STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

ROOKS FAMILY TRUST, J.F. GIRARD ROOKS, and JEANNE A. ROOKS, Co-Trustees,

Defendants-Appellants,

and

UNION BANK & TRUST CO., N.A., and PATER BROTHERS FARMS a/k/a JOHN PATER,

Defendants.

UNPUBLISHED
October 5, 2006

No. 264337
Ottawa Circuit Court
LC No. 01-040310-CC

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

In this condemnation case, defendants[1] appeal by delayed leave granted the trial court's order granting summary disposition in favor of plaintiff and directing that plaintiff pay defendants $793,100 as just compensation for land taken in conjunction with the M-6 highway south of Grand Rapids. We affirm.

I

This condemnation case arises from a complaint filed by plaintiff on June 15, 2001, to condemn land in two separate parcels of property owned by defendants, "parcel 142" (59.49 acres of farmland south of M-6), and a portion of "parcel 141" (34.12 acres and a home north of M-6 at the 8th Avenue interchange).[2] Before trial, a dispute arose concerning the extent to which

[1] Defendants Union Bank and Trust Company and Pater Brothers Farms are merely interested parties in the condemnation action and are not involved in this appeal. This opinion therefore refers to defendants Rooks as simply "defendants."

[2] In the taking of parcel 141, plaintiff sought all but 19.79 acres and the home.

defendants were entitled to compensation for the increased land value from speculation surrounding the M-6 project over the two decades that the project was under development. At issue was section 20(1) of the Uniform Condemnation Procedures Act[3] (UCPA), MCL 213.70(1), which provides:

> A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. Except as provided in section 23, [MCL 213.73] the property shall be valued in all cases as though the acquisition had not been contemplated.

In particular, the parties disputed the import of the statutory provisions that (1) a change in the fair market value that "was substantially due to the general knowledge of the imminence of the acquiring by the agency" shall be disregarded and (2) "property shall be valued . . . as though the acquisition had not been contemplated." According to plaintiff, these provisions precluded compensation for any increase in land value after general knowledge of the *imminence of the M-6 project*. Defendants argued that the plain language of the statute only precludes the increase in value after general knowledge of the *imminence of the condemnation of their property in particular*.

In keeping with its interpretation of the statute, plaintiff moved to exclude evidence of market value based on any increase from speculation related to the M-6 project, which plaintiff argued was improperly included in defendants' expert appraisals. Following a hearing, the trial court ruled that MCL 213.70(1) precluded consideration of any increase in value directly related to the "concretization" of the M-6 highway route and the 8th Avenue interchange, i.e., increase in value after the decision that the route would include the 8th Avenue interchange. Accordingly, the court concluded that defendants' expert appraisals may require revision or, alternatively, that it would be necessary for defendants to establish a proper basis for the expert opinion during the course of trial.

After the trial court's ruling, defendants' expert revised his appraisals and significantly increased defendants' appraised land values by classifying all the property at issue as speculative investment property. As a result, the proffered new appraisals not only increased the value of parcel 141, which was the subject of the parties' earlier dispute, but also increased the value of parcel 142 from $10,000 an acre (a value previously agreed upon by the parties for residential development property) to around $50,000 an acre for speculative commercial development property. Defendants' new appraisals increased the overall value of the property taken from a previous value of $1,616,775 to a claimed value of $4,258,000.

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[3] MCL 213.51 *et seq.*

Plaintiff moved to exclude defendants' new appraisals on the ground that they were contrary to the trial court's order concerning evidence of market value. The trial court agreed, finding that the appraisals did not appear to be in good faith because, if anything, the court's order should have reduced the claimed value, and defendants' appraisals instead doubled the value. The court entered an opinion and order striking defendants' new appraisals.

Plaintiff thereafter moved for summary disposition, contending that absent defendants' appraisals, there was no genuine issue of material fact regarding valuation. Defendants agreed that given the trial court's rulings, there was no reason for a trial because defendants could make no argument that would better their position.[4] The trial court granted summary disposition for plaintiff, determining that defendants were entitled to $793,100 in just compensation.

II

This Court reviews de novo a trial court's denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* Summary disposition is proper if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Id.* at 455.

The decision whether to exclude expert testimony is within the sound discretion of the trial court. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990). Expert testimony may be excluded when based on assumptions that do not comport with the established facts, *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), or the relevant facts and law in a particular case. *Detroit/Wayne Co Stadium Authority v Drinkwater, Taylor, and Merrill, Inc*, 267 Mich App 625, 648-649; 705 NW2d 549 (2005).

III

On appeal, defendants argue that the trial court erred in interpreting MCL 213.70(1) to preclude increased value from speculation related to general knowledge of the imminence of the project as opposed to the acquiring of defendants' property in particular. Further, if the court did not err in interpreting the statute, then the condemnation is an unconstitutional taking in violation of just compensation.

We reject defendants' narrow interpretation of the statute because it is contrary to longstanding condemnation law as reflected in decisions of Michigan courts and the United

[4] Because parcel 141 involved only a partial taking, any argument that increased the speculative investment value of the portion of land retained by defendants would effectively decrease their overall compensation under MCL 213.73.

States Supreme Court.[5] These decisions have withstood scrutiny with respect to constitutional principles of just compensation. More importantly, the lower court result in this case was dictated by defendants' adherence to their interpretation of MCL 213.70(1) and their failure to comply with the trial court's ruling concerning expert testimony. Because we find no abuse of discretion in the trial court's rulings on the expert testimony, and defendants agreed that summary disposition was proper given the rulings, we affirm the trial court's decision.

A

MCL 213.70 recognizes that changes in property value occur when condemnation is imminent. *In re Acquisition of 306 Garfield (Detroit v King)*, 207 Mich App 169, 185; 523 NW2d 644 (1994). Accordingly, our courts have long recognized that "[w]here condemnation proceedings tend to increase the value of property, the property owner is not entitled to the increased value." *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965). Likewise, where condemnation proceedings are protracted and the whole character of an area is changed to the detriment of the landowner, the owner is not obliged to suffer the reduced value of the property. *Id.* MCL 213.70(1) is a codification of this longstanding rule.

> It is an established rule of condemnation law that the value of an interest in property is to be determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation. [*State Hwy Comm v L & L Concession Co,* 31 Mich App 222, 226-227; 187 NW2d 465 (1971).[6]

This Court recently reiterated the law of condemnation and just compensation in another M-6 case, *MDOT v Tomkins*, 270 Mich App 153, 157-160; 715 NW2d 363 (2006).

> "Just compensation . . . must put the party injured in as good position as he would have been if the injury had not occurred." In keeping with this principle, the Michigan Supreme Court has held that determination of "just compensation" requires "that the proper amount of compensation for the property takes into account all factors relevant to market value." The Court further clarified that there was no indication in the UCPA that the Legislature intended to abrogate this established meaning of "just compensation." "Indeed, to attribute such an intent, i.e., the intent to diminish a constitutional standard by statute, is to place the

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[5] See, e.g., See *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373-379; 663 NW2d 436 (2003); *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965); *In re Acquisition of 306 Garfield (Detroit v King)*, 207 Mich App 169, 185; 523 NW2d 644 (1994).

[6] See also authority cited by *Highway Comm, supra*, in support of this rule: 27 Am Jur 2d, Eminent Domain, §§ 282, 283, but see, also, § 436; *United States v Virginia Electric & Power Co*, 365 US 624, 635, 636; 81 S Ct 784; 5 L Ed 2d 838 (1961); *McGovern v New York*, 229 US 363; 33 S Ct 876; 57 L Ed 1228 (1913); *In re Urban Renewal, Elmwood Park Project, supra*; *Matina Holding Corp v State*, 31 AD2d 1004; 299 NYS 2d 95 (1969); MCL 213.389.

legislators in the posture of acting unconstitutionally," which is a construction that the Court will seek to avoid "unless no other construction is possible."

* * *

> A condemnee's damages are, in general, measured by the fair market value of the property taken. [*Tompkins, supra* at 158 (footnotes omitted).]

As recognized by UCPA, the valuation of property in a taking is not formulaic, but instead must be based on sound judgment and discretion based on all the relevant facts in a particular case. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378-379; 663 NW2d 436 (2003). Nonetheless, the act prohibits consideration of any changes in market conditions that are "substantially due" to the "general knowledge" of the "imminent" condemnation of the property. MCL 213.70(1); *MDOT v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 135; 700 NW2d 380 (2005). "Instead, with the exception of enhancement in value of the remainder of a partially taken parcel, [MCL 213.73,] 'the property shall be valued in all cases as though the acquisition had not been contemplated.'" *Haggerty Corridor Partners, supra* at 135-136, quoting MCL 213.70(1). "[C]ompensation should enrich neither the property owner at public expense nor the public at the property owner's expense." *MDOT v Frankenlust Lutheran Congregation*, 269 Mich App 570, 578; 711 NW2d 453 (2006).

Although valuation under MCL 213.70 is generally a fact question for the jury, *Frankenlust Lutheran, supra*, in this case the trial court's ruling resulted from the dispute over the admissibility of the expert appraisals, which is properly an issue for the trial court to decide. *King, supra* at 214. Plaintiff challenged defendants' appraisals on the grounds that they took into consideration changes in market value related to the condemnation proceeding, contrary to MCL 213.70(1). As noted above, plaintiff argued that MCL 213.70(1) precludes consideration of an increase in land value after general knowledge of the *imminence of the M-6 project* while defendants argued that the statute only precludes the increase in value after general knowledge of the *imminence of the condemnation of their property in particular*.

In rendering its initial decision on plaintiff's motion to exclude evidence, the trial court noted that plaintiff's argument was "well-taken," "[a]s [was] some of defendants" argument. In its ruling from the bench, the court indicated that defendants ought to receive the benefit of certain speculation, but once the highway location is announced and the 8th Avenue interchange was established, defendants were not entitled to any subsequent increase from the speculation. The Court reasoned:

> I believe that it's appropriate for [defendants'] appraiser to testify as to the value of the property as an investment property with the potential to be serviced by a major highway. But that value must be established before the location of the highway, particularly the Eighth Street interchange is established. At that point the increased value of the land can be directly attributable to the eminent [sic] acquisition of the property.
>
> [Defendants'] appraiser would have to establish that pre-location value based on rational and appropriate comparables. . . .

> [Defendants'] appraiser may not value the property based on the actual location of the interchange at Eighth Street. At that point it is no longer speculation as to whether a highway would be built and if so whether or not there would be an intersection at Eighth Street. At that point, it becomes eminent [sic] acquisition. And that will be the basis on which the property is valued.
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> Now, that may require some retooling by [defendants'] expert, I am not sure, or maybe that is something that is just going to have to happen during the course of trial as [defendants'] expert tries to establish a basis for the opinion. But I think that plaintiff's argument is well taken. As is some of [defendants'].

The trial court's written order was generally consistent with this reasoning, although the order more specifically stated that "[t]he 8th Avenue interchange shall be deemed established as of the date that a decision was made which contained the route that included the 8th Avenue interchange."

Defendants now object to the trial court's decision on the admissibility of the expert testimony as contrary to the plain language of MCL 213.70(1). However, defendants' narrow interpretation of MCL 213.70(1) does not comport with the law of condemnation and just compensation. Pursuant to the statute, various factors must be considered in establishing the value of the land taken, but the valuation must disregard a change in fair market value that was "substantially due" to the "general knowledge" of the "imminence of the acquiring" by the agency. Case law applying the standards of MCL 213.70(1) has clearly not limited the terms "acquiring" or "acquisition" to only a specific parcel of land. Moreover, defendants' interpretation runs contrary to the express definitions of the UCPA. The UCPA defines the terms "acquiring" or "acquisition" in the context of "property," generally, rather than a "parcel," which is defined as "an identifiable unity of land . . . ." MCL 213.51(a), (b), (g) and (i).

A strict limitation on disregarding market value changes, as urged by defendants, does not comport with fundamental principles of just compensation. It would effectively deny compensation to property owners who suffer a reduction of the value attributable to condemnation or the threat of condemnation, *L & L Concession Co, supra* at 227, when condemnation proceedings are protracted, *In re Urban Renewal, Elmwood Park Project, supra* at 318, and would effectively enrich certain property owners at public expense, *Frankenlust Lutheran Congregation, supra* at 578.

The trial court's initial ruling on the exclusion of evidence was consistent with the standards under MCL 213.70(1) and longstanding case law, and did not improperly circumscribe defendants' expert appraisals of market value. The ruling did not preclude defendants from presenting arguments and evidence that the increased value they sought was not "substantially due" to the "general knowledge" of the "imminent" condemnation of the property and thereby excluded from consideration by the jury. MCL 213.70(1); *Haggerty Corridor Partners, supra* at 135. Furthermore, it was not the ruling itself, but rather defendants' *failure to comply* with the initial ruling that ultimately resulted in summary disposition in this case.

IV

To the extent that defendants argue that the question of valuation under MCL 213.70(1) is a factual question for the jury, we agree, in general. However, the admissibility of proffered expert testimony is a decision properly made by the trial court. In this case, defendants sought to admit the expert appraisals based on their narrow interpretation of MCL 213.70, which the trial court rejected.[7] Consequently, when defendants' second appraisals did not adhere to the trial court's ruling, the trial court struck the appraisals. Even if there is merit to defendants' argument that they were entitled to some consideration of increased value, up to the time that condemnation became imminent, we find no basis for relief under the circumstances of this case.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens

I concur in result only.

/s/ Brian K. Zahra

[7] Further, defendants did not seek to have the disputed issues determined by the jury within the confines of MCL 213.70(1) and only belatedly raised this point at the second hearing on the disputed evidentiary issue.