

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

SEHN FAMILY NOVI LIMITED
PARTNERSHIP, FRANCIS J. SEHN, and
CELESTINE SEHN,

Defendants-Appellants.

UNPUBLISHED

March 22, 2007

No. 263934

Oakland Circuit Court

LC No. 1996-521477-CC

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

The trial court entered a partial judgment, following a jury trial, awarding defendants \$2,651,601 as just compensation for a parcel of property that plaintiff condemned for use in the M-5 highway construction project, also known as the M-5 Haggerty Connector. The condemned property, consisting of approximately 14.33 acres, was part of a larger parcel of property of approximately 78.87 acres of undeveloped land owned by defendants. The trial court held a hearing on defendants' motion for costs on March 18, 2005. On March 25, 2005, defendants filed a motion for additur or for a new trial premised on evidence presented at the cost hearing that plaintiff allegedly failed to produce before trial. Defendants appeal as of right the July 1, 2005, order denying the motion for additur or for a new trial. We affirm.

I

The condemned property ran through the middle of defendants' property and bisected the remaining property. The west remainder of the property consisted of 10.55 landlocked acres. The east remainder of the property consisted of a nearly 54-acre parcel with 700 feet of frontage on Haggerty Road. Plaintiff Michigan Department of Transportation (MDOT) provided defendants with a good-faith offer of \$1,612,000¹ for the property, based on its then-applicable

¹ MCL 213.55(1) requires a condemning agency, before initiating negotiations for the purchase of property, to make a "good faith written offer" based on the agency's appraisal of just compensation for the property.

low density residential and agricultural zoning classification. Defendants, believing that the “highest and best use” of the property was for high-tech office development, refused MDOT’s offer.

On March 19, 1996, MDOT filed a complaint seeking to determine just compensation. The parties presented widely divergent evidence with respect to just compensation. Consistent with its theory that the highest and best use of the property was as an investment grade property to hold for future development, MDOT presented evidence that, at the time of the taking, the property was not likely to be rezoned to permit the development proposed by defendants. MDOT’s appraiser opined that the highest and best use of the west remainder property² was as excess property, and the highest and best use of the east remainder property was as speculative investment or retention. His calculation of damages included damages for the value of the land taken as well as severance damages for the diminution in value of the remainder of the property. MDOT’s appraiser testified that the difference in the value of defendants’ property before and after the taking amounted to \$1,612,000.

Defendants, on the other hand, sought to establish that the highest and best use of the property was for high tech office development. They retained the engineering firm of Hubbell, Roth, and Clark (HRC) to develop a concept site plan for the property. HRC determined that, cures to the property, including the construction of a bridge and a collector road, would be necessary to permit development of the property after the taking in the same manner as before the taking, at the same cost. It calculated severance damages under the cost to cure method in the amount of \$1,880,000. Defendants’ appraiser testified that the difference in value of defendants’ property before and after taking, including HRC’s cost to cure, was \$5,470,000.³ The jury returned a verdict in favor of defendants in the amount of \$2,651,601.

Subsequent to the jury verdict defendants filed a motion for costs. At that hearing, defendants called Craig Duckwitz of the engineering firm of Anderson, Eckstein, and Westrick (AEW). AEW was retained by MDOT in 1997 to examine the development options for the property under the zoning classifications. At MDOT’s request, Duckwitz and AEW employee Roy Rose “calculated engineering costs for the property in accordance with defendants’ concept site plan.” Although Duckwitz and Rose were listed on MDOT’s first and second amended witness lists and were deposed by defendants, MDOT eventually removed Duckwitz and Rose from MDOT’s third amended witness list. MDOT indicated during several proceedings below that it would not offer evidence to refute evidence regarding the cost to cure associated with defendants’ concept site plan, but rather would challenge the foundation of the site plan itself.⁴

² The parties stipulated that the date of taking was July 22, 1994.

³ Defendants’ appraiser testified that, without construction of a bridge, the property would have a value of “\$2,000,000 perhaps.”

⁴ MDOT filed a motion for summary disposition to dismiss defendants’ damage claims as too speculative. MDOT also sought to strike defendants’ site plan and damage estimate. And at the hearing on MDOT’s motion in limine to exclude any reference to AEW, counsel for MDOT explained:

(continued...)

Defendants served subpoenas on Duckwitz and Rose to appear and testify at trial. MDOT moved to quash the subpoenas, asserting that the two witnesses had been retained to assist counsel and were no longer on the witness list and no longer subject to discovery. The trial court held that MDOT did not have to call the two witnesses, but left open defendants' option to call the witnesses at trial or deposition. Defendants chose not to call either witness or to refer to their calculations.

At the hearing on defendants' motion for costs defense counsel indicated that Duckwitz was called because MDOT disputed defendants' request for reimbursement of costs for work performed by defendants' appraisers after the appraisers completed their appraisal report. Over MDOT's objection as to relevancy, defense counsel questioned Duckwitz with respect to whether AEW calculated a final cost to cure. Duckwitz stated that he calculated the cost to cure in comparison with defendants' cost to cure based on defendants' concept site plans. The calculations resulted in a cost to cure of \$591,500. This information was provided to MDOT by letter dated March 14, 2001.

Subsequent to the hearing defendants filed a motion for a new trial or for additur of the amount of the cost to cure testified to by Duckwitz at the hearing on the motion for costs. Defendants asserted that MDOT wrongfully withheld the March 14, 2001, letter from defendants in violation of a discovery order requiring the exchange of expert witness reports. MDOT responded that the decision not to call Duckwitz and Rose was trial strategy consistent with MDOT's position that the highest and best use of the property was for retention or speculative investment and that evidence of a cost to cure was not relevant to a determination of just compensation. The trial court denied defendants' motion, stating in part:

(...continued)

The reason we don't want to call them [AEW, through Duckwitz and Rose] is because the MDOT had made a decision in this case not to try this case the same way they tried the case – the companion case, argue and quibble over whether their numbers are right, or our numbers are right, or whose numbers are right. We're not going to do that in this case, Your Honor.

The MDOT is going to attack the foundational aspects of the Defendant's case, not the numbers. The foundational aspect of the case.

That's why we don't want to call AEW. We're not going to put a witness on the stand to say it should be \$2.00, or \$3.00, or \$7.00. We're not going to do that in this case.

We're going to attack the foundation of the Defendants' case. That's why we don't want to be forced to have to call AEW while one of their witnesses gets on the stand and says, well, AEW said it might be "X" amount of dollars, or it might be – you might have to do it this way.

They were looking at this hypothetical, conceptual site plan for which no approvals have ever been obtained, and that's all they were doing.

The Court did allow Plaintiff to strike those witnesses but also ruled that Defendants could call the AEW witnesses themselves. Defendants chose not to call the AEW witnesses. With regard to the correspondence, the correspondence constituted a form of work product and in addition stated that about \$3,000,000 of Defendants' concept site plan were unnecessary.

Defendants also seek additur of the verdict. The Court notes that the jury returned a verdict of \$1,000,000 over Plaintiff's offer. Further, the Court allowed Defendants' appraiser to testify as to the full extent of Defendants' alleged damages based upon the HRC concept site plan.

II

Just compensation for property taken by a government agency is constitutionally required. *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Property owners are entitled to just compensation based upon the "highest and best use of their land." *Novi v Woodson*, 251 Mich App 614, 631; 651 NW2d 448 (2002). The purpose of just compensation is to restore the property owner to the position he would have been had the property not been taken. *Id.* Neither the public nor the property owner may be enriched at the other's expense. *Id.* The proper measure of damages in "a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property if applicable." *Id.* at 130. Severance damages are measured by the "cost to cure" or the diminution in value of the remainder of the property. *Dep't of Transp v Sherburn*, 196 Mich App 301, 305-306; 492 NW2d 517 (1992). "To calculate the severance damages, the parties may present evidence of the cost to cure." *Id.* at 306.

III

Defendants first argue that the trial court abused its discretion by denying their motion for a new trial because MDOT was obligated by the trial court's discovery order to disclose AEW's March 14, 2001, letter to MDOT regarding the cost to cure. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004).

A review of defendants' motion for new trial reveals that the motion was premised on MCR 6.211(A)(1)(b), which allows a trial court to grant a new trial on grounds of "[m]isconduct of the jury or of the prevailing party." Defendants alleged that MDOT committed misconduct by failing to produce evidence regarding a cost to cure and that this failure to produce violated the court's February 28, 2001, discovery order. MDOT alleged that it did not have a duty to disclose the evidence regarding costs to cure because Duckwitz and Rose were no longer expert witnesses and would not be testifying at trial in light of MDOT's position that cost to cure is not relevant to the determination of just compensation in this case.

MCR 2.302(B)(4)(a) and (b) govern the discovery of another party's experts' opinions that were acquired or developed in anticipation of litigation or for trial. Such opinions may be obtained only as provided in MCR 2.302(B)(4). MCR 2.302(B)(4)(a) is directed at testimonial experts. MCR 2.302(B)(4)(b), on the other hand, controls discovery of nonwitness experts. Here, Duckwitz and Rose were identified as testimonial experts at the time they were deposed by

defendants in January 2001. At the time of the deposition, Duckwitz and Rose had not analyzed defendants' calculation of the cost to cure. MDOT subsequently decided not to call Duckwitz and Rose and deleted them from their witness list. MDOT is permitted to execute the trial strategy it deems appropriate to defend its case; this extends to changing the status of an expert, which thereby narrows the scope of discovery. See, e.g., *Mantolete v Bolger*, 96 FRD 179, 181 (D Ariz 1982). Duckwitz and Rose became nonwitness experts who had been retained by MDOT. Thus, under MCR 2.302(B)(4)(b), any further discovery required "exceptional circumstances," defined as "circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by another means." "Exceptional circumstances" clearly do not apply in this case.

In *Nelson Drainage District v Bay*, 188 Mich App 501; 470 NW2d 449 (1991), the plaintiff in a condemnation proceeding appealed a trial court order allowing the defendants to depose Jacobs, an expert retained by the plaintiffs but not expected to be called as a witness at trial. This Court stated:

We also note that the purposes of pretrial discovery regarding experts to be used as witnesses at trial-narrowing the issues, preparation of cross-examination and the elimination of surprise at trial-do not support permitting defendants to depose Jacobs once plaintiff decided not to call Jacobs as a witness at trial. Defendants merely wanted to engage in a fishing expedition to determine whether they could benefit from Jacobs' opinion. [*Id.* at 506-507.]

MDOT was not required to produce the March 14, 2001, letter from AEW to MDOT because Rose and Duckwitz were not testimonial witnesses at the time the letter was prepared. MDOT, therefore, did not commit misconduct. Defendants have failed to demonstrate that the trial court abused its discretion by denying defendants' motion for new trial.

IV

Defendants argue that MDOT's failure to produce the March 14, 2001, letter from AEW to MDOT violated a constitutionally mandated duty to disclose. They base the claim for constitutionally mandated disclosure on the Due Process Clause and liken the duty to the duty of the state to disclose material exculpatory evidence to a defendant in a criminal prosecution. See *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In *Brady*, the Court held that due process requires disclosure of evidence in the prosecutor's possession which is exculpatory and material. *Brady v Maryland*, 373 U.S. 83; 83 S Ct 1194; 10 L.Ed.2d 215 (1963); *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998). Defendants cite no authority in support of the proposition that *Brady* mandates disclosure of a nontestifying witness's opinion in a civil action. Nonetheless, even in the criminal context, *Brady* requires the evidence to be both exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Here, defendants retained experts to determine the cost to cure and presented this evidence at trial. Further, the Duckwitz and Rose calculation of the cost to cure was less than defendants' experts' calculation and, therefore, the evidence was not favorable to defendants. Thus, even assuming that *Brady* applied, defendants have failed to demonstrate that their due process rights were violated.

Lastly, defendants argue that they were entitled to a directed verdict on the issue of severance damages because they offered the only evidence of cost to cure and, therefore, the issue was not contested. We review de novo a trial court's decision on either a motion for judgment notwithstanding the verdict or a motion for a directed verdict, "considering the evidence and all reasonable inferences in a light most favorable to the nonmoving party." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 11; 697 NW2d 913 (2005), citing *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "If reasonable jurors could have reached different conclusions, the jury verdict must stand." *Id.*, citing *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

MDOT's position at trial was that the highest and best use of the property was for retention or speculative investment and that defendants' evidence regarding the cost to cure was irrelevant because it was based on a hypothetical concept site plan and was speculative. MDOT's position was that just compensation in this case did not involve any cost to cure and, therefore, it presented no evidence regarding the cost to cure. Rather, MDOT disputed defendant's position regarding highest and best use and its position regarding the cost to cure associated with that highest and best use. MDOT presented evidence that the property was not zoned in accordance with defendants' concept site plan, that the necessary rezoning to allow the development was uncertain at the time of the taking, and that defendants had obtained none of the state and city approvals necessary to develop the property. MDOT also challenged the possibility of rezoning in light of the city's master plan calling for low density residential development in the area, as well as the city's refusal to rezone another parcel, the lack of sewers to the property, and a city imposed moratorium on extending water lines. MDOT clearly contested the applicability of damages for the cost to cure associated with defendants' concept site plan. It was therefore for the jury to determine the fair market value of the property and the amount, if any, of severance damages. The trial court properly denied defendants' motion for directed verdict.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio