



THE IOWA LAWYER

April 2021 V81 N3



THE ETHICS ISSUE

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WHEN YOU LACK STANDING, YOUR CASE SINKS

By Brandon M. Schwartz, Esq. and Maya Mallavarapu

It is axiomatic that to file a lawsuit, the plaintiff(s) must have standing. A rarely discussed standing argument recently reached the Iowa Court of Appeals in *Mallavarapu, et al. v City of Cedar Falls, et al.*, 2020 WL 7383115 (Iowa Ct. App. 2020).

Calling themselves the ‘pond scum neighbors,’ this band of homeowners sought to force the City of Cedar Falls and a local property association to clean up the detention basin abutting each of their houses. The basin had become infected with cyanobacteria and was a health hazard to the neighbors, the neighborhood, pets and those downstream.

The court of appeals rejected their claim holding they lacked standing to enforce the maintenance agreement and stating they were not intended

beneficiaries of the maintenance agreement. What is the difference between an intended beneficiary and an incidental beneficiary and why does one, but not the other, have standing?

EPA GUIDELINES

The United States Environmental Protection Agency (“EPA”) requires cities, here the City of Cedar Falls, to have a permit related to the discharge of stormwater. Stormwater is simply surface water from heavy rains or snowfalls. With land development and increases in impervious cover altering the hydrologic response of local watersheds and increases in stormwater runoff rates and volumes, there has been an increase in the quantities of water-borne pollutants. As a result, cities utilize detention basins to help protect local water resources from degradation and to regulate stormwater.

The City of Cedar Falls adopted Ordinance No. 2718 which was “applicable to all surface waters” in the city. The ordinance, in turn, adopted the Iowa Stormwater Management Manual which was a collaborative publication between the Iowa Department of Natural Resources and The Center for Transportation Research and Education at Iowa State University. The manual provides maintenance requirements for detention basins to ensure that they are serving their two main purposes: 1) flood control, and 2) pollutant control. The city and association also had a maintenance agreement requiring specific maintenance obligations to ensure that the detention basin functionally served its two main purposes.

CYANOTOXINS

There was no dispute here that the city and the association conducted absolutely no maintenance on the detention basin abutting the ‘pond scum neighbors.’ The basin lost more than 60 percent of its volume and became infected with dangerous bacteria. Cyanobacteria (blue-green algae) are prokaryotic organisms which are known as one of earth’s pioneer organisms. They are considered to be the main

producers of oxygen released into the atmosphere. Cyanobacteria multiply quickly in surface waters, especially in optimal conditions.

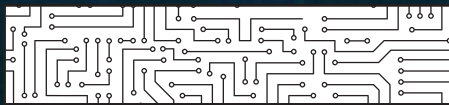
However, when they reproduce, they form blooms and these blooms can be harmful to humans and other organisms due to the fact that cyanobacterial species produce toxic metabolites otherwise known as cyanotoxins. The majority of the time, humans are exposed to cyanotoxins orally meaning through contaminated drinking water or contaminated foods. However, it is also possible for humans to be exposed to cyanotoxins through inhalation.

Not only can cyanobacterial toxins enter the human body orally, but they can also enter the human body through a parenteral route of exposure. For instance, cyanobacteria-contaminated surface water has been used for hemodialysis, increasing the amount of cyanotoxins in the human body. Certain types of cyanotoxins can cause damage to the kidneys, spleen, heart and other organs. The time-frame when these effects could take place is currently unknown as such negative effects could occur within a few minutes or even a few days.

Because of the significant negative health impact to their families, their pets, themselves and those who come in contact with the detention basin, the ‘pond scum neighbors’ filed suit in Black Hawk County District Court requesting the city and the association complete the agreed-upon maintenance on the detention basin pursuant to the maintenance agreement. Their case was sunk by the court of appeals.

INTENDED VS. INCIDENTAL BENEFICIARIES

To file suit for breach of a contract, you must either be a party to the contract or an intended beneficiary of the contract. The difference between an intended beneficiary and an incidental beneficiary is nuanced and not well-developed. Iowa adopted the Restatement (Second) of Contracts, § 302 in *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216 (Iowa 1988). The key difference



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between an incidental beneficiary and an intended beneficiary is the duty owed to the third-party by the contracting parties. But oftentimes the performance of a contract will impact third parties. So how do you tell the difference between intended and incidental beneficiaries?

Luckily, the restatement provides a helpful example. The operator of a chicken processing and fertilizer plant contracts with a municipality to use its sewage system. With the purpose of preventing harm to downstream homeowners, the municipality obtains a promise from the operator to remove specified types of waste from its deposits in the system. In this example, the downstream homeowner is an intended beneficiary and would have standing to enforce the contract at issue.

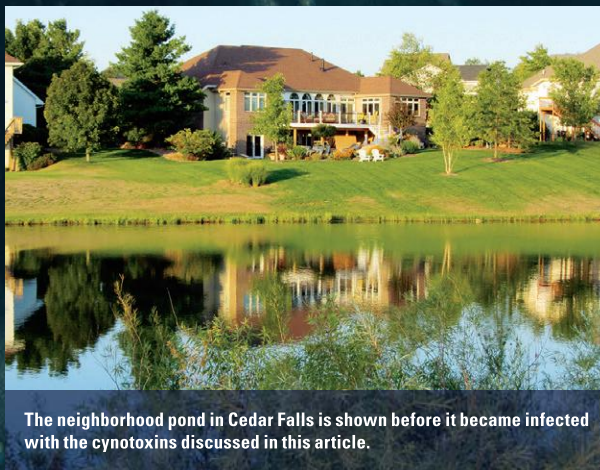
Thus, as the plaintiffs all abut the detention basin, the purpose of the detention basin is to control flooding (thereby protecting the homeowners' land) and pollution (thereby protecting the homeowners' health), the plaintiffs in this case clearly had standing, right? Wrong. While the district court held the plaintiffs had standing, and notwithstanding that one of the plaintiffs lost property due to flooding, they all lost property value, and their health was at risk, all facts which were undisputed, the court of appeals held that the plaintiffs were merely incidental beneficiaries and had no standing to enforce the maintenance agreement. Case closed. The cyanotoxins live to grow and spread another day.

IMPLICATIONS

'So what' you may ask. What is the big deal? From an environmental standpoint, the court of appeals' decision results in pollutants continuing to impact the plaintiffs and those who walk, live and play around the basin, but

also those who come in contact with the Cedar River. The detention basin drains into the river and ultimately the river that the Cedar River flows to, the Mississippi River. Hundreds of thousands, if not millions, of people per year come into contact with this infected water. The decision also jeopardizes the plaintiffs' property; with over 60 percent of the volume lost, the basin does not drain as it should and has already flooded causing property loss.

From a legal standpoint, the decision creates substantial ambiguity as to who is an intended beneficiary. Where is the distinction between the example given in the restatement and the plaintiffs here? The court of appeals even cited the illustration in its decision, but still found the 'pond scum neighbors' case was sunk. From this biased opinion (one of the authors was trial and appellate counsel, the other is a much smarter high school student whose house abuts the detention basin), the court of appeals' decision creates substantial flux in this underdeveloped area of law.



The neighborhood pond in Cedar Falls is shown before it became infected with the cyanotoxins discussed in this article.



This photo reflects the current state of the infected pond.



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