COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1362 **Cir. Ct. No. 2013CV289**

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

DANNY GOEMAN AND GOEMAN RUBICON ENTERPRISES, LLC,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Danny Goeman and Goeman Rubicon Enterprises, LLC (Goeman) appeal a money judgment in favor of the Wisconsin Department of

Transportation in this eminent domain case. Goeman contends that he is entitled to a new trial because the circuit court erroneously excluded evidence at trial. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Goeman was the owner of a 3.193 acre parcel of land that is located adjacent to the intersection of STH 60 and Highway P in Dodge County. Situated on the property is a tavern/banquet hall. The DOT took 0.256 acres of Goeman's parcel by eminent domain for the installation of a roundabout, of which 0.223 acres was subject to an existing road right of way easement. The DOT determined that Goeman's damages from the taking was $14,100, and paid that amount to Goeman. Goeman appealed the award to the circuit court. The jury determined that the value of the property taken by eminent domain was $6,560. Because the DOT had previously paid Goeman $14,100, a money judgment was entered in favor of the DOT in the amount of the DOT's overpayment, $7,540, plus costs, disbursements and pre-judgment interest. Goeman appeals.

¶3 We set forth additional facts in our discussion below.

DISCUSSION

¶4 Goeman contends that he is entitled to a new trial because the circuit court erred in excluding the following evidence at trial: (1) his testimony on the value of the property that was taken through eminent domain; (2) the DOT's pre-condemnation appraisal of the property; (3) the DOT's certification of value; and (4) evidence as to the value of improvements made to a part of the property that lay within a pre-existing right-of-way. We now explain how we resolve each contention in turn.

A. Exclusion of the Landowner's Testimony Regarding the Value of the Taken Property

¶5 Goeman contends that the circuit court erred by excluding from evidence at trial his testimony regarding the value of the property taken by the DOT. Generally, the admission of evidence is addressed to the court's discretion. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. In making evidentiary rulings, the circuit court has broad discretion. ***Id.*** As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***

¶6 The circuit court determined that Goeman would not be permitted to testify at trial regarding the value of the property the DOT took because Goeman failed to disclose that testimony prior to trial as required by the court's scheduling order. A circuit court has the authority to enforce its scheduling order through sanctions. *See* WIS. STAT. § 802.10(7) (2015-16).[1] Among the authorized sanctions for violating a scheduling order is "prohibiting the disobedient party from introducing designated matters in evidence." WIS. STAT. § 804.12(2)2. Whether a party should be prohibited from introducing evidence as a sanction for violating a scheduling order is a decision that lies with the circuit court's discretion. *See* ***Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.,*** 2002 WI App 138, ¶19, 256 Wis. 2d 205, 647 N.W.2d 315.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶7 The scheduling order required the parties to file with the circuit court, and exchange, at least 48 hours prior to the final pretrial conference, a number of disclosures, including "A list of lay witnesses and a brief synopsis of what topic(s) the witness is being called to testify about." Goeman's filing for the pretrial conference included the following:

> (2) Lay witnesses and summary of testimony
>
> Mr. Danny Goeman, landowner, will testify about subject property, history of subject property, purchase of subject property, parking lot of subject property, driveways of subject property, impact of DOT project on subject property, and attempts to sell property.

¶8 At trial, Goeman was permitted to testify. However, as he began to testify about the effect on the value of his remaining parcel the roundabout project had as a result of grade changes, the DOT objected to this testimony.

¶9 After considerable discussion regarding an objection to Goeman's testimony that is not at issue on appeal, the DOT brought up the issue of whether Goeman had properly disclosed in the final pretrial conference report that he would be giving valuation figures. The DOT argued that "[t]here was no disclosure of any value opinions by Mr. Goeman" in the report, as required by the scheduling order. Goeman argued in response: "The synopsis very clearly stated that [Goeman] would be testifying to his opinion of the impact on the subject property."

¶10 The circuit court determined that Goeman would not be permitted to testify on the specific topic of the value of the property. The court explained:

> I'm going to actually exclude it. I'm not letting it [in]. I think that's a violation [of the scheduling order], it's a trial by ambush.… [Goeman] should have put in [his disclosure] the values of the before property and after property but there's none of that [in the disclosure] and [what's in the

> disclosure] would not have alerted somebody that we were going to switch this case from one of experts contending on the price to one on Mr. Goeman just deciding to, you know, put in his numbers. I find it to be a violation of the pretrial order and I'm not going to allow it.

¶11 On appeal, Goeman argues that as the landowner, he has a right to testify concerning the value of his property. The cases cited by Goeman support this assertion. However, the right of a landowner to testify regarding the value of his or her property is not absolute. *See* ***Genge v. City of Baraboo,*** 72 Wis. 2d 531, 536, 241 N.W.2d 183 (1976).

¶12 As we stated above, the admission of evidence and the imposition of sanctions are exercises of discretion by the circuit court, which we will affirm if the court examined the facts, applied the appropriate law and deliberately engaged in exercising its discretion. Here the circuit court carefully considered the facts and the parties' arguments regarding the admission or exclusion of Goeman's testimony, the court had authority to sanction Goeman for violating the court's scheduling order, and the court's decision to sanction Goeman by excluding his testimony was fully explained on the record. The court allowed Goeman to testify, but prevented him from testifying on the specific topic of valuation numbers. Whether or not the pretrial order can be reasonably read to have required that he state in the pretrial disclosure "the values of the before property and after property," as the court stated, at a minimum his pretrial disclosure should have revealed that he intended to give valuation numbers. We discern no erroneous exercise of the circuit court's discretion in the court's decision to exclude Goeman's testimony on this specific topic and, therefore, reject this argument.

B. Exclusion of the DOT's Pre-Condemnation Appraisal

¶13 In a motion in limine prior to the final pretrial conference, the DOT requested that the circuit court exclude from evidence an appraisal prepared by Tierney Lalor, an outside appraiser, at the direction of the DOT, prior to condemnation of Goeman's property. The motion was heard first at the final pretrial conference and the circuit court deferred its decision on the motion. On the second day of trial, the question of the admissibility of the Lalor appraisal was raised once again, in an objection by the DOT to cross-examination questions of the DOT's expert witness. After argument and voir dire of the witness, the court excluded the Lalor appraisal on the ground that the appraisal is evidence of the parties' negotiations and is, therefore, inadmissible under WIS. STAT. § 904.08.

¶14 Before discussing whether the exclusion of the Lalor appraisal is an erroneous exercise of discretion,[2] it will be helpful to provide some context about the appraisal. Under the statutory condemnation procedure that applies to transportation projects, WIS. STAT. § 32.05, there are a number of mandatory steps in the process. One of the first steps in this process is for the condemnor, in this case the DOT, to "cause at least one … appraisal to be made." WIS. STAT. § 32.05(2). A copy of the appraisal must be provided to the owner, and the owner must be informed of his or her right to obtain an additional appraisal at the DOT's expense. Sec. 32.05(2)(b). The Lalor appraisal is the appraisal that the DOT had prepared pursuant to § 32.05(2).

[2] We have already noted with regard to the previous issue that the admission or exclusion of evidence is an exercise of discretion.

¶15 As we explain below, we affirm the exclusion of the Lalor appraisal, albeit for a different reason than the circuit court.

¶16 The DOT argues that the circuit court properly exercised its discretion when it excluded the Lalor appraisal from evidence for the following two reasons. First, the DOT argues that because the Lalor appraisal is the same amount as the jurisdictional offer, the Lalor appraisal is not admissible under WIS. STAT. § 32.05(11). Section 32.05(11) provides: "The amount of the jurisdictional offer or basic award shall not be disclosed to the jury." Second, the DOT argues that, as determined by the circuit court, the Lalor appraisal is part of the negotiation process and, thus, inadmissible under WIS. STAT. § 904.08, which provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Both arguments fail.

¶17 Turning to the DOT's first argument, the DOT assertion that a pre-condemnation appraisal that is the same amount as the jurisdictional offer is inadmissible under WIS. STAT. § 32.05(11) is effectively an argument that such an appraisal is the functional equivalent of the jurisdictional offer. We recently decided in ***Otterstatter v. City of Watertown***, 2017 WI App 76, ¶27, 378 Wis. 2d 697, 904 N.W.2d 396, that while the jurisdictional offer is required to be based upon the pre-condemnation appraisal, the jurisdictional offer need not match the pre-condemnation appraisal. We noted in ***Otterstatter*** that the property owner in that case "points to no language in the statute that would prevent a condemnor, such as the City, from offering more than the appraised amount as part of the effort it is required to make to 'attempt to negotiate personally with the owner.'" ***Id.*** at ¶28 (quoting § 32.05(2a)). Our holding in ***Otterstatter*** effectively precludes a conclusion that the appraisal is the functional equivalent of the jurisdictional offer, as argued by DOT, and rendered inadmissible by § 32.05(11). And, so far

as we can tell, there is no reason a jury would infer that a pre-offer appraisal ended up being the jurisdictional offer. That is, there is no reason to suppose that admission of the appraisal was the functional equivalent of informing the jury of the jurisdictional offer.

¶18 Turning to the DOT's second argument, we do not agree that the Lalor appraisal was part of the negotiation process. In determining that the appraisal was part of the negotiation process and excluding it under WIS. STAT. § 904.08, the circuit court relied upon ***Connor v. Michigan Wisconsin Pipe Line Co.***, 15 Wis. 2d 614, 113 N.W.2d 121 (1962). ***Connor*** involved statements made by an agent of the condemnor pipeline company directly to the landowner during the course of face-to-face negotiations, which the supreme court determined were not admissible because those statements were part of the negotiation process. ***Id.*** at 618, 625. However, as Goeman points out, the Lalor appraisal was prepared prior to negotiations being commenced. The statements in ***Connor*** have no obvious similarity to a pre-negotiation appraisal. Accordingly, we conclude that facts of this case are distinguishable from those in ***Connor.***

¶19 We can perceive no basis upon which it could be determined that an appraisal prepared prior to negotiation could be considered "[e]vidence of conduct or statements made in compromise negotiations." Although WIS. STAT. § 32.05 requires that the pre-condemnation appraisal be given to the landowner, that delivery takes place prior to the commencement of any negotiations. Accordingly, we conclude that the Lalor appraisal is not inadmissible under WIS. STAT. § 904.08.

¶20 Although we have determined that the Lalor appraisal was not inadmissible for the reasons determined by the circuit court or argued by the DOT,

we generally look for reasons to sustain the circuit court's discretionary decisions, *see* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and "may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall,*** 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Upon our independent review, we conclude that the Lalor appraisal is inadmissible hearsay.

¶21 The DOT argued at both the pretrial conference and at trial (in arguing on its objection to testimony about the appraisal) that the appraisal was hearsay and that Lalor had not been listed as a witness by either party. At the pretrial hearing, Goeman argued that the appraisal was not hearsay, but argued that, even if it were, two exceptions to the hearsay rule applied, that for government records[3] and that for records of a regularly conducted activity.[4] Goeman did not repeat the exception arguments at trial, nor develop them in his briefs in this appeal,[5] so they must be considered abandoned. *See* ***State v. Allen***, 2004 WI 106, ¶26 n.8, 274 Wis. 2d 568, 682 N.W.2d 433 (issue not argued on appeal is subject to forfeiture).

¶22 Hearsay is generally inadmissible absent a specific exception. WIS. STAT. § 908.02. Goeman argues on appeal that the Lalor appraisal is not hearsay because it is an admission of a party opponent. *See* WIS. STAT. § 908.01(4)(b).

---

[3] *See* WIS. STAT. § 908.03(8).

[4] *See* WIS. STAT. § 908.03(6).

[5] In Goeman's brief, he states: "In the unlikely event that the pre-condemnation appraisal is hearsay, it fits in many exceptions. WIS. STAT. § 908.01(4)(b)(1-4)." Not only does this not develop an argument, but the citation is to the section that Goeman relies upon to argue that the appraisal is not hearsay, not to a section on exceptions to hearsay.

¶23 We reject Goeman's attempt to characterize the Lalor appraisal as a statement of the DOT.

¶24 The Lalor appraisal is not a statement of the DOT, but is instead the statement of Lalor, who is an outside appraiser fulfilling a statutory requirement and has no apparent interest in the outcome of the proceedings. As Goeman himself points out, the DOT used a different appraiser in its case at trial.

¶25 Goeman attempts to overcome the problem of the appraisal being a statement of Lalor, and not the DOT, by arguing that the statement is attributable to the DOT. Goeman admits that there is no Wisconsin authority that supports this argument. However, he points to language from a treatise and from cases from other states in support of the argument.

¶26 Goeman begins by citing this court to Nichols on Eminent Domain, § 18.12(2) (2014) for the following proposition: "Statements made by or attributable to the condemning authority which are inconsistent with its valuation position at trial are admissible as admissions against interest." However, § 18.12(2) goes on to provide that statements which may become admissions include: "appraisals of the property prepared and adopted for purposes *other than* acquisitions, negotiations or condemnation." (Emphasis added) Appraisals *for the purpose of* acquisitions, negotiations or condemnation are not listed. In fact, § 18.12(2) goes on to state that "[i]t has been held, also, that the approved value of the state and the appraisals on which they are based are not admissible in evidence." ***Id.*** What is clear from § 18.12(2), when read in its entirety, is that while some states consider an appraisal filed pursuant to a statute, as here, to constitute an admission against interest of the party filing the appraisal, it is a minority view; only three states are listed as adhering to this view.

¶27 Goeman also attempts to shore up his argument by citing five cases from other jurisdictions. However, none of the quotes from the cases concern or mention an appraisal. Our reading of the cases does not suggest that the statements in them were meant to apply to appraisals as admissions. But even if that were true, it would still amount to no more than a minority view. Thus, we are not persuaded by the cases Goeman cites from other jurisdictions.

¶28 For the above reasons, we affirm the decision of the circuit court to exclude the Lalor appraisal, albeit on different grounds than those articulated by the circuit court. *See* ***Loomans,*** 38 Wis. 2d at 662; and ***Randall,*** 235 Wis. 2d 1, ¶7.

C. Exclusion of the DOT's Offering Price Report

¶29 WISCONSIN. STAT. § 32.05(11) provides in part that "[t]he amount of the jurisdictional offer or basic award shall not be disclosed to the jury during … trial." Goeman sought to introduce at trial a document from the DOT file entitled "Offering Price Report." DOT argued at trial that the "Offering Price Report" is not admissible because it "identifies the amount paid by the [DOT] to the landowner" and is, therefore, the functional equivalent of the jurisdictional offer. In response, Goeman argued that the "Offering Price Report" predated the jurisdictional offer by five months.

¶30 On appeal, Goeman does not develop an argument that the "Offering Price Report" is not the document upon which the jurisdictional offer is based.

Instead, Goeman argues that the "Offering Price Report" was prepared pursuant to 42 U.S.C. § 4651(3), which provides:[6]

> Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor *and shall make a prompt offer to acquire the property for the full amount so established.*" (Emphasis added).

Under Goeman's own argument, the jurisdictional offer is inherently identical to the amount shown in the "Offering Price Report," as the name indicates. Therefore, we determine that Goeman has conceded that the "Offering Price Report" states "the amount of the jurisdictional offer" and is thus inadmissible.

D. The Property Subject to the Existing DOT Easement

¶31 As previously noted, of the 0.256 acres acquired by the DOT through this condemnation action, 0.223 acres were subject to an existing road easement in the DOT. Goeman's predecessor in title had built a parking lot upon this already encumbered property. The circuit court excluded testimony from Goeman's appraiser regarding the value of improvements or associated costs upon the 0.223 acres subject to the easement. On appeal, Goeman argues that the court erred in doing so.

¶32 Goeman's arguments on this issue are undeveloped and rely upon conclusory statements without support by authority. We decline to address them. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3,

[6] Goeman argues that federal law applies. He does not develop an argument that the outcome would be different under federal law than under state law. Consequently, we do not address this issue.

258 Wis. 2d 915, 656 N.W.2d 56 (generally, this court does not consider conclusory assertions and undeveloped arguments).

CONCLUSION

¶33 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.