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DISTRICT II

June 6, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2171 Walter W. Bell, as Trustee of the Walter W. Bell Trust and Nancy Bell, as Trustee of the Nancy Bell Trust v. McCue Family Limited Partnership (L.C. #2016CV515)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Walter W. Bell, as Trustee of the Walter W. Bell Trust, and Nancy Bell, as Trustee of the Nancy Bell Trust, appeal from an order granting summary judgment in favor of the McCue Family Limited Partnership. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1)

(2015-16).[1] We reverse the order and remand for further proceedings consistent with this opinion.

The McCue Family bought a house in Lake Geneva in 2008. In 2009, the Bells, as trustees of their respective trusts, purchased the property immediately adjacent to and north of the McCue Family property. In 2016, the Bells filed suit against the McCue Family alleging a private nuisance and, despite repeated written notice, the negligent failure to abate it. They claimed that since 2012 the McCue Family's failure to maintain its property altered and increased the flow of surface water, thereby depositing "significant quantities" of loose stone and other debris onto their property.[2] They specifically blamed the McCue Family's failure to construct and maintain gutters and other drainage management systems on the north side of the home's roof and haphazard attempts to repair the repeated collapses of the driveway and an outdoor staircase.

The McCue Family responded that the Bells' complaint is a result of a natural flow of surface water. It asserted that its property is uphill to the Bell property, that the abutting city road and neighborhood to the east also is uphill to both properties, and that the boundary between the two properties is at the toe of a natural watershed, facts known to the Bells at the time of purchase. Further, the McCue Family notes that after the Bells purchased their property, they tore down the existing house and built a new one, allegedly on a different "footprint" that is closer to the McCue Family property.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The McCue Family moved for summary judgment. The circuit court granted its motion, holding that, under ***Hocking v. City of Dodgeville***, 2009 WI 70, 318 Wis. 2d 681, 768 N.W.2d 552, the McCue Family had no duty to abate the alleged nuisance because the matter of which the Bells complained simply resulted from the natural downhill flow of surface water, which the McCue Family had not altered. The court further concluded that, if there was a nuisance, under ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee***, 2005 WI 8, ¶¶15-16, 277 Wis. 2d 635, 691 N.W.2d 658 (***MMSD***), the McCue Family could not be liable because the McCue Family did not know it existed at the time it purchased its property.

Whether the circuit court properly granted summary judgment is a question of law an appellate court reviews de novo. ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294. We apply the WIS. STAT. § 802.08 standards just as the circuit court does. ***Schmidt***, 305 Wis. 2d 538, ¶24. Whether a duty exists and, if so, the scope of the duty are questions of law we decide de novo. ***Johnson v. Seipel***, 152 Wis. 2d 636, 643, 449 N.W.2d 66 (Ct. App. 1989).

To prevail on a claim of negligent maintenance of a nuisance, the Bells have to prove: the existence of a private nuisance—i.e., the interference with their interest in the private use and enjoyment of their land; the McCue Family's conduct is the legal cause of the private nuisance; and the McCue Family's conduct is otherwise actionable under rules governing liability for negligent conduct, including notice. *See* ***MMSD***, 277 Wis. 2d 635, ¶63. The Bells thus must

[2] The McCue Family's counsel repeatedly asserts in the Statement of Facts, often without citation to the record, that the Bells allege "minor" sediment deposits. The occasional record cite does not support the adjective "minor." Counsel is cautioned to save its client's version of the facts for its argument.

show that the McCue Family failed to act when it had a duty to do so. *See* ***Hocking***, 318 Wis. 2d 681, ¶9; *see also* WIS JI—CIVIL 1920.

The question is whether the property damage of which the Bells complain is, as they contend, a result of a noticed but unremediated nuisance—the unguttered roof and patchwork repairs—or, as the McCue Family contends, a natural surface water runoff due to the downhill lay of the land known to the Bells when they purchased their property.

The circuit court adopted the McCue Family position based on ***Hocking***. There, the issue was whether landowners uphill from the complaining owners were liable for damages caused by surface water runoff. ***Hocking***, 318 Wis. 2d 681, ¶2. The supreme court found that the uphill neighbors' conduct was not unreasonable, as they did not alter their property to create a flow of surface water, and, consequently had no duty to abate the nuisance. ***Id.***, ¶22.

The Bells argue that ***MMSD*** should control. In that case, the question was whether the City of Milwaukee had notice of a nuisance—a leaking water main—before a sewer break, such that it was negligent in failing to address it and thus was liable for the resulting damages. *See* ***MMSD***, 277 Wis. 2d 635, ¶¶3, 7.

In our view, the parties' differing factual positions are not amenable to resolution on summary judgment. Accordingly, we reverse and remand for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily reversed and remanded for further proceedings consistent with this opinion. WIS. STAT. RULE 809.21(1).

Sheila T. Reiff
Clerk of Court of Appeals