STATE OF WISCONSIN
COURT OF APPEALS -- DISTRICT IV
Consolidated Case Nos. 16 AP 2503 and 17 AP 0013
Dane County Case Nos. 16 CV 008 and 16 CV 350

ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Appeal No. 2016-AP-2503

Petitioners-Respondents,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,

Respondents-Appellants.

ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,

Appeal No. 2017-AP-0013

Plaintiffs-~~A~~ppellants,

v.

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY LIMITED PARTNERSHIP WISCONSIN,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT DATED NOVEMBER 11, 2016, ENTERED IN THE DANE COUNTY CIRCUIT COURT, BRANCH 17, THE HONORABLE PETER ANDERSON, PRESIDING

REPLY BRIEF OF PLAINTIFFS/APPELLANTS ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES and TIM JENSEN

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In April of 2015, Dane County's Zoning Committee ("Zoning Committee") issued a conditional use permit for Enbridge's Waterloo Pump Station. Given the significant risk of an oil spill and a risk management expert's opinion that the company's existing insurance was inadequate, R. 8:198-227, the conditional use permit included a requirement for Environmental Clean-Up Insurance Requirement Conditions ("Conditions") that the expert recommended. R. 8:164-166.

Enbridge no longer challenges the authority of the Zoning Committee attaching to the Conditional Use Permit the Environmental Clean-up Insurance Requirement Conditions when it was issued on April 21, 2015. On July 2, 2015 a last minute amendment attached the so-called "Super Amendment" to the State Budget. Joint Finance Committee Motion 999, at p. 18, ¶55, to 2015 Senate Bill 22 ("Budget Bill"), and was enacted into law. That amendment preempts counties prospectively from requiring insurance of interstate hazardous liquid pipeline companies, "…if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." ("Sudden and Accidental Insurance"). Wis. Stats. §59.70 (25) ("Budget Bill")

Shortly after the adoption of the Budget Bill, on July 24, 2015, Enbridge, prevailed upon the Zoning Administrator to remove the insurance requirement. R. 8-128-132. That ultra vires act was reversed by the Zoning Committee on September 29, 2015. R. 8:125, 133-136. The Zoning Administrator admitted under oath that his actions in removing the conditions were not legally binding. R. 9:305-307

Enbridge's, Waterloo Pump Station was the only hazardous pipeline facility which benefitted from the exemption that the Budget Bill afforded. Enbridge appealed the refusal of the Zoning Committee to remove the conditions from their Conditional Use Permit to the Dane County Board. The County Board denied the appeal. R. 9:439 to 443. After Enbridge filed a petition for certiorari review, the Circuit Court granted the writ of certiorari and struck the Environmental Clean-Up Insurance Requirement Conditions from the permit. R. 51:1 to 2.

The central issues for this Court to decide are whether the Budget Bill's provisions required Dane County to remove the Environmental Clean-up Insurance Requirement Conditions from the Conditional Use Permit they issued to Enbridge, because Enbridge had insurance that includes Sudden and Accidental insurance necessary to apply the preemption contained in the Budget Bill; and if Dane County's conditions were prospectively barred by the Budget Bill , could the Circuit Court rewrite the Conditional Use Permit?

I. THE CIRCUIT COURT SHOULD NOT HAVE REMOVED THE INSURANCE CONDITIONS FROM ENBRIDGE'S CONDITIONAL USE PERMIT BECAUSE THE BUDGET BILL DID NOT COMPEL THEIR REMOVAL

Enbridge cannot utilize the provisions of the Budget Bill against the County and the Campbells because the bill provision limiting counties from requiring insurance (Wis. Stat. §59.70(25)) contains a precondition, namely, the pipeline company must maintain "Sudden and Accidental insurance. Enbridge has refused to show its insurance policy to Dane County's ZLR Committee, its insurance consultant, the County Board or to the Circuit Court, and thus cannot apply the Budget Bill to override Dane County's cleanup insurance condition. Campbell Br., at pp. 20-23.

None of these core precepts were questioned in the Circuit Court's ruling, R. 55:93-95, or in Enbridge's response brief. The Circuit Court ruled for Enbridge based on a determination that Dane County had found that Enbridge had Sudden and Accidental Insurance. R. 55:94 to 95 Not only was no one authorized to act for the County to make such a finding, but the Zoning Committee's actions and its insurance consultant's report strongly suggest they did not believe that Enbridge had Sudden and Accidental Insurance.

II. CAMPBELLS WERE SPECIFICALLY DEEMED FULL PARTIES TO THE CONSOLIDATED PROCEEDINGS BELOW OVER ENBRIDGE'S OBJECTION.

Enbridge offers nothing of merit to dispute any of the critical facts and

arguments set forth above. Instead Enbridge futilely attempts to throw up a meritless argument that this Court should not consider Campbells' arguments.

Enbridge is gravely mistaken in claiming that the Circuit Court did not confer on the Campbells full party status in the consolidated cases. The action for injunction filed by the Campbells was consolidated with the certiorari action Enbridge filed against Dane County. The Joint Order to Consolidate entered by Judges Anderson and Niess April 18, 2016 ("Order") itself makes this clear:[1]

The Circuit Court expressly stated in its oral ruling on September 27, 2016:

> "…You definitely were parties in that action (complaint for injunction). That's been consolidated with this action.
>
> My view of it is that – and we discussed this before somewhat. I would view them as intervenors. If it's permissive, then it's by permission, and if it's by right, then it's by right because. **If you need permission, I'm granting the permission, intervenors in the certiorari action to defend the action of the board and the ZLR. And it that wasn't clear before, I would make it nunc pro tunc to the time in which we consolidated the cases.** (emphasis added) What I did not really intend was that their intervening then gave them rights to challenge the board's action because they never filed a petition.
>
> So that's the intent of my ruling. **So I view them as intervenors in the same defense of the board and ZLR action with comparable status to the county in the certiorari case…**" (emphasis added) in response to Attorney McLeod stating that the plaintiffs do not have "standing to appeal on behalf of the county." R 57:47-48

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[1] The Order provides in relevant part:

"…It is hereby ordered that:

1. Pursuant to Wis. Stat. § 805.05(1)(b), Dane County Case No. 16-CV-350 shall be consolidated into Dane County Case No. 16-CV-0008.

2. The plaintiffs in Campbell et. al. v. Enbridge (Case No. 16 CV 350) need not obtain leave to implead in Enbridge v. Dane County et. al. (Case No. 16 CV 8), and shall have 20 days from entry of the consolidation order to file responsive pleadings, if any, in Enbridge v. Dane County et. al (Case No. 16 CV 8)....

3. Consolidation of these cases shall not affect the burden of proof required or remedy available to any party in the type of action originally filed by that party..." R 12:1-2

If the Campbells were intervenors in the certiorari action, their status was "…the same as all the other participants in the proceeding…" *Zellner v. Herrick* , 2009 WI 80, ¶22, 319 Wis. 2d 532 at 541, 770 N.W.2d 305. Nothing in the consolidation order limited the Campbells to parroting the County's arguments, nor could intervenors be prohibited from raising issues the County had overlooked. The Campbells do not "challenge the board's action," because they agree that the ZLR Committee was correct in refusing to remove the Environmental Clean Up Insurance conditions from Enbridge's Conditional Use Permit.

III. THERE IS NOTHING IN THE RECORD SHOWING THAT EITHER THE ZONING COMMITTEE OR THE COUNTY BOARD FOUND THAT ENBRIDGE HAD SECURED SUDDEN AND ACCIDENTAL INSURANCE

Nor does Enbridge provide any evidence to support for the Circuit Court's erroneous ruling that either the Zoning Committee or the County Board found that Enbridge had "Sudden and Accidental Pollution Liability" Insurance. R. 55:94-95 The basis for this Court finding that the Circuit Court was in error are set forth in detail in Campbells' Br. at pp. 20-23.

Because the actual policies were never produced to make such a determination and because Enbridge acknowledged that its insurance coverage changed from year to year, the record is devoid of any evidence to establish that

Enbridge met the predicate for the application of the preemption afforded to it under the Budget Bill.

A. Plaintiffs Never Admitted That They Were Barred From Enforcing the Insurance Requirements or That Enbridge Had The Type Of Insurance Required To Prohibit Enforcement

As the Campbells argued in the Circuit Court, a violation of a conditional use permit is an ordinance violation *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, 259 Wis. 2d 818, 830, 656 N.W.2d 491, and landowners are empowered by statute to enforce ordinance violations Wis. Stat. §59.69(11). Enbridge appealed the Zoning Committee's imposition of the Environmental Clean-up Insurance Requirement Conditions recommended by the risk management consultant, and has apparently (as no one but Enbridge knows what insurance they have) never complied with the Environmental Clean-up Insurance Requirement Conditions.

Enbridge's claim that that the Campbells admitted that Wis. Stat. §59.70(25) applied in their Answer to Enbridge's Complaint confuses the statement that "Enbridge **notified** ZLR that it carried $700 million of General Liability Insurance, including a Sudden and Accidental insurance exception to the pollution exclusion." (R. 18:16) (emphasis added) with an admission that Enbridge actually had the right kind of insurance.

Furthermore, because Enbridge kept attempting to confuse the matter, the Campbells timely submitted an Amended Answer making that distinction

expressly clear, R. 33, which the Circuit Court admitted into the record. R. 57:48-49.

B. The Insurance Expert Did Not Testify That Enbridge Had Sudden And Accidental Insurance.

By lifting quotations out of their context, Enbridge's Brief is misleading. The insurance expert, Mr. Dybdahl, did not testify that Enbridge has the required "Sudden and Accidental Insurance" Enbridge Br. at pg. 39. In fact the record supports the opposite conclusion.

Mr. Dybdahl, like the Corporation Counsel's Office, the Zoning Committee and the County Board were hamstrung by Enbridge's refusal to produce its insurance policies. However, the record supports the conclusion that Mr. Dybdahl's found that Enbridge had substantially more limited protection called "time element" coverage. R :8:209-211

Mr. Dybdahl painstakingly explained that they are two very distinct types of insurance coverage that are terms of art used in the insurance industry, and are not interchangeable. R: 8:210-211 Mr. Dybdahl's uncontroverted evidence clearly demonstrates that the more common "time element" clauses are in use today. Such coverage severely limits the pollution coverage in General Liability policies. Such coverage provides substantially less protection than the earlier expansive "sudden and accidental pollution liability insurance" clauses. The footnote below describes in more detail how "sudden and accidental insurance" clauses covered pollution

releases extending over decades so long as they were unexpected, while "time element" only covers releases detected within 30 days.[2]

Thus, what Mr. Dybdahl actually concluded is this:

> The Enbridge General Liability insurance policy contains Time Element pollution coverage in the General liability insurance policy. R. 8:211

This is further confirmed by the terms used in the permit which expressly state that a "time element exception to the pollution exclusion was currently in place". R. 8:135.

One example of Enbridge playing fast and loose with the facts is taking out of context statements in Mr. Dybdahl's report and by eliding quotations to suggest the opposite of what he stated. As an example:

"Mr. Dybdahl expressly stated that his report addressed the sudden and

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[2] Mr. Dybdahl's report explained that until about 1990, the insurance industry generally offered their General Liability insurance policies with a blanket exclusion for pollution damages. Beginning about 1970, to improve marketing, these general liability policies would restore a part of the coverage that those blanket pollution exclusions removed. These were referred to as "sudden and accidental pollution liability insurance" coverage. They were written in the form of a double negative (adding back part of something that had previously been subtracted).

The original understanding had been, to limit their cost, they would only cover pollution releases that were not only accidental but also, using the typical usage of the term "sudden and accidental pollution liability insurance", occur over a short period of time. However, in the 1980s, court decisions ruled that pollution releases extending for decades would be considered "sudden" if they were unexpected. That created major unexpected claims exposure, which led the industry to move to largely reduce the further reach of the limited exception to the exclusion.

The significant reductions in coverage in these new clauses, referred to as "Time Element" or "Time Limited" coverage, generally (i) limited coverage to releases that were discovered in the first 30 days, (ii) did not nor take longer than 90 days to be reported, and (iii) excluded property damage to adjoining homes, all of which had been covered under sudden and accidental pollution liability insurance coverage.

Since leaks into underground water supplies, for example, are unseen and can take decades to be detected, and since pipeline disasters have caused substantial property damage to adjoining homeowners, the distinction for the interests protected by the statute is significant and not merely technical. R. 8:208-211.

> accidental pollution liability coverage **that Enbridge has today**.'" Enbridge Br. at p. 39.

However, Mr. Dybdahl went on to say that Enbridge's policy "**is different than**" Sudden and Accidental Insurance. Here is the complete sentence, with the portion Enbridge omitted shown in bold type:

> "The 'sudden and accidental pollution liability coverage' that Enbridge has today **on the General Liability insurance policy <u>is different than</u> the General Liability insurance policies [with a sudden and accidental pollution liability insurance clause] the City of Edgerton had in place during the time the Superfund site was slowly leaching hazardous waste into the ground**." R. 8:209 (emphasis added)

These are not mere theoretical differences that define the coverage provided by Sudden and Accidental Insurance, but denied by "time element". In the real world context these distinctions are extraordinarily significant.

In 2015, just south of the city of Ft. McMurray in Alberta, the global center of operations for tar sands oil production, a brand new, double-walled pipeline burst open, leaking 1,323,000 gallons of tar sands oil that covered an area larger than two football fields with black goo. But, for more than three weeks, the leak went unnoticed by the industry's much ballyhooed auto detection systems (which only actually detect 5% of leaks), and by visual observation. R. 9:77

"Sudden and accidental pollution liability insurance" clauses, which include leaks that continue undetected for decades, would cover this type of accident. But, "time element" clauses, which expressly restrict coverage to accidents detected in 30 days, would not (had this undetected leak extended for just a few days longer). R. 8:209 and 8:212

C. The Corporation Counsel's Opinion Is Not a "Finding" And Not Entitled To Any Weight

Enbridge's reliance on the opinion of the Assistant Corporation Counsel is misplaced. The Corporation Counsel's Office admitted he never saw the policies. R. 55: 58-61. He has not been appointed to the Zoning Committee. He has not been elected to the Dane County Board. His interpretation of whether the statute applied was simply his opinion. That office is not vested with any authority to make such a finding let alone an admission on behalf of those bodies. Dane County's Ordinances provide that the only entity authorized to "make findings of fact" and issue conditional use permits for Dane County is the Zoning Committee, and the County Board hears appeals in which the Zoning Committee's action is "…deemed just and equitable.." unless reversed by three fourths of board members. §§10.255(2) (b) and (2) (j), D.C.O. That is consistent with the Circuit's reasoning, R. 55:15 and 60-62, and Enbridge has not challenged that limitation on who may make official reviewable findings for the County.

IV. THE CAMPBELLS SHOULD NOT BE BARRED FOR FAILING TO APPEAL THE PURPORTED COUNTY DECISION FINDING THAT ENBRIDGE HAD SUDDEN AND ACCIDENTAL INSURANCE BECAUSE THERE NEVER WAS SUCH A DECISION.

Enbridge finally argues that the Campbells cannot be heard on this issue because the Circuit Court's order, R. 51, states that the landowners failed to appeal Dane County's "determination" that Enbridge had Sudden and Accidental Insurance. Enbridge Br., at p. 36. The simple answer is that one cannot appeal

from a purported decision that was never made, as the foregoing conclusively demonstrates.

V. THE BUDGET BILL AND THE CONDITIONS ATTACHED TO THE CONDITIONAL USE PERMIT ARE CONTINUING DUTIES

Enbridge offers only a cursory defense to dispute Campbells' argument that the Budget Bill creates a continuing obligation to carry the Sudden and Accidental Insurance. It claims that principles of statutory construction support its position but offers no argument whatsoever to support that claim but for its naked assertion. Enbridge Br. at pp. 42-43.

Judicial precedent directs us to first examine the words of the statute at issue. *Rock Tenn Co. v. Labor & Indus. Review Comm 'n* ,2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904. An examination of the Budget Bill lends no support to Enbridge's claim that the requirement of Sudden and Accidental Insurance is anything less than a continuing obligation.

> A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability insurance.

Significantly the statute employs the terms "carries" and "includes" not "carried" and "included". There is simply nothing in the Budget Bill which supports the construction urged by Enbridge.

It also advances the nonsensical proposition that the Conditional Use Permit did not include a condition regarding future enforcement of the statutory

requirement. The plain language of the conditions impose a continuing obligation to impose the additional insurance at issue here:

> 6. Enbridge shall procure and maintain liability insurance as follows: $100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion (currently in place), and $25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total $125,000,000 of combined liability insurance.
>
> 7. The required General Liability Insurance and Environmental Impairment Liability Insurances shall meet the technical insurance specifications listed in Appendix A[3] of the insurance consultant's report, which is incorporated herein by reference.

If the plain language of the Conditions was not sufficient, §10.255(m) makes it clear that such conditions constitute continuing obligations and the failure to meet those conditions in the future subject the holder of a conditional use permit to an action for revocation. DCO §10.255(m)

Finally, Enbridge's argument that the continuing obligation is not reviewable in this certiorari proceeding and that review is limited to the record and cannot be expanded to include new issues raised on review is in error.

Initially, Campbells raised this issue front and center with the Circuit Court. R. 48. The issue is relevant to this proceeding because the Circuit Court erroneously found that Enbridge had secured Sudden and Accidental Insurance and struck the conditions entirely. By striking the conditions, the Circuit Court deprived the County and Campbells of the protections afforded by the conditions

[3] Appendix A listed specifications requiring an A.M. Best rating, naming the County as an additional insured, providing notice of cancellation to Dane County, and that Enbridge provide proof of insurance to the County on request. R. 8-168-169.

if Enbridge fails to maintain the "Sudden and Accidental Pollution Liability Insurance". Part of the relief that Campbells seek is the restoration of the conditions to the conditional use permit. Both the Budget Bill and the conditions impose a "continuing obligation" on Enbridge.

VI. ENBRIDGE FAILED TO MEET ITS BURDEN OF PROOF

Inasmuch as Enbridge has refused to turnover its insurance policy to either the Zoning Committee, or the Zoning Administrator, or to the County's insurance consultant, Mr. Dybdahl, or to the Corporation Counsel's office, or to the Dane County Board or to the Circuit Court [Campbells' Br. at pp. 20-23] it has utterly failed to demonstrate that it is entitled to the preemption provided for in the Budget Bill to override the Environmental Clean-Up Insurance Requirement Conditions. Enbridge cannot overcome the "presumption of validity" accorded to the County's actions. *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 367, 291 N.W. 745, 749, (1940).

VII. CONCLUSION

Although the future ability of counties to provide their taxpayers with complete financial protection from oil spills was extinguished by the Budget Bill, partial protection was left. Namely a prerequisite requirement that the pipeline company maintain, as a bare minimum, Sudden and Accidental Insurance, which is substantially less than environmental insurance, but substantially more than "time element."

Campbells request this Court to reverse the Circuit Court's grant of a Writ of Certiorari and order the immediate restoration of the Environmental Clean-up Insurance Requirement Conditions to the Conditional Use Permit, and reverse the Circuit Court's order dismissing their injunction action.

In the alternative, Campbells request this Court to remand the matter to the Circuit Court with instructions to remand to the Zoning Committee for a determination of whether Enbridge has met the predicate to the application of the Budget Bill statute applies; and if so to reconsider whether to grant the conditional use permit without the Environmental Clean-up Insurance Requirement Conditions.

Dated May 16, 2017.

Respectfully submitted:

Plaintiffs Appellants ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES and TIM JENSEN

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Section 809.19(8) (b) and (c) for a reply brief and appendix produced with a proportional serif font. The length of this brief is less than 3,000 words or, 2,965 words.

Patricia Hammel

CERTIFICATE OF SERVICE

The undersigned states, under oath, that he served the foregoing Reply Brief of the Plaintiff/Appellant, Robert and Heidi Campbell, Keith and Trisha Reopelle, James and Jan Holmes and Tim Jensen, by placing three (3) copies in an envelope addressed as indicated below, and depositing the same in the U.S. Mail at Madison, Wisconsin, proper postage prepaid, at approximately 5:00 p.m. on the _____ day of May 2017, to the following persons:

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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Reply Brief, which complies with the requirements of Section 809.19(12), Stats. I further certify that this electronic Reply Brief is identical in content and format to the printed form of the Reply Brief filed as of this date.

A copy of this Certificate has been served with the paper copies of this Reply Brief filed with the Court and served on all opposing parties.

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