

EXHIBIT B

FILED
06-28-2024
Anna Maria Hodges
Clerk of Circuit Court
2023CV007313

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STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY

CIVIL DIVISION

BRANCH 34

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT ET AL,

Plaintiff,

-vs-

CASE NO. 2023-CV-007313

MONSANTO COMPANY ET AL,

Defendant.

May 30th, 2024 EXCERPT OF THE ORAL RULING

PROCEEDINGS HELD BEFORE

THE HONORABLE GLENN H. YAMAHIRO

PRESIDING JUDGE

APPEARANCES:

TED A. WARPINSKI & M. ANDREW SKWIERAWSKI, Attorneys

at Law, appeared on behalf of the Plaintiff.

ERIK M. GUSTAFSON, Attorney at Law, appeared on

behalf of Involuntary Plaintiff Chubb Custom

Insurance Company.

ZACHARY TYREE, RUSSELL BALIKIAN, EMILY L. STEDMAN,

REEMA HOLZ, Attorneys at Law, appeared on behalf

of the Defendant.

Sarah C. Schramka, Official Court Reporter, RPR RMR.

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EXCERPT OF PROCEEDINGS:

THE COURT: Well, as you know, the legal standard here on a motion to dismiss is based on a failure to state a claim, and a motion to dismiss tests the legal sufficiency of the complaint. The primary case in Wisconsin is Data Key Partners versus Permira Advisers, LLC, 356 Wis. 2d 665. So in order to survive a motion to dismiss, the complaint must set out a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief. Importantly, the Court must accept as true all well-pleaded facts alleged in the complaint, along with all reasonable inferences from those facts. However, the Court is not required to accept legal conclusions contained in the pleadings: a formulaic recitation of the elements does not meet the standard.

The first issue here is the primary jurisdiction doctrine, which gives the Court discretion where there is also an agency potentially involved, such as in this case the

1 EPA and the DNR, the Court has a choice as to
2 whether to involve itself. Really, the key
3 decision here was Brookfield versus MMSD, 1992,
4 171 Wis. 2d 400, which was Justice Abrahamson's
5 exposition on -- well, that case of course was
6 municipalities challenging MMSD's use of
7 property based formula to allocate capital
8 cost, but the Court does talk about the proper
9 exercise in discretion. In particular, not to
10 really infringe on what these agencies were
11 designed to do, which is do a lot of fact
12 finding, and they have been empowered by the
13 legislature to do certain things. Primarily
14 the Court -- so the Court in that case found
15 that the Court should have left it to the
16 administrative agencies and other entities that
17 were responsible.

18 Additionally, there was a case,
19 Wisconsin Property Tax Consultants versus WMC,
20 from 2022, Wisconsin Supreme Court, and primary
21 jurisdiction was at issue; the question
22 regarding eligibility for property tax
23 exemptions for machinery tools and patterns.
24 In that case, the Court said that this was a
25 pure question of law. So it was an erroneous

1 exercise of discretion for the Court to
2 delegate it to the agency and not take it up
3 itself.

4 Here, we have a case regarding
5 Plaintiffs' costs associated with alleged
6 contamination and dredging regarding PCBs.
7 There is no reason here for the Court to defer
8 to the EPA or the DNR. This is a question of
9 determining whether or not there is liability.
10 If so, what are the damages? These are the
11 things the Courts are designed for. The EPA
12 and the DNR is not in business of establishing
13 what is or does not create liability and also
14 what is an appropriate measure of damages.
15 Really, the Plaintiff -- or I should say the
16 Defendants' brief doesn't spend a whole lot of
17 time on this.

18 Also, I don't want to leave out the
19 Chubb brief on this point regarding Basin H. I
20 think the statement that was made in that brief
21 was accurate and persuasive. Primary
22 jurisdiction doctrine does not preclude claims
23 as no administrative agency has taken
24 jurisdiction of responsibility for payment of
25 the clean up. If this were to become an issue

1 where there was a lot of technical expertise
2 that the Court was being dragged into, probably
3 try to find a way out of it because that is an
4 area where we have entities that are designed
5 to deal with these things. I am not persuaded
6 here that the primary jurisdiction doctrine
7 precludes the Plaintiffs' claims.

8 With regard to nuisance, I think under
9 Sunnyside Feed Company versus City of Portage,
10 222 Wis. 2d 461, if a nuisance is continuing,
11 the nuisance claim is not barred by a statute
12 of limitations. If it is permanent, then the
13 statute of limitation applies. I am citing
14 Bartleson versus United States, 96 F.3d 1270,
15 and a 9th Circuit decision from 1996. The
16 Court must determine whether the nuisance in
17 this case is classified as a continuing or
18 permanent nuisance. Obviously, we have had
19 kind of parallel trains running here regarding
20 the statute of limitations and the continuing
21 nuisance. I don't really think it is a failure
22 to respond here to the statute of limitations
23 arguments; rather, it is an assertion by the
24 Plaintiff that the nature of the continuing
25 nuisance here makes the statute of limitations

1 irrelevant.

2 A nuisance is generally considered to
3 be continuing if it can be discontinued or
4 abated, or if it is an ongoing or repeated
5 disturbance, such as a disturbance caused by
6 noise, vibration, or foul odor. If the
7 nuisance harm is ongoing, there is no
8 requirement that the liability creating conduct
9 be within any statute of limitations because,
10 until abated, each day is a new harm and a new
11 claim.

12 The Defendants have argued that the
13 contamination at issue is a permanent nuisance;
14 therefore, barred by the applicable statute of
15 limitations. Also relying on the Ends
16 (phonetic) decision today. As has been
17 referenced several times, the Defendants'
18 position has been that the alleged nuisance is
19 continuing only if the harm alleged is recurring
20 or worsening. They rely on the fact that
21 Pharmacia stopped manufacturing these PCBs in
22 1977, and that because the harm did not change
23 over time, the alleged nuisance cannot be said
24 to be continuing.

25 In Sunnyside Feed Company, which also

1 relied on the reasoning of *Arcade Water*
2 District versus United States, 940 F.2d 1265,
3 9th Circuit. In that case, the 9th Circuit
4 first concluded that chemical contamination of
5 soils by an enterprise that ceased operations
6 several years prior to the commencement of the
7 suit may nevertheless properly be considered a
8 continuing nuisance. The Court held that the
9 fact that the enterprise is no longer operating
10 is not material to the continuing nuisance
11 analysis.

12 Again, under the *Sunnyside* case, the
13 clarification that the appropriate factors to
14 consider in deciding whether a nuisance is
15 continuing are, number one, whether it
16 constitutes an ongoing or repeated disturbance
17 or harm. Number two, whether it can be
18 discontinued or abated. In this case,
19 Plaintiffs have alleged that the PCB
20 contamination at issue is both an ongoing harm
21 and it can be abated. Specifically, with
22 respect to the ongoing or continuing nature of
23 the harm, Plaintiffs have alleged that the
24 contamination of their property by PCBs is
25 continuing. With respect to whether nuisance

1 can be abated, the Plaintiffs have alleged that
2 the harms associated with the contamination
3 are, quote/unquote, reasonably abatable.

4 Taking these factors together, the
5 Court finds the Plaintiffs have alleged that
6 the nuisance at issue constitutes an ongoing
7 harm and can be abated. At this stage of the
8 proceedings, the Court must accept as true all
9 well-pleaded facts alleged in the complaint,
10 along with all reasonable inferences from those
11 facts.

12 The Ends case here with regard to the
13 wind turbines, the Court is going to draw a
14 distinction there based upon the environmental
15 damage here. I do think it is a little bit --
16 raises a question as to why that could not have
17 been found to be a continuing nuisance.
18 Obviously, it could just be taken down. It is
19 not really -- I think the authority that has
20 been cited here in other respects is more
21 persuasive. I think this is much more clearly
22 a claim for continuing nuisance based upon the
23 simple fact that -- that what is a continuing
24 nuisance every day is a new cause of action and
25 new harm. I believe that to be the case here

1 at least at the stage that we are at. So I do
2 believe that they have stated a claim for
3 nuisance.

4 Nuisance generally refers to the
5 invasion of either an interest in the use and
6 enjoyment of land or a common public right.
7 Again, we go back to the MMSD decision versus
8 City of Milwaukee, 277 Wis. 2d 635, which has
9 characterized a nuisance as a condition or
10 activity which unduly interferes with the use
11 of land or of a public place. Quoting
12 Physicians Plus Insurance Corporation versus
13 Midwest Mutual Insurance Company, 254 Wis. 2d
14 77. In nuisance, a cause of action is
15 predicated upon a particular type of injurious
16 consequence, not the wrongful behavior causing
17 the harm. After it is established that an
18 injurious consequence exists, the next step is
19 analyzing whether there is any
20 liability-forming conduct. Proof of the
21 underlying tortious conduct is an essential
22 element in a nuisance analysis and liability
23 for a nuisance may be based upon either
24 intentional or negligent conduct.

25 The Court first has to determine that

1 the Defendants have caused substantial injury
2 to the Plaintiffs. I believe that the Court of
3 Appeals has already concluded that toxic
4 chemicals that seeped into or latched onto a
5 Plaintiffs' property and contaminated the land
6 was the type of invasion, quote/unquote, that
7 would subject a party to liability under
8 nuisance. And that is under the Fortier
9 decision versus Flambeau Plastics Company, 164
10 Wis. 2d 639. The Plaintiffs have alleged that
11 PCB-laden sediment and other solid materials
12 deposit or accumulate in the sewer systems that
13 are owned by the Plaintiffs. They further
14 alleged that PCB is a toxic chemical, exposure
15 to which can cause a range of cancers.
16 Therefore, the Plaintiffs have alleged facts
17 that, if true, demonstrate the toxic PCBs have
18 seeped into or leached into Plaintiffs'
19 property. The Court does determine that the
20 invasion of PCBs onto Plaintiffs' property is
21 the type of invasion that would subject
22 Defendants to nuisance liability.

23 Obviously, the next step is to
24 determine whether the complaint alleges
25 liability-creating conduct. One is subject to

1 liability for a nuisance if, and only if, his
2 conduct is a legal cause of an invasion of
3 another's interest in land, and the invasion is
4 either intentional and unreasonable, or
5 unintentional and otherwise actionable under
6 the rules controlling liability for negligent
7 or reckless conduct. Again, based on the
8 Fortier decision. In this case, the Plaintiff
9 alleged a reckless or negligent invasion of
10 their land as the basis for liability under a
11 nuisance theory. Specifically, the Plaintiffs
12 have alleged the Defendants knew or should have
13 known of the dangers associated with PCBs, but
14 concealed this information while actively
15 marketing them, as set forth in paragraph 39,
16 43-44, 46-47 of the complaint. Based on that,
17 the Court does conclude that the complaint sets
18 forth facts that alleged liability-creating
19 conduct.

20 Plaintiffs have also stated a claim
21 for trespass. Trespass may be either be an
22 intentional intrusion or an unintentional
23 intrusion resulting from reckless or negligent
24 conduct or from an abnormally dangerous
25 activity. Again, as cited in the Fortier

1 decision. Here, the Plaintiffs do not allege
2 that Defendants intentionally intruded upon
3 their lands. Based on that, the Court is
4 looking at whether or not the Defendants could
5 be liable for an unintentional intrusion.

6 One who recklessly or negligently
7 enters land in the possession of another or
8 causes a thing to enter is subject to liability
9 to the possessor if the presence of the thing
10 upon the land causes harm to the land, which is
11 a portion of the Restatement of Tort Second at
12 Section 165. In *Fortier*, the Court of Appeals
13 determined that where compounds containing
14 certain volatile organic compounds had intruded
15 into the Plaintiffs' well water and the
16 Plaintiffs claimed that they personally and
17 their lands have been harmed by the intrusion,
18 the Plaintiffs were found to have stated a
19 claim for trespass.

20 I believe these facts are very similar
21 to the *Fortier* case. The Plaintiffs have
22 alleged that compounds containing PCBs have
23 intruded into sewers, soils, and sediments on
24 lands exclusively owned by Plaintiffs and that
25 this intrusion has caused harm to the land.

1 Based on that, the Court finds that the
2 Plaintiffs have stated sufficient claim for
3 trespass.

4 The next issue is strict product
5 liability for a design defect. At issue in
6 this case is whether the Plaintiffs have
7 alleged a strict liability claim for defective
8 design where the complaint alleges, number one,
9 the products are various PCBs. Number two, the
10 alleged design defect is the presence of PCBs.
11 Number three, the Defendants were manufacturers
12 of PCBs. A product is not defective if the
13 alleged defective condition arises from harmful
14 ingredients that are characteristic of the
15 product, pursuant to *Godoy ex rel. Gramling*
16 *versus EI du Pont de Nemours & Company*, 319
17 Wis. 2d 91. Holding that the design of a
18 product is not defective where removal of the
19 characteristic ingredient would transform it
20 into a different product.

21 I believe the Plaintiffs agree with
22 the general proposition that the defective
23 design cannot be the product itself.

24 Nevertheless, the Plaintiffs have argued that
25 the design of the PCBs was defective because

1 there existed other classes of PCBs that were
2 not as highly chlorinated as some PCBs
3 manufactured by the Defendants. The Court
4 finds that this argument fails. Plaintiffs
5 have argued that the fact that there were other
6 PCBs that differed in chemical structure means
7 that some of the PCBs were defectively designed
8 because PCBs with higher levels of chlorination
9 pose greater health and environmental dangers.
10 What Plaintiffs have failed to recognize is
11 that the chemical properties of PCBs with
12 higher chlorination levels, including the
13 health environmental dangers, are
14 characteristic of those PCBs and do not result
15 from a faulty design, but rather are the result
16 of the chemical properties of such compounds.

17 Therefore, the alleged condition of
18 increased health and enviromental dangers
19 arises from the chemical compound itself rather
20 than a defect in the design process. And based
21 on that, the Court will grant the Defendants'
22 motion to dismiss with respect to the
23 Plaintiffs' sixth cause of action for strict
24 products liability for design defect.

25 The Court will look at the fifth cause

1 of action next; claim for strict products
2 liability for failure to warn.

3 A manufacturer of a product has a duty
4 to warn consumers directly of the known or
5 knowable dangers associated with the use of its
6 products, under *Strasser versus Transtech*
7 *Mobile Fleet Service Incorporated*, 236 Wis. 2d
8 435. This duty exists whether or not the
9 product was properly designed.

10 In this case, the complaint alleges
11 the Defendants knew that PCBs were highly
12 toxic, highly persistent -- highly toxic,
13 paragraph 32, highly persistent, paragraph 38,
14 and risky when released in the environment,
15 paragraph 43. The complaint further alleges
16 that, despite knowing about these risks of use
17 of PCBs, Defendants did not warn consumers, the
18 public, or Plaintiffs of the risks of the PCBs,
19 and failed to instruct consumers and users on
20 safe methods for handling, using, and disposing
21 of PCBs that would either eliminate or reduce
22 discharges to the environment.

23 Courts in other jurisdictions have
24 allowed strict products liability claims for
25 the failure to warn of the risks posed by

1 certain products to proceed on the basis that
2 had a manufacturer warned its consumers of the
3 risks posed by the product when not disposed of
4 properly, the consumers may have acted
5 differently and taken more care to prevent
6 environmental exposure. I will cite Ryan
7 versus Greif Incorporated, 2023 WL 8828220 at
8 10, D.Mass., December 21st, 2023, as well as
9 Middlesex Water Company versus 3M Company, 2022
10 WL 16552920 at DNJ, October 31st, 2022.

11 Therefore, because Plaintiffs have alleged that
12 Defendants knew about the dangers associated
13 with the use and disposal of PCBs but took no
14 efforts to warn consumers of those risks
15 associated with PCBs, Plaintiffs' allegations
16 state a claim for failure to warn. To that
17 extent, the Defendants' motion is denied.

18 Moving to the indispensable parties
19 argument, Defendants have argued that the
20 Plaintiffs' complaint should be dismissed in
21 its entirety because Plaintiffs failure to join
22 indispensable parties mandates dismissal, under
23 Section 803.03, I am not going to read those
24 portions into the record. Suffice to say, it
25 is 803.03 (1) (3).

1 The indispensable inquiry is a
2 two-part test, under Dairyland Greyhound Park
3 Incorporated versus McCallum, 258 Wis. 2d 210.
4 First, the Court must determine whether EPA and
5 DNR are necessary parties for one of the
6 reasons set forth in Statute 803.03 (1). If
7 the Defendants do not establish the
8 requirements for EPA and DNR being necessary
9 parties under the statute, they cannot be
10 deemed indispensable under 803.03 (3), and that
11 is the end of the inquiry.

12 In this case, the Court finds that the
13 EPA and the DNR are not indispensable parties;
14 therefore, the claims should not be dismissed
15 for the failure to join them as parties. As
16 the Plaintiffs pointed out, the Defendants have
17 failed to explain what interest will be
18 impaired or impeded by the Plaintiffs' pursuit
19 of their claims given Plaintiffs' claims seek
20 compensation for costs incurred by Plaintiffs'
21 remediation efforts. The fact that other
22 parties, in particular the EPA and the DNR, are
23 also conducting remediation efforts has no
24 bearing on the costs incurred by the Plaintiffs
25 for their own efforts. Based on that, the

1 Court is determining that the EPA and the DNR
2 do not fit the definition of a necessary party
3 under 803.03 (1) (a).

4 The Court also is determining that
5 803.03 (1) (b) is not satisfied. Under 803.03
6 (1) (b), the person must claim an interest
7 relating to the subject of this action. There
8 is no indication in this case that either the
9 EPA or DNR has claimed any interest in this
10 action. Absent a claim of interest in the
11 action, they cannot be said to be necessary
12 parties. Because they cannot meet the
13 requirements for being a necessary party under
14 803.03 (1), then they cannot be deemed
15 indispensable under 803.03 (3), and that's the
16 end of the Court's inquiry.

17 Based on that, the Court finds they
18 are not necessary parties. So the motion to
19 dismiss is denied in all respects except the
20 strict liability ruling that the Court made.

21 I will ask Plaintiffs' counsel to
22 submit an order under the five-day rule.

23 I propose adjourning for about three
24 weeks to have a Zoom status to find out whether
25 or not you are going to make your first trip

1 upstream. If not, then we will engage in a
2 scheduling conference and move forward. Have a
3 safe trip back.

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