STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY HOUSTON,

Plaintiff-Appellant,

v

TOWNSHIP OF DAVISON, DAVISON TOWNSHIP ZONING BOARD OF APPEALS, and RANDALL STEWART,

Defendants-Appellees.

UNPUBLISHED
March 24, 2009

No. 281708
Genesee Circuit Court
LC No. 05-082433-CZ

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff seeks compensation for what he claims is a regulatory taking of his real property, and appeals the order of the trial court that entered judgment on the jury's verdict of no cause for action in favor of defendants. For the reasons stated in this opinion, we affirm.

I. Facts and Proceedings

Plaintiff complains that, because he ran against the incumbent for the office of Supervisor of Davison Township, defendants demanded that he provide more parking spaces in his commercial development, Davison Business Center, even though he had obtained site plan approval, the building and planning administrator told plaintiff that his parking lot did not violate township parking regulations, and he had no space to add more parking. Defendants assert that plaintiff painted and located the parking spaces in violation of township ordinances and, despite his earlier representations, he leased space in the development to retail tenants instead of office tenants, which raised the intensity of use for the development. With regard to another development, Davison Crossings, plaintiff alleges that the township unfairly recalculated the number of parking spaces he needed once it determined that the actual use of space in the development would require additional parking under its ordinances. The case went to trial on plaintiff's claim that the township waived its parking requirements for the Davison Business Center development and his claim that the township's method of calculating the number of parking spaces constituted an unconstitutional regulatory taking. The trial court granted defendants' motion for a directed verdict on plaintiff's waiver claim and the jury returned a verdict of no cause of action on plaintiff's regulatory taking claim.

II. Waiver and Estoppel

Plaintiff argues, unpersuasively, that the trial court improperly granted defendants' motion for a directed verdict[1] on the issue of whether the actions of Davison Building Inspector Randall Stewart constituted a waiver of the Davison Township parking regulations as applied to plaintiff's commercial property developments, the Davison Business Center and Davison Crossings.

Generally, the doctrine of equitable estoppel will not prevent a municipality from enforcing its zoning ordinances based on the acts of a zoning official. *Fass v Highland Park*, 326 Mich 19, 31; 39 NW2d 336 (1949). Each person is charged with the knowledge of the nature and extent of the powers of municipal officials. *Id*. at 27. The rule that a municipality is not estopped from the enforcement of its zoning ordinances based upon the acts of a municipal employee extends to instances where the ordinance violator has acted in good faith, and has expended money or other resources in reliance on the officer's acts. *Id*. at 25-26. Despite this general rule, both our Supreme Court and this Court have recognized that an exception may be found under certain exceptional circumstances, where the only reasonable use for the property exists if the ordinance is not enforced. *Pittsfield Twp v Malcolm*, 375 Mich 135, 146-147; 134 NW2d 166 (1965); *Holland v Manish Enterprises*, 174 Mich App 509, 514; 436 NW2d 398 (1988).

However, this Court has observed that *Malcolm* was decided in the context of a suit in equity, where the municipality sought injunctive relief, and the Court based its holding on the principle that "a court will not grant an injunction that works an injustice." *Grand Haven Twp v Brummel*, 87 Mich App 442, 445-446; 274 NW2d 814 (1978). Thus, neither the Supreme Court nor this Court has recognized an exception to the rule that a municipality may not be estopped from enforcing its zoning ordinances based on the actions of a zoning official where, as here, a plaintiff seeks monetary damages arising from a municipality's enforcement of its zoning ordinances.

Here, plaintiff contends that Stewart waived the application of the parking ordinances, specifically Davison Township Ordinance § 1706, to the Davison Business Center. According to plaintiff, he advised Stewart that he had changed his method of striping the parking lot at the Davison Business Center, and Stewart responded that plaintiff's method posed no problem with respect to the Davison Township parking regulations. Further, according to plaintiff, Stewart was aware that although plaintiff designated the Davison Business Center as "intended office

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[1] The grant or denial of a motion for a directed verdict is reviewed on appeal de novo. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). This Court views the evidence presented up to the time of the motion in a light most favorable to the non-moving party, granting the non-moving party every reasonable inference, in reviewing a trial court's decision on a motion for a directed verdict. *Id*. In ascertaining whether a factual question exists, conflicts in the evidence are resolved in favor of the non-moving party. *Id*. In the absence of factual questions, on which reasonable jurors could differ, the motion for a directed verdict is properly granted. *Id*. at 679-680. If reasonable jurors could reach different conclusions, a directed verdict is improper, and "this Court's judgment should not be substituted for the judgment of the jury." *Id*. at 280.

space" on the site plans he submitted, plaintiff would in fact rent the spaces, as they became available, to customers engaged in retail sales. Plaintiff argues that the exception to the general rule of non-estoppel set forth in *Malcolm* should apply because defendants waited four years before applying the parking regulations to the Davison Business Center. Plaintiff contends that defendants' application of the parking ordinance precludes plaintiff from renting space in the Davison Business Center to retail tenants, and has caused him to lose the Davison Business Center through foreclosure.

However, plaintiff fails to demonstrate that the special circumstances set forth under *Malcolm*, *supra*, apply here. In *Malcolm*, the building inspector issued a building permit to the landowner, and in reliance on the building permit, the landowner constructed a dog and cat kennel. *Malcolm, supra* at 137. About ten and one-half months after the landowner commenced business, the municipality brought suit against the landowner, sought a permanent injunction, and contended that the building permit was erroneously issued. *Id*. According to the municipality, the landowner's property was zoned as "M-1 light industrial," and under that designation, animal kennels were prohibited. *Id*. The kennel structure cost $45,000. *Id*.

After acknowledging the general rule set forth in *Fass, supra*, that a municipality is not estopped from enforcing its zoning ordinances based on the actions of a municipal employee, the *Malcolm* Court recognized that the circumstances were "so exceptional" that an exception was required from the general rule. *Malcolm, supra* at 145-146, 148. The *Malcolm* Court relied heavily on the fact that the landowner spent $45,000 to construct "a specialty type building of otherwise doubtful utility." *Id*. at 148. Further, the Court recognized that the public was put on notice that "construction of some unusual kind was taking place." *Id*. The Court was further convinced that special circumstances existed because the municipality waited ten and one-half months before it enforced its zoning ordinance. *Id*. The Court concluded that the municipality's injunction should not be enforced under the principles of equity. *Id*.

Here, although plaintiff testified that defendants waited four years before enforcing their parking ordinances to the Davison Business Center, and plaintiff has expended a considerable amount of money in developing the project, we remain unconvinced that the "special circumstances" apply. Unlike the situation presented in *Malcolm*, if Davison Township enforces its parking regulations, all reasonable use of the Davison Business Center is not foreclosed. Plaintiff does not contend, and the record does not show that the Davison Business Center is a distinctive structure intended for a single use, like the kennel constructed by the landowner in *Malcolm*. Rather, the record demonstrates that the Davison Business Center is a generic structure conducive to multiple uses. Further, plaintiff never denied that he could rent the units in the Davison Business Center for use as office space, which, according to the site plans submitted, was the intended use of the development.

We further observe that plaintiff waived his claim that Davison Township waived the application of its parking ordinance to his properties based on Stewart's actions. Specifically, on cross-examination, the following exchange occurred between plaintiff and defense counsel:

> *Q*. Are you stating that Randy Stewart on behalf of Davison Township waived the parking ordinance requirements at Davison Business Center?
>
> *A*. He approved the parking.

Q. Are you claiming he waived it?

A. I don't understand – I can't answer your question the way you're saying it, sir. And I'm not trying to avoid it. You asked me a question that – He approved it.

Q. A township employee doesn't have the authority to waive an ordinance requirement, does he?

A. I don't know that.

Q. Okay, you don't know? Let me show you your deposition testimony, page 249.

Question: Do you think a township employee has the ability to waive the requirements of a parking ordinance?

Answer: The word waive, I'll have to think on the word waive.

Question: Take your time.

Answer: What I know now I would – Probably what I know now, I would probably say no.

A. What I know now, what I know now.

Q. So --

A. Because that raised the whole issues [sic] after this. I didn't know that then.

Q. What you know now is an employee does not have the authority to waive the parking requirement; correct?

A. What I know now.

Q. So you're not --

A. I only know that because you told me that.

Q. Just a second.

A. Okay.

Q. You're not making a claim in this case that Randy Stewart waived any parking requirements, are you?

[PLAINTIFF'S COUNSEL:] Objection, asked and answered at least twice.

THE COURT: Continue.

Q. (By [Defense counsel], continuing:) You're not making that claim now, are you?

A. No, sir.

Q. Thank you.

As set forth above, plaintiff conceded on the record that he was not pursuing a claim that Davison Township waived the application of its parking ordinance to his properties based on an actions by Stewart. Our Supreme Court has defined "waiver" as "a voluntary relinquishment of a known right." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008). Thus, we conclude that plaintiff waived his claim that Stewart waived the application of the parking ordinance to plaintiff's properties, and the trial court properly granted defendant's motion for a directed verdict on this basis. Together with plaintiff's admission at trial that he was not asserting his waiver claim, this case does not present the "extraordinary circumstances" calling for an exception to the general rule that a municipality is not estopped from enforcing its zoning regulations based upon the actions of a municipal employee.

III. Great Weight of the Evidence

Plaintiff argues that the jury's verdict of no cause of action should be overturned because the verdict was based upon insufficient evidence. We disagree.[2]

Where the verdict is contrary to the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). A trial court may only grant a new trial where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 518; 679 NW2d 106 (2004). Where there are conflicts in the evidence, the question of credibility is for the fact-finder to decide. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007).

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[2] Although plaintiff characterizes the issue as a challenge to the sufficiency of the evidence, in order for the question to be conducive to appellate review, we will analyze the issue as contending that the verdict was contrary to the great weight of the evidence. Plaintiff did not raise the issue in a motion for a new trial before the trial court; therefore, the issue is unpreserved on appeal. This Court may grant review of an unpreserved claim that a jury verdict is against the great weight of the evidence "if failure to consider the issue would result in a miscarriage of justice." *Petrus v Dickinson Co Bd of Comm'rs*, 184 Mich App 282, 288; 457 NW2d 359 (1990).

Similarly, a party challenging the sufficiency of the evidence must first present the issue to the trial court in a motion for a directed verdict (where the defendant claims that the plaintiff presented insufficient evidence to support a claim), or in a post-verdict motion. *Napier v Jacobs*, 429 Mich 222, 229; 414 NW2d 862 (1987). A party who fails to raise the issue regarding sufficiency of the evidence in a civil case is deemed to have waived the issue, absent manifest injustice. *Id*. at 235-237.

Plaintiff sets forth a version of the facts to substantiate a verdict in his favor but fails to acknowledge countervailing proofs, including portions of his own testimony, presented at trial. Further, plaintiff's argument ignores the jury's role in assessing the credibility of the witnesses and weighing the evidence. "A jury is entitled to believe all, part, or none of a witness's testimony." *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346 (1973). For example, plaintiff testified that he served as chairman of the Davison Planning Commission from 2000 to 2004, during which he, along with the other members of the Commission, applied Davison's parking regulations to other landowners. The jury could have inferred from this testimony that plaintiff was sophisticated and knowledgeable about the zoning regulations, including the parking ordinance, and discounted plaintiff's testimony that he was unfamiliar with the parking ordinance and that he was surprised by defendant's application of the parking regulations. Further, plaintiff testified that he submitted the site plans for the Davison Business Center under the designation of "intended office use," and further testified that he nevertheless rented units in the Davison Business Center to tenants engaged in retail uses. Moreover, plaintiff testified that he striped the parking lot in a manner that did not conform to the site plan in order to increase the number of parking spaces. From this testimony, the jury could have found that plaintiff was aware that the number of parking spaces was a potential problem long before defendants applied their parking regulations.

With respect to Davison Crossings, the jury could have rejected plaintiff's theory that Stewart concocted a "moving target" when Stewart arrived at different results regarding the number of parking spaces required at Davison Crossings. Additionally, the jury could have given more weight to the testimony of Stewart that he arrived at different results because plaintiff repeatedly requested that he recalculate the number of parking spaces required using different formulae. Further, the jury could have rejected plaintiff's attempt to establish a causal connection between plaintiff's unsuccessful campaign for Davison Township Supervisor and Davison Township's application of its parking regulations to plaintiff's properties in order to suggest that political retribution motivated Davison Township. The jury could have credited Stewart's testimony that the decision to enforce the parking regulations was not politically motivated.

The jury's function, as the trier of fact, was to weigh all of the evidence presented at trial and judge the credibility of the witnesses. Plaintiff fails to acknowledge all of the testimony presented at trial, and further ignores the jury's function to make credibility determinations. Thus, we conclude that the verdict was not against the great weight of the evidence.

IV. Jury Instruction Regarding Regulatory Taking

Finally, plaintiff contends that the trial court improperly defined "the character of the government's action" when instructing the jury with regard to the elements of an unconstitutional taking. We disagree.[3]

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[3] This Court reviews challenges to jury instructions de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). This Court reviews the jury instructions in their entirety,
(continued…)

Under the Fifth Amendment of the United States Constitution, the government may not take private property without providing just compensation to the landowner. US Const, Am V. Similarly, the Michigan Constitution states: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Const 1962, art 10, § 2. Although the government may effectuate a taking of private property through condemnation proceedings, the government can also effectively take private property by overburdening the property with regulations. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004).

Where a landowner alleges that the regulation has denied him the economically viable use of his land, a taking may be found in two situations: "(a) a 'categorical' taking where the owner is deprived of 'all economically beneficial use of the land,' *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the traditional 'balancing test' established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *K & K Const v Dept of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998). Under the *Penn Central* balancing test, "a reviewing court must engage in an 'ad hoc, factual inquiry,' centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K, supra* at 577, citing *Penn Central, supra* at 124.

Our review of the record persuades us that the trial court correctly defined what constitutes "the character of the government's action" in this case. In articulating the balancing test to be used in cases such as this one, the United States Supreme Court explained, with respect to "the character of the government's action," that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life for the public good." *Penn Central, supra* at 124. The trial court properly defined "the character of the government's action" in this case as the parking ordinance itself. Further, the trial court properly instructed the jury that the trial court had previously concluded, as a matter of law, that the parking ordinance was a reasonable ordinance. Contrary to plaintiff's argument, the trial court clearly instructed the jury that the question for it to decide was whether the parking regulation as applied to plaintiff "resulted in an unconstitutional taking of the plaintiff's property." Thus, we conclude that plaintiff's challenge to the jury instructions fails.

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as opposed to finding error in isolated portions of the jury instructions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Only where the result would be inconsistent with substantial justice will this Court reverse based upon instructional error. MCR 6.613(A); *Ward v Consolidated Rail Corp*, 472 Mich 77, 84, 87; 693 NW2d 366 (2005). Further, it does not constitute reversible error where, on balance, the jury instructions fairly and adequately presented the theories of the parties and the applicable law. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008).

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra