COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2093 **Cir. Ct. No. 2002CV6**

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

YOURCHUCK VIDEO, INC., JOSEPH YOURCHUCK AND JOANNE YOURCHUCK,

PLAINTIFFS-RESPONDENTS,

V.

BURNETT COUNTY, BURNETT COUNTY BOARD OF SUPERVISORS, BURNETT COUNTY ZONING ADMINISTRATION AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Burnett County: ROBERT RASMUSSEN, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Burnett County, its Board of Supervisors, its Zoning Administration, and its insurance company (collectively, the County),

appeal a judgment, entered upon a jury's verdict, awarding damages to Joseph and JoAnne Yourchuck and their business, Yourchuck Video, Inc. (collectively, Yourchuck). The County argues that various provisions of Wisconsin's governmental immunity statute, WIS. STAT. § 893.80, apply to bar Yourchuck's claim.[1] The County also contends the court applied the wrong measure of damages. We conclude § 893.80 is preempted because Yourchuck's present claim arises under federal, not state, law. Further, we conclude the measure of damages was not improper. Accordingly, we affirm the judgment and order.

Background

¶2 Yourchuck operates Yourchuck Ace Hardware and Market, which encompasses multiple business pursuits in one building. The building was in the same location until January 2001, when Yourchuck opened a new building approximately one-half mile north of the old site. Yourchuck applied to the County for a permit to install a 200-square-foot sign standing thirty-one feet tall. The County rejected the application because an ordinance at the time limited signs to ninety-six square feet and a height of twenty feet.

¶3 Yourchuck requested a hearing on the rejection, but was told there was no provision for granting variances. When Yourchuck filed a second application, it was also denied. Yourchuck then served the County with a notice of claim and challenged the constitutionality of the ordinance, seeking a declaratory judgment and injunctive relief. Yourchuck's suit did not initially seek money damages.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The trial court concluded the zoning ordinance was constitutional and enforceable. Yourchuck appealed and we reversed, concluding that without a variance or other review procedure for permit applications, certiorari review provided no remedy for the ordinance's restriction on land use. *See* ***Yourchuck Video, Inc. v. Burnett County***, No. 2004AP2345, unpublished slip op. ¶¶1, 8, 11 (WI App July 6, 2005). The ordinance was therefore unconstitutional and unenforceable. The case was returned to the trial court.

¶5 The County moved for summary judgment in December 2005, alleging that Yourchuck failed to comply with the statutory notice requirements of WIS. STAT. § 893.80(1) and that the County enjoyed immunity under § 893.80(4). The County later invoked the $50,000 damages cap in § 893.80(3). In April 2006, Yourchuck filed a third amended complaint, now specifically alleging a claim for damages based on a federal due process right violation, but without specifically referencing 42 U.S.C. § 1983 (1996).[2] In June 2006, the County filed a motion in limine asking the court to determine the appropriate measure of damages, arguing there should be no mention of lost profits.

¶6 Following a hearing on the County's motions, the court concluded that any failure by Yourchuck to comply with notice requirements was technical

[2] 42 U.S.C. § 1983 (1996), creates a civil action for the deprivation of rights and states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

and not prejudicial. Further, the court concluded, the statutory cap was inapplicable and WIS. STAT. § 893.30(4) did not bar Yourchuck's suit. Accordingly, the court denied the County's motion for summary judgment. Also at the hearing, Yourchuck admitted it did not have a takings case and was therefore not maintaining that claim. The court acknowledged Yourchuck's federal claim and directed it to file a fourth amended complaint specifically referencing § 1983 for clarity's sake. Based on the nature of the § 1983 claim, the court denied the County's motion in limine and refused to prohibit Yourchuck from offering lost profit evidence. The jury subsequently found in Yourchuck's favor and awarded $200,000 in damages. The County appeals.

Discussion

I. Application of WIS. STAT. § 893.80

¶7 WISCONSIN STAT. § 893.80 states, in relevant part:

> (1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof … unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim … is served on the [entity]...; and
>
> (b) A claim containing … an itemized statement of the relief sought is presented to the appropriate clerk … and the claim is disallowed.
>
> ….
>
> (3) Except as provided in this subsection, the amount recoverable by any person for any damages, injuries or death in any action founded on tort … shall not exceed $50,000….
>
> ….

> (4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for … acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The County asserts that Yourchuck failed to comply with the notice requirement of subsec. (1); that the cap on damages in subsec. (3) applies; and that subsec. (4) bars Yourchuck's claim outright.

¶8 Application of a statute to a set of facts is a question of law. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶8, 251 Wis. 2d 45, 640 N.W.2d 764. It is well established that the requirements of WIS. STAT. § 893.80 do not apply to a § 1983 claim brought in state court. ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶21, 235 Wis. 2d 610, 612 N.W.2d 59 (citing ***Felder v. Casey***, 487 U.S. 131 (1988)). The County appears to concede as much, but asserts that § 893.80 "applied to plaintiffs' state law claims…." It argues that before Yourchuck could pursue its § 1983 claim, it was first required to exhaust its state remedies, including a takings claim under Wisconsin's just compensation clause. *See* WI CONST. art. I, § 13.[3] To bring the state takings claim, the County asserts, Yourchuck would have had to comply with § 893.80. Because it did not, and the state claims were never properly adjudicated, the County asserts the § 1983 claim never ripened. Although not specifically stated, the County's arguments appear to be premised on its belief that Yourchuck's § 1983 claim is a species of takings claim. It is not.

[3] Article I, § 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." This reflects the requirement of the Fifth Amendment to the United States Constitution that private property may not "be taken for public use without just compensation."

¶9 Section 1983 establishes liability when any person, acting under the color of law, violates the secured rights of another. In certain circumstances, the "exhaustion" of state remedies is necessary to establish the rights violation itself. For example, in ***Eberle v. Dane County Board of Adj.***, 227 Wis. 2d 609, 638, 595 N.W.2d 730 (1999), the plaintiffs had to pursue their Art. I, § 13 takings claim first because, until compensation was denied, no violation of the constitutional right to just compensation had occurred. Otherwise, as the United States Supreme Court has repeatedly held, exhaustion of state remedies is not a bar to a federal cause of action.[4] ***Patsy v. Board of Regents***, 457 U.S. 496, 506 (1982).

¶10 Here, Yourchuck's § 1983 claim is not about the "taking" itself. Rather, it is a claim that the County violated Yourchuck's due process rights when the County enacted, and subjected Yourchuck to, an unconstitutional ordinance with no variance procedures and no manner of redressing grievances. Therefore, Yourchuck need not pursue an inapplicable remedy before bringing its claim. Even if Yourchuck could prove a taking, there would still be this separate basis for a § 1983 claim in addition to whatever claim might arise under § 1983 for the taking itself. Because Yourchuck's claim is one for a due process violation contrary to the United States Constitution, not a taking contrary to the Wisconsin Constitution, WIS. STAT. § 893.80(1) notice is not required, the § 893.80(3) damages cap does not apply, and § 893.80(4) immunity is not a bar.

[4] There are some specific exceptions where the United States Congress has specifically required exhaustion of remedies. *See* ***Felder v. Casey***, 487 U.S. 131, 148-49 (1988). The County cites to no such Congressional exception here.

II. Measure of Damages

¶11 Because it considers this a taking case, the County argues the proper measure of damages is diminution of property value, not lost profits. However, the County has not asserted that diminution of value is the proper measure of damages in a § 1983 case, nor does it cite any authority for the proposition that lost profits are an improper measure. While the County asserts lost profits are too speculative, the case it cites in support is a condemnation case. *See* ***Rademann v. DOT***, 2002 WI App 59, 252 Wis. 2d 191, 642 N.W.2d 600. Yourchuck, on the other hand, does not attempt to demonstrate that lost profits is the correct measure of damages. Instead, it simply complains the County did not offer sufficient evidence of damages at trial. This claim is a red herring because the burden of proof at trial was on Yourchuck to prove its damages, not on the County to disprove them.

¶12 In any event, the determination of the appropriate measure of damages is a question of law. ***Magestro v. North Star Envtl.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722. The parties effectively request that we choose only between lost profits and diminution. Under the facts of this case, we conclude lost profits are a rational, reasonable measure of damages. Without a variance or other review procedure, Yourchuck was bound by the ordinance's size restrictions and had no way to appeal the Board's decision to obtain permission for a larger sign or to negotiate a satisfactory middle ground. In other words, Yourchuck was left with no way to protect or preserve the stream of business coming to the store. It is therefore not unreasonable to conclude that by depriving Yourchuck of due process, the County also deprived Yourchuck of profits.

By the Court.—Judgment and order affirmed.

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