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DISTRICT II

December 20, 2023

To:

Hon. Angelina Gabriele
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Charlotte Gibson
Electronic Notice

Hannah Schieber Jurss
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Alan Marcuvitz
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Andrea H. Roschke
Electronic Notice

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

2021AP1759	MRED (75th Street/Kenosha) Associates v. DOT (L.C. #2019CV1169)
2021AP1762	MRED (75th Street/Kenosha) Associates v. DOT (L.C. #2020CV887)

Before Gundrum, P.J., Neubauer and Grogan, 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).

In these consolidated appeals, the State of Wisconsin Department of Transportation (DOT) appeals from circuit court orders granting summary judgment to MRED (75th Street/Kenosha) Associates (MRED) and Dickow Enterprises, LLC (Dickow) and denying

DOT's summary judgment motions.[1] This dispute concerns DOT's rights to revoke driveway access to a highway pursuant to a highway improvement project. 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 (2021-22).[2] We summarily reverse and remand to the circuit court with directions.

The parties do not dispute the following material facts. MRED and Dickow own business properties close to a busy intersection on state trunk highway (STH) 50 in Kenosha. Years ago, MRED and Dickow's predecessors-in-title entered into an access agreement granting the MRED property an easement over the Dickow property, allowing for the joint use of a driveway leading onto STH 50. DOT was not a party to the access agreement. At issue here is a DOT highway project that removes the businesses' driveway access to STH 50 without compensation.

Consistent with DOT policy when a dispute over a highway project is unresolved, DOT issued MRED a jurisdictional offer to purchase, through eminent domain, a portion of its property along STH 31. The jurisdictional offer shows that DOT took no access rights or property adjacent to STH 50. The jurisdictional offer further reflects that DOT would be compensating MRED for property taken in fee simple, as a permanent limited easement, and as a temporary limited easement, as reflected on an amended transportation plat. DOT did not acquire any property from Dickow through eminent domain as part of this highway project.

[1] The Honorable Anthony Milisauskas presided over the hearings on the parties' cross motions for summary judgment and issued the orders challenged in these consolidated appeals. The cases were later transferred to the Honorable Angelina Gabriele.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Dissatisfied with the impact of DOT's highway project on their businesses, MRED and Dickow filed a declaratory judgment action against DOT objecting to DOT's right to restrict their access to STH 50 without compensation. While the declaratory judgment action was pending, MRED also filed a right-to-take action pursuant to WIS. STAT. § 32.05(5).[3] DOT filed motions to dismiss both actions, which the circuit court denied following a hearing. Both parties subsequently filed motions for summary judgment, and the court held a hearing on the cross-motions. The court granted summary judgment to MRED and Dickow and denied DOT's motions. Regarding the declaratory judgment action, the court "judicially declared that DOT has no power, or right, to remove the existing driveway on STH 50 under the police power." Regarding the right-to-take action, the court "judicially declared that DOT has no power, or right under police power to remove MRED's access rights to STH 50." As to both actions, the court concluded that MRED and Dickow "have a right to get some sort of compensation for their loss." DOT appeals.

We review a circuit court's decision to grant summary judgment de novo, applying the same methodology as the circuit court. ***Fromm v. Village of Lake Delton***, 2014 WI App 47, ¶11, 354 Wis. 2d 30, 847 N.W.2d 845. On summary judgment, the moving party is entitled to judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT.

[3] WISCONSIN STAT. § 32.05(5) provides, in relevant part, that "[i]f an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer … the owner may … commence an action in the circuit court of the county wherein the property is located …."

§ 802.08(2); *see* ***Bank of N.Y. Mellon v. Klomsten***, 2018 WI App 25, ¶31, 381 Wis. 2d 218, 911 N.W.2d 364.

DOT argues that the circuit court erred in granting summary judgment to MRED and Dickow and denying summary judgment to DOT. When these appeals were first filed, DOT advanced three arguments: (1) MRED and Dickow could not bring their driveway-use challenge through a declaratory action under WIS. STAT. § 806.04; (2) MRED could not bring its driveway-use challenge through a right-to-take action under WIS. STAT. § 32.05(5); and (3) MRED and Dickow are not entitled to compensation for DOT's exercise of its police power to revoke driveway access to STH 50. While the appeals were pending, however, our supreme court issued a decision addressing facts and issues similar to those here. *See* ***DEKK Prop. Dev., LLC v. DOT***, 2023 WI 30, 406 Wis. 2d 768, 988 N.W.2d 653.

DEKK involved property with multiple driveways accessing the property where, for safety reasons, DOT decided to close one driveway entrance onto STH 50 while leaving DEKK's driveway access to an adjacent highway in place. ***Id.***, ¶2. As MRED did here, DEKK brought a challenge to the driveway closure under the right-to-take statute, WIS. STAT. § 32.05(5), seeking compensation for the driveway closure. ***Id.***, ¶1. The supreme court held that the circuit court should have granted DOT's summary judgment motion because "[s]ection 32.05(5) provides a means to challenge DOT's right to take property described in a jurisdictional offer issued under § 32.05(3), and here DOT's jurisdictional offer to DEKK did not describe any removal of access to STH 50." ***Id.*** Because the jurisdictional offer did "not describe the STH 50 driveway closure or any loss of access rights," the court concluded that "§ 32.05(5) is not the appropriate means for determining the nature of DEKK's access rights to STH 50, whether those rights are being impeded, or whether any such impediment is compensable." ***Id.***, ¶21.

Based on its resolution of the case on that ground, the court declined to address "whether DEKK might recover damages for the driveway closure through a different procedural avenue." ***Id.***, ¶23.

After ***DEKK*** was released, this court ordered the parties here to file supplemental briefs addressing how that decision affects these appeals. In its supplemental brief, MRED concedes that the ***DEKK*** decision forecloses its WIS. STAT. § 32.05(5) right-to-take action challenging the planned revocation of driveway access to STH 50 because the jurisdictional offer did not describe the removal of access to STH 50. Based on this concession, we reverse the circuit court's order granting summary judgment to MRED in that improper right-to-take action and remand to the circuit court with directions to enter summary judgment in DOT's favor.

This leaves the issue of whether MRED and Dickow could use a declaratory judgment proceeding to seek compensation for the STH 50 driveway closure. DOT argues that ***DEKK*** forecloses MRED's and Dickow's theory that a WIS. STAT. § 32.05(5) right-to-take action achieves a sovereign immunity waiver for a declaratory action. DOT asserts that sovereign immunity precludes an action against the State, or any of its agencies, absent legislative consent to suit, and MRED and Dickow cannot establish any such consent. MRED and Dickow argue that because the supreme court's decision did not explicitly address the declaratory judgment procedure, their declaratory action seeking compensation for revocation of driveway access to STH 50 "is not affected by ***DEKK***." We disagree with MRED and Dickow.

The doctrine of sovereign immunity provides that "the State cannot be sued without its consent, and the legislature directs the manner in which suits may be brought against the State."

PRN Assocs. LLC v. DOA, 2009 WI 53, ¶51, 317 Wis. 2d 656, 766 N.W.2d 559. Without consent to suit by the legislature, a court has no personal jurisdiction over the State or any agency thereof. ***Id.*** "'A declaration which seeks to fix the [S]tate's responsibility to respond to a monetary claim is not authorized by Wisconsin's Declaratory Judgments Act[,]'" meaning that a declaratory action seeking only money damages from the State is not permissible. ***Id.*** ¶57 (citation omitted).

As we now explain, the legislature has established the exclusive means by which to challenge DOT's exercise of police power when it is limiting driveway access to a highway, and the State has not consented to suit through the declaratory judgment statute under the circumstances presented here. *See* ***DEKK***, 406 Wis. 2d 768, ¶15 (explaining that the appropriate avenue for a property owner's challenge "depends on the facts of the case and the nature of the challenged governmental action" and further concluding that "[t]hese statutes are not interchangeable, and 'even if a highway construction project results in damages that are compensable under a particular statute, those damages cannot be recovered in a claim brought under the wrong statute.'") (citation omitted)).

The legislature has established that the proper avenue to contest a decision limiting or revoking highway access is through an action pursuant to WIS. STAT. § 86.073 challenging DOT's authority.[4] MRED's and Dickow's declaratory action against DOT is not viable under these circumstances. Instead, MRED and Dickow must seek relief through the particular route the legislature authorizes for their objection to DOT's use of its police power:

[4] WISCONSIN STAT. § 86.073 establishes the procedures for DOT review of a decision revoking driveway access to a highway. The details of that procedure do not matter to our reasoning.

administrative review under WIS. STAT. § 86.073 following DOT's formal notice of a decision to revoke use of the highway entrance. *See* ***Nick v. State Highway Comm'n***, 13 Wis. 2d 511, 512, 111 N.W.2d 95 (1961); ***J & E Invs. LLC v. DHA***, 2013 WI App 90, ¶¶16–17, 349 Wis. 2d 497, 835 N.W.2d 271. This procedure is the exclusive remedy the legislature has authorized for challenging a revocation of highway access and the sole means by which the legislature has consented to a sovereign immunity waiver for such a challenge.[5] Therefore, we remand to the circuit court with directions to enter summary judgment for DOT on the declaratory action as well.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily reversed and the cause remanded to the circuit court with directions.

[5] The highway project limiting driveway access to STH 50 is an exercise of DOT's police power to act to protect public safety and welfare in a way that may affect private land. When DOT acts pursuant to its police power authority to regulate driveway access under WIS. STAT. § 86.07(2) or WIS. ADMIN. CODE ch. TRANS 231, the property owner is (with the exception of a regulatory taking of all reasonable access to the property) not entitled to compensation for any deprivation or restriction of the right of access. *See* WIS. STAT. § 32.09(6)(b) ("[N]othing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict [an existing right of] access without compensation under any duly authorized exercise of the police power."). Thus, we also conclude that the circuit court erred in deciding that MRED and Dickow are entitled to compensation for DOT's action limiting their driveway access to STH 50.

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

Samuel A. Christensen
Clerk of Court of Appeals