COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2012AP626

Cir. Ct. Nos. 2007CV76
2007CV470

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE ACQUISITION OF PROPERTY OF FORBES SRE II LLC:

FORBES SRE II, LLC,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

RESPONDENT-RESPONDENT.

--

FORBES SRE, LLC,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. This is a condemnation case. The Wisconsin Department of Transportation ("DOT") condemned property owned by Forbes SRE, LLC and Forbes SRE II, LLC (collectively, "Forbes," except when otherwise noted), located along U.S. Highway 151, including a private gravel driveway that connected the property to the highway. A jury trial was held to determine the value of the Forbes' properties before and after their taking. In pre-trial motions in limine, Forbes sought to exclude testimony from the DOT's expert appraiser that the taking of the driveway did not affect the value of the subject property because the DOT had authority to require the owner of the property to obtain a permit in order to change the use of the driveway, and that the DOT likely would have declined to issue such a permit. Forbes also sought to admit evidence regarding the amount the DOT and others had previously paid for property across the highway from the Forbes property, which also had access to Highway 151. The circuit court denied both motions.

¶2 On appeal, Forbes renews the arguments made in the circuit court. Forbes also contends that the real controversy has not been fully tried, and therefore requests that we exercise our discretionary power to reverse under WIS. STAT. § 752.35.[1] For the reasons we explain below, we conclude that the circuit

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court properly exercised its discretion in making its evidentiary rulings and that the real controversy has been fully tried. Accordingly, we affirm.

BACKGROUND

¶3 The following facts are undisputed. Forbes SRE, LLC and Forbes SRE II, LLC are two limited liability companies that own contiguous parcels of land between the cities of Madison and Sun Prairie. One of those parcels abuts U.S. Highway 151. The parcels were originally zoned for agricultural purposes, but, in 2001, were rezoned for C-2 commercial purposes. Forbes purchased the parcels in 2003 with the intent to later sell the parcels for commercial development.

¶4 In 2005, the DOT began a highway improvement project to Highway 151. As part of that project, the DOT condemned a portion of each of the Forbes' parcels and took the subject property's access rights to Highway 151. The DOT issued two damages awards for the takings, one for each Forbes owner.

¶5 Forbes SRE, LLC and Forbes SRE II, LLC each filed an application for condemnation proceedings to determine the amount of just compensation owed for the DOT's takings. Both cases proceeded to the Dane County Condemnation Commission, and both owners appealed the awards of the commission to the circuit court.

¶6 Prior to trial, Forbes SRE, LLC filed a motion in limine seeking to exclude testimony that before the taking, Forbes would have been required to obtain a new driveway access permit from the DOT to convert the private gravel driveway from farming to commercial use. The court denied the motion, reasoning:

> I can't accept that the D.O.T. has no authority to deny this – converting this driveway from private agricultural into a commercial point of ingress and egress…. I don't think there's an automatic right just because there's a private driveway reserved … to use it for whatever purpose you want to put it to without further permitting ….

¶7 The case was tried twice to a jury. During the first trial to determine the value of Forbes SRE, LLC's property, Forbes SRE, LLC's expert witness testified on direct examination about the amount the DOT paid the owner of the property immediately across the road for their access rights to Highway 151 in connection to a separate purchase contract with the DOT for the 2005 highway improvement project. The DOT subsequently moved for a mistrial, and the court granted the motion on the ground that testimony regarding the amount paid by a condemnor for other property is inadmissible and a curative instruction was insufficient. Following the mistrial, the parties stipulated to, and the court ordered, the consolidation of the two cases.

¶8 Before the second trial, Forbes' attorney filed a motion in limine, asserting that he should be allowed to cross-examine the DOT's real estate appraisal expert, John Rolling, regarding the amount that the DOT and others paid for the property across the highway from the Forbes parcel, which is owned by Whitson-Swift Homes, Inc., and also had access rights to Highway 151. The court denied the motion, explaining, as it had when it granted the motion for a mistrial in the first trial, that the amount paid by a condemnor for other property is inadmissible.

¶9 A two-day jury trial was held. At trial, Rolling testified as to the value of the subject property before and after the taking. Rolling testified that the DOT's taking of access rights to Highway 151 did not affect the property's value. Rolling testified that the property's highest and best use, both before and after the

taking, was for development of a light industrial business park and that the private gravel driveway connecting the subject property to Highway 151 would not accommodate such a use. More specifically, Rolling testified:

> [T]his property's gravel driveway goes out to Highway 151. Fine for the use back in 1956 [when the driveway was used for agricultural purposes] …. You can take your farm equipment in and out, couple of trips a day. Not a big deal…. If we're going to change the use, if we're not going to use it as we did in 1956 …, we're going to have to upgrade this driveway and/or even just the change in use will require the owner of the property to go before the Wisconsin Department of Transportation and explain that use and explain what change they want to make. And the Department then has the authority to approve or deny … a driveway permit.

¶10 On cross-examination, Forbes' counsel asked Rolling what authority he relied on in stating his opinion that Forbes would have been required to obtain a driveway access permit from the DOT in order to use the driveway for commercial purposes before the taking. Rolling testified that he relied on the DOT's standard form for driveway application permits, the administrative regulations governing driveway permits for property abutting state trunk highways as set forth in WIS. ADMIN. CODE § TRANS. 231, and information he obtained from an access coordinator employed by the DOT. According to Rolling, the DOT's access coordinator explained to him that had Forbes sought a new driveway permit for commercial development, it would be the DOT's policy to reject such a permit application. At the conclusion of the evidence, the jury determined the before and after taking values of the subject property.

¶11 After the jury trial, Forbes moved for a new trial claiming that the circuit court erroneously exercised its discretion by: (1) admitting Rolling's testimony that Forbes would have been required to obtain a new driveway access permit from the DOT in order to use the driveway for commercial purposes; and

(2) excluding testimony regarding the amount paid for the Whitson-Swift parcel. The court denied the motion. Forbes appeals.

DISCUSSION

I. Admission of Rolling's Testimony Regarding the Need for a Driveway Permit

¶12 Forbes argues that the issue of whether the DOT had authority to require it to apply for a driveway permit to access Highway 151 for commercial purposes is a question of law, which must be decided by this court de novo. Forbes contends that, as a matter of law, it was not required to obtain a permit in order to use the driveway for commercial purposes before the taking. Forbes also argues that the DOT does not have authority to use its driveway-permitting authority as a land planning device, citing to ***Wisconsin Builders Ass'n v. Wisconsin Dep't of Transp.***, 2005 WI App 160, 285 Wis. 2d 472, 702 N.W.2d 433.

¶13 In response, the DOT argues that whether the DOT had the authority to require Forbes to apply for a driveway access permit in order to use the driveway for commercial purposes is not a question of law, but rather a question of fact to be decided by the finder of fact. Thus, the DOT contends, the issue is whether the circuit court properly exercised its discretion in admitting Rolling's testimony that Forbes' loss in access rights to the Highway did not affect the value of the subject property because the DOT had the authority to require Forbes to obtain a driveway access permit for a change in use of the property's driveway before the taking, and had such a request been made, the DOT would have likely denied Forbes the permit. The DOT argues that the circuit court properly admitted Rolling's testimony because it was the jury's role to determine the weight to be

given to Rolling's testimony, including the assumptions he relied on in forming his opinion that the Forbes' loss in access rights did not affect the value of the remaining property. We agree.

¶14 In ***Hoekstra v. Guardian Pipeline, LLC***, 2006 WI App 245, 298 Wis. 2d 165, 726 N.W.2d 648, we explained that the circuit court has broad discretion in admitting expert testimony:

> The admissibility of expert evidence is left to the sound discretion of the trial court. Expert testimony is admissible if the witness is qualified as an expert and has specialized knowledge that is relevant. Expert testimony is relevant if it assists the trier of fact in understanding the evidence or in determining a fact at issue. The relevance of an expert's testimony turns on the probative value of that testimony.... [E]xpert testimony will be excluded only if the testimony is superfluous or a waste of time. The reliability of an expert's testimony is a credibility determination to be made by the fact finder. Evidence given by a qualified expert is admissible regardless of the underlying theory. The fundamental determination of admissibility comes at the time the witness is qualified as an expert. We will sustain a court's evidentiary rulings if the court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.

Id., ¶14 (citations and internal quotations marks omitted). These same principles apply in condemnation proceedings. *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶¶12-13, 281 Wis. 2d 173, 188, 696 N.W.2d 194, 200.

¶15 The circuit court has broad discretion in determining whether to admit or exclude evidence regarding the fair market value of property in a condemnation case. ***Id.***, ¶12. "[A]ny factor affecting the value of property that could influence or sway the decision of a prospective buyer should be considered in the valuation of property in a condemnation proceeding." ***Id.***, ¶15 (citation omitted).

¶16 As we explained, the issue in this case is the value of the subject property before and after the taking. In determining the value of the property, the jury was to consider the value of the portion of property taken by condemnation and the diminution in value of the remaining property, which is known as "severance damages." ***Narloch v. DOT, Div. of Highways, Div. II***, 115 Wis. 2d 419, 422 n.2, 340 N.W.2d 542, 545 (1983). Severance damages include the "damage to remaining property from the deprivation or restriction of access rights to the highway from abutting property." ***Id.*** at 433.

¶17 To determine the value of the Forbes' property, the jury had to consider whether the loss in access rights to Highway 151 diminished the value of the remaining property. The jury heard testimony from Rolling, the DOT's expert witness, that the subject property's loss in access rights to the Highway did not result in any diminution in value. As previously discussed, Rolling testified to his research which indicated that the DOT had authority to require a change in use permit, and this testimony was evidence that assisted the jury in making its determination of the property's value.

¶18 Our supreme court has stated that as long as a proper foundation is laid, "[e]xpert testimony concerning diminution in value of remaining land due to loss of access rights is admissible. The weight to be given this evidence is for the trier of fact…. The experts' opinions including their theory and basis of value are for the jury to evaluate."[2] ***Id.*** at 434; *see also* ***Bear v. Kenosha Cnty.***, 22 Wis. 2d

[2] In ***Narloch***, we held that:

> [A] condemnee seeking severance damages due to a taking of access rights must establish a foundation that prior to the taking, there was a reasonable potential in the foreseeable future for developing his or her property in accordance with its highest and

(continued)

92, 97, 125 N.W.2d 375 (1963) ("The opinions of the experts including their theory and basis of value [of property] were for the jury to evaluate…. We do not consider an opinion of the value of real estate should necessarily be disregarded because of different evaluations of the factors upon which such opinion is predicated."). Following our supreme court's holding in ***Narloch***, we conclude that the circuit court properly exercised its discretion in admitting Rolling's challenged testimony that there was no diminution in the value of the Forbes property as a result of the taking of access as well as the underlying assumptions on which Rolling based his opinion.

¶19 In essence, Forbes is challenging the underlying assumptions on which Rolling based his opinion that the loss in access rights to Highway 151 did not diminish the value of the property. However, Forbes fails to acknowledge that it had ample opportunity at trial to cross-examine Rolling regarding those assumptions. Indeed, Forbes' counsel asked Rolling on cross-examination the basis for his opinion, and specifically questioned Rolling's contention that WIS.

> best use, and that this potential for development has been diminished because of the loss of access rights. Once that foundation is established, evidence of expert testimony concerning diminution in value of remaining land due to loss of access rights is admissible. The weight to be given this evidence is for the trier of fact. As we stated in ***Bear***, the experts' opinions including their theory and basis of value are for the jury to evaluate against any contention by the state that these access rights were so impaired, restricted, and controlled as to have little or no value.

Narloch v. DOT, Div. of Highways, Div. II, 115 Wis. 2d 419, 434, 340 N.W.2d 542, 550 (1983). Although ***Narloch*** addressed whether an expert on behalf of a *condemnee* may testify regarding the diminution in the value of property due to loss of access rights, we see no reason why the general rule of admissibility set forth in ***Narloch*** does not also apply where a expert on behalf of a *condemnor* testifies regarding whether there has been any diminution in value of the property as a result of the loss of access rights.

ADMIN. CODE § TRANS. 231 would have required Forbes to obtain a driveway permit before the driveway could be used for commercial purposes, and that the DOT likely would have denied a request for such a permit. It was for the jury to determine how much weight, if any, to give the assumptions Rolling relied on in forming his opinion that the loss in access rights did not affect the value of the subject property. It was not for the circuit court, nor is it for this court, to determine whether, as a matter of law, Rolling's assumptions were correct. Accordingly, we need not address Forbes' challenge to Rolling's underlying assumptions.

¶20 In sum, we conclude that the circuit properly exercised its discretion in admitting Rolling's testimony that the DOT had the authority to require Forbes to obtain a driveway access permit in order to change the use of the existing driveway, and that the DOT likely would have denied a request for such a permit.

II. Whitson-Swift Parcel

¶21 Forbes contends that the circuit court erroneously exercised its discretion in excluding evidence regarding the amount of money the DOT paid to acquire the access rights to the driveway connecting the Whitson-Swift parcel to U.S. Highway 151 and the total amount paid for the Whitson-Swift parcel. Forbes maintains that, because a central issue at trial was the value of the driveway connecting the subject property to Highway 151, the admission of evidence regarding the amount paid for the Whitson-Swift parcel, including the amount paid by the DOT for the access rights to Highway 151, was highly relevant to determining the value of the subject property and that its exclusion was unfair and prejudicial to Forbes.

¶22 The DOT responds that the circuit court properly excluded evidence regarding the amount paid for the Whitson-Swift parcel because, under ***Blick v. Ozaukee Cnty.***, 180 Wis. 45, 46, 192 N.W. 380 (1923), and ***Pinczkowski v. Milwaukee Cnty.***, 2005 WI 161, ¶¶17-20, 286 Wis. 2d 339, 352, 706 N.W.2d 642, 648, the price that the condemning authority has paid for other property in the area is inadmissible. We agree.

¶23 As we have explained, a circuit court's decision to admit or exclude evidence is entitled to great deference. ***State v. Head***, 2002 WI 99, ¶43, 255 Wis. 2d 194, 219, 648 N.W.2d 413,425. Thus, we uphold a circuit court's decision to admit or exclude evidence unless it has erroneously exercised its discretion. ***State v. Jackson***, 2014 WI 4, ¶43, 352 Wis. 2d 249, 272-733, 841 N.W.2d 791, 802 . "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." ***Id.***

¶24 We conclude that the circuit court properly exercised its discretion in excluding evidence regarding the amount paid for the Whitson-Swift parcel, including the amount paid for the access rights to Highway 151. Our supreme court held in ***Blick***, and reaffirmed in ***Pinczkowski***, that "the price paid in settlement of condemnation proceedings, or the price paid by the condemnor for similar land, even if proceedings had not been begun, where the purchaser has the power to take by eminent domain is not admissible." ***Blick***, 180 Wis. at 45, 192 N.W. at 380; ***Pinczkowski***, 2005 WI at ¶17, 286 Wis. 2d at 352, 706 N.W.2d at 648. Applying this rule to the undisputed facts, we conclude that the amount paid for the Whitson-Swift parcel was inadmissible and therefore the circuit court properly exercised its discretion in excluding the evidence.

III. Discretionary Reversal

¶25 Finally, Forbes contends that, even if the circuit court did not erroneously exercise its discretion in making its evidentiary rulings, we should exercise our discretion under WIS. STAT. § 752.35 and reverse on the ground that the real controversy has not been fully tried because the court's rulings prevented the jury from hearing all of the evidence bearing on the value of the driveway access to Highway 151. This argument is without merit.

¶26 WISCONSIN STAT. § 752.35 provides in relevant part:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried … the court may reverse the judgment or order appealed from.

We exercise our discretionary reversal power "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662, 667 (1983).

¶27 We conclude that Forbes has failed to demonstrate that the real controversy was not fully tried and therefore this is not an exceptional case. As the DOT correctly points out, the circuit court's admission of Rolling's testimony allowed the controversy over the value of the subject property to be *more* fully tried, not less so. Moreover, the circuit court's decision to exclude evidence regarding the amount paid for the Whitson-Swift parcel was based on an application of a well established rule of law and therefore the exclusion of that evidence did not prevent the real controversy from being tried. For these reasons, we do not exercise our discretionary power to reverse.

CONCLUSION

¶28 Based on the foregoing, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.