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DISTRICT II

November 16, 2022

To:

Hon. Barbara H. Key
Circuit Court Judge
Electronic Notice

Clayton Patrick Kawski
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Benjamin Southwick
Electronic Notice

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

2022AP302

Fin 'N Feather Properties, LLC v. Wisconsin Department of
Transportation (L.C. #2020CV176)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

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 court's denial of damages for diminished property value arising from the loss of two driveways providing access to its property as a result of the change in grade of an abutting road, arguing that such damages are available under WIS. STAT. § 32.18 (2019-20).¹ 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.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

Fin ‘N Feather operates a restaurant 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 property. First Street runs along the west side of the property and provides vehicular access to the restaurant. STH 116 runs along the south side of the property and crosses the Wolf River via a bridge. A Wisconsin Department of Transportation (DOT) project replaced the STH 116 bridge over the Wolf River with a new, higher bridge to the south of the old bridge.

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.²

Fin ‘N Feather filed a complaint against the DOT seeking damages pursuant to WIS. STAT. § 32.18, asserting that there was “a reduction in value to the remainder of the subject property upon completion of defendant’s highway improvement project.” Fin ‘N Feather filed a motion in limine seeking to admit evidence of diminished property value as a result of the change of grade and elimination of the two driveways. Fin ‘N Feather submitted a real estate appraisal, contending that the loss of the two driveways has a significant impact on the value of the property.

² In *Fin ‘N Feather Properties, LLC v. DOT*, No. 2020AP165, unpublished op. and order (WI App Jan. 20, 2021), we affirmed denial of Fin ‘N Feather’s claim under WIS. STAT. § 32.09(6)(f) seeking compensation for a change in grade “where accompanied by a taking.” While a compensable partial taking did occur on the other side of the property, because the taking had no connection or relation to the loss of the two driveways, Fin ‘N Feather’s claim was appropriately denied. *Fin ‘N Feather*, No. 2020AP165, at 4-5.

After briefing, the circuit court denied Fin ‘N Feather’s motion in limine and excluded evidence pertaining to diminished property value. The court ultimately entered a stipulated dismissal of this action, whereby Fin ‘N Feather reserved the right to appeal the court’s order denying the motion in limine. Fin ‘N Feather appeals.

Fin ‘N Feather argues that it is entitled to recover damages for diminished property value pursuant to WIS. STAT. § 32.18 given the loss of the driveways due to the change in grade. The circuit court, relying upon *United America, LLC v. DOT*, 2021 WI 44, 397 Wis. 2d 42, 959 N.W.2d 317, held as a matter of law that Fin ‘N Feather was not entitled to damages for diminished property value under § 32.18.³

We agree that *United America* controls. In *United America*, DOT changed the grade of Highway 51, which abutted United America’s property on which it operated a gas station and convenience store. *United America*, 397 Wis. 2d 42, ¶¶2-3. As a result, access to the property from Highway 51 became less convenient, and the property’s value decreased. *Id.* The supreme court rejected United America’s claim for compensation from DOT under WIS. STAT. § 32.18. *United America*, 397 Wis. 2d 42, ¶10. The court held “that the diminution in property value occasioned by a change in an abutting highway’s grade is not an injury compensable under ... § 32.18 because such damages are not ‘damages to the lands.’” *United America*, 397 Wis. 2d 42, ¶10. The court reached its conclusion based on its interpretation of the definition of “property” in WIS. STAT. § 32.01(2) and held that the phrase “‘damages to the lands’ is a

³ WISCONSIN STAT. § 32.18 states, in pertinent part: “Where a street or highway improvement project undertaken by the department of transportation ... causes a change of the grade of such street or highway ... but does not require a taking of any abutting lands, the owner of such lands ... may file with the department ... a claim for any *damages to said lands* occasioned by such change of grade.” (Emphasis added).

narrower category of injuries than ‘damages to property.’” *United America*, 397 Wis. 2d 42, ¶¶12-13. Though it declined to define the “full scope of ‘damages to the lands,’” the court unequivocally determined that diminished property value is not a damage to the land. *Id.*, ¶10 (quoting § 32.18).

Fin ‘N Feather attempts to distinguish *United America* because, in that case, the change of grade in the abutting highway resulted in less convenient access rather than loss of direct access. This is a distinction without a difference. The supreme court held that under the statute’s plain language, the context of the terms and usage of those terms under related statutes, the court’s interpretation of the terms prior to the statute’s enactment, and the statute’s legislative history, diminished property value does not fall “within the class of ‘damages to the lands.’” *United America*, 397 Wis. 2d 42, ¶¶12-20. Whether the change of grade resulting in diminished value arises from less convenient access versus loss of direct access is immaterial to the court’s statutory interpretation of “damages to the lands.”

Fin ‘N Feather points to the supreme court’s additional rejection of *United America*’s “attempt to reframe” its diminished property value damage as damages due to decreased “flow of traffic” resulting from less convenient access, citing *United America*, 397 Wis. 2d 42, ¶20 n.14. Contrary to Fin ‘N Feather’s contention that the court’s holding is thus limited to situations involving less convenient access, the court merely affirmed that there is no right to the flow of traffic. *Id.* The court’s rejection of *United America*’s reframing of its lost property value damages as arising from less convenient access to one of damages arising from the diminished flow of traffic did not limit the court’s interpretation of “damages to the lands” under WIS. STAT. § 32.18.

We also reject Fin ‘N Feather’s contention that the “unreasonable” limitation to one point of access to its property entitles it to damages. Fin ‘N Feather cites cases addressing whether an alleged unreasonable limitation violates various other statutes. However, Fin ‘N Feather’s claim was brought under WIS. STAT. § 32.18, not under other statutory avenues. Thus, we decline to address what amounts to hypothetical alternative bases for redress.

The undisputed facts before us are on point with *United America*. Fin ‘N Feather sought to recover solely for a claim under WIS. STAT. § 32.18, and the only damages it seeks are for diminished property value occasioned by a change in the grade of the abutting highway. As our supreme court clearly stated in *United America*, “the diminution in property value occasioned by a change in an abutting highway’s grade is not an injury compensable under ... § 32.18 because such damages are not ‘damages to the lands.’” *United America*, 397 Wis. 2d 42, ¶10. The same applies in this case.

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