NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

RONALD DECOSTER,

Petitioner,

V.

WAUSHARA COUNTY HIGHWAY DEPARTMENT AND
WAUSHARA COUNTY, WISCONSIN

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-2387
RONALD DECOSTER,
Plaintiff-Appellant,
v.
WAUSHARA COUNTY HIGHWAY DEPARTMENT
and WAUSHARA
COUNTY, WISCONSIN,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 17-C-1623 — William C. Griesbach, *Chief Judge*.

ARGUED NOVEMBER 6, 2018 — DECIDED
NOVEMBER 15, 2018

Before WOOD, *Chief Judge*, and EASTERBROOK
and KANNE,
Circuit Judges.

EASTERBROOK, *Circuit Judge*. When Waushara County set out to improve a rural highway, a dispute erupted about who owned a tract of land on which Ronald DeCoster had erected a fence. The County maintained that it owned the land or at least had a transportation easement that required the fence's removal; DeCoster insisted that the land was his and refused to take down the fence. Litigation in state court was se]led for a $7,900 payment from the County to DeCoster—who then sought more than $110,000 in attorney fees and other expenses, relying

on Wis. Stat. §32.28. The state judge awarded about $31,000, ruling that any outlay after the County offered the $7,900 was unreasonable and improvident. The court of appeals affirmed. *Waushara County v. DeCoster*, 2015 WI App 37 ¶¶18–20.

DeCoster then sued the County in federal court, seeking an award under 42 U.S.C. §§ 4651–55, part of the Uniform Relocation Assistance and Real Property Acquisition Act, which conditions federal grants for highway projects on states' providing assurance that they will compensate affected landowners for reasonable attorney, appraisal, and engineering fees. The district court ruled that the Act does not provide a private right of action, 2018 U.S. Dist. LEXIS 90440 (W.D. Wis. May 30, 2018), and DeCoster filed this appeal. We do not decide that question, because DeCoster had to present his claim in the state suit.

The effect of the state court's decision depends on Wisconsin's law. 28 U.S.C. §1738. Wisconsin employs the doctrine of claim preclusion (also known as res judicata or merger and bar) under which all legal theories, pertaining to a single transaction, that could have been presented in the initial suit, are barred if not so presented. See, e.g., *Wisconsin Public Service Corp. v. Arby Construction, Inc.*, 2012 WI 87 ¶34. In other words, a plaintiff cannot seek a recovery with one legal theory in one suit, then present a different legal theory in a second suit. The initial decision extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected

transactions, out of which the action arose." *Restatement (Second) of Judgments* §24(1) (1982). It does not matter whether we identify as the "transaction" the (arguable) taking of DeCoster's land or his expenses during the litigation. In either event, the federal suit rests on a transaction that was before the state court.

That's not all. Like Wis. Stat. §32.28, the federal Act calls for the reimbursement of "reasonable" litigation expenses. See 42 U.S.C. §4654, applied to federally financed state programs by §4655(a)(2). Wisconsin's judiciary determined that an award exceeding $31,561 would not be reasonable. The resolution of that issue is conclusive whether or not the doctrine of claim preclusion applies. See *In re Estate of Rille*, 2007 WI 36 ¶¶37–38. Whether called issue preclusion or collateral estoppel, this doctrine applies to issues actually and necessarily decided in the first suit even if the plaintiff advances new legal theories or demands new remedies. See *Restatement (Second) of Judgments* §27.

Preclusion is an affirmative defense, see Fed. R. Civ. P. 8(c)(1), and was invoked by the County—though imperfectly. DeCoster asked the federal court to award him more money than the state judge had been willing to do. The County invoked preclusion as a defense, to the extent that DeCoster's claim rested on state law, and the district judge agreed. 2018 U.S. Dist. LEXIS 90440 at *10–12. The County's reference to preclusion, and the district court's decision, were enough to alert DeCoster to the problem in seeking

state-court litigation expenses in a second suit, so we do not see any obstacle to treating all of his current theories as barred by the state court's judgment. The court that decides the merits is the right forum to resolve requests for attorney fees and other expenses of litigation.

AFFIRMED

2018 WL 2447805
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

Ronald DECOSTER, Plaintiff,

v.

WAUSHARA COUNTY HIGHWAY DEPARTMENT, et al., Defendants.

Case No. 17–C–1623
Signed 05/30/2018Filed 05/31/2018

ATTORNEYS AND LAW FIRMS

Raymond M. Dall'Osto, Gimbel Reilly Guerin & Brown, Milwaukee, WI, for Plaintiff.
John M. Bruce, Schober & Mitchell SC, New Berlin, WI, for Defendants.

ORDER GRANTING SUMMARY JUDGMENT

William C. Griesbach, Chief Judge

*1 Plaintiff Ronald DeCoster brought this action against Defendants Waushara County and the

Waushara County Highway Department (collectively "the County") seeking compensation for litigation costs and expenses, including attorney's fees, incurred in connection with an alleged taking of his property by the County. DeCoster asserts his claim for compensation under the Uniform Relocation Assistance, Acquisition and Real Property Policies Act of 1970 (the "URA"), 42 U.S.C. § 4601, *et seq.*, as well as 49 C.F.R. § 24.107 and Wis. Stat. § 32.19(3)(d). He also seeks damages under 42 U.S.C. § 1983. The court has jurisdiction under 28 U.S.C. § 1331. The case is before the court on the County's motion for summary judgment. For the reasons that follow, the County's motion will be granted and the case dismissed.

BACKGROUND

DeCoster and his wife, Nicole, own land located at N6190 County Road I in Fremont, which is in Waushara County, Wisconsin. DeCoster Aff. ¶ 1, ECF No. 21. In the fall of 2009, the Wisconsin Department of Transportation (WisDOT) authorized a reconstruction project on County Trunk I. Def.'s Proposed Material Facts (DPMF) ¶ 1, ECF No. 18 (citing Compl. ¶ 8, ECF No. 1). The reconstruction project relied largely on funding from the federal government, although WisDOT also contributed some funds for the project costs. *Id.* ¶ 2 (citing Compl. ¶ 10). Part of the project included reconstruction of a highway bridge over Alder Creek, which runs east to west and cuts across the DeCosters' property. *Id.* ¶ 3 (citing Compl. ¶ 12). Because the bridge was adjacent to the DeCosters' property, the reconstruction

projected affected a parcel of their property containing approximately 300 feet of fencing. *Id.* ¶ 5; Compl. ¶ 16; Pl.'s Statement of Facts (PSF) ¶¶ 4–5, ECF No. 23.

The County believed that the fence encroached four feet onto the highway right of way, but DeCoster maintained that it was properly on his property. DPMF ¶¶ 5–6; PSF ¶ 5. When the County asked DeCoster to apply for a revocable occupancy permit, which would have allowed the fence to remain in place subject to removal if necessary, DeCoster declined the request. DPMF ¶¶ 7–8; PSF ¶ 7. Subsequently, the County issued an order under Wis. Stat. § 83.01(7)(f) to remove the fence. DPMF ¶ 9. DeCoster refused to comply with the order, so the County commenced an action in the Waushara County Circuit Court to secure removal under Wis. Stat. § 86.04. DPMF ¶¶ 9–10 (citing Compl. ¶ 17). The DeCosters filed a counterclaim for inverse condemnation. *Id.* ¶ 11 (citing Compl. ¶ 18).

In January 2013, the circuit court approved a stipulation between the DeCosters and the County. *See* Stip., ECF No. 1–1 at 7–9. Under the stipulation, the County agreed to pay the DeCosters $7,948.24 in exchange for a quitclaim deed to two parcels of land. Stip. ¶ 1. Although the County expressly maintained that no taking had occurred, it also agreed that the court could treat its acquisition of the property as a taking for the limited purpose of determining whether the DeCosters could recover their litigation expenses under Wis. Stat. § 32.28.

Stip. ¶ 2. DeCoster provided the County with the quitclaim deed in May 2013, and the County now owns the disputed parcel. DPMF ¶ 15 (citing Compl. ¶ 20).

*2 In the subsequent litigation regarding their efforts to recover their litigation expenses, the DeCosters sought a $110,000 reimbursement. Compl. ¶ 21. After holding an evidentiary hearing and considering post-hearing briefing, the circuit court issued an extensive memorandum decision in December 2013 awarding litigation expenses of $31,560.91 to the DeCosters. DPMF ¶¶ 17–18; Compl. ¶ 21; *see also* ECF No. 17 at 9–58. The circuit court reasoned that the DeCosters' litigation expenditures were reasonable through April 2011—when the County offered a settlement similar to the ultimate stipulated sale amount—but all subsequent expenses incurred were not. ECF No. 17 at 43. After the circuit court entered judgment in January 2014, the DeCosters appealed, but the Wisconsin Court of Appeals affirmed the circuit court's decision and the Wisconsin Supreme Court denied their petition for review. DPMF ¶¶ 19–21 (citing Compl. ¶ 22). The County ultimately issued a check to the DeCosters for $31,560.91, but the DeCosters have not cashed that check. *Id.* ¶ 22 (citing Compl. ¶ 24).

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). All reasonable inferences are construed in favor of the nonmoving party. *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir. 2004). The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (quoted source and internal quotation marks omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Parent v. Home Depot U.S.A., Inc.*, 694 F.3d 919, 922 (7th Cir. 2012) (internal quotation mark omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

The URA serves the express purpose of "establish[ing] a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken ... with Federal financial assistance." 42 U.S.C. § 4621(b). The URA accomplishes this goal, at least in part, by providing that the head of a federal agency may not approve the use of federal financial assistance by an acquiring state agency without receiving assurances that

property owners will be reimbursed for necessary expenses as provided for in 42 U.S.C. §§ 4653 and 4654. 42 U.S.C. § 4655(a)(2). As relevant here, § 4654(a) provides that an agency acquiring real property "shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, *including reasonable attorney, appraisal, and engineering fees, actually incurred* because of the condemnation proceedings." (Emphasis added.) In turn, 49 C.F.R. § 24.107(c) clarifies that "[t]he owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if ... [t]he Agency effects a settlement of such proceedings."[1] Wisconsin law expressly incorporates these URA provisions into state condemnation law, providing that, "in the case of a program or project receiving federal financial assistance, a condemnor shall ... make any additional payment required to comply with the federal [Uniform Act], 42 USC. 4601 to 4655, and any regulations adopted thereunder." Wis. Stat. § 32.19(3).

***3** The URA does not provide for an express private right of action that would permit DeCoster to proceed against the County on a claim for litigation expenses. *See Delancey v. City of Austin*, 570 F.3d 590, 593 n.4 (5th Cir. 2009). Consequently, DeCoster's assertion that the County failed to pay his reasonable

litigation expenses turns upon whether the URA created an implied private right of action that would allow him to proceed on a claim for damages under 42 U.S.C. § 1983. Critically, "[i]n order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). An evaluation of three factors can assist the court in determining whether a federal statute creates a private right enforceable under § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820 (7th Cir. 2017) (quoting *Blessing*, 520 U.S. at 340–41). These factors, however, "set the bar high," as "nothing 'short of an unambiguously conferred right [will] support a cause of action brought under § 1983.'" *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 968 (7th Cir. 2012) (alteration in original) (quoting *Gonzaga*

University v. Doe, 536 U.S. 273, 283 (2002)). "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286.

Although the Seventh Circuit has not addressed whether the URA gives rise to a private right of action enforceable under § 1983, DeCoster directs the court's attention to *Pietroniro v. Borough of Oceanport*, 764 F.2d 976 (3d Cir. 1985). There, the Third Circuit concluded without significant analysis that, "[i]n the absence of a comprehensive enforcement scheme within the regulatory scheme which encompasses the plaintiff's complaint[,] there exists a private cause of action against state officials for violations of the ... URA." *Id.* at 980 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). But that decision predates the Supreme Court's *Gonzaga* opinion, in which the Court expressly rejected the idea that a cause of action exists in the absence of an "unambiguously conferred right." 536 U.S. at 283.

The Fifth Circuit's post–*Gonzaga* decision in *Delancey v. City of Austin* provides a more persuasive analysis concluding that the URA does not give rise to an implied private right of action enforceable under § 1983. 570 F.3d 590 (5th Cir. 2009). There, the plaintiffs argued that a private right of action arose under 42 U.S.C. § 4625(b)–(c). Subsection (b) provides that the "head of any

displacing agency" must "ensure that the relocation assistance advisory services described in subsection (c) ... are made available to all persons displaced by such agency." *Id.* Concluding that the URA did not show evidence of an implicit intent by congress to create a private right of action, the Fifth Circuit noted that § 4625(b) directs its mandate at an agency head, rather than individuals benefitted by the statute, like the statute in *Gonzaga* that did not give rise to a private right of action. *Delancey*, 570 F.3d at 594 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' " (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001))). Also significant to the Fifth Circuit was the fact that § 4625speaks in terms of establishing a uniform policy or practice for implementation, rather than "rights-creating language like that in Titles VI and IX." *Id.* at 594–95.

For these same reasons, 42 U.S.C. §§ 4654 and 4655 do not, as DeCoster contends, give rise to an implied private right of action. As already noted, § 4655(a) permits "the head of a Federal agency" to approve federal financial assistance for certain state agency projects only if the acquiring agency, among other things, provides adequate assurance that property owners will be reimbursed for certain expenses. Section 4654(a) then defines the substance of the reimbursable expenses, which include attorney, appraisal, and engineering fees incurred because of condemnation proceedings. Rather than establishing

a "right" to the reimbursement of certain kinds of expenses, these sections direct federal agency heads to exercise their discretion to approve the use of federal funds in certain limited ways. These sections therefore fail to unambiguously confer a right in the manner necessary to imply the existence of a private cause of action under *Gonzaga*. *See also Hoeft v. City of Beaver Dam*, No. 2014AP2790, 2015 WL 3887035, ¶¶ 30–33 (Wis. Ct. App. June 25, 2015) (concluding that URA, specifically 42 U.S.C. §§ 4601 and 4651, does not give rise to a private cause of action). Absent an implied private cause of action under the URA, Plaintiff cannot proceed directly under the URA in Count I of his complaint or under 42 U.S.C. § 1983 in Count II.

***4** To the extent that DeCoster seeks recovery of his litigation expenses under Wis. Stat. § 32.19(3)(d), his claim is precluded by the state court judgment. As noted above, when a project relies on federal financial assistance, Wis. Stat. § 32.19(3)(d) requires that a condemnor make any payments required by the URA. But DeCoster has already obtained a final judgment on the merits of his claim for litigation expenses under Wisconsin law in state court. He has no legal right to seek a second determination of his recoverable expenses in federal court. The Supreme Court has held that 28 U.S.C. § 1738 implements the Constitution's Full Faith and Credit Clause and "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which

the judgments emerged." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)(internal quotation mark omitted) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982)).

Under Wisconsin law, an earlier judgment has preclusive effect on a subsequent claim when there is "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 729 (1995). To evaluate identity of causes of action, Wisconsin uses the "transactional approach," which "connotes a common nucleus of operative facts" and reflects "the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so." *Fed. Nat'l Mtg. Assoc. v. Thompson*, 2018 WI 57, ¶ 36, 2018 WL 2374894 (quoting *Kruckenberg v. Harvey*, 2005 WI 43, ¶¶ 26–27, 279 Wis. 2d 520, 694 N.W.2d 879). The state court judgment on DeCoster's previous claim for litigation expenses clearly satisfies the conditions required to preclude any claim DeCoster could assert for litigation expenses in this court: DeCoster and the County were both parties to the suit before the circuit court, DeCoster sought reimbursement for his reasonable litigation expenses, the circuit court entered a judgment on the merits finding only some of his litigation expenses reasonable, and DeCoster pursued all available options for review in the Wisconsin Court of Appeals

and the Wisconsin Supreme Court. DeCoster now seeks to recover additional litigation expenses that were rejected in the state court proceeding. The earlier state court judgment precludes any such claim. And since the court has already determined that he is precluded from raising a Wisconsin law claim for litigation expenses here, there is no need to address the merits of the County's *Rooker–Feldman* argument.

CONCLUSION

For the foregoing reasons, the County is entitled to judgment as a matter of law on both counts in DeCoster's complaint. The County's motion for summary judgment (ECF No. 15) is therefore **GRANTED**, and this action is dismissed. The Clerk is directed to enter judgment accordingly.
SO ORDERED this 30th day of May, 2018.

ALL CITATIONS

Slip Copy, 2018 WL 2447805

FOOTNOTES

1
As a political subdivision of the state, the County satisfies the definition of "Agency" in the regulation. *See* 49 C.F.R. § 24.2(a)(1); *see also* 42 U.S.C. § 4601(3).

COURT OF APPEALS DECISION DATED AND FILED

March 19, 2015

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. 2014AP397 Cir. Ct. No. 2010CV76

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT IV

WAUSHARA COUNTY,

PLAINTIFF-RESPONDENT,

V.

RONALD J. DECOSTER AND NICOLE K. DECOSTER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This is a dispute over litigation expenses between Ronald and Nicole Decoster and Waushara County. The Decosters appeal a circuit court order awarding the Decosters litigation expenses in an amount that was substantially less than the Decosters' claimed. The Decosters make two arguments on appeal: (1) the court erred in reducing the claimed litigation expenses and (2) the circuit court judge erred in denying the Decosters' motion that he recuse himself from further proceedings. For the reasons that follow, we conclude that the court properly exercised its discretion in limiting the litigation expenses awarded

to the Decosters, and that the judge properly denied the Decosters' motion for recusal. We affirm.

BACKGROUND

¶2 The County filed a lawsuit against the Decosters seeking an order requiring the Decosters to remove a fence located on their property. In the complaint, the County claimed the fence was on a right-of-way of a county road targeted for a highway improvement project. The Decosters refused to remove the fence, and filed a counterclaim alleging inverse condemnation. In the counterclaim, the Decosters demanded that the County construct a ditch on the Decosters' property to receive storm water runoff from the road improvement project and direct that runoff so as to prevent flooding on their farm land.

¶3 In attempts to resolve this dispute, the County offered to pay the Decosters compensatory damages and expert witness fees, in an amount of $7,282.54. In response, the Decosters told the County that they would not settle unless the offer included litigation expenses, which at that point totaled approximately $31,000. The parties attempted to mediate a settlement in September 2011, however, those attempts failed. Following the mediation attempt, the County advised the Decosters that it could not admit to a taking, but that in an effort to resolve the dispute, the County would pay $7,282.54 to the Decosters and agree to pay reasonable

attorney's fees as if a taking had taken place and in an amount to be determined by the court. The County indicated, however, that it would strongly dispute the reasonableness of the fees claimed.

¶4 In January 2013, the parties agreed to settle the issues in this case and entered into a stipulation memorializing that agreement. The court signed an order approving the stipulation. The stipulation contained a provision establishing the legal framework for how litigation expenses were to be determined by the circuit court. The dispute in this case centers on that provision.

¶5 The circuit court held an evidentiary hearing to determine the reasonableness of the Decosters' claimed expenses. During the lengthy hearing, the Decosters disputed the court's construction of paragraph two of the stipulation. The court heard arguments on the proper construction of paragraph two, and heard testimony and considered documentary evidence on the topic of litigation expenses.

¶6 Approximately three months after the hearing, the Decosters filed a motion for the circuit court judge to recuse himself on the ground that the judge was biased against the Decosters. In a telephone hearing on the motion to recuse, the court denied the motion. Following that hearing, the court asked the parties to submit briefs regarding the

interpretation of the stipulation and the claimed expenses.

¶7 In a memorandum decision, the circuit court awarded the Decosters approximately $31,000 in litigation expenses, which is a substantial reduction from the $110,000 in expenses the Decosters' claimed. The court entered an order of judgment and judgment consistent with the terms of the stipulation regarding litigation expenses. The Decosters appeal the court's orders denying their motion for recusal and reducing their claim for litigation expenses.

DISCUSSION

¶8 The Decosters raise two arguments on appeal: first, that the circuit court erred in reducing their claimed litigation expenses without a reasonable basis, and second, the circuit court judge erroneously denied the Decosters' motion for recusal. We reject both arguments. We begin our discussion with the Decosters' judicial-bias argument and then turn to the issue of litigation expenses.

Judicial Bias

¶9 The Decosters contend that Judge Dutcher demonstrated judicial bias, as evidenced by various comments he made throughout the litigation expenses hearing. They argue that these comments strongly suggest that the judge had prejudged the

case without having first heard testimony from the Decosters' witnesses. The Decosters also complain that the judge exhibited bias by repeatedly challenging the Decosters' litigation strategy, and ignoring the County's strategy.

¶10 The right to an impartial judge invokes the fundamental principals of due process under the United States and Wisconsin Constitutions. *See State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Under due process principles, it is presumed that a judge has acted fairly, impartially, and without bias. *Id.* However, this is a rebuttable presumption. *Id.* To overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased. *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). To determine whether a party has rebutted that presumption, we apply both a subjective and objective test. *Id.* at 415-16. A party's due process right to an impartial judge can be violated upon a finding that a judge was biased in either way. *See State v. Gudgeon*, 2006 WI App 143, 295 Wis. 2d 189, ¶20, 720 N.W.2d 114.

¶11 The County contends that the Decosters forfeited their judicial bias challenge because they failed to file a timely motion. Relying on *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992), the County points out that any challenge to a judge's ability to adjudicate a matter must be made as soon as the alleged infirmity is known and

prior to a decision in a contested matter. The County argues that the Decosters knew all of the grounds that allegedly supported their judicial bias challenge, at least by the end of the evidentiary hearing in April, yet they waited until three months had passed to move for the judge's recusal.

¶12 In reply, the Decosters contend that under the standards set in *Marhal* for timeliness, their challenge to the judge's partiality was timely made. They point out that they filed their motion on July 17, 2013, which was well before the judge issued his decision on litigation expenses on December 30, 2013. The Decosters also contend that, contrary to the County's argument, they filed their recusal motion as soon as they learned that the judge demonstrated bias at the litigation expenses hearing, which was not until after they received the hearing transcript on May 31, 2013. The Decosters argue that because they met the standards for timeliness under *Marhal*, they did not forfeit their right to move for the judge's recusal.

¶13 We agree with the County that the Decosters' challenge to the judge's partiality was not timely made, and therefore they have forfeited their right to raise this challenge. Moreover, even if we were to accept the Decosters' assertion that they first learned that the judge exhibited bias at the hearing only after they received the hearing transcript[1] on May 31, 2013, the Decosters do not explain or point to any case law or legal authority supporting the idea that filing a motion to recuse six weeks after learning

of the judge's "alleged infirmity" is timely under *Marhal*. We need not define the parameters of when a motion to recuse is timely. It is sufficient to say that under the circumstances here, filing the motion six weeks after learning all necessary facts is not timely. The Decosters do not explain the long delay between receiving the hearing transcript and filing their motion to recuse. Thus, we conclude that the Decosters have forfeited their right to challenge the judge's ability to be impartial at the hearing on the litigation expenses.

Litigation Expenses

¶14 The Decosters contend that the circuit court erroneously reduced their claim for litigation expenses from approximately $110,000 to just $31,000. We disagree.

¶15 As background, the parties entered into a stipulation that, by all appearances, was intended to settle all of the issues in this case. Pertinent to this case, paragraph two of the stipulation purportedly was intended to set the framework by which litigation expenses the Decosters incurred were to be established and determined by the court. Paragraph two provides:

> 2. The parties have agreed that the Court shall treat the County's acquisition of the parcels of land identified as 'Parcel A' and 'Parcel B' as

> a 'taking' for the purposes of establishing litigation expenses as that term is used by § 32.28, Wis. Stats, and shall determine those litigation expenses as if the defendants had received a judgment as a condemnee under § 32.28(3)(c), Wis. Stats. The County maintains no taking has taken place, but agrees for purposes of this Stipulation it shall not argue that there was no taking. Further, the parties agree that this Stipulation shall be void if the Court were to make such a finding independently.

¶16 WISCONSIN STAT. § 32.28 is part of the condemnation statutory scheme and governs the circumstances under which litigation expenses and costs are awarded in a condemnation proceeding. Section 32.28(3)(c), which cross-references WIS. STAT. § 32.10 concerning inverse condemnation claims, provides that litigation expenses shall be awarded where a plaintiff prevails on a claim of inverse condemnation.

¶17 One of the issues in this case concerned the Decosters claim that the County was obligated to install a ditch across parcels A and B of the Decosters' property as part of the road improvement project. The Decosters wanted a ditch to prevent potential water runoff onto parts of the their farm land caused by the highway improvement project. This issue was part of

the Decosters' inverse condemnation counterclaim. Paragraph six of the stipulation addressed this concern:

> 6. The parties agree that this stipulation is contingent upon Waushara County completing the installation of a ditch within the area depicted as 'Parcel A' and 'Parcel B' on the attached Exhibit A, in accordance with its application to the Wisconsin Department of Natural Resources. If Waushara County should fail to complete installation of this ditch project, the [Decosters] shall be permitted to press claims for additional takings in the area of Parcel C as depicted on the attached Exhibit B.

¶18 The circuit court's decision to reduce the Decosters' claimed litigation expenses hinged primarily on the court's interpretation of paragraphs two and six of the stipulation. In its written decision, the court read paragraph two as limiting litigation expenses to the "taking" of parcels A and B. Based on this reading of paragraph two, in conjunction with the court's reading of paragraph six, the court deemed the Decosters' claim for litigation expenses incurred litigating issues apart from the County's "taking" of parcels A and B to be unreasonable. As to paragraph six, the court explained that this paragraph worked against the Decosters' interpretation of paragraph two. On this topic the court wrote:

> Paragraph 6 dictates that the De[c]osters would be allowed to assert "taking" of an additional parcel (Parcel C) if and only if the County failed to install the ditch across Parcels A and B. The reference to this additional 'taking', conditioned upon one party's failure to perform an agreed task, begs the rhetorical question: If the Stipulation really was intended to directly encompass 'takings' beyond Parcels A and B, then why is the potential for the De[c]osters arguing the taking of additional lands specifically articulated?... The conditional language applicable to Paragraph 6 further eliminates any conceivable argument that the 'takings' agreed upon within the Stipulation applied to any property beyond Parcels A and B.

¶19 With this background in mind, we now address the merits of this issue. As indicated, the circuit court rested most, if not all, of its decision to limit the Decosters' claim for litigation expenses to just over $31,000 on the court's interpretation of the parties' stipulation. On appeal, the Decosters' inexplicably avoid addressing the court's interpretation of the stipulation in their brief-in-chief. The Decosters wait until their reply brief to refer to the stipulation, and even then the Decosters

only tangentially touch on it. The Decosters focus their entire brief-in-chief on explaining the lodestar method for determining the reasonableness of attorney's fees, the policies underlying fee-shifting in condemnation proceedings, and arguing that the court erroneously exercised its discretion by making a downward adjustment in the Decosters' claimed litigation expenses. Nowhere in their brief-in-chief do the Decosters even mention the court's interpretation of the stipulation, let alone argue that the court's interpretation was unreasonable. Because the Decosters do not develop an argument regarding the interpretation and application of the stipulation, they, obviously, fail to persuade us that the circuit court erred.

¶20 Having concluded that the Decosters failed to demonstrate that the circuit court erred in its interpretation and application of the stipulation to the facts of this case, the Decosters only remaining argument is that they are entitled to additional expenses incurred relating to the County's acquisition of parcels A and B. However, the Decosters fail to provide a basis for this court to discern the expenses they incurred relating to the County's acquisition of parcels A and B, and distinguish those from expenses incurred to litigate the other issues. The Decosters' arguments on this topic are made in broad sweeping terms and they fail to provide specifics to support reversal of the circuit court.

¶21 Thus, for the above reasons, we conclude that the circuit court did not erroneously exercise its discretion in awarding litigation expenses to the Decosters in an amount less than they claimed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

STATE OF WISCONSIN CIRCUIT COURT
WAUSHARA COUNTY

WAUSHARA COUNTY,

Plaintiff,

Case No. 10-CV-76

v.

RONALD J. DECOSTER
and NICOLE K. DECOSTER,

Defendants.

STIPULATION AND ORDER

STIPULATION

The parties, through their respective counsel, do hereby stipulate and agree as follows:

1. Waushara County (the "County") shall pay to Ronald J. Decoster and Nicole K. Decoster, (the defendants), the sum of $7,948.24 as and for compensation for the parcels of land identified as 'Parcel A' and 'Parcel B', as depicted on the attached Exhibit A. Upon the receipt of such compensation, the

defendants shall provide to the County a Quit Claim Deed for said parcels of land.

2. The parties have agreed that the Court shall treat the County's acquisition of the parcels of land identified as 'Parcel A' and 'Parcel B' as a 'taking' for the purposes of establishing litigation expenses as that term is used by §32.28, Wis. Stats., and shall determine those litigation expenses as if the defendants had received a judgment as a condemnee under §32.28(3)(c), Wis. Stats. The County maintains no taking has taken place, but agrees for purposes of this Stipulation it shall not argue that there was no taking. Further the parties agree that this Stipulation shall be void if the Court were to make such a finding independently.

3. The parties agree that the County shall prepare a Right of Way Plat which may be recorded with this Stipulation in the office of the Waushara County Register of Deeds establishing that the right-of-way line is at least 2' (two feet) west of the Defendant's fence line at all points along Count Highway I. The parties agree that the Right of Way Plat has been created to reestablish the location of the right of way from that as depicted in the Carlovsky surveys recorded at CSM #5992, at Vol. 33, Pg. 198 and CSM #5993, at Vol. 33, Pg. 201.

4. The County shall Quit Claim any easement rights for highway right of way purposes along County Highway I that it may have east of a line 2' (two feet) west of and parallel to the existing fence

line along the Defendant's property. The Parties agree that the County's highway was acquired by way of prescriptive easement and that the intent of the Quit Claim Deed is to release any claim of prescriptive easement in the area being quit claimed.

5. The County shall prepare a deed transferring the property depicted as 'Parcel A' and 'Parcel B' on the attached Exhibit A to the County, and the Defendants shall sign said deed.

6. The parties agree that this stipulation is contingent upon Waushara County completing the installation of a ditch within the area depicted and 'Parcel A' and 'Parcel B' on the attached Exhibit A, in accordance with its application to the Wisconsin Department of Natural Resources. If Waushara County should fail to complete installation of this ditch project, the defendants shall be permitted to press claims for additional takings in the area of Parcel C as depicted on the attached Exhibit B.

7. Upon the signing of this stipulation by the counsel for the plaintiff, the defendants shall provide disclosure of all litigation expenses they are claiming. Upon receipt of said disclosure of litigation expenses, the plaintiff shall, within thirty (30) days advise the defendants and the Court of its acceptance or rejection of said litigation expenses. To the extent that the plaintiff objects to any portion of the litigation expenses, the plaintiff shall identify those expenses it objects to and detail the nature of its objection.

8. Upon approval of this Stipulation and the installation of the ditch, the County shall dismiss its action with prejudice and release any Lis Pendens it may have filed.

/s/ John M. Bruce	/s/ John A. Kassner
Attorney John M. Bruce	Attorney John A. Kassner
Schober & Mitchell SC	Murphy Desmond S.C.
Attorney for Plaintiff	Attorney for Defendants
State Bar No. 1005232	State Bar No. 1019538
2835 S. Moorland Road	33 East Main Street,
New Berlin, WI 53151	Suite 500
	Madison, WI 53703
(Phone) 262-785-1820	(Phone) 608-268-5587
(Fax) 262-7867-1073	(Fax) 608-257-2508
Date: 1/11/13	Date: 1/14/13

ORDER

Based upon the above Stipulation of the parties,

IT IS HEREBY ORDERED that the above terms and provisions be incorporated forthwith as an Order of the Court, without further notice or hearing.

Dated this 16th day of January, 2013.

BY THE COURT:

/s/ Guy D. Dutcher

_____

Honorable Guy D. Dutcher

CONSTITUTIONAL PROVISIONS AND STATUTES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.CONST. amend v.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.CONST. amend xiv.

---

* * * * * *

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

(b) For purposes of this section, the term "acquiring agency" means—

(1)a State agency (as defined in section 4601(3) of this title) which has the authority to acquire property by eminent domain under State law, and

(2)a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation.

42 U.S.C. §4655.

Claims against the United States.
The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney,

appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. §4654(c).

Expenses Incidental to Transfer of Title to United States

The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for-

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective

date of possession of such real property by the United States, whichever is the earlier.

42 U.S.C. §4653.

Certain Litigation Expenses:
The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

* * * * * *

(c) The Court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

49 C.F.R. §24.107.

Manner of notices.
Each notice which the Agency is required to provide to a property owner or occupant under this part, except the notice described at § 24.102(b), shall be personally served or sent by certified or registered first-class mail, return receipt requested, and documented in Agency files. Each notice shall be written in plain, understandable language. Persons who are unable to read and understand the notice must be provided with appropriate translation and counseling. Each notice shall indicate the name and telephone number of a person who may be contacted for answers to questions or other needed help.

49 C.F.R. §24.5.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State orTerritory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes

of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

---

* * * * * *

(3) RELOCATION PAYMENTS. Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation may be exercised, or undertakes a program or project that causes a person to be a displaced person, shall make fair and reasonable relocation payments to displaced persons, business concerns and farm operations under this section. Payments shall be made as follows:

* * * * * *

(d) *Federally financed projects.* Notwithstanding pars. (a) to (c), in the case of a program or project receiving federal financial assistance, a condemnor shall, in addition to any payment under pars. (a) to

> (c), make any additional payment required to comply with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC 4601 to 4655, and any regulations adopted thereunder.

Wis. Stat. §32.19(3).