COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1556 **Cir. Ct. No. 2014CV1163**

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

KENNETH RANSOM,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF CROSS PLAINS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. By exercise of its eminent domain power, the Village of Cross Plains acquired a portion of Kenneth Ransom's property for a road project. Ransom appealed the just compensation amount to the circuit court, and, while that appeal was pending, the Village temporarily used a different

portion of Ransom's property for the same project. Ransom sought damages for this temporary easement in the context of his pending just compensation appeal. The circuit court excluded those alleged damages and instead adopted the Village's position that Ransom's remedy for temporary easement-related damages was an inverse condemnation claim. Ransom now appeals to this court, renewing his claim that the easement-related damages are compensable as part of his just compensation appeal. Because Ransom fails to persuade us that he is correct, we affirm. The parties have not briefed whether Ransom may still bring his inverse condemnation claim and, therefore, we do not weigh in on that question.

Background

¶2 In March 2014, the Village acquired 703 square feet of Ransom's property for its road project by exercising its statutory eminent domain power, that is, by recording an award of damages under WIS. STAT. ch. 32.[1] The award provided that just compensation for this partial taking of Ransom's land was $6,650.

¶3 In April 2014, Ransom appealed the award of damages to the circuit court. Ransom submitted an appraisal stating that just compensation for the 703-square-foot fee acquisition was $11,300. The Village submitted an appraisal admitting to a just compensation value of $11,400, slightly higher than the value asserted by Ransom. Based on this conceded value, the Village moved for summary judgment that would, in effect, give Ransom the higher value.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Ransom opposed summary judgment, arguing that there was more at stake than the value of the acquired 703 square feet. Ransom argued that he was also entitled to damages based on the temporary easement referenced above. According to Ransom, the easement lasted from August 2014 to November 2014. Ransom asserted that the Village knew at the time of the partial taking in March 2014 that the Village would need a temporary easement. Ransom claimed, therefore, that he should receive his damages for the temporary easement as part of his just compensation appeal from the March 2014 damages award.

¶5 The Village did not dispute that Ransom might be entitled to compensation for the temporary easement. Rather, the Village contended that the alleged temporary easement damages were not compensable as part of the pending just compensation appeal. The Village argued that Ransom's remedy for the taking of the temporary easement was to recover damages through an inverse condemnation claim.

¶6 The circuit court agreed with the Village and granted summary judgment, disallowing damages for the temporary easement. We reference additional facts as needed below.

Discussion

¶7 Whether Ransom's damages for the temporary easement are compensable as part of his just compensation appeal from the March 2014 partial taking is, under the posture of this case, an issue that hinges on the proper interpretation of a statute. We review such issues de novo. *See* ***State v. Moreno-Acosta***, 2014 WI App 122, ¶8, 359 Wis. 2d 233, 857 N.W.2d 908 (statutory interpretation is an issue that we review de novo); *see also* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 385, 595 N.W.2d 96 (Ct. App. 1999) (the measure of

damages for a given type of claim presents a question of law for independent review).

¶8 The statute that determines the amount of just compensation for the March 2014 partial taking of Ransom's property is WIS. STAT. § 32.09(6). That statute provides, in part:

> [T]he compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum 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, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist ….

¶9 Ransom makes several arguments, one of which is developed for the first time on appeal. We put this new argument aside for now and start with arguments that Ransom has preserved for appeal. We reject all of those arguments. We then address the new argument, and conclude that it is forfeited.

A. Ransom's Non-Forfeited Arguments

¶10 Ransom's non-forfeited arguments largely ignore pertinent statutory language that determines just compensation. Ransom appears to place more focus on why it was unreasonable, at least in Ransom's view, to require him to bring an inverse condemnation claim. These arguments are better directed at the legislature. Regardless, as explained below, none of Ransom's arguments persuade us that the circuit court was wrong to exclude Ransom's temporary easement-related damages from Ransom's just compensation award for the partial

taking, or that the court was wrong to conclude that Ransom is required to bring an inverse condemnation action for those damages.

¶11 Ransom puts significant emphasis on what he views as evidence that, at the time of the March 2014 damages award for the partial taking, the Village knew that it would need a temporary easement as well. We will assume, without deciding, that the Village had such knowledge. Similarly, without deciding the issue, we will assume, as Ransom argues, that the Village could and should have exercised its eminent domain power at that time to include the anticipated easement in the March 2014 partial taking. But the undisputed fact is that the Village *did not* exercise its eminent domain power to take the easement in the March 2014 taking. Given this fact, Ransom fails to persuasively explain why easement damages may nonetheless be included in the just compensation award for the March 2014 taking. Among other things, Ransom fails to come to grips with the statutory requirement that just compensation for the March 2014 taking must be determined as of the date the award of damages was recorded. *See* WIS. STAT. § 32.05(7)(c). Here, that date was March 26, 2014, several months before the Village can be said to have taken the temporary easement.

¶12 Ransom also argues that it "makes little sense" to require him to bring an inverse condemnation claim because the Village concedes that the Village took the temporary easement. Ransom asserts that inverse condemnation claims are more "typical" when the government denies having taken property in the first place. Regardless what is typical, Ransom's "makes little sense" argument falls far short of showing that an inverse condemnation claim is not a proper or adequate remedy here.

¶13 Ransom argues that forcing him to bring an inverse condemnation claim is bad public policy because it encourages condemnors to avoid paying for temporary easements. Putting aside that this court does not make policy, Ransom's policy argument is not compelling. Ransom assumes that condemnors will intentionally attempt to avoid paying for temporary easements, but he does not provide a good reason for us to make the same assumption. Moreover, Ransom's concern appears overstated. If the just compensation amount for an anticipated temporary easement is comparatively large, then a condemnor already has a strong incentive to pay up front; not paying up front is practically certain to invite costly and potentially disruptive litigation with the landowner. If, instead, the just compensation amount is relatively small, as appears true here, then the condemnor has little financial incentive to avoid paying the additional incremental cost.[2] We note that Ransom points to nothing suggesting that the Village's intent was to avoid paying just compensation for the temporary easement at issue here or any other temporary easement associated with the road project.

¶14 We acknowledge that it might seem burdensome to Ransom to require him to bring an inverse condemnation claim—that is, a separate action—to recover damages for the temporary easement. But there is nothing inherently unfair about the requirement. Indeed, that is what Ransom would have needed to

[2] It appears that the amount in dispute here is no more than $267. Although Ransom claims that his damages for the temporary easement were $2,900, we fail to see how Ransom reasonably arrives at that figure. Ransom seems to be adding the asserted value of damaged asphalt ($2,100) to the annual rental value of the easement area ($800). However, Ransom does not dispute the Village's assertion that the Village replaced the damaged asphalt. Further, Ransom does not explain why his damages would include a full year's rental value when the easement lasted no more than four months. In sum, as far as we can tell from Ransom's briefing, his just compensation for the easement may be no more than $267, representing four months of rent at an $800 annual rental value.

do if all that happened here was that the Village took the temporary easement as it did without also taking other property of Ransom's by exercising its eminent domain power. We see no material difference in fairness or unfairness between the hypothetical situation and what actually occurred here.

¶15 Finally, for support Ransom relies on the case of ***Somers USA, LLC v. DOT***, 2015 WI App 33, 361 Wis. 2d 807, 864 N.W.2d 114. Ransom's reliance on ***Somers***, however, is misplaced. In ***Somers***, as part of a land transaction, a property owner inadvertently dedicated property for a road project through a drafting error. ***Id.***, ¶¶3-5. The condemnor subsequently occupied the property and argued, based on the landowner's inadvertent mistake, that the condemnor was entitled to occupy the property without paying just compensation. ***Id.***, ¶¶6, 8, 10. This court disagreed and held that the condemnor could not rely on the landowner's mistake to take property without paying just compensation. *See* ***id.***, ¶¶2, 16. Ransom argues that here, when the *condemnor* is the one who made a mistake, it would be even more unfair to allow the condemnor to avoid paying just compensation. But, unlike the condemnor in ***Somers***, the Village has never argued that the Village was entitled to take property without just compensation. Rather, the Village makes the more limited argument that Ransom's alleged damages are not an available remedy in this proceeding.

B. Ransom's Forfeited Argument

¶16 In the final portion of Ransom's briefing on appeal, Ransom for the first time develops an extensive and hard to summarize statutory interpretation argument regarding severance damages. We conclude that the argument is forfeited. Rather than attempt to summarize the argument at the outset, in the following paragraphs we first set forth forfeiture law, then summarize the pertinent

statutory language, and, finally, explain Ransom's argument as best we can and explain why declaring it forfeited is appropriate.

¶17 "Arguments raised for the first time on appeal are generally deemed forfeited." ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810. This forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *See* ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727. One main purpose of the rule "is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. The forfeiture rule gives both the circuit court and the parties notice of the issues and a fair opportunity to address them. *See* ***id.***

¶18 Thus, we have said that "the 'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court." ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155; *see also* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not … blindside trial courts with reversals based on theories which did not originate in their forum.").

¶19 Understanding why we deem Ransom's argument to be forfeited begins with a distinction between two subsections in WIS. STAT. § 32.09, sub. (6) and sub. (6g). As we shall see, Ransom's appellate argument focuses on sub. (6), whereas his circuit court argument appeared to focus on sub. (6g). Each subsection sets forth rules for determining just compensation for a category of taking. Subsection (6) applies to a "partial taking of property *other than an*

easement" (emphasis added). Subsection (6g) applies to "the taking of *an easement*" (emphasis added). Both subsections require the condemnor to "giv[e] effect" to severance damages, including, as follows:

> In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property.

WIS. STAT. § 32.09(6)(e); *see also* § 32.09(6g) (incorporating § 32.09(6)(a) to (6)(g)).

¶20 Ransom's argument begins with an acknowledgment that his just compensation appeal arises out of the March 2014 taking and award of damages, a partial taking with just compensation determined under *sub. (6)*. That is, Ransom asserts that his appeal arises out of a "partial taking of property *other than an easement*." *See* WIS. STAT. § 32.09(6) (emphasis added). Ransom then argues, as we understand it, that his severance damages for the March 2014 partial taking should have included the temporary easement that the Village knew the Village would later need. That is, we understand Ransom to be arguing that damages for the temporary easement are available because they are, in the words of the statute, "damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property." *See* § 32.09(6)(e). In support, Ransom cites authorities for the proposition that § 32.09 must be broadly construed in favor of landowners and that every element affecting the value of condemned property should be considered in setting just compensation.

¶21 This severance damages argument is much more developed, and quite different, than what Ransom appeared to argue in the circuit court based on WIS. STAT. § 32.09. To the extent Ransom made a § 32.09 argument in the circuit court, Ransom appeared to focus on *sub. (6g)* of the statute, the subsection for the "taking of an easement." And, Ransom relied on ***118th Street Kenosha, LLC v. DOT***, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486, a case involving sub. (6g) and the question of whether a temporary easement is compensable as the "taking of an easement" under that subsection. *See* ***118th Street Kenosha***, 359 Wis. 2d 30, ¶¶4, 6, 36 & n.12, 38. ***118th Street Kenosha*** did not involve any issue as to severance damages.

¶22 It is true that, in his circuit court briefing, Ransom quoted the severance damages language from sub. (6)(e), which applies to both sub. (6) and sub. (6g) takings. It is also true that Ransom referred to severance damages at the summary judgment hearing. However, as we read Ransom's circuit court briefing, the thrust of Ransom's WIS. STAT. § 32.09 argument in that forum was that his damages for the temporary easement should have been compensated as the "taking of an easement" under *sub. (6g)* and ***118th Street Kenosha***, not, as Ransom now appears to argue, that those damages should have been compensated as severance damages for the "partial taking of property other than an easement" under *sub. (6)*. On appeal, Ransom has largely abandoned reliance on sub. (6g). He makes no argument based on sub. (6g), apart from a passing assertion in his reply brief that a temporary easement would be valued the same pursuant to sub. (6g) as it would in an inverse condemnation claim under the state constitution.

¶23 We acknowledge that there may be overlap between Ransom's sub. (6) argument and his sub. (6g) argument insofar as both subsections allow for the same type of severance damages. However, we conclude that this overlap is

not enough for Ransom to avoid the forfeiture rule. When addressing forfeiture, it is not enough that "the [new argument] somehow relate[s] to an issue that was raised before the circuit court." *See* ***Townsend***, 338 Wis. 2d 114, ¶27; *see also* ***id.***, ¶25 ("[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court."). Here, Ransom's sub. (6) argument and sub. (6g) argument are sufficiently different that reversal based on his sub. (6) argument would "blindside" the circuit court, contrary to the forfeiture rule. *See* ***Townsend***, 338 Wis. 2d 114, ¶25; ***Rogers***, 196 Wis. 2d at 827.

¶24 Accordingly, we conclude that Ransom has forfeited his severance damages argument. And, on that basis, we decline to address the argument's merits.

Conclusion

¶25 For the reasons stated above, we affirm the judgment limiting Ransom's just compensation for the March 2014 taking to $11,400.

By the Court.—Judgment affirmed.

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