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Article 13

Property

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States,[29] and adopted by Wisconsin in *State v. Richards*.[30] Since the court did not state a general rule as to when this rule applies outside of criminal cases, it is impossible to predict how widely it might be applied. The court went on to hold, however, that the officer had the burden of proving that he was prejudiced by the failure to produce the statements in order to establish a denial of due process and that no prejudice was shown on the record.

MARY F. WYANT

PROPERTY

I. LANDLORD - TENANT

The legal rights of tenants were expanded this term in *College Mobile Home Park and Sales, Inc. v. Hoffman*,[1] in which the court held that exculpatory clauses in leases may under some circumstances be invalid. The court refused to set any absolute rule stating that certain categories of exculpatory clauses are void, preferring to develop the rule by case-by-case application.

College Mobile Home began as an eviction action commenced by the landlord for nonpayment of rent. The tenant counterclaimed for personal injury and other damage allegedly caused by the landlord's failure to maintain adequate heating. The landlord moved for summary judgment on the counterclaim based on an exculpatory agreement in the lease releasing the landlord from liability for property damage and personal injury. The trial court dismissed the motion on the grounds that the clause should not be enforced and the supreme court affirmed.

The court first stated that although exculpatory clauses are generally valid on the principle of freedom of contract, they are usually strictly construed in favor of the tenant. It then noted that several states have either legislatively prohibited such clauses or judicially held them unenforceable as against public

29. 353 U.S. 657 (1957).

30. 21 Wis. 2d 622, 124 N.W.2d 684 (1963).

1. 72 Wis. 2d 514, 241 N.W.2d 174 (1976).

policy.[2] Concluding that on public policy grounds exculpatory clauses may be invalid, the court nonetheless said that the best approach would be a rule supporting the general principle of freedom of contract but recognizing that this may cause unfair results in some circumstances:

> The unconsidered application of the principle of freedom of contract, even when accomplished by the rules of strict construction, is not always justified when there are extenuating circumstances which may affect the degree to which that freedom actually exists. Therefore, we are of the opinion that the better view is that which takes into account the actual effect of the particular clauses in question and that [*sic*] the facts and circumstances attendant upon the creation of the landlord-tenant relationship.[3]

By requiring the trial court to consider the facts and circumstances attendant to the exculpatory clause in determining its enforceability, the court concluded that the trial court had properly denied the landlord's motion for summary judgment to the tenant's counterclaim. The court then held that in *College Mobile Home* it was a question of fact whether the circumstances were such that the clause should not be enforced and so affirmed the trial court's denial of the landlord's motion for summary judgment.

II. EMINENT DOMAIN

A. Claim Procedure

In 1970, the court in *Luber v. Milwaukee County*[4] ruled that owners of a condemned rental property were entitled, under the "just compensation" provision of the Wisconsin Constitution,[5] to compensation for the entire rental loss caused by a taking of property under eminent domain, despite a statutory provision limiting lost rent recovery to twelve months.[6] The case

2. *See* N.Y. GEN. OBLG. LAW § 5-321 (McKinney 1964); MASS. LAWS ANN. 186-15 (Supp. 1975); McCutchenon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971); Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.C. Cir. 1969); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Cardova v. Eden Realty, 118 N.J. Super. 381, 288 A.2d 34 (1972); Crowell v. Housing Auth., 495 S.W.2d 887 (Tex. 1973).

3. 72 Wis. 2d at 517, 241 N.W.2d at 177.

4. 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

5. WIS. CONST. art. I, § 13: "The property of no person shall be taken for public use without just compensation therefor."

6. WIS. STAT. § 32.19 (1967).

caused speculation that a wide variety of incidental damages might now be compensable,[7] although subsequent amendments to Wisconsin Statutes section 32.19, which sets out in considerable detail precisely which damages are compensable in addition to the value of the condemned property itself, seem to indicate a legislative intent to restrict compensable damages within the constitutional boundaries of *Luber*.[8]

The court in *Rotter v. Milwaukee County Expressway and Transportation Commission*[9] indicated this term that the *Luber* holding will be confined quite strictly to its facts. The plaintiffs in *Rotter* brought an action for various items of incidental damage caused by the defendant commission's condemnation proceeding. They did not follow the statutory scheme of presenting the claims first to the condemnor for voluntary payment[10] because the items claimed were not among the enumerated items of compensable damage under the then-existing version of section 32.19.[11] Rather, they demanded compensation for these items for the first time in a trial to the circuit court.

The commission argued that the plaintiffs had forfeited any right to assert their claim for these items by failing to file them with the commission. The plaintiffs countered that they had not followed the statutory procedure because the items were clearly not compensable under section 32.19. They argued that *Luber* had created an extra-statutory category of compensable damages and that the proper procedure for recovery of such damages was to commence an action in the circuit court, bypassing the statutory claim procedure.

The supreme court rejected the plaintiffs' argument on the grounds that the only effect of *Luber* was to invalidate the time limits set by section 32.19, not to create a new cause of action:

> The *Luber* holding is to be read and limited to its holding that the twelve-month limit as to rent losses was constitutionally invalid. It is true, as *Luber* noted, that when property is taken by condemnation "incidental damages are very apt to occur." That is not to say that a cause of action for com-

7. *See* Note, *Eminent Domain - Compensation for Lost Rents*, 1971 WIS. L. REV. 657.

8. 1971 Wis. Laws, chs. 99, 103, 244, 287; 1973 Wis. Laws, ch. 192; 1975 Wis. Laws, chs. 224, 273.

9. 72 Wis. 2d 553, 241 N.W.2d 440 (1976).

10. WIS. STAT. § 32.20 (1965).

11. WIS. STAT. § 32.19 (1965).

> pensation for incidental damages has been created that has no basis or relatedness to the items made compensable by sec. 32.19, Stats. It means only that payment and time limits set forth in sec. 32.19 may encounter constitutional difficulties, as did the twelve-month rent loss limit in *Luber*.[12]

The court went on to state that in the situation presented in *Rotter,* a property owner claiming items not enumerated in the statute must first present his claim to the condemnor, as outlined in the statute, and may take his claim to the court only after rejection by the condemnor. The broader significance of *Rotter,* however, is its strict limitation of *Luber* to a means for challenging statutory limitations on compensable damage. It seems clear from *Rotter* that *Luber* did not open the door to a potentially wide variety of compensable incidental damages.

B. Compensation for Inconvenience

The court in *DeBruin v. Green County*[13] determined that under section 32.09(6)[14] the owner of property partially taken in a condemnation proceeding is not entitled to compensation for inconvenience caused by public improvement work done on the condemned property. Some confusion had existed on this point because an earlier case, *Carazalla v. State,*[15] had held under a predecessor statute that inconvenience was not compensable as a separate item, but that it would be taken into consideration in determining the value of the property after the taking. This rule became incorporated in the standard jury instruction.[16]

Green County took a strip of the plaintiffs' property as a part of a highway widening project. After the property was taken and work had been started, the plaintiffs' normal access to their remaining property became impassable and they had to devise an alternate and inconvenient accessway. They commenced an action in circuit court to determine the amount of just compensation for the condemned property, believing that the amount offered by the county was inadequate.[17] The

12. 72 Wis. 2d at 562-63, 241 N.W.2d at 445.
13. 72 Wis. 2d 464, 241 N.W.2d 167 (1976).
14. WIS. STAT. § 32.09(6) (1973).
15. 269 Wis. 593, 70 N.W.2d 208 (1955).
16. WIS. J. I. - CIVIL No. 8125.
17. WIS. STAT. § 32.05(11) (1973) provides for a trial on the amount of compensation.

trial court granted the county's motion to bar any evidence on the inconvenience suffered by the plaintiffs due to the loss of access. The supreme court affirmed.

Under section 32.09(6), the proper amount of compensation in the case of a partial taking is the difference between the fair market value of the entire property immediately before the evaluation date and its fair market value immediately after the evaluation "assuming completion of the public improvement."[18] The court found that compensation for the inconvenience caused by construction of the highway improvement would not meet this formula, since it does not make the required assumption of completion of the improvement.

The court also found that the measure of compensation allowed under section 32.09(6) conforms to the Wisconsin Constitution just compensation requirement.[19] It pointed out that the highway construction work took place entirely after the taking of the property and thus was an exercise of the police power, not the power of eminent domain, and thus was noncompensable.[20] An exercise of police power creates a compensable taking only if the impairment of the use of the remaining property is so great as to be considered an actual taking of that portion of the property, which was not the case in *DeBruin*.[21]

C. *Evidence*

Under section 32.09(1),[22] compensation for condemned property is determined as of the "date of evaluation."[23] In *Schey Enterprises, Inc. v. State*,[24] decided in 1971, the court ruled that testimony as to an appraisal of condemned property

18. WIS. STAT. § 32.09(6) (1973) states in pertinent part:
In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the wholz property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist . . . .

19. WIS. CONST. art. I, § 13.

20. 72 Wis. 2d at 472, 241 N.W.2d at 170-71.

21. *Id.* at 470-71, 241 N.W.2d at 169-70.

22. WIS. STAT. § 32.09(1) (1973).

23. The date of evaluation is determined by § 32.05(7) (c) or § 32.06(7), depending on the purpose for which the property is taken. The dates of evaluation set by these statutes relate to various stages of the condemnation proceedings.

24. 52 Wis. 2d 361, 190 N.W.2d 149 (1971).

made nine months before the evaluation date was not admissible to prove the value of the property on the evaluation date. This rule was modified this term in *Rollie Johnson Plumbing v. Department of Transportation.*[25] The court in *Johnson* held that evidence as to an appraisal made seventeen months before the evalution date was admissible where the appraiser was able to testify that the property had appreciated since the appraisal, and there was other evidence of the value of the property at the evaluation date. In *Schey,* the appraisal made nine months before the evaluation date was the only evidence offered.

The court had hinted in *Schey* that evidence relative to the value of property at a date prior to the evaluation date is not necessarily inadmissible, so long as it can be related forward to the date of evaluation.[26] *Johnson* apparently is an example of the kind of evidence sufficient to relate appraisal evidence forward. The essential distinction, the court said, was that in *Johnson* the combination of the early appraisal value, the appraiser's opinion that the property had appreciated, and the other evidence as to the value of the property on the date of evaluation provided the jury with a range within which it could determine the value. Such a range was missing in *Schey,* where the evidence showed only a single value at a time well in advance of the evaluation date.

III. Mortgage Foreclosure Procedure

In *First Wisconsin National Bank v. KSW Investments, Inc.,*[27] the court clarified language used earlier in *Citizens Bank v. Rose*[28] to interpret section 816.165(2).[29] Section 816.165 defines the procedure in a judicial mortgage foreclosure sale; subsection (2) gives the rule for confirmation of sale when the sale price is less than the amount due on the mortgage:

> In case the mortgaged premises sell for less than the amount due and to become due on the mortgage debt and costs of sale, there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that

25. 70 Wis. 2d 787, 235 N.W.2d 528 (1975).
26. 52 Wis. 2d at 369, 190 N.W.2d at 154.
27. 71 Wis. 2d 359, 238 N.W.2d 123 (1976).
28. 59 Wis. 2d 385, 208 N.W.2d 110 (1973).
29. Wis. Stat. § 816.165(2) (1973).

> the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

In *Citizens Bank* the court had indicated that a trial court applying section 816.165(2) need not find the fair value of the foreclosed property in all cases: "The upset price or the fair value finding is utilized in the discretion of the court only after the court finds the price bid to be so inadequate as to shock its conscience."[30] The *Citizens Bank* court, therefore, had patently heightened the restriction placed on foreclosure sales by making judicial supervision discretionary.

The court in *First Wisconsin* corrected this statement, holding that under its express language, section 816.165(2) requires the trial court to make a finding that the fair value of the property has been credited toward the debt in every case in which the amount realized on sale is less than the amount owed:

> The language of the statute mandates that no sale shall be confirmed until the court is satisfied that the fair value of the premises has been credited toward the mortgage debt, interest and costs. For ease of administration and consistent with logical interpretation of the statute, the trial court should, when confronted with a motion to confirm a sheriff's sale where the mortgaged premises have been sold for less than the amount due on the mortgage, make a specific finding of the fair value of the premises and make a specific finding that such value has been credited to the mortgage debt. These findings should be made even though the trial court's conscience is not shocked by the bid.[31]

When the bid price is sufficiently below the fair market value of the property, as ascertained by the court, to shock the conscience of the court, it may then exercise its broad discretion to deny continuation of the sale.[32]

IV. CONDOMINIUM LAW

Condominium owners won a measure of protection against liability occasioned by a developer's poor business judgment in *Stevens Construction Corp. v. Draper Hall, Inc.*[33] The decision

30. 59 Wis. 2d at 388, 208 N.W.2d at 112.
31. 71 Wis. 2d at 369, 238 N.W.2d at 128.
32. *Id.* at 363, 238 N.W.2d at 125.
33. 73 Wis. 2d 104, 242 N.W.2d 893 (1976).

will doubtlessly make condominium ownership more attractive to the cautious purchaser.

The plaintiffs in *Stevens* had provided general construction and landscaping work on a condominium developed by defendant Draper Hall. Construction began before the developer filed its condominium declaration with the register of deeds pursuant to section 703.03.[34] After the declaration had been filed and several of the units had been sold to individual owners, each of the plaintiffs filed a construction lien against the property in accordance with section 289.06.[35] The plaintiffs later commenced proceedings to foreclose their liens, naming as defendants both the developer, who retained ownership of the unsold units, and the individual unit owners.

The issue was whether each unit owner was liable for the full amount of the lien or only for a share proportionate to the extent of his ownership. This turned on a construction of section 703.09(2), which states in pertinent part:

> If a lien becomes effective against 2 or more units, any unit owner may remove the lien from his unit and from the percentage of undivided interest in the common areas and facilities appurtenant to such unit by payment of the fractional or proportionate amount attributable to his unit, such amount to be computed by reference to the percentages appearing on the declaration.[36]

Both the trial court and the supreme court ruled that each unit owner was liable for only a proportionate share of the lien, but on different theories. The trial court reasoned that the liens did not become "effective" within the meaning of section 703.09(2) until the time of the filing of the liens, rather than the time that construction began. Since the liens were filed after the condominium declaration was filed and several of the units had been sold, the lien had become "effective against 2 or more units," so that the statutory limitation protected individual owners from full liability. The plaintiffs' argument was that the liens became effective at the time construction began, before the condominium declaration was filed, resulting in a blanket lien on the whole property.

The supreme court held that the lien became effective as of

34. WIS. STAT. § 703.03 (1973).
35. WIS. STAT. § 289.06 (1973).
36. WIS. STAT. § 703.09(2) (1973).

commencement of construction, making it originally effective as a blanket lien against the whole property, but that upon filing of the condominium declaration it became effective against the individual units within the meaning of the statute, with the result that each unit owner was liable only for a proportionate share.

The critical time, the court ruled, is the date of commencement of foreclosure proceedings and the filing of a lis pendens against the property. So long as the condominium declaration is filed before foreclosure proceedings are commenced, section 703.09 applies and each owner is liable only for his proportionate share. However, if the foreclosure is started before the declaration is filed, "the situation is frozen so that the subsequent recording of a declaration does not transform the blanket lien into a proportional lien on individual units."[37]

The court explained its ruling by saying that foreclosure is an equitable proceeding and it is patently inequitable to charge individual unit owners with liability for the full value of a lien against the entire property.

MARY F. WYANT

TAXATION AND TRUSTS AND ESTATES

I. ACCRUED LIABILITIES

In Wisconsin, corporations are allowed to deduct from their gross income compensation paid to employees for services rendered.[1] Frequently, in addition to the employees' regular wages, companies will also pay bonuses and vacation pay, or both. When these payments have been made in good faith, and as additional compensation, they are likewise deductible.[2] *Ladish Co. v. Department of Revenue*[3] involved a situation where an accrual basis calendar year corporation was denied a

37. 73 Wis. 2d at 115, 242 N.W.2d at 898.

1. WIS. STAT. § 71.04(1)(1973).

2. Treas. Reg. § 1.162-9 (1958); McCoy-Brandt Mach. Co., 8 B.T.A. 909 (1927) (acq.); I.R.C. § 463.

3. 69 Wis. 2d 723, 233 N.W.2d 354 (1975).