NO. COA13-140

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v. Rockingham County
No. 10 CVS 1678

ASHCROFT COMMONS, LLC, TRSTE, INC., Trustee, WELLS FARGO BANK, NA (as successor in interest to WACHOVIA BANK, NATIONAL ASSOCIATION), WESTERN NORTH CAROLINA SERVICE CORPORATION, Trustee, and HOMETRUST BANK,

Defendants.

Appeal by defendant from judgment filed 23 May 2012 by Judge A. Moses Massey in Rockingham County Superior Court. Heard in the Court of Appeals 13 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell and Special Deputy Attorney General E. Burke Haywood, for plaintiff-appellee.

Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for defendant-appellant.

STEELMAN, Judge.

Where defendant does not cite this Court to errors in the trial court's rulings, we are unable to review its expressions of dissatisfaction with the trial court. Where a witness changed his methodology to a more complicated analysis, performed it during the first few days of trial, and admitted that he was not an economic forecaster, the trial court did not abuse its discretion in de-designating the witness as an expert and allowing the jury to consider his testimony as a lay witness. Where defendant's expert witness primarily based his valuation of the property after the taking on the placement of a median, the trial court did not abuse its discretion in excluding the witness' testimony. Where defendant designated an expert witness on the Friday before trial and did not adequately answer pre-trial discovery interrogatories, we cannot say it was an abuse of discretion for the trial court to exclude the testimony of the newly designated witness as a discovery sanction.

I. Factual and Procedural Background

On 30 August 2010, the North Carolina Department of Transportation (plaintiff) instituted an action in the Superior Court of Rockingham County seeking to condemn portions of a parcel of commercial property situated on Freeway Drive in Reidsville, North Carolina, owned by Ashcroft Commons, LLC (defendant). The taking consisted of one of the two driveways

leading into the property; a large portion of the rear of the property, which was used for a vegetated buffer area; and an approximately 200-square-foot slope easement. Plaintiff also installed a median on Freeway Drive, separating the northbound lanes from the southbound lanes. While vehicles could still enter the property from the southbound lanes of Freeway Drive, vehicles from the northbound lanes were now required to either perform a U-turn onto the southbound lanes, or to turn at an intersection, use a service road, and enter at the rear of the property.

Defendant asked the jury to return a verdict between $2,000,000 and $2,100,000 while plaintiff asked the jury to return a verdict of $778,800. The jury returned a verdict in the amount of $778,800.

Defendant appeals.

II. Alleged Favoritism

In its first argument, defendant contends that the trial court erred by demonstrating marked favoritism towards plaintiff's case and against defendant's case. We disagree.

In support of this contention, defendant does not cite this Court to specific errors in the trial court's rulings, but instead generally argues that there were "one sided interruptions . . . of [defendant's] witnesses," that "the trial

court overruled most of [defendant's] counsel's objections[,]" that "the trial court rarely overruled [plaintiff's] objections[,]" and that the trial court "continually admonish[ed] [defendant's] counsel and reprimand[ed] him."

The Court of Appeals reviews decisions of the trial court for error. The fact that the trial court sustained more objections for plaintiff than for defendant is irrelevant. The question before us is whether a specific ruling was erroneous, and in this argument, defendant has not directed us to specific errors of law in these rulings.

This argument is without merit.

III. Expert Witnesses

In its second argument, defendant contends that the trial court erred in refusing to allow Larry Somers (Somers) and Fitzhugh L. Stout (Stout) to testify as expert witnesses. We disagree.

A. Standard of Review

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the

> admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations and quotation marks omitted).[1]

B. Testimony of Somers

During trial, defendant called its property manager, Somers, to testify and to give his opinion concerning the value of the Ashcroft Commons property before and after the taking. Over the objection of plaintiff, Somers was accepted as an expert in the field of "investment and financing" and testified to the valuation of the Ashcroft Commons property using a discounted cash flow analysis. Plaintiff moved to strike the expert testimony of Somers as far as it concerned the value of the Ashcroft Commons property on two grounds: (1) as a discovery sanction because Somers' discounted cash flow analysis was not disclosed to plaintiff prior to trial, and (2) the newly disclosed opinion did not meet the minimum threshold of reliability. Plaintiff's objections were overruled. The next day, the trial court informed the parties that it had reconsidered its prior rulings and concluded that Somers should be "de-designated" as an expert in the field of finance and

[1] Rule 702 was amended in 2011. 2011 N.C. Sess. Law ch. 283, § 1.3. However, these changes only apply to actions arising on or after 1 October 2011. *State v. Gamez*, __ N.C. __, __, 745 S.E.2d 876, 878 (2013).

investment, "to the extent that [it] include[s] the appraisal of real property as an expert. . . ." Defendant contends that the trial court erred in de-designating Somers as an expert witness because his methodology was sufficiently reliable and because the trial court's de-designation was an improper expression of the trial court's opinion.

Admissibility of expert opinion is a three-step inquiry in which the trial court must first "determine whether an expert's method of proof is sufficiently reliable as an area for expert testimony." *N.C. Dep't of Transp. v. Haywood Cnty.*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006). "In land condemnation cases, 'mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation. The testimony offered should tend to prove the fact in question with reasonable certainty.'" *Id.* (quoting *Raleigh, Charlotte & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915)). Personal opinions and feelings unsupported by objective criteria are not sufficiently reliable. *Haywood Cnty.*, 360 N.C. at 352, 626 S.E.2d at 647.

In his 13 January 2012 deposition, Somers testified that he had not done a ten-year "discounted cash flow income analysis" "[b]ecause I'm not getting paid $10,000.00 a year . . . ." Somers testified that a discounted cash flow method would:

> require a lot more time; it requires a lot more expertise about the particular subject business that [is being] analyzed.
>
> . . . [Y]ou basically have to forecast income statements going forward over a period of time; so that way you've got to have detailed knowledge of the market. You've got to be able to forecast expenses.

Instead, Somers testified at his deposition that he estimated that the annual income for Ashcroft Commons would be $50,000 per year over the next ten years and then capitalized that income at ten percent. Based upon this analysis, Somers testified at his deposition that the fair market value after the condemnation of Ashcroft Commons was $1,000,000.

At trial, Somers testified that he had created a "discounted cash flow analysis" during the first few days of the trial. According to Somers, it was this new analysis that now formed the basis for his valuation and, based upon that analysis, he determined "the fair market value of Ashcroft Commons after the taking [to] be $1,013,000." Somers admitted he was "not an economic forecaster," but that he "forecasted the cost of the services, the maintenance, and all of the other things for the shopping center for the next ten years." When asked why he thought that commercial rents would generally increase in Rockingham County when the economy of the county was stagnant, he testified: "Now, eventually, at some point surely

we're going to find some industries that want to come into Rockingham County that will give us some jobs, you know, but when that is going to happen, I don't know." The trial court heard the opinion of Somers as well as the basis for that opinion. Although Somers had experience in business administration and as a chief financial officer, he articulated two different methodologies and changed his methodology between the time of his deposition and the trial. Further, at trial, he also used a more complicated analysis that required "a lot more expertise[,]" "a lot more time[,] and "a "detailed knowledge of the market." Somers' testimony that he performed and completed this more complicated analysis during the first few days of trial and that he was not an economic forecaster, explains and justifies the trial court's concern that his testimony was not sufficiently reliable. Based upon these considerations, we cannot say the trial court abused its discretion in de-designating Somers as an expert witness and designating Somers' testimony as lay opinion.

Defendant additionally contends that the trial court's de-designation of Somers as an expert demonstrated a marked favoritism towards plaintiff and was so prejudicial as to warrant a new trial. In de-designating Somers as an expert witness, the trial court stated to the jury:

> I have, for want of a more appropriate term, de-designated Mr. Somers as an expert witness to the extent that his designation as an expert witness includes the valuation of property in general.
>
> The legal significance of that is that Mr. Somers is still allowed to testify and he may give his lay opinion, not expert opinion, but his lay opinion about the value of the property that is the subject of this lawsuit. And it's up to you to place whatever weight you choose to place on that lay opinion.

We hold that these remarks do not suggest a "marked favoritism" towards plaintiff or that they are so prejudicial that defendant deserves a new trial.

This argument is without merit.

C. Testimony of Stout

Plaintiff filed a motion in limine seeking to exclude the testimony of defendant's appraiser Stout. The basis for the motion was that Stout's testimony concerning the diminution in value of defendant's property as a result of the condemnation was in part based upon the loss of access to the property from the northbound lanes of Freeway Drive as a result of plaintiff's decision to erect a median on Freeway Drive.

Following receipt of Stout's appraisal dated 19 April 2011, counsel for plaintiff advised counsel for defendant on 12 October 2011 that the law in North Carolina was that "a property owner is not entitled to compensation for the installation of a

median." This e-mail cited to the North Carolina Supreme Court case of *N.C. Dep't of Transportation v. Blevins*, 363 N.C. 649, 686 S.E.2d 134 (2009). Stout's appraisal included the following statement: "Note that since we believe that the subject [property] will be adversely impacted by the elimination of access from northbound Freeway Drive traffic in the after valuation, we have included a 30% reduction under functional obsolescence, which is supported by our valuation by the income approach." The reduction for functional obsolescence resulted in a $990,618 reduction in the after-taking value of the property.

On 6 January 2012, plaintiff deposed Stout. His testimony included the following:

> Q. . . . You state in - on Page, I believe, 65 that - that "Since we believe the subject property will be adversely impacted by the elimination of access from northbound Freeway Drive traffic in the after valuation, we have included a 30 percent reduction under functional obsolescence which is supported by our valuation by the income approach."
>
> Is that a quote directly from your appraisal?
>
> A. Yes, it is.
>
> Q. And when you say the subject property will be adversely impacted by the elimination of access from the northbound Freeway Drive traffic, what you're referring to is the median; correct?
>
> A. Its direct access into the property; yes.

Q. And it’s being prevented by the median?

A. That’s correct.

Q. Okay. And with the - because of that lack of access resulting from the median, you have included a 30 percent reduction under functional obsolescence; is that correct?

A. Yes.

Q. And the 30 percent functional obsolescence amounts to--- And this can be found on Page 66 of your appraisal. --- $990,618.00 of lost value. Is that correct?

A. Yes.

Q. Okay. And that was how you quantified the median’s lost - the effect of the median as lost access in your cost approach immediately after the date of taking.

But it would - would it be a fair reflection of the importance you place on it in your income approach?

A. That's primarily where I got that 30 percent adjustment.

. . . .

Q. And I believe what you've just testified is is [sic] that you cannot break down what percent of the 30 percent is attributable to the median, that loss of access to northbound traffic?

A. That's correct.

Q. It is an insoluble part of your 30 percent?

A. Yes.

After hearing extensive argument from both counsel, the trial court allowed plaintiff's motion in limine. Defendant then sought to convince the trial court to allow other portions of Stout's testimony. The trial court suggested that during the morning recess, counsel should confer to "see if you can agree upon what he might be allowed to testify to." Following the recess, it appeared that counsel for plaintiff acknowledged that Stout could testify as to the value of defendant's property prior to the condemnation. Finally, counsel for defendant stated:

> I fear - I hope we've reached an agreement. We have not. I think that we should go back to the Court's ruling that Mr. Stout is excluded. I obviously disagree with that. I'm not saying I consent to that. You understand that. Respectfully disagree with it.
>
> I think once he's out, he's out, and to put him on the stand for other purposes - -

Subsequently, defendant made a proffer of Stout's testimony, outside of the presence of the jury. Stout's appraisal and deposition were received into evidence, without objection. There being no questions concerning Stout's opinion as to the value of defendant's property prior to the taking, the focus was on his methodology and opinion as to the value of the property after the taking. Stout testified that this value was $1,278,000. In reaching this number, two methods were used; the cost and income

approaches. Under the cost approach, his opinion of the after-taking value was $1,341,800. Under the income approach, his opinion of the after-taking value was $1,278,000. During defendant's direct examination of Stout, the 30% functional obsolescence was mentioned in the cost approach, but not elaborated upon. On cross-examination, Stout confirmed the basis for the 30% functional obsolescence deduction:

> Q. And the, again on page 65 of your appraisal -- I'm referring to page 65 of your appraisal, not the Bates stamp, you have written, note -- and this is under functional and external obsolescence -- it says, "Note that since we believe the subject will be adversely impacted by the elimination of access from northbound Freeway Drive traffic in the 'after' valuation, we have included a 30 percent reduction under functional obsolescence which is supported by our valuation by the income approach." Is that a correct reading of your appraisal?
>
> A. It is.
>
> . . . .
>
> Q. And it is your understanding that the reason the subject property has no access to northbound lanes of traffic immediately after the taking is because there's a median. Is that correct?
>
> A. That's correct.

On appeal, defendant contends that the trial court erred in excluding Stout's testimony concerning the diminution in value of defendant's property resulting from the condemnation.

Defendant argues that the trial court "incorrectly surmise[d] that Mr. Stout's testimony based the diminution in value completely upon (1) the placement of the median in front of the Property and (2) the re-routing of traffic to the rear, unfinished portion of the commercial retail Property."

The issue for determination in a condemnation case is the amount of damages the property owner should be awarded "based upon the difference in fair market value of the property before and after the taking." *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992). "Accepted methods of appraisal in determining fair market value include: (1) the comparable sales method, (2) the cost approach, and (3) the capitalization of income approach." *Id.*

Defendant contends that the erection of the median on Freeway Drive restricts access to its property from the northbound lanes. Prior to the erection of the median, northbound traffic could make a left turn into defendant's property. With the erection of the median, northbound traffic will either have to go to the next intersection and make a U-turn, or go to the rear of defendant's property to gain access. In support of its position, defendant cites us to the seminal case of *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E.2d

732 (1962), contending that it is entitled to compensation for the restrictions on access to its property.

Barnes specifically dealt with a highway condemnation proceeding in which a median was erected in the highway, restricting access to the condemnee's property. The Supreme Court examined both North Carolina law and the law of other jurisdictions concerning whether restrictions upon access resulting from the placement of a median constituted an element of damages in a condemnation proceeding. *Barnes* concluded that they were not a proper element of damages:

> Whether petitioner is entitled to compensation for diminution in the value of the remaining portion (17.14 acres) of his land by reason of the fact he now has *direct* access only to the lanes of #401 (as relocated) reserved exclusively for southbound traffic and only southbound traffic has *direct* access to his property does not depend upon whether a portion of his land was appropriated in connection with Project No. 8.14368. The separation of the lanes of #401 for northbound traffic from the lanes thereof for southbound traffic was and is a valid traffic regulation adopted by the Highway Commission in the exercise of the police power vested in it by G.S. Chapter 136, Article 2, and injury, if any, to petitioner's remaining property *caused thereby* is not compensable. We conclude, therefore, that the instruction that injury, if any, *caused thereby* was for consideration by the jury as an element of petitioner's damages, and the admission of evidence as to the injury to the remaining portion (17.14 acres) of petitioner's property *caused thereby*, were erroneous and entitle the

Highway Commission to a new trial.

Barnes, 257 N.C. at 518, 126 S.E.2d at 740.

The holding in *Barnes* was confirmed in the recent Supreme Court case of *N.C. Dep't of Transportation v. Blevins*, 363 N.C. 649, 686 S.E.2d 134 (2009). In that case, the Court of Appeals affirmed the judgment of the trial court, holding that: "Evidence of the construction of the traffic median near Blevins' property could have been considered in the context of the purpose and use of the taking as well as generally considered in determining whether the taking rendered Blevins' property less valuable." *Blevins*, 363 N.C. at 650, 686 S.E.2d at 134 (quoting *N.C. Dep't of Trnsp. v Blevins*, 194 N.C. App. 637, 642, 670 S.E.2d 621, 625 (2009)). The Supreme Court expressly disavowed the above-quoted language, in accordance with its decision in *Barnes*. *Id.* at 650, 686 S.E.2d at 134. However, it held that the evidence presented at trial with respect to the damages resulting from the median was *de minimis* and therefore not prejudicial. *Id.*

We first of all hold that unlike *Blevins*, where the impact of the erroneously admitted evidence was *de minimis*, the proffered evidence of Stout was substantial, since it included an impact of $990,618 for loss of access.

Second, we note that during his proffered testimony Stout stated that his 30% reduction was "really a combination of everything, and I may not have put it in the report, but it's really the loss of one major access point along Freeway Drive and the redirection." It appears that the primary basis for the $990,618 was the loss of access for northbound traffic on Freeway Drive. However, the above testimony, can be construed to include other factors, such as the loss of one access point and a shift of access to the rear of the property. Such factors could possibly have been a proper basis for Stout's testimony.

Our standard of review is abuse of discretion. Where the record shows that the primary focus of Stout's testimony for the 30% reduction was the deprivation of access due to the erection of the median; that defendant had been advised of the legal problem with using the median as being a basis for compensation many months before Stout's deposition and the trial; that defendant was entitled to no compensation for the devaluation of their property due to the erection of the median; and that defendant failed to present testimony that segregated the reduction in value due to the erection of the median from that dealing with other, possibly proper, factors, we cannot say that the trial court abused its discretion in excluding this testimony.

IV. Discovery Sanctions

Defendant contends that the trial court abused its discretion in excluding the testimony of its expert Thomas Harris (Harris) as a discovery sanction under Rule 37 of the North Carolina Rules of Civil Procedure. We disagree.

A. Standard of Review

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996).

B. Analysis

The parties orally agreed to handle the designation of expert witnesses and the substance of the experts' opinions through depositions to be conducted in January 2012, rather than providing detailed responses to interrogatories. On 5 March 2012, fourteen days before trial, defendant indicated via an e-mail that it might call another appraiser, Harris, as well as two other witnesses, Dewey Rickman (Rickman) and Donna Setliff (Setliff). Plaintiff requested that defendant prepare a written report or answer the interrogatories for each newly designated witness and defendant agreed that it would supplement its written discovery. At 4:14 p.m. on the Friday before trial,

defendant sent its supplemental discovery response. In its supplemental discovery responses, defendant stated that it might call Harris, Rickman, Setliff, and Tom Furstenburg. Defendant indicated that it would call Harris to "testify regarding his reviews of the appraisals prepared by the Plaintiff, its experts, and by Mr. Stout, and Defendant's other experts." On the first day of trial, plaintiff made a motion to exclude the testimony of these four witnesses on the grounds that defendant had not designated these expert witnesses until the Friday before trial, or in the alternative, to continue the trial. Defendant voluntarily withdrew all of the newly designated expert witnesses, except for Harris, before the trial court ruled on plaintiff's motion. The trial court granted plaintiff's motion to exclude Harris's testimony as a discovery sanction.

Defendant did not make an offer of proof concerning Harris' testimony and therefore, defendant has waived appellate review of this issue. N.C. Gen. Stat. § 8C-1, Rule 103(a) (2) (2011); *see also State v. Ginyard*, 122 N.C. App. 25, 33, 468 S.E.2d 525, 531 (1996) ("In order to preserve an argument on appeal which relates to the exclusion of evidence, including evidence solicited on cross-examination, the [litigant] must make an offer of proof so that the substance and significance of the excluded evidence is in the record.").

Even assuming *arguendo* that defendant did not waive review of this issue, defendant's disclosure of Harris was not only untimely, but it also failed to satisfy defendant's obligation to answer plaintiff's interrogatories made pursuant to N.C. Gen. Stat. § 1A-1, Rule 26(b)(4). Based upon this non-compliance, we cannot say the trial court abused its discretion when it excluded Harris from testifying.

Defendant further contends that by excluding Harris as a witness, the trial court permitted plaintiff to take an inconsistent position with its pre-trial stipulation. Defendant states that "the parties orally stipulated that rather than formally designating experts and providing detailed responses to interrogatories regarding experts that they would simply make experts available for deposition." Plaintiff made the following references to the agreement:

> The parties agreed to handle the designation of expert witnesses and the substance of their opinions through depositions.
>
> . . . .
>
> We worked things out because if you look at the initial designations he just objected to everything for being unduly burdensome. So we worked out an agreement whereby we would exchange and have our experts deposed sort of simultaneously.

Defendant's counsel admitted "there was an informal agreement about how depositions would be taken." There is no indication in

the record that the informal agreement between counsel would have allowed defendant to add four expert witnesses on the Friday before trial. Further, there is no indication in the record that plaintiff took an inconsistent position with the oral pre-trial stipulation.

This argument is without merit.

AFFIRMED.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).