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Wisconsin v. Hurley, 604 N.W.2d 35 (Wis. Ct. App. 1999)

**Wisconsin v. Hurley, 604 N.W.2d 35 (Wis. Ct. App. 1999)** (holding that citation for placing concrete pad on lakebed without a permit was proper, and order compelling landowner to remove improper portion of structure did not violate due process).

Defendant, Larry Hurley, owned riparian property adjacent to an artificial lake. The lake was created when a nearby navigable stream was dammed, and the lake had maintained its current water level since 1968. Hurley acquired his property in 1982. Hurley took several futile steps since 1984 to prevent his property's shoreline from eroding. Finally, in 1996, Hurley, without a permit, placed several rocks encased in concrete along his shoreline.

The Wisconsin Department of Natural Resources ("DNR") cited Hurley for violating state statutes, and ordered him to remove a portion of the concrete structure. Hurley challenged the DNR's decision and his conviction, claiming the statute did not apply to him. He also argued the lower court's order requiring him to remove part of his structure violated due process. The Court of Appeals, however, thought differently.

Hurley initially claimed the statute he had allegedly violated was inapplicable for two reasons. First, Hurley argued that the statute prohibited placing material or structures on the bed of any navigable water below the established shoreline did not apply to his case because he had placed the material on his own property. That is, it had been his property, before it eroded and became part of the lakebed. Thus, Hurley claimed that because the concrete's location was on land that had formerly been Hurley's, he had not placed any material on the bed of a navigable waterway.

Addressing this argument, the court looked at the sufficiency of the evidence presented at trial. The court noted that both sides had presented conflicting testimony regarding whether the structure was on the lakebed or former private property. Recognizing the lower court had considered this evidence and chosen to accept the DNR's evidence as true, the Court of Appeals would not disturb the lower court's ruling.

Hurley next claimed the statute was inapplicable because the lake was an artificial lake, and therefore the DNR lacked jurisdiction to cite him for not having a permit. The court recognized that under state law, if an artificial lake was created entirely on private property, the owner might alter the lake in any legal way without recourse. In this case, however, because the artificial lake was navigable and was not entirely on private property, the DNR had authority to regulate its use. Additionally, the court noted that when an artificial lake was created by damming a navigable waterway, the DNR has regulatory authority despite the lake's existence on private property. Therefore, Hurley was subject to the statute and the DNR's authority, and the court affirmed the findings that Hurley violated the statute.

Hurley finally claimed that the lower court's order requiring him to remove a portion of the concrete structure violated due process. He argued that he was entitled to a separate hearing before ordering removal. The

DNR had argued for three alternative abatement levels: (1) complete removal; (2) partial removal of everything that did not need a permit; or (3) partial removal of only the portion for which DNR would not grant a permit. Because the trial court ordered the alternative most favorable to Hurley, allowing him to seek a permit from DNR to save some of his structure, and noting the permit approval process would afford Hurley an opportunity to be heard, the court ruled that the removal order did not violate Hurley's due process rights. Thus, the court upheld Hurley's conviction.

*Michael Fischer*