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Gillen v. City of Neenah, 580 N.W. 2d 628 (Wis. 1998)

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WISCONSIN

Gillen v. City of Neenah, 580 N.W. 2d 628 (Wis. 1998) (holding that: (1) the specific procedures for injunction took precedence over the general procedures requiring notice of claims against a governmental body; and (2) a citizen asserting a violation of the public trust doctrine may directly sue a private party).

In 1952, the legislature granted the rights to land near the south shore of Little Lake des Morts to the City of Neenah ("City"). The City was obligated to hold these lands in public trust for the benefit of all citizens. In 1951, continuing to 1975, Bergstrom Paper Company ("Bergstrom"), the predecessor to P.H. Glatfelter Company ("Glatfelter"), placed sludge material in the grant area. Furthermore, in 1951, 1974, and 1984, the city leased a portion of the grant area to Bergstrom and Glatfelter Companies for construction and operation of a wastewater treatment plant.

In 1995, Minergy Corporation ("Minergy") sought a lease from the City to construct and operate a commercial facility for paper sludge processing on a different part of the grant area. The Department of Natural Resources ("DNR"), City, Glatfelter and Minergy entered a settlement agreement. As part of this agreement DNR agreed not to pursue enforcement action under its public trust authority. Thereafter Minergy and the City entered into a lease authorizing commencement of Minergy's proposed facility. The City conducted public meetings and finally the facility was approved. The DNR subsequently issued a final air pollution control permit and indicated that an environmental impact statement would not be necessary.

The plaintiffs, environmental activists, initiated suit in the circuit court as individuals, "and in the name of the State of Wisconsin," challenging the Minergy lease and the actions of Glatfelter. The plaintiffs sought a permanent injunction against the construction of the Minergy facility. The circuit court dismissed the plaintiffs' claims and they appealed. The Wisconsin Supreme Court heard the case upon certification from the court of appeals.

The supreme court first addressed the issue of whether the plaintiffs' failure to file a notice of claim against the City barred their action against the City. The court determined that there were two statutes in conflict. One statute required notice before an action against a governmental entity and the other specifically provided for injunctive relief. The supreme court held, "[w]here general and specific statutory provisions are in conflict, the specific provisions take precedence" and therefore, the plaintiffs' failure to comply with the notice obligation did not bar their claims.

The supreme court then addressed the issue of whether the public trust doctrine allowed a citizen to directly sue a private party. The court held the public trust doctrine, "establishes standing for the state,

or any person suing in the name of the state for the purpose of vindicating the public trust to assert a cause of action recognized by the existing law of Wisconsin." The court then examined the history and text of the Wisconsin statute providing for actions by citizens for abatement of public nuisances (plaintiffs claimed the proposed Minergy development was a public nuisance). The court found no basis in the history or text to prevent the plaintiffs' standing. The court held the plaintiffs' claims could therefore go forward.

The concurring opinion agreed that the plaintiffs' failure to file a notice of claim with the City did not bar their claims. However, the concurring opinion criticized the *per curiam* opinion stating the "holding and rationale . . . do not apply to the facts of the case" The court's unpredictable applications of the notice of claim requirement, "leaves attorneys and courts guessing about when a notice of claim must be filed and calls into question the status of cases now pending or already decided by the courts."

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Turkow v. Wisconsin Dep't of Natural Resources, 576 N.W. 2d 288 (Wis. Ct. App. 1998) (holding that the agency has authority over navigability determinations and that the proper avenue for a challenge to agency action is through § 227 of the Wisconsin Statutes, not through a declaratory judgment motion).

In 1942, the construction of Big Lake Road created an artificial outlet ("the stream") of Big Lake. In 1957, the Public Service Commission ("PSC") found that the stream was not navigable. After the PSC finding, Lawrence Turkow purchased the property that contained the stream. A walkway and a metal fence blocked the stream at the time he purchased the property. Mr. Turkow subsequently erected another walkway that also obstructed the stream. In 1989, the Wisconsin Department of Natural Resources ("DNR") received complaints from citizens regarding the walkways and the fence. These obstructions prevented anyone from traveling down the stream. The DNR investigated and found that the stream was navigable. After additional complaints from citizens, the DNR wrote to Turkow advising him as to their finding of navigability. It ordered him to remove the obstructions within forty-five days or face citation. In response to the DNR's action, Mr. Turkow filed a complaint against the agency and both parties moved for summary judgment.

The trial court granted summary judgment to the plaintiff based on his declaratory judgment action. The trial court found that the DNR lacked jurisdiction due to the PSC's finding of non-navigability. The trial court precluded the DNR's authority and equitably estopped the agency from finding that the stream was navigable. The DNR