COURT OF APPEALS DECISION DATED AND FILED

April 28, 2005

Cornelia G. Clark
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. 2004AP2532-FT

Cir. Ct. No. 2003CV1105

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MACFARLANE PHEASANT FARM, INC., A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Reversed and cause remanded with directions*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. MacFarlane Pheasant Farm, Inc., appeals a judgment dismissing its claim for fencing expenses arising from a condemnation by the State of Wisconsin Department of Transportation. The dispositive issue is whether MacFarlane's claim was barred by claim preclusion. We conclude it was

not, and we reverse and remand with directions to enter judgment in MacFarlane's favor.

¶2 MacFarlane began this action with a complaint against the State seeking a money judgment for approximately $12,000 in fencing expenses. The complaint alleged that the expenses were incurred on three parcels that had earlier been partly condemned by the State for highway projects. It alleged that the litigation to determine just compensation for the takings was concluded, that MacFarlane had then submitted the fencing claim for payment, and that the State had rejected the claim. The State did not file a timely answer, but the circuit court granted its motion to extend that time. MacFarlane moved for summary judgment, but the court denied the motion and instead entered judgment in the State's favor, dismissing the complaint.

¶3 On appeal, MacFarlane first argues that the court erred by granting the State's motion to extend the time to answer. We agree that the court may well have erred in doing so. Granting such an extension after the time has already expired requires a showing of excusable neglect by the movant. WIS. STAT. § 801.15(2)(a) (2003-04);[1] ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467-69, 326 N.W.2d 727 (1982). If the movant demonstrates excusable neglect, the court then considers the interests of justice. ***Hedtcke***, 109 Wis. 2d at 467-69. In the brief supporting its motion, the State expressly declined to present a claim of excusable neglect.[2] Nonetheless, the circuit court concluded that "the interests of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] We also note that, in quoting WIS. STAT. § 801.15(2)(a) in its circuit court brief, the State used an ellipsis to remove the requirement of excusable neglect.

justice require a finding of excusable neglect." This statement appears to rest on an error of law. Excusable neglect must be found before the interests of justice are considered, and the two concepts are independent of each other. The court's discussion did not explain why the State's failure to act was excusable. If we were to conclude that the court erred in granting the extension, we would reverse and remand for the court to consider whether a default judgment should be granted. However, because we conclude that a disposition on the merits will terminate the litigation without further proceedings in the circuit court, we address the merits.

¶4 The State's opposition to MacFarlane's summary judgment motion was based on claim preclusion, and more specifically on the argument that MacFarlane's claim was barred because the claim could have been pursued in the earlier litigation that established the amount of compensation to be paid under WIS. STAT. § 32.09(6) for the taking.[3] The circuit court agreed. MacFarlane argues that claim preclusion does not apply regardless of whether it could have raised the claim in the previous condemnation proceeding. It notes that the legislature has provided a separate and independent method for condemnees to obtain payment for fencing expenses under WIS. STAT. § 32.195(7) by following the procedure provided in WIS. STAT. § 32.20. We agree with MacFarlane.

¶5 The statute that governs the amount of compensation to be paid when there is a partial taking of property provides two alternative valuation methods. *See* WIS. STAT. § 32.09(6). The first is the fair market value of the property taken, and the second is a "before and after" method comparing the value

[3] The State's letter brief in opposition to the summary judgment motion is not in the appellate record. However, in MacFarlane's reply brief it described the State as raising only this issue. The circuit court's summary judgment decision also identified only this issue.

of the entire property with the value of the remainder. The owner is compensated using whichever of these two methods produces the greater amount. In addition, the statute provides a list of so-called severance damages, including the cost of fencing reasonably necessary to separate the taken land from the remainder of the condemnee's land, subject to certain restrictions. § 32.09(6)(g). We recently held that these severance damages are available only to an owner who is paid using the "before and after" method. ***Justmann v. Portage County***, 2005 WI App 9, 692 N.W.2d 273.

¶6 Fencing expenses are also discussed in a separate statute, WIS. STAT. § 32.195. That statute provides a list of incidental expenses that the owner is entitled to recover from the condemnor "in addition to amounts otherwise authorized by this subchapter." The subchapter includes the statute we discussed above that provides the measure of just compensation, WIS. STAT. § 32.09. One of the incidental expenses that can be recovered is fencing: "Cost of fencing reasonably necessary pursuant to s. 32.09(6)(g) shall, when incurred, be payable in the manner described in s. 32.20." Section 32.195(7). Section 32.20 provides a procedure for submitting claims for incidental expenses to the condemnor. If the claim is denied, "the claimant has a right of action against the condemnor" in "a court of record," which may lead to a judgment that "may be collected in the same manner and form as any other judgment." WIS. STAT. § 32.20.

¶7 MacFarlane argues that WIS. STAT. § 32.195(7) provides a separate legal basis for his fencing claim, apart from the litigation to set just compensation for the taking. The State disagrees. The State argues that because § 32.195(7) refers to WIS. STAT. § 32.09(6)(g), it is nothing more than a procedural statute for implementation of compensation awarded under § 32.09(6)(g). In other words, the State argues that § 32.195(7) provides no substantive rights for condemnees

beyond what is provided in § 32.09(6)(g), and that § 32.195(7) can be used only when the owner has already prevailed in a claim brought under § 32.09(6)(g), which it argues MacFarlane did not do.

¶8 We reject the State's interpretation of WIS. STAT. § 32.195(7) for several reasons. First, the State's argument appears to leave § 32.195(7) with no function at all. It would not be necessary for the legislature to create a separate procedure to recover awards made under § 32.09(6)(g), because there are other provisions within the condemnation procedure that require payment of awards made under § 32.09. *See, e.g.,* WIS. STAT. §§ 32.05(9)(c) and (11)(c); 32.06(9)(b) and (10)(d). Furthermore, it is difficult to see why the legislature would single out this one item from the other items of severance damages simply to create a separate procedural mechanism for collecting payment. Finally, we do not read the reference to § 32.09(6)(g) as meaning that only owners who recover under that subsection are entitled to fencing expenses. That would not be consistent with the language stating that the incidental expenses in § 32.195 may be recovered "in addition to" payments otherwise authorized. A more reasonable reading is that the reference to § 32.09(6)(g) is meant to incorporate the standards for when fencing costs are "reasonably necessary," and to incorporate the other limitations provided in § 32.09(6)(g), without having to repeat them.

¶9 Read in this manner, WIS. STAT. § 32.195(7) provides a legal basis for a claim that is separate from claims under WIS. STAT. § 32.09. It provides that fencing expenses are available to all owners of partially taken land, including those who, pursuant to ***Justmann***, do not receive the severance damages provided in § 32.09(6)(a)-(6)(g) because their just compensation award was based on the value of the taken property, rather than on the "before and after" method.

¶10 We next consider how this interpretation interacts with traditional concepts of claim preclusion. We conclude that the legislature's enactment of an independent basis and mechanism for obtaining fencing expenses renders some of the concepts inapplicable. It may be true that MacFarlane could have sought these fencing expenses in the course of the litigation to set the compensation award if it was attempting to show that the "before and after" valuation produced a higher damage award than the market value of the land taken. But we see nothing in the statutes that indicates an owner *must* make such an attempt before the procedure in WIS. STAT. §§ 32.195(7) and 32.20 will be available, or that indicates any preference for one method over the other. If the legislature intended to create such limits, it certainly could have included language to that effect. Instead, the legislature expressly authorized the recovery of this expense item at a later point in the process. Application of claim preclusion in these circumstances to bar a fencing claim that arguably could have been raised earlier would thwart that intent. Traditional preclusion concepts would no doubt still apply to prevent a double recovery of the same expense, however, as well as to prevent relitigation of claims that were previously litigated and rejected. Neither of these situations is alleged to be present here.

¶11 Having concluded that MacFarlane's claim under WIS. STAT. § 32.195(7) is not barred by claim preclusion, we turn to the specific relief to be granted. As we described above, MacFarlane moved for summary judgment. On review of summary judgment, we apply the same standard the circuit court is to apply. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). So far as shown by the record before us, the State submitted no proofs in opposition to the motion, and it did not argue that there were any factual disputes that precluded summary judgment. The State's only argument then, and in this

appeal, was that MacFarlane's claim was barred by claim preclusion. We have reviewed MacFarlane's summary judgment material, and it shows a *prima facie* case in support of its claim. It explains the necessity of the fencing and itemizes the expenses in the amount of $12,152.

¶12 Accordingly, we conclude that MacFarlane is entitled to summary judgment. We reverse and remand with directions for the circuit court to enter judgment in the amount above, plus other costs as appropriate.

By the Court.—Judgment reversed and cause remanded with directions.

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