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DISTRICT II

December 18, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1079-FT 19601 Bluemound, LLC v. Wisconsin DOT (L.C. # 2012CV610)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

19601 Bluemound, LLC, appeals from an order dismissing its challenge to the amount of compensation awarded by the Department of Transportation for the partial taking of property in the form of an easement. Pursuant to a presubmission conference and this court's order of May 29, 2013, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).[1] Upon review of those memoranda and the record, we affirm.

In 2011, the DOT acquired an easement on Bluemound's property and, pursuant to WIS. STAT. § 32.05(3), made a jurisdictional offer. Bluemound rejected the offer and the DOT served

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

an award of damages in the amount of $9679 for just compensation. *See* § 32.05(7). The undisputed "date of taking" was November 10, 2011.[2] Bluemound appealed the award's adequacy to the trial court. *See* § 32.05(11). The trial court's scheduling order required Bluemound to name its expert witnesses with "a written report for each expert named" by July 2, 2012. Bluemound named expert Steven Vitale and advised that his "appraisal dated May 27, 2011 has been furnished to the DOT." The Vitale appraisal was prepared as part of the preacquisition negotiation process and did not reference the date of taking. Bluemound's witness list stated: "An updated appraisal will be provided to the DOT within 90 days of trial."

The DOT moved to strike the Vitale appraisal because it did not reference the date of taking. Thereafter, Bluemound furnished what purported to be "the updated report of [Vitale] dated September 12, 2012." The "updated report" was simply a letter from Vitale to Bluemound's counsel, and it did not provide an appraisal tied to the date of taking. Two months later, the DOT filed a motion for summary judgment. Though Bluemound filed a response, it still neglected to provide an appraisal valuing the property immediately before and after the date taking.[3]

At a hearing in February 2013, the trial court provided the following summary:

> [Prior to the date of taking], the plaintiff had produced a report which I will designate as the Vitale report. It's dated

[2] Pursuant to WIS. STAT. § 32.05(7)(c), the date upon which the award of damages is recorded in the office of the register of deeds is, for purposes of eminent domain acquisition, "the 'date of evaluation' and also the 'date of taking.'"

[3] Around the time of summary judgment, Bluemound furnished a second letter from Vitale in which he stated that he was "unable to provide revised opinions of value or damages as of the November 7, 2011 date of taking without completing a new appraisal." Vitale's letter also noted that he was not asked to complete such an appraisal.

> May 27, 2011, attempting to establish a value approximately five and a half months before the taking.
>
> What I would note for this record is that there has been no subsequent report, neither an update nor any other report on behalf of [Bluemound], that establishes value at—that relates to the time of taking meaning the value of the parcel prior to the taking and then right after the taking.…
>
> Now, the reason why all of this is important is that the [DOT] has brought a Motion for Summary Judgment on the basis that what is a necessary component of the burden of the plaintiff has not been met as of this point in time and [they] have not provided the requisite information and that that is fatal to their case.

The trial court pointed out that its scheduling order required the disclosure of expert witnesses and their reports by July 2, 2012, and "[s]o certainly there was the opportunity for [Bluemound] to have had [its appraisal] updated in the intervening months." The trial court noted that Bluemound could have submitted an updated report as part of its response to the summary judgment motion, "and it certainly could have been considered for the purposes of the Summary Judgment Motion." Relying on ***Schey Enterprises, Inc. v. State***, 52 Wis. 2d 361, 368-69, 190 N.W.2d 149 (1971), the trial court determined that the Vitale appraisal did not reference the statutory date of taking and "was not relevant and admissible under the circumstances." The court concluded that summary judgment was appropriate because though it was given ample opportunity to do so, Bluemound failed to meet its burden to establish the value of the property immediately before and after the date of taking.

Bluemound filed a motion for reconsideration and included an appraisal report dated March 29, 2013, which referenced the date of taking. The trial court denied reconsideration:

> [The updated appraisal] could have been … available a long, long time ago meaning long before the motion for summary judgment. It … could have been available, and at least under the terms of the scheduling order, probably needed to be available as of July 2nd of

> 2012. But as I indicated, it wasn't even made available for response to the motion for summary judgment. And that would have been an appropriate time to have addressed it or to have brought it [forth] considering that was an issue that was raised as part of the motion ….
>
> Now, so I am satisfied it doesn't constitute newly discovered evidence. It just doesn't meet the criteria.

The trial court denied Bluemound's reconsideration motion and dismissed its action. Bluemound appeals.

Just compensation appeals are governed by the rules set forth in WIS. STAT. § 32.09. Pursuant to § 32.09(6g):

> In the case of the taking of an easement, the compensation to be paid by the condemnor shall be 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 ….

Similarly, under § 32.09(1), "The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by [§] 32.05(7)(c)," here, the November 10, 2011 date of taking.

Neither party disputes that in determining the amount of just compensation, evidence of a property's fair market value must be fixed to the date of taking. *See* ***Schey***, 52 Wis. 2d 361, 368-69, 190 N.W.2d 149 (1971). In ***Schey***, the DOT attempted to introduce an expert appraisal authored months before the date of taking. ***Id***. at 365-66. The expert confirmed that he could not offer an appraisal tied to the date of taking without further preparation. ***Id***. at 370. On appeal, the court held that it was error to admit the appraisal:

> [WISCONSIN STAT. § 32.09(1)] has set a necessary but nevertheless arbitrary standard for fixing the compensation to be paid for land condemned in eminent domain proceedings, namely, the day of taking as the date of valuation. To allow an expert to give opinions of values based on other dates of appraisal would introduce a doubly artificial standard, a standard that would shift upon the ceaselessly moving sands of an appraiser's convenience and degree of preparation.
>
> We do not believe that this court should foster a policy whereby a party is encouraged not to prepare his case adequately. In the instant case the state should not be allowed to take advantage of the failure of its own principal witness. The present rule that the value given must be related to the day of taking should not be abrogated.

Schey, 52 Wis. 2d at 368-69.

We conclude that the trial court properly granted summary judgment in favor of the DOT.[4] It is undisputed that neither Vitale's appraisal nor its prejudgment "updates" tied the property's value to the date of taking. Under ***Schey***, an appraisal that fails to evaluate the fair market value of the affected property immediately before and after the date of acquisition is irrelevant and inadmissible. Despite ample opportunity, Bluemound failed to produce any relevant, admissible evidence of the property's fair market value as of the statutory date of evaluation, and the trial court properly dismissed its claim for compensation.

Bluemound asserts that it was not obligated to provide an updated appraisal report prior to trial. This argument ignores the requirements of the trial court's scheduling order and of the summary judgment process. We are not persuaded that ***Schey*** is distinguishable simply because its inadmissibility determination occurred at the time of trial. Similarly, we reject Bluemound's contention that by naming witnesses concerning the cost-to-cure deficiencies on the property, it

[4] The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751.

demonstrated a material issue of triable fact. As explained by the trial court, cost-to-cure evidence is not relevant "unless we get to the threshold issue that the actual diminution in value is at least the cost to cure."[5] To establish an entitlement to cost-to-cure damages, Bluemound would have to demonstrate that there was a reduction in the property's fair market value and that this reduction was greater than the cost of the potential cure. *See* WIS JI—CIVIL 8103 Eminent Domain: Severance Damages: Cost to Cure. Summary judgment was proper because Bluemound failed to produce evidence on the threshold issue, the property's fair market value before and after the date of taking.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

[5] This argument was asserted in the respondent's brief and was not addressed or disputed in Bluemound's reply brief. We may consider confessed a respondent's arguments left unaddressed in the appellant's reply brief, especially "where the respondent raises the grounds relied upon by the trial court." ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).