STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

Town of Sumner,
Plaintiff,

vs.

Case No: 13 CV 530

Badgerland Excavating, Corp.,
Defendant.

MEMORANDUM DECISION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF FACTS

Due to erosion of the Koshkonong shoreline at Mud Lake -- a Lake determined to have valuable habitat -- that habitat was endangered. The Rock Koshkonong Lake District [RKLD][1] determined that dredging and building of a berm was necessary to protect this habitat. RKDL obtained approvals form the Army Corps of Engineers and Wisconsin DNR. The bidding process seemingly began in late December 2012, early January 2013, and the work had to be completed prior to March 1, 2013. Failure to do so would result in liquidated damages of $570 per day.

Upon review of various bids, RKDL issued a construction contract to Badgerland Excavating Corp. [hereinafter "Badgerland"] wherein Badgerland agreed to perform restoration and erosion control work on the shoreline of Lake Koshkonong in the Town of Sumner. The project involved the procurement and delivery of stone and heavy rip-rap via dump trucks. North Shore Road was identified as the primary access road to Lake Koshkonong from the

[1] A "local municipal form of government that pursued the grants and the permitting to do some large-scale projects on Lake Koshkonong in collaboration with the Wisconsin DNR and the Army Corps of Engineers." 1/9/15 Depo of Brian Christianson, p. 6, ls. 13-17.

quarry. A secondary access road – Lamp Road – was identified but not used because its condition would not sustain the traffic.

The project is defined in part in a document entitled "Lake Koshkonong Dredging and Shoreline Restoration Project, Project #1453." The Special Provisions section of that document (at page 105) require payment of "Town Road Access Fees" to include payment of bond fees for use of the Town's roads and trip fees which may be charged by the Town for construction traffic.

North Shore Road falls within two townships – the Town of Koshkonong, and the Town of Sumner – with the Town of Sumner component being that adjoining Lake Koshkonong.

The Town of Koshkonong and Badgerland entered into an "Agreement for Use of Town Road" on 1/28/13 which recites, in part, as follows:

> RECITALS:
> A. As part of its shoreline restoration project located outside of the Town of Koshkonong, Badgerland wishes to use certain Town roads in order to access a specific site to perform such "Project"; and
> B. Pursuant to Wis. Stat. 349.16, the Town, through its officer in charge of maintenance of highways, has the power and responsibility to prevent the operation of vehicles on Town roads when necessary to prevent injury to such roads; and
> C. It is the mutual desire of the parties to assure that the Town is fully reimbursed for damage to its roads resulting from Badgerland's use during the Project.

The contract includes, at paragraph 9, an indemnification clause:

> Badgerland shall indemnify the Town, its insurers, successors, and assigns for all reasonable damages, expenses, and costs the Town may incur as a result of damage to [North Shore] Road from vehicles and equipment owned by or under the control of Badgerland and its subcontractors and agents.

The Town of Sumner [hereinafter "Town"] did not enter into a similar "Agreement" with Badgerland.

Nor did the Town enter into a similar type agreement ["Intergovernmental Agreement between the Rock Koshkonong Lake District and the Town of Sumner"] with RKLD. The

second such Intergovernmental Agreement – T191-T194 – specifically provided that RKLD "acknowledges its responsibility for the repair, restoration and replacement of Town roads" including North Shore Road.

The Town did not exercise its authority under 349.16(1)(a) – to decrease the weight restriction below the established 48,000 pound restriction or 349.16(1)(c) -- to order suspension of operation. The Town of Sumner did not do so.

Rather the Town, by letter dated 1/23/13 to Badgerland from Snyder & Associates (the Town's Civil Engineering Firm), recommended as follows:

> . . . To help protect the road from damage and limit the expense of possible road repairs, I'd suggest the following action items:
>
> - Put cold patch in potholes and larger cracks to strengthen the edge of asphalt from failure
> - Protect asphalt shoulder drop offs with gravel
> - Drive in the center of the road whenever possible
> - Haul in the morning hours with [sic] the pavement is stronger from the overnight freeze
> - Avoid hauling on sunny days when the temperature is above freezing

Badgerland did not follow the first or second "suggested item"; there is disagreement as to whether they followed the third; per the deposition testimony of Tim Van Bommel of Badgerland, hauling occurred throughout the day, and the roads were always frozen; and there is evidence indicating that it was above freezing on 2/11/13, but that evidence does not indicate whether it was sunny or not on that day.

DISCUSSION

Every cause of action in tort for negligence must have four elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the

conduct and injury; and (4) an actual loss or damages as a result of the injury. *Rockweit by Donohue v. Senecal,* 197 Wis.2d 409, 541 N.W.2d 742 (1995).

The Town's Amended Complaint asserts, in relevant part to this decision, as follows:

¶ 6. The Town Board informed RKLD that some of the roads that would be used for the [dredging] project were asphalt over gravel with no substantial base and that heavy dump truck loads would likely cause significant damage.

¶ 7. It was anticipated that a Town road restoration agreement would need to be completed with the successful project bidder prior to the beginning of the dredging project or any hauling of materials on Town roads.

¶ 11. Upon information and belief, the "Standard General Conditions of the Construction Contract" awarded to Defendant, Badgerland Excavating Corp., require it to indemnify the RKLD and any subcontractor from claims raised from the project, including, but not limited to, the claim that is the subject matter of this lawsuit.

¶ 12. Although attempts were made at a restoration road agreement with the Defendant, Badgerland Excavating Corp., a formal agreement was never signed between the parties during the permitting process prior to or after the hauling.

¶ 18. Upon information and belief, Defendants failed to obtain a hauling permit[2] *and hauled loads in excess of weight limits resulting in damage to Towns roadways.*

¶ 23 Defendants negligently *injured the Town's roadway by hauling heavy truckloads of material* (stone/breaker-run/rip rap) over said highway all to plaintiff's damages.

Badgerland's focus in its' Summary Judgment Motion is on the "excess of weight limits" language. The Town's focus is on a number of factors combined.[3]

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[2] The court's review of the papers submitted with respect to this Summary Judgment motion is that there were no hauling permits that needed to be obtained that were not obtained. Thus this allegation is unsubstantiated.

[3] The Town's 2/23/15 Motion for Actual Costs and Attorneys Fees acknowledges this in part when it states:

> Wisconsin is a notice pleading state and the Court has the ability to amend the pleadings to conform to the evidence. See Wis. Stat. §802.09(2). The Town alleged that Defendant "... hauled approximately 151 (one hundred fifty one) heavy loads ... on or about February 2013." (Amended Complaint, ¶10). The Town's expert's opinion included the volume of truck traffic over 3 days causing significant damages. (Gross Report, P. 4). Defendant cannot pick only portions of the case and fail to perform discovery and allege that as a basis for dismissal. To do so would violate the attorneys' for defendants duty to the bench.

If the case turns on hauling "loads in excess of weight limits resulting in damage", summary judgment must be granted in favor of Badgerland.

The uncontested facts are that over the course of 4 days – 2/11/13, 2/12/13, 2/13/13, and 2/28/13 – 157 truckloads of quarried materials were hauled over North Shore Road, 9 of which were marginally overweight. On 2/11//13, one load was 1,720 pounds over, another 640 pounds, and a third, 80 pounds; on 2/12/13, one load was 920 pounds over, another 260 pounds over, and a third 40 pounds over; on 2/13/13, one load was 60 pounds over; and on 2/28/13, one was 1,220 pounds over and a second 1,460 pounds over.

There was a duty imposed by law -- not to exceed the 48,000 pound weight limit. That duty was breached on these 9 occasions.

Whether or not moving 9 marginally overweight loads out of 157 caused the alleged resultant damage is not something within the common knowledge or experience of jurors, but involves technical or scientific matters. Without the aid of an expert, a jury could only speculate as to causation based upon 9 slightly overweight loads. Neither the Town's expert report, nor his supplementary Affidavit, opines on this limited issue. Having read the report and Affidavit, accepting the facts within them in the light most favorable to the Town, there is nothing to support the assertion in the Amended Complaint that it was the act of moving 9 marginally overweight loads that caused the damage to North Shore Road.

There are no genuine issues of material fact on this limited issue. Summary judgment, to the extent that the negligence is based solely upon violation of a legally imposed duty not to haul loads in excess of the stated weight limit is granted.[4]

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[4] It has not been argued that violation of the weight limit is a violation of a safety statute and thus negligent per se, or that the damage to North Shore Rd is such as to endanger the users of the road. This court understands the purpose of the weight limitation is primarily designed to reduce road deterioration. Having reviewed all the

But the Amended Complaint asserts more generally at ¶ 23 that it was the "hauling of heavy truckloads of material (stone/breaker-run/rip rap)" that caused the damage.

Wisconsin is a notice pleading state. Badgerland has been on notice – through the Town's expert report and the various depositions – that the alleged negligence is based upon a combination of factors alleged to have caused the damage: the number of trips (full, empty, and on 9 occasions overweight), the manner in which the drivers operated the trucks on North Shore Road, not taking the precautions "suggested" by the Civil Engineer for the Town of Sumner, and the operation of trucks on a single day when the temperature exceeded freezing.

Wisconsin JI-CIVIL 1005 defines "Negligence" as follows:

> A person is negligent when he/she fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

"Every person owes to all others a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of his act." *Fitzgerald v. Ludwig,* 41 Wis.2d 635, 639, 165 N.W.2d 158, 160 (1969). "Each individual is held, at the very least, to a standard of ordinary care in all activities." *Coffey v. City of Milwaukee,* 74 Wis.2d 526, 537, 247 N.W.2d 132, 138 (1976). "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable." *Rolph v. EBI Cos.,* 159 Wis.2d 518, 464 N.W.2d 667 (1991).

"Once it is determined that a negligent act has been committed and that the act is a substantial factor in causing the harm, the question of duty is irrelevant and a finding of

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submissions made by virtue of the summary judgment motion, there is nothing stating or remotely implying a safety issue based upon the damage alleged to have been done.

nonliability can be made only in terms of public policy." *Schuster v. Altenberg,* 144 Wis.2d 223, 424 N.W.2d 159 (1988). A finding of nonliability made in terms of public policy is a question of law which the court alone decides. *Morgan v. Pennsylvania General Insurance Co.,* 87 Wis.2d 723, 737, 275 N.W.2d 660, 667 (1979).

In *Colla v. Mendella,* 1 Wis.2d 594, 598-99, 85 N.W.2d 345, 348 (1957) , the Court provided a number of factors to consider in determining whether to limit liability on the grounds of public policy:

> It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tort-feasor", or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would "enter a field that has no sensible or just stopping point."

Id..[5]

There are certainly material factual disputes regarding negligence under the broader basis asserted by the Town. But that does not mean this case should proceed to trial.

Determining whether to preclude liability based on public policy factors is a determination of law. *Alvarado v. Sersch,* 2003 WI 55, ¶¶ 16-17, 262 Wis.2d 74, 662 N.W.2d 350 (citing *Bowen v. Lumbermens Mut. Cas. Co.,* 183 Wis.2d 627, 644, 517 N.W.2d 432 (1994); *A.E. Inv. Corp. v. Link Builders,* 62 Wis.2d 479, 484-45, 214 N.W.2d 764 (1974)). Preclusion of liability can be made either through the filing of a motion to dismiss [see, for example, *Hornback v. Archdiocese of Milwaukee,* 2008 WI 98, 313 Wis.2d 294] or through the Summary Judgment

[5] These six public policy grounds have been cited over and over in court decisions. See, for example, *Hoida, Inc. v. M&I Midstate Bank,* 2006 WI 69, 291 Wis.2d 283, ¶41, 717 N.W.2d 17; *Hornback v. Archdiocese of Milwaukee,* 2008 WI 98, 313 Wis.2d 294, ¶49, 752 N.W.2d 862.

process [see, for example, *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 21, 308 Wis.2d 17, 746 N.W.2d 220].

Although courts have been cautioned "against applying public policy factors to preclude liability where the facts are too complicated and warrant development of the factual basis", *Butler v. Advanced Drainage Systems, Inc.*, 2006 WI 102, ¶ 20, 294 Wis.2d 397, 412, this analysis may be performed without a full factual resolution of the cause of action by trial. *Nichols,* 308 Wis.2d 17. As stated in *Hornback, supra*:

> ¶ 51. As a matter of best practice, we will refrain from a public policy consideration of liability until after a trial of the facts, but we may make a public policy determination without first remanding for an analysis of the negligence claim where the facts presented are simple to ascertain and the public policy questions have been fully presented. [citations omitted].
>
> ¶ 52. We conclude in this case that the public policy issues are fully presented by the complaint and motions to dismiss. There are no remaining factual questions that would substantively alter our public policy analysis.

Id.,313 Wis. 2d at 322.

When a court undertakes a public policy analysis based on a motion to dismiss or summary judgment motion, it "assume[s] there is negligence and that the negligence was a cause of the injury, but for reasons of public policy, we prevent the claim from proceeding." *Cole v. Hubanks,* 2004 WI 74, ¶ 7, 272 Wis.2d 539, 546, 681 N.W.2d 147. "A determination that any one of the factors applies to the case at hand is sufficient to preclude liability." *Id.*, 272 Wis.2d at 546, ¶ 8.,

This case need go no further. The Town had the tools in its possession to protect itself from the further deterioration of North Shore Road through the entry of a contract or, barring success in obtaining that, the exercise of its statutory authority to reduce the weight limit on North Shore Road or suspend the operation. It did none of these things.

The "suggestions" made by the Civil Engineering Firm in the first and second bullet-points amount to suggestions that Badgerland, in essence, fix the road prior to using it. Towns have no authority to require lawful users of public roadways to assume an obligation to fix or repair roadways before lawfully operating upon them. Towns have the obligation to maintain their roads. To require a lawful user to fix or repair a roadway prior to lawful use, or subsequent thereto because of damage incurred despite lawful use, is tantamount to imposing a toll on the use of that roadway. Only the legislature, not the court, would have such authority.

Several of the public policy factors prohibit recovery:

(1) The injury is too wholly out of proportion to the culpability of the negligent tort-feasor. But for the poor condition of North Shore Road to start with, and the failure by the Town to adjust the restrictions on use of North Shore Road prior to the project, the further deterioration was inevitable.

(2) Allowance of recovery would place too unreasonable a burden upon users of the highway. Users of the highways, whether they be individuals or companies, must have confidence that they can freely use the roadways without concern that someone might dictate -- beyond limitations contained in lawfully enacted ordinances/statutes -- the manner in which they operate their vehicle(s) [down the center of the road; under the posted speed limit] or terms they must comply with prior to use [patch potholes and larger cracks; add extra gravel to shoulder drop-offs], or face possible lawsuit.

(3) Allowance of recovery would be too likely to open the way to fraudulent claims or "enter a field that has no sensible or just stopping point." Many cities, towns and villages are experiencing budgetary issues vis-à-vis necessary road repairs/upkeep. Encouraging lawsuits as a means of securing monetary contribution toward these budgetary items is a slippery slope.

This is most apparent through a reading of the Deposition of Glendan Rewoldt, the then Deputy Town Clerk. Deputy Clerk Rewoldt testified that she followed the trucks and, when not actually following them, parked alongside North Shore Road to witness and document what she believed to be the damage caused by them. And she testified that she had done so on prior occasions involving others.

Consider the unfortunate truck driver who is the last to drive over a crack in the roadway, following hundreds of other vehicles that have preceded him, who receives a notice to repair the damage or be sued. Or the newly licensed 16 year old who allows her car to run off the shoulder of the road at a point where the asphalt is higher than the gravel and causes damages. And who receives a similar notice.

This cannot be a place that public policy allows us to go. While generating income for repair of roads, the chilling effect would be remarkable. What paint contractor, or arborist, or construction worker would make a bid on a project on North Shore Road without adding to the bid the possible road repair cost? What individual would risk driving to the Sunset for dinner and drinks knowing the potential added cost?

And, as in *Butler v. Advanced Drainage Systems, Inc.*, 2006 WI 102, 294 Wis.2d 397, such lawsuits as this would have a chilling effect on a local governmental agency's ability to contract for the performance of necessary work due. Contractors would be forced to consider the cost of possible road repair, and factor that into their bids, which would necessarily increase the cost of the project and may result in projects not being completed, all as a means of protecting a local municipalities roadways.

The sole cause of action contained in the Amended Complaint is one of negligence. Based upon considerations of public policy, the court precludes liability.

Having ruled in favor of Badgerland in part, and having used the Summary Judgment briefs and supporting documents as a means of analyzing the public policy issues, the court denies the Town's motion for attorneys fees.

There being no other legal issues pled herein, the court dismisses this action. Badgerland shall prepare an Order in accordance herewith.

BY THE COURT:

4/9/15

Jennifer L. Weston Date
Circuit Court Judge, Br. 1

Pc: Attorney Bennett Brantmeier
Attorney Robert DeBauche