FILED
07-02-2019
CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

BY THE COURT:

DATE SIGNED: July 2, 2019

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 3** **DANE COUNTY**

JAMES COORS, et al.,

Petitioner

v. **Case No. 16CV1564**

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents

ORDER

On March 22, 2019, this Court signed an Order that required the Wisconsin Department of Natural Resources, Respondents, to comply with the parties' Stipulation and Order entered on April 5, 2017. The Court also required that Respondents propose a site-specific phosphorous criterion for Lac Courte Oreilles as required by the parties' Stipulation. On April 11, 2019, Respondents filed a Motion for Reconsideration, asking the Court to reconsider the ruling from March 22, 2019. Respondents stated that the issue was best governed under the principles of contract law and that they had complied with the Stipulation to the extent of their abilities under Wisconsin law. The issue was fully briefed on May 29, 2019. Respondents present no newly

discovered evidence and the Court addressed and referenced the applicable statutes and administrative code during the March 22 hearing.

STANDARD OF REVIEW

In order to prevail on a motion for reconsideration, the moving party "must present newly discovered evidence or establish a manifest error of law." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, LTD.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier. Further, on a motion for reconsideration, a manifest error of law is more than dissatisfaction with the resulting order. It is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.*

DISCUSSION

Under the appropriate standard for review, the moving party must either introduce newly discovered evidence or establish a manifest error of law to prevail on a motion for reconsideration. *Id.* Respondents concede in their Motion for Reconsideration that they are not alleging any newly discovered evidence. Resp. Reply Br. 2. Instead, Respondents allege that the court erred in its analysis of the laws controlling the DNR's ability to propose site specific criteria. As such, Respondent will need to show that there was a "wholesale disregard, misapplication, or failure to recognize controlling precedent" in the previous decision of this Court. *Koepsell's Olde Popcorn Wagons, Inc.*, 2004 WI APP 129 at ¶44. Based on the analysis below, the Court finds that this standard has not been met. Therefore, Respondents Motion to Reconsider is DENIED.

I. *Even if the Court views the Stipulation as a Contract, there is no Basis for a Grant of the Motion for Reconsideration*

Respondents ask the Court to view the Stipulation as a contract, stating that "[a] stipulation is a contract made in the course of judicial proceedings." *Johnson v. Owen*, 191 Wis. 2d 344, 349, 529 N.W,2d 511 (Ct. App. 1995). Petitioners reject this claim, stating that "[a]lthough stipulations of settlement have been referred to as contracts, they are not governed by contract law." *Lueck's Home Imp., Inc. v. Seal Tite Nat. Inc.*, 142 Wis. 2d 843, 419 N.W,2d 340 (Ct. App. 1987) (citing *Burmeister v. Vondrachek*, 86 Wis.2d 650, 664, 273 N.W.2d 242, 248 (1979)). This apparent split in authority has been reconciled by the Court of Appeals:

> "…[I]t was within the trial court's discretion to refuse to strictly adhere to contract law principles in considering whether to enforce the stipulation. As we explained in *Phone Partners*, because the enforcement of stipulations of settlement is committed to a trial court's discretion, contract law is not binding on the trial court as to the stipulation question.

Joseph Lorenz, Inc. v. Harder, 2005 WI App 59, ¶ 15, 280 Wis. 2d 557, 694 N.W.2d 510 (citing *Phone Partners Limited Partnership v. C.F. Communications Corp.*, 196 Wis. 2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995)). While contract law is not binding on this Court in its interpretation of a stipulation, it retains the discretion to apply contract principles to illuminate a stipulation dispute. *Phone Partners Limited Partnership*, 196 Wis. 2d at 710-11. The Court has the ability to modify the stipulation and order, and principles of contract law may be helpful, but not dispositive, in doing so. *Lueck's Home Imp., Inc.*, 142 Wis. 2d 843, n.4 (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932)).

Even assuming that the Stipulation is similar to a contract, the argument that the stipulation is void as a result of being contrary to a statute fails. As discussed below, the Stipulation is not in violation of any statutory language. As such, any analysis of good-faith efforts to comply with

the Stipulation by the DNR is not relevant. The DNR is still obligated to comply with the Stipulation and develop and propose an SSC for Lac Courte Oreilles.

II. The March 22, 2019 Order Does Not Require the DNR to Violate Wisconsin Law

Wis. Stat. §281.15(2)(c) requires the DNR to "[e]stablish criteria which are no more stringent than reasonably necessary to assure attainment of the designated use for the water bodies in question." Wis. Admin. Code § NR 102.06(7) states that the DNR may establish a phosphorous site-specific criteria (SSC) "where site-specific data and analysis using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody." Wis. Admin. Code § NR 102.06(7) specifically states that two-story fishery lakes, such as Lac Courte Oreilles, are the most appropriate water bodies for site-specific criteria.

There is no question that the water body at issue is failing to achieve its "designated use" under the minimum standards set forth in Wis. Stat. § 281.15(2)(c). The body of water at issue has been on the impaired list since at least 2017. This is probably why the DNR agreed to a SSC when it signed the stipulation in 2017. However, the DNR now reads the relevant statutory language and administrative code as preventing the development and proposal of an SSC at Lac Courte Oreilles under the concern that a more stringent standard will not "guarantee" the attainment of the designated use, and thus be unlawful.[1] According to the DNR unless the SSC guarantees to improve the waters, it cannot be proposed without violating the "no more stringent than reasonably necessary to assure attainment" requirement.

However, this Court has reads the statutes in a manner that is less severe than the DNR. With regard to the administrative code, the Wisconsin Supreme Court recently "decided to end

[1] The Court recognizes that Respondents claim they do not require 100% certainty; however, the Court also notes that the practical effect of Respondent's analysis seems to require substantially more certainty than the statute mandates.

[the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. As such, while this Court has given respectful and appropriate consideration to the interpretations advanced by the DNR, but it is not bound by that interpretation and will exercise its independent judgment in interpreting the requirements of the statutory and administrative code at issue. In addition, it appears that the DNR's position is a new one, adopted after it signed the Stipulation and Order requiring it to develop a SSC. The same laws and facts were before the DNR at that time and the DNR willingly agreed to the Stipulation. Therefore, no deference is appropriate.

The Court believes that the DNR's reading of the requirements for establishing an SSC is incorrect in that it would lead to bare minimum standards that rarely protect the waters of Wisconsin. Wis. Stat. §281.15(2)(c) requires that the DNR focus on assuring attainment of the "designated use for the water bodies in question." The DNR's argued limitation on the statute—that it is prevented from acting when a proposed solution is not one hundred percent certain of success—seems to run counter to the goal of assuring attainment. The statute allows the DNR to exercise its discretion in deciding what is reasonably necessary to assure that the waters are suitable for their intended use. It does not require absolute proof or guaranteed success before the minimum standards can be exceeded; only that it is reasonably likely to work. "Reasonably necessary" by its definition requires the DNR to exercise discretion---to determine what SSC is appropriate to achieve success without being too restrictive.

In short, the Court reads Wis. Admin. Code § NR 102.06(7) as providing the means to justify a standard that is backed by the statute and necessary to 'assuring attainment.' The DNR is tasked with the obligation to "protect, maintain and improve the quality and management of the waters of the state." Wis. Stat. § 281.11. By using "scientifically defensible methods and

sound scientific rationale" to support an SSC, it seems that the DNR could establish an SSC that more adequately assures attainment, is no more stringent than reasonably necessary, and coincides with the broad purpose of the Department. Wis. Admin. Code § NR 102.06(7).

Furthermore, the DNR's reading of the relevant text is further strained when Wis. Admin. Code § NR 102.06(7) specifically states that two-story fishery lakes, such as Lac Courte Oreilles, are the most appropriate water bodies for site-specific criteria. If the DNR is unwilling or unable to find scientific justification at a lake-type that it decided to use as an example, it is unclear when, if ever, the DNR would ever depart from the bare minimum standards, even when everyone concedes that they are failing. Simply put, the Court finds the window in which to develop and propose an SSC broader than the window advocated for by the DNR. The Stipulation that was previously agreed to remains valid, and the DNR needs to follow its requirements. If the DNR believed that it could not propose a SSC, it should not have entered into the stipulation in 2017. Nothing has changed except for the DNR's decision to revisit its stipulation and this Court's order. All of the facts and the law remain the same. This was the case before and remains the case today. Because of this, there is no manifest error of law that can result in the granting of the motion for reconsideration.

CONCLUSION

A Motion for Reconsideration requires the moving party to demonstrate either newly discovered evidence or a material error of law. That same moving party is precluded from rehashing the same arguments used prior to the Court's ruling at issue. *See Oto*, 224 F. 3d at 606 ("Contrary to this standard, Beverly's motions merely took umbrage with the court's ruling and rehashed old arguments…As such, they were properly rejected by the District Court").

The Court has heard and rejected Respondent's arguments that Wisconsin statutes and regulations create a narrow regulatory sweet spot for creating SSC's. The new assertion that the April 5, 2017 Stipulation and Order be read as a contract does not sway the Court's analysis for two reasons. First, the Court does not read the applicable regulations as prohibitively as the DNR; therefore, the alleged contract between the parties is not in violation of any Wisconsin lawTherefore, the Court DENIES Respondent's Motion for Reconsideration.