



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 1, 2017

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Nicholas J. Boerke
von Briesen & Roper
411 E. Wisconsin Avenue, Ste. 1000
Milwaukee, WI 53202

Alan Marcuvitz
von Briesen & Roper, S.C.
411 E. Wisconsin Avenue, Ste. 1000
Milwaukee, WI 53202

Abigail Potts
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707

You are hereby notified that the Court has entered the following opinion and order:

2016AP1112

118th Street Kenosha, LLC v. DOT (L.C. #2015CV516)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

118th Street Kenosha, LLC (the LLC) appeals from an order granting the motion of the Wisconsin Department of Transportation (DOT) to dismiss the complaint for failure to state a claim upon which relief may be granted. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the circuit court's order dismissing the LLC's complaint.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The LLC commenced this action pursuant to WIS. STAT. §§ 84.29(5) and 84.295(6) against the DOT alleging that the LLC owns commercial property improved with a four-store strip shopping center, which had been fronted on the east by 118th Avenue.² However, as a result of a DOT project involving State Highway 50 and I-94, the DOT moved 118th Avenue to the east, leaving the LLC without frontage on and direct access to 118th Avenue. In addition, the DOT condemned a temporary limited easement on the LLC's property in order "to construct and restore legally conforming access" to it. Thus, the LLC alleged, the subject property now fronts and abuts a large grass area instead of 118th Avenue, which is now a block away. As a result of

² WISCONSIN STAT. § 84.29(5) provides, in part:

CONSTRUCTION OF GRADE SEPARATIONS AT INTERSECTIONS. In the furtherance of the public interest and general welfare of the state and the traveling public in the development of the interstate system, the department is authorized and empowered to construct grade separations at intersections of any interstate highway with other public highways and railroads and to change and adjust the lines of public highways and if necessary combine or relocate the same to adjust traffic service to grade separation structures. The entire cost of grade separations and relocations and alterations of local roads as so determined by the department shall be a part of the construction of and financed as a part of the cost of the interstate highway. The department may by agreement with a county or municipality or by order summarily vacate or relocate any town, county, city or village highway as part of the construction of an interstate highway but shall pay any damage legally payable under existing law to any property owner directly injured by the vacation or relocation of such street or highway.

WISCONSIN STAT. § 84.295(6) provides, in part:

CONSTRUCTION OF GRADE SEPARATIONS AT INTERSECTIONS. In the furtherance of the public interest and general welfare of the state and the traveling public in the development of freeways or expressways, the department is authorized and empowered to construct grade separations at intersections of any freeway or expressway with other public highways and railroads and to change and adjust the lines of public highways and if necessary combine, relocate or extend the same to adjust traffic service to grade separation structures. The entire cost of grade separations and relocations, alterations or extensions of local roads as so determined by the department shall be a part of the construction of and financed as a part of the cost of the freeway or expressway. The department may by agreement with a county or municipality or by order summarily vacate or relocate any town, county, city or village highway as part of the construction of a freeway or expressway but shall pay any damage legally payable under existing law to any property owner directly injured by the vacation or relocation of such street or highway.

the DOT having moved 118th Avenue, the fair market value of the property had been reduced by \$427,600. Thus, the LLC was entitled to damages in that amount from the DOT.

Although not noted in the complaint, the LLC had previously sued the DOT to recover compensation pursuant to WIS. STAT. § 32.09(6g) for the decline in the subject property's value as a result of 118th Avenue being moved. *See 118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶12, 359 Wis. 2d 30, 856 N.W.2d 486. Our supreme court held that the LLC was “precluded from seeking damages under WIS. STAT. § 32.09(6g) for the commercial property's diminution in value which resulted from its loss of direct access and proximity to 118th Avenue” because “[t]he temporary limited easement did not cause the commercial property to lose direct access and proximity to 118th Avenue,” as § 32.09(6g) required in order to be entitled damages. *118th St. Kenosha*, 359 Wis. 2d 30, ¶61.

The DOT moved to dismiss the complaint for failure to state a claim upon which relief may be granted. The DOT argued that both statutes under which the LLC sued, WIS. STAT. §§ 84.29(5) and 84.295(6), did not create an independent right of action, but merely provided that the DOT “shall pay any damage legally payable under *existing law* to any property owner directly injured by the vacation or relocation of such street or highway.”³ (Emphasis added.) The LLC had not cited any other existing law as the basis for its claim and, thus, its complaint had to be dismissed.

The circuit court agreed with the DOT, ruling that it was not enough for the LLC to rely on WIS. STAT. §§ 84.29(5) and 84.295(6), but the LLC had to base its action on some other “existing law.” Since the LLC had not cited any other “existing law,” its complaint had to be dismissed, and the court did so with prejudice.

³ WISCONSIN STAT. § 84.29(5) applies where the project relates to the construction of an interstate highway, whereas WIS. STAT. § 84.295(6) applies to the construction of a freeway or highway.

“Sovereign immunity derives from article IV, section 27 of the Wisconsin Constitution.” *Koshick v. State*, 2005 WI App 232, ¶6, 287 Wis. 2d 608, 706 N.W.2d 174. Article IV, section 27 of the Wisconsin Constitution provides, “The legislature shall direct by law in what manner and in what courts suits may be brought against the state,” which includes suits against state agencies such as the DOT. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶51, 317 Wis. 2d 656, 766 N.W.2d 559. “If the legislature has not specifically consented to the suit, then sovereign immunity deprives the court of personal jurisdiction over the State, assuming that the defense has been properly raised.” *Id.* In other words, “[t]here must exist *express legislative authorization* in order for the state to be sued.” *Kallembach v. State*, 129 Wis. 2d 402, 408, 385 N.W.2d 215 (Ct. App. 1986) (citation omitted).

“[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. “[S]tatutory interpretation ‘begins with the language of the statute.’” *Id.*, ¶45 (citation omitted). “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The context and structure of a statute are also important to the meaning of a statute. *Id.*, ¶46. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* If, after this process, the statutory meaning is clear, “then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Id.*

The circuit court’s ruling on the DOT’s motion to dismiss, and the circuit court’s interpretation of WIS. STAT. §§ 84.29(5) and 84.29(6) both present questions of law. Thus, we review those questions independently of the circuit court without any deference to its conclusions. *Evers v. Sullivan*, 2000 WI App 144, ¶5, 237 Wis. 2d 759, 615 N.W.2d 680.

WISCONSIN STAT. §§ 84.29(5) and 84.295(6) provide the State with the authority, including by agreement with local government entities, to vacate or relocate certain local streets or highways as part of the construction of an interstate highway, freeway, or expressway. Both subsections provide that the DOT “shall pay any damage legally payable *under existing law* to any property owner directly injured by the vacation or relocation of such street or highway.” (Emphasis added.) This language makes clear that the grant of authority to the DOT to relocate and vacate local streets and highways does not eliminate an existing cause of action when the State’s actions in doing so directly injure a property owner.

As the State correctly argues, these statutes are plain and unambiguous. They provide for no separate cause of action, but merely recognize that to the extent another “existing law” provides for liability, these statutes, WIS. STAT. §§ 84.29(5) and 84.295(6), do not relieve the State of that liability when the State undertakes actions under the authority provided. Without the liability language in §§ 84.29(5) and 84.295(6), it could be unclear whether those statutes foreclosed damages from other existing causes of action.

As an example, the State cites to WIS. STAT. § 88.87(2)(c), which we find persuasive. If in the course of the DOT constructing an interstate highway, a freeway, or expressway, it vacated or relocated a village highway and the vacation or relocation of that village highway “directly injured” a property owner because it resulted in a highway grade not in accordance with § 88.87(2)(a),⁴ thereby impeding the general flow of surface water or stream water in an

⁴ WISCONSIN STAT. § 88.87(2)(a) provides, in part:

(continued)

unreasonable manner so as to cause an unnecessary accumulation of waters flooding, § 88.87(2)(c),⁵ permits that property owner to submit a claim to the DOT and, if no action is taken within a specified time, to sue in inverse condemnation under WIS. STAT. ch. 32. Thus, § 88.87(2)(c) is an “existing law” that gives a property owner a right of action for certain specified damages against the DOT, where those damages were the direct result of the DOT work authorized under WIS. STAT. §§ 84.29(5) and 84.295(6).

Indeed, WIS. STAT. § 88.87(2) further illustrates our conclusion that these statutes do not provide an independent cause of action, as § 88.87(2) expressly provides a specific procedure for

Whenever any county, town, city, village, railroad company or the department of transportation has heretofore constructed and now maintains or hereafter constructs and maintains any highway or railroad grade in or across any marsh, lowland, natural depression, natural watercourse, natural or man-made channel or drainage course, it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands. All such highways and railroad grades shall be constructed with adequate ditches, culverts, and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage. This paragraph does not apply to highways or railroad grades used to hold and retain water for cranberry or conservation management purposes.

⁵ WISCONSIN STAT. § 88.87(2)(c) provides:

If a city, village, town, county or railroad company or the department of transportation constructs and maintains a highway or railroad grade not in accordance with par. (a), any property owner damaged by the highway or railroad grade may, within 3 years after the alleged damage occurred, file a claim with the appropriate governmental agency or railroad company. 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. Within 90 days after the filing of the claim, the governmental agency or railroad company shall either correct the cause of the water damage, acquire rights to use the land for drainage or overflow purposes, or deny the claim. If the agency or company denies the claim or fails to take any action within 90 days after the filing of the claim, the property owner may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable.

making such a claim, an express waiver of sovereign immunity which is wholly absent from WIS. STAT. §§ 84.29(5) and 84.295(6).

In sum, the liability language in WIS. STAT. §§ 84.29(5) and 84.295(6) is meant to preserve a landowner's causes of action under other statutes. Since §§ 84.29(5) and 84.295(6) do not provide for a separate right of action, and the LLC cites to no other law that permits it to seek damages based on the allegations in its complaint, the complaint fails to state a claim upon which relief may be granted, and the circuit court correctly dismissed the complaint with prejudice on that basis.

Upon the foregoing reasons,

IT IS ORDERED that the order dismissing the LLC's complaint with prejudice is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals