COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-1900

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

VIVID, INC., A WISCONSIN CORPORATION,

PETITIONER-RESPONDENT,

V.

RONALD R. FIEDLER, SECRETARY OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION AND WISCONSIN DEPARTMENT OF TRANSPORTATION,

RESPONDENTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. This is an appeal from a money judgment for $217,292 in favor of Vivid, Inc. and against the Wisconsin Department of Transportation (DOT). There are several issues, all of which contest the amount

of damages included in the judgment. We conclude that none of the errors asserted by DOT requires reversal. We therefore affirm.

BACKGROUND

This appeal arrives with a considerable history. In April 1989, DOT removed two of Vivid's outdoor advertising signs during a highway improvement project at the junction of I-90 and Avalon Road in Rock County. Vivid refused DOT's offer of relocation benefits, payable under § 32.19, STATS,[1] and commenced an inverse condemnation action under § 32.10.[2] The circuit court granted DOT's summary judgment motion, and Vivid appealed. We concluded that Vivid's complaint stated a claim under § 32.10 for inverse condemnation, that the outdoor advertising signs were property that could not be taken for public use without just compensation, and that the items permitted as compensation under § 32.19 did not constitute just compensation under WIS. CONST. art. I, § 13.[3] We remanded for further proceedings, noting that the question of how Vivid's signs were to be valued would be determined at trial. ***Vivid, Inc. v. Fiedler***, 174 Wis.2d 142, 149, 497 N.W.2d 153, 156 (Ct. App. 1993) (***Vivid I***).

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[1] Section 32.19(1), STATS., provides for "relocation assistance" for those displaced by the construction of public improvements.

[2] Section 32.10, STATS., is commonly known as "inverse condemnation." This section permits one whose property has been taken by a person possessing the power of condemnation to initiate a condemnation action if the potential condemnor fails to do so.

[3] Article I, § 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor."

The supreme court granted DOT's petition for review. That court determined, without reaching Vivid's other arguments, that § 84.30(6), STATS.,[4] required DOT to pay Vivid just compensation for the signs. ***Vivid, Inc. v. Fiedler***, 182 Wis. 2d 71, 75, 512 N.W.2d 771, 773 (1994). (***Vivid II***).

On remand, the trial court allowed Vivid to try the case as an inverse condemnation case under § 32.10, STATS. Over DOT's objection, Vivid's experts used an income approach and a gross income multiplier approach in valuing the billboards. The jury determined that the billboards had a fair market value of $37,800. The trial court entered judgment on the verdict and awarded Vivid its actual attorneys' fees. DOT appeals.

SIGNIFICANCE OF *VIVID I*

We first must address what part, if any, ***Vivid I*** plays in deciding the issues raised in this appeal. This question is closely intertwined with the rules of summary judgment methodology, and we will discuss these issues together. Our decision on this question will determine several of the issues in this case, because the court of appeals and the supreme court previously decided this case on separate and distinct grounds.

In the trial court, DOT argued that because the supreme court had decided ***Vivid II*** the court of appeals decision, ***Vivid I***, was a "nullity." DOT asserted that in two other circuit court cases where this issue was being litigated,

[4] Section 84.30, STATS., was passed in response to the Federal Highway Beautification Act. *See* ***Vivid, Inc. v. Fiedler***, 182 Wis.2d 71, 75-76, 512 N.W.2d 771, 773 (1994). It controls the erection and maintenance of outdoor advertising signs adjacent to interstate and defense highways. Section 84.30(6) provides that DOT shall pay just compensation for signs removed by DOT after March 18, 1972. But compensation paid under § 84.30(6) is limited, which is why Vivid did not claim damages under § 84.30, STATS.

the courts agreed with this position. Here, DOT continues its assertion, arguing that our opinion in ***Vivid I*** lacks any continuing precedential force.

We conclude that the effect of a supreme court review of a court of appeals opinion must be determined on a case-by-case basis. Here, it is significant that this case arises from summary judgment. Certainly, when a court of appeals decision is vacated, or a single-issue case is reversed, our decision is a nullity. But here, the supreme court affirmed our decision and modified it only by remanding the cause for a determination of the amount of just compensation that DOT must pay. We agree that this modification could be considered ambiguous because the court of appeals mandate also remanded the case to the trial court for further proceedings. ***Vivid I***, 174 Wis.2d at 163, 497 N.W.2d at 162. ***Vivid I*** also noted: "The question of how Vivid's signs are to be valued is to be determined at trial." ***Vivid I***, 174 Wis.2d at 149, 497 N.W.2d at 156. We find no significance in this factor. Both courts concluded that further trial court proceedings were necessary.

We see no reason to conclude that when a published court of appeals opinion is affirmed, though by a rationale not addressed by the court of appeals, the court of appeals opinion loses all jurisprudential significance. This is what we meant in ***State ex rel. Dicks v. Employe Trust Funds Bd.***, 202 Wis.2d 703, 709, 551 N.W.2d 845, 848 (Ct. App. 1996), where we said: "When the court of appeals construes a statute in a published opinion, that opinion binds every agency and every court until it is reversed or modified. This is the meaning of § 752.41(2), STATS., which provides, 'Officially published opinions of the court of appeals shall have statewide precedential effect.'" *But see* ***Bergmann v. McCaughtry***, 211 Wis.2d 1, 10 n.8, 564 N.W.2d 712, 716 (1997) (stating that the effect of a court of appeals decision that has been resolved by the supreme court on a different issue has not been definitively answered).

In analogous situations, courts have held that a multi-issue court of appeals decision reversed on one issue remains authority for issues not reversed. In ***Pennington v. Gillaspie***, 61 S.E. 416, 417 (W. Va. 1908), the court said: "That the decision has been overruled as to one of the points decided argues nothing against its soundness in respect to other propositions enunciated by it." And in a more colorful way, the Michigan Court of Appeals noted:

> We reject the insurers' argument, made in a supplemental brief, that the Supreme Court's reversal of this Court's opinion in ***Polkow*** renders the opinion of the Court of Appeals completely without precedential value. "Just as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all the other holdings appearing in that decision."

Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 496 N.W.2d 373, 377 (Mich. Ct. App. 1992), *aff'd*, 519 N.W.2d 864 (Mich. 1994) (citations omitted).

This principle is recognized in the parenthetical "reversed on other grounds," used to note the subsequent history of a case. If a supreme court decision reversing one issue of a multi-issue court of appeals opinion resulted in the nullification of the entire court of appeals opinion, there would be no need for such a statement. The supreme court has cited court of appeals opinions after they were reversed on other grounds. *See* ***State v. Solberg***, 211 Wis.2d 372, 384, 564 N.W.2d 775, 780 (1997); ***Management Comp. Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 157, 176, 557 N.W.2d 67, 75 (1996).

Certainly a supreme court opinion affirming a court of appeals opinion on grounds not considered by the court of appeals could not affect the latter opinion more significantly than a supreme court opinion reversing one of several issues in a court of appeals opinion and leaving other issues untouched.

We conclude that only to the extent a supreme court opinion reverses, modifies or vacates a court of appeals opinion is the court of appeals opinion or some portion of it rendered a nullity.

Summary judgment methodology explains what happened in this case. That methodology is discussed in many cases, more recently in ***L.L.N. v. Clauder***, 209 Wis.2d 674, 682-84, 563 N.W.2d 434, 438-39 (1997). The pertinent part of the methodology is:

> We review a grant of summary judgment *de novo,* applying the standards set forth in Wis. Stat. § 802.08(2) in the same manner the circuit court applies them. Specifically, a court first examines the pleadings to determine whether a claim for relief is stated and whether a material issue of fact is presented.

Id. at 682, 563 N.W.2d at 438 (citations omitted).

In 1989, the circuit court granted DOT's motion for summary judgment, adopting DOT's brief as its opinion. That brief concluded that Vivid had failed to state a claim for inverse condemnation. Although it is not entirely clear, the reason for the court's conclusion appears to be that Vivid's billboards were personal property, and that only real property is subject to the "just compensation" requirement of Chapter 32, STATS. Vivid's complaint did not (and could not) allege that it was the owner of the real estate underlying the signs.

We reviewed the trial court's order dismissing Vivid's complaint[5] *de novo,* as required by § 802.08(2), STATS. We first examined the pleadings to

[5] In inverse condemnation proceedings, a plaintiff's complaint is called a petition for institution of condemnation proceedings.

determine whether a claim for relief was stated. We concluded that Vivid's pleadings stated a claim in inverse condemnation:

> We conclude that the owner of property which is "taken" by the state may maintain an action under sec. 32.10 if the state does not provide the owner with just compensation as required by article I, section 13, of the Wisconsin Constitution, regardless of whether the property taken is personal property or an interest in land.
>
> ….
>
> … We conclude that the items payable under sec. 32.19 and sec. ILHR 202.64 are not just compensation for the taking of property under WIS. CONST. art. I, § 13.

Vivid I, 174 Wis.2d at 148-49, 497 N.W.2d at 156.

The supreme court granted DOT's petition for review. It, too, reviews trial court decisions on motions for summary judgment *de novo,* although it did not repeat that methodology in ***Vivid II***. Neither the supreme court nor the court of appeals was required to determine whether Vivid's complaint stated any particular cause of action. Section 802.08(2), STATS., requires only that the moving party show that it is entitled to a judgment as a matter of law. The supreme court determined that Vivid had shown that it was entitled to judgment as a matter of law and that the only issue remaining was the amount of just compensation DOT must pay.

It would have been helpful to the parties had the court of appeals and the supreme court set out summary judgment methodology and explained at which stage of that methodology each court determined that Vivid prevailed. But it is apparent from both opinions that each court was addressing the same issue that the trial court addressed: Did the complaint state a claim for relief? Both appellate courts answered this question "yes," although for different reasons. However, the

fact that the court of appeals concluded that Vivid stated a claim under Chapter 32, STATS., does not mean that Vivid failed to state a claim under Chapter 84, STATS., and the fact that the supreme court concluded that Vivid stated a claim under Chapter 84 does not mean that Vivid failed to state a claim under Chapter 32. Section 802.08(2), STATS., requires only that the complaint state *a* claim, not that it state any particular claim. Indeed, we have concluded that where a plaintiff alleges several claims, and we conclude that one claim survives a summary judgment motion, we need not address other claims. *See* ***City of Edgerton v. General Cas. Co.***, 172 Wis.2d 518, 561, 493 N.W.2d 768, 786 (Ct. App. 1992), *aff'd in part, rev'd in part*, 184 Wis.2d 750, 517 N.W.2d 463 (1994). And in ***Ollerman v. O'Rourke Co.*** 94 Wis.2d 17, 51, 288 N.W.2d 95, 112 (1980), the court said:

> We need not decide at this time—and we do not decide at this time—whether the "second cause of action" of the complaint based on the theory of negligent misrepresentation for nondisclosure states a claim upon which relief could be granted. We have determined that the complaint states a claim for intentional misrepresentation and we need go no further.

We recognize that ***Ollerman*** was decided on a motion to dismiss. But the first step in summary judgment methodology is identical to the analysis used to decide motions to dismiss. ***Prah v. Moretti***, 108 Wis.2d 223, 228, 321 N.W.2d 182, 185 (1982).

We realize that in footnote eight of ***Vivid II***, the court noted that the circuit court should refer to § 84.30(7), STATS.[6] Had the supreme court intended

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[6] Section 84.30(7), STATS., provides:

> MEASURE. The just compensation required by sub. (6) shall be paid for the following:

(continued)

that Vivid's only viable cause of action was pursuant to § 84.30(7), it would not have specifically stated that it was not reaching Vivid's argument that it was entitled to just compensation under art. I, § 13 of the Wisconsin Constitution. ***Vivid II***, 182 Wis.2d at 75, 512 N.W.2d at 773. We interpret footnote eight as a directive that in the event the case was tried under Chapter 84, the court should refer to § 84.30(7).

BILLBOARD VALUATION

DOT offers several arguments challenging the methods by which Vivid sought to value its billboards. We will address each argument in turn.

First, DOT argues that when a nonconforming sign is removed under § 84.30, STATS., the state is not required to pay for lost business income in addition to payment for the sign structure and any leasehold value. But we need not address this argument because Vivid claimed damages under Chapter 32, not Chapter 84.

DOT also asserts that the circuit court erred by refusing to inform the jury of applicable law. It explains that applicable federal regulations do not

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> (a) The taking from the owner of such sign, all right, title and interest in and to the sign and the owner's leasehold relating thereto, including severance damages to the remaining signs which have a unity of use and ownership with the sign taken, shall be included in the amounts paid to the respective owner, excluding any damage to factories involved in manufacturing, erection, maintenance or servicing of any outdoor advertising signs or displays.
>
> (b) The taking of the right to erect and maintain such signs thereon from the owner of the real property on which the sign is located.

authorize compensation for lost advertising income. It notes that § 84.30, STATS., was enacted to bring Wisconsin into compliance with federal legislation. But again, this case was not tried under Chapter 84, STATS. Vivid's complaint asserted that it was entitled to just compensation under § 32.10, STATS. We have concluded that the supreme court's opinion in ***Vivid II*** did not prevent Vivid from trying the Chapter 32 claim that it brought. The circuit court did not erroneously exercise its discretion by refusing to inform the jury of irrelevant federal law.

DOT next asserts that courts should not give more extensive damages to sign companies than damages given to other tenant businesses. Again, DOT argues that because this is a Chapter 84, STATS., case, damages are those allowed by that chapter. We have explained that this case was properly tried as a Chapter 32 inverse condemnation case. DOT then uses, as a comparison, cases discussing the compensation to be paid to a tenant whose lease has been terminated by condemnation. DOT does not assert that these cases are directly applicable to this case, but are analogous.

Maxey v. Redevelopment Auth., 94 Wis.2d 375, 401, 288 N.W.2d 794, 806 (1990), is one of the cases cited by the DOT. There, the court repeated what it had adopted in ***Fiorini v. City of Kenosha***, 208 Wis. 496, 243 N.W. 761 (1932), as the measure of damages for the condemnation of a tenant's leasehold interest:

> A leasehold is normally valued as the difference between the rental value of the premises at the time of taking and the rent due the lessors during the *unexpired* term. Compensation is apportioned to the lessor for the taking of his reversionary interest and to the lessee for the taking of his leasehold. Where the leasehold is relatively long and rental values have substantially increased since the inception of the lease term, the lessee's share may exhaust the entire award.

(Citations omitted; emphasis added.) ***Maxey*** was cited in ***Green Bay Broad. Co. v. Redevelopment Auth.***, 116 Wis.2d 1, 13, 342 N.W.2d 27, 33 (1983), *modified on reconsideration*, 119 Wis.2d 251, 349 N.W.2d 478 (1984), which provides: "Of course, that proportionate share in respect to a tenant need not reflect only the value of immovable fixtures. It might well, in an appropriate case, reflect the value of an *unexpired* lease terminated by the condemnation." (Emphasis added.)

In ***Riebs v. Milwaukee County Park Comm'n***, 252 Wis. 144, 31 N.W.2d 190 (1948), the tenant held land under a month-to-month tenancy. The court concluded that the tenant's damages must be limited to the value of thirty days' occupancy of the premises.

Whether lease expectancies have value has been much litigated. The leading case in Vivid's favor is ***Almota Farmers Elevator & Warehouse Co. v. United States***, 409 U.S. 470 (1973). There, the Supreme Court concluded that the owner of grain elevators adjacent to a railroad and built on land leased from the railroad were entitled to damages for the condemnation of their leasehold interest for a term in expectancy up to the useful life of the elevators. Since ***Almota***, however, courts have distinguished that case because of the unique relationship between the landlord and tenant, and the substantial nature of the elevators. In ***Arizona ex rel. Miller v. Gannett Outdoor Co.***, 795 P.2d 221, 224 (Ariz. Ct. App. 1990), a condemnation case involving outdoor advertising signs, the court said: "The majority of state courts deciding this issue have also determined that an expectation in the continuation of a lease is not a compensable property interest." *See also* ***Stroh v. Alaska State Hous. Auth.***, 459 P.2d 480 (Alaska 1968); ***Whiteco***

Indus., Inc. v. City of Tucson, 812 P.2d 1075 (Ariz. Ct. App. 1990);[7] ***Cracchiolo v. Arizona***, 706 P.2d 1219, 1226 (Ariz. Ct. App. 1985); ***New Jersey v. Jan-Mar Inc.***, 509 A.2d 310, 315 (N.J. Super. Ct. Law. Div. 1985), *aff'd in part, appeal dismissed in part*, 563 A.2d 310 (N.J. Super Ct. App. Div. 1989).

Although DOT cites ***Maxey***, ***Fiorini***, ***Riebs*** and several other cases holding that lease expectancies are not compensable, what it really argues is that a tenant is given "just compensation" by receiving the rental value of the property less the actual rent received. We agree that this is the test, but the problem in this case is the meaning of "rental value of the property." Although we agree with DOT that the outdoor sign industry is not entitled to special or preferential treatment in condemnation cases, the cases on which DOT relies hold only that sign companies cannot base their claims on damages occurring after the expiration of their leases with the land owner.[8] We will next consider whether Vivid's verdict includes those damages.

At trial, Vivid used a gross income multiplier to value its signs. George French, Jr., President of Orde Advertising Company, explained that although a long-term lease with a land owner is valuable, there is about a ninety-five percent renewal rate in the industry. He had purchased companies that owned signs with no leases with land owners at all, and had experienced about a ninety-

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[7] Whitco is instructive because it quotes at length testimony of the expert witness who valued the outdoor advertising sign for the sign's owner. That testimony is in many respects similar to the testimony of Vivid's expert witnesses. The ***Whiteco*** court rejected that testimony. It concluded that because the billboard owner's leases had expired, the company had no legal right to maintain the billboards on the property and therefore had no compensable legal interest.

[8] The reason that sign companies occupy a special place in eminent domain jurisprudence is that outdoor advertising signs are not easily compared to the more usual retail sales businesses that occupy leased space.

five percent success rate in obtaining leases with the land owners for the outdoor advertising signs. He was asked:

> Q: Can you explain why a sign company might still buy a sign if there were very few years left on a lease?
>
> A: The expectation of renewing it.
>
> Q: Even if there was no lease in place or just months to run on a lease, if you were looking at an attractive sign, would you still use a gross income multiplier?
>
> A: Yes.
>
> Q: Why is that?
>
> A: Because it's been our experience that we have a fairly high opportunity of renewing leases.

This is the Achilles heel involved in using a gross income multiplier to value outdoor advertising signs. ***Maxey***, ***Green Bay Broadcasting*** and ***Riebs*** prohibit valuing the expectation with a land owner that a lease will be renewed in eminent domain valuations. But the expectation that the lease with the land owner would be renewed was an assumption underlying Vivid's use of a gross income multiplier. Although the trial court's decision to admit evidence is discretionary, the trial court erroneously exercises its discretion when it bases its determination on an incorrect interpretation of law. *See* ***Wester v. Bruggink***, 190 Wis.2d 308, 317, 527 N.W.2d 373, 377 (Ct. App. 1994). Because the gross income multiplier approach used by Vivid was inconsistent with ***Maxey***, ***Green Bay Broadcasting***

and ***Riebs***, the trial court erroneously exercised its discretion by permitting the jury to hear this evidence.[9]

We would ordinarily remand for a new trial at which the value of Vivid's signs would be determined through the use of economic theories which assume that Vivid's leases with land owners would expire at the end of their terms. But § 805.18(2), STATS., requires that we not reverse a judgment which does not affect the substantial rights of the parties. A reversal is required under that statute only if the result might, within reasonable probabilities, have been more favorable to the complaining party had the error not occurred. ***Nowatske v. Osterloh***, 201 Wis.2d 497, 507, 549 N.W.2d 256, 259 (Ct. App. 1996). This is a condemnation proceeding. The question considered by the jury here and which would be considered by a second jury, should we reverse, is: "What is the fair market value of the two signs?" *See* ***Muscoda Bridge Co. v. Grant County***, 200 Wis. 185, 189, 227 N.W. 863, 864 (1929). We will consider whether the error in permitting the use of gross income multiplier testimony in this case was harmless.

In ***Leathem Smith Lodge, Inc. v. State***, 94 Wis.2d 406, 288 N.W.2d 808 (1980), the court considered the value of a Door County resort, a portion of which had been taken by condemnation. The trial court had excluded evidence of the property's value based on an income approach. In basic terms, an income

[9] "Fair market value" is a term which recognizes that the best test of value is a sale of the property or comparable property. The majority holding that lease expectancies are not compensable in eminent domain cases is at variance with this concept of value. The testimony in this case shows this inconsistency because buyers and sellers of billboards place a value on the probability that ground leases will be renewed ninety-five percent of the time. But, we are not free to ignore the language in ***Green Bay Broadcasting***, ***Riebs*** and ***Maxey*** that limits just compensation to the value of unexpired lease terms. *See* ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984).

approach to value assumes that a property can be valued by the income it produces. The more income produced, the higher the value of the property.

After noting that this was a discretionary decision of the trial court, the supreme court discussed the general rule that income evidence is never admissible to value property where there is evidence of comparable sales. ***Leathem Smith***, 94 Wis.2d at 413, 288 N.W.2d at 812. The reason that income evidence is ordinarily inadmissible in condemnation cases involving commercial enterprises is that business income is dependent upon too many variables, such as the fortune, skill and good management of the owner. ***Id.*** at 412, 288 N.W.2d at 811. Because there was evidence of comparable sales in ***Leathem Smith***, the court concluded that the trial court properly excluded the income method of valuation. ***Id.*** at 414, 288 N.W.2d at 812. The court noted three exceptions to the general rule: (1) where a profit is produced without the labor of the owner; (2) where the profits derived from the property's use are the chief source of its value; and (3) where property is so unique as to make unavailable any comparable sales data. ***Id.*** at 412-13, 282 N.W.2d at 811. We conclude that Vivid's signs may be valued based on an income approach because two of the three ***Leathem Smith*** exceptions apply.

Outdoor advertising sign company profits are not made without labor. Two witnesses for Vivid testified that operating expenses of sixty-five percent of gross income were typical for these companies and that Vivid's operating expenses were about sixty-five percent of its gross income. A DOT witness testified that a figure of 86.3% was more accurate. Whichever figure is correct, the first exception to the ***Leathem Smith*** rule is inapplicable here.

But the profits derived from an outdoor advertising sign are virtually the only source of the sign's value. Although outdoor advertising signs are not sold singly, the only reason for buying one would be to make money with it. The second ***Leathem Smith*** exception is applicable here.

Billboards are unique because their value depends upon their location. In ***City of Scottsdale v. Eller Outdoor Adver. Co.***, 579 P.2d 590, 598 (Ariz. Ct. App. 1978), the court said: "Depending upon the viewable distance in either direction, the amount of traffic passing the location, and the type of viewing public, a location of a particular billboard may have a value over and above its nuts and bolts value." Both DOT's and Vivid's witnesses agreed that outdoor advertising signs are not sold singly, with the result that there are no sales comparable to the taking of the two signs taken here. The third ***Leathem Smith*** exception is also applicable.

Other jurisdictions have used an income approach to value billboards. In ***New Hampshire v. 3M Nat'l Adver. Co.***, 653 A.2d 1092, 1094 (N.H. 1995), the trial court concluded that the condemnee inappropriately based its income valuation upon a capitalization rate not derived from sales of single signs with short-term leases. But the trial court also rejected the State of New Hampshire's appraisal method, which neglected to place any value upon the ground leases. The New Hampshire Supreme Court found no error or abuse of discretion in the trial court's decision to value the leaseholds by their actual net income value.

And the court in ***Whitco Indus., Inc. v. City of Tucson***, 812 P.2d 1075 (Ariz. Ct. App. 1990), rejected the use of a gross income multiplier that

disregarded the existence, length or terms of the leases, concluding that the use of an income approach was more appropriate:

> I agree that the income approach to value is proper evidence of value.… The income approach applied to the billboards would be the income produced by the six billboards, less rent and expenses, capitalized and then adjusted for the remaining term of the lease. The difference between this and the rent would be the bonus value, if any.

Id. at 1078.

In short, we conclude that two of the exceptions to the ***Leathem Smith*** rule permit the use of an income approach to valuing outdoor advertising signs. We find the methods of valuation approved in ***Whitco Industries*** and ***3M Advertising*** to be reasonable.

It is undisputed that Vivid had contracts with advertisers. At the time that the signs were taken, one sign had about twenty-four months remaining on a contract. Rent was about $550 per month. The other sign had about twenty-six months left on a contract. Rent was $500 per month. Gross rents therefore totaled about $26,000 until the end of the advertisers' contracts. Vivid's expert testimony that there would be little upkeep on the two signs until the end of the two contracts except for changing a light bulb once in a while was undisputed. Personal property taxes on the signs would be minimal, as would electricity for the lighted sign. Rent for the underlying land would be $800 per year.

In ***3M***, the court approved adding together the value of the physical structures and the value of the leasehold interest in the unexpired leases with land owners. It did so noting that only thirteen months remained on the leases. We recognize that Vivid's contracts were somewhat longer than thirteen months, requiring some deduction for the present value of the rents. And we realize that

the usual income approach to value divides net income by an appropriate capitalization rate to arrive at value. Still, when looking at relatively short terms such as thirteen months in ***3M*** and approximately twenty-six and twenty-four months here, the ***3M*** approach can provide an answer to a harmless error inquiry.

Using the ***3M*** formula, adding net contract rents of about $23,000 to DOT's expert's $10,500 value of the physical structures yields a value of the signs for the two years remaining on the advertisers' contracts of $33,500. The jury awarded Vivid $37,800 as damages for the loss of its structures. And after the present advertisers' contracts expired, there would still be six years left on one of Vivid's leases with the land owner, and seven on the other. Vivid's expert witnesses' testimony that these signs were never vacant is undisputed.

The evidence establishes that outdoor advertising signs are not sold singly or in pairs. It is therefore only hypothetically that we can consider what a willing buyer would pay for the two signs DOT took from Vivid. But it is clear that a hypothetical buyer would pay more than $10,500, the price at which the DOT appraiser valued the signs. Outdoor advertising signs are good for little more than producing income. But the evidence at this trial showed that they are quite good at doing that. Vivid pays an underlying landowner $400 per year to rent the space for a sign. In turn, it enters contracts with advertisers for $500 to $550 per month. There is more to the outdoor advertising business than this, of course. The industry has overhead of sixty to sixty-five percent of gross income, according to one witness. But we are not looking at the condemnation of an advertising business, just the condemnation of two signs. We look at those signs, not the business. We conclude that a willing buyer would pay far more than $10,500 for two signs which would give a gross return of $12,600 in one year with operating expenses of about $800 per year for rent, and perhaps another few

hundred dollars per year for labor, electricity and taxes. How much more the hypothetical willing buyer would pay for underlying leases with eight and nine years remaining is open to debate. We need not attempt to determine that sum, however, for the only question we must ask in a harmless error analysis is whether the jury's verdict of $37,800 might, within reasonable probabilities, have been more favorable to DOT had Vivid's evidence not included an assumption that its leases would be renewed. *See* ***Nowatske***, 201 Wis.2d at 507, 549 N.W.2d at 259.

Vivid's leases with the land owners were relatively long term, eight and nine years. If one assumes that the signs would have no vacancies until the end of the leases with the land owners, the income generated would be over $100,000, assuming no increase in rents. But the value of the rents for later years would be significantly reduced to present value. And expenses would probably increase along with the rents. Still, we can reasonably assume that the value of the two signs with two years remaining on the advertising contracts would be about $33,000 to $34,000. We then need only ask whether there is a reasonable probability that a jury would attach a value of significantly more than $4,300 to the net income from the signs for the six and seven years remaining on the underlying leases with the landowners after the present advertising leases expire. We have no difficulty answering that question "yes." We therefore conclude that the error of which DOT complains has not affected its substantial rights because, without the error, the result probably would not have been more favorable to DOT than the present jury's verdict. Section 805.18(2), STATS.

JURY INSTRUCTIONS

DOT next asserts that the trial court "committed reversible error" by giving the following jury instruction: "Keep in mind that in condemnation cases

such as this one, 'just compensation' for the taking is what the owner has lost, not what the condemnor has gained." This assertion implies a *de novo* review of this issue.

We first note that we do not review a trial court's jury instructions *de novo.* We use a deferential standard of review, inquiring whether the instruction was an erroneous exercise of discretion. ***State v. Morgan***, 195 Wis.2d 388, 448, 536 Wis.2d 425, 448 (Ct. App. 1995). Even if we would not have used the instruction, we still do not necessarily reverse. The review of an exercise of discretion is a recognition of the trial court's limited right to be wrong. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). We therefore look for a reason to sustain the trial court's use of the instruction. *See* ***Schauer v. DeNeveu Homeowner's Ass'n***, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995).

Much of DOT's concern with this instruction centers around its contention that this case is not a condemnation action. We have addressed that question already. Vivid was entitled to bring this case as an inverse condemnation action. And in ***Besnah v. City of Fond du Lac***, 35 Wis.2d 755, 758, 151 N.W.2d 725, 727 (1967), the court noted: "In condemnation cases just compensation for the taking is what the owner has lost, not what the condemnor has gained." The trial court did not erroneously exercise its discretion by giving the instruction.

INCONSISTENT METHODS OF APPRAISAL

Next, DOT argues that it should have been permitted to introduce evidence that Vivid used a cost less depreciation method to value its signs when submitting personal property tax returns to local governments. Again, DOT treats this issue as one which we review *de novo*, but our review is deferential. We

review evidentiary matters for an erroneous exercise of discretion. ***Sielaff v. Milwaukee County***, 200 Wis.2d 105, 109, 546 N.W.2d 173, 175 (Ct. App. 1996). Still, the proper exercise of discretion requires that the trial court apply the proper law to the facts of the case. ***Id.*** An error of law constitutes an erroneous exercise of discretion. ***Beaupre v. Airriess***, 208 Wis.2d 238, 243, 560 N.W.2d 285, 287 (Ct. App. 1997).

DOT wanted to cross-examine William Ware, Vivid's operations manager, about Vivid's assertion at a board of review hearing in Reedsburg, Wisconsin, that the appropriate method to value its signs was cost less depreciation. DOT had obtained a transcript of that proceeding. Vivid objected that the material was irrelevant. The trial court sustained Vivid's objection to this line of cross-examination, ruling:

> Well, the court will rule that assessments for property tax purposes are not the issue in this case and that the principles applied for assessing personal property or real estate are sufficiently different from the concepts involved in condemnation matters so that this—this would not be relevant at this stage of the proceedings.
>
> I'm going to sustain the objection.

DOT is correct in asserting that property is appraised at its fair market value for both tax assessment purposes and for condemnation purposes. "Section 70.32, Stats., requires assessors to assess real estate at its fair market value." ***Flood v. Lomira Bd. of Review***, 149 Wis.2d 220, 226, 440 N.W.2d 575, 577 (Ct. App. 1989), *aff'd and cause remanded*, 153 Wis.2d 428, 451 N.W.2d 422 (1990). Real estate and personal property are both assessed under this test. *See* ***Xerox Corp. v. DOR***, 114 Wis.2d 522, 527, 339 N.W.2d 357, 360 (Ct. App. 1983). In a condemnation proceeding, the measure of damages is also "fair market value." ***Almota***, 409 U.S. at 474.

The property tax assessment was irrelevant to this proceeding, however, because the property interest valued for property tax assessment purposes is different from the property interest valued for just compensation purposes. For just compensation purposes, Vivid was entitled to reimbursement for both the taking of the sign and the taking of Vivid's leasehold interest. *See* ***Green Bay Broad.,*** 116 Wis.2d at 13, 342 N.W.2d at 33. Without the accompanying leasehold interest, the sign would not have income-producing value. Therefore, the value of the sign and the leasehold together is considerably higher than the value of the sign itself.

For tax assessment purposes, however, only the value of the sign is assessed to Vivid. Vivid self-reported the value of the signs as personal property.[10] Personal property is assessed to its owner at its "true cash value." Section 70.34, STATS.

Real property, on the other hand, is valued in the manner specified in the Wisconsin property assessment manual. Section 70.32(1), STATS. Real property is assessed in the name of its owner, § 70.17(1), STATS., and includes not only the land itself, but also all "rights and privileges appertaining thereto." Section 70.03, STATS. Among these rights and privileges is the leasehold estate. The PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS 7-2 (1997) provides:

> In the case of a leasehold estate, the owner transfers part of the bundle of rights to the lessee for the duration of the lease; however, the assessor must still value the property based on all of the rights. The assessment must include the

[10] Section 70.35(1), STATS., provides that "the assessor may require [a] person, firm or corporation to submit a return of [its] personal property and of the taxable value thereof."

> owner's rights (leased fee) and the tenant's rights (leasehold).

Therefore, for tax assessment purposes, the value of a leasehold interest is assessed to the owner of the land, not the tenant.

The statutes, case law and assessor's manual show that a property interest can be assigned to different parties is different situations. For eminent domain purposes, Vivid was credited with the value of the leasehold interest. For property tax purposes, however, the value of the leasehold would be assessed to the land owner, not Vivid. Because the two measures are different, the trial court did not erroneously exercise its discretion in refusing to allow DOT to pursue its line of cross-examination.

SOVEREIGN IMMUNITY

DOT's last argument is that Vivid's costs and attorneys' fees are not recoverable because they are barred by the doctrine of sovereign immunity. But again, DOT bases much of its argument on its assertion that "[i]n the wake of the supreme court decision, this case has clearly gone forward as a case arising under sec. 84.30, Stats., not under ch. 32 Stats." We have rejected that argument and concluded that Vivid was entitled to bring an inverse condemnation action. We agree that the constitutional requirement of "just compensation" following a taking does not necessarily include payment by the State of the condemnee's attorney fees. *See* ***W.H. Pugh Coal Co. v. State***, 157 Wis.2d 620, 635, 460 N.W.2d 787, 793 (Ct. App. 1990). And we agree that attorney fees are not recoverable against the state unless provided for by statute. *See* ***id.*** We even agree with DOT that "[t]here is no amount of argument, advocacy, equity, empathy, or downright begging, that can overcome the indisputable fact that the Legislature has not

expressly authorized the payment of litigation expenses in cases arising under sec. 84.30, Stats."

But Vivid's complaint demands: "WHEREFORE, petitioner respectfully requests that condemnation proceedings be commenced pursuant to § 32.10, Stats. …." We have explained why there is nothing in ***Vivid I*** or ***Vivid II*** that precluded Vivid from maintaining this as an inverse condemnation action. And § 32.28(1) and (3)(c), STATS., provide that attorney fees and costs shall be awarded if the judgment is for the plaintiff in an action under § 32.10. We conclude that those statutes waive the State's sovereign immunity for costs and fees and that the trial court correctly awarded them to Vivid.

WAIVER

We are surprised that Vivid has asked that we affirm the judgment in this case because DOT failed to make motions after verdict and yet has asked that we publish this case because there are over twenty-five similar cases pending in Wisconsin between these parties and others similarly situated. We doubt that there would be much precedential value to a decision affirming the trial court for DOT's failure to make motions after verdict. We agree with DOT that if this appeal is decided on waiver, the case will have to be relitigated in one or several of the cases now pending. The only difference will be added cost to the parties. DOT's failure to make motions after verdict does not remove our jurisdiction to

decide this case. ***Hartford Ins. Co. v. Wales***, 138 Wis.2d 508, 510-11, 406 N.W.2d 426, 427 (1987). We have therefore exercised our discretion to do so.[11]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[11] Pursuant to RULE 809.23(2), STATS., two of the judges joining in this opinion have recommended that it not be published. With hindsight, we probably should have concluded that the State waived the issues it now raises by failing to make motions after verdict. However, a decision under RULE 809.23(3) is made after an opinion is written, not before.