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January 20, 2021

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

2020AP165

Fin 'N Feather Properties, LLC v. Wisconsin Department of
Transportation (L.C. #2017CV151)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Fin 'N Feather Properties, LLC, appeals from an order of the circuit court dismissing this case upon stipulation of the parties. Fin 'N Feather challenges the denial of "severance damages" for the loss of two driveways providing access to its property as a result of the change in grade of

an adjoining road, arguing that under WIS. STAT. § 32.09(6)(f) (2017-18),¹ a compensable partial taking occurred. While a compensable partial taking did occur, the taking had no connection/relation to the loss of the two driveways that Fin ‘N Feather seeks compensation for. 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. We affirm the order of the circuit court.

The Fin ‘N Feather restaurant is located at the corner of State Trunk Highway 116 (STH 116) and First Street in Winneconne, Wisconsin. The Wolf River traverses the east side of the Fin ‘N Feather restaurant. First Street bounds the west side of the property and provides vehicular access to the restaurant. STH 116 bounds the south side of the property and crosses the Wolf River via a bridge. In 2018, the Wisconsin Department of Transportation (DOT) began a project to replace the STH 116 bridge over the Wolf River. The old STH 116 bridge was retained, and a new STH 116 bridge was constructed to the south.

Prior to the project, Fin ‘N Feather had two driveways that accessed STH 116; however, the project required a raise in grade for the new bridge, resulting in the elimination of the two driveways onto STH 116. Fin ‘N Feather’s driveway access along First Street remained unchanged. DOT also acquired (by eminent domain) six square feet of Fin ‘N Feather’s land for the purpose of relocating the intersection of First Street and the new STH 116. None of the six square feet were part of the two driveways that previously accessed STH 116. As compensation for the taking, DOT issued an award of damages.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

Fin ‘N Feather appealed the amount of compensation pursuant to WIS. STAT. § 32.05(11), arguing that “[t]he access remaining to the subject property ... will be so unreasonable so as to amount to a deprivation by defendant of substantially all of the economic value of the subject property.” The parties filed cross-motions in limine on whether to exclude evidence regarding any loss of property value as a result of the elimination of the two driveways. After briefing, the circuit court granted DOT’s motion in limine and denied Fin ‘N Feather’s, excluding evidence pertaining to the loss of driveway access from STH 116. The court ultimately entered a stipulated dismissal of this action. Fin ‘N Feather appeals.

Fin ‘N Feather argues that it is entitled to severance damages in accordance with WIS. STAT. § 32.09(6)(f), as the loss of the driveways due to the change in grade was “accompanied by a taking of land.”² The circuit court, relying upon *118th St. Kenosha, LLC v. DOT*, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486, and *Jantz v. DOT*, 63 Wis. 2d 404, 217 N.W.2d 266 (1974), held as a matter of law that Fin ‘N Feather was not entitled to damages under § 32.09(6)(f), as there was no causal relationship between the loss of the driveways and the taking of land for the intersection redesign.

We agree with the court’s reliance upon *118th Street*, which in turn relied upon *Jantz*. *Jantz* is on point. As part of an improvement project, the state widened and raised the grade of the highway adjacent to Jantz’s property. *Jantz*, 63 Wis. 2d at 406, 408. The state acquired land by eminent domain from Jantz for purposes of widening the highway, but the taking was not the cause of Jantz losing her driveway access point; the raise in the grade resulted in the loss of the

² WISCONSIN STAT. § 32.09(6)(f) provides compensation for “[d]amages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land.”

driveway access. *Id.* at 406-07, 411. Fin ‘N Feather makes the same argument that Jantz made: the entire project included a taking; thus, it was entitled to damages for the loss of its driveway under WIS. STAT. § 32.09(6)(f). *See Jantz*, 63 Wis. 2d at 408. The problem with Fin ‘N Feather’s argument is the result arrived at in *Jantz*—that each element of a road construction project must be analyzed as “separate and distinct acts” when considering compensation under § 32.09. *Jantz* 63 Wis. 2d at 408-09. Jantz’s argument that all aspects of the project “constitue[d] a single act” was rejected by our supreme court, *id.*, and we must likewise reject Fin ‘N Feather’s similar argument that damages are due for the loss of the driveways despite the taking having nothing to do with the driveways.

The taking of the six square feet of Fin ‘N Feather’s land for the new intersection at STH 116 and First Street was a compensable exercise of eminent domain. The “relocation and change of grade” of STH 116 which resulted in the loss of the driveways was an independent “exercise of the police power of the state” that does not require compensation, as no taking of property occurred for the change in grade. *See id.* at 409. Although “both undertakings [were] related to a single overall highway improvement purpose,” that did “not merge the actions into a single act or warrant holding that the change of grade of [the r]oad was accompanied by a taking of plaintiff’s land.” *Id.* at 411; *see also 118th Street*, 359 Wis. 2d 30, ¶48 & n.16 (summarizing *Jantz*).

Our supreme court reemphasized WIS. STAT. § 32.09’s causation requirement in *118th Street*, where the dispute centered on whether altering a property’s access to an adjacent road by relocating the road entitled the owner to compensation under § 32.09. *118th Street*, 359 Wis. 2d 30, ¶¶2-5. One part of the project involved a physical taking, while a separate part involved relocating the adjacent road. *Id.*, ¶¶9–11. Our supreme court rejected the owner’s claim for

damages due to the altered access, reasoning that “damages for a partial taking cannot include damages for the impact caused by loss of access to a highway if the loss of access resulted from the relocation of the highway, rather than from the taking.” *Id.*, ¶57. Although the owner could obtain damages caused by the physical taking, that separate act could not “serve to bootstrap damages that emanate from [a] road relocation.” *Id.*

The undisputed facts before us are on point with *118th Street* and *Jantz*. As our supreme court clearly stated, “the partial taking did not cause the change in grade,” *118th Street*, 359 Wis. 2d 30, ¶48 n.16 (citing *Jantz*, 63 Wis. 2d at 411-12), and the same applies in this case. We affirm.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals