STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

CBS OUTDOOR, INC., COMMODITIES EXPORT COMPANY, and WALTER H. LUBIENSKI,

Defendants-Appellees,

and

DETROIT INTERNATIONAL BRIDGE COMPANY,

Appellant.

UNPUBLISHED
December 6, 2011

No. 297016
Wayne Circuit Court
LC No. 07-707208-CC

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this condemnation action brought by plaintiff Michigan Department of Transportation (MDOT), defendant CBS Outdoor, Inc. (CBS), was awarded a judgment of $200,000 as just compensation for the taking of its property interest, and two other defendants, Commodities Export Company and Walter H. Lubienski (the "Lubienski defendants"), were awarded a judgment of $325,000 each as just compensation for the taking of their property interests. Appellant Detroit International Bridge Company (DIBC) filed this appeal, challenging the trial court's earlier decision denying DIBC's motion to intervene in the condemnation action. We conclude that, assuming DIBC had an interest in the litigation ordinarily sufficient to permit or require intervention under MCR 2.209 predicated on a contract with MDOT, intervention by DIBC in the suit would contravene the plain language of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. Accordingly, we affirm the trial court's ruling.

This condemnation action arose out of construction plans related to the Ambassador Bridge, which is owned by DIBC and provides travel between the United States and Canada across the Detroit River. The plans were the subject of a 2004 contract between MDOT and

DIBC, titled the Ambassador Bridge Gateway Project Agreement. The contract was entered into "for the purpose of fixing the rights and obligations of the [parties as] to the design, construction, maintenance and operation of certain improvements to access between Highways I-75/I-96 and the Ambassador Bridge . . . and related matters."[1] Under the contract, DIBC was to design and construct Part A of the project in accordance with MDOT specifications and standards. Part A pertained to construction activities in a particular geographical area identified in the plans. DIBC was responsible for 100 percent of the costs associated with Part A. Parts B through F were designated as MDOT's portion of the project. Each party was responsible, at no direct cost to the other party, for acquiring any lands needed for the construction relative to the particular area assigned to a party. Therefore, DIBC was responsible for acquiring land associated with Part A of the project.

The contract was amended in February 2006. The amendment indicated that DIBC had not been able to acquire all of the property interests needed to complete Part A of the project. The amendment further reflected that DIBC had requested MDOT "to move the point of delineation" between those parts of the project for which MDOT was responsible and the part of the project for which DIBC was responsible, i.e., Part A. Pursuant to the amendment, MDOT assumed responsibility to acquire the necessary property interests encompassed by a portion of Part A, identified in an attached exhibit,[2] and to complete the associated construction work. Additionally, the amendment required DIBC to bear the costs of construction and property acquisition relative to Part A. Another paragraph in the amendment reiterated that MDOT, using the power of eminent domain if necessary, was to acquire the property interests, "with DIBC bearing all of the costs incurred by . . . [MDOT] in acquiring that property." MDOT would "retain ownership of all property so acquired and needed for the [project] or for related transportation purposes." We note that the amendment further indicated that MDOT would "determine the property interests that must be acquired for the additional portion" in Part A. DIBC was required to convey an easement appurtenant to a property owner if MDOT determined that the "remaining portion of any property to be acquired . . . would otherwise be deprived of its property right to reasonable access."

In March 2007, MDOT filed this action under the UCPA against CBS and the Lubienski defendants to condemn property or property interests for the Gateway Project. The property in question was identified as MDOT Parcel 201 with respect to defendant Lubienski and MDOT Parcel 199 with respect to defendants Commodities Export Company and CBS. CBS's property interest arose from a lease to maintain a billboard on the property. While CBS did not dispute the necessity of the condemnation, the Lubienski defendants filed a joint motion for review of the necessity of the partial condemnation of their property rights. On May 1, 2007, the trial court

[1] The contract also indicated that it satisfied the objectives identified in the Gateway Study, including accommodation of "a potential second span of the [Ambassador Bridge]."

[2] The portion of part A that became MDOT's responsibility with respect to property acquisition and construction, which was referred to as the "additional portion," is circled in the exhibit and contains within its boundaries the property subject to condemnation.

determined that the Lubienski defendants were collaterally estopped from challenging necessity and, therefore, dismissed their challenge.

In June 2007, the trial court entered a stipulated order, vesting CBS's billboard and leasehold interests in MDOT and requiring MDOT to pay just compensation to CBS. Also in June 2007, the trial court entered an order for MDOT to pay just compensation to the Lubienski defendants, who were required to surrender certain property rights to MDOT. The order provided that the Lubienski defendants were not waiving their right to contest the amount of compensation or to appeal the trial court's decision regarding the issue of necessity. Possession was to be returned to the Lubienski defendants if MDOT's right to possession was reversed. Lastly, MDOT was ordered to enforce easement provisions in its amended agreement with DIBC.

In February 2008, this Court reversed the trial court's order dismissing the Lubienski defendants' challenge to necessity. *Dep't of Transp v CBS Outdoor, Inc,* unpublished order of the Court of Appeals, entered February 7, 2008 (Docket No. 278036). An evidentiary hearing regarding the Lubienski defendants' motion challenging necessity was later scheduled for October 7, 2009. Before the October 7, 2009, hearing, the trial court denied MDOT's motion to consolidate the condemnation action with a separate contract action that MDOT had filed in the circuit court against DIBC and Safeco Insurance Company (hereafter the "contract action").[3] At the beginning of that hearing, DIBC made an emergency motion to intervene in the condemnation action, seeking to challenge the necessity for taking the property. The trial court denied the motion and later denied DIBC's motion for reconsideration.

On October 19, 2009, upon stipulation, the trial court entered a consent order regarding the necessity, public use, and possession of the Lubienski defendants' property. The court declared that MDOT had acquired the property for a public use, that it was necessary to so acquire the property for the reasons stated in MDOT's complaint, and that MDOT would return certain property taken for construction purposes after three years, without restoring it to its former condition. The parties acknowledged that the issue involving easement access to remaining property was being litigated by MDOT in the contract action.

The condemnation action then proceeded with case evaluations regarding the issue of just compensation for each of the three defendants, with MDOT, CBS, and the Lubienski defendants

[3] DIBC eventually filed an action in the Court of Claims against MDOT and the Michigan State Transportation Commission, raising various contract, partnership, joint venture, and fiduciary claims. The Court of Claims case was then joined with the contract action in the circuit court, with the circuit judge being assigned by the Supreme Court Administrative Office to also serve as a Court of Claims judge for purposes of presiding over and addressing DIBC's claims. Our reference to the "contract action" in the remainder of this opinion encompasses both MDOT's contract action as well as DIBC's Court of Claims suit against MDOT. Multiple orders granting summary disposition were entered in favor of MDOT in the contract action, and, on appeal to this Court in Docket No. 298276, DIBC challenges various rulings in the contract action, which appeal is also being decided by us in a separate opinion.

all subsequently accepting the evaluations upon which the judgments were entered. DIBC then filed this claim of appeal, challenging the trial court's decision to deny its motion to intervene.

MDOT, CBS, and the Lubienski defendants all argue that this Court lacks jurisdiction to consider DIBC's appeal. This Court, however, previously denied motions to dismiss brought by CBS and the Lubienski defendants, which included the jurisdictional argument as the primary basis for why dismissal was appropriate. *Dep't of Transp v CBS Outdoor, Inc*, unpublished orders of the Court of Appeals, entered May 24, 2010 (Docket No. 297016) ("The Court orders that the motions to dismiss . . . are DENIED"). "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). A question of law decided by an appellate court will not subsequently be decided differently by an appellate court in the same case. *Id.* The rationale behind the law of the case doctrine is to maintain consistency and to avoid reconsideration of issues and matters previously decided during the course of a particular lawsuit. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). A conclusion by this Court that a prior appellate decision in the same case constituted error is not sufficient, in and of itself, to justify ignoring the doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). "Normally, the law of the case applies regardless of the correctness of the prior decision, but the doctrine is not inflexible." *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). The law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Id.* For this exception to apply, the change of law must occur after this Court's initial decision. *Id.*

In *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983), this Court applied the doctrine on the basis of a prior panel's ruling on a preliminary motion filed in the appeal:

> It is beyond our power to remand this cause for an evidentiary hearing. The decision of a previous panel of this Court, finding a "lack of merit in the grounds presented" on whether defendant was entitled to a remand for an evidentiary hearing, is the law of the case. When an appeal and a motion to remand are filed, a subsequent order denying the motion to remand for lack of merit in the grounds presented is the law of the case, barring further review of the issue in this Court. If a litigant in the Court of Appeals has any objection to a denial of his motion to remand for lack of merit in the grounds presented, his redress is an application for rehearing to the deciding panel or an application for leave to appeal the order to the Supreme Court. [Citations omitted.]

Here, the prior panel rejected outright and thus on the merits the argument that this Court lacked jurisdiction over DIBC's appeal, thereby allowing the appeal to proceed and us to address the other arguments posed by the parties. Accordingly, and given that there has been no intervening change of law, we shall not disturb that ruling pursuant to the law of the case doctrine. We voice no position on the legal soundness or correctness of the earlier panel's decision and, ultimately, for the reasons stated below and regardless of the jurisdictional question, we reject DIBC's challenge to the trial court's ruling on intervention.

Under MCR 2.209(A)(3), a person has a right to intervene in a lawsuit "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Permissive intervention, as opposed to intervention of right, is appropriate "when an applicant's claim or defense and the main action have a question of law or fact in common." MCR 2.209(B)(2). Intervention has been described as "an action where a third party becomes a party in a suit that is pending between others." *Hill v L F Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008). We review a trial court's ruling on a motion to intervene for an abuse of discretion. *Id.* at 507. However, the trial court's resolution of underlying questions of law, including the construction of statutes and court rules, is reviewed de novo by this Court. *Id.*

DIBC argues that it had a contractual obligation to actually fund any "just compensation" payable to CBS and the Lubienski defendants for the taking of property and that its prospective claim also posed a question of law and fact common to the condemnation action; therefore, it had an interest sufficient to intervene as of right under MCR 2.209(A)(3), as well as having a basis to intervene permissively pursuant to MCR 2.209(B)(2). DIBC sought to intervene in order to challenge the necessity for condemnation, which does appear to be a peculiar and questionable position given that the same amended contract relied on by DIBC to claim an interest in the litigation also required MDOT, at DIBC's behest, to acquire property interests relative to Part A. In other words, condemnation was ostensibly necessary under the amendment, but DIBC nonetheless contends that condemnation was simply not necessary to carry out the project. We find that the contract action, and not the condemnation action, was the proper avenue to address DIBC's contractually-based concerns and arguments about condemnation, necessity, and the payment of just compensation. DIBC's challenge regarding necessity to condemn was grounded in the amended contract, and therefore DIBC could seek redress within the parameters of the contract action but not through participation in the condemnation action. Indeed, in the Court of Claims complaint, Count XI, DIBC attacks MDOT's decision and the necessity to condemn the property.

We reach the conclusion that DIBC was confined to the contract action and could not intervene in the condemnation action because DIBC was simply not a proper party for purposes of litigation under the UCPA given the circumstances presented and, concomitantly, the trial court did not have statutory jurisdiction to decide DIBC's rights. This is true even if we assumed that DIBC had an interest that would otherwise give rise to a right to intervene or support permissive intervention under the court rule. Our Supreme Court has recognized the principle that MCR 2.209 has to be effectively disregarded and is inapplicable when a person, otherwise having an adequate interest in certain litigation, would not be a proper party given the nature and subject matter of the particular proceedings before the lower court. *Estes v Titus*, 481 Mich 573, 583-584; 751 NW2d 493 (2008). In *Estes*, *id.*, the Court observed:

> Plaintiff's motion to intervene was based on MCR 2.209(A)(3), which allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties. The court rule would otherwise have applied in the divorce because neither of the Tituses adequately represented plaintiff's interest as a potential creditor. However, the rule did not apply because

> the creditor sought to intervene in a divorce action in which the court did not have statutory jurisdiction to decide the intervenor's rights. Court rules cannot establish, abrogate, or modify the substantive law.
>
> In *Yedinak v Yedinak*[, 383 Mich 409; 175 NW2d 706 (1970)], we addressed this same issue in the context of the court rules of permissive and necessary joinder. The majority in *Yedinak* found that nothing in these rules gave the divorce courts "power to disregard statutory provisions pertaining to divorce and to litigate the rights of others than the husband and wife." The same reasoning applies here. The divorce court properly denied plaintiff's motion to intervene in the divorce proceedings, and plaintiff correctly concluded that an appeal from the denial order would have been futile. [Citations omitted.]

Here, we are addressing a condemnation action brought pursuant to the UCPA. Such an action is an rem proceeding that allows a state agency to take title to privately owned property. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 380; 663 NW2d 436 (2003). The UCPA "provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation." MCL 213.52(1). Under the UCPA, DIBC itself is not empowered to pursue a condemnation action; it does not qualify as an agency for purposes of the act. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 673-674; 760 NW2d 565 (2008) (holding that DIBC "is not authorized by law to condemn property" after DIBC commenced a condemnation action under the UCPA). As indicated above, DIBC wished to intervene in the case at bar so it could specifically challenge MDOT's claim that condemnation was necessary. However, on the issue of necessity, MCL 213.56(1) provides that "an *owner* of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed." (Emphasis added.) MCL 213.66(2) provides for an award of attorney fees and expenses "[i]f the *property owner*, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper[.]" (Emphasis added.) As noted by our Supreme Court in *Silver Creek*, 468 Mich at 380, with respect to a condemnation action under the UCPA, "the agency and the owner are parties."

The UCPA defines an "owner" as "a person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned." MCL 213.51(f). Here, DIBC was not an "owner" of the property at issue and thus had no right or ability under the UCPA to challenge MDOT on the issue of necessity, nor could the trial court entertain a challenge to necessity by DIBC, given that it lacked statutory jurisdiction. There is no statute conferring standing on DIBC such that it could participate in the condemnation proceeding commenced under the UCPA. Although "[a]ll laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in [the UCPA]," applying MCR 2.209, the court rule governing intervention, in the context of this case would contravene the UCPA's clear mandate that only persons or entities that qualify as "owners" can challenge the necessity of a condemnation suit brought by an agency.

Moreover, any recognition of a right by DIBC to intervene would tread on the UCPA rights of the actual owners of the property interests at stake to control the direction of litigation concerning *their* property. CBS, and ultimately the Lubienski defendants, made the decision to stipulate to the necessity for condemnation, bringing them a step closer to obtaining just compensation. And allowing DIBC to intervene and reopen the door on necessity when the owners themselves already closed the door on the subject would circumvent the decision-making authority of CBS and the Lubienski defendants relative to the question whether to challenge necessity under MCL 213.56(1). In that same vein, for purposes of MCR 2.209(B)(2) relative to permissive intervention, consideration must be given to "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," and such undue delay and prejudice would occur here if DIBC were permitted to intervene and present a challenge on the issue of necessity. Also, for purposes of intervention of right, MCR 2.209(A)(3), we further find that disposition of the condemnation action did not as a practical matter impair or impede DIBC's ability to protect its interests. DIBC had the opportunity in the contract action to seek damages, a declaration that MDOT and not DIBC should have to fully bear the costs associated with paying just compensation, or other relief predicated on the contract-based theory actually proffered by DIBC in the contract action that condemnation was unnecessary. The fact that DIBC ultimately lost in the contract action does not mean that DIBC's ability to protect its interests was impaired or impeded by denying intervention in the condemnation action.

Finally, MCR 2.209(A) (Intervention of Right) and (B) (Permissive Intervention) require a "timely application" to intervene. Here, the condemnation action was initiated in March of 2007, and DIBC filed its motion to intervene in October 2009. DIBC was fully aware of the condemnation action, and it was DIBC's own execution of the amended contract in 2006 that precipitated MDOT's filing of the suit. We reject all of DIBC's arguments attempting to explain why it was reasonable for it to wait two and a half years before seeking intervention, including the contention that it was reasonable to file the motion only after it learned of the necessity hearing on the Lubienski defendants' post-appeal motion on necessity. The excuses made by DIBC do not adequately, rationally, or soundly explain why DIBC failed to file the motion to intervene much earlier if it indeed did not believe that condemnation was necessary in whole or in part. Reversal is unwarranted.

Affirmed. Having fully prevailed on appeal, all appellees are entitled to taxable costs pursuant to MCR 7.219.[4]

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause

[4] With respect to CBS's request for sanctions for vexatious proceedings, MCR 7.216(C), the proper procedure is to file a motion in accordance with MCR 7.211(C)(8).