COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1998 **Cir. Ct. No. 2004CV329**

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

RICHARD D. HERR AND HERR INVESTMENTS OF WISCONSIN, LLC,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. The Wisconsin Department of Transportation (DOT) acquired through eminent domain a portion of land belonging to Richard D. Herr and Herr Investments of Wisconsin, LLC, (Herr) for a road-

widening project. The DOT denied Herr's subsequent claims for fencing costs and alleged water damage. Upon judicial review, the circuit court granted the DOT's motion for summary judgment dismissing Herr's challenges on grounds that the claims were untimely under WIS. STAT. § 32.20 (2003-04),[1] did not sufficiently identify the alleged faulty construction under WIS. STAT. § 88.87(2)(c), and was not a taking. We affirm on all grounds.

BACKGROUND

¶2 Most of the relevant facts are undisputed. Richard Herr owned a parcel of real estate in Waukesha County. The parcel abuts the south side of U.S. Highway 18. In March 1999, Richard deeded the property to Herr Investments, LLC.

¶3 Sometime in the late 1990s, the DOT undertook an improvement project of Highway 18 that involved widening the right-of-way in the vicinity of the Herr property. The DOT properly acquired a portion of the Herr property through eminent domain. The DOT denominated the acquired property as "Parcel #15" of its extensive highway improvement project. The State occupied the parcel on July 3, 1998, and took title to it when the Award of Damages was recorded on July 15, 1998. Actual work on the project began on August 19, 1998; grading and shoulder widening began on March 29, 1999.

¶4 The Herr property was used as a commercial elk-raising business. The property contained several rows of mature evergreen trees which acted as a

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

visual barrier between highway traffic and the elk. The property also had an eight-foot-high mesh fence with cedar posts to contain the elk. As part of the taking, the DOT took two or three rows of the trees, paying Richard $10,650 as part of its just compensation. Richard spent approximately $31,660 to restore the visual barrier and fence to its pre-taking utility. On April 13, 2001, Richard filed a written claim with the DOT pursuant to WIS. STAT. § 32.195(7) seeking the approximately $21,000 difference. The DOT rejected the claim in its entirety.

¶5 On October 28, 2002, Richard filed a claim with the DOT pursuant to WIS. STAT. § 88.87(2)(c) asserting $120,845 in construction-related water damages. He contended that as a result of the highway project, the elk pens and a barn both are subject to chronic flooding. The flooding in the pens also was described as "persistent," while that in the barn was described as "periodic." Richard demanded that the DOT reimburse him and either correct the cause of the alleged water damage or exercise its eminent domain rights under WIS. STAT. ch. 32. The DOT effectively denied the claim by not responding to it within ninety days. *See* § 88.87(2)(c).

¶6 On February 9, 2004, nearly three years after filing the written claim, Richard filed suit against the DOT. On July 26, 2004, Richard and Herr Investments filed an Amended Complaint stating three claims: a fencing claim brought pursuant to WIS. STAT. § 32.20; a water damage claim under WIS. STAT. § 88.87 and an inverse condemnation claim under WIS. STAT. § 32.10; or, alternative to the second claim, a determination that the water damage constituted a taking warranting just compensation.

¶7 On December 16, 2004, the DOT mailed to Herr "Defendant's Requests to Admit, Interrogatories and Document Requests." The Requests to

Admit sought Herr's admissions that, among other things, title vested in the State on July 15, 1998, by the recording of the Award of Damages and that the State took physical possession of the property no later than that date. The DOT received Herr's responses forty-one days later, on January 26, 2005. The DOT later argued that Herr's untimely response effectively admitted the date of possession. *See* WIS. STAT. § 804.11(1)(b) (a matter is deemed admitted unless denied in writing within thirty days after service of the request).

¶8 On February 9, 2005, the DOT moved for summary judgment on grounds that, given the two-year limitation set out in WIS. STAT. § 32.20,[2] the lawsuit was untimely brought. The DOT also argued that Herr did not comply with statutory prerequisites before bringing the second claim and that, as a matter of law, the DOT's actions did not constitute a taking.

¶9 On April 19, 2005, Herr filed its response,[3] giving a nod to the two-year statute of limitations set out in WIS. STAT. § 32.20, but arguing that § 32.20 also invokes rules made by the Department of Commerce. Accordingly, Herr

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[2] Wisconsin Stat. § 32.20 provides in relevant part:

> **32.20 Procedure for collection of itemized items of compensation.** 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 the condemnor takes physical possession of the entire property acquired* or such other event as determined by the department of commerce by rule. (Emphasis added.)

[3] Under local rules, Herr's response brief was due within fifteen days of service of the DOT's summary judgment motion. It was filed seventy days later, and the DOT moved to strike it. At the summary judgment motion hearing, the circuit court opted to set aside the motion to strike and consider the summary judgment motion on its merits.

argued, under WIS. ADMIN. CODE § COMM 202.08(1)(b) (Mar. 1997),[4] a claim may be filed within two years of the final payment made by the DOT. Herr also contended that eminent domain statutes must be liberally construed. As to its other two claims, Herr countered that the water damage claim was sufficiently specific, and the third claim stated an alternative claim upon which relief could be granted.

¶10 The circuit court granted the DOT's motion "across the board." Herr appeals.

DISCUSSION

¶11 We review the granting of a summary judgment motion de novo, applying the same methodology and standards as the trial court. ***Nesbitt Farms LLC v. City of Madison***, 2003 WI App 122, ¶4, 265 Wis. 2d 422, 665 N.W.2d 379. The methodology has been stated many times, and we need not repeat it here. *See, e.g.,* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. ***Nesbitt Farms***, 265 Wis. 2d 422, ¶4. In such a case, the practical effect is that the facts are stipulated and only issues of law are before us. *See* ***id.***

1. Claim One—The Fencing Claim

¶12 On appeal, Herr concedes that the two-year statute of limitations set out in WIS. STAT. § 32.20 applies. Herr argues, however, that there exist issues of

[4] All references to the Wisconsin Administrative Code are to the March 1997 version unless otherwise noted.

material fact as to when the DOT took physical possession of the property it acquired from Herr. Apparently abandoned is the argument based on WIS. ADMIN. CODE § COMM 202.08(1)(b).

¶13 We decline Herr's invitation to address the merits of an alleged factual dispute. First, this is not the argument Herr presented to the circuit court, at least not until the court was prepared to rule on the arguments Herr did proffer, and then it was only to ask the court's leave to begin conducting discovery on that issue. The court declined, admonishing Herr's attorney that "today was the day for submissions on issues of fact." We need not address issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶14 We observe that these proceedings have been characterized throughout by foot dragging and disregard of the procedural rules by Herr, or Herr's counsel. For example, the scheduling order required Herr to disclose witnesses and provide expert reports by August 6, 2004. Two months later, on October 7, the DOT moved to bar Herr from introducing any lay or expert witnesses for failing to either disclose or request an extension. Two weeks later, Herr moved to amend the scheduling order, chalking the noncompliance up to "inadvertence and mistake." Herr also was late filing responses to the DOT's Requests to Admit and late again responding to the summary judgment motion. Through "oversight," Herr's attorney failed to respond to the DOT's numerous attempts to contact him for mediation, as directed by the scheduling order, necessitating a rescheduling of the final pretrial. Then, after already having been granted a two-month postponement of the summary judgment hearing due to an asserted conflict, Herr's attorney requested leave to conduct further discovery. Finally, Herr was delinquent in filing its appellate brief and appendix and was

cautioned that failure to either serve it within five days or to file for an extension would result in dismissal.

¶15 We reject Herr's charitable view of its repeated untimeliness as a "technical matter." Herr has made excuses and been granted concessions at numerous turns both in the trial court and on appeal. We opt not to overlook Herr's laxity one more time. Accordingly, we do not consider the merits of this first issue. It is waived.

¶16 Moreover, Herr did not file either a reply brief or a statement that one would not be filed. *See* WIS. STAT. RULE 809.19(4) (providing that an appellant "shall file" one or the other). A reply brief is not mandatory and, in fact, too often is an unnecessary reiteration of the same points made in the brief-in-chief. Here, however, the DOT's brief offers new and significant information on each issue—for example, the waiver argument—in response to Herr's contentions. Yet Herr stands mum. We may treat an appellant's failure to refute a proposition in a responsive brief as a concession. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

2. Claim Two—The Statutory Water-Damages Claim

¶17 Herr next contends that the DOT project caused water damage in two areas of his property, the elk pens and a barn. He raises a statutory objection and, in the alternative, a constitutional objection. Neither is persuasive.

¶18 The statutory water-damages claim alleged that portions of the elk pens experience chronic flooding since the highway improvement project, but never had before. It also alleged that flooding in a barn occurs because the DOT constructed an outflow pipe that was too small to accommodate the volume of

water present, resulting in backflow into the barn's storage area and in the vicinity of the barn. Herr contends this allegation satisfied the "alleged faulty construction requirement" of WIS. STAT. § 88.87(2)(c). The DOT responds that Herr's claim draws a "spurious correlation" between the highway project and the water problems without identifying with sufficient specificity what aspect of the extensive project caused the alleged flooding. The circuit court found that the level of specificity urged by the DOT was appropriate and that Herr's claim gave deficient notice of claim. We agree.

¶19 WISCONSIN STAT. ch. 88 is entitled "Drainage of Lands." WISCONSIN STAT. § 88.87(2)(c) provides that a landowner who claims to have been damaged by a highway project may file a claim with the proper agency. "The claim shall consist of a sworn statement of the alleged faulty construction and a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water-soaking." Sec. 88.87(2)(c). If the DOT denies the claim, the property owner may bring an action in inverse condemnation under WIS. STAT. ch. 32. Sec. 88.87(2)(c). http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=39026404&infobase=stats.nfo&jump=ch.%2032&softpage=Document - JUMPDEST_ch. 32

¶20 Herr contends eminent domain statutes must be liberally construed, citing ***Standard Theaters, Inc. v. DOT***, 118 Wis. 2d 730, 742-43, 349 N.W.2d 661 (1984), and ***Shepherd Legan Aldrian, Ltd. v. Village of Shorewood***, 182 Wis. 2d 472, 478-79, 513 N.W.2d 686 (Ct. App. 1994). That is true, but WIS. STAT. § 88.87 is a notice of claim statute while WIS. STAT. ch. 32 governs eminent domain. Herr acknowledges as much but contends that this court should accord

similar latitude to § 88.87. We decline to do so, as we know of no statutory or case law giving us such authority, and Herr offers none.[5]

¶21 As noted, Herr's water damage claim consists of two allegations: (1) portions of the elk pens now experience flooding whereas such did not occur before the highway improvement project, and (2) the DOT constructed an outflow pipe that is too small to accommodate the volume of water. Herr's "before and after" allegation woefully fails to satisfy the requirement of a "statement of the alleged faulty construction" as required by WIS. STAT. § 88.87(2)(c). This allegation merely alleges a condition, but fails to speak to any "faulty construction." As to the outflow pipe allegation, the DOT points to the unrefuted summary judgment evidence that the pipe belongs to Herr, is located entirely on Herr's land, and was not constructed by the DOT. Once again, we note the absence of a reply brief to the DOT's responses on these arguments. As such, Herr has conceded the DOT's arguments on these points. *See* ***Schlieper***, 188 Wis. 2d at 322.

¶22 Finally, the State cannot be sued unless it clearly and expressly consents to suit. ***Erickson Oil Prods., Inc. v. DOT***, 184 Wis. 2d 36, 42-43, 516 N.W.2d 755 (Ct. App. 1994). "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." WIS. CONST. art. IV, § 27. Having concluded that Herr failed to adequately identify the alleged faulty construction under WIS. STAT. § 88.87(2)(c), the doctrine of sovereign immunity

[5] Herr does cite ***Kohlbeck v. Reliance Construction Co.***, 2002 WI App 142, 256 Wis. 2d 235, 647 N.W.2d 277, but that case does not apply. ***Kohlbeck*** addressed whether a claim for injunctive relief was adequately stated under ordinary pleading practice. *See* ***id.***, ¶¶1-2. It did not involve, as this case does, a claim by the DOT that the notice of claim was defective. *See* ***id.***, ¶6 n.2.

precludes Herr from bringing an inverse condemnation action under WIS. STAT. § 32.10.

3. Claim Three—The Constitutional Water-Damages Claim

¶23 In this claim, stated in the alternative to the second, Herr asserts an entitlement to compensation from the DOT for its taking of a flooding easement over Herr's property, pursuant to the takings clauses of the federal and state constitutions. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 13.

¶24 A governmental taking occurs in one of three ways: through a permanent physical occupation, a physical invasion short of an occupation, or a regulation that restricts the use of property. *See* ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 430 (1982). Here, there is no permanent physical occupation because Herr retains the rights of ownership, use and possession, and the right to dispose of the property. Likewise, no regulation is at issue. The only question remaining is whether the DOT action has resulted in a physical invasion short of an occupation.

¶25 Herr argues that a taking occurred by virtue of the DOT taking a flooding easement over the property. But Herr has not alleged or demonstrated that the property has lost all value or utility. Mere consequential damage to property resulting from governmental action is not a taking. ***Wisconsin Power & Light Co. v. Columbia County***, 3 Wis. 2d 1, 6, 87 N.W.2d 279 (1958). Damage to private property without appropriation to public use may be a compensable taking under some states' constitutions, but not Wisconsin's. ***Id.***

¶26 Finally, Herr asserts that a water-damages claimant need allege only that the property is subject to "permanent flooding" to sufficiently state a claim

under both WIS. STAT. § 32.10, the inverse condemnation statute, and the takings clauses of the state and federal constitutions. However, Herr's complaint does not allege that the flooding is "permanent." Rather, it alleges "persistent, chronic flooding" of portions of the elk pens and "periodic, chronic flooding" in the vicinity of a barn. "Periodic" flooding certainly is not "permanent," and we construe "persistent" and "chronic" to connote flooding of a recurring, but not permanent, nature such as after a dam gives way. There is no taking unless the flooding is permanent. ***Menick v. City of Menasha***, 200 Wis. 2d 737, 743, 547 N.W.2d 778 (Ct. App. 1996); ***Loretto***, 458 U.S. at 428. "[T]o be a taking, flooding must 'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" ***Loretto***, 458 U.S. at 428 (citation omitted).

¶27 That is not the case here. Indeed, Herr submitted photographs with his summary judgment materials purportedly to show "the elk pens in their flooded condition." The photos show elk grazing in a large grassy fenced field, with a "pond" in a limited portion of it. Herr's own photos do not depict damage so severe as to constitute an "actual, permanent invasion of the land, amounting to an appropriation" of it. ***Id.*** (citation omitted). Rather, they show an elk pen that, even with the water, still is being used as an elk pen. We see no material issue of fact that arguably supports Herr's claim of a taking.

CONCLUSION

¶28 We conclude that Herr has waived the right to raise on appeal the issue of the date the DOT took actual possession of the property by failing to afford the circuit court a timely opportunity to address it. We also conclude that the statutorily insufficient water damages claim precludes an inverse

condemnation claim. Finally, we see no taking. We affirm the grant of summary judgment.

By the Court.—Order affirmed.

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