COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1645

Cir. Ct. No. 2008CV1109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RUTH HODGE,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

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

Before Lundsten, P.J., Blanchard, J., and Charles P. Dykman, Reserve Judge.

¶1 LUNDSTEN, P.J. This appeal concerns condemnation by the Wisconsin Department of Transportation of several acres of Ruth Hodge's land. As a result of the condemnation, Hodge lost some access to her remaining land.

At trial, the core dispute was whether, given the new access situation, Hodge would be able to construct a road as part of possible residential development of her remaining land. Absent such access, the fair market value of Hodge's remaining land would be significantly lowered.

¶2 DOT offered an appraisal indicating a $56,900 loss to Hodge based on the assumption that a post-condemnation access road could be built to support development on all of the remaining property. Hodge offered a contrary appraisal indicating a $1,535,000 loss based on the assumption that no such access road could be built. A jury awarded Hodge $321,800. On appeal, Hodge contends that the circuit court should have excluded DOT's appraisal for reasons relating to DOT's access-road assumption. Hodge also raises alternative arguments attacking the appraisal's admissibility. The circuit court rejected Hodge's arguments. We affirm.

Background

¶3 To build a new section of Highway 12, DOT condemned 3.31 acres of Ruth Hodge's land in the Town of Delton. The condemned land was part of Hodge's larger 148-acre parcel. The taking included a significant portion of Hodge's southern frontage along North Reedsburg Road, a road running east and west. This road is the only public road that abuts Hodge's property.

¶4 Prior to the taking, there was unrestricted access to the public road along both a westerly portion of the southern border and a separate easterly portion of the southern border. It is undisputed that the eastern access, for purposes that matter here, was eliminated by the taking and that the western access was unaffected.

¶5 DOT offered Hodge $75,000 for the condemned land. Hodge appealed this offer in circuit court. Hodge's appeal concerned the fact that the majority of her developable land was in the eastern portion of her land. Hodge alleged that her remaining western access did not give her the ability to develop this large eastern portion because there was a wetlands between the western access and the eastern portion of her property.

¶6 At trial, DOT's appraisal expert, Cheryl Schroeder, testified that she relied on data showing that the wetlands did not block access to the larger eastern portion of Hodge's property. Schroeder's written summary of the topic, presented to the jury, describes a non-wetland corridor that permitted access. Schroeder essentially opined that Hodge's loss was limited to the land actually taken, which Schroeder valued at $56,900.

¶7 Hodge's expert relied on contrary data showing that the wetlands blocked the east-west access described in Schroeder's summary. Accordingly, Hodge's expert offered a much larger damages figure, $1,535,000, which represented the value lost because the large eastern portion of Hodge's property could not be developed.

¶8 The jury awarded Hodge $321,800, an amount much closer to the value asserted by DOT's expert. The circuit court denied Hodge's post-trial motion challenging the verdict, and Hodge appeals.

Discussion

¶9 Hodge contends that the circuit court erred when it declined to exclude expert testimony from DOT's appraisal expert, Schroeder. According to Hodge, if we agree that Schroeder's appraisal testimony should have been

excluded, the only remaining appraisal evidence is that of Hodge's expert and we should direct a verdict reflecting that higher appraisal.

¶10 We apply the following general principles to Hodge's complaints about the admission of expert evidence:

> Expert testimony is admissible if the witness is qualified as an expert and has specialized knowledge that is relevant because it will assist the trier of fact in understanding the evidence or determining a fact at issue. The admissibility of expert evidence is left to the sound discretion of the trial court. However, "[a]ny relevant conclusions which are supported by a qualified witness should be received unless there are other reasons for exclusion." Expert testimony will be excluded only if the testimony is superfluous or a waste of time.

Arents v. ANR Pipeline Co., 2005 WI App 61, ¶13, 281 Wis. 2d 173, 696 N.W.2d 194 (citations omitted).

A. Western Access Issues

¶11 Underlying the appraisal of DOT's expert, Schroeder, was her opinion that a non-wetlands corridor would allow a road to be constructed from Hodge's remaining western public-road access to the eastern portion of Hodge's property. Hodge asserts, however, that Schroeder's appraisal should have been excluded because, at trial, she effectively admitted that her appraisal was incorrect. In the alternative, Hodge contends that Schroeder's appraisal was flawed because it did not include a cost figure for a road. We reject these arguments.

1. Whether DOT Or Its Expert Admitted That The DOT Appraisal Was Incorrect

¶12 Although Hodge speaks in terms of whether it was "undisputed" at trial that wetlands impeded a western access road, it is more apt to say that Hodge contends that DOT or its appraisal expert, Schroeder, ended up admitting during

the trial that her appraisal was incorrect.[1] The circuit court disagreed, observing that the wetlands issue was "disputed obviously." We agree with the circuit court.

¶13 Schroeder testified that her data revealed a corridor between the southernmost extension of the wetlands and the southern property line and that a road could be built in this corridor. More specifically, Schroeder testified that she used data shown on GIS maps and that she consulted with a professional engineer who specialized in civil engineering and "subdivision work." Schroeder further agreed that "GIS maps are routinely used by appraisers when they have to address wetland issues."[2] Schroeder explained that, based on these maps and her consultation with the engineer, she determined that the wetlands did not prevent a road from being built.

¶14 While acknowledging that Schroeder testified that there was a non-wetlands corridor, Hodge asserts that an admission by Schroeder rendered her own appraisal opinion irrelevant. Hodge is referring to the difference between identifying wetlands based largely on "GIS" mapping, which is the identification process Schroeder relied on, and identifying wetlands through an on-site "wetland

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[1] We note that part of Hodge's appraisal argument also involves whether DNR would issue a permit for a road across wetlands on her property. That is, Hodge also argues that Schroeder's appraisal was irrelevant because the evidence showed that, given the "undisputed" wetlands situation, DNR would not issue a permit to build a road over the wetlands. Because Hodge fails to persuade us that the wetlands situation was undisputed, we do not discuss the permit issue.

[2] We discern no dispute on this point. As Hodge acknowledges in her brief-in-chief, for purposes of his appraisal report, Hodge's appraiser also used GIS maps to determine the extent of the wetlands.

delineation," something Hodge's expert relied on.[3] Hodge points to a portion of Schroeder's testimony in which she agreed, in general terms, that a "wetland delineation" may be more reliable than wetlands identification based on GIS mapping. That testimony is as follows:

> Q In fact, you utilized the GIS maps in doing your appraisal of Exhibit – Exhibit No. 1; is that correct?
>
> A Yes, I did.
>
> Q And would you also agree that if you have a GIS map covering a certain area and a wetland delineation covering that same area, that the wetland delineation is a more reliable source as to the extent of wetlands than the GIS map?
>
> A Pending the qualifications of that individual who did the wetland delineation, I would think that it's fair to agree.

Hodge asserts that this testimony is a concession that the wetland delineation *in this case* is more reliable than the information Schroeder based her appraisal on. We disagree.

¶15 Schroeder's statement is prefaced by a condition, namely, that the report's reliability depends on "the qualifications of [the] individual who did the wetland delineation." It is obvious that Schroeder was not conceding that the particular wetland delineation in this case was more accurate than the wetlands information Schroeder relied on because Schroeder went on to opine that, after

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[3] For purposes of this opinion, we use the term "wetland delineation" to refer to a particular type of on-site inspection. We do that because that is how we understand Hodge to be using the term. We express no view as to whether "wetland delineation" has this limited meaning.

viewing the wetland delineation presented by Hodge, Schroeder's opinion about "the feasibility of building a road" did not change.

¶16 In related assertions, Hodge contends that DOT's *attorney* conceded the wetlands issue. For example, Hodge points us to a pretrial hearing during which DOT's attorney said: "There are wetlands *there*, no question about it." (Emphasis added.) Read in context, however, this is merely a statement that there were wetlands somewhere on the property.

¶17 Hodge also points to the fact that DOT "stipulated to the admission of" the wetland delineation report. It is true that DOT stipulated to the admission of the report, stating: "We have no objection to [the report] being received into evidence without further foundation." However, Hodge makes too much of this stipulation. Stipulating to admissibility is plainly not the same thing as stipulating to the accuracy of asserted facts.

¶18 What remains available to Hodge is the argument that the jury *should* have accepted her expert's opinion about the wetlands impediment because that opinion was more credible than Schroeder's. But as DOT points out, this is an argument that must be directed to a fact finder, not a reviewing court.[4]

[4] In her brief-in-chief, Hodge asks us to take note of the fact that the jury actually believed her expert. She refers to post-verdict correspondence between Hodge's attorney and a juror. DOT argues that reliance on information from this juror is impermissible, and Hodge does not refute this assertion in her reply brief. We simply note that such information from a juror is generally inadmissible, *see* WIS. STAT. § 906.06(2) (2009-10), and we do not consider it.

2. Cost Of The Access Road

¶19 Hodge argues that, even if the wetlands do not impede a road from her western public-road access, Schroeder's appraisal was inadmissible because it did not state a cost for the road. More specifically, Hodge contends that the Schroeder appraisal was inaccurate as a matter of law because that appraisal ignored a significant item of cost Hodge would need to incur to develop her property using the western access point—that is, a road from that point to the eastern portion of her property. DOT responds that the burden of proving such a cost is on Hodge. We agree with DOT.

¶20 As DOT points out in its responsive brief, it is well established that the burden of proof on damages in a condemnation proceeding is on the landowner. *See* ***Berg v. Board of Regents of State Univs.***, 40 Wis. 2d 657, 660-61, 162 N.W.2d 653 (1968) (stating that in a condemnation case the burden is on the landowner); *see also* ***Rademann v. DOT***, 2002 WI App 59, ¶25 n.5, 252 Wis. 2d 191, 642 N.W.2d 600 ("The burden of proof in eminent domain proceedings on the question of damages rests upon the landowner."). Accordingly, the case law teaches that Hodge had the burden on damages.

¶21 Thus, Hodge had the burden of presenting evidence on the additional cost, if any, of constructing a road for development purposes from the western public-road access point, as compared with the cost of a road from the lost eastern access point. Hodge did not attempt to meet this burden.

¶22 Hodge asserts that there was "obviously" an additional cost because a western access road would, at a minimum, need to cross a "ravine." For the same reason discussed above, Hodge's assertion goes nowhere. Hodge did not meet her burden of showing that the lost eastern access did not involve a different

set of impediments and related costs that would have offset the alleged "ravine" costs.

¶23 We briefly address Hodge's apparent request that we adopt new "cost to cure" law. Hodge first mentions "cost to cure" in her brief-in-chief and then expands on the topic in her reply brief. Hodge characterizes Schroeder's appraisal as "provid[ing] a cure (the road), but no costs," and asserts that the burden of presenting evidence on such a cost should be borne by DOT. Hodge asserts that "Wisconsin has never addressed this issue before," and urges us to look to non-Wisconsin authority to address the topic. Hodge, however, gives us no good reason to go beyond Wisconsin law. Hodge does not describe a gap in Wisconsin law that we need fill to resolve this case. We decline to address the topic further.

¶24 In what we understand to be a related but somewhat different argument, Hodge seems to assert that, regardless of burden, Schroeder's appraisal was inadmissible because the omission of road cost information rendered the appraisal "speculative." This argument adds nothing because it assumes there would be *additional* road cost, as compared with the lost eastern access. As we have explained, it was Hodge's burden to present evidence on this topic.[5]

[5] Hodge cites two cases for the proposition that speculative evidence should be excluded, but those cases do not address our circumstances. *See* ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 416, 288 N.W.2d 808 (1980) (addressing an income-based appraisal where it was "difficult or impossible to ascertain how much of the income is to be attributed to the owner's management"); ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶¶18, 24, 281 Wis. 2d 173, 696 N.W.2d 194 (addressing a homeowner survey about whether fear of a natural gas pipeline lowered the fair market value of a property).

B. Eastern Access Issues

¶25 In her brief-in-chief, Hodge argues that the circuit court erred by failing to "issue a ruling" stating that, after the taking, access from the southeast corner of Hodge's property could not occur. According to Hodge, the circuit court further erred by allowing DOT to present evidence about the possibility of eastern access.

¶26 As to Hodge's failure-to-rule argument, it is undeveloped. In particular, Hodge does not demonstrate that the evidence presented would have created an incorrect belief on the part of the jurors that needed to be addressed by a ruling.

¶27 As to Hodge's complaint about the admission of evidence, she effectively abandons that complaint in her reply brief. DOT states in its responsive brief:

> Hodge argues that the trial court erred by allowing the Department to introduce evidence that it would be possible, in the future, to build a road from the southeast quarter. But every time the trial court was asked to exclude such evidence, it did so.

In reply, Hodge does not disagree. To the contrary, Hodge states:

> The DOT attempted to circumvent this road access problem by eliciting testimony from its employee that it was reasonably probable that access rights could later be changed to allow road access along the Eastern Frontage. Hodge repeatedly objected to these questions by the DOT …. *The trial court did sustain every one of these objections*, and the DOT has even acknowledged this.

(Emphasis added.) Accordingly, we deem Hodge's argument abandoned, and address it no further.

Conclusion

¶28 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

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