COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1571 **Cir. Ct. No. 2009CV902**

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

JOYCE ESSELMAN,

PLAINTIFF-APPELLANT,

V.

TOWN OF HORTONIA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Joyce Esselman appeals an order affirming a Town of Hortonia board decision recommending removal of an obstruction from a

natural watercourse pursuant to WIS. STAT. § 88.90(2).[1] Esselman argues that the board lacked jurisdiction over the matter and that it erroneously concluded that a natural watercourse existed. We affirm the board's decision.

BACKGROUND

¶2 This case centers on WIS. STAT. § 88.90. That statute provides, as relevant:

> **(1)** Whenever any natural watercourse becomes obstructed so that the natural flow of water along the same is retarded by the negligent action of the owner ... of the land on which the obstruction is located, the owner ... of any lands damaged by such obstruction may request the removal thereof by giving notice in writing to [the] owner ... of the land on which the obstruction is located.
>
> **(2)** If the obstruction is not removed within 6 days after receipt of such notice and if the obstruction is located in a ... town, the owner ... of the damaged lands may make complaint to the ... town board, filing at the same time a copy of the notice. The ... town supervisors, after viewing the watercourse and upon being satisfied that the complaint is just, shall make recommendations in writing to the owner ... of the lands where the obstruction is located, for the removal of such obstruction. If such recommendations are not followed within a reasonable time, the ... town board shall order the obstruction removed.

WIS. STAT. § 88.90(1), (2).

¶3 Esselman owns land on the east side of Winchester Road in the Town of Hortonia. Glenn and Leland Marks (Marks) own land on the west side of the road. A culvert runs under the road and allows water to drain from the Marks property to the Esselman property. Approximately eighty feet to the east of the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

culvert, Esselman constructed a pond and, east of that, she installed drainage tile. She also piled dirt near the culvert. Esselman's project was intended to promote drainage of her land for farming.

¶4 The following spring, water backed up on Marks' property. Marks gave written notice to Esselman to remove the obstruction. Esselman refused, and Marks complained to the Town of Hortonia board. After viewing the site, the board scheduled a hearing. Esselman objected to the hearing, claiming there was not a natural watercourse and, therefore, the board had no jurisdiction under WIS. STAT. § 88.90. The board nonetheless proceeded with the contested case hearing with Marks and Esselman each represented by counsel and having the right to cross-examine witnesses. Seven witnesses testified at the nearly three and one-half hour meeting. The board then accepted posthearing, written arguments. The Town provided the following definition of natural watercourse to the board:

> A watercourse consists of bed, banks and water; yet the water need not flow continually; and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which in times of freshet, or melting of ice and snow, descend from the hills and inundate the country. To maintain (that there is) a watercourse, it must appear that the water usually flows in a certain direction, and by a regular channel with banks and sides. *Fryer v. Warne*, 29 Wis. 511 (1872).
>
> The term "watercourse" comprehends a stream of water and its channel, both of natural origin, where the stream flows constantly or recurrently on the surface of the earth in a reasonably definite channel. §841 RESTATEMENT OF TORTS.

The definition also included four examples, presumably from the Restatement.

¶5 The board concluded that prior to Esselman's excavation work, "water flowing through the culvert then flowed into a shallow channel with a bed and banks easterly across" Esselman's property. It further concluded that the "shallow channel was a natural watercourse," that "Esselman negligently obstructed the natural flow of water by placing fill in the natural watercourse and retarding its natural flow," and that the obstruction damaged Marks' land. Consequently, the board recommended that Esselman remove all obstructions between the culvert and the pond and maintain the drain tile in good working order.

¶6 Esselman then sought certiorari review and declaratory judgment in the circuit court. She subsequently moved to supplement the record with testimony of Norman Hanson, the former owner of Esselman's property. The court remanded to the board, which found Esselman acted with due diligence in locating Hanson. The board therefore held a supplementary hearing to allow Hanson's testimony. The board made several factual determinations regarding the testimony, and affirmed its prior conclusions. The case then returned to the circuit court.

¶7 After Esselman filed for certiorari review, she took the deposition of Scott Koehnke, a DNR water specialist. Esselman moved for summary judgment, supported by Koehnke's deposition and an affidavit from Esselman's husband. The Town moved to strike the deposition and affidavit as being outside the certiorari record. The court denied the motion, but indicated "the review is on, and limited to, the record of the administrative hearing." Ultimately, the court affirmed the board's decision. Esselman now appeals.

DISCUSSION

¶8 "Certiorari review is limited to whether: [1] the agency kept within its jurisdiction; [2] the agency acted according to law; [3] the action was arbitrary, oppressive or unreasonable; and [4] the evidence presented was such that the agency might reasonably make the decision it did." ***Merkel v. Village of Germantown***, 218 Wis. 2d 572, 578, 581 N.W. 2d 552 (Ct. App. 1998). In certiorari proceedings, we review the decision of the agency, not the circuit court. ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989).

¶9 Esselman first argues the board did not have jurisdiction over the dispute because there was not a natural watercourse on her property near the culvert. Esselman's brief is poorly organized and difficult to follow. She does not reference the four-pronged scope of certiorari review in this argument, but she does address it in her second, separately captioned argument. The second argument merely restates the same propositions set forth in her first argument. We therefore treat the two arguments as one argument challenging whether the agency kept within its jurisdiction.

¶10 Esselman commences her argument by asserting that WIS. STAT. § 88.90(1) and (2) "note[] that a town board has jurisdiction when a natural watercourse becomes obstructed." The statute states no such thing. Nonetheless, Esselman follows her assertion by arguing that "[i]n order for the board to have jurisdiction over the dispute in the present case, it had to find that the area in question was a natural watercourse."

¶11 Esselman's argument begs the question: How can the board first determine whether a natural watercourse exists, when it has no jurisdiction to receive evidence to determine whether a natural watercourse exists? Esselman's

brief indicates: Because it "is a legal question ... the [c]ourt could make its own determination as to jurisdiction."[2] We reject Esselman's argument. The statute plainly grants the board jurisdiction over precisely the type of dispute presented here. The determination whether a natural watercourse exists presents a question of fact, not law. Esselman's argument is akin to saying a circuit court has no jurisdiction to hear a criminal case unless it first determines that one element of the crime is proven.

¶12 In her third and final argument, Esselman asserts that even if the board had jurisdiction over the dispute, the decision is not supported by the evidence. This argument, that the facts do not support the board's determination that a natural watercourse exists, relies on contentions asserted in her first argument. We now discuss those contentions regarding the board's factual inquiry.

¶13 Esselman first addresses the definition of the term natural watercourse. She argues the definition should be attained by considering related statutes. She does not, however, utilize any other statutes to define natural watercourse or take issue with the definition the board used.[3] Instead, she abruptly changes course and attempts to tie WIS. STAT. § 88.90 to various statutes

[2] Esselman cites W***isconsin Citizens Concerned for Cranes and Doves v. Wisconsin DNR***, 2004 WI 40, ¶10, 270 Wis. 2d 318, 677 N.W.2d 612, for the proposition that "[r]eviewing a claim for certiorari review based on lack of jurisdiction is a question of law." That case did not involve certiorari review. Rather, the standard of review there referred to "construction of a statute[.]" ***Id.***

[3] At another point in her brief, Esselman asserts the board applied only a portion of the definition, excluding the requirement that the watercourse be natural. The record does not support Esselman's assertion. In fact, two of the board's three supplemental findings on remand expressly addressed whether the watercourse near the culvert was naturally occurring.

concerning DNR authority over state waters. Esselman's winding stream of argument eventually cascades into the proposition that it is the DNR that must determine whether a natural watercourse exists in a § 88.90 town board proceeding.[4] We reject this proposition; the statute does not reference the DNR or DNR-related statutes.

¶14 However, even if we were to assume Esselman's proposition was correct, that the board was somehow compelled to accept the DNR's conclusion as to whether a natural watercourse existed, Esselman's argument would still fail. As the Town observes, the certiorari record indicates Koehnke determined only that the area near the culvert did not comprise a navigable waterway. That does not

[4] Esselman's argument is riddled with holes. She begins with WIS. STAT. § 88.90(3), which is not implicated here. That subsection provides: "Whenever any natural watercourse becomes obstructed through *natural* causes, the owner ... of any lands damaged by ... the obstruction ... may … remove it ...." ***Id.*** (emphasis added). She then asserts that before removing a natural obstruction, one must obtain a WIS. STAT. § 30.20(1) permit from the DNR. That requirement, however, came from a case that has been largely negated by statutory revisions. *See* ***State v. Dwyer***, 91 Wis. 2d 440, 283 N.W.2d 448 (1979).

Dwyer held that a person acting under WIS. STAT. § 88.90(3) must first obtain a DNR permit because, despite the title of WIS. STAT. § 30.20 (1977-78) referencing "navigable waters," para. 30.20(1)(b) referred to "any ... stream," without addressing navigability. ***Dwyer***, 91 Wis. 2d at 443. The current version of para. 30.20(1)(b), however, now expressly applies only to a "navigable stream." Moreover, the paragraph also now includes an exception to the permitting requirement for removing material from a navigable stream bed if an "authorization has been granted by the legislature[.]" It would appear that § 88.90 is such an authorization. Thus, ***Dwyer*** does not aid Esselman's argument.

Finally, even if ***Dwyer*** was still good law, Esselman's argument simply does not flow. From her assertion that a permit is required before removing a *natural* obstruction from a natural watercourse, she argues: "Therefore, the DNR has a direct role in addressing cases involving the obstruction of natural watercourses, both public and private. The DNR must identify what constitutes a natural watercourse under § 88.90 in order to determine whether a permit is needed under § 30.20(1)(b)." From this, she asserts the DNR has authoritative say over whether a natural watercourse exists. Neither version of para. 30.20(1)(b) addresses natural watercourses; it refers to streams. Thus, even *if* the para. 30.20(1)(b) permitting requirement also applied to *artificial* obstructions, the DNR would not be tasked with determining whether a natural watercourse exists. Esselman's disjointed argument does not hold water.

resolve whether the area contained a natural watercourse. Esselman cites other testimony from Koehnke on the topic. However, those facts all come from the deposition submitted in the circuit court. Because Esselman failed to present those facts to the board, the facts are not part of the certiorari record. We must therefore disregard that evidence. *See* ***Donaldson v. Board of Comm'rs of Rock-Koshkonong Lake Dist.***, 2004 WI 67, ¶75, 272 Wis. 2d 146, 680 N.W.2d 762; ***Merkel***, 218 Wis. 2d at 578. Thus, there is no DNR natural watercourse determination that could be imposed on the board, were that required.

¶15 Indeed, all of the facts Esselman cites in support of her argument that the facts fail to support the board's conclusion come from one of two documents: her husband's affidavit or Koehnke's deposition. She cites nothing on the issue from the certiorari record.

¶16 Against this complete lack of evidence contrary to the board's finding, we contrast the evidence presented by just one of the witnesses before the board. Tim Roach, the Outagamie County zoning administrator, testified that there was a natural watercourse between the culvert and the Esselman pond. Roach visited the site three or four times, and explained how his review of historical documents—aerial photographs and a topographic survey—supported his conclusion.

¶17 "The test on certiorari for sufficiency of the evidence is the substantial evidence test ...." ***Stacy v. Ashland Cnty. Dep't of Pub. Welfare***, 39 Wis. 2d 595, 602, 159 N.W. 2d 630 (1968). "Substantial evidence does not mean a preponderance of the evidence. Rather the test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" ***Madison Gas & Elec. Co. v. Public Serv. Comm'n***,

109 Wis. 2d 127, 133, 325 N.W. 2d 339 (1982) (quoting ***Sanitary Transfer & Landfill, Inc. v. DNR***, 85 Wis. 2d 1, 15, 270 N.W.2d 144 (1978)).

¶18 Esselman's argument, which cites no facts contrary to the board's conclusion, does not come close to overcoming the substantial evidence test.

By the Court.—Order affirmed.

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