COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2329

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

SCOTT DEVELOPMENT COMPANY, L.L.C.,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN-DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott Development Company, L.L.C., initiated this action to challenge the Department of Transportation's damage award in a condemnation action. Scott appeals the judgment entered on the jury's verdict finding that the condemnation award exceeded Scott's loss by $102,681 and

awarding the DOT that sum at 5% interest. Scott argues that (1) it is entitled to a new trial because the jury verdict failed to consider severance damages and (2) the DOT is estopped from recovery because it failed to comply with WIS. STAT. § 32.26[1] requiring that it provide property owners with a pamphlet describing eminent domain law. We affirm the judgment.

¶2 Scott's owners formed the company to purchase and develop a 114.23-acre parcel at the northeast intersections of Highways 54 and 57 in Brown County. This property had been on the market for approximately ten years when Scott purchased it for $310,000. It was located at "the last major intersection leaving Green Bay … a high traffic intersection" that takes bay shore traffic, commuter traffic and tourist traffic into Door County. "It was also the town designated commercial center for the citizens surrounding the community of Scott." In 1995, when it considered purchasing the property, Scott knew the DOT was expanding the highway to four lanes and that it contemplated constructing a new four-lane intersection at the site. The DOT needed approximately twenty-five acres to develop the new interchange.

¶3 At the time Scott purchased the property, it was zoned and used for farming. Due to high traffic, however, it had good commercial prospects. Chuck Servi, one of Scott's members, concluded that an advantage to buying the property was that a "major highway interchange is planned [in] 1996." Drew Ricks, a convenience store consultant, testified that he was retained to study the traffic patterns at the site in question. He stated: "[J]ust having the traffic go by the site

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

doesn't really mean anything. It's the ability of the site to stop the traffic so it will utilize it that's important."

¶4 After it purchased the property, Scott sought to rezone for commercial use. At the 1996 rezoning hearing, one of the factors the town considered in granting Scott's request was the DOT's planned new highway interchange.

¶5 In November 1997, Scott received an award of $261,000 from the DOT in return for the twenty-five acres. Scott was dissatisfied with this sum and filed this action seeking a jury determination of the land's value pursuant to WIS. STAT. § 32.05(11).[2] At the three-day jury trial, Jon Tessier, Scott's appraiser, testified that before the taking, the 114.23 acres were valued at $3,875,000 and, after the taking, the remaining eighty-eight acres were valued at $2,736,559.

¶6 David Gagnow, the DOT's appraiser, testified that the highest and best use of the property was "agricultural interim use" where it would be developed a little at a time as demand warrants. He testified that he viewed the parcel in question as a "development parcel," not an "end-user parcel." He noted that several hundred acres of industrial park and other significant amounts of

[2] WISCONSIN STAT. § 32.05(11) provides the procedure to be followed by an owner in an appeal to the circuit court and jury. Subsections (a) and (b) state:

> (a) If the jury verdict as approved by the court does not exceed the basic award, the condemnor shall have judgment against the appellant for the difference between the jury verdict and the amount of the basic award, plus interest on the amount of such difference from the date of taking.
>
> (b) If the jury verdict as approved by the court exceeds the basic award, the appellant shall have judgment for the amount of such excess plus legal interest thereon to date of payment in full from that date which is 14 days after the date of taking.

vacant land existed in Brown County. He also took into account that rural property is absorbed into developed property in the Brown County area at the rate of approximately nine acres per year.

¶7 Gagnow further testified that the price of a large parcel for development costs less per acre than individual units. He explained:

> A developer/speculator has holding costs …. Large parcels do not sell out immediately. That's a developer as compared to somebody paying 25 to a hundred thousand an acre is an end user. There's no speculation. You know you have this use for the property. You're going to use it. It isn't like buying the 70 plus acres and waiting to sell it. It's a matter of economy, scale, and return on your investment and risk.

Through the use of a comparable sales method, and taking into account the size, appreciation, location, utility availability and other factors, Gagnow's professional opinion was that the value of the original 114.23-acre parcel was $5,000 per acre.

¶8 Gagnow valued the 25.13 acres at $6,000 per acre or $151,000. Gagnow also testified that after the taking, however, he decreased the remaining 89.1 acres' value by $1,000 per acre. He explained: "That difference of a thousand dollars an acre is what's referred to as severance. And that severance is because they lost the main corner. They lost the better part of the visibility for that corner property."

¶9 After the three-day trial, the jury returned a verdict valuing the portion of land acquired by the DOT at $6,300 per acre or $158,319. The jury also determined that the entire property's value immediately before the taking was $6,200 per acre times 114.23 acres or $708,226. It valued the remaining property at $7,200 per acre times 89.1 or $641,520. The DOT was awarded $102,681,

reflecting the difference between the condemnation award and the jury's value of the twenty-five acres. Scott appeals the judgment.

¶10 Scott argues that it is entitled to a new trial because the jury did not consider evidence of severance damages.[3] Scott agrees that this issue requires us to determine whether sufficient evidence supports the verdict. A motion challenging the sufficiency of the evidence to support a verdict may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). This "standard applies to both the trial court and this court on appeal." ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). When there is any credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand." ***Id.*** at 672 (citation omitted).

¶11 "The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence, the trial court must accept the inference drawn by the

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[3] The jury was instructed:

> In arriving at your determination of the fair market value of the plaintiff's property immediately after the taking, you are instructed to consider and allow such severance damages, if any, to the remaining property as you are convinced by the required degree of proof have resulted by reason of the taking of the 25.13 acres.
>
> Severance damages means the diminution in the fair market value of the remainder of the property not taken by reason of the taking of the 25.13 acres. This is to be distinguished from the value of the property actually taken.

jury." ***Id.*** at 671. Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶12 Scott initially contends that because the jurors computed damages based upon a per-acre valuation, it is clear that they gave no consideration to severance damages. Scott's contention does not demonstrate error. First, Scott provides no explanation why severance damages cannot be reflected in a per-acre calculation. Second, the jurors were not required to find that Scott was entitled to severance damages as a matter of law. To the contrary, the jury was instructed to "consider and allow such severance damages, if any, to the remaining property as you are convinced by the required degree of proof …." The jury, as the arbiter of the weight and credibility of testimony, was entitled to reject evidence of severance damages if it disbelieved it.

¶13 Scott also argues that while the amounts varied, three appraisers testified that the remaining property's value was reduced after the taking. Scott claims, therefore, that the jury's verdict finding an increase in the price per acre after the taking is unsupported by testimony. Scott relies on evidence showing that after the taking, it lost its most desirable corner and that there remained only one available entrance to the property instead of two. We are unpersuaded.

¶14 While the record may lack direct testimony that the interchange increased the value of Scott's remaining property, there was evidence from which the jury could have made this inference. An inference reasonably drawn is generally an appropriate basis for an unassailable finding of fact. *See* ***St. Paul Fire & Marine Ins. Co. v. Burchard,*** 25 Wis. 2d 288, 293, 130 N.W.2d 866

(1964). Appellate courts search the record for evidence to support findings reached by the trier of fact, not for evidence to support findings the trier of fact could have but did not reach. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Conflicts in the testimony are for the jury, not the appellate court, to resolve. *See* ***Richards***, 200 Wis. 2d at 671.

¶15 Here, the jury was aware that Scott paid $2,719 an acre for the original 114 acres just two and one-half years before the taking. Scott's appraisers, nonetheless, testified that as of the date of the taking, the property was worth many times that amount. The jury could have believed Servi's observation that the interchange helped make the property an advantageous purchase. Also, the jury could have believed Ricks' testimony to the effect that heavy traffic alone does not necessarily enhance a property's value, but the "ability of the site to stop the traffic" to utilize the site is significant. Because the record contains credible evidence from which the jury could infer that the interchange enhanced the remaining property's value, we will not overturn its findings on appeal.

¶16 Scott also argues that it is entitled to compensation for what the owner has lost, not what the condemnor has gained. Scott fails to explain, however, why it did not pursue this result at the trial level. Here, the verdict not only determined the value of the twenty-five acres taken, but also that of the entire 114.23 acres before the taking and the value of the eighty-nine acres after the taking. Because the verdict calculated the effect of the taking on the value of the remaining property, Scott could have sought to use these amounts in calculating the judgment. Scott's failure to develop this contention precludes further consideration of it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶17 Next, Scott contends that the DOT is estopped from obtaining judgment because it failed to provide an accurate pamphlet informing owners of eminent domain law.[4] Scott does not claim that the DOT failed to provide the pamphlet. Rather, it contends that the pamphlet was incomplete because it failed to advise that if the verdict valued the property owner's loss to be less than the award, the DOT would obtain judgment for the difference. *See* WIS. STAT. § 32.05(11)(a). Scott contends that the pamphlet's explanation that it may have

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[4] WISCONSIN STAT. § 32.26(6) requires the department of commerce to prepare the pamphlets, and WIS. STAT. § 32.05 requires the condemnor to distribute the pamphlets.

WISCONSIN STAT. § 32.05(2a), entitled "Negotiation," provides:

> (2a) Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor shall consider the owner's appraisal under sub. (2)(b) and may contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 as may be applicable to the property in one or more instalments on such conditions as the condemnor and property owners may agree. Before attempting to negotiate under this paragraph, the condemnor shall provide the owner or his or her representative with copies of applicable pamphlets prepared under s. 32.26 (6).

WISCONSIN STAT. § 32.26(6) provides:

> The department of commerce, with the cooperation of the attorney general, shall prepare pamphlets in simple language and in readable format describing the eminent domain laws of this state, including the reasons for condemnation, the procedures followed by condemnors, how citizens may influence the condemnation process and the rights of property owners and citizens affected by condemnation. The department shall make copies of the pamphlets available to all condemnors, who may be charged a price for the pamphlets sufficient to recover the costs of production.

been liable for "costs" if unsuccessful misled it into believing that costs would be its only potential liability.[5] We reject this argument.

¶18 The first page of the pamphlet, entitled "Foreward" states:

> The material in this pamphlet provides information on how the condemnation process works in Wisconsin. It should serve as a reference for you, but it is not intended to cover every possible eventuality or every right you may have in individual cases. A further source of information is Chapter 32 of the Wisconsin statutes which contains the law that is summarized in this pamphlet.

¶19 The next page, entitled "Introduction," states:

> This pamphlet is intended to give citizens information about Wisconsin's eminent domain procedure, the workings of the condemnation process, and the rights of property owners in this process. It is, by necessity, of a general nature and is not a substitute for legal advice in individual cases, since many aspects of Wisconsin law cannot be covered in general terms. Another source of information for citizens is the particular authority which is acquiring the property.

In part seven of the pamphlet describing procedures to appeal the damages award, it states: "It would be advisable to secure legal counsel to aid you in your appeal."

¶20 "[E]stoppel is rarely applied against a government or one of its agencies, especially when it is seeking to exercise its police power. In order to establish estoppel, the acts of the state agency must be proved by clear and distinct evidence and must amount to a fraud or a manifest abuse of discretion." ***Surety***

[5] The pamphlet stated:

> You may be required to pay "costs" to the acquiring authority if you are unsuccessful in challenging the compensation you have received or the acquiring authority's right to acquire the property. "Costs" are defined in Ch. 814 of Wisconsin statutes.

S&L Asso. v. State, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972) (citation omitted). In order to demonstrate estoppel, three basic elements must be present: (1) Action or nonaction that induces (2) reliance by another (3) to his detriment. *See* ***State v. City of Green Bay***, 96 Wis. 2d 195, 222, 291 N.W.2d 508 (1980). It is elementary that any reliance by the party asserting estoppel must be reasonable. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 680-81, 273 N.W.2d 279 (1979).

¶21 In light of the several disclaimers and references to WIS. STAT. ch. 32, as well as the advice to seek legal counsel, Scott's reliance on the pamphlet as a complete description of eminent domain procedure was not reasonable as a matter of law. No reasonable person would initiate a lawsuit against a state agency and rely on a pamphlet's summary of a complex area of the law as its sole source of information. Because Scott's alleged reliance on the pamphlet as a complete and detailed description of all facets of eminent domain law was unreasonable, its estoppel argument fails.

By the Court.—Judgment affirmed.

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