COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3266 **Cir. Ct. No. 2003CV9524**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CITY OF MILWAUKEE POST 2874,
VETERANS OF FOREIGN WARS
OF THE UNITED STATES,

PLAINTIFF-APPELLANT,

V.

REDEVELOPMENT AUTHORITY OF
THE CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. The City of Milwaukee Post 2874, Veterans of Foreign Wars of the United States appeals an order dismissing its claim for relocation

benefits in an eminent-domain proceeding initiated by the Redevelopment Authority of the City of Milwaukee. Post 2874 contends that the trial court erred when it concluded that: (1) Post 2874's comparable-replacement-property claim was barred under the doctrine of claim-preclusion, and (2) the $50,000 limit on business-replacement damages under WIS. STAT. § 32.19(4m)(a) is constitutional.[1] We affirm.

I.

¶2 This is the latest in a series of appeals stemming from the Redevelopment Authority's acquisition by eminent domain of property on which Post 2874 leased 5,250 square feet in a 113,000 square-foot hotel on West Wisconsin Avenue in Milwaukee. Under Post 2874's ninety-nine-year lease, it paid one dollar per year in rent. The lessor paid the real estate taxes, and provided heat, air conditioning, and maintenance. It also redecorated every seven years.

¶3 The Redevelopment Authority started condemnation proceedings under WIS. STAT. § 32.09(5) in the late 1990's. In January of 2001, it offered

[1] WISCONSIN STAT. § 32.19(4m)(a) provides, as material:

> **(4m)** BUSINESS OR FARM REPLACEMENT PAYMENT. (a) *Owner-occupied business or farm operation*. In addition to amounts otherwise authorized by this subchapter, the condemnor shall make a payment, not to exceed $50,000, to any owner displaced person who has owned and occupied the business operation, or owned the farm operation, for not less than one year prior to the initiation of negotiations for the acquisition of the real property on which the business or farm operation lies, and who actually purchases a comparable replacement business or farm operation for the acquired property within 2 years after the date the person vacates the acquired property or receives payment from the condemnor, whichever is later.

$440,000 to the then-owner of the property, Maharishi Vedic University, and to Post 2874 for the fair market value of the property and its improvements. *See* WIS. CONST. art. I, § 13 ("The property of no person shall be taken for public use without just compensation therefore."); § 32.09(5)(a) ("condemnor shall pay the fair market value of the property taken"). After a hearing on the University's and Post 2874's motion for an order apportioning the damage award, the trial court, the Honorable Michael P. Sullivan, presiding, awarded $140,000 to the University for its interest in the parking lot and personal property in the hotel, and $300,000 to Post 2874 for the value of its leasehold interest.

¶4 In February of 2001, the Redevelopment Authority told Post 2874 that it was also entitled to relocation assistance under the Wisconsin statutes, including the statutory maximum of $50,000 for an owner-occupied business, the statutory maximum of $10,000 for re-establishment expenses, and actual and reasonable moving expenses. *See* WIS. STAT. § 32.19(3)(a), (4m).

¶5 Post 2874 challenged the $300,000 award, claiming that its interest in the property should be valued commensurate with its leasehold interest, which would have, of course, encompassed its extremely valuable right to pay only one dollar per year in rent. The Redevelopment Authority disagreed, and contended that the value of the property should be determined as a whole under the unit rule. *See* ***Green Bay Broad. Co. v. Redevelopment Auth. of Green Bay***, 116 Wis. 2d 1, 12, 342 N.W.2d 27, 32 (1983) (unit rule requires "that improved real estate be valued in respect to its gross value as a single entity as if there were but one owner"). In May of 2002, Judge Sullivan determined that the fair market value of the property was to be determined as a whole under the "unit rule":

> I agree with the [Redevelopment Authority's] argument that the valuation is for the fair market value of the

> property rather than the VFW's lease since the Authority instituted a total taking of the property. The fair market value may be substantially less than the value of the lease. Nevertheless, sec. 32.09(5)(a) of the Wisconsin Statutes mandates that, in eminent domain proceedings, the determination of just compensation where there is a total taking be based on "… the fair market value of the property taken." Fair market value has, many times, been defined as the amount that can be realized in a sale by a willing but unforced seller to a willing but unobligated buyer. Moreover, property taken by eminent domain is valued as a single unit as opposed to having each interest in the property valued separately. This is known as the "unit rule" and is currently the law in Wisconsin. Therefore, [the Redevelopment Authority] should value the property as a single unit, using fair market value as the applicable standard. I acknowledge the harsh result to the VFW, but the statutory and case law is clear as to how the valuation is to be done.

In a July 2002, order, the trial court directed the Milwaukee County Condemnation Commission "to determine the fair market value of the property taken as a whole."

¶6 In the meantime, in August of 2001, the Redevelopment Authority sought a writ of assistance for the property. The trial court, the Honorable Maxine A. White, presiding, granted the writ in March of 2002, concluding that the Redevelopment Authority had, among other things, made available to Post 2874 a comparable replacement property. *See* WIS. STAT. § 32.05(8)(b) ("The circuit court shall grant the writ of assistance if all jurisdictional requirements have been complied with, if the award has been paid or tendered as required and if the condemnor has made a comparable replacement property available to the occupants.").

¶7 Post 2874 appealed both the March and July 2002, orders. In an unpublished decision, we upheld the trial court's July of 2002 order applying the unit rule. *See* ***City of Milwaukee Redev. Auth. v. Veterans of Foreign Wars Post 2874***, Nos. 02-1035, 02-1880, unpublished slip op. at 4–8 (WI App Sept. 30,

2003). We did not, however, address the March of 2002 writ-of-assistance order because Post 2874 conceded that the appeal was moot because the building had been razed. ***Id.***, Nos. 02-1035, 02-1880, unpublished slip op. at 3–4. We agreed, noting that although we were dismissing the appeal from Judge White's order granting the writ of assistance, we would, nevertheless, "address VFW's arguments in [Judge White's] case to the extent that they correspond to the arguments VFW presents in" the appeal from Judge Sullivan's order. ***Id.***, Nos. 02-1035, 02-1880, unpublished slip op. at 4 n.3. This was in accord with the request by Post 2874 in their appellate brief in the appeal from Judge Sullivan's order that we "should decide the underlying issue of whether the VFW was and is entitled to comparable replacement property or is limited to nominal relocation benefits of $50,000, reestablishment costs of $10,000 and actual moving costs." Reply Brief of Plaintiff-Appellant at 6 n.1, ***Veterans of Foreign Wars Post 2874***, Nos. 02-1035, 02-1880, unpublished slip op. (No. 02-1880).

¶8 After the trial court, the Honorable Jeffrey A. Kremers, presiding, issued the raze order in April of 2003, Post 2874 filed a claim for relocation benefits under WIS. STAT. § 32.20, estimating that the cost of acquiring a site, constructing a new building, and paying future taxes, maintenance, and utilities would be approximately $1,202,500, or $902,500 more than the $300,000 condemnation award.

¶9 When the Redevelopment Authority did not act on Post 2874's relocation-benefits claim, Post 2874 appealed to the Department of Commerce, which denied the appeal. In October of 2003, Post 2874 went back to court, claiming that: (1) the Redevelopment Authority "failed to provide comparable replacement property," and (2) the $50,000 limit to the owner-occupied business-relocation benefit was unconstitutional. *See* WIS. STAT. § 32.19(4m)(a).

¶10 The trial court, the Honorable Francis T. Wasielewski, presiding, granted the Redevelopment Authority's motion for summary judgment, concluding that: (1) the comparable-replacement-property claim was barred under claim-preclusion because it had been decided by the trial court's May of 2002 order granting the writ of assistance, and (2) the $50,000 limit on owner-occupied relocation benefits was constitutional. We address each claim in turn.

II.

¶11 We review a trial court's decision to grant summary judgment *de novo*, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2).

A. *Comparable Replacement Property.*

¶12 Post 2874 seeks replacement property "comparable" to its leasehold interest, which, as we have seen, it values as encompassing its right to pay only one dollar per year in rent. We agree with Judge Wasielewski that this contention is barred by claim-preclusion.

¶13 Claim-preclusion makes a final adjudication on the merits in a prior action a bar to later actions between the same parties as to all matters that were or could have been litigated in the earlier action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). Wisconsin uses a transactional analysis to determine whether to apply claim-preclusion to a second

action between the same parties, as is the case here. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 311, 334 N.W.2d 883, 886 (1983) ("'The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories.'") (quoted source omitted). Insofar as Post 2874 did not specifically argue before Judge Sullivan that its one-dollar-per-year rental agreement entitled it to some $900,000 more than the $300,000 awarded to it by Judge Sullivan, it could have done so. Thus, under claim-preclusion principles it may not do so now. Moreover, the comparable-replacement-property issue was raised before Judge White during the writ-of-assistance proceedings. Judge White ruled, as a predicate to granting the writ, that the Redevelopment Authority *did* offer Post 2874 comparable replacement property, despite Post 2874's leasehold right to pay only one dollar per year in rent. Post 2874 was, therefore, free to argue on the appeal from Judge Sullivan's order the very issue it sought to have Judge Wasielewski decide.[2]

B. *Constitutionality of WIS. STAT. § 32.19(4m)(a).*

¶14 Post 2874 claims that the $50,000 limit on business-replacement damages under WIS. STAT. § 32.19(4m)(a) violates article 1, section 13 of the Wisconsin Constitution, and relies on ***Luber v. Milwaukee County***, 47 Wis. 2d

[2] ***City of Milwaukee Redevelopment Authority v. Veterans of Foreign Wars Post 2874***, Nos. 02-1035, 02-1880, unpublished slip op. (WI App Sept. 30, 2003), noted that it was not deciding the constitutional issue left open by ***Dotty Dumpling's Dowry, Ltd. v. Community Development Authority of Madison***, 2002 WI App 200, 257 Wis. 2d 377, 651 N.W.2d 1. ***Veterans of Foreign Wars Post 2874***, Nos. 02-1035, 02-1880, unpublished slip op. at 8. Although Post 2874 on this appeal challenges, as we discuss below, the constitutionality of the $50,000 cap enforced by WIS. STAT. § 32.19(4m)(a), it does not here raise the constitutional issue left open by ***Dotty Dumpling's***.

271, 177 N.W.2d 380 (1970).[3] ***Luber*** held unconstitutional a statute that limited a landlord's recovery for the loss of its rental income-stream. ***Id.***, 47 Wis. 2d at 283, 177 N.W.2d at 386. Post 2874 claims that ***Luber*** applies to this case because the "limitations on rent loss recovery … are generically identical to the [$50,000] limitation in Wis. Stat. § 32.19(4m)." We disagree.

¶15 We rejected this argument in ***Hasselblad v. City of Green Bay***, 145 Wis. 2d 439, 427 N.W.2d 140 (Ct. App. 1988), where the property owners, like Post 2874, relied on ***Luber*** to claim that the $50,000 limit on business-replacement damages under WIS. STAT. § 32.19(4m)(a) violated article 1, section 13 of the Wisconsin Constitution. ***Hasselblad***, 145 Wis. 2d at 442, 427 N.W.2d at 141. As material, ***Hasselblad*** distinguished ***Luber***, noting that "[r]ental losses bear a direct relationship to fair market value that business replacement expenses do not." ***Hasselblad***, 145 Wis. 2d at 444, 427 N.W.2d at 142. We are bound by ***Hasselblad***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189–190, 560 N.W.2d 246, 256 (1997) ("court of appeals may not overrule, modify or withdraw language from a previously published decision').

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[3] Post 2874, in its October 2003 complaint, also claimed that WIS. STAT. § 32.19(4m)(a) violated the Just Compensation Clause of the Fifth Amendment to the United States Constitution. It does not renew this claim on appeal.