

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 4, 2011

A. John Voelker
Acting 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. 2009AP3013

Cir. Ct. No. 2005CV2218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WISCONSIN MALL PROPERTIES, LLC,

PLAINTIFF-APPELLANT,

v.

**CITY OF GREEN BAY AND REDEVELOPMENT AUTHORITY OF THE CITY
OF GREEN BAY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Reversed.*

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

¶1 PER CURIAM. Wisconsin Mall Properties, LLC, appeals an order prohibiting it from voluntarily dismissing its condemnation appeal. Mall

Properties argues it was statutorily entitled to dismiss its appeal without circuit court permission. We agree and reverse.

BACKGROUND

¶2 The Redevelopment Authority of the City of Green Bay undertook to condemn a department store owned by Mall Properties and leased to Younkers. The Redevelopment Authority provided Mall Properties a jurisdictional offer to purchase under WIS. STAT. § 32.05(3).¹ The jurisdictional offer allocated specific dollar amounts to both the leasehold interest and the reversionary property interest. After Mall Properties failed to accept the jurisdictional offer, the Redevelopment Authority made an award of compensation under § 32.05(7) that matched its jurisdictional offer.

¶3 Mall Properties subsequently appealed the award, opting to appeal directly to the circuit court under WIS. STAT. § 32.05(11). However, the condemnation appeal was stayed by stipulation of the parties because Mall Properties had sued Saks, Younkers' successor, in a separate breach of lease action. Following extensive litigation and appeals in the lease action, Mall Properties filed a WIS. STAT. § 805.04(1) notice of voluntary dismissal of the condemnation appeal. The Redevelopment Authority opposed the dismissal, seeking an increase in the amount of the condemnation award allocated to the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

leasehold interest in the Younkers building.² After a hearing, the circuit court denied Mall Properties' attempted dismissal, relying on public policy. Mall Properties now appeals the order denying its voluntary dismissal.³

DISCUSSION

¶4 This case is largely controlled by *Dickie v. City of Tomah*, 160 Wis. 2d 20, 465 N.W.2d 262 (Ct. App. 1990), which involved WIS. STAT. § 32.05's sibling condemnation procedure statute, WIS. STAT. § 32.06.⁴ In *Dickie*, 160 Wis. 2d at 22-23, we held that a condemnee who appealed a county condemnation commission award to the circuit court could voluntarily dismiss the appeal pursuant to WIS. STAT. § 805.04(1), which provides: “[A]n action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion” We arrived at our holding despite recognizing that § 32.06(10) does not contemplate the filing of an answer or other responsive pleading and that no response is necessary to join issue because the statute itself specifies the issues to be tried. *See Dickie*, 160 Wis. 2d at 27-28; 29-30 (Gartzke, J., dissenting).

² The Redevelopment Authority has argued it made a mistake in its allocation of the total compensation award between the two property interests. Mall Properties prevailed in the lease action, obtaining a judgment against Saks. Saks, however, is entitled to an offset to that judgment for the amount Mall Properties already received for its leasehold interest via the condemnation proceedings. Retroactively increasing the amount of the condemnation award allocated to the leasehold interest, therefore, would increase the amount of the offset. The City of Green Bay agreed to indemnify Saks; therefore, any increase in the offset would reduce the City's liability.

³ We granted Mall Properties' petition for leave to appeal a nonfinal order.

⁴ Generally, WIS. STAT. § 32.05 applies to condemnation for sewers and transportation facilities, while WIS. STAT. § 32.06 covers most other condemnation proceedings. *See* WIS. STAT. §§ 32.05, 32.06. However, in certain situations, condemnors, including redevelopment authorities, may opt to proceed under either section. *See* WIS. STAT. § 32.05, 32.05(1)(a).

¶5 WISCONSIN STAT. §§ 32.05 and 32.06 contain nearly identical provisions for appealing a condemnation commission’s award to the circuit court: WIS. STAT. §§ 32.05(10) and 32.06(10). *Dickie*’s holding permitting voluntary dismissals is therefore equally applicable to § 32.05(10) appeals.

¶6 However, condemnees in WIS. STAT. § 32.05 proceedings have two avenues of appeal available to challenge the amount of an award. Here, Mall Properties arrived before the circuit court not under subsec. (10), but under subsec. (11). Ultimately, as we will explain, this difference is inconsequential. Subsection 32.05(11) contains the same operative language regarding an appeal to the circuit court as both WIS. STAT. §§ 32.05(10) and 32.06(10):⁵

The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall [thereupon] proceed as an action in said court subject to all the provisions of law relating to actions originally brought therein and shall have precedence over all other actions not then on trial. The sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor.

It is primarily this language upon which the *Dickie* holding was based. *See Dickie*, 160 Wis. 2d at 23, 24, 27; 30 (Gartzke, J., dissenting). At first blush, then, it would appear *Dickie* should apply equally to § 32.05(11) proceedings. Nonetheless, to fully explain why Mall Properties’ election of § 32.05(11) appeal procedure is inconsequential, we must compare the condemnation proceedings outlined by WIS. STAT. §§ 32.05 and 32.06.

⁵ The language is identical in all three statutes, except that WIS. STAT. § 32.05(11) omits the term “thereupon,” which we inserted in brackets above.

¶7 In WIS. STAT. § 32.06 condemnation proceedings, when the condemnee fails to accept the condemnor’s jurisdictional offer, the next step is for the condemnation commission to make an award. *See* WIS. STAT. § 32.06(7), (8). The condemnor then has the option to reject the commission’s award and abandon the condemnation proceeding. *See* WIS. STAT. § 32.06(7). If the condemnor does not abandon, then, as emphasized in *Dickie*, both the condemnor and condemnee have the right to appeal the commission’s award to the circuit court. *See* WIS. STAT. § 32.06(10); *Dickie*, 160 Wis. 2d at 26-27. Further, even if one appeals first, the other may still file its own appeal to the circuit court. *Dickie*, 160 Wis. 2d at 26-27. This factor was essential to the *Dickie* holding. *See id.*

¶8 In contrast to the WIS. STAT. § 32.06 procedure, in WIS. STAT. § 32.05 proceedings, when the condemnee fails to accept the condemnor’s jurisdictional offer, the next step is for the *condemnor* to make an award, known as the “basic award.”⁶ *See* WIS. STAT. § 32.05(7), (7)(b). The condemnee then has two alternatives for appealing. It can appeal the basic award first to the condemnation commission under subsec. (9), and then, if desired, appeal the commission’s award to the circuit court under subsec. (10). Alternatively, the condemnee can appeal the basic award directly to the circuit court under subsec. (11).

¶9 The condemnor, on the other hand, is provided no procedure for challenging the basic award. This is only logical, since it was the condemnor who determined the amount of that award. Next, if the condemnee has appealed to the

⁶ The basic award must be greater than or equal to the amount of the jurisdictional offer. WIS. STAT. § 32.05(7).

condemnation commission, the condemnor too may appeal the commission's award to the circuit court, just like in WIS. STAT. § 32.06 proceedings. *See* WIS. STAT. §§ 32.05(10), 32.06(10).⁷ Alternatively, if, like here, the condemnee has appealed the basic award directly to the circuit court under § 32.05(11), the condemnor has no right of appeal under that subsection. Again, this is logical because the condemnor would be appealing from the very award it made.

¶10 Without discussing the statutory framework, the Redevelopment Authority asserts the *Dickie* holding should not apply because WIS. STAT. § 32.05(11) does not provide it any opportunity for appeal to ensure the award of compensation is proper.⁸ As our preceding discussion has shown, this argument is a nonstarter because it was the Redevelopment Authority that determined the amount of the award. The Redevelopment Authority is essentially arguing it needs protection from itself. WISCONSIN STAT. § 32.05 does not provide such protection.⁹

¶11 In a related argument, the Redevelopment Authority argues that, unlike WIS. STAT. § 32.06(10), and contrary to *Dickie*'s reasoning, WIS. STAT. § 32.05(11) does not permit an appeal after another party has already appealed. This argument is nonsensical because the condemnor has no right to appeal its own award in the first place. Moreover, the argument is disingenuous because the

⁷ Unlike WIS. STAT. § 32.06, however, there is no provision in WIS. STAT. § 32.05 for the condemnor to reject the commission's award and abandon the appeal.

⁸ References to the Redevelopment Authority in our discussion are inclusive of the City of Green Bay, which is also a respondent.

⁹ The Redevelopment Authority could have instead elected to proceed under WIS. STAT. § 32.06, and let the condemnation commission determine the amount of the condemnation award.

Redevelopment Authority's brief omits critical language recognizing that, although a second party cannot appeal, that party can give notice and join the first appeal. *See* WIS. STAT. § 32.05(11).¹⁰

¶12 The circuit court denied Mall Properties' voluntary dismissal on the basis of public policy. The Redevelopment Authority does not, however, rely on that premise. After observing that Mall Properties had sought the stay of the condemnation proceedings, the court stated:

Now, let's analyze that. Is it ... proper to prohibit the condemning authority from having their day in court? You know, public policy would seem to dictate that when taxpayer dollars are at issue, it is not unreasonable. And this is an issue that wasn't addressed in [*Dickie*] that I can tell; that when you look at it from the flip side, the public policy would seem to dictate that while the property owner has rights to have the value of his taking determined, that the taxpayers also have a right to have that valuation determined.

And it is under that very limited circumstance that I find that this voluntary dismissal would not be appropriate

¶13 We agree with the circuit court that under both WIS. STAT. §§ 32.05 and 32.06 the taxpayers, via the condemning authority, have a right to a valuation of the condemned property. And, here, the Redevelopment Authority received that. In fact, it was able to determine the value itself. Neither § 32.05 nor any

¹⁰ WISCONSIN STAT. § 32.05(11) provides, in relevant part:

The owner of any interest in the property condemned named in the basic award may ... appeal to the circuit court of the county wherein the property is located. ... Where one party in interest has appealed from the award, no other party in interest who has been served with notice of such appeal may take a separate appeal *but may join in the appeal* (Emphasis added.)

public policy requires that the condemnor have an opportunity to challenge its own valuation.¹¹

By the Court.—Order reversed.

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

¹¹ The Redevelopment Authority also argues that, based on the separate lease action, Saks was subrogated to Mall Properties' interests and that, therefore, only Saks could voluntarily dismiss the condemnation proceedings. Regardless of any merits of this argument, Saks was not a party to this action below or on appeal, has not sought to intervene, and has not objected to the dismissal.

In another argument, the Redevelopment Authority points to language in *Dickie* suggesting that a particular case might be excepted from its holding because WIS. STAT. § 805.04(1) "is limited in its application to an early stage of the proceedings." *Dickie v. City of Tomah*, 160 Wis. 2d 20, 28, 465 N.W.2d 262 (Ct. App. 1990). However, the Redevelopment Authority concedes Mall Properties "moved the court to stay the condemnation appeal at the same time that it filed the condemnation appeal." There could be no earlier stage of proceeding.

