COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1523 **Cir. Ct. No. 2014CV1482**

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

VINCENT MILEWSKI AND MORGANNE MACDONALD,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF DOVER, BOARD OF REVIEW FOR THE TOWN OF DOVER AND GARDINER APPRAISAL SERVICE, LLC, AS ASSESSOR FOR THE TOWN OF DOVER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 REILLY, P.J. Vincent Milewski and Morganne MacDonald (Plaintiffs) seek a declaration that Wisconsin law on property tax assessments and

appeals is unconstitutional. Plaintiffs filed suit against the Town of Dover, the Board of Review for the Town of Dover, and Gardiner Appraisal Service, LLC, (collectively, Defendants) for violating Plaintiffs' constitutional and statutory rights. Plaintiffs appeal an order of the circuit court denying Plaintiffs' partial motion for summary judgment, granting Defendants' motions for summary judgment, and dismissing all claims against Defendants. We affirm.

BACKGROUND

¶2 The facts are straightforward and undisputed. Plaintiffs own a home in the Town of Dover (Town). In 2013, the Town performed a new assessment of all real property within the Town for the 2013 tax year. Gardiner Appraisal Service, LLC (Gardiner), a private entity engaged by numerous local governments across Wisconsin, was hired to perform property tax assessment services. In Wisconsin, "[r]eal property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under [WIS. STAT. §] 73.03(2a)[1] from actual view or from the best information that the assessor can practicably obtain." WIS. STAT. § 70.32(1). The Wisconsin Property Assessment Manual (WPAM) provides that "[i]n the case of real property, actual view requires a detailed viewing of the interior and exterior of all buildings and improvement and the recording of complete cost, age, use, and accounting treatments."

¶3 To facilitate the property tax assessment, Gardiner sent a notice to Plaintiffs stating, "We must view the interior of your property for the Town wide

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

revaluation program which is in progress. An assessor will stop by to view your property on Tues, Aug 20 at 6:10 PM." On August 20, 2013, Plaintiffs denied the Gardiner representative entry into the interior of their home, and the representative left without completing an inspection. On October 4, 2013, Gardiner sent a certified letter to Plaintiffs indicating,

> We have not yet viewed the interior of your buildings located in the Town of Dover … because you have refused us entry. If you would like to have us view your property for the revaluation please call our office … to find out when the assessor would be available to view the property. If you fail to schedule an appointment your property will then be assessed according to the Wisconsin State Statutes provided below.

The letter referenced the relevant portions of WIS. STAT. §§ 70.32(1) and 70.47(7)(aa).

¶4 Plaintiffs responded with a letter to the Town, arguing that "interior home inspections are not legally required for a revaluation" and that Plaintiffs "have not refused a 'reasonable' request to view our property by refusing to allow an unknown stranger entry into our private and secure residence." The letter made clear that Gardiner would not be allowed to view the interior of the premises, but Plaintiffs would permit Gardiner to "'view' the property from the exterior." An interior viewing of Plaintiffs' property never occurred as part of the 2013 revaluation.

¶5 Without the benefit of an interior viewing, Gardiner valued the total property at $307,100, a 12.12% increase from the previous assessment of $273,900. According to Gardiner, it reached this figure after considering (1) the possibility that Plaintiffs remodeled over the past nine years, which had not been disclosed or could not be verified; (2) its inability to evaluate "if the effective age of the home increased or decreased"; (3) the "reasonable assumption that homes in

which no inspection is permitted will have less increase in effective age than average"; (4) "that it is not fair to assume that there have been no improvements for any home where access has been denied"; (5) that assessed values of many homes had increased in 2013; and (6) "a thirteen percent increase in value from 2004 to 2013 is not uncommon."

¶6 On November 14, 2013, Plaintiffs filed a formal objection to their assessment with the Town. On November 25, 2013, Plaintiffs attended the Board of Review for the Town of Dover (BOR) hearing, seeking to object to the assessment of their property. Finding that Plaintiffs had refused a reasonable request of the assessor to view the property, the BOR rejected Plaintiffs' request. After consulting with the Wisconsin Department of Revenue, the BOR determined that Plaintiffs had waived their appeal rights under WIS. STAT. § 70.47(7)(aa).

¶7 Under WIS. STAT. ch. 70, property owners have the right to object to tax assessments before the local board of review. WIS. STAT. § 70.47(7). Section 70.47(7)(aa), however, places an important restriction on that right. Under § 70.47(7)(aa),

> No person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property.

Further, in order to challenge a tax assessment to the circuit court, the property owner must have first complied with all board of review requirements. WISCONSIN STAT. § 74.37(4)(a) provides that "[n]o claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under [§] 70.47 … have been complied with." *See also* ***Clear Channel Outdoor, Inc. v. City of Milwaukee***, 2011 WI App 117, ¶15, 336

Wis. 2d 707, 805 N.W.2d 582 (finding that exhaustion of administrative remedies before the board of review is required). Since Plaintiffs were unable to challenge their assessment before the BOR, Plaintiffs filed a complaint against Defendants in circuit court, arguing that the Wisconsin statutes for property tax assessment and appeals are unconstitutional and that Gardiner over assessed their property in violation of WIS. STAT. §§ 70.501 and 70.503.

¶8 The parties filed cross-motions for summary judgment. The circuit court denied Plaintiffs' motion for partial summary judgment and granted the Town's and Gardiner's motions for summary judgment, dismissing all claims against Defendants. Plaintiffs appealed.

DISCUSSION

¶9 Whether the circuit court properly granted a motion for summary judgment is a question of law an appellate court reviews de novo. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189. It is well established that this court applies the same summary judgment methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

¶10 The constitutionality of a statute is a question of law that this court reviews de novo. ***State v. Migliorino***, 150 Wis. 2d 513, 524, 442 N.W.2d 36 (1989). "All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law." ***State v. Randall***, 192 Wis. 2d 800, 824, 532 N.W.2d 94 (1995). Further, the challenger bears the burden to prove a statute

unconstitutional beyond a reasonable doubt. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989).

¶11 The issues on appeal are (1) whether the operation of WIS. STAT. § 70.47(7)(aa) in conjunction with WIS. STAT. § 74.37(4)(a) is unconstitutional, (2) whether Gardiner intentionally over assessed Plaintiffs' property in violation of WIS. STAT. §§ 70.501 and 70.503, and (3) whether the Defendants deprived Plaintiffs of their constitutional rights in violation of 42 U.S.C. § 1983. We address each issue in turn.

WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a) are Not Unconstitutional

¶12 Plaintiffs' primary argument is that WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied as they deprive Plaintiffs of property without due process of law and punish Plaintiffs for exercising their Fourth Amendment right. Plaintiffs phrase their constitutional argument in terms of an "as applied" challenge; however, Plaintiffs' argument is de facto facial as their reasoning suggests that under any circumstance where the statutes are applied together the result is a constitutional violation. When a party challenges a law as being unconstitutional on its face, that party "must show that the law cannot be enforced 'under any circumstances,'" unlike under an as applied challenge, which courts are to assess "by considering the facts of the particular case in front of us, 'not hypothetical facts in other situations.' Under such a challenge, the challenger must show that his or her constitutional rights were actually violated." ***League of Women Voters of Wis. Educ. Network, Inc. v. Walker***, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (citation omitted).

¶13 In opposing the appraiser's entry into their home, Plaintiffs allege that their right to privacy, guaranteed by the Fourth Amendment, shields their

property from a compelled interior inspection. Plaintiffs base their constitutional argument on the United States Supreme Court's holding in ***Camara v. Municipal Court***, 387 U.S. 523 (1967). In that case, a housing inspector attempted to access Camara's apartment for a routine annual inspection for possible violations of the city's housing code. ***Id.*** at 525-26. Camara refused entry on several occasions, citing the city's lack of a search warrant. ***Id.*** at 526-27. Based on his repeated refusal to allow entry into his apartment, Camara was eventually arrested and charged with a misdemeanor. ***Id.*** at 527. The Court held:

> [A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual ….

Id. at 534.

¶14 We distinguish ***Camara*** based on the facts and circumstances in this proceeding. In ***Camara***, the government officials were searching for violations of the city's housing code, which, if violations were uncovered, could result in civil or criminal penalties. ***Id.*** at 526-27. Further, Camara's refusal to permit the government officials entry into his apartment ultimately resulted in his arrest. ***Id.*** at 527. This case could not be more different. Plaintiffs face no criminal consequences, either from allowing the appraiser to enter their home to conduct an interior viewing or from refusing to allow the appraiser access.

¶15 We find that the facts of this case are more comparable to the search at issue in ***Wyman v. James***, 400 U.S. 309 (1971). In ***Wyman***, the Court held that home visits by a social worker, made pursuant to the administration of New York's welfare program, were not Fourth Amendment searches because they were made for the purpose of verifying eligibility for benefits, not as part of a criminal

investigation. ***Id.*** at 317-18. According to the Court, while the caseworker's visits to the home were "rehabilitative and investigative," the visitation was not "forced or compelled" and "the beneficiary's denial of permission [to enter the home] is not a criminal act." ***Id.*** at 317. The Court also reasoned that the visits were not searches because the beneficiary could choose to withhold consent and there would be "no entry of the home and ... no search." ***Id.*** at 317-18.

¶16 In the alternative, the Court concluded that even if the home visit by the caseworker was considered a search, it did not violate the Fourth Amendment because it did "not descend to the level of unreasonableness." ***Id.*** at 318. The ***Wyman*** Court cited many reasons for its decision, including the state's high interest in being able to protect the needs of the children, the reasonable manner in which the caseworker conducted the visits, the fact that no other means of investigation would be as effective to determine the necessary information, that the visit is not a criminal investigation, and that it is not made by the police or other uniformed authority. ***Id.*** at 318-23.

¶17 Like in ***Wyman***, the Town's requirement that Gardiner conduct an interior viewing of real property does not violate Plaintiffs' constitutional rights. Regardless of whether an interior viewing of Plaintiffs' home is a search, Plaintiffs' Fourth Amendment rights have not been violated. Plaintiffs are not being forced to allow Gardiner entry into the interior of their property—Plaintiffs are fully within their rights to refuse.

¶18 Further, even if the Fourth Amendment is implicated, we find that Wisconsin law regarding tax assessments is a reasonable statutory scheme. Not all government searches violate the Fourth Amendment, as "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

Terry v. Ohio, 392 U.S. 1, 9 (1968) (citation omitted). The reasonableness of the search depends on the context within which the search takes place, and requires us to balance an "individual's legitimate expectations of privacy and personal security" with "the government's need for effective methods" to carry out its statutory commands. ***New Jersey v. T.L.O.***, 469 U.S. 325, 337 (1985).

¶19 In this case, as in ***Wyman***, the statutory scheme is reasonable as it is not based on regulatory or criminal investigations, but on government's requirement to comply with the uniformity clause of the Wisconsin Constitution.[2] The interior view of the home is one of the most important pieces of evidence that the tax assessor must consider when making an assessment. No other means are as effective to provide an accurate valuation. Interior viewings ensure that the property is being assessed accurately and fairly, which ensures compliance with the uniformity clause. This need is significant, especially where the level of intrusion on the homeowner is relatively low as the homeowner is provided advanced notice and an opportunity to reschedule the viewing. Under the circumstances, we conclude that the Town's request to conduct an inspection of the interior of Plaintiffs' property neither forces Plaintiffs to submit to a search nor involves an unreasonable search, and, therefore, does not violate Plaintiffs' Fourth Amendment rights.

¶20 Plaintiffs further argue that the specific interaction between WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a) imposes an "unconstitutional condition" on

[2] The uniformity clause of the Wisconsin Constitution states in pertinent part, "The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods." WIS. CONST. art. VIII, § 1.

Plaintiffs. According to Plaintiffs, homeowners are forced to forfeit their due process rights in order to exercise their Fourth Amendment rights. We disagree.

¶21 As previously addressed, the interior viewing of Plaintiffs' home does not violate the Fourth Amendment, so Plaintiffs are not foregoing one constitutional right in favor of another. Plaintiffs were well informed of the repercussions of refusing Gardiner's reasonable request to view the interior of their home, and Plaintiffs chose to abandon their right to challenge the tax assessment before the BOR. As the Court explained in ***Wyman***,

> It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making.

Wyman, 400 U.S. at 324. Here, Plaintiffs have the "right" to refuse to allow Gardiner access to their home, but the consequence that flows from the refusal is cessation of the right to challenge the tax assessment and pay without recourse. There is no due process violation; the choice belongs entirely to Plaintiffs. Under the circumstances, we conclude, under either an as applied or a facial challenge, that WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a) are not unconstitutional. Plaintiffs' claim was properly dismissed.

Gardiner Did Not Violate WIS. STAT. §§ 70.501 or 70.503

¶22 Plaintiffs next argue there is a question of fact as to whether Gardiner violated WIS. STAT. §§ 70.501 and 70.503. Section 70.501 addresses fraudulent valuations by an assessor. The statute provides as follows:

> Any assessor, or person appointed or designated under [WIS. STAT. §§] 70.055 or 70.75, who intentionally fixes the value of any property assessed by that person at less or more than the true value thereof prescribed by law for the valuation of the same, or intentionally omits from assessment any property liable to taxation in the assessment district, or otherwise intentionally violates or fails to perform any duty imposed upon that person by law relating to the assessment of property for taxation, shall forfeit to the state not less than $50 nor more than $250.

Sec. 70.501.[3] According to Plaintiffs, Gardiner retaliated against Plaintiffs for asserting their Fourth Amendment right by intentionally over assessing the property in violation of § 70.501.[4] Further, they argue that Gardiner violated § 70.501 by failing to perform assessment duties required under the law. We disagree.

¶23 A violation of WIS. STAT. § 70.501 requires intentional conduct, and Plaintiffs have failed to establish that Gardiner intentionally assessed Plaintiffs' property for greater than the true value. Gardiner acted in accordance with the statutory law. Gardiner followed the proper procedures to attempt to view the interior of Plaintiffs' home as required under WIS. STAT. ch. 70 and WPAM, including sending a notice before visiting as well as providing Plaintiffs with a certified letter allowing an opportunity to schedule an appointment at their

[3] WISCONSIN STAT. § 70.503 provides that if an assessor is guilty of a violation or omission of duty found in WIS. STAT. § 70.501, the assessor "shall be liable in damages," and the individual sustaining the loss "shall be entitled to all the remedies given by law in actions for damages for tortious or wrongful acts." Sec. 70.503.

[4] Plaintiffs also argue that Gardiner deprived Plaintiffs of their constitutional right to equal protection of the laws by assessing their property, as well as the property of others who did not submit to an interior inspection, in a discriminatory manner. Plaintiffs make an undeveloped argument in one paragraph of their brief that Gardiner's actions "should have triggered strict scrutiny," but Plaintiffs fail to establish beyond a reasonable doubt that Gardiner's treatment was unconstitutional. Because this argument in undeveloped, we reject it. ***Cemetery Servs., Inc. v. Wisconsin Dep't of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

convenience when entry was refused. Gardiner explained the increased assessment on Plaintiffs' home, noting that it was motivated by an inability to evaluate the home and a need to make reasonable assumptions. Plaintiffs submit no evidence contradicting Gardiner's assessment. Since Plaintiffs failed to establish evidence that would lead us to believe that Gardiner intentionally fixed the value of Plaintiffs' property for more than true value, we conclude that Gardiner did not violate § 70.501.

¶24 Plaintiffs further argue that even if Gardiner did not intentionally overvalue the property, Gardiner did "intentionally violate[] or fail[] to perform any duty imposed upon that person by law." WIS. STAT. § 70.501. According to Plaintiffs, Wisconsin law and WPAM require Gardiner to value the property from the best information that Gardiner could have practicably obtained, *see* WIS. STAT. § 70.32(1); therefore, Gardiner should have viewed the exterior of the home, conducted an owner interview, and/or conducted a building permit inspection.

¶25 We are not convinced that Gardiner failed to perform a legal duty. Neither WIS. STAT. ch. 70 nor WPAM impose a legal duty on Gardiner to take the actions suggested by Plaintiffs. Nor are we convinced that any failure by Gardiner was intentional. Given that Gardiner followed the statutory law and that Plaintiffs failed to establish evidence suggesting Gardiner intentionally violated the statute, we conclude that there is no genuine issue of material fact and summary judgment was properly granted in Gardiner's favor.

Defendants Did Not Violate 42 U.S.C. § 1983

¶26 Plaintiffs' final argument is that Defendants[5] deprived Plaintiffs of their constitutional rights in violation of 42 U.S.C. § 1983. Plaintiffs concede that if WIS. STAT. §§ 70.47(7)(aa) and 74.37(4)(a) are not unconstitutional, then Plaintiffs' § 1983 claim fails. Since we concluded that §§ 74.37(4)(a) and 70.47(7)(aa) are not unconstitutional, Plaintiffs' § 1983 claims were properly dismissed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[5] Plaintiffs also contend that Gardiner's alleged violation of Plaintiffs' equal protection rights equates to Gardiner's violation of 42 U.S.C. § 1983. Since we previously refused to address Plaintiffs' equal protection claim as undeveloped, we find that Plaintiffs' § 1983 claim against Gardiner fails as well.