COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP537 **Cir. Ct. No. 2014CV2497**

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

ADAMS OUTDOOR ADVERTISING LIMITED PARTNERSHIP,

PLAINTIFF-APPELLANT,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Adams Outdoor Advertising Limited Partnership ("Adams") appeals a summary judgment in favor of the City of Madison ("the

City"). Adams brought an inverse condemnation action against the City after the City constructed a bridge that obstructs the view of the west-facing side of a billboard owned by Adams.[1] Adams also argues that the City violated the Equal Protection and Due Process clauses, and that the bridge is a private nuisance. For the reasons discussed below, we affirm the judgment on all claims.

BACKGROUND

¶2 The parties' dispute centers on the City's construction of Cannonball Bridge ("the bridge"), a pedestrian and bicycle overpass that crosses the Beltline Highway. The following facts are undisputed for the purposes of summary judgment. The City constructed the bridge in 2013. Adams owns property adjacent to the bridge and has maintained a two-sided billboard on that property for close to two decades. Although the zoning regulations have changed in this time, Adams' billboard is a legal non-conforming use, which means that Adams cannot change its height or location. The bridge obstructs the west-facing side of Adams' billboard from the view of east-bound traffic. However, the east-facing side is unaffected. The City has not allowed Adams to change or alter its billboard to mitigate the obstruction. However, the City did allow a nearby Culver's restaurant to move its billboard.

¶3 Adams filed suit, alleging four grounds for relief: (1) the City's obstruction of the west-facing side of its billboard resulted in an unconstitutional taking requiring compensation as an inverse condemnation under WIS. STAT.

[1] For the purposes of summary judgment, the City relied on the allegation in Adams' complaint that the west-facing panel was totally or almost totally obstructed.

§ 32.10 (2015-16)[2]; (2) by allowing Culver's to move its sign but not allowing Adams to make any changes, the City violated Adams' constitutional right to equal protection; (3) Adams was denied procedural due process; and (4) the bridge is a private nuisance that the City must abate. The circuit court granted summary judgment to the City on all claims. We address the arguments of the parties regarding each claim in turn.

DISCUSSION

¶4 Summary judgment is appropriate if there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). We review the circuit court's decision to grant summary judgment de novo, benefiting from the circuit court's decision. ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58. When reviewing whether summary judgment is appropriate, we view the facts in the light most favorable to the nonmoving party. ***Id.***

A. Adams' Inverse Condemnation Claim

¶5 Adams argues that it is entitled to relief under the inverse condemnation procedure of WIS. STAT. § 32.10, which allows a landowner to recover just compensation for a taking of its private property.

¶6 In order to be eligible for relief under WIS. STAT. § 32.10, Adams must first establish that the City has taken a protected property interest of Adams. *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis. 2d 74, 80, 284

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

N.W.2d 887 (1979). Adams argues that the facts demonstrate a taking because the west-facing side of its billboard has lost all economic value.

¶7 The City argues that Adams' claim of a taking requiring compensation under constitutional law is foreclosed by two Wisconsin Supreme Court decisions. Specifically, it argues that ***Randall v. City of Milwaukee***, 212 Wis. 374, 249 N.W. 73 (1933), stands for the proposition that a property owner's right to an unobstructed view from the roadway is not a protected property interest. The City also argues that, under ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 548 N.W.2d 528 (1996), the fact that the east-facing side of the billboard is unaffected means that Adams cannot establish a taking because the property as a whole still retains some value.

¶8 ***Randall*** involved a property owners' request for compensation after the City of Milwaukee built a pedestrian shelter on the public street in front of their property. The owners argued that this was a taking requiring compensation because the shelter interfered with their ingress and egress, as well as the views from the property. The court held there was no taking because any rights the property owners may have are "subject to such public street use and purpose as the location of the street requires." ***Randall***, 212 Wis. at 378. Moreover, "'the primary use and purpose'" of a road "'is public travel.'" ***Id.*** (quoting ***Krueger v. Wisconsin Tel. Co.***, 106 Wis. 96, 102, 81 N.W. 1041 (1900)).

¶9 Surveying case law from other jurisdictions, the court in ***Randall*** explained that local government's duty to promote the safety of those using the road for public travel did not place any burden on the abutting landowner that was not within the original contemplation of the parties at the time the road was built. ***Id.*** at 379-81. Accordingly, the court concluded that "[a]lthough plaintiffs may

sustain consequential damages in so far as that street improvement will somewhat obstruct … the view to and from their land to the vehicular traveled portion of the street," this was not a taking of private property within the meaning of the Wisconsin Constitution. ***Id.*** at 382.

¶10 Adams has not pointed to any authority that undermines this aspect of ***Randall***. To the contrary, Adams relies on ***Howell Plaza***, which itself cites ***Randall*** for the proposition that "partial obstruction of ingress to and egress from plaintiff's property, and the view therefrom" is not a taking. *See* ***Howell Plaza***, 92 Wis. 2d at 81 (citing ***Randall***, 212 Wis. at 382). Instead, Adams asks us to distinguish ***Randall*** on the ground that the property owners in that case were "not dependent upon an unobstructed view from the street." In contrast, Adams argues, the sole purpose and basis for any economic value of its billboard is derived from the unobstructed view from the street.[3]

¶11 To succeed with this part of its argument, Adams must convince us to focus only on the obstructed west-facing side of the billboard while ignoring the continued value in the unobstructed east-facing side. This aspect of Adams' argument is foreclosed by ***Zealy***, 201 Wis. 2d 365. In ***Zealy***, a landowner sought compensation for the lost value of its 10.4 acre parcel after the City of Waukesha rezoned 8.2 acres. Addressing whether the property should be viewed as a whole or in segments, the court explained that the United States Supreme Court has

[3] To support this distinction, Adams notes that Wisconsin law gives property owners of outdoor advertising the right to remove vegetation from a highway right of way if it obscures the view of the billboard. *See* WIS. STAT. § 84.305(2). This right to trim vegetation does not alter the analysis under ***Randall*** that the primary purpose of a road is travel, and claims of obstructed views to or from the property must necessarily yield to this purpose. *See* ***Randall v. City of Milwaukee***, 212 Wis. 374, 378, 249 N.W. 73 (1933) (quoting ***Krueger v. Wisconsin Tel. Co.***, 106 Wis. 96, 102, 81 N.W. 1041 (1900)).

"never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." ***Id.*** at 375-76. Instead, the takings analysis focuses "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.'" ***Id.*** (quoting ***Penn Cent. Transp. Co. v. City of New York***, 438 U.S. 104, 130-31 (1978)). Accordingly, the court concluded that a taking had not occurred because the property owner was not deprived of substantially all the beneficial uses of the whole parcel. ***Zealy***, 201 Wis. 2d at 380.

¶12 The circuit court here relied on ***Zealy*** in granting summary judgment to the City, reasoning that ***Zealy*** compels the conclusion that the entire billboard is the property at issue, and that no taking has occurred so long as one side of the billboard remains visible. On appeal, Adams presents no argument in its opening brief explaining why we should not apply ***Zealy*** to the billboard. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (A brief is insufficiently developed "when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling.").[4] We therefore conclude that ***Zealy*** requires us to consider the

[4] Adams argues in its reply brief that ***Zealy v. City of Milwaukee***, 212 Wis. 374, 249 N.W. 73 (1933) is distinguishable because the land owner in that case had not yet developed the land and therefore had no vested rights in the use of its property. We do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. In addition, Adams has not pointed us to any authority that would support the distinction it argues.

billboard as a whole in determining whether there has been an unconstitutional taking.[5]

¶13 In the face of the apparent bars of ***Randall*** and ***Zealy***, Adams argues that the fact that its billboard is a "legal nonconforming use" gives it "a vested property right in the continuation of that use." *See* ***Des Jardin v. Town of Greenfield***, 262 Wis. 43, 48, 53 N.W.2d 784 (1952). However, the passage in ***Des Jardin*** on which Adams relies does not say what Adams needs it to say. ***Des Jardin*** stands for the proposition that "'zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor preexisting conditions be affected *thereby*.'" ***Id.*** at 48 (emphasis added) (quoted source omitted). Here, the word "thereby" refers to zoning regulations.

¶14 Adams asks us to eschew this narrow reading and instead read ***Des Jardin*** to prohibit other forms of municipal interference with a legal non-conforming use of property. But applying ***Des Jardin*** in this manner would give

[5] The United States Supreme Court's recent decision in ***Murr v. Wisconsin***, _ U.S. _, No. 15-214, slip op. (June 23, 2017), does not appear to help Adams either. In ***Murr***, the Court concluded that two contiguous lots should be treated as a single parcel for the purpose of its regulatory takings analysis. In so holding, the Court drew on longstanding case law holding that as long as some use is permitted, the property is not "economically idle." ***Id.*** at 19-20 (citing ***Palazzolo v. Rhode Island***, 533 U. S. 606, 631 (2001)). Likewise, even a substantial loss in value will not necessarily establish a taking. ***Murr***, _ U.S. __ , slip op. at 20 (citing ***Lucas v. South Carolina Coastal Council***, 505 U. S. 1003, 1019 n.8 (1992) (suggesting that even a landowner with 95 percent loss may not recover)).

That said, the Court also endorsed a flexible approach that "define[s] the parcel in a manner that reflects reasonable expectations about the property." ***Murr***, _ U.S. __, slip op. at 20. The Court further noted that any approach must be consistent with the central purpose of the Takings Clause: to "'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" ***Id.*** (quoting ***Armstrong v. United States***, 364 U. S. 40, 49 (1960)). While this discussion in itself may lend some support to Adams' arguments, it does not give us a concrete basis for considering our supreme court's approach in ***Zealy*** to be inconsistent with U.S. Supreme Court precedent.

the owners of legal non-conforming property broader protection from diminution in value than other property owners have under ***Randall*** and ***Zealy***. Nothing in ***Des Jardin*** supports this broader proposition, nor has Adams pointed us to any authority to suggest that its language about "vested interests" extends beyond the immediate context of zoning regulations. To the contrary, our decision suggests a narrower reading. *See, e.g.*, ***Waukesha Cty. v. Seitz***, 140 Wis. 2d 111, 117, 409 N.W.2d 403 (Ct. App. 1987) (Summarizing the key passage in ***Des Jardin*** in the following terms: "Once a property owner has acquired a proprietary or 'vested' interest in the use, the use will be protected from subsequent zoning elimination."). Accordingly, we see no basis for distinguishing ***Randall*** or ***Zealy***.

¶15 We can dispense with Adams' remaining arguments on the inverse condemnation claim briefly. Adams points to ***Wisconsin Pub. Serv. Corp. v. Marathon Cty.***, 75 Wis. 2d 442, 249 N.W.2d 543 (1977), to support its argument that a partial taking is compensable. In that case, the County ordered the property owner to bury its above-ground power lines, and the property owner was seeking compensation for the costs associated with that action. ***Id.*** at 449. The property owner was not seeking compensation for diminution in value and instead stipulated that its damages were the cost of removal and relocation. ***Id.*** at 452. However, the instant case is about compensation for a diminution in value. Therefore, ***Wisconsin Pub. Serv. Corp.*** does not affect our application of the rule that our supreme court articulated in the more recent ***Zealy*** decision. Adams also asserts that "courts in Wisconsin and elsewhere" have found a partial taking where the burdens of government action fall on a few property owners. While courts elsewhere may endorse a broader partial takings analysis, Adams has not pointed

to any authority that would allow us to depart from our supreme court's decision in ***Zealy***.[6]

¶16 In sum, because Adams has pointed to no Wisconsin authority that would allow us to disregard our supreme court's holdings in ***Randall*** and ***Zealy***, we affirm the circuit's court's decision granting the City summary judgment on the inverse condemnation claim.

B. Equal Protection

¶17 We next turn to Adams' arguments that the City has denied it equal protection in violation of the federal and state constitutions. Adams points to the fact that a nearby Culver's was allowed to change the location and height of its sign in order to maintain the view, while the City has not given Adams permission to change the location or height of its sign. Adams advances a "class of one" claim, arguing that the City's failure to give it the same treatment as Culver's violates its equal protection rights.

¶18 The federal and state constitutions both contain equal protection provisions. *See* U.S. Const. amend. XIV, § 1 ("No state shall … deny to any person within its jurisdiction the Equal Protection of the laws."); Wis. Const. art. I, § 1 ("All people are born equally free and independent, and have certain inherent rights"). An equal protection claim has three elements. ***Nankin v. Village of***

[6] The lone Wisconsin case that Adams cites for this proposition is ***Noranda Exploration Inc. v. Ostrom***, 113 Wis. 2d 612, 624, 335 N.W.2d 596 (1983). That case involved a state statute that required a mineral exploration firm to disclose its data. ***Id.*** at 615-19. Our supreme court rejected the statute as an improper exercise of the state's police power, because it involved "the state's acquisition of a private citizen's property, and the distribution of that property … to other private citizens for their benefit." ***Id.*** at 629. ***Noranda*** does not involve a partial taking and therefore does not help Adams distinguish ***Zealy***.

Shorewood, 2001 WI 92, ¶¶13-15, 245 Wis. 2d 86, 630 N.W.2d 141. First, a plaintiff must show that the government created a distinct classification of citizens. ***Id.*** at ¶13. Second, the plaintiff must show that the government treats this class significantly different from all others similarly situated. ***Id.*** at ¶14. Third, the plaintiff must show that the classification lacks a rational basis. ***Id.*** at ¶15.

¶19 The City argues that it has a rational basis for treating Adams differently from Culver's, namely, that Culver's is the owner of an on-premises sign, *i.e.*, a sign that directs customers to the location of its nearby restaurant. In contrast, Adams' billboard is an off-premises advertising sign. The City points out that it has a rational interest in enabling the public to locate businesses without difficulty or confusion, and therefore treats on-premises signs differently than off-premises signs.

¶20 Adams does not dispute that the City makes this on-premises, off premises distinction as a general rule, nor does Adams argue that this approach to regulation lacks a rational basis. Instead, Adams focuses on the "similarly situated" portion of the analysis, arguing that the City has treated two similarly situated property owners differently. But Adams' argument is a non-starter so long as the City has a rational basis for treating the two property owners differently. In its reply brief, Adams argues that we should reject the city's "one-size-fits-all rational basis" because the billboard is a legal non-conforming use that gives Adams vested property interests. However, Adams points us to no authority that would support this argument. Because the City had a rational basis for treating Culver's differently from Adams, we affirm the summary judgment on the equal protection claim.

C. Procedural Due Process

¶21 Adams next argues that it has been denied procedural due process because the City has not provided any pre- or post-deprivation process for its property rights. Procedural due process is satisfied where a state provides adequate post-deprivation remedies. ***Thorp v. Town of Lebanon***, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. Here, the post-deprivation remedy is an inverse condemnation action under WIS. STAT. § 32.10.

¶22 Adams argues that in its case the inverse condemnation statute has proved an inadequate remedy, and every right must have a remedy. What Adams is actually arguing, however, is that every *claim* to a right must have a *successful* remedy. If this were correct, every unsuccessful plaintiff in an inverse condemnation case would be able to establish a procedural due process violation. We cannot agree. Through its action under WIS. STAT. § 32.10, Adams has received all the process that is due for its claim to a property right. The fact that it ultimately lost on its claim does not establish a violation of procedural due process.

D. Private Nuisance

¶23 Adams argues that the bridge is a private nuisance.[7] Whether there is a legal basis for a nuisance claim is a question of law subject to de novo review.

[7] Liability for private nuisance exists "if, but only if, [the defendant's] conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) [I]ntentional and unreasonable or (b) [U]nintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶31, 350 Wis. 2d 554, 835 N.W.2d 160 (alteration in original) (quoted source omitted).

Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2005 WI 8, ¶16, 277 Wis. 2d 635, 691 N.W.2d 658.

¶24 The parties agree that the City is immune from liability for a private nuisance that is based on discretionary acts. *See* ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶9 (municipalities have immunity for discretionary, legislative decisions). However, Adams argues that this immunity does not extend to the maintenance of a nuisance that results in harm, because the failure to abate a nuisance is a ministerial act. *See* ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶¶51-52, 350 Wis. 2d 554, 835 N.W.2d 160.

¶25 The facts of ***Bostco*** demonstrate that Adams is trying to fit a square peg into a round hole. ***Bostco*** involved a municipality's decision to maintain a tunnel by excessively siphoning groundwater. ***Id.***, ¶42. After learning that this maintenance choice was damaging the plaintiff's property, the municipality had a duty to use reasonable means at a reasonable cost to abate the nuisance. ***Id.***, ¶43. In contrast, Adams has not identified any aspect of the City's maintenance of the bridge that is negligent. Instead, Adams is complaining about the manner in which the bridge was designed in the first instance. However, the bridge design is precisely the sort of discretionary act that government immunity encompasses. *See* ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶9 ("Decisions concerning the adoption, design, and implementation of a public works system are discretionary, legislative decisions for which a municipality enjoys immunity."). We therefore conclude that the City is entitled to immunity on Adams' nuisance claim.

CONCLUSION

¶26 For the foregoing reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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