

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2008

David R. Schanker
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. 2007AP751

Cir. Ct. No. 2005CV4179

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PRN ASSOCIATES LLC AND PGN ASSOCIATES LLC,

PLAINTIFFS-APPELLANTS,

v.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. PRN Associates LLC and PGN Associates LLC (collectively referred to as Prism) appeal a judgment dismissing their declaratory judgment action against the Department of Administration (DOA). Because we

conclude that the circuit court lacked personal jurisdiction over DOA based on sovereign immunity, we affirm the judgment dismissing the action.

¶2 Prism, an unsuccessful bidder for a State construction project, sought a declaration that: (1) DOA violated its procurement rules and (2) its rules regarding procurement protests; (3) Prism had a contract or exclusive right to negotiate for the project; (4) DOA improperly released the contents of its proposal to the public and other proposers; and (5) DOA acted outside its authority in authorizing and conducting a second “Request for Proposals.” The circuit court dismissed the action based on sovereign immunity. It also concluded that WIS. STAT. ch 227 provides the exclusive remedy and the issue is not justiciable due to Prism’s failure to secure an injunction to prevent another company from completing the construction. Although we agree with the trial court’s analysis of each of these issues, our conclusion that sovereign immunity applies obviates the need to further review the alternative grounds for dismissal.

¶3 The State cannot be sued without its consent. *See Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980). Sovereign immunity derives from WIS. CONST. art. IV, § 27 which provides: “The legislature shall direct by law in what manner and in what courts suits may be brought against the state.” *Kenosha v. State*, 35 Wis. 2d 317, 322, 151 N.W.2d 36 (1967). This immunity extends to state agencies and deprives the court of personal jurisdiction over state agencies. *Id.* at 323. With narrow exceptions, sovereign immunity applies to declaratory judgment actions. *Id.* Courts may entertain lawsuits to enjoin state officers and agencies from acting beyond their constitutional or jurisdictional authority. *Id.* Prism argues: (1) its action comes within the injunction exception; (2) the State

can be sued for a “taking” despite sovereign immunity; and (3) WIS. STAT. § 775.01¹ waives sovereign immunity. We reject these arguments.

¶4 An action against state officers and agencies to enjoin them from acting beyond their authority can be brought if prospective relief is sought. The right to declaratory relief applies only for anticipatory or preventative actions. *Lister v. Board of Regents*, 72 Wis. 2d 282, 307-08, 240 N.W.2d 610 (1976). All of the declaratory relief Prism sought relates to DOA’s past conduct. Prism does not identify any continuing violation of the state procurement procedures. Prism argues that the DOA continues to fail to give it a fair appeal. The exception would swallow the rule if such a broad construction of continuing harm is recognized.

¶5 A “taking” of private property is also recognized as an exception to the doctrine of sovereign immunity. *See Zinn v. State*, 112 Wis. 2d 417, 436, 334 N.W.2d 67 (1983). This is not a “takings” case, therefore the exception does not apply.

¶6 Prism argues that WIS. STAT. § 775.01 authorizes this action against the State, and therefore waives sovereign immunity. That section allows a claimant to commence an action against the State “upon the refusal of the legislature to allow a claim.” Subsequent to commencement of this action, Prism filed a claim with the Wisconsin Claims Board, but it has not requested payment from the legislature. Section 775.01 requires Prism, upon denial of a claim, to introduce a bill in the legislature for compensation. It must also post a \$1,000

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

bond. Prism has not met these conditions and therefore § 775.01 does not apply. See *Brown v. State*, 230 Wis. 2d 355, 368-69, 602 N.W.2d 79 (Ct. App. 1999).

¶7 In addition, claims under WIS. STAT. § 775.01 are limited to claims that would “render the State a debtor to the claimant.” See *Koshick v. State*, 2005 WI App 232, ¶8, 287 Wis. 2d 608, 706 N.W.2d 174. Lost profits and incurred expenses that are not readily determined from the terms of a contract or from fixed data or mathematical computation are not the type of “claims” to which § 775.01 applies. *Id.* Because Prism’s complaint seeks only equitable relief and not damages, its claims are not the type allowed under § 775.01. Prism argues that *Koshick* was erroneously decided. This court is bound by its precedent. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

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

