STATE OF MICHIGAN

COURT OF APPEALS

JOHN M. HORVATH and DONNA HORVATH,

Plaintiffs–Appellants/
Cross-Appellees,

v

TOWNSHIP OF CLAY,

Defendant–Appellee/
Cross-Appellant.

UNPUBLISHED
July 30, 1996

No. 182885
LC No. 94-001356

Before: Neff, P.J., and Fitzgerald and C.A. Nelson,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting summary disposition for defendant Clay Township. We affirm.

Plaintiffs brought suit for money damages, claiming that the township's prior refusal to issue building permits, which had been resolved pursuant to a consent judgment, resulted in an unconstitutional taking of their property during the interim between the initial denial of the permits and the entry of the consent judgment. The trial court granted the township's motion for summary disposition on the basis of res judicata, but did not address the validity of plaintiffs' constitutional claim or the township's request for attorney fees and costs.

The township correctly asserted, and the trial court agreed, that the facts in this case are parallel to *Schwartz v City of Flint*, 187 Mich App 191; 466 NW2d 357 (1991), which also involved a second lawsuit following a consent judgment resolution of a zoning dispute. Although plaintiffs argue that *Schwartz* is distinguishable because, in that case, the constitutional issue was actually litigated in the first suit, plaintiffs' reliance on this distinction is misplaced. Plaintiffs' claim is barred under res judicata if it could have been brought in the prior suit, even if it was not. *Schwartz*, *supra* at 194; *Vanderwall v Midkiff*, 186 Mich App 191, 197; 463 NW2d 219 (1990). Counsel for plaintiffs admitted during the hearing on the motion that plaintiffs could have brought their claim for money damages in the prior suit.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Furthermore, plaintiffs are deemed to have admitted that the issues involved in this suit could have been brought in the prior suit by virtue of their failure to respond to defendant's interrogatories and requests for admissions. MCR 2.312(B)(1). Consequently, the trial court did not err when it determined that plaintiffs' claim was barred by the doctrine of res judicata.

Because the court below correctly determined that plaintiffs' claim was barred, the court's failure to address the validity of plaintiffs' constitutional issue was not error. Furthermore, under the holding in *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 87-89; 445 NW2d 61 (1989), plaintiffs' constitutional claim was not ripe for adjudication where plaintiffs did not attempt to obtain compensation through inverse condemnation proceedings before filing suit. See also *Paragon Properties Co v City of Novi*, 206 Mich App 74, 76-77; 520 NW2d 344 (1994).

On cross-appeal, defendant argues that the trial court erred by failing to address the township's claim for attorney fees, costs and sanctions. We disagree. The transcript is devoid of any reference to the township's claim for attorney fees. The order of judgment, which was drafted by the township, stated that the judgment was "without costs." Defendant township has failed to persuade this Court that the trial court erred by failing to address an issue that was not properly presented to it.[1]

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Charles A. Nelson

[1] Further, had the township wished to pursue the issue of attorney fees, it could have sought the appropriate post-judgment relief in the trial court following the grant of summary disposition.