COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2011

A. John Voelker
Acting 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. 2010AP1923 **Cir. Ct. No. 2007CV156**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WINTERBERRY OF LAKE DELTON, LLC,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

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

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. This is a partial taking eminent domain case initiated by the Wisconsin Department of Transportation (DOT) in order to re-route a frontage road in the Village of Lake Delton (the Village) in the Wisconsin Dells area. The property owner, Winterberry of Lake Delton, LLC, appeals the

trial court judgment entered on a $400,000 jury award of just compensation. Winterberry seeks a new trial on three grounds.

¶2 First, Winterberry contends that the trial court erroneously barred evidence using the income approach to establish the value of the parcel at issue. Second, Winterberry argues that the trial court erred in allowing the jury to consider a memorandum of understanding (MOU) between DOT and the Village under which the Village agreed to limit or prohibit development of the parcel at issue. Third, Winterberry argues that the trial court erroneously excluded evidence relating to negotiations between Winterberry and DOT over a possible land swap involving the parcel at issue. We reject Winterberry's arguments and, therefore, affirm the judgment.

BACKGROUND

¶3 In 2002, Winterberry[1] began considering the purchase of property that was available for commercial development in a high-traffic area of the Wisconsin Dells. Winterberry already owned commercial properties in the Dells, and believed that this location could be a profitable one.

¶4 Winterberry consulted with Famous Dave's restaurant, which expressed an interest in opening an outlet at the new location, so long as Winterberry could secure a liquor license. Winterberry also elicited interest from other potential tenants.

[1] We refer simply to "Winterberry" for ease of discussion, although some of the actions described were taken by Winterberry principal, Leon Agami, before Winterberry was formed. Nothing about Winterberry's arguments suggests that the two must be distinguished for purposes of this appeal.

¶5 At roughly the same time in 2002, DOT began making plans to re-route a frontage road bordering the property that Winterberry was interested in developing. The re-route would necessitate the partial taking of a 0.61-acre parcel of the property that Winterberry was looking at.

¶6 DOT and the Village executed an MOU on March 27, 2002. As relevant here, it is undisputed that the MOU provided that the Village committed to limiting or prohibiting development on the 0.61-acre parcel involved in the proposed re-route.

¶7 In order to maximize its development plans, and in order to secure sufficient parking spaces for those plans, Winterberry needed DOT to make one of two decisions: (1) forego condemnation of the 0.61-acre parcel, or (2) enter into a land swap or lease with Winterberry for another adjoining parcel that Winterberry could use for its project. If DOT decided to take the 0.61-acre parcel without making available to Winterberry additional land through a swap or lease, then parking would be insufficient for Winterberry to develop the property as fully as Winterberry planned.

¶8 Winterberry finalized purchase of the property in January 2004. From early 2004 through at least January 2005, Winterberry attempted to negotiate the land swap or lease with DOT. Winterberry also executed leases with potential commercial tenants, including Famous Dave's.

¶9 Winterberry and DOT were unable to reach an agreement on a land swap or lease. In February 2005, DOT issued a jurisdictional offer for a partial taking of Winterberry's property, namely the 0.61-acre parcel, and in March 2005, DOT issued an award of damages of $421,700. At the time of the award,

construction of new buildings to house Winterberry's tenant businesses had begun but was incomplete.

¶10 After the taking, Famous Dave's cancelled its original lease, and other tenants renegotiated for lower rent payments or failed to pay full rent. Winterberry alleged that all of this occurred because insufficient parking prevented Famous Dave's, an anchor tenant, from obtaining a liquor license and operating as planned, thus negatively affecting the entire development project, a factual contention disputed by DOT.[2]

¶11 Winterberry commenced this action, an appeal of the $421,700 award of damages, in the circuit court, challenging the amount of compensation. After a trial, the jury returned a special verdict valuing Winterberry's property at $3 million before the partial taking and $2.6 million after the partial taking, resulting in an award of just compensation of $400,000. Because the amount was less than the jurisdictional offer, Winterberry was ordered to pay the difference of $21,700 to DOT plus interest. Winterberry now appeals to this court. Further facts will be provided as necessary in the Discussion section of this opinion.

DISCUSSION

¶12 Each of the issues raised in this appeal concerns an evidentiary ruling of the trial court, although Winterberry challenges the court's selection of proper legal standards in making these evidentiary rulings. As a general rule, trial courts have broad discretion in making evidentiary rulings and we will sustain

[2] According to testimony at trial, a smaller-scale Famous Dave's franchise, purchased by Winterberry, eventually began operating on the property.

those rulings when courts have "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Arents v. ANR Pipeline***, 2005 WI App 61, ¶12, 281 Wis. 2d 173, 696 N.W.2d 194 (citation omitted). "In order to properly exercise its discretion, a circuit court must 'apply the correct standard of law to the facts at hand.'" ***National Auto Truckstops, Inc. v. DOT***, 2003 WI 95, ¶13, 263 Wis. 2d 649, 665 N.W.2d 198 (citation omitted). Consistent with these general standards, in this particular context, "the admission or exclusion of evidence regarding fair market value in condemnation cases is left to the trial court's discretion." ***Arents***, 281 Wis. 2d 173, ¶12. To the extent we interpret or apply legal authority in reviewing the trial court's decision, our review is de novo. *See* ***State v. West***, 2011 WI 83, ¶21, 336 Wis. 2d 578, 800 N.W.2d 929.

¶13 As indicated above, Winterberry's arguments present three main issues: whether the trial court erroneously excluded income approach evidence to establish the value of the property taken; whether the trial court erred in admitting evidence of the MOU between DOT and the Village; and whether the trial court erroneously excluded evidence of the land swap negotiations between Winterberry and DOT. We address each issue in turn.

I. Income Approach Evidence

¶14 Winterberry first argues that the trial court erred in excluding evidence using the income approach to value the property taken. To place Winterberry's argument in its proper context, we set forth the pertinent law on property valuation for purposes of just compensation along with additional background facts. We then address Winterberry's more specific arguments.

A. Law on Valuation

¶15 The rules governing the determination of just compensation in eminent domain proceedings are found at WIS. STAT. § 32.09. Most relevant here, § 32.09(6) addresses partial takings other than easements, and explains how to calculate just compensation:

> In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either [1] the fair market value of the property taken as of the date of evaluation or [2] the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation ….

Here, both parties advocated a value based on the difference between the fair market value of the whole property immediately before the date of evaluation (the date of the taking) and the fair market value of the remainder immediately after the date of evaluation.

¶16 Wisconsin has "three primary methods for appraising the value of commercial property" in an eminent domain case. ***National Auto***, 263 Wis. 2d 649, ¶23. These are: (1) the "income approach," which focuses on the income generated by a property; (2) the "comparable sales approach," which focuses on the sale price of comparable properties; and (3) the "cost approach," which focuses on the cost of replacement.[3] ***Id.***

[3] The cost approach is less easily summarized than the other two approaches. A leading eminent domain treatise explains the cost approach as follows. The basic steps of the cost approach are essentially: (1) value the land (by using comparable sales data, generally) as if vacant and available for valuing at its highest and best use; (2) estimate reproduction or replacement cost of improvements; (3) estimate accrued depreciation; (4) subtract accrued (continued)

¶17 At issue here is a general rule limiting the use of the income approach in this context. The general rule is that income evidence is *not* admissible for establishing property values in condemnation cases involving commercial enterprises. ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 413, 288 N.W.2d 808 (1980) (citing ***Mancheski v. State***, 49 Wis. 2d 46, 50, 181 N.W.2d 420 (1970); ***Lambrecht v. State Highway Comm'n***, 34 Wis. 2d 218, 225-27, 148 N.W.2d 732 (1967)). This is because, in general, commercial or business income "is dependent upon too many variables to serve as a reliable guide for determining fair market value." ***Leathem Smith***, 94 Wis. 2d at 406; *see also* ***National Auto***, 263 Wis. 2d 649, ¶25. The level of such income often "depends largely on the labor and skill of its management." *See* ***Leathem Smith***, 94 Wis. 2d at 416.

¶18 The court in ***Leathem Smith*** stated three exceptions to the general rule. ***Leathem Smith***, 94 Wis. 2d at 413 (citing ***Mancheski*** and ***Lambrecht***). Income approach evidence has been held admissible in valuing commercial property for purposes of condemnation if (1) the character of the property is such that income is produced without the labor and skill of the owner,[4] (2) income reflects the property's chief source of value, or (3) the reason that comparable

---

depreciation from the land value and cost of improvements. *See* 5 NICHOLS ON EMINENT DOMAIN § 20.03[3] (3d ed. 2009).

[4] Terms such as "profit," "net profit," and "income" are sometimes used interchangeably by authorities in discussing the net proceeds gained by or returned to a property owner in connection with financial or business transactions arising from use of the property. Neither party makes an argument that there is a meaningful distinction, for purposes of this appeal, among the various terms used for this concept. Therefore, in the interest of simplicity and to match the terminology used in discussing the income approach to property valuation at issue in this appeal, we use the term "income" for this idea, recognizing that in such areas as accounting, tax law, and other contexts the term has specific definitions not at issue in this case.

sales are unavailable is that the property is "so unique." ***Id.*** Each exception may stand on its own as a basis for the use of income evidence.[5]

B. Additional Facts

¶19 Before trial, Winterberry indicated that it intended to introduce income approach evidence through its expert appraiser. It is undisputed that, for purposes here, "income" largely refers to the rents paid, or anticipated to be paid, to Winterberry by its commercial tenants with leases to operate out of the buildings Winterberry was developing on the property.

¶20 In contrast, DOT sought to use a combination of two approaches, one for the land and the other for the partially completed improvements. DOT's appraiser offered to use a comparable sales approach to value the land underlying the Winterberry property and the cost approach to value the partial improvements. The DOT appraiser reasoned that relying wholly on a comparable sales approach could be problematic because buyers rarely buy "half-built" properties. As to the income approach, the DOT appraiser took the position that it could be problematic because projecting income "as if" a development were complete requires

[5] Although in one of its recitations of the three exceptions, the court in ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 288 N.W.2d 808 (1980), uses the conjunctive "and," we agree with Winterberry that ***Leathem Smith*** recognized three separate exceptions, to be read as a list in the disjunctive. *See* ***id.*** at 412-13 (quoting NICHOLS ON EMINENT DOMAIN as listing the exceptions in the disjunctive, rather than considering the exceptions as factors in a balancing test of income admissibility); *see also* ***National Auto Truckstops, Inc. v. DOT***, 2003 WI 95, ¶25, 263 Wis. 2d 649, 665 N.W.2d 198; ***Lambrecht v. State Highway Comm'n***, 34 Wis. 2d 218, 226, 148 N.W.2d 732 (1967); ***Rademann v. DOT***, 2002 WI App 59, ¶30-31, 252 Wis. 2d 191, 642 N.W.2d 600.

significant discounts that are difficult to calculate in order to reflect the unfinished nature of improvements to the property.[6]

¶21 On a DOT motion in limine, the trial court excluded Winterberry's income approach evidence. The trial court gave a number of reasons for this decision, including that DOT had identified sufficiently comparable sales of land, that the Winterberry property was not so unique that comparable sales could not be found, and that Winterberry's income approach evidence was too speculative. Given the trial court's ruling, Winterberry was essentially limited to submitting evidence of value using the comparable sales approach or the cost approach.

C. Analysis of Winterberry's Arguments

¶22 Winterberry acknowledges the general rule that income approach evidence is inadmissible. Winterberry argues, however, that it met the three exceptions to the general rule.

¶23 Winterberry also argues that, although the trial court acknowledged all three exceptions, it expressly addressed only the third exception. However, "[w]e will uphold a discretionary decision … if the record contains facts which would support [the trial court's] decision." ***State v. Gulrud***, 140 Wis. 2d 721, 734, 412 N.W.2d 139 (Ct. App. 1987); *see also* ***Alsum v. DOT***, 2004 WI App 196, ¶17, 276 Wis. 2d 654, 689 N.W.2d 68. Even when a trial court's reasoning is not fully expressed, we may independently search the record to determine whether it

[6] Although DOT does not concede the point on appeal, Winterberry asserts that DOT's approach was in fact a pure cost approach and, indeed, the DOT's appraiser used that characterization at least some of the time. However, whether DOT's approach is viewed as a pure cost approach or a mix of the comparable sales approach and cost approach does not affect our decision.

provides a basis for the trial court's decision. ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989).

¶24 We begin by addressing the first and second exceptions, then turn to the third exception.

1. First and Second Exceptions

¶25 As stated above, the first or second exceptions to the general rule barring income evidence apply when (1) the character of the property is such that income is produced without the labor and skill of the property owner, or (2) income reflects the property's chief source of value. ***Leathem Smith***, 94 Wis. 2d at 413. The trial court implicitly concluded that those exceptions do not apply to allow Winterberry to submit income evidence. We conclude that this was a reasonable conclusion with a basis in the undisputed facts in the record.

¶26 As to the first exception, the record reflects that the circuit court could have reasonably concluded that, given the character of the property and the circumstances, the property could produce income only with the benefit of the labor and skill of the owner. In contrast to the situation when there is a going concern, it is easy to see why a new and unique real estate development may depend heavily on the labor and skill of the developer. At a minimum, in any case, the circuit court could have reasonably concluded as much.

¶27 The situation might be different if Winterberry had purchased an existing commercial rental property, with a pre-existing stream of rental income. However, at the time of the taking, Winterberry's new development on property that included the 0.61-acre parcel was not a "passive income" enterprise in the same sense that rental income from an established development might be. The

trial court noted this distinction, reasonably concluding that the instant case is an example of the "overly speculative tendencies of the income approach." Winterberry points to no case law that supports its argument that the first exception nonetheless should apply.

¶28 As to the second exception, the circuit court could reasonably conclude that income was not the chief source of value of the property for a similar reason: because the income was, at the time of valuation, still uncertain for a number of reasons. Winterberry points to no facts that would have required the circuit court to conclude that Winterberry's largely *anticipated* income was a reliable indicator of value. While there was evidence that Winterberry owned other commercial properties in the Wisconsin Dells, Winterberry does not argue in its briefing that those properties were sufficiently similar to provide reliable evidence of anticipated income here. In short, it was reasonable to view the anticipated income stream as sufficiently speculative, at least at the time of the taking, such that income was not the property's chief source of value.

¶29 For all these reasons, we conclude that the trial court could have reasonably concluded that the first two ***Leathem Smith*** exceptions were not met.

2. Third, "So Unique" Exception

¶30 We turn to Winterberry's argument that the trial court should have admitted income evidence because the Winterberry property was "so unique" that comparable sales were unavailable. Winterberry relies primarily on ***Alsum*** for its "so unique" argument.

¶31 The facts of ***Alsum***, also a partial takings case, are unusual. The property at issue was a farm that was split into two unconnected pieces by a DOT

condemnation, leaving the owners with two entirely separate parcels. ***Alsum***, 276 Wis. 2d 654, ¶3. The parties disputed whether there was evidence of sufficiently comparable sales to trigger the ***Leathem Smith*** rule that income evidence cannot be admitted when there is evidence of comparable sales. ***Id.***, ¶¶10-14. We stated that, when comparable sales are offered as substantive evidence of value, "the properties must be located near each other and sufficiently similar in relevant market, usability, improvements and other characteristics so as to support a finding of comparability." ***Id.***, ¶18 (citing ***Calaway v. Brown County***, 202 Wis. 2d 736, 741-42, 553 N.W.2d 809 (Ct. App. 1996)). We reversed because the trial court gave no reasoning for its decision that comparable sales existed, and nothing in the record showed that the offered comparables were the same type of farm as the owners' farm or were severed the way that the property owners' farm was. ***Id.***, ¶¶17-21.

¶32 Winterberry argues that, under ***Alsum***, the improvements on two properties must be similar for the properties to be comparable and that, because only the underlying land was comparable here, the third, "so unique" exception must apply to allow the admissibility of income evidence. We are not persuaded.

¶33 The court in ***Alsum*** did not purport to address whether comparable sales were not available for the completely bisected parcel of property because the property was "so unique" that comparable sales could not be found for it. Winterberry does not explain why we must assume that the discussion in ***Alsum*** informs application of that exception here.

¶34 Here, the trial court concluded that the partial improvements on Winterberry's property did not make it "so unique" as to make comparable sales unavailable, and this was a reasonable determination. There were ample

comparable sales for the underlying land, and the partial improvements could be valued based on the cost approach. We reject the premise inherent in Winterberry's argument that the presence of partial improvements, by itself, necessarily makes a property "so unique" as to allow the admissibility of income evidence under the third exception. Put differently, Winterberry fails to explain why either of the two elements (comparable underlying land sales and cost of partial improvements) was necessarily inaccurate when considered separately, or necessarily inaccurate when added together, so that income evidence was necessary.

¶35 Moreover, unlike the trial court in ***Alsum***, the trial court here provided reasoning. It reasoned that the comparable sales of land were not "absurdly dissimilar" to Winterberry's land. Further, it reasoned that the partial improvements on Winterberry's property did not make it "so unique" as to make comparable sales unavailable. In addition, as already explained, the court reasonably concluded that Winterberry's income approach evidence was speculative.

¶36 As to the underlying land, there is no serious dispute that it was not "so unique" as to make comparable sales unavailable. The trial court found that DOT's four land comparables were similarly located and functionally equivalent to the Winterberry property. The comparables properly featured the most recent sale (to Winterberry) of the Winterberry property itself.

¶37 Accordingly, the trial court reasonably exercised its discretion to conclude that the Winterberry property does not meet the "so unique" exception.

¶38 Moreover, even if we assumed for the sake of argument that the third, "so unique," exception applies, the trial court nonetheless reasonably

excluded Winterberry's income evidence. As discussed above, the trial court could reasonably conclude that Winterberry's income approach evidence was unreliable given the uncertain and speculative nature of Winterberry's anticipated income from the partially completed development project at the time of the taking. Winterberry points to no authority that *requires* a circuit court to admit income approach evidence when one of the three exceptions applies.

¶39 For all of these reasons, we conclude that the trial court properly exercised its discretion in excluding Winterberry's income approach evidence.[7]

II. MOU Evidence

¶40 We now turn to Winterberry's contention that the trial court improperly admitted evidence of the March 2002 MOU between DOT and the Village. Winterberry argues that the evidence of the MOU was inadmissible under the "project influence" rule, as stated in WIS. STAT. § 32.09(5)(b). We conclude for the reasons that follow that Winterberry's argument is insufficiently developed and therefore reject it.

---

[7] Winterberry makes a separate, minimally developed argument, based on tax assessment cases: that once a trial court admits cost approach evidence, it must also admit income approach evidence. The tax assessment cases cited by Winterberry include ***Adams Outdoor Advertising, Ltd. v. City of Madison***, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803, ***Waste Management of Wisconsin, Inc. v. Kenosha County Board of Review***, 184 Wis. 2d 541, 516 N.W.2d 695 (1994), ***State ex rel. Garton Toy Co. v. Town of Mosel***, 32 Wis. 2d 253, 145 N.W.2d 129 (1966), and ***Allright Properties, Inc. v. City of Milwaukee***, 2009 WI App 46, 317 Wis. 2d 228, 767 N.W.2d 567. These cases generally focus on what *assessors* must consider. *See, e.g.*, ***Waste Mgmt.***, 184 Wis. 2d at 557. We find no indication that Winterberry raised this argument, at least not with any prominence, in the circuit court. We therefore consider it forfeited. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise argument forfeits the argument on appeal). We also conclude that, even if the argument had been raised before the circuit court, we would consider it insufficiently developed in this appeal and decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address insufficiently developed arguments).

¶41 WISCONSIN STAT. § 32.09(5)(b), provides as follows:

> Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement …, may not be taken into account in determining the just compensation for the property.

¶42 We find no copy of the MOU in the record, but, as we have stated, there appears to be no dispute as to its content as relevant for purposes of this appeal. The parties agree that, under the MOU, the Village agreed to limit or prohibit development on the 0.61-acre parcel to allow for the re-route. Winterberry argues that the trial court erred in interpreting WIS. STAT. § 32.09(5)(b) to apply only to total takings, not to partial takings, as part of its decision to allow the MOU to be admitted into evidence.

¶43 We will assume without deciding that WIS. STAT. § 32.09(5)(b) may apply to partial takings. Still, Winterberry's project-influence argument is lacking. That argument consists essentially of a one-sentence assertion, based on one record citation to closing arguments at trial, that "[DOT] used the MOU to argue [to the jury] that Winterberry knew it was unable to use the subject area for parking prior to undertaking its development, and that this was proof that *no* post-tak[ing] diminution in value occurred." (Emphasis added.) However, DOT did not argue, at least not at the cited portion of the record, that there was *no* diminution in value, and the jury did not find that there was no diminution in value. Rather, DOT conceded that there was a $304,533 diminution in value, and the jury found a $400,000 diminution in value. Thus, it is not apparent to this court from Winterberry's briefing how the trial court's decision to allow the MOU evidence led the jury to improperly take project influence into account.

¶44 It is not this court's job to develop arguments for a party, and an attempt on our part to do so could easily result in unfairness to one or both parties. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments); *see also* WIS. STAT. RULE 809.19(1)(e) (argument portion of a brief shall include citations to parts of the record relied on). Similarly, "[t]he burden is on [the appellant] to show that the trial court misused its discretion and we will not reverse unless such misuse is clearly shown." ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996). Thus, we reject Winterberry's project influence argument as too insufficiently developed and lacking in record citations to demonstrate that the trial court erroneously exercised its discretion.

III. Land Swap Negotiation Evidence

¶45 We next turn to Winterberry's challenge to the trial court's decision, pursuant to WIS. STAT. § 904.08, to exclude evidence that Winterberry negotiated with DOT for a land swap or lease on the grounds that this was evidence of settlement negotiations, which are generally inadmissible under § 904.08. Winterberry argues that the statute does not apply to the land swap negotiation evidence, and therefore this evidence should have been allowed. For the reasons that follow, Winterberry's argument does not persuade us that the trial court erroneously exercised its discretion in excluding the evidence.

¶46 WISCONSIN STAT. § 904.08 "precludes the admission of settlement evidence to show liability or prove the invalidity of a claim at issue …, [but] permits admission of settlement evidence if that evidence is offered for other enumerated purposes," such as proving bias or prejudice of a witness, accord and satisfaction, novation, or release, or an effort to interfere with a criminal

investigation or prosecution, or to disprove a contention of undue delay. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶82, 235 Wis. 2d 325, 611 N.W.2d 659.[8]

¶47 Winterberry does not rely on any of the enumerated exceptions in WIS. STAT. § 904.08 that permit the admission of settlement negotiation evidence. Rather, Winterberry argues that § 904.08 does not bar the land swap negotiation evidence because that evidence did not relate to either the "validity" or the "amount" of his claim. If the evidence does not go to show "validity" or "amount," then it potentially falls outside the reach of the statute. *See* § 904.08.

¶48 Winterberry asserts that the land swap negotiation evidence does not show amount because it "says nothing about either party's opinion of the value of the lands taken from Winterberry." At the same time, however, Winterberry concedes, inconsistently, that it wanted to use the land swap negotiation evidence to show that it reasonably expected that it could secure the parking it needed to follow its plan to maximize its use of the larger parcel for its development. In other words, Winterberry was proposing to use evidence of the land swap to advocate for a higher value for the 0.61-acre parcel, which bears directly on the

[8] WISCONSIN STAT. § 904.08 provides as follows:

> Evidence of furnishing or offering or promising to furnish, or 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 section 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, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

only issue before the jury in this just compensation case, namely the *amount* of Winterberry's claim.

¶49 For the foregoing reasons, we conclude that the trial court reasonably excluded evidence of the land swap negotiations.

CONCLUSION

¶50 For the reasons stated above, we affirm the trial court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.