. In 2000, the County brought a forfeiture action alleging that the Blanskis were utilizing their garage as a dwelling in violation of POLK COUNTY, WIS. SHORELAND PROTECTION ZONING ORDINANCES, art. XII, § 12.3B (1991).[2]

¶4 During a pre-trial jury instruction and verdict conference, the trial court considered proposed instructions on the burden of proof and the definition of

[2] POLK COUNTY, WIS., SHORELAND PROTECTION ZONING ORDINANCES, art. XII, § 12.3B (1991), lists as a permitted use, the "[y]ear-round single family dwelling for owner occupancy, rent or lease."

a dwelling. The County argued that the lower burden of proof found in WIS JI—CIVIL 200 applied.[3] However, the court determined that WIS JI—CIVIL 205, middle burden of proof, applied because there was a "punitive aspect" to the charge and if the Blanskis violated the ordinance, "they are going to pay a penalty."[4]

¶5 The County also requested that the definition of a dwelling submitted to the jury be based upon WIS. STAT. § 66.1337(4)(a)2.a.[5] The Blanskis requested that the definition of dwelling be based on POLK COUNTY, WIS. COMPREHENSIVE LAND USE ORDINANCES, § III (1993), which defines dwelling as a "detached building designed for or occupied exclusively by one family."

¶6 Rather then approving either proposal, the trial court drafted its own definition: "A dwelling is defined as a detached building designed for or occupied for human habitation on more than an occasional or emergency basis." The County objected to the language "on more than an occasional or emergency basis."[6]

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[3] WISCONSIN JI—CIVIL 200 states the quantum of evidence required in an ordinary civil case is "the greater weight of the credible evidence."

[4] WISCONSIN JI—CIVIL 205 states the quantum of evidence required is, "clear, satisfactory, and convincing."

[5] WISCONSIN STAT. § 66.1337(4)(a)2.a. reads as follows: "'Dwelling' means any building, structure or part of the building or structure that is used and occupied for human habitation or intended to be so used and includes any appurtenances belonging to it or usually enjoyed with it."

[6] The Blanskis also proposed a definition from a source identified as the American Law of Zoning Dictionary. The definition is not part of the record. It is undisputed, however, that the definition did not include the contested language ultimately adopted by the court.

¶7 The case proceeded to trial. At trial, Jeff Blanski testified that guests stayed overnight in the garage approximately six to eight times a year during the summer months and over the New Year's holiday. He also testified that guests used the garage for up to three continuous nights. The jury determined that the Blanskis did not use their garage as a dwelling. The trial court then dismissed the complaint.

STANDARD OF REVIEW

¶8 Our review of a trial court's jury instructions is deferential and we inquire only whether the trial court erroneously exercised its broad discretion to give jury instructions. ***Young v. Professionals Ins. Co.***, 154 Wis. 2d 742, 746, 454 N.W.2d 24 (Ct. App. 1990). We will reverse and order a new trial if we conclude that the challenged jury instruction, taken as a whole, was prejudicial in that it (1) probably misled the jury, or (2) was an incorrect statement of the law. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992). We independently review whether jury instructions probably misled the jury or are correct statements of the law. *See* ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993).

DISCUSSION

I. BURDEN OF PROOF

¶9 The County argues that by instructing the jury to apply WIS JI—CIVIL 205, the middle burden, the court incorrectly stated the law. The County contends that the lower burden of proof found in WIS JI—CIVIL 200 is the correct standard.

¶10 The complaint alleged that the Blanskis violated § 12.3B of the Polk County Shoreland Protection Zoning Ordinances. A violation of the ordinance is subject to a forfeiture. POLK COUNTY, WIS. SHORELAND PROTECTION ZONING ORDINANCES, art. XVIII, § 18.1 (1991); *see also* WIS. STAT. § 59.69(11).

¶11 Forfeiture proceedings are civil actions. ***State ex rel. Prentice v. County Court***, 70 Wis. 2d 230, 241-42, 234 N.W.2d 283 (1975). There are two different burdens of proof that apply in civil actions: (1) preponderance of the evidence; [7] and (2) clear and convincing evidence. ***State v. Walberg***, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982). The preponderance standard applies in ordinary civil actions. ***Id.*** The middle burden of proof "applies only to those forfeiture actions for violation of municipal ordinances, where the violation involves an ordinance which has a statutory counterpart." ***Reinke v. Personnel Bd.***, 53 Wis. 2d 123, 137, 191 N.W.2d 833 (1971). "If there is no statutory counterpart, the required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." ***Id.***

¶12 In this case, the trial court instructed the jury to apply the middle burden. However, the County's ordinance has no statutory counterpart.[8] Therefore, the lower burden of proof applies. Thus, the court's instruction was prejudicial because it was an incorrect statement of the law.

[7] The "preponderance of the evidence" standard is identical to "the greater weight of the credible evidence" standard.

[8] The ordinance is authorized by WIS. STAT. § 59.69(11), but has no statutory counterpart, as that phrase is used in the case law.

II. DEFINITION OF DWELLING

¶13 The County argues that the trial court's definition of dwelling misled the jury. At the pre-trial conference, the trial court drafted the definition that was used to instruct the jury: "A dwelling is defined as a detached building designed for or occupied for human habitation on more than an occasional or emergency basis."

¶14 The "trial court has wide discretion in choosing the language of jury instructions and if the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested …." ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635 (Ct. App. 1990). If the overall meaning is a correct statement of the law, then any erroneous part of the instruction is harmless and not grounds for reversal. ***Betchkal v. Willis***, 127 Wis. 2d 177, 188, 378 N.W.2d 684 (1985).

¶15 Dwelling is defined in POLK COUNTY, WIS., COMPREHENSIVE LAND USE ORDINANCES, § III (1993), as "[a] detached building designed for or occupied exclusively by one family." The Polk County Shoreland Protection Zoning Ordinance incorporates this definition. *See* POLK COUNTY, WIS., COMPREHENSIVE LAND USE ORDINANCES, § I.b. The trial court used the definition found in the ordinance as a starting point and then incorporated additional language.

¶16 The trial court thought that the qualifier, "on more than an occasional or emergency basis," came the closest to fulfilling the apparent intent of the ordinance. However, the definition of dwelling in the comprehensive land use ordinance is not dependent upon the number of times a building is used. Under the court's definition a seasonal cabin, for example, could fall outside the

definition of a dwelling. If a cabin was only used occasionally, it is possible that a jury could find that it was not a dwelling. Yet, a cabin does not cease to be "a detached building designed for or occupied exclusively by one family" based on the number of times it is used. There are many cabins that are used infrequently but are still dwellings.

¶17 Here, the special verdict asked whether the Blanskis had more than one dwelling on their property. The Blanskis testified that they lodged guests in the garage on occasion during the summer and over the New Year's holiday. Under the trial court's definition, the number of times the Blanskis used the garage to lodge guests became a determinative issue.

¶18 However, under the definition in the ordinance, the determination of whether a building is a dwelling does not depend on the frequency of its use. Nor is there such a limitation in the statutory definition, WIS. STAT. § 66.1337(4)(a)2.a., or in any dictionary definition brought to our attention. In fact, the parties have identified nothing anywhere in the Shoreland Protection Zoning Ordinance suggesting that frequency of use has any bearing on the "intent of the ordinance." Therefore, we conclude that the court's definition of dwelling was prejudicial because it probably misled the jury.

By the Court.—Order reversed and cause remanded with directions.

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