STATE OF MICHIGAN

COURT OF APPEALS

VILLAGE OF OXFORD,

Plaintiff-Appellee,

v

NATHAN GROVE FAMILY, LLC, and KNAUF FAMILY PROPERTIES, LLC,

Defendants-Appellants,

and

JOAN WECKLE, DAVID WECKLE, OXFORD BANK, and CAPAC STATE SAVINGS BANK,

Defendants.

UNPUBLISHED
January 26, 2010

Nos. 288779, 288780, 289839
Oakland Circuit Court
LC No. 2002-042244-CC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, defendants Nathan Grove Family, LLC ("Grove"), and Knauf Family Properties, LLC ("Knauf"), appeal as of right the judgment entered on a jury verdict awarding $267,830 to Grove as just compensation in this condemnation action pursued by plaintiff Village of Oxford ("Oxford") relative to the taking of property, which consisted of two separate parcels that Oxford has designated for use as a public parking lot. Grove also appeals the trial court's order awarding Oxford case evaluation sanctions. This case was originally commenced in July 2002 after Grove rejected a good-faith offer relative to the property and challenged the necessity of a taking. More specifically, on July 10, 2002, Oxford issued a notice and declaration of taking and initiated the condemnation action. The case has wound its way through the appellate system and back to the trial court on the issue of necessity, and it now has returned to this Court, but the issue this time, given certain stipulations, is on valuation. The event that caused much of the confusion in this case below and which is the focus of the appellate issues raised here was Grove's ostensible conveyance of the property to Knauf in March 2006. On consideration of all the issues presented, we affirm.

I. Analysis

A. Overview of Appellate Arguments

In Docket Nos. 288779 and 288780, a joint appellate brief has been submitted by Grove and Knauf, challenging the dismissal of Knauf and the substitution of Grove as party defendant, challenging the exclusion of evidence regarding the March 30, 2006, sale of the property from Grove to Knauf, and challenging the exclusion of testimony concerning conversations involving Brett Knapp, the owner of a restaurant on property adjacent to the condemned property. In Docket No. 289839, Grove appeals the award of case evaluation sanctions to Oxford in the amount of $29,623.

We note that this panel has carefully examined and scrutinized all of the facts in this case and its extensive history. For purposes of this unpublished opinion, we shall not recite the factual and procedural history of the case.

B. Substitution of Grove for Knauf as Party Defendant

(1) *Arguments of Defendants Knauf and Grove*

Defendants argue that Knauf had standing to be in the condemnation action as a party defendant, given the conveyance of the property to Knauf from Grove, given Oxford's consent to Knauf's participation in the litigation through stipulated orders, and given Oxford's conduct prior to seeking dismissal of Knauf. Defendants contend, citing *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523; 695 NW2d 508 (2004), that Oxford's stipulation to Knauf's substitution as defendant in place of Grove, along with Oxford's failure to challenge or raise an issue of standing until the eve of trial, demand reversal of the trial court's ruling on the matter. Not only did Oxford file the motion to dismiss Knauf late under the court's scheduling order, Oxford engaged in filing interrogatories, requesting documents, discussing settlement, and holding case evaluation with Knauf before then moving to dismiss Knauf. Defendants assert that Oxford could not stipulate to a matter and now argue on appeal that the result of the stipulation was erroneous. Oxford waived any argument to Knauf's standing. Aside from consent and waiver issues, defendants argue that Knauf had a legally protected interest (fee simple) once ownership of the property was acquired on March 30, 2006, which date was after this Court's order was issued vacating the trial court's stay order, *Village of Oxford v Nathan Grove Family, LLC*, unpublished order of the Court of Appeals, issued February 10, 2005 (Docket No. 258060), was after this Court's ruling in the first appeal that necessity had not been established, *Village of Oxford v Nathan Grove Family, LLC*, 270 Mich App 685, 686; 717 NW2d 400 (2006), reversed 477 Mich 894 (2006), and was before our Supreme Court reversed the trial court and this Court on the issue of necessity, 477 Mich 894. Defendants maintain that, although by operation of law title vested in Oxford retroactively to July 2002, it was only when Oxford and defendants stipulated that necessity was established that title, practically speaking, vested in Oxford, and this was after the March 2006 sale. Knauf is the real injured party and the party in interest. Finally, defendants argue that, because of the stipulated orders and Oxford's failure to timely challenge or raise the issue of Knauf's participation in the suit, Oxford waived its ability to attack personal jurisdiction of the court over Knauf.

(2) *Oxford's Arguments*

Oxford first argues that the trial court did not actually grant its motion to dismiss Knauf as a party. Oxford explains that the July 23, 2008, order denied its request to dismiss Knauf and that Knauf moved for reconsideration, with Knauf's counsel noting on the record that the trial court was granting the motion for reconsideration to the extent that Grove would be substituted as party defendant in place of Knauf. Accordingly, Oxford argues that the trial court reacted to the wishes of defense counsel. The July 25, 2008, order of substitution was entered at Knauf's request, and the trial stipulations submitted by the defense indicated that Grove was the sole owner of the property on the valuation date of July 10, 2002.

Oxford additionally argues that a condemnation action is an "in rem" proceeding and the sole issue for resolution by the jury was determination of the property's fair market value. The focus of the condemnation action, according to Oxford, is on the fair market value of the property, not on the defendant, as the owner of the property is irrelevant.

(3) *Standard of Review*

The issues raised entail matters of standing, jurisdiction, statutory interpretation, and other questions of law that we review de novo on appeal. *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *Duncan v Michigan*, 284 Mich App 246, 260; 774 NW2d 89 (2009).

(4) *Discussion*

This case implicates the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* In *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 380; 663 NW2d 436 (2003), our Supreme Court stated that "a condemnation action is an in rem proceeding governed by the UCPA[, and] [i]t is instituted to allow a state agency to take title to privately owned property; thus, *the agency and the owner are parties*." (Emphasis added.) Accordingly, the owner of the property must be made a party to the action.[1] MCL 213.51(f) defines an "owner" as including "a . . . corporation . . . having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned." There is no dispute that Grove was the owner of the property when suit was commenced in July 2002. Given the order of this Court issued on February 10, 2005, that vacated the stay order and found no justification to enjoin Grove from exercising its legal property rights pending appeal, and also considering this Court's first opinion, nothing emanating from the courts necessarily precluded Grove from selling the property to Knauf in March 2006. A statute cited repeatedly below and on appeal is MCL 213.57(1), which provides:

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[1] This can be seen in a number of the provisions contained in the UCPA. See, e.g., MCL 213.56(1) ("Within the time prescribed to responsively plead after service of a complaint, 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.").

> If a motion to review necessity is not filed under section 6, the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act. If the motion to review necessity is denied after a hearing and after any further right to appeal has terminated, title to the property shall also vest in the agency as of the date on which the complaint was filed or such other date as the court may set upon motion of the agency.

Grove filed a motion to review necessity and that litigation proceeded through the trial court, the Court of Appeals, and the Supreme Court, which reversed and remanded the matter to the trial court for further consideration of necessity, with the proper focus to be on whether it was necessary to take the property in order to accomplish the improvement or goal of free public parking, and not on the wisdom of Oxford's decision to provide free public parking. Ultimately, the motion to review necessity was neither granted nor denied, where the parties stipulated to the order of June 27, 2007, pursuant to which Grove and Knauf withdrew the motion and agreed that public necessity existed. It is logical to conclude that the first sentence in MCL 213.57(1), addressing the absence of a filed motion, was implicated when the motion was formally withdrawn, which would result in the vesting of title in Oxford as of July 10, 2002, and in the vesting of the right to just compensation in Grove, the owner in July 2002.

With respect to the impact of the stipulated order of June 27, 2007, which was confirmed by another stipulated order on June 30, 2008, MCL 213.70(3) becomes relevant. MCL 213.70(3) provides, in pertinent part, that "[t]he date of acquiring and of valuation in a proceeding pursuant to this act shall be the date of filing unless the parties agree to a different date, or unless a different date is determined by a counterclaim filed under section 21." The term "acquire" is defined in the UCPA, and it "means to secure transfer of ownership of property to an agency by involuntary expropriation." MCL 213.51(a). MCL 213.70(3) suggests that the dictates of MCL 213.57(1) on the vesting of title and the right to just compensation, and certainly the setting of a valuation date, are subject to agreements by the parties. That being said, the June 27, 2007, stipulated order contained some contradictions within the order itself. It provided that Knauf was the sole fee owner of the property and substituted into the action in place of Grove, yet it also provided that title vested with Oxford as of July 10, 2002,[2] leaving one to question under what legal theory could Grove have conveyed the property in March 2006 if title at that time was retroactively deemed to have been with Oxford. Defendants posit that a practical approach should be taken, recognizing as valid the March 2006 conveyance from Grove to Knauf, such that Knauf held the interest subject to the taking, while treating the vesting of Oxford's interest as having actually occurred only when the stipulated order was entered, which was after the March 2006 sale, although theoretically it vested in July 2002.

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[2] Adding to the conflicting language was the order's provision that, once the $170,000 was paid to Knauf, Oxford "shall be entitled to full possession of the Property interests described in the Complaint, in fee simple absolute[.]"

The procedural posture of this case is indeed unusual and the interplay between the stipulated order and the UCPA makes matters even more difficult. However, we affirm the substitution of Grove for Knauf, notwithstanding the stipulated order. We appreciate defendants' arguments concerning consent and waiver, and we certainly are troubled by Oxford's decision to move for a substitution of parties so late in the litigation and after twice stipulating to Knauf being the proper party defendant.[3] But we choose to affirm because the record reflects that Grove proceeded to trial and Knauf was dismissed from the suit due in part to their own efforts and silence. The July 23, 2008, order of the trial court denied Oxford's request to exclude a particular valuation, granted its request to exclude evidence regarding the March 30, 2006, sale to Knauf, and *denied* Oxford's request to dismiss Knauf and substitute Grove as party defendant. Therefore, at that point in time, Knauf remained in the suit and Grove remained out of the litigation. Knauf sought reconsideration of the order, not Oxford, expressing an inconsistency between the court's ruling that title vested with Oxford in July 2002 and the ruling keeping Knauf in the suit. Knauf essentially argued that if title vested in 2002 with Oxford, there could be no sale to Knauf in 2006; therefore, Knauf would have no interest in the property and thus no reason to be in the suit. Again, the June 2007 stipulated order itself, while admittedly having language to the contrary, acknowledged that title vested with Oxford in July 2002. In the motion for reconsideration, Knauf requested in part that the court substitute Grove for Knauf in the suit and revise the June 2007 stipulated order. When the parties went on the record on July 25, 2008, counsel for Knauf indicated that the court was partially granting its motion for reconsideration by making the substitution of Grove for Knauf. While not entirely clear, the record suggests that there was agreement by all that Knauf should be dismissed from the suit and Grove added as the party defendant. We acknowledge that Grove was not technically in the suit or present for purposes of Oxford's motion and Knauf's motion for reconsideration. However, wrongly or rightly, counsel for Knauf also represented Grove, and Grove never filed any objection or challenge to the trial court's ruling prior to or during trial. On this record, we conclude that Grove and Knauf consented to the substitution and thereby waived any appellate argument on the issue. A party cannot waive its rights on an issue or rule and then seek appellate review of a claimed deprivation of its rights on the matter; counsel is not permitted to harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Moreover, our ruling is consistent with the UCPA, where the owner of property subject to a taking is a proper party to the suit, and where, under either MCL 213.57(1) or the stipulated order, title vested with Oxford in July 2002, at which time Grove was the property owner. Further, under MCL 213.57(1), the right to compensation vested at the same time, July 2002, and Grove was the entity entitled to compensation at that time. Additionally, the valuation date of July 2002 fell within Grove's period of ownership.

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[3] Defendants' focus on the doctrine of standing is a bit misguided in that standing issues generally pertain to the question of whether, in order to pursue a suit, a *plaintiff* has suffered an injury in fact, that being an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical. *Duncan*, 284 Mich App at 292. Here, the question relates more to the concept of necessary parties, although the underlying principles are comparable.

In regard to Grove's argument that Oxford's motion to exclude evidence and substitute parties was untimely under the court's scheduling order, it is true that the motion was filed on July 16, 2008, and that the scheduling order required all motions to be *heard* by July 16, but the trial court was presented with this same argument below and decided to hear and address the motion. And the court certainly had the discretion and authority to slightly relax its own scheduling order and elect to hear the motion. See MCR 2.401(A) and (B). Accordingly, we are not prepared to reverse the trial court's ruling on the substitution of parties.[4]

C. Exclusion of Evidence Pertaining to the March 2006 Sale of Property

(1) *Grove's Arguments*[5]

For many of the same reasons argued with respect to the first issue, Grove contends that evidence of the March 2006 sale of the property was relevant and had a bearing on the valuation of the property by the jury. The stipulated orders, case evaluation proceedings, and the unreasonable delay in challenging admission of the evidence and Knauf's participation in the suit effectively established consent to the admission of evidence regarding the March 2006 sale and waiver of any challenge to the evidence. Indeed, $170,000 was paid to Knauf by Oxford, thereby showing that Knauf had an actual interest in the property and thus making the sale of the property from Grove to Knauf and the price paid pertinent to the action.

Further, it is argued that even if Grove was the proper defendant, the trial court erred in its ruling because evidence of the March 2006 sale was admissible on the issue of value as a comparable sale's transaction. Citing *Detroit/Wayne Co Stadium Authority v Drinkwater Taylor & Merrill, Inc*, 267 Mich App 625; 705 NW2d 549 (2005), Grove asserts that a trial court may, in its discretion, admit or exclude evidence of a comparable sale, taking into consideration such factors as: the time of the transaction; the size, shape, and character of the comparable property; and, whether there has been any enhancement or depression in value. Citing *State Highway Comm v Abood*, 83 Mich App 612; 269 NW2d 247 (1978), Grove also argues that, in order to admit evidence of a comparable sale, it must be shown that the comparable sale was voluntary, that it was not too remote in time, and that it had some probative value. Instead of engaging in this analysis and taking into consideration the *Drinkwater* and *Abood* factors, the trial court here improperly focused solely on the argument that Oxford obtained title in July 2002, rendering the 2006 sale ineffective and making Grove the proper party to the suit. According to Grove, by not

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[4] We recognize that our ruling necessarily calls into question the validity of the March 2006 conveyance from Grove to Knauf and may fuel the fire of any dispute possibly existing between Grove and Knauf, especially where Grove was awarded just compensation from Oxford *and* received consideration from Knauf for the conveyance. Indeed, counsel for defendants noted below that if the sale was void, Knauf might have a "cause of action for breach of warranty, breach of contract and other causes against Grove." We take no position on the matter, and it is not our concern in the context of this appeal.

[5] While this and the next argument addressed by us is presented in Knauf's and Grove's joint brief, these evidentiary arguments are necessarily posed by Grove because Knauf was not a party at trial.

even considering the *Drinkwater* and *Abood* analysis, the trial court abused its discretion in excluding the evidence. Grove maintains that application of the *Drinkwater* and *Abood* factors supports admission of the evidence and that evidence of post-taking comparable sales and valuations can be used to impeach witnesses and to confirm a valuation by an expert as of the taking date. And the size, shape, and character of the property sold in 2006 is necessarily the same as the property that Oxford condemned in 2002; *it is the same property*. Next, it is argued that the 2006 sale was not too remote in time from July 2002 such that the evidence was excludable; rather, it should have been admitted, with the jury determining the proper weight to give the evidence. Grove argues that use of comparable sales remote in time from the applicable valuation date constitutes standard appraisal practice, and there was deposition testimony that market conditions in Oxford from 2002 to 2005 essentially remained unchanged. Grove disputes Oxford's contention below that the March 2006 sale was not an arm's-length transaction where, as claimed by Oxford, it was part of a 1031 tax exchange, Grove and Knauf had an attorney-client relationship, and where there existed a potential that Knauf would resell a portion of the property to a third-party. Grove argues that Oxford failed to show how and why any of these circumstances would destroy the arm's length nature of the transaction. Finally, Grove contends that the March 2006 sale had probative value, as it constituted evidence of the property's value.

(2) *Oxford's Arguments*

Oxford contends that "[w]hen a motion to review necessity is not filed, title to the property vests with the agency as of the date of the filing of a complaint. If a challenge to necessity is filed and is later denied and any further right to appeal has terminated, then title to the property vests with the agency as of the date of the filing of the complaint." Oxford states that it effectively obtained title on July 10, 2002, as a matter of law, where the case had proceeded through the Supreme Court and where on remand defendants withdrew any challenge to necessity. Indeed, the June 27, 2007, stipulated order provided that, pursuant to MCL 213.57, title to the property vested with Oxford on July 10, 2002, and this order was never appealed. According to Oxford, there could be no effective sale of the property by Grove to Knauf in 2006, considering that title vested with Oxford in 2002. Accordingly, evidence of the 2006 sale had to be excluded.

Oxford also argues that the March 2006 sale was not relevant because it involved a sale of the property too remote in time, where it occurred four years after the July 2002 valuation date. Further, Oxford contends that the March 2006 sale was not an arm's length transaction, as it involved a 1031 tax exchange and was conditioned on many external factors and considerations, including prior business dealings between Knauf and Grove and forgiveness of an ambiguous loan secured by other property. Finally, Oxford maintains that, assuming the court's ruling was in error, it was harmless under MCR 2.613(A), where the sale was for $825,000, and where, at trial, Grove's expert gave an opinion, rejected by the jury, that just compensation equaled $1.16 million.

(3) *Standard of Review*

We review for an abuse of discretion a trial court's decision to admit or exclude evidence; however, where the determination of admissibility involves a preliminary question of law, such as the application or interpretation of a statute or rule of evidence, our review is de novo.

Michigan Dep't of Transportation v Frankenlust Lutheran Congregation, 269 Mich App 570, 575; 711 NW2d 453 (2006).

(4) *Discussion*

We hold that the trial court did not abuse its discretion in excluding evidence of the March 2006 sale of the property. Initially, we incorporate our findings with respect to the first issue. Thus, Grove was the proper party defendant and title vested in Oxford in July 2002. This necessarily calls into question the validity of the 2006 sale, thereby providing a basis not to admit evidence regarding the sale. We note that the stay order entered by the trial court prior to the first appeal prohibited the altering, changing, developing, or using of the property in a manner inconsistent with the status quo, and this Court's order simply reversed that order, expressing the absence of justification to enjoin such actions and the exercise of legal property rights. This Court's order was not specifically a blessing to sell the property; rather, it merely spoke to the prohibitions set forth by the trial court, which did not encompass the *selling* of the property. Regardless, at the time of the 2006 sale, the property was the subject of a known condemnation action that had not yet fully made its way through the appellate process. And MCL 213.57(1) indicated that the vesting of title could reach back to the date the complaint was filed. Therefore, any sale under the circumstances carried a degree of risk.

There is no dispute that the date of valuation was July 10, 2002. See MCL 213.70(3). Assuming the validity of the March 2006 sale, we still find that the evidence was properly excluded on the following grounds, when considered collectively: it was significantly remote in time from the date of the taking and valuation; the circumstances of the sale raised serious doubts about whether it was an arm's-length transaction; and, the nature and timing of the sale, occurring when the litigation had not yet fully concluded and valuation remained a potential issue, give pause in considering it for valuation purposes. In *Drinkwater*, 267 Mich App at 647-648, this Court observed:

> Generally, a condemnation award is based on the fair market value at the time of the taking. Evidence regarding value is to be liberally received. The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based on consideration of all relevant facts in a particular case. [Citations omitted.]

A court may allow evidence of a comparable sale in a condemnation action, regardless of whether it occurred before or after the taking, but only if the sale took place within a reasonable time of the taking and the sale price is relevant in determining market value of the condemned property. *Id.* at 648. It is not required that market conditions be precisely the same. *Id.* Evidence of a sale can be admitted if not too remote in time, and the weight to be given the evidence is for the jury to decide. *Id.* at 649; see also *Abood*, 83 Mich App at 618 ("Generally, proof of the sales price is competent to show fair market value where the sale is voluntary, not too remote in time, and not otherwise shown to have no probative value."). The *Abood* panel concluded that "the lapse of nearly five years since the property was purchased was alone [a] significant indication that the purchase price paid . . . was not relevant to fair market value[.]" *Id.* Here, the lapse of time was also considerable, approximately four years. Standing alone, however, remoteness in time does not provide a sufficient basis to exclude the evidence. But

there is also the problem with whether the purchase agreement and associated conveyance constituted an arm's-length transaction.

The term "arm's-length" means "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship[.]" Black's Law Dictionary (7th ed). Here, the purchase agreement executed by Grove and Knauf provided:

> The parties recognize that The Law Office of Lee D. Knauf, P.C. is representing the Buyer for the purposes of the transaction described in this agreement. Further, Lee D. Knauf is a principal of Buyer. Lee D. Knauf, P.C. shall prepare all documents necessary for closing and perform other services necessary to complete closing. Lee D. Knauf, P.C., has been the attorney for Seller and is acting as attorney on other matters for Seller and the principals of Seller, therefore there is an apparent conflict of interest. Seller and the principals of Seller have been informed that they may retain another lawyer to review and or prepare any documents pertaining to the transaction described in this agreement and waive any conflict of interest . . .

The purchase agreement also provided that "[t]he parties each agree to cooperate with each other if either party decides to effect a tax free exchange pursuant to Section 1031 of the Internal Revenue Code of the property now owned by Seller."[6] Grove later assigned its rights under the purchase agreement and rights to the purchase proceeds to another limited liability company for purposes of accomplishing a tax deferred like-kind exchange in accordance with Section 1031. Finally, the purchase agreement contained an option for adjacent property, whereby Grove or Knauf promised to offer the other a fifty percent interest at a certain price if either was able to obtain an adjacent parcel.

Grove and Knauf were clearly on very close terms and a confidential relationship, attorney-client, between Lee Knauf and Grove existed and was ongoing. Moreover, the same attorney and firm represented both Grove and Knauf in this condemnation litigation, below and on appeal. Furthermore, the March 2006 sale was effectuated when continuing litigation over necessity and therefore valuation was a possibility. Considering these circumstances, along with the remoteness in time between the sale and taking, and given our ruling on the first issue as to the proper defendant and vesting of title, we find no abuse of discretion in excluding evidence of the March 2006 sale.

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[6] 26 USC 1031(a)(1) provides that "[n]o gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment."

D. Exclusion of Evidence Pertaining to Negotiations with Knapp

(1) *Grove's Arguments*

Grove argues that the evidence concerning discussions between Knapp and Knauf regarding a possible sale of one of the parcels for $330,000, which collaterally involved Oxford, was admissible and not barred by MRE 408, which encompasses, generally, the exclusion of settlement negotiations. Grove maintains that Knapp was not a party to the litigation, that the evidence was otherwise discoverable, and that the evidence was offered for a proper purpose, showing value, and not a prohibited purpose. Therefore, MRE 408 does not bar admission of the evidence.

(2) *Oxford's Arguments*

Oxford argues that the evidence was properly excluded under MRE 408, where it constituted testimony relating to discussions on compromises and settlement. Moreover, the evidence was not admissible under MRE 401-403, where the communications at issue occurred long after July 2002, and where Knauf did not even hold ownership of the property at the time of the communications, such that it could sell the property to Knapp.

(3) *Standard of Review*

As indicated above, we review for an abuse of discretion a trial court's decision to admit or exclude evidence; however, where the determination of admissibility involves a preliminary question of law, such as the application or interpretation of a statute or rule of evidence, our review is de novo. *Frankenlust Lutheran*, 269 Mich App at 575.

(4) *Discussion*

MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

We reject Grove's argument that the trial court erred in its ruling. First, Grove fails to adequately explain the circumstances surrounding the conversation between Knapp and Lee Knauf, such that the discussion would not fall under MRE 408. Grove did and does not counter Oxford's claim below and on appeal that the conversation regarding a potential purchase of a single parcel for $330,000 occurred in the presence of village officials during talks to resolve and

settle the litigation. Further, Knapp's deposition testimony reveals that the amount of $330,000 was bandied about informally; there was no formal offer and nothing was reduced to writing. Additionally, the trial court merely ruled, "I'm going to have to grant the motion in limine to the effect that discussions of settlement are not to be brought before the jury and I'll make that decision." The court essentially ruled, in general, that it would preclude testimony barred under MRE 408, leaving open the possibility of admitting testimony by Lee Knauf or Knapp if shown to be outside the scope of MRE 408, but Grove never pursued the matter at trial. We also note that nothing precluded an attempt by Grove to have Knapp testify at trial that he had an interest in purchasing the property and was willing to pay a certain dollar amount for the single parcel. At trial, Knapp only testified that there would be some value to purchasing the parcel for his restaurant. Finally, given the nature of the evidence at issue and its minimal probative value, and considering the focus on expert testimony at trial, we conclude that, assuming error in the court's ruling, it was harmless and does not necessitate reversal. MCR 2.613(A).

E. Case Evaluation Sanctions

(1) *Grove's Arguments*

Grove presents four separate arguments in challenging the award of case evaluation sanctions. First, Grove contends that the imposition of sanctions violates the intent behind the UCPA and violates the constitutional mandates, US Const, Am V; Const 1963, art 10, § 2, to pay just compensation to an aggrieved property owner. Grove also maintains that the imposition of sanctions is contrary to the Legislature's intent to place an owner of condemned property in the same position as if the property had never been taken. Further, Grove argues that the amount awarded was greater than the amount actually paid by Oxford to counsel, which violates statutory and constitutional requirements that are focused on placing an aggrieved property owner in the same position as if the taking had never occurred. Finally, Grove asserts that the trial court erred in imposing case evaluation sanctions because Grove never participated in the case evaluation hearing; rather, Knauf was the party defendant at the hearing and Grove was not even in the case at that point in time.

(2) *Oxford's Arguments*

Oxford argues that, pursuant to *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127; 573 NW2d 61 (1997), the court rule on case evaluation sanctions, MCR 2.403, applies to condemnation actions. In fact, the UCPA expressly provides for case evaluation sanctions, MCL 213.66. Accordingly, Grove's constitutional and statutory arguments fail. Moreover, Grove did not suffer any financial hardship as a result of the sanctions. Further, Grove was a properly substituted party under MCR 2.202, and when Grove reentered the suit, it still had time to accept or reject the case evaluation award. Additionally, Grove stipulated to the hourly rate sought by Oxford. Accordingly, sanctions were properly awarded.

(3) *Standard of Review*

The decision whether to award case evaluation sanctions is a question of law that is reviewed de novo on appeal; however, review of the amount awarded is subject to an abuse of discretion standard. *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009); *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 356; 737 NW2d 807 (2007). Grove's arguments also

entail questions of constitutional law, statutory interpretation, and questions of law generally, each of which are reviewed de novo on appeal. *Oakland Co Bd*, 456 Mich at 610; *Duncan*, 284 Mich App at 260.

(4) *Discussion*

Grove's argument that the imposition of case evaluation sanctions violates the Legislature's intent in enacting the UCPA is wholly lacking in merit, where the UCPA expressly contemplates such sanctions. The UCPA provides, "If the agency *or owner* is ordered to pay attorney fees as sanctions under *MCR 2.403* [case evaluation rule] or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise." MCL 213.66(3) (emphasis added).[7] Furthermore, because case evaluation arises from the court rules, MCL 213.52(1) also has a bearing on this issue, where it provides that "[a]ll laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act." Additionally, in *Great Lakes Gas*, 226 Mich App at 131-134, this Court held that MCR 2.403 applies to condemnation actions. Accordingly, the awarding of case evaluation sanctions is not contrary to, nor precluded by, the UCPA.

We also reject Grove's argument that the imposition of sanctions violates the constitutional mandates, US Const, Am V; Const 1963, art 10, § 2, to pay just compensation to an aggrieved property owner. Two separate and distinct purposes are served by the case evaluation rule and the constitutional requirement to pay just compensation for a taking. "[A] guiding principle when awarding just compensation in a condemnation suit is to 'neither enrich the individual at the expense of the public nor the public at the expense of the individual' but to leave him 'in as good a position as if his lands had not been taken.'" *Michigan Dep't of Transportation v Tomkins*, 481 Mich 184, 198; 749 NW2d 716 (2008). The purpose of the case evaluation rule is to place the burden of costs associated with litigation on the party who insists on a trial by rejecting a proposed case evaluation award. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 522; 664 NW2d 263 (2003). By imposing case evaluation sanctions in a condemnation action against a property owner, a court is not infringing on the right to just compensation for a taking. Rather, the imposition of sanctions is merely shifting litigation costs to a party recovering just compensation who unnecessarily forced a trial that did not inure to the party's benefit and in fact caused a detriment, while providing some relief as to the costs incurred by the party who was willing to settle and end the litigation or providing monetary relief to the court

[7] Oxford was awarded the sanctions and there is no order indicating that the sanctions are to be paid to the court instead of Oxford. Grove does not argue that the court should receive the sanction money in place of Oxford. The record sheds no light nor reveals any follow-up on the court's notation in the sanction order that the parties "will reach agreement on MCL 213.66 within 30 days and notify the court." Possibly, it relates to Grove's apparent right to receive some attorney fees under MCL 213.66(3), where the verdict was higher than the good-faith offer.

whose resources were expended. Although a property owner has a right to be made whole, he or she must proceed reasonably through the litigation process and comply with the applicable court rules. Moreover, it appears that Grove would be entitled to some recovery of attorney fees itself under MCL 213.66(3). We find no constitutional violation. See *Great Lakes Gas*, 226 Mich App at 131-134 (rejecting landowner's claim that mediation sanctions infringed on constitutional right to a jury determination of just compensation).

We also reject Grove's argument that the amount of the award was greater than the amount actually paid by Oxford to counsel. The court's order provided that Oxford "is awarded case evaluation sanctions at 200.00 / hour plus . . . costs for a total of $29,623.45." We note that MCR 2.403(O)(6)(b) provides that actual costs available as a sanction includes "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." Grove waived the present argument when, at the hearing on case evaluation sanctions, defense counsel stated, "Your Honor, we've stipulated that $200 an hour is the reasonable fee." Counsel also stated, "We don't contest the reasonableness of the hours." Counsel further stated, "We don't dispute anything else with regard to [Oxford's counsel's] hours or the expert fees." Accordingly, there is no basis for reversal.

Finally, we address Grove's argument that the trial court erred in imposing case evaluation sanctions because Grove never participated in the case evaluation hearing; rather, Knauf was the party defendant at the hearing and Grove was not even in the case at that point in time. In a Supreme Court order in *AFSCME v Benton Harbor*, 450 Mich 953; 548 NW2d 628 (1995), the Court stated that "[t]he award of mediation sanctions against appellant union was improper because the union did not participate in the mediation of the individual appellants' race discrimination claims, was not a party to the claims, and was not a 'rejecting party.'" Here, Grove did not participate in the case evaluation hearing as it was not a party at the time; however, it was a party to the condemnation action for a majority of the proceedings, and it was a rejecting party with respect to case evaluation. In *Vermilya v Carter Crompton Site Dev Contractors, Inc*, 201 Mich App 467, 472; 508 NW2d 580 (1993), this Court observed that the case evaluation rule "suggests that a judgment entered pursuant to a mediation evaluation can be effective against only those parties who actually participated in the action and cannot bind parties not privy to the proceedings." Here, Grove did participate in the action generally and was privy to the proceedings, although it was not involved in the actual case evaluation hearing.

We hold that reversal, under the unique circumstances of this case, is unwarranted. Our ruling is limited to this case alone and is not to be construed as serving as a basis to argue that a party need not participate in case evaluation before sanctions are awarded against that party. Ordinarily, a party must participate in the case evaluation hearing before being subject to sanctions. Here, Grove was a party to the action through the necessity stage of the proceedings, which included an appeal to this Court and the Supreme Court, was out of the action for about a year, and was then brought back into the action. Even though Grove did not participate in the case evaluation hearing, Grove's attorney throughout the lower court proceedings, while representing Knauf at the time, was a participant in the hearing. And although he was representing Knauf, counsel's goal was of course to show that the property had a high value in July of 2002, which goal would have been the same if Grove was involved in the hearing. In other words, because counsel and the goal would have been identical, and because there would

be no real difference in the hearing and outcome had Grove participated instead of Knauf, we are not prepared to reverse. Further, Grove was given the opportunity to accept or reject the evaluation and effectively rejected it by not filing an acceptance or rejection. MCR 2.403(L)(1). Additionally, Grove voiced no complaint about being placed in the position of having to accept or reject the case evaluation. Had Grove been entitled to actual costs under the MCR 2.403(O), it would hardly be arguing that the award should be vacated.

II. Conclusion

Defendants waived any argument that the trial court erred in substituting Grove into the action in place of Knauf. Moreover, the court's order on the matter was consistent with the UCPA and part of the stipulated order itself. Further, the trial court did not abuse its discretion in excluding evidence regarding the March 2006 sale of the property, nor did it abuse its discretion in excluding settlement negotiations or testimony concerning a conversation between Knapp and Lee Knauf. Finally, the trial court did not err with respect to the award of case evaluation sanctions.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra