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## Howe v. Neenah Springs, Inc., 02-1657, 2003 Wisc. App. LEXIS 940 (Wisc. Ct. App. Oct. 2, 2003)

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incomplete information and allow amendment for resolving imperfections.

Since the 1987 statute contained three subsections, each describing when to allow amendment, Ecology asked the court to apply the statutory construction canon of *ejusdem generis*. The court declined because employing the canon required finding the other two subsections identified a class of amendments, and no class existed.

*Elizabeth Frost*

## WISCONSIN

**Howe v. Neenah Springs, Inc., 02-1657, 2003 Wisc. App. LEXIS 940 (Wisc. Ct. App. Oct. 2, 2003)** (affirming a judgment of the trial court that a bottler of water was not required to make royalty payments to well owners for the bottling of their well water upon learning that the well on the owners' former property did not conform to applicable governmental regulations).

In 1988, J. Ronald and Janice Howe ("Howes") built a bottling operation to package and sell drinking water from a well located on their property, and then sold the bottling operation and real estate to Alvin Klawitter. Pursuant to the sale agreement ("1988 Agreement"), the Howes would receive twenty years of royalty payments based on the amount of water sold. The Howes kept a mortgage on the property to secure royalty payments. In 1991, Klawitter sold the property to Neenah Springs, Inc. ("Neenah") and they amended the royalty agreement on March 28, 1991 ("1991 Agreement"). Under this new agreement, Neenah's obligation to pay royalties to the Howes immediately terminated "in the event the supply of water from the well stops or if water directly from the well does not meet standards for bottled water of the FDA or any other applicable governmental authority." In 1997, a Wisconsin state official found that the Howes' well did not meet the state's Department of Natural Resources ("DNR") requirements for high-capacity wells. Instead of risking sanctions by using the old well, Neenah decided to drill a new well and ceased paying royalty payments to the Howes on March 1, 1999, because it was no longer bottling water from their well. The new well water, however, came from the same aquifer.

In March of 2000, the Howes sued Neenah in the Circuit Court for Marquette County, Tennessee, alleging three causes of action for breach of contract. First, the Howes claimed that Neenah could not terminate its obligations under the royalty agreement because the water quality from the existing well complied with applicable DNR standards that applied to water discharged at a slower rate. More stringent state government standards applied to water from high-capacity wells. Second, the Howes argued that Neenah owed them

royalties from water discounted for promotional reasons. Finally, the Howes asserted that Neenah's termination of royalty payments equaled default on the mortgage that secured the royalty obligations. Neenah requested summary judgment, stating there was no breach because it was entitled to stop paying royalties after learning that the well did not comply with the applicable DNR standards. Neenah further argued that the agreement did not require royalties for discounted water sold as promotions, and, regardless of any such provision, this claim was barred by the doctrine of laches. The trial court granted summary judgment and the Howes appealed to the Fourth District Court of Appeals of Wisconsin, reasserting their first two claims.

On appeal, the Howes contended that the trial court erred when it determined that Neenah could drill a new well and terminate royalty payments upon notification that the existing well did not meet the applicable standards under the 1991 Agreement. The Howes argued that to determine the intent of the parties, the 1991 Agreement must be read contemporaneously with other contracts executed between themselves and Klawitter. However, the court found that the 1991 Agreement with Neenah contained an integration clause that supplanted provisions from the 1988 Agreement between the Howes and Klawitter pertaining to the royalties for water from the Howes' well. The court held a new contract consists of new terms and any terms of the original that were not altered by the modification. As the transfer altered the royalty terms, the court found that the trial court correctly limited its inquiry to the 1991 Agreement.

The court then considered whether the 1991 Agreement entitled Neenah to drill a new well and terminate royalty payments to the Howes. The Howes contended that (1) the water would have been fit for consumption had it been extracted from the well more slowly, (2) that they should have had an opportunity to fix the problem instead of Neenah having the sole discretion to provide a remedy, and (3) that Neenah breached its duty of good faith when it drilled a new well and stopped paying royalties. After evaluating the 1991 Agreement, the court found that regardless of the water extraction speed, the failure of the well to meet DNR specifications provided a valid basis for Neenah's ceasing the royalty payments, and that Neenah did have discretion to drill their own well. Also, the court found no implied duty of good faith from the 1991 Agreement requiring Neenah to give the Howes an opportunity to fix their well. The court stated, "where the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing."

The Howes further asserted that Neenah breached its contractual obligations regarding royalties for water distributed before March 1, 1999, and that the doctrine of laches did not bar their claim. To account for free promotional water, Neenah discounted entire invoices to represent water that was given away, but did not record the discounts given for particular sales. The Howes argued that this process led to discounted water, instead of free water, and therefore,

Neenah owed them royalties from this discounted water. Neenah asserted that the doctrine of laches precluded the Howes from bringing this action. The trial court determined that under the 1991 Agreement, the Howes received Neenah's quarterly sales records, and in 1995, were aware of potential problems with Neenah's compensation for water sales. However, by waiting until 1999 to bring a claim related to this activity, the Howes satisfied the doctrine of laches. Thus, the Howes were precluded from bringing this breach of contract claim, and the appeals court affirmed the trial court's summary judgment ruling for both breach of contract claims.

*David W. Hall*

## WYOMING

### **Wilson v. Lucerne Canal & Power Co., 77 P.3d 412 (Wyo. 2003)**

(holding court's procedural due process requirements met, concerning injunction and proceedings, where injunction merely reiterates known obligations under preexisting injunction, and holding that, where appellant has not met burden of producing evidentiary record, and record not otherwise available, court assumes findings at trial based on sufficient evidence).

In the Wyoming District Court for Goshen County, Lucerne Canal and Power Company ("Lucerne") filed for an injunction preventing Thomas and Helen Wilson ("Wilsons") from interfering with its easements on their land. During earlier litigation, between 1988 and 1990, the Wilsons filed a Consent to Entry of a Preliminary Injunction with the court. The parties settled the litigation without trial in 1990 through a consent decree, which contained a permanent restraining order restraining the Wilsons from interfering with Lucerne's easements. In 2002, Lucerne filed again for a restraining order, which the district court granted. The Wilsons appealed to the Wyoming Supreme Court, alleging procedural deficiencies and abuse of discretion on the part of the trial judge.

Lucerne was a private irrigation company that delivered water from the North Platte River to its members. Some of Lucerne's facilities lay on the Wilsons' land. According to the 1990 consent decree, Lucerne's easement and right-of-way for its canal and associated facilities dated to an 1894 federal grant, and ran with the land.

The original consent to preliminary injunction, the 1990 consent decree's permanent injunction, and the 2002 permanent injunction all enjoined the Wilsons from interfering in any manner with Lucerne's use of its easements, which included easements on the river and on a roadway. Each document ensured Lucerne full access to operate, maintain, and renovate both its easements and its facilities thereon for the purpose of making its water deliveries. By the beginning of litigation in 1988, the Wilsons had a history of interfering with