

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2485

Cir. Ct. No. 2012CV61

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KRIST OIL CO., A MICHIGAN CORPORATION,

PLAINTIFF-APPELLANT,

v.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Iron County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Krist Oil Company, A Michigan Corporation, appeals a summary judgment dismissing its action against the Wisconsin Department of Transportation (“the Department”). Krist argues the circuit court

erred by dismissing its suit as untimely. We reject Krist's arguments and affirm the judgment.

BACKGROUND

¶2 The Department condemned a portion of Krist's property in 2005 and took physical possession of the property on April 4, 2006. Although the parties settled on an amount of compensation for the taking, they disagreed about how much Krist should receive for relocation expenses pursuant to WIS. STAT. §§ 32.195 and 32.20.¹

¶3 On or about June 10, 2008, Krist submitted a claim to the Department for \$179,266 in relocation assistance. On April 1, 2009, the Department allowed a portion of the claim, leaving approximately \$172,000 in dispute. Krist appealed that decision to the Department, and it affirmed its award on September 2, 2009. The award was again affirmed on appeal to the Department of Commerce ("the Commerce Department") in a March 29, 2010 decision. A subsequent mediation attempt failed and Krist filed suit in the circuit court. The court dismissed that action with prejudice based on Krist's failure to properly serve its summons and complaint upon the State.

¶4 On appeal, we affirmed that part of the order dismissing the lawsuit, but remanded the matter with directions to determine whether the dismissal should have been with prejudice. *See Krist Oil Co. v. DOT*, No. 2011AP763, unpublished slip op. (WI App May 15, 2012). Although the Department

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

alternatively argued that the statute of limitations had expired, thus barring Krist from re-filing suit, we declined to address that issue, as the parties' respective arguments were not made in the circuit court. *Id.*, ¶3.

¶5 On remand, the circuit court determined the dismissal should have been without prejudice and, on August 29, 2012, Krist filed the underlying action.² The Department moved for summary judgment on the ground that the lawsuit was not timely filed. The circuit court dismissed the action as untimely and this appeal follows.

DISCUSSION

¶6 We review a grant of summary judgment independently, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 Under WIS. STAT. §§ 32.19 and 32.195, owners can recover relocation benefits when a condemning authority acquires the owner's property for a public purpose. WISCONSIN STAT. § 32.20 sets forth a procedure for claiming these benefits, and provides, in relevant part:

Claims for damages itemized in ss. 32.19 and 32.195 shall be filed with the condemnor carrying on the project through which condemnee's or claimant's claims arise. All such claims must be filed after the damages upon which they are based have fully materialized but not later than 2 years after

² Although otherwise identical to its earlier action, Krist's second suit sought approximately \$2,500 less in relocation assistance because it had been credited an additional payment that was earlier omitted as a result of clerical error.

the condemnor takes physical possession of the entire property acquired or such other event as determined by the department of commerce by rule. If such claim is not allowed within 90 days after the filing thereof, the claimant has a right of action against the condemnor carrying on the project through which the claim arises. Such action shall be commenced in a court of record in the county wherein the damages occurred.

“[P]rior to commencing court action against the condemnor under s. 32.20,” a condemnee may petition the Commerce Department “for review of his or her complaint.” WIS. STAT. § 32.26(5).³ The Commerce Department “may conduct an informal review of the situation and attempt to negotiate an acceptable solution.” *Id.* “If an acceptable solution cannot be negotiated within 90 days, [the Commerce Department] shall notify all parties, and the [condemnee] may then proceed under s. 32.20.” This informal review procedure “is not a condition precedent to the filing of a claim and commencement of legal action pursuant to s. 32.20.” *Id.*

¶8 Citing *Pinczkowski v. Milwaukee County*, 2005 WI 161, 286 Wis. 2d 339, 706 N.W.2d 642, the Department argued, and the circuit court agreed, that Krist opted to pursue an administrative appeal of the department’s determination and then sought judicial review of that decision. In *Pinczkowski*, our supreme court outlined the options available to a condemnee seeking to challenge a condemnor’s decision on a relocation assistance claim. *Id.*, ¶67. Like Krist, Pinczkowski petitioned the Commerce Department for review of the

³ References to the “department of commerce” in WIS. STAT. §§ 32.20 and 32.36 were replaced with references to the “department of administration” in 2011.

condemnor’s decision on her relocation assistance claim.⁴ *Id.*, ¶60. After the Commerce Department affirmed the condemnor’s decision, Pinczkowski filed suit in the circuit court under WIS. STAT. § 32.20. *Id.* On appeal, our supreme court determined that because Pinczkowski opted to seek initial review with the Commerce Department under WIS. STAT. § 32.26(5), it would review the Commerce Department’s determination—not that of the circuit court. *Id.*, ¶¶68-69. Concluding *Pinczkowski* was “procedurally nearly identical” to Krist’s case, the circuit court determined that Krist’s § 32.20 action was one for review of the Commerce Department’s decision.

¶9 Where, as here, a statute does not establish a deadline for seeking judicial review of an administrative decision, “courts have established six months as the ‘default limitation.’” *Habermehl Elec., Inc. v. DOT*, 2003 WI App 39, ¶21, 260 Wis. 2d 466, 659 N.W.2d 463. The *Habermehl* court reasoned that “when a statute does not prescribe the time within which the right to review must be exercised, that right must be exercised within a reasonable time, and six months has been established as reasonable.” *Id.* Because Krist’s suit was filed more than six months after the Commerce Department’s decision, the court dismissed the action as untimely.

¶10 Krist argues the circuit court erred by concluding its suit was subject to a six-month statute of limitations, as it did not seek judicial review of the underlying administrative decision but, rather, initiated an original circuit court

⁴ Krist asserts *Pinczkowski* is distinguishable because the condemnee in that case sought relocation assistance under WIS. STAT. § 32.19, while Krist sought assistance under WIS. STAT. § 32.195. We conclude this is a distinction without a difference, as both cases involve a claim for itemized damages under WIS. STAT. § 32.20. As noted above, § 32.20 provides the procedure for claims for damages itemized in §§ 32.19 and 32.195.

action governed by the six-year statute of limitations set forth in WIS. STAT. § 893.93(1)(a). We assume, without deciding, that even applying the six-year statute of limitations, Krist’s suit was properly dismissed as untimely. See *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (we decide cases on narrowest possible grounds).

¶11 WISCONSIN STAT. § 893.93(1)(a) provides that an action upon a liability created by statute “when a different limitation is not prescribed by law” must be commenced within six years after the cause of action accrues. Krist contends a cause of action “accrues when a condemnor does not allow a claim for payment.” We are not persuaded. As noted above, Krist insists it did not seek judicial review of the underlying administrative decision but, rather, initiated an original circuit court action. If Krist was not seeking review of the administrative decision, then that decision could not be the trigger for commencing the six-year statute of limitations. We are persuaded by the Department’s argument that the cause of action accrued on April 4, 2006—the date the Department took physical possession of the property.⁵ Because the underlying suit was filed more than six years after Krist’s cause of action accrued, the circuit court properly dismissed the action as time-barred.⁶

⁵ Krist concedes the Department’s argument by failing to file a reply brief. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

⁶ The Department contends Krist’s initial claim for relocation assistance was also untimely under WIS. STAT. § 32.20, which requires such a claim to be filed with the condemnor “not later than 2 years after the condemnor takes physical possession of the” property. As noted above, the Department took possession of the property in April 2006 and Krist filed his initial claim for relocation assistance with the Department in June 2008. Krist again concedes the argument by failing to submit a reply brief. See *Charolais*, 90 Wis. 2d at 109.

¶12 Krist alternatively seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced “that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” Krist contends the real controversy has not been tried based “on procedural grounds that are questionable, at best.” Krist cites no authority supporting the application of this statute in this case. Further, an appellate court will exercise its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Because Krist’s action was properly dismissed as time-barred, this matter does not constitute an “exceptional case” warranting discretionary reversal.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

