COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2014

Diane M. Fremgen
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. 2013AP2215 **Cir. Ct. No. 2008CV1908**

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

IN RE THE PETITION OF COUNTRY SIDE RESTAURANT, INC. FOR THE CLERK OF THE CIRCUIT COURT OF WINNEBAGO COUNTY TO ACCEPT A PORTION OF AN AWARD OF DAMAGES MADE BY THE DOT ON 10/09/08 FOR PROPERTY LOCATED AT 1145 ABRAHAM LANE, OSHKOSH, WI:

THE LAMAR COMPANY, LLC D/B/A LAMAR OUTDOOR ADVERTISING,

PETITIONER-APPELLANT,

V.

COUNTRY SIDE RESTAURANT, INC.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Reversed and cause remanded with directions*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. This is a dispute about the amount of compensation The Lamar Company, LLC, d/b/a Lamar Outdoor Advertising is entitled to when the land it leased for its billboard was taken by the Department of Transportation (DOT). We reverse and remand because the circuit court's ruling does not comport with the supreme court's holding that relocation expenses are distinct from damages for the loss of the fair market value for the property taken.

¶2 Lamar leased a site for its billboard from Country Side Restaurant, Inc. ***Lamar Co. v. Country Side Restaurant, Inc.***, 2012 WI 46, ¶7, 340 Wis. 2d 335, 814 N.W.2d 159. In 2008, the DOT acquired the land on which the billboard was located by eminent domain. ***Id.***, ¶¶2, 7. The DOT issued jointly to Country Side and Lamar a just compensation award of $2,000,000. ***Id.***, ¶¶2, 11. Country Side deposited $120,000 of this award with the circuit court because the parties did not agree on the value of Lamar's share of the total property interest taken. ***Id.***, ¶12. As a separate compensation, Lamar applied for and received $83,525 in relocation expenses from the DOT, submitting a signed form stating that it "agree[d] to accept the amounts as payment in full for the items claimed, and release the [DOT] … from any and all claims for damages arising through this project, for the listed items for which an amount is claimed." ***Id.***, ¶15. This "$83,525 consisted of $75,175 for the in-place value of the billboard, i.e. the cost to build the billboard new; $2,500 for relocation expenses; and $5,850 for take-down cost." ***Id.***[1] When Lamar later contacted the DOT about recovering the

[1] The supreme court took judicial notice of the DOT worksheet submitted and agreed to by Lamar, providing for a $75,175 payment to Lamar for the cost to rebuild the sign. ***Lamar Co. v. Country Side Restaurant, Inc.***, 2012 WI 46, ¶15 n.7, 340 Wis. 2d 335, 814 N.W.2d 159.

value of its billboard, the DOT responded that "only the value of the sign site, not the value of the structure itself, was included within the $2,000,000 award of damages." ***Id.***, ¶16.

¶3 Lamar and Country Side each petitioned the court for partition of the $120,000. ***Id.***, ¶¶17-18. The circuit court ordered that the $120,000 be disbursed to Country Side. ***Id.***, ¶19. Lamar appealed, and the court of appeals affirmed, ***Lamar Co. v. Country Side Restaurant, Inc.***, No. 2010AP2023, unpublished slip op. (WI App May 25, 2011), concluding that Lamar had agreed to the amount of compensation to which it was entitled by signing the DOT relocation form. ***Lamar***, 340 Wis. 2d 335, ¶¶17-20. Lamar petitioned the supreme court for review, which it accepted. ***Id.***, ¶21. The supreme court held that relocation payments are distinct from a condemnor's payment of fair market value for the property taken, ***id.***, ¶25, and that Lamar was entitled to petition for just compensation in addition to the $83,525 in relocation payment it had received, ***id.***, ¶40.[2]

¶4 As regards the just compensation award, the supreme court cited the general rule that "a billboard owner's property interest may include three elements: a leased or fee interest in the land; an ownership interest in the billboard itself; and an interest in the permit that makes the billboard legal." ***Id.***, ¶24 (citing Jill S. Gelineau, *Valuation of Billboards in Condemnation*, 19 PRAC. REAL EST.

[2] Relocation payment associated with displacement by a public project is described in WIS. STAT. § 32.19(3) (2011-12). Under § 32.19(3), relocation payments are required for, among other things, "the actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation." ***Lamar***, 340 Wis. 2d 335, ¶29 (citing § 32.19(3)(a)). The DOT treated the loss of the sign structure itself as "a tenant's fixture" that was included in the relocation payment. ***Id.***, ¶16.

LAW at 23, 25 (July 2003)). However, the supreme court noted that "in this case, there is no question that Lamar is entitled to just compensation: its property interest, derived from both its *lease and permit*, was completely taken." ***Id.***, ¶24 (emphasis added). As for the ownership interest in the billboard itself, the supreme court noted the DOT's position that the cost to rebuild the sign was included in the relocation payment and that the relocation payment did not include the leasehold value or permit value. *See* ***Lamar***, 340 Wis. 2d 335, ¶¶15, 31.

¶5 On remand to the circuit court, the circuit court awarded Lamar $36,575 in just compensation. The circuit court arrived at this figure by finding a fair market value of $120,100 and deducting an amount equal to the entire $83,525 relocation payment Lamar had received from the DOT. Regarding the supreme court's directive that relocation costs are distinct from fair market value, the circuit court had this to say:

> And I'll note in the Supreme Court decision I believe at least twice and possibly three times the Supreme Court does use the word "distinct". In Paragraph 6, for instance, the DOT's payment for Lamar's relocation expense is distinct to the DOT award for the fair market value of the property taken. But the Court does indicate that the three factors in determining fair market value of the property were those three factors, of which one includes the ownership interest in the billboard itself which is in large part what the relocation expense is. So I think the Supreme Court is using the word distinct in the sense that it reversed the appellate court who said because the DOT had already paid Lamar those relocation-type expenses, that they—Lamar—were not entitled to any additional money for the sign and that I think is where the Supreme Court is clarifying that the relocation expense is distinct or separate as one of those elements that the Court is to utilize in determining the fair market value.

The circuit court denied Lamar's motion for reconsideration.

¶6 The circuit court erroneously treated all of the relocation expenses as an "element" of just compensation, deducting the entire amount, including the amounts awarded for takedown cost and "other reimbursable relocation expenses," from the fair market value. In deducting the full amount of the relocation payment from the fair market value starting point of $120,100, the circuit court misapplied the supreme court's decision, which made clear that the relocation payment is distinct from just compensation. ***Id.***, ¶¶6, 25, 37, 40. This misapplication of the supreme court decision was an error of law. *See* ***id.***, ¶22 (interpretation of statutory scheme governing compensation and relocation expenses is question of law).

¶7 That said, as the supreme court recognized, Lamar was already compensated for the loss of the sign structure. The relocation payment made by the DOT included "$75,175 for the in-place value of the billboard, i.e. the cost to build the billboard new." ***Lamar***, 340 Wis. 2d 335, ¶15. Lamar's expert, on remand, confirmed that the DOT's relocation payment compensated Lamar for the "structure itself, and for removal and relocation expenses," but not the value of the sign site, sign permit, and lease value.

¶8 While perhaps attempting to eliminate a double payment, it appears that the circuit court was using the just compensation determination as a mechanism for adjusting a perceived *overpayment* for the cost to rebuild the sign component of the relocation payment from the DOT to Lamar.

> So I will make a finding that the total fair market value of the subject property as indicated by [the expert] to be $120,100. I disagree with his analysis that the cost approach resulted in $33,700. That may have been how he computed it and that may in fact be the appropriate cost approach, but he took the $120,100 and took the $33,700 off of that. But in this case, the reality is that Lamar has been paid $83,525 already for this. It would strike the

> Court that based on [the expert's] analysis the DOT grossly overpaid Lamar for those relocation fees.…
>
> So I think to award them the amount of $120,100, minus the $33,700, with the knowledge that they already have in their pocket $83,525, would be greatly in excess of the $120,100 … fair market value of the subject property.

To the extent the circuit court reduced the fair market value of Lamar's leasehold and permit interests from the joint just compensation award due to a perceived prior overpayment for the cost to rebuild the sign, this too was error.

¶9 The portion of the relocation payment for the cost to rebuild the sign, made directly from the DOT to Lamar, is done. The supreme court made clear that Lamar is still entitled to just compensation for its leasehold and permit interests in the property. Any perceived overpayment for the cost to rebuild the sign structure in the DOT settlement cannot be used to short Lamar of its fair share of the DOT's joint just compensation award, which would also provide Country Side with a windfall in the amount of any perceived overpayment.

¶10 The circuit court, on remand, has several choices from the record that is before it in assigning Lamar's share of the just compensation award for the loss of this sign site, i.e. the leasehold and permit interests. The circuit court has already determined that the fair market value of the sign is $120,100. Lamar's expert averred that this amount included the value of the sign structure itself and the value of the sign site. Lamar's expert averred that the fair market value of the sign structure was $33,700 and that the value of the sign site was $86,400. There is, however, conflicting evidence in the record that supports different approaches to the valuation of Lamar's ownership interests in the sign structure and sign site. The same expert who valued the sign structure at $33,700 also appraised the "total

reproduction cost new" of the sign at $70,712.[3] An appraiser's report prepared for the DOT to be used in determining just compensation valued the "total estimated replacement cost new" of the sign at $75,673. This same DOT report valued the "permitted fee sign site" at $65,000. The DOT's relocation payment for the sign structure was "$75,175 for the in-place value of the billboard, i.e. the cost to build the billboard new." ***Lamar***, 340 Wis. 2d 335, ¶15. These are some of the values in the record that could be used to arrive at the value of the leasehold and permit interests. It is the function of the circuit court to sift through all the evidence and determine the weight it should be given. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998) (court of appeals is not a fact-finding court).

¶11 We remand for the circuit court to determine the damages owing from the DOT just compensation award for the fair market value of this property—the value of the sign leasehold and permit, which is the fair market value less the value of the sign structure.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[3] In his report, Lamar's expert calculated the "cost approach" value of $33,700 by assessing the depreciated reproduction cost, to which "the appraiser would … add the corresponding leasehold benefit or disbenefit (leasehold bonus), i.e., the capitalized difference between the land lease's Market Rent and Contract Rent."