

IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 19-1582
Linn County No. LACV087659
Linn County No. CVCV087911

IN THE MATTER OF THE CONDEMNATION OF
CERTAIN RIGHTS IN LAND FOR THE EXTENSION
OF ARMAR DRIVE PROJECT BY THE CITY OF
MARION, IOWA.

PHYLLIS M. RAUSCH, Trustee of the
WILLIAM J. RAUSCH FAMILY TRUST,

Plaintiff-Appellant,

vs.

CITY OF MARION, IOWA,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE CHIEF JUDGE PATRICK R. GRADY

PROOF BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

IN A CONDEMNATION PROCEEDING SEEKING A DETERMINATION OF JUST COMPENSATION FOR A TAKING, IS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE PROPERTY OWNER (A TRUST) THE ABILITY TO PRESENT TO THE JURY EVIDENCE OF COMPARABLE SALES BY EXHIBITS AND THE TESTIMONY OF A REPRESENTATIVE OF THE OWNER, A TRUST BENEFICIARY, WHO TESTIFIED AS TO THE VALUE OF THE TRUST PROPERTY?

Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376 (Iowa 1975)

Department of Transportation v. Mendel, 237 Ga.App.900, 902, 517 S.E.2d 365 (1977)

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Iowa Code Section 428A.5

Iowa Code Section 622.36

Iowa R. Evidence 5.103(a)
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ROUTING STATEMENT

The Appellant believes this case involves the application of existing legal principles, meaning the appeal should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

This is a lawsuit to determine the amount of damages due Phyllis M. Rausch, as Trustee of the William J. Rausch Family Trust, owner of vacant land in Marion, Iowa, because of the condemnation or taking of a part of the land in connection with the establishment of a street located between Iowa Highway 100, also known as Collins Road, and the Marion city boundary with the City of Cedar Rapids.

On March 29, 2017, the City of Marion, as the acquiring agency, condemned the particular parcel of land and easements involved in this lawsuit. Notice of Appeal from the Condemnation Commission was filed. (Notice of Appeal) A Petition was filed. (Petition) The City of Marion filed an answer. (Answer)

Prior to trial, the City of Marion filed a Motion in Limine and the matter was briefed and argued on August 7, 2019. (Motion in Limine; Hearing Transcript August 7, 2019) The Motion in Limine was granted prohibiting three witnesses from testifying at trial regarding comparable sales. (Order August 14, 2019) The Trial Court based the exclusion of comparable sale testimony by James Rausch and exhibits of sales on the need to have an expert witness identify sales as comparable before the value of the sales could be presented to the jury. (Trial Tr. 36-37, 59, 64; Order August 14, 2019) Two

other potential witnesses were excluded for other reasons. (Order August 14, 2019) The depositions of the three potential witnesses were considered by the Trial Court. Id.

Based upon the deposition of James Rausch and the testimony of James Rausch entered into the record prior to the commencement of trial, Plaintiff established a basis for James Rausch to testify as to the property taken. (Deposition of James Rausch 7-9, 19-21, 24-28 and Trial Tr. 21-65). At the trial, he stated the value of the property before the taking and after the taking. (Trial Tr. 110-111) His testimony, however, was not connected to any comparable sale testimony because of the Trial Court's ruling excluding evidence of comparable sales. (Trial Tr. 64; Order August 14, 2019) Without evidence of comparable sales to support the testimony of James Rausch, the jury returned a verdict that matched the damages according to the City's expert. Verdict.

Plaintiff Phyllis Rausch appeals seeking a reversal of the Trial Court's ruling, vacation of the Jury Verdict Order and the grant of a new trial at which evidence of comparable sales may be introduced by Plaintiff through a witness who is not a hired expert.

STATEMENT OF THE FACTS

Since 1969 William Rausch's name has been on title to certain real estate located in Marion, Iowa. (Trial Tr. 75) Following his death in 2002, the real estate was conveyed by deed to Phyllis M. Rausch as Trustee of the William J. Rausch Family Trust. (Trial Tr. 78). The property abuts Iowa Highway 100, a four-lane divided highway with access limited to specific locations. (Trial Tr. 90, 108-109) Traffic counts on the highway are about 20,000 vehicles a day. (Trial Tr. 90) Direct access to the Trust property is controlled by an operating traffic signal that was installed before the condemnation. (Trial Tr. 89) The Trust property is vacant. (Trial Tr. 82) Seeking to connect Iowa Highway 100 to the City of Cedar Rapids, the City of Marion condemned fee title to a portion of the Trust property. (Exhibit 1) The City also condemned two construction easements. Exhibit 2. The fee taking divided the Trust property into a .61 acre triangular shaped parcel and an 8.33 acre parcel. (Exhibit 3) Some of the larger parcel cannot be developed with improvements. (Trial Tr. 91) The amount of buildable land in the larger parcel was a matter of conjecture. (Trial Tr. 177-179)

Phyllis Rausch claimed damages for the fee title to the .63 acre (27,400 square feet) of land taken, and the easements (a combined 33,361 square feet),

and claimed further damages asserting that the remaining land was reduced in value. (Petition; Exhibit 3)

The Trust was established under the Will of William J. Rausch who died in 2002. (Trial Tr. 78) Phyllis Rausch and William Rausch had five children together. (Trial Tr. 78) In the Will of William J. Rausch the property that the City condemned was placed in trust with income from the property to go to Phyllis Rausch during her life. (Trial Tr. 79) She was named Trustee. In addition, the Trustee has the power to invade the principal of the Trust for the health, education, support and maintenance of Phyllis Rausch. (Trial Tr. 23) Upon the death of Phyllis Rausch, the trust assets are to be distributed to her five children, including James Rausch, in equal shares. (Trial Tr. 79)

Phyllis Rausch became unable to participate in hearings or trial of the condemnation. (Trial Tr. 75-76) The Trust was represented at trial by her son, James Rausch. (Trial Tr. 74)

James Rausch has helped Phyllis Rausch with her real estate affairs for several years. (Trial Tr. 30-31, 80; Rausch Depo 7-9) James Rausch is familiar with the Trust's real estate and the condemnation. (Trial Tr. 98-100, 121-123; Rausch Depo. 15-17) Utilities have been extended to the Trust's real estate. (Trial Tr. 239; Rausch Depo. 17) The Trust's real estate is zoned for general commercial, a very inclusive district. Trial Tr. 159-162; Ex 6; Angstman Depo. 22-24) Identified as a witness for Trustee, James Rausch testified as to the

value of the Trust property before the taking and after the taking. (Trial Tr. 104, 110-111, 119-121) He testified that the before value was \$12.00 per square foot (Trial Tr. 104). His value and damages testimony was based on review of sales of property for development or redevelopment. (Trial Tr. 41-45) The sales were not disclosed to the jury because of the Trial Court's exclusion order.

The Trust's property is located in the Lindale Mall area of Cedar Rapids and Marion. (Trial Tr. 92-97, 101, 206) The Lindale area is the leading retail area in the Cedar Rapids and Marion market. (Trial Tr. 207) Several national stores are found in the Lindale area, along with a convenience station, restaurants and office uses. (Trial Tr. 92-101) The Trust's property is located about one-half mile away from a major intersection of Highway 100 and First Avenue in Cedar Rapids. (Trial Tr. 92) A Menards store is located nearby. (Trial Tr. 93) Vacant land is scarce in the Lindale area except for the Trust's property and other undeveloped land lying further away from Lindale Mall. (Trial Tr. 92-94; 209-210) Some redevelopment is occurring in the Lindale Mall area with demolition necessary to create a buildable site. (Trial Tr. 42-43; 210)

The Cedar Rapids and Marion area has another mall area, Westdale, that is undergoing extensive redevelopment. (Trial Tr. 101-102) The Westdale area has major big box retailers, a Menards store, convenience stores, restaurants and hotel. (Angstman Depo. 28-29) The Westdale area is located in Cedar

Rapids, west and south of the Lindale area. (Angstman Depo. 28) The Westdale area is a secondary commercial center when compared to the Lindale area. (Trial Tr. 43, 101, 207)

Sales of vacant land in the Lindale area are few. (Trial Tr. 209) More often there is redevelopment of land with improvements and demolition is added to land cost. (Trial Tr. 42-43, 236-238) A half mile away a restaurant parcel was sold and the restaurant building demolished for another use; the reported sales price was about \$21 per square foot. (Trial Tr. 43)

Sales of vacant land or redevelopment land in and near the Westdale area were presented for purposes of the preservation of error on the Trial Court's ruling. (Rausch Depo. 26-28, 33-34; Angstman Depo. 28-31) Sales included land for medical offices operated by an area hospital and a convenience store. The latter was the redevelopment of a vacant bank site. These sale prices were \$9.25 per square foot and \$9.71 per square foot, respectively. (Angstman Depo. 28-31)

The Trust's property located on a state highway, at a signalized intersection, is suitable for medical offices, convenience store, restaurants and other highway commercial uses. (Trial Tr. 217-219; Exhibit 6) Portions of the Trust's property, although not capable of being built upon, provide storm water management and green space. (Trial Tr. 123, 205)

James Rausch is knowledgeable about properties that had sold in Cedar Rapids and Marion. (Trial Tr. 26-29, 33-34; Rausch Depo. 19-20, 25-28) He knew enough about the properties, the location, size, characteristics and sale price of the properties to establish that the properties were comparable to the Trust property. (Trial Tr. 25-32, 40-46; Rausch Depo. 7-8) He testified (without the jury present) as to sale information on the comparable properties. (Trial Tr. 26-29; Rausch Depo. 19-21)

Defendant City of Marion hired an appraiser who prepared an appraisal report and testified at the trial. (Trial Tr. 171) The appraiser placed a value on the real estate of \$120,000 per acre which is \$2.75 per square foot. (Trial Tr. 188)

Phyllis Rausch requires around the clock care and supervision, which James Rausch almost single handedly provides. (Trial Tr. 75-76) Accordingly, James Rausch arranged for a caretaker to stay with Phyllis Rausch and he participated in the trial as her surrogate and as a beneficiary of the Trust. (Trial Tr. 78-79) He had assisted his mother in investing proceeds from the sale of other land suitable for development. The proceeds were ultimately invested in Iowa farmland. (Trial Tr. 25, 31, 60-62; Rausch Depo. 20-21) He was responsible for many aspects of the real estate owned by the Trust, by Phyllis Rausch or by her own trust. (Trial Tr. 80-81)

James Rausch gained experience in researching records regarding real estate and working with real estate agents during the investment of the proceeds of the sale of Phyllis Rausch's other development property in years prior to the condemnation. (Trial Tr. 60-61, 107; Rausch Depo. 26-28) He became knowledgeable about and used the readily available public records and methods of finding public records online. (Trial Tr. 61-63; Rausch Depo. 26-28)

Knowledge about the value of real estate that one owns, is selling or is buying can be gained in several ways. From online records available to the public (such as the records of the County Recorder or the County or City Assessor), personal observation and information obtained from real estate agents, attorneys and investors, a trust beneficiary can learn a great deal regarding real estate value. (Trial Tr. 212, 216; Rausch Depo. 26-28) A beneficiary is able to determine when property has been sold, the land area of the property, its zoning district and the price at which the property was sold. (Trial Tr. 214-217) Personal observations reveal when property undergoes development, leading to discovery of sales and the price paid for the property. (Trial Tr. 26-28, 60-63) In addition, assessors have searchable databases to find sale transactions. (Trial Tr. 214)

When dealing with vacant or idle land, such as the property at issue in the Marion condemnation, value is determined primarily by finding sale

information for comparable property. (Trial Tr. 24) Online records reveal recorded documents such as deeds and plats. Deeds will reveal the amount of transfer tax paid at the time of recording the deed. (Trial Tr. 243) The transfer tax can be used to determine the price paid for the real estate within \$500. (Trial Tr. 242-244) Online records also reveal governmental records such as tax assessments of real estate, the area of the real estate and the owner of the real estate. (Trial Tr. 107, 212-217)

ARGUMENT

Issue was preserved for appellate review by offer of proof. (Trial Transcript 21-34, 40-46, 60-63 and 73-82, including depositions).

Standard of review is correction of errors at law (re hearsay) and abuse of discretion (re exclusion of evidence).

A district court's decision to admit relevant evidence is reviewed for an abuse of discretion. (citation omitted) "An abuse of discretion occurs when 'the court exercise[s] [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" (citation omitted) Grounds or reasons are clearly untenable if they are not supported by substantial evidence or if they are based on an erroneous application of law. (citation omitted) "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party" Iowa R. Evid. 5.103(a).

Eisenhauer v. Henry County Health Center, 935 N.W.2d 1, 9 (Iowa 2019).

I. The Trial Court’s Exclusion of Comparable Sale Evidence was in Error

Private property shall not be taken for public use without fair and just compensation to its owner. Hamer v. Iowa State Highway Commission, 250 Iowa 1228, 1229-30, 98 N.W.2d 746, 747 (1959).

Just compensation means the payment of money to the owner of the condemned property that fully makes up for the loss. Iowa Jury Instruction 2500.2.

The Plaintiff, Phyllis M. Rausch, was required to prove the “fair and just compensation” to which she as Trustee of the William J. Rausch Family Trust is entitled. Fair and just compensation for a partial taking is the difference in the fair and reasonable market value of the property as a whole immediately before and the fair and reasonable market value of the remaining property immediately after the taking which occurred on March 29, 2017. Hamer supra, 250 Iowa at 1230, 98 N.W.2d at 748.

The term “fair and reasonable market value” means the cash sales price between a voluntary, willing seller who is not forced to sell, and a voluntary, willing buyer who is not forced to buy. It assumes a buyer and seller are bargaining freely in the open market for the purchase and sale of real estate. Iowa Jury Instruction 2500.2.

It is commonplace for owners and owner representatives to give an opinion of value in condemnation cases. Redfield v. Iowa State Highway Commission, 251 Iowa 332, 335, 99 N.W.2d 413, 415, 85 A.L.R.2d 96 (1959) (owner testified as to value); Simkins v. City of Davenport, 232 N.W.2d 561, 563 (Iowa 1975) (owner); Heins v. Iowa State Highway Commission, 185 N.W.2d 804, 806 (Iowa 1971) (owner); Van Horn v. Iowa Public Service Co., 182 N.W.2d 365, 373 (Iowa 1970) (owners each testified as to market value decline); Reeder v. Iowa State Highway Commission, 166 N.W.2d 839, 841 (Iowa 1969) (owner); Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1230, 150 N.W.2d 642, 645 (1967) (owner); Iowa Development Company v. Iowa State Highway Commission, 255 Iowa 292, 298, 122 N.W.2d 323, 327 (1963) (president of owner).

The presentation of comparable sales by witnesses other than experts has been clearly recognized in other jurisdictions. Henry County v. RJR Management One, LLC, 290 Ga.App.241, 659 S.E.2d 676, 677 (2008); Department of Transportation v. Mendel, 237 Ga. App. 900, 902, 517 S.E.2d 365, 368 (1977); Walter C. Diers Partnership v. State Department of Roads, 17 Neb. App. 561, 575, 767 N.W.2d 113, 125 (2009) (owner); United States v. 4.85 Acres of Land, 546 F.3d 613, (9th Cir. 2008) (investor and developer); State ex rel. Department of Transportation v. Sherrill, 276 P.3d 1060, 1063 (Ok. Civ. App. 2012) (owner).

Iowa has adopted the Uniform Principal and Income Act, Iowa Code chapter 637. Section 637.410(4) provides a default rule that proceeds of eminent domain are principal unless otherwise provided. James Rausch has an interest in the condemnation and the award of damages. (Trial Tr. 79) He testified to the value of the Trust property before the condemnation and after the condemnation. (Trial Tr. 104)

Plaintiff was entitled under Redfield v. Iowa State Highway Commission, 251 Iowa at 341, 99 N.W.2d at 418, to present evidence regarding sales of similar property as substantive evidence in lieu of relying on the opinion of an expert. Prior to Redfield, sales of comparable properties could only be used to test the knowledge of witnesses who gave an opinion of value. Id. 251 Iowa at 339, 99 N.W.2d at 417. Redfield was decided in recognition of the “absurdity” of the former rule: “Everyone recognizes that the first thing a prospective buyer of any kind of property wants to know is what other people have paid for like property in the recent past.***But when the valuation of realty is the problem, court and jury are suddenly cut off from informative sources and forced to rely (theoretically) upon opinions based on undisclosed prices of other sales....” Redfield, 251 Iowa at 341, 99 N.W.2d at 418 (quoting a California case).

The before and after value testimony of James Rausch was seriously undermined by the prohibition on presentation of evidence of comparable

sales. His estimate of value of the condemned real estate was not anchored to the sales of other property.

Since Redfield, evidence of comparable sales has been admissible as substantive evidence of value. “Like other evidence, it is for the jury to determine its weight and credit.” Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 384 (Iowa 1975) (“While the properties must be similar enough that the sales assist the jury, we have noted, ‘Jurors are men and women of the world, and when the difference between properties are brought out in evidence, ***the jurors may make comparisons in value.’”).

To the extent the other land is similar or comparable in character to the owner’s property, the sale prices may be considered as evidence of the value of the owner’s property. “Similar” and “comparable” do not mean identical. They mean having a resemblance. Parcels of land may be similar although they possess certain differences. The size, use, location and nature of the parcels of land, and the time of the sales are factors in considering similarity or comparability. Iowa Jury Instruction 2500.7.

Sales of property can be identified and within \$500 the reported purchase price can be gleaned from the amount of transfer tax shown on a recorded deed. Iowa Code Section 428A.1(1) (imposition of transfer tax; requirement for declaration of value to accompany deed); Iowa Code Section 428A.5 (amount of transfer tax to appear on recorded instrument). (Trial Tr.

242-244). See also Redfield, *supra*, 251 Iowa at 343, 99 N.W.2d at 420 (United States Revenue Stamps are “as reliably indicative of the consideration as a recited amount would be.”). The transfer tax appears on the recorded deed by the hands of the County Recorder. (Depo. Exhibit 2) It is a simple misdemeanor to willfully enter false information on a declaration of value. Iowa Code Section 428A.15.

The City of Marion’s Motion in Limine, granted by the Trial Court, denied Appellant the opportunity to introduce evidence of comparable sales at trial. The City sought, and the Trial Court approved, the elevation of one person selected as a hired expert witness to serve as the judge of comparable properties admissible under the Redfield decision and the many subsequent cases applying Redfield.

A few years after Redfield, the Court noted that “[i]t frequently happens, as it did here, that opinion testimony and evidence of comparable sales comes from the same witness.” In re Primary Road I-80, 256 Iowa 43, 48, 126 N.W.2d 311, 314 (1964). If it “frequently happens” that evidence of comparable sales comes from a witness providing opinion testimony, surely that is a recognition that evidence of comparable sales may come from witnesses other than hired experts. Especially such evidence may come from a witness familiar with the property that was taken and knowledgeable of other

property who testified as to the before and after values of the property of the Trust.

The market values of comparable properties established by sales are facts from which a jury should be allowed to determine the amount of damages suffered by Appellant as a result of the taking. In a related context the following appears: “[T]he rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable. ‘Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered.’” Tracy v. City of Mt. Pleasant, 165 Iowa 435, 146 N.W. 78, 82 (1914) (emphasis added). “Generally speaking, the true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence desiring to purchase. *** In this estimation the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and of any and every use to which it may reasonably be adapted or applied.” Id. at 81 (emphasis added).

An owner, knowing the cash price that property in the relevant market has sold for, will find a way in negotiations to impress upon a potential purchaser those facts establishing the market value of the owner's property based on comparable sales. Indeed, the introduction of evidence of comparable sales as substantive evidence following the Redfield opinion, simply "recognizes that the first thing a prospective buyer of any kind of property wants to know is what other people have paid for like property in the recent past." Redfield, 251 Iowa at 341, 99 N.W.2d at 418. It is paramount that the jury have such information in conjunction with the owner's evidence of the value of the real estate.

The sale price of real estate can be determined from a recorded deed showing the transfer tax paid. That information can then be used with other recorded information, such as a plat, to determine the area of the real estate. From the sale price and the area of the real estate, the sale price per acre or per square foot can be calculated and used to show the market value of the condemned real estate. Under Iowa Code Section 622.36, "Every instrument in writing affecting real estate, which is acknowledged or proved and certified as required, may be read in evidence without further proof." See Redfield, supra, 251 Iowa 333, 99 N.W.2d 415.

To the extent exhibits reflect something that may be hearsay and essential to the presentation of the Trust's evidence, Iowa R. Evidence 508.3(8)(A), (14) and (15) provide exceptions to the rule against hearsay.

CONCLUSION

The trial court ruling on the Motion in Limine unfairly and unjustly denied Appellant the opportunity to obtain just compensation. The judgment should be vacated and the matter returned for a new trial where Appellant is allowed to fairly and justly seek compensation based on the relevant facts that a willing seller would impart to a willing buyer, to-wit, the sale price of other properties shown to be comparable.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

/s/ Dean A Spina
Dean A. Spina

April 30, 2020
Date

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE
REQUIREMENTS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Dean A Spina
Dean A. Spina

April 30, 2020
Date

CERTIFICATE OF SERVICE

I certify that on April 30, 2020, I served the foregoing Proof Brief of Appellant by electronically filing the document with EDMS, which will notify all parties of the electronic filing.

/s/ Dean A. Spina
Dean A. Spina

COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief of Appellant is \$N/A and that the amount has been paid in full by Appellant.

/s/ Dean A. Spina
Dean A. Spina