

NOTICE  
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2016 IL App (5th) 150175-U

NO. 5-15-0175

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE DEPARTMENT OF TRANSPORTATION,	)	Appeal from the
State of Illinois,	)	Circuit Court of
	)	Monroe County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-ED-2
	)	
LARRY J. WINKLER,	)	Honorable
	)	Dennis B. Doyle,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.  
Justices Chapman and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment directing verdict in favor of the plaintiff in a condemnation proceeding affirmed, where defense counsel failed to comply with Illinois Supreme Court Rule 213(i), sanction striking the testimony of defense witness and barring testimony of additional defense witness concerning the issue of valuation of the subject property, pursuant to Supreme Court Rule 219(c), was neither punitive nor an abuse of discretion, written report of excluded witness was not improperly withheld from the jury, and the plaintiff's expert witness did not violate the unit rule.

¶ 2 The defendant, Larry J. Winkler, appeals the January 26, 2015, judgment of the circuit court of Monroe County that entered a directed verdict in favor of the plaintiff, the

Department of Transportation of the State of Illinois (IDOT). For the following reasons, we affirm.

¶ 3

### FACTS

¶ 4 The facts of this case are not in dispute. On April 1, 2013, IDOT filed a complaint for condemnation against Winkler, and other defendants who are not parties to this appeal. On May 24, 2013, Winkler filed a counterclaim against IDOT, alleging that the taking of the subject real property would result in damages to the remainder of the real property not taken. The circuit court was closed on Monday, January 19, 2015, in observance of Martin Luther King Jr. Day. A jury trial was held the following two days, January 20 and 21, 2015.

¶ 5 On the first day of trial, Winkler's appraisal expert, Ernest Demba, testified. Demba indicated that, in forming his opinion regarding the market value of the property, he had relied on James Rocca's valuations of the trees on the property.<sup>1</sup> In that regard, Demba testified that "it's incumbent upon me to talk to experts and rely upon them and form an opinion." He added that Rocca's opinions "go into my calculations and my adjustments," and the total is "formed with the differences and the inputs on the trees." After cross-examination of Demba, the circuit court adjourned for the day.

¶ 6 The next morning, court reconvened with the expectation that Winkler would present his second expert, James Rocca. At this point, outside the presence of the jury,

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<sup>1</sup>Rocca is an arborist who was also retained by defense counsel as an expert witness.

defense counsel notified the circuit court that Demba, who testified the day before, had relied on false information. Specifically, James Rocca had contacted defense counsel on January 19, 2015—the day before the trial began—and informed him that he had inadvertently provided false information to Demba, who, as aforementioned, relied on this false information in preparing his appraisal report, which was the basis of his testimony. Rocca had informed defense counsel the day before the trial commenced that the correct calculation reflected a value that was 20% less than the calculation which he had previously submitted to Demba.

¶ 7 Upon learning this, the circuit court inquired as to whether Demba could be brought back for cross-examination. Defense counsel responded that Demba was not present, that he had a medical appointment, and defense counsel was uncertain when Demba would be able to testify. The circuit court inquired as to how Demba's appraisal would have changed had he been provided the correct information from Rocca. Defense counsel insisted that Demba's testimony would not have changed, and he maintains that position on appeal. The circuit court found it unreasonable to keep the jury waiting indefinitely and concluded that defense counsel was not making a reasonable effort to call Demba back to the stand. Counsel for IDOT made a motion to strike Demba's testimony and to bar Rocca from testifying. The circuit court granted the motion, pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002), for defense counsel's failure to fulfill his duty to supplement discovery, as required by Supreme Court Rule 213(i) (eff. Jan. 1, 2007). Defense counsel presented Rocca's testimony outside the presence of the jury as an offer of proof. IDOT then proceeded with its case, presenting a civil engineer

and an appraisal expert. At the conclusion of the trial, Winkler moved for the circuit court to strike the testimony of IDOT's appraisal expert. The circuit court denied the motion. IDOT moved for a directed verdict, as the only remaining opinion for valuation of the property had been presented by IDOT. The circuit court directed the verdict in favor of IDOT. Winkler filed a timely notice of appeal.

¶ 8

#### ANALYSIS

¶ 9 On appeal, we must determine whether the circuit court erred by granting a directed verdict in favor of IDOT. We review *de novo* the grant of a directed verdict. *Susnis v. Radfar*, 317 Ill. App. 3d 817, 825 (2000). "A motion for directed verdict should be granted when 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand.'" *Id.* at 826 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "A directed verdict is improper where 'there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.'" *Id.* (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992)).

¶ 10 In looking at whether the directed verdict was properly granted, we must first determine whether Demba's testimony was properly stricken and Rocca's testimony properly barred by the circuit court, as a sanction pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002), for defense counsel's failure to comply with the duty to supplement discovery, as required by Supreme Court Rule 213(i) (eff. Jan. 1, 2007). "[T]he

imposition of sanctions for failure to comply with discovery rules and orders, and decisions regarding what type of sanction to impose, are matters within the broad discretion of the trial court." *Kubichek v. Traina*, 2013 IL App (3d) 110157, ¶ 30. "We may reverse a trial court's imposition of a particular sanction only when the record establishes a clear abuse of discretion." *Id.*

¶ 11 Illinois Supreme Court Rule 213(i) (eff. Jan. 1, 2007) provides that "[a] party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." Here, defense counsel failed to seasonably supplement discovery when the new information became available. He was notified by Rocca about the erroneous information on Monday, January 19, 2015, the day before the trial began. Knowing this, defense counsel allowed Demba to testify based on false information when the trial commenced the following day. It was not until the second day of trial, Wednesday, January 21, 2015, that defense counsel revealed the new information to the court. He could have made the information known before the trial ever began, but opted not to, resulting in a blatant violation of Supreme Court Rule 213(i) (eff. Jan. 1, 2007).

¶ 12 Having established that defense counsel violated the above discovery rule, we turn to Supreme Court Rule 219(c) (eff. July 1, 2002), which provides that if a party unreasonably fails to comply with any discovery rules, the circuit court may, *inter alia*, bar a witness from testifying regarding that issue. That is precisely what happened here. As established, defense counsel clearly violated Supreme Court Rule 213(i) (eff. Jan. 1, 2007). As a sanction, the circuit court struck Demba's testimony and barred Rocca from

testifying, which is proper under Supreme Court Rule 219(c) (eff. July 1, 2002). We cannot say that no reasonable judge would have done as the circuit court did here. The trial had commenced and the jury was present. Defense counsel allowed Demba to testify based on false information. Demba himself testified that his opinion was based, in part, on the information Rocca had provided, information defense counsel knew to be false. Defense counsel made no move to inform the court or IDOT's counsel about the newly discovered information while Demba was still available to be cross-examined. Once defense counsel finally made the revelation, Demba was neither present nor available and defense counsel made no reasonable effort to retrieve him for cross-examination. In light of these facts, we find the sanction imposed by the circuit court, striking Demba's testimony and barring Rocca's testimony, to be reasonable, and we reject Winkler's suggestion that the sanction was punitive. Accordingly, the circuit court did not abuse its discretion by imposing the sanction.

¶ 13 Winkler argues that because Demba's testimony was stricken from the record and his written report was not, the circuit court erred by not allowing the jury to review the written report as conflicting evidence. This argument is waived because Winkler failed to raise it in the circuit court, nor did he raise it in his posttrial motion. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) (issues not raised in the trial court are waived and may not be raised for the first time on appeal). However, waiver notwithstanding, we find that it was not error for the circuit court to withhold Demba's report from the jury because the information in the report was a part of Demba's testimony. Allowing the jury to consider the report would have rendered pointless the

effect of the discovery sanction which we already established was reasonable. See *Lindholm v. Wilson*, 196 Ill. App. 3d 914, 919 (1990) (report of expert was not considered, where testimony of that expert was properly excluded as discovery sanction). For these reasons, we reject Winkler's argument.

¶ 14 Winkler's final argument is that the testimony of IDOT's valuation witness should have been stricken because it violated the unit rule, and a directed verdict in favor of IDOT was therefore improper. "The unit rule requires that the value of improved property be considered as a whole, without assignment of separate costs for the land and individual improvements." *Department of Transportation v. First Bank of Schaumburg*, 260 Ill. App. 3d 490, 496 (1992). "The fair cash market value of improved property is *not* the sum of its component parts, i.e., the land and improvements valued separately." (Emphasis in original.) *Id.* at 496-97. "To avoid misleading \*\*\* the jury, the evidence should be confined to the value directly at issue, which is the value of the improved property as a whole." *Id.* at 497.

¶ 15 Here, Winkler alleges that IDOT's appraiser, Donna Howard, testified that she valued the subject property as a whole in the before condition, then subtracted the value of the part taken. Winkler contends that Howard did not value the whole property in the after condition and that her calculation violated the unit rule because she valued the part taken as separate from the whole tract. A review of the transcript reveals that this is a mischaracterization of Howard's testimony.

¶ 16 Howard testified that she calculated the value of the subject property as a whole before the taking. That calculation was based on a comparative market analysis of

comparable property in the area, and a fair cash market value of the property at its highest and best use as of April 1, 2013. That amount totaled \$165,000. Howard further testified that the fair cash market value of the remainder, as a part of the whole, *before* the taking totaled \$159,150. She added that the fair cash market value of the remainder property *after* the taking totaled \$159,150, an unchanged amount from the property before the taking because it was determined that there would be no damages to the remainder property.

¶ 17 Howard agreed that she valued the taking at \$5,850, but she made it clear that she was careful not to violate the unit rule. She explained that the taking was the contributory value of the whole, and she calculated the value of the land with the trees and how that contributed to the whole property. She testified that, in order to value the whole after the taking, she looked at comparable sales, and she considered that Winkler's property no longer consisted of a yard of 12,375 square feet, but now consisted of a yard of 12,091 square feet.

¶ 18 Winkler additionally suggests that Howard violated the unit rule in her method of calculation of IDOT's temporary construction easement. He again argues that Howard did not value the whole property. This is belied by the record. After describing the value of the property as a whole, Howard testified that a temporary construction easement "can be thought of as basically renting the land from the property owner, and so it is typical to use a percentage of the fee[,] the total market value of land in the area to do that." Howard observed the location of the easement, which was on the far back border of the property, which did not interfere at all with the ingress and egress of the property.

Howard's calculation was determined by applying 5% per year in the use of the easement, which totaled \$300. For these reasons, Winkler's argument that Howard violated the unit rule is without merit. Accordingly, the circuit court did not err by denying Winkler's motion to strike Howard's testimony.

¶ 19 Having made the above determination that the imposed sanction was not an abuse of discretion and that the circuit court did not err by not striking the testimony of IDOT's valuation witness, all that remained for the jury to consider regarding valuation of the property was the evidence presented by IDOT. Because of this, all of the evidence, when viewed in a light most favorable to Winkler, so overwhelmingly favored IDOT that no contrary verdict could ever stand. See *Radfar*, 317 Ill. App. 3d at 826. Moreover, there was no evidence to demonstrate a substantial factual dispute, nor was the credibility of the witnesses or a determination regarding conflicting evidence decisive to the outcome of the case. See *id.* For these reasons, the directed verdict in favor of IDOT was appropriate.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the January 26, 2015, judgment of the circuit court of Monroe County is affirmed.

¶ 22 Affirmed.