**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 30, 2003**

Cornelia G. Clark
Clerk of Court of Appeals



**Appeal Nos. 02-1035**
**02-1880**

**Cir. Ct. Nos. 01 CV 8011**
**02 CV 1711**

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

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**NO. 02-1035**
**CIR. CT. NO. 01 CV 8011**

**CITY OF MILWAUKEE**
**REDEVELOPMENT AUTHORITY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VETERANS OF FOREIGN**
**WARS POST 2874,**

**RESPONDENT-APPELLANT.**

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**NO. 02-1880**
**CIR. CT. NO. 02 CV 1711**

**CITY OF MILWAUKEE POST NO. 2874**
**VETERANS OF FOREIGN WARS,**

**PLAINTIFF-APPELLANT,**

**V.**

**REDEVELOPMENT AUTHORITY
OF THE CITY OF MILWAUKEE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Dismissed.*

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed and cause remanded.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 SCHUDSON, J. In these consolidated appeals, the Veterans of Foreign Wars Post 2874 (VFW) challenges the circuit court order granting a writ of assistance to the Redevelopment Authority of the City of Milwaukee to evict VFW from the property at 2601 West Wisconsin Avenue and from the non-final order[1] directing the Milwaukee County Condemnation Commission panel to apply the "unit rule" to determine "fair market value," under WIS. STAT. § 32.09(5)(a) (2001-02),[2] of the property where the VFW post was located.

¶2 We conclude that because a raze order for the building at 2601 West Wisconsin was approved, VFW's challenge to the order granting the writ of assistance is now moot and, accordingly, we dismiss the appeal in Case No. 02-1035. We also conclude that, because, under ***Dotty Dumpling's Dowry, Ltd., v.***

[1] On November 27, 2002, this court granted VFW leave to appeal Judge Michael P. Sullivan's July 9, 2002 order.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 32.09(5)(a) provides, "In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 [relating to '[a]dditional items payable'] if shown to exist."

***Community Development Authority***, 2002 WI App 200, 257 Wis. 2d 377, 651 N.W.2d 1, *rev. denied*, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890 (Wis. Oct. 21, 2002) (No. 01-1913), application of the "unit rule" was required and, therefore, we affirm Judge Michael P. Sullivan's order and return this case to the circuit court for further proceedings in Case No. 02-1880.

## I. BACKGROUND

¶3 A brief history of the appellate litigation surrounding this case will help locate the central issue in these consolidated appeals.

¶4 **Appeal No. 01-1642**: In 2001, VFW appealed from the circuit court order of Judge William J. Haese granting summary judgment to the Redevelopment Authority of the City of Milwaukee dismissing VFW's challenge, under WIS. STAT. § 32.05(5), to the acquisition, by condemnation, of VFW's ninety-nine-year leasehold interest to 5,200 square feet of space in property located at 2601 West Wisconsin Avenue in Milwaukee. We affirmed, concluding that VFW had waived its challenges. *See* ***City of Milwaukee Post #2874 v. Redevelopment Auth.***, No. 01-1642, unpublished slip op. (WI App Feb. 12, 2002). Much of the factual background of the instant appeals is recited in our per curiam decision, a copy of which is appended to and incorporated in this opinion.

¶5 **Appeal No. 02-1035**: In 2002, VFW appealed from the circuit court order of Judge Maxine A. White granting the Redevelopment Authority's application for a writ of assistance to evict VFW. As VFW, in its reply brief in Appeal No. 02-1880 concedes, however, "[b]ecause Judge [Jeffrey] Kremers on

April 8, 2003 approved a raze order of the building …, the issue of whether a Writ of Assistance should be stayed is now moot." We agree.[3]

¶6 **Appeal No. 02-1880**: In 2002, VFW, in an interlocutory appeal, challenged the circuit court order of Judge Michael P. Sullivan requiring application of the "unit rule" to determine the fair market value of the property where the post was located. This court consolidated these last two appeals and heard oral argument on August 5, 2003.

## II. DISCUSSION

¶7 VFW argues that if we affirm the circuit court's order requiring application of the "unit rule," it "will be barred from presenting evidence regarding the value of its [l]ease" and it "will receive nothing as compensation for the termination of its [l]ease." It is undisputed that, at the point that condemnation effectively terminated VFW's lease, sixty years remained and the lease value, without any adjustment for inflation, exceeded eight million dollars. The City responds, however, that the value of VFW's lease is not a proper component in the determination of the property's "fair market value."

¶8 Our review of the circuit court's determination is *de novo*. ***City of Racine v. Bassinger***, 163 Wis. 2d 1029, 1034, 473 N.W.2d 526 (Ct. App. 1991). Although the underlying litigation is factually and procedurally complicated, the appellate question is clear: *Under WIS. STAT. § 32.09(5)(a), must the City pay the*

[3] In No. 02-1035, VFW also challenges Judge Michael P. Sullivan's July 9, 2002 order with arguments that go beyond those mooted by the raze order. Those additional arguments, however, correspond to arguments VFW also presents in No. 02-1880. For clarity in these consolidated appeals, therefore, we dismiss No. 02-1035 but address VFW's arguments in that case to the extent that they correspond to the arguments VFW presents in No. 02-1880.

*VFW anything more than the "fair market value of the property" as determined under the "unit rule"?* We conclude that the case law, including this court's recent decision in ***Dotty***, yields an equally clear answer: *No*.

¶9 In ***Dotty***, Dotty was the owner of a restaurant in Madison when the Community Development Authority sought to acquire the property and raze the building to develop the area for a cultural arts facility. 257 Wis. 2d 377, ¶2. As in VFW's case, the city, in ***Dotty***, acquired title to the real estate and identified several potential replacement properties. ***Id.***, ¶¶3-4. Dotty's cost of purchasing, relocating and remodeling, however, substantially exceeded the city's proposed condemnation award and relocation-assistance compensation. ***Id.***, ¶4.

¶10 "Asserting that the Authority had not offered 'a comparable business replacement in compliance with sec. 32.05(8),' Dotty refused to vacate the property." ***Id.***, ¶5. The city sought a writ of assistance, the circuit court issued it, and Dotty appealed, "on the grounds that the Authority did not make a comparable replacement property available to it as required by [WIS. STAT. § 32.05(8)]." ***Id.***, ¶6. Arguing "that the only 'comparable replacement property' identified by the Authority which met Dotty's criteria was not 'made available' because the cost to purchase and remodel the property would be almost $1 million more than the amount Dotty could expect to receive from the Authority[,]" ***id.***, ¶10 (footnote omitted), Dotty presented what, essentially, is the very theory VFW presents here.

¶11 In ***Dotty***, this court acknowledged that WIS. STAT. § 32.05(8), in isolation, allowed for some uncertainty in determining "what a condemner must do in order to satisfy the requirement that a 'comparable replacement property' be 'made available.'" ***Id.***, ¶11. We concluded, however, that consistent with this court's holding in ***Bassinger***: (1) "WIS. STAT. § 32.05(8) grants a condemnee no

rights beyond what the legislature has authorized in the relocation assistance law, WIS. STAT. § 32.19 *et seq*.," ***Dotty***, 257 Wis. 2d 377, ¶15; (2) "the Authority made available to Dotty the maximum allowable 'business replacement payment' authorized under WIS. STAT. § 32.19(4m)," ***id.***, ¶20; and (3) therefore:

> by identifying potential replacement properties, obtaining renovation cost estimates for a property in which Dotty expressed some interest, tendering the maximum business replacement payment, and offering to reimburse Dotty for its other statutorily authorized relocation expenses, the Authority "made available" to Dotty a comparable replacement property "*to the extent required by the relocation assistance law*." ***Bassinger***, 163 Wis. 2d at 1040.

***Dotty***, 257 Wis. 2d 377, ¶21.

¶12 Acknowledging what might seem a harsh result, particularly in cases involving small businesses (and, we might now add, non-profit organizations such as VFW), this court further explained:

> Finally, we note that Dotty's reading of WIS. STAT. § 32.05(8) suggests that a condemnor must provide virtually unlimited relocation assistance before it can gain possession of condemned premises. In Dotty's view, a court may not grant a condemnor possession of condemned premises until a replacement property deemed acceptable by the condemnee is procured, regardless of its acquisition costs, all of which the condemnor must bear or tender. Alternatively, Dotty's interpretation of the "made available" requirement implies that it will never have to vacate the condemned property if the Authority cannot identify a replacement property acceptable to Dotty which can be acquired for an amount not exceeding the award of compensation plus the maximum relocation benefits to which Dotty is entitled. Either result is unreasonable and contrary to the legislative intent regarding the "made available" requirement that we discerned in ***Bassinger***.
>
> Given the limits specified by the legislature for the various relocation assistance benefit payments authorized by WIS. STAT. § 32.19, we agree with the trial court's conclusion that "[t]he law does not impose any … open-

> ended obligation upon a condemnor" to provide business relocation payments regardless of the cost to the condemnor. The obligation of the condemning agency under § 32.19 is to *assist* in the procurement and acquisition of replacement property, not to make a displaced business financially whole regardless of the cost to the condemning agency. In short, Dotty's interpretation would render meaningless the subsections of § 32.19 which place upper limits on relocation assistance payments, and it is thus an interpretation we cannot adopt.

***Dotty***, 257 Wis. 2d 377, ¶¶26-27. Indeed, harsh though the result may be, this court recognized that "[t]he relocation statutes and regulations plainly contemplate that some business-owners will opt not to relocate or ultimately be unsuccessful in doing so." ***Id.***, ¶29.

¶13 This court's conclusion in ***Dotty*** is consistent with the supreme court's pronouncements in ***Green Bay Broadcasting Co. v. Redevelopment Authority***, 116 Wis. 2d 1, 342 N.W.2d 27 (1983). The supreme court rejected the argument "that the unit rule does not apply in Wisconsin," and "point[ed] out that its acceptance is beyond question in Wisconsin jurisprudence." ***Id.*** at 11. The supreme court emphasized:

> *The unit rule is designed to protect the interests of the condemnor and not to protect the interests of a condemnee*. The condemnees, irrespective of their interests, are indeed constitutionally entitled to just compensation, but contracts between the owners of *different interests in the land should not be permitted to result in a total sum which is in excess of the whole value of the undivided fee*.

***Id.*** (emphasis added). Here, it is undisputed that the multi-million dollar award that would be required to compensate VFW for the value of its lease would be substantially "in excess of the whole value of the undivided fee." *See* ***id.*** And here, VFW does not dispute that, if ***Bassinger*** and ***Dotty*** apply, its appeal cannot prevail.

¶14 Ultimately, VFW asks this court to either: (1) distinguish ***Dotty*** and find it inapplicable here; or (2) essentially ignore the case law and "make an exception to the unit rule"; in order to (3) "compel [the City] … to provide … sufficient funds to build a replacement property and establish a fund adequate to offset its occupancy costs." Notwithstanding our considerable sympathy for the VFW, we see no basis on which to distinguish this case from ***Dotty*** and, therefore, we have no authority to grant VFW its requested relief. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (court of appeals bound by its decisions). The case law, culminating in ***Dotty***, controls.

¶15 In ***Dotty***, however, this court did not decide whether WIS. STAT. § 32.05(8), as applied, "constituted an unconstitutional taking because it deprived Dotty, without just compensation, of its ability to continue operating its business." ***Dotty***, 257 Wis. 2d 377, ¶30. Although VFW would have this court decide that constitutional issue, the circuit court has not yet addressed it.[4]

*By the Court.*—Appeal dismissed in No. 02-1035; order affirmed and cause remanded in No. 02-1880.[5]

[4] The VFW also challenges what it perceives as the circuit court's refusal to order the City to provide a copy of the appraisal report. The VFW concedes, however, that "[t]he Nicholson appraisal report … has been furnished to the VFW" and that it is "not clear" whether any other report exists. At oral argument, the VFW did not dispute the City's assertion that no other report exists but, instead, contended that the City should be required to create an appraisal that is consistent with its proposed compensation. The VFW offered no authority supporting this novel notion and we see no basis on which to require the City to do so.

[5] Although this case will return to the circuit court for further proceedings consistent with this decision, we would be remiss if we failed to express our view that, hopefully, the parties now will till their common ground. After all, the City agrees that the VFW post in this case has experienced most unfortunate circumstances. The City also agrees that a VFW post can be a very positive influence in a neighborhood; therefore, clearly, *the City has a stake in VFW's continuing existence*.

(continued)

Not recommended for publication in the official reports.

Thus, this court believes that, with genuine and concerted efforts involving both the public and private sector, the City and VFW can locate an excellent new home where VFW will thrive while adding stability and vitality to its new neighborhood. Hopefully, the parties now can join forces to find a solution.

**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 12, 2002**

**Cornelia G. Clark**
**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. 01-1642** **Cir. Ct. No. 01 CV 1752**

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

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**CITY OF MILWAUKEE POST #2874, VETERANS OF FOREIGN WARS OF THE UNITED STATES,**

**PLAINTIFF-APPELLANT,**

**V.**

**REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,**

**DEFENDANT-RESPONDENT,**

**MAHARISHI VEDIC UNIVERSITY, INC.,**

**DEFENDANT.**

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APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶16 PER CURIAM. The City of Milwaukee Post #2874, Veterans of Foreign Wars of the United States (VFW) appeals from an order granting

summary judgment to the Redevelopment Authority of the City of Milwaukee (RACM), dismissing its challenge to the acquisition, by condemnation, of the VFW's ninety-nine-year leasehold interest to 5,200 square feet of space in property located at 2601 West Wisconsin Avenue, Milwaukee, Wisconsin, pursuant to WIS. STAT. § 32.05(5).

¶17 The VFW claims the trial court erred when it granted summary judgment because: (1) RACM has not filed an adequate relocation plan as required by WIS. STAT. § 32.25(1); (2) RACM has not filed an adequate relocation assistance service plan and has not implemented that plan as required by § 32.25(2); (3) RACM should have been required to issue separate awards for the fee owner and the tenant (VFW), who had 160 years remaining on its lease; and (4) there are disputed issues of material fact, which preclude summary judgment.

¶18 Because the VFW has waived any challenge to whether the requirements of WIS. STAT. § 32.25(1) and (2) have been satisfied and, as a result, whether there are disputed material issues of fact is not properly before this court, we affirm.

## I. BACKGROUND

¶19 A bit of history will supply the factual background for this appeal. The VFW owned real estate located in the 2600 block of West Wisconsin Avenue, Milwaukee, Wisconsin. In 1962, it conveyed its property to Towne Metropolitan, Inc. (Towne Realty). Towne Realty constructed a 113,000 square foot hotel on the site. In exchange for the conveyance of the real estate, VFW received a ninety-nine-year lease to a 5,200 square foot area in the hotel structure facing the west side of North 26th Street, just south of Wisconsin Avenue. The lease granted an option to the VFW to renew for an additional ninety-nine years. The annual rent

was $1.00. The lease further provided that the lessor would pay all real estate taxes, provide heat, air conditioning, and maintenance at no cost to the VFW. In 1986, Towne Realty sold the property to Marquette University, which used the property as a dormitory. In 1994, Marquette sold the building to Maharishi Vedic University, Inc. The latter never occupied the building. At all times, both Marquette and Maharishi substantially complied with the terms of the lease to the VFW.

¶20 On February 4, 1998, RACM held a public hearing to consider the creation of a redevelopment district for parcels of land including the property located on Wisconsin Avenue between 26th and 27th Streets. On January 4, 1999, RACM created a redevelopment district and issued a relocation order pursuant to the provisions of WIS. STAT. § 32.25(1). The hotel structure, which encompassed the VFW leased premises, was included in the district. The relocation plan for the entire project referred to the long-term lease of the VFW. RACM located three comparable properties and filed the plan with the Department of Commerce on April 20, 1999. It was approved on May 3, 1999. The VFW disputed the comparability of the three properties cited in the plan, but did not appeal the determination of the Department of Commerce. On January 18, 2001, RACM issued a jurisdictional offer in the sum of $440,000, naming Maharishi Vedic University and the VFW as the owners of the subject premises. An award of damages in the same amount was issued on February 21, 2001, and was duly filed with the clerk of courts for Milwaukee County.

¶21 As pertinent to this appeal, the VFW filed this action on February 21, 2001, pursuant to WIS. STAT. § 32.05(5)[6] challenging the right of RACM to acquire its leasehold interest at 2601 West Wisconsin Avenue. RACM moved for summary judgment. The trial court granted RACM's motion for summary judgment. The VFW now appeals.[7]

## II. ANALYSIS

¶22 This court reviews summary judgment decisions de novo, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

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[6] WISCONSIN STAT. § 32.05(5) provides:

> COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. If an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, the owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of post-mark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant.

[7] Two cases involving the condemnation of this same property are currently pending in the circuit court of Milwaukee County: Case No. 01-CV-001802 and Case No. 01-CV-008011. The former involves the disbursement of the award for damages after the determination of the respective rights of the VFW and Maharishi Vedic University. The latter involves the appropriateness of the identified comparable replacement properties.

¶23 The VFW first contends that the trial court erred because RACM did not file an adequate relocation plan as required by WIS. STAT. § 32.25(1), and RACM did not implement the relocation service assistance plan as required by § 32.25(2). The VFW argues that because RACM disregarded the mandate of §§ 32.25(1) and (2), which requires municipalities to prepare and *implement* an adequate relocation plan and an adequate relocation assistance plan *before* proceeding with acquisition, this case must be returned to the trial court with directions that RACM may not proceed with the acquisition of the subject property until it has satisfied the requirements of the statute. We are not persuaded.

¶24 As relevant to the disposition of this appeal, WIS. STAT. § 32.25(1) reads: "[N]o condemnor may proceed with any activity that may involve the displacement of persons, business concerns or farm operations until the condemnor has filed in writing a relocation payment plan and relocation assistance service plan and has had both plans approved in writing by the department of commerce."

¶25 Initially, it is uncontraverted that RACM filed plans for relocation payment and assistance service and they were subsequently approved without objection by the Department of Commerce. On appeal, the VFW now appears to be challenging the adequacy or sufficiency of the approved plans. It bases this contention on WIS. STAT. § 32.25(2)(a) and (b), which require:

> **(2)** The relocation assistance service plan shall contain evidence that the condemnor has taken reasonable and appropriate steps to:
>
> (a) Determine the cost of any relocation payments and services or the methods that are going to be used to determine such costs.

> (b) Assist owners of displaced business concerns and farm operations in obtaining and becoming established in suitable business locations or replacement farms.

¶26 The VFW apparently wishes to dispute the reasonableness or propriety of the steps taken to accept the plans. A reasonable reading of § 32.25(2)(a) and (b), however, provides no express remedy. The approval process was executed by the Department of Commerce, an administrative agency. It is further undisputed that the VFW has a long-term leasehold interest in the condemned premises and was included as an interested party in the relocation plans submitted to the Department of Commerce. The VFW's status more than qualified it as a party with standing for the purposes of a Chapter 227 administrative appeal. *See* WIS. STAT. § 227.53(1) (A person "aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision …."). The VFW, however, did not pursue an administrative review on the reasonableness and propriety of the relocation plans. Thus, we deem a waiver to have occurred. *See* ***State v. Mudgett***, 99 Wis. 2d 525, 530-31, 299 N.W.2d 621 (Ct. App. 1980). In addition, we can find no basis in the statutes or case law that would prevent vesting of title in the condemning authority once the Department of Commerce has approved the relocation plans.

¶27 Regardless of the foregoing application of the waiver doctrine, the VFW is not without a remedy for its qualitative and quantitative challenges to the condemnation result. First, WIS. STAT. § 32.05(8)(c) contains a proviso that a "condemnor may not require the persons who occupied the premises on the date that title vested in the condemnor to vacate until a comparable replacement property is made available." The qualitative nature of a proposed comparable property therefore, can be tested in a Writ of Assistance action. We take judicial notice of a pending action in Milwaukee County Circuit Court, ***Redevelopment***

***Authority of the City of Milwaukee v. VFW Post 2874***, Case No. 01-CV-008011, wherein the replacement comparables RACM has identified are being challenged by the VFW.

¶28 Second, as to the quantitative result, we take additional judicial notice[8] of Case No. 01-CV-001802, with the same title stated above, which, pursuant to WIS. STAT. § 32.05(7)(d),[9] has under consideration a determination of the respective rights of the VFW and Maharishi Vedic University and the allocation of the award of damages on deposit with the clerk of court's office. If the VFW feels aggrieved by the circuit court's division of the award, it may appeal the decision of the circuit court pursuant to WIS. STAT. §§ 32.05(9) and (11).

¶29 Because the vesting of title to the subject premises at the time of the award of damages was not defective and the substantial rights of the VFW have been assured by the procedures it has followed in other pending judicial notice cases, we conclude that the VFW's statutory challenge to the trial court's granting of the summary judgment must fail.[10]

¶30 Lastly, the VFW claims the trial court erred when it rejected the VFW's claim that disputed issues of material fact exist which preclude summary

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[8] *See* WIS. STAT. § 902.01(2)(b) (A court may take judicial notice of a fact if the fact is not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

[9] WISCONSIN STAT. § 32.05(7)(d) provides in pertinent part: "[o]n or before said date of taking, a check … shall … be deposited with the clerk of the circuit court …. The clerk shall give notice thereof by certified mail to such parties. The persons entitled thereto may receive their proper share of the award by petition to and order of the circuit court of the county."

[10] The VFW challenges the application of the "Unit Rule" by RACM. Because this is an issue more properly before the circuit court in case No. 01-CV-00182 and the appellate rights attaching thereto, we eschew consideration of this issue.

judgment. We reject this contention. This claim of error is essentially based upon the proposition that the relocation issue is fact-intensive. Concededly, the relocation issue might have been fact-intensive, but it was never properly challenged as we have explained earlier in this opinion. Therefore, the only question before the trial court was a question of law, which the court decided correctly. The same may be said for the issue of comparability. This case was not the proper forum to address those alleged issues of material fact. Rather, the issue has been preserved in the Writ of Assistance action presently pending in the circuit court. Thus, the VFW's last claim of error fails.

*By the Court.*—Order affirmed.

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