IN THE SUPREME COURT OF IOWA

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

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,

Plaintiffs-Appellants,

vs.

CITY OF MARION, IOWA,

Defendant-Appellee.

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

PROOF BRIEF OF APPELLEE AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals based on the application of existing legal principles.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

IN A CONDEMNATION APPEAL, TESTIMONY OF COMPARABLE SALES INVOLVES OPINION TESTIMONY, BY EXPERT WITNESSES OR BY A LAY WITNESS WHO HAS FIRSTHAND, PERSONAL KNOWLEDGE OF A SALE PURPORTED TO BE COMPARABLE. JAMES RAUSCH, A BENEFICIARY OF THE TRUST AND A REPRESENTATIVE OF THE TRUST, DID TESTIFY AS TO HIS OPINION OF THE VALUE OF THE TRUST PROPERTY AND ITS REDUCTION IN VALUE RESULTING FROM THE CONDEMNATION, BUT NOT COMPARABLE SALES DUE TO HIS LACK OF FIRSTHAND, PERSONAL KNOWLEDGE OF ANY SALES THAT HE WOULD OPINE TO BE COMPARABLE TO THE TRUST PROPERTY.

STATEMENT OF THE CASE

These consolidated cases originate from a condemnation proceeding by the City of Marion, Iowa concerning its Armar Drive Road Project to connect that road to Highway 100, as shown in Defendant's Exhibit F. On March 29, 2017, the Compensation Commission made an award of damages to the Plaintiff in the amount of $403,000.00. The peculiar thing is that the award exceeded the Plaintiff's own appraiser's just compensation figure of $280,625.00 by $122,375.00 ($403,000.00 - $280,625.00 = $122,375.00). Nevertheless, the Plaintiff appealed the award asking for an award of $1,000,000.00 in Linn County Consolidated Cases Nos. CVCV087911 and LACV087659.

It became apparent that the Plaintiff could not get an appraiser who would come up with a dollar amount equal to or greater than $403,000.00.

On November 9, 2017, the Defendant, City of Marion, served Discovery Requests, Interrogatory No. 3 to identify Plaintiff's expert witnesses, and Production of Document Request No. 4 to provide copies of the appraiser's reports.

On December 14, 2017, an Order Setting Trial (for August 13, 2018) And Approving Plan was issued. It required the Plaintiff to identify expert witnesses and to provide copies of the reports of the expert witnesses by April 1, 2018.

The Plaintiff had appraiser Keith Westercamp's appraisal of $280,625 on March 29, 2017. Denise Cronk of Cook Appraisal in Iowa City, Iowa could not be appraiser for the City of Marion, Iowa because in December 2017 attorney Dean Spina had contacted Casey Cook of Cook Appraisal to make an appraisal for the Plaintiff in these cases. See Defendant's Combined

Motion For Summary Judgment and Motion To Exclude Any Expert Witnesses For The Plaintiff, filed May 4, 2018, p. 4, and the attached email dated December 14, 2017.

On February 2, 2018, the Defendant filed a Motion To Compel Discovery. The Plaintiff made no response to the Motion To Compel.

The Plaintiff failed to identify an expert witness, and also failed to produce any reports of expert witnesses by the required date of April 1, 2018.

On April 16, 2018, the Court issued an Order granting the Defendant's Motion To Compel. On April 18, 2018, the Plaintiff, in Answer to Defendant's Interrogatory No. 3, identified the following as expert witnesses:

- Keith Westercamp or Jonathan Westercamp, Appraisal Associates.
- Kyran (Casey) J. Cook or Rochelle L. Dietiker, Cook Appraisal.
- James Angstman, a commercial real estate agent and developer of commercial real estate.

The Answer said the witnesses' impressions and opinions will be set forth. But, none were provided as required by Ia. R. Civ. P. 1.500(2)(b) and the Trial Scheduling and Discovery Plan, except Keith Westercamp's March 28, 2017 Appraisal for $280,625. Also, the Plaintiff never certified to the Court nor to the Defendant the expert witnesses' name, subject matter of expertise, and qualification as required by Ia. R. Civ. P. 1.500(2)(b) and the Trial Scheduling and Discovery Plan.

On May 4, 2018, the City of Marion filed its Combined Motion For Summary Judgement and Motion To Exclude Expert Witnesses For The Plaintiff. The City's Motion For Summary

Judgment was based on the Plaintiff having not designated any expert witness by April 1, 2018 as required; the Plaintiff, therefore, has no expert witness to provide evidence of the difference in the fair market value of the Plaintiff's real estate; and the only competent evidence is that of the City's Appraiser, David Passmore, in the amount of $83,900.00. The Motion To Exclude any Expert Witness was on the basis that the Plaintiff failed to identify and certify expert witnesses by the April 1, 2018 deadline.

On May 21, 2018, the Plaintiff filed a Resistance To Defendant's Motions. The Plaintiff's Statement of Facts In Dispute asserted, without any substantiation or comparable sales, that the Plaintiff's property has a value of $12.00 per square foot, which equals $522,720.00 per acre.

On July 25, 2018, an Order of Court set a Hearing on August 3, 2018 on each party's Motion To Continue, and the Defendant's Motion For Summary Judgment and Motion To Exclude Witnesses.

At the August 3, 2018 Hearing, the Plaintiff's attorney, Dean Spina, represented that the Plaintiff has no expert witnesses. Instead, Mr. Spina stated that he intends to prove his case by having Phyllis M. Rausch testify to her opinion of value as a lay witness, and to cross-examine and impeach the City's appraiser, Mr. Passmore. The Court made it clear that, in resistance to the City's Motion For Summary Judgment, the Plaintiff was allowed to only submit an Affidavit of Phyllis M. Rausch, as to what her testimony is going to be, and no other affidavit. A transcript of the August 3, 2018 Hearing has been filed with this Court.

At the August 3, 2018 Hearing, the Plaintiff's attorney, Mr. Spina, represented to the Court that "The before and after value, even without an expert witness, I think, can be established if Mrs. Rausch has the capability of presenting the knowledge she has." 8-3-18 Tr. P. 5 l. 23 – P. 6 l. 1.

Mr. Spina further said to the Court "So, I expect to impeach him (the city's appraiser) with the facts that he has to admit, I think; that there are other sales out there." 8-3-18 Tr. P. 6 ll. 10-12.

The Court stated "All right. Well, here is what we're going to do. Both parties have asked to have the trial continued, and I'm going to grant that.

Mr. Spina, I'm going to give you two weeks to submit an Affidavit from Ms. Rausch - -

Mr. Spina: Yep." 8-3-18 Tr. P. 19 ll. 11-16.

"The Court: But, that's the only Affidavit you're going to be allowed to submit.

Mr. Spina: Okay.

The Court: All right?

Mr. Spina: Yep. Yes, sir." 8-3-18 Tr. P. 19 ll. 21-25.

On August 5, 2018, the Court issued an Order that the August 13, 2018 trial date should be continued and the Plaintiff could submit an Affidavit by Phyllis M. Rausch as to what her testimony at trial will be. The Court would thereafter rule on the City's Motion For Summary Judgment.

On August 9, 2018, the City of Marion served Notice on Phyllis M. Rausch that her deposition would be taken on August 21, 2018.

On August 17, 2018, the Plaintiff filed (a) Plaintiff's Supplemental Resistance To Motion For Summary Judgment, (b) an Affidavit of Phyllis M. Rausch dated August 16, 2018, and (c)

Plaintiff's Statement Of Facts In Dispute. The Affidavit of Phyllis M. Rausch stated that she does not agree with the opinion of damages of Keith Westercamp, and that, without providing any basis or substantiation for it, her opinion of damages was $1,267,000.00, which is nearly $1,000,000.00 more than Mr. Westercamp's appraisal. Her Affidavit and the Plaintiff's Statement of Facts In Dispute identify a value figure of $12.00 per square foot, or $522,720 per acre, without any substantiation or comparable sales.

On August 21, 2018, the Defendant filed a Report To Court Re Attempted Deposition because Phyllis M. Rausch did not appear for the deposition scheduled on August 21, 2018.

On August 24, 2018, the Defendant filed its Report To Court Re Attempted Deposition (Second Attempt) because Phyllis M. Rausch did not appear for her deposition rescheduled for August 24, 2018.

On August 27, 2018, the Defendant, City of Marion, filed Defendants Renewal of Its Motion For Summary Judgment. It was noted that Phyllis M. Rausch did not respond to the Notice to have her deposition taken, and her Affidavit did not show that she has any personal knowledge of comparable sales that is needed for her to testify as lay witness about the fair market value of the Trust's real estate.

On September 11, 2018, the Plaintiff filed its Resistance To Motion For Summary Judgment. It cited an appraisal by David Passmore, who is the appraisal witness for the City of Marion in this case, concerning his appraisal of another property not involved in this case. In that other appraisal, the value of that property was $12.00 per square foot. The Plaintiff's Resistance attached an Affidavit of Kimberly L. Bishop of a sale recorded in the Linn County Recorder's

Office. There is no showing that sale is comparable to the Rausch Trust property. Furthermore, the Affidavit of Kimberly L. Bishop violated the Court's August 3, 2018 Order that the Plaintiff would only be allowed to file an Affidavit of Phyllis M. Rausch.

On September 17, 2018, the City of Marion filed Defendant's Reply To Plaintiff's Resistance To Defendant's Motion For Summary Judgment and Motion To Strike Plaintiff's Resistance. Also attached to the City's Reply is a copy of David Passmore's Affidavit in which he states "It is ludicrous for Phyllis Rausch's attorney to assert that the two properties (named in the Plaintiff's Resistance) are comparable. The properties are not in the same general location … The Menard, Inc. to St. Luke's Menard's, LLC property is not comparable to the Rausch Family Trust property.

The Retail Strip Center had graded and developed sites. The Rausch family Trust property has no developed and graded lots. … I am confident that no credible appraiser would say that the Rausch Family Trust property and the Retail Strip Center are comparable."

On October 17, 2018, the Court issued a Ruling. It denied the City of Marion's Motion For Summary Judgment. The Ruling goes on to say the following:

> "While the Court agrees with Plaintiff that the exclusion of expert witnesses is a harsh penalty, it is justified by the facts of this case. This Court extended lenity to Plaintiff in allowing her to submit a late affidavit at the time of the hearing on the Motion For Summary Judgment based on the medical problems she was facing. However, the Court made it clear that that was all it was allowing. This was not a total re-opening of the case and, especially, the designation of experts. Plaintiff's attempt to re-open the summary judgment record by submitting an affidavit of a person who was clearly designated to bootstrap testimony of value on an allegedly comparable property, a subject of expert testimony, is certainly not admissible in Plaintiff's case-in-chief. For these reasons, Defendant's Motion To Exclude Plaintiff's Expert Witnesses should be granted on this record."

On November 13, 2018, an Order Resetting Jury Trial and Pretrial Conference was issued. Trial was scheduled for May 6, 2019.

On March 25, 2019, the City of Marion filed a Motion To Compel Discovery.

On March 25, 2019, the Court issued an Order that Phyllis M. Rausch shall appear for the taking of her deposition on or before April 12, 2019.

On April 12, 2019, the city of Marion filed Defendant's Motion In Limine which included barring any testimony or evidence from expert witnesses on behalf of the Plaintiff, any testimony of sales on the Assessor's website, and any testimony about sales unless a foundation is laid by Defendant's expert witness that the sales are comparable.

On April 14, 2019, the Plaintiff filed Plaintiff's Pretrial Statement in which it identified as witnesses the following:

- Jonathan Westercamp
- James Rausch
- James Angstman

On April 16, 2019, the Court issued an Order stating that if the Plaintiff has not appeared for her deposition by the time of the pre-trial conference on April 19, 2019 there would be a Ruling on that matter.

On April 18, 2019, the City of Marion filed Defendant's Objection To Plaintiff's Identification of Expert Witnesses And To Bar Such Witnesses To Testify At Trial.

The Transcript of the April 19, 2019 Pretrial Conference is filed herein.

Mr. Spina represented to the Court that Phyllis Rausch was not going to participate in the trial. 4-19-19 Tr. p. 5 ll. 9-16.

"The Court: And in terms then of - - As the way this case has developed and as I was - - as I ruled on the Motion For Summary Judgment, I was given the impression she was going to be able to testify to the issues that might create a jury question as to this appeal.

Mr. Spina: That's correct.

The Court: And I think - - I've seen their Motion To Strike. And though I'm willing to hear your side of that, I think I made it clear that you were not going to be able to designate an expert. So where are we?

Mr. Spina: I understand I'm not able to have an expert testify as to opinion on value, which is the essential question in a condemnation appeal. I understand that.

The Court: So I guess I need to know who at this point is going to be - - did you intend to call to express an opinion?

Mr. Spina: I do not intend, because of the Court's ruling, to call someone to express an opinion of value." 4-19-19 Tr. p. 5 l. 17 – p. 6 l. 11.

Clearly, Mr. Spina stated he was not going to call an expert. 4-19-19 Tr. p. 6 ll. 9-11.

There was discussion that identifying a sale as being comparable is opinion testimony typically limited to an expert witness. 4-19-19 Tr. p. 7 l. 2 – p 9 l. 5, p. 16 l. 10 – p. 19 l. 20.

The Court noted that it could consider sanctions for Phyllis M. Rausch not participating in her deposition. 4-19-19 Tr. p. 20 l. 1 – p. 22 l. 1.

The Defendant's counsel raised the issue of being able to depose the persons whom Mr. Spina intended to identify sales that were comparable to the Trust's property. 4-19-19 Tr. p. 22 l.

4 – p. 24 l. 13. It was agreed that the Defendant's counsel could depose the Plaintiff's witnesses.

4-19-19 Tr. p. 24 l. 4 – p. 25 l. 16.

On April 29, 2019, the Court issued an Order in which the Court states as follows:

"A major issue that still troubles the Court is the identity of witnesses that the Trust wishes to call at trial and what they will be allowed to testify about. This initially arose in the context of the City's Motion For Summary Judgment where the Trust's failure to designate an expert witness to testify as to the before and after value of the condemned affected property was the principal basis for the Motion. The Court found that expert testimony was not absolutely required as to market value before a party could submit to the jury their opinion as to the loss of market value the owner of the land suffered. The Court allowed the Trustee to submit an affidavit as to her opinions as to the before and after value of the property. The Court concluded that, based on that affidavit, the Trust could overcome the City's Motion For Summary Judgment because the Trustee showed familiarity with the property and had sufficient experience in the buying and selling of real estate to express an opinion that would be reliable and helpful to the jury. The Court also continued the trial but ruled that the Trust could not designate any expert witnesses because they had missed that deadline with no good cause.

Based on the Court's ruling, the City attempted to depose Phyllis Rausch. The parties scheduled two dates for the deposition and Attorney Spina informed the City the day of each scheduled deposition that Ms. Rausch would not be available. The City sought and received an order from the Court compelling Ms. Rausch's attendance at a deposition on or before April 12, 2019. Attorney Spina has informed the City and the Court that Phyllis Rausch would not be testifying by deposition or at trial due to her emotional upset about the case and cognitive impairments based on a recent history of cerebral hemorrhage. Spina also suggest that Rausch might no longer be competent to represent the Trust. Spina has now disclosed the identities of three witnesses he wishes to have testify. Two of the witnesses, Jonathan Westercamp and James Angstman, have backgrounds in real estate sales and appraisals, and a third is Phyllis Rausch's son, James.

The City has objected on this basis that the testimony they have been told will be given is still expert testimony that is not allowed under the Court's prior ruling. The Trust appears to again assert that this is not expert testimony but is lay testimony based on the witnesses' knowledge and observation unrelated to this litigation as to what real estate is 'comparable' for assessment of what market value is."

. . .

> This Court does not have a sufficient record at this time to know whether Westercamp and/or Engstrom (Angstman) have been retained by the Trust, how they became aware of the sale prices and when they formed their underlying opinions that the properties were comparable. Only then can the Court decide whether this is truly expert testimony under the guise of lay testimony. If the Court determines that the testimony or a portion of it is expert, then it will be limited or excluded. The Court will need a similar proffer with regard to the testimony of James Rausch as to the basis of his familiarity with the property at issue and any other parcels he wishes to testify about.
>
> The parties shall be prepared to further address these issues on May 6, 2019, at 8:30 a.m.
>
> So ordered."

On May 3, 2019, the Court issued a Memorandum Order that the trial scheduled for May 6, 2019 is continued.

On May 6, 2019, the Defendant, after taking the deposition of Jonathan Westercamp, James Angstman and James Rausch, filed its Supplement To Defendant's Objections to Plaintiff's Identification Of Expert Witnesses And To Bar Such Witnesses To Testify At Trial And Request For Hearing. The Defendant City of Marion noted that Jonathan Westercamp and James Angstman are expert witnesses who the Plaintiff wanted to testify under the guise of being lay witnesses. James Rausch is a lay witness who has no firsthand, personal knowledge of the sales that he would say are comparable to the Trust property.

In his deposition, James Angstman testified that the Armar Drive Project was a benefit to the Trust property.

In his deposition, Jonathan Westercamp testified that he had not yet formed an opinion of value, but he was working on making an appraisal that will not be completed before May 6, 2019. His father, Keith Westercamp, whose March 27, 2017 appraisal was for $280,625.00, had died February 20, 2019.

On May 7, 2019, the Court issued an Order Resetting Jury Trial and Pretrial Conference. The trial was reset for August 19, 2019.

On May 20, 2019, the Plaintiff filed Plaintiff's Response And Resistance To Defendant's Supplement To Motion In Limine.

On June 10, 2019, the Court issued an Order to Reschedule Hearing On Defendant's Motion To Strike for July 26, 2019.

On July 22, 2019, the City of Marion filed Defendant's Reply To Plaintiff's Response And Resistance To Defendant's Motion In Limine.

On July 25, 2019, the Court issued an Order Setting Hearing on August 7, 2019 instead of July 26, 2019.

On August 7, 2019, there was a Hearing on Defendant's Motion To Strike. No report had yet been provided by Jonathan Westercamp.

At the August 7, 2019 Pretrial Conference, the City of Marion expressed its concern that the Plaintiff is now attempting to have expert witnesses testify under the guise of being lay witnesses. 8-7-19 Tr. p. 2 l. 16 – p. 5 l. 24.

Mr. Spina asserted that "the Court was in error in excluding expert testimony in order to preserve, I've maintained, naming those individuals as witnesses." 8-7-19 Tr. p. 7 ll. 16-20.

That was contrary to him saying he has no expert witness and needs no expert witness to express an opinion of value, as represented to the Court on August 3, 2018, and again on April 19, 2019.

The Court asked Mr. Spina as follows:

"The Court: So you're saying that determining whether a parcel is actually comparable is subject to lay testimony?

Mr. Spina: Well, it's a determination by the Court in case law as to whether the property is sufficiently comparable to then allow information as to the sale price to come before the jury.

The Court: But that's - - again, isn't that - - Other than, let's say an owner, isn't it otherwise expert testimony then?

Mr. Spina: I don't understand why it would have to be an expert to say this property has these characteristics" 8-7-19 Tr. p. 9 l. 25 – p. 10 l. 12.

The City's counsel responded as follows:

"The Court: Mr. Goodwin, any response?

Mr. Goodwin: Yes, Your Honor. The Redfield case involved expert witnesses, appraisers, and says that the appraisers can indeed testify as to comparable sales, but that is again within the expertise of the appraisers. It's expert testimony whether one property is comparable to the subject property in the litigation. So Redfield allows experts to talk about comparable properties. Under Rule of Evidence 5.701, again, the Iowa Supreme Court has held that if you're going to have lay witnesses testify as to an opinion, they have to have firsthand personal knowledge of the matter. And for a witness to say that sale is comparable to the subject property, that in and of itself is an opinion. Mr. Spina wants Mr. Rausch to be able to express an opinion that property is comparable to the trust property, but that is an opinion, and he does not have any firsthand personal knowledge of the comparability of that sale. So under Rule of Evidence 5.701

and the rulings of the Iowa Supreme Court, he's not able to express an opinion of comparability because he has no firsthand personal knowledge of that sale.

Again, Mr. Angstman has only firsthand personal knowledge of one sale at 1500 Blair's Ferry Road. He is an expert.

Mr. Angstman is an expert witness.

Mr. Westercamp is an expert witness. They cannot have expert witnesses because they failed to identify their experts within the required time. And as the order of this Court of April 29 of this year, they cannot have expert witnesses because they failed to meet the - - or identify the witnesses at the time required without good cause." 8-7-19 Tr. p. 12 ll. 16-21.

On August 9, 2019, the City of Marion filed Defendant's Resistance To Plaintiff's Motion In Limine.

On August 14, 2019, the Court entered an Order after reviewing the depositions of James Rausch, Jonathan Westercamp, and James Angstman, ruling "that the opinions they seek to give are expert in nature rendered by witnesses who otherwise qualify as experts … Further, they were not approached by Plaintiff about their testimony until after this litigation commenced and well after the deadline for designating experts had expired. Thus, their opinions will not be allowed at trial.

James Rausch's testimony does not even qualify as proper lay opinion … Thus, Defendant's Motion To Strike is granted subject to Plaintiff's offer of proof."

The case proceeded to Trial on August 19, 2019.

STATEMENT OF THE FACTS

The Plaintiff made an offer of proof out of the hearing of the jury, before testimony was presented in the case for James Rausch to testify. Mr. Rausch testified that he was able to go on the assessor's website and find various sales. Tr. p. 25 l. 15 – p. 3d l. 8. The Plaintiff made no offer of proof in regard to the testimony of Jonathan Westercamp nor James Angstman. Tr. p. 16 l. 8 – p. 39 l. 19.

It was pointed out on behalf of the City of Marion that, as shown in his deposition that had been provided to the Court, "James Rausch has no firsthand personal knowledge of any sales he wants to say are comparable." Tr. p. 35 ll. 20-21. Also, it was again stated "this is simply an effort to do an end run on the Court's Ruling and Order of August 14." Tr. p. 36 ll. 1-3.

The Court stated to Mr. Spina as follows:

"The Court: Well, that's where I - - I think you've got - - your problem is you go on the internet and all you see is this property was sold for a certain amount and it's commercial property. But that doesn't determined if it's comparable, does it, with all the other factors?" Tr. p. 38 ll. 21-25.

James Rausch admitted he is not an appraiser, nor a realtor, and has no personal firsthand knowledge of the three sales he believes are comparable to the Trust's property. Tr. p. 51 l. 6 – p. 52 l. 25.

On behalf of the City of Marion, it was again pointed out that James Rausch is not an expert witness and he does not have firsthand personal knowledge of the sales he wants to identify as being comparable to the Trust property. Tr. p. 56 ll. 8-14.

The Court ruled as follows:

"The Court: Well, and that - - that is still my ruling, that he cannot give the values of those other sales. He doesn't have qualification in any way through personal knowledge and certainly he didn't - - was never designated and wouldn't qualify as an expert. Where I'm still having trouble with the record is his personal knowledge of the tract in question." Tr. p. 59 ll. 11-17.

"The Court: All right. Here's what we're going to be left with. He is not qualified to testify as to comparable sales. That's pretty clear. He's - - I will let him testify as to what he believes the value is and that it's - - that he got it from looking on the internet, but nothing about a specific sale. And then we'll let the jury take on the weight of the - - and he can talk about what he did with his mother's farmland. But that's basically all the knowledge he has and then we'll let the jury weigh out the rest. But it's going to be clear in the instructions that the City has the experts and that they have the comparable sales. And then we'll see where it shakes out." Tr. p. 64 ll. 10-21.

The Jury in considering the weight and credibility of the testimony of James Rausch could see that Mr. Rausch wanted to put some high figures out that were probably not his own figures, or at least were not logically considered.

At trial, the following exchange occurred on direct examination of James Rausch with his own attorney, Mr. Spina.

"… Would you describe the triangle-shaped parcel in terms of its elevation with respect to Armar Drive as it was constructed?

A. It's quite lower, almost like it's hunked in.

Q. Which is lower?

A. The triangle portion.

Q. The triangle portion is lower than Armar Drive?

A. It sits pretty low.

Q. I think you've got it backwards. I'm sorry." Tr. p. 99 ll. 1-9.

On direct examination, James Rausch said he valued the 9.57 acres at 12 dollars per square foot. Tr. p. 104 ll. 11-23. James Rausch had difficulty knowing what that computed to for the value of the property being "410 to be '20 thousand, or four million, or five million, or four million 300 thousand.'" Tr. p. 110 l. 23 – p. 111 l. 23. During that exchange, Mr. Spina said the following to James Rausch: "Q. I don't want to - - You chose the number that you think it is worth after the taking." Tr. p. 111 ll. 12-13.

On cross examination, James Rausch was asked if he was aware that $12 per square foot equals $522,720.00 per acre. He answered "I never realized that." Tr. p. 114 l. 16.

James Rausch admitted his figure of $12 per square foot was in spite of the Trust property not being graded, not having a commercial entrance, and not having utilities brought into the property. Tr. p. 115 l. 25 – p. 117 l. 12.

The City Engineer for Marion, Iowa, Michael Barkalow, testified that the Trust property contained 9.57 acres. There was an acquisition of 0.63 acres right-of-way for Armar Drive, and 0.30 acres temporary construction easement. There is a 0.61 acre parcel remaining on the west side of Armar Drive, and 8.33 acres remaining on the east side of Armar Drive. Tr. p. 137 l. 12 – p. 140 l. 23.

The City of Marion determined that the 0.61 acres on the west side of Armar Drive can be developed with a 4,150.21 square foot building with 15 parking spaces. Tr. p. 141 l. 21 – p. 142 l. 12, p. 144 l. 16 – p. 145 l. 25.

The appraiser for the City of Marion, David Passmore, using the comparable sales approach, determined the fair market value of the Trust property to be $120,000.00 per acre. Tr. p. 188 ll. 23-25.

Mr. Passmore determined the 0.61 acres on the west side of Armar Drive could be developed just as a similar size tract across Highway 100, which has a dentist office. Tr. p. 179 l. 24 – p. 180 l. 19.

Mr. Passmore analyzes the Trust property having 9.57 acres of which 6.18 acres were usable before the taking. After the taking, there were 8.94 acres, of which 5.5 acres are usable.

There is a large ravine on the east side of the property. Mr. Passmore determined just compensation to be $82,900.00. Tr. p. 191 l. 15 – p. 193 l. 2.

Mr. Passmore considered a sale near the Trust property, across Highway 100 from the Trust property, which had sold the same month as the condemnation of a portion of the Trust property, to be comparable to the Trust property. It sold for $121,359.00 per acre, but it needed less grading for development than the Trust property. Tr. p. 188 ll. 2-25.

ARGUMENT

THE TRIAL COURT CORRECTLY EXCLUDED LAY WITNESS', JAMES RAUSCH'S, TESTIMONY AS TO HIS OPINION THAT SALES OF WHICH HE HAD NO FIRSTHAND NOR PERSONAL KNOWLEDGE WERE COMPARABLE TO THE SUBJECT TRUST PROPERTY.

All condemnation appeals involve opinion testimony of the fair market value of the subject property. These cases also involve opinion testimony of the reduction in the fair market value of the subject property as a result of the condemnation. These cases also involve opinion testimony of what sales are comparable to the subject property.

An opinion is a belief or view, which, without proper foundation, can be speculation or conjecture. Iowa Rule of Evidence (Ia. R. Ev.) 5.701 allows lay opinion testimony if the testimony is rationally based on the perception of the witness and will assist the trier of fact in understanding the witness' testimony or in determining a fact in issue. The lay witness must confine their testimony to facts on which they have personal knowledge.

Ia. R. Ev. 5.701 provides as follows:

> "Rule 5.701 Opinion testimony by lay witnesses
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> a. Rationally based on the witness's perception;
> b. Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> c. Not based on scientific, technical, or other specialized knowledge within the scope of rule 5.702."

For a lay witness to testify to an opinion a foundation must be laid to show that the witness' opinion is based on firsthand, personal knowledge of the facts to which the observed facts are being compared.

> "To properly admit a lay witness's testimony, a sufficient factual foundation must be established showing the witness's opinion is based on firsthand knowledge and 'personal knowledge of facts to which the observed facts are being compared.' *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 390 (Iowa 2012) (citation omitted). We find the district court did not abuse its discretion in finding the evidence concerning travel vouchers was not admissible due to the lack of a sufficient factual foundation. Wyngarden stated he

did not have personal knowledge of the facts." Wyngarden v. Iowa Judicial Branch, 922 N.W.2d 105 (Table) (Iowa App. 2018) p. 9.

In accord are Meeker v. City of Clinton, 259 N.W.2d 822, 830-831 (Iowa 1977), and Whitley v. C.R. Pharmacy Serv., Inc., 816 N.W.2d 378, 390 (Iowa 2012).

James Rausch had no firsthand, personal knowledge of sales which he intended to opine as being comparable to the Trust property. Therefore, the Trial Court correctly excluded James Rausch's testimony on his opinion of comparable sales. The Court ruled that James Rausch could testify as to his opinion of the value of the Trust's property but not comparable sales because he has no firsthand, personal knowledge of comparable sales. Tr. p. 64 ll. 10-23.

The Plaintiff focuses on the case of Redfield v. Iowa State Highway Commission, 99 N.W.2d 413 (Iowa 1959). Indeed, in that case the Iowa Supreme Court ruled that evidence of comparable sales were admissible, rather than only being used to impeach the knowledge and competency of expert witnesses. Id. at 99 N.W.2d 416, 418.

The Plaintiff argues that sales should be admitted into evidence as being comparable without the witness laying a proper foundation to express an opinion that the sales are comparable. The Redfield case, on which the Plaintiff so heavily focuses, does not provide a way to put sales into evidence as being comparable without the witness laying a foundation that the sales are comparable.

Evidence of sales of comparable property is substantive evidence. But, for the sales to be admitted into evidence, a foundation must first be laid for the witness to express an opinion that the sales are indeed comparable. Such testimony may be through an expert witness - or a lay witness

who has firsthand, personal knowledge of the sale which the witness opines to be comparable to the subject property.

> Since Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413, 85 A.L.R.2d 96, evidence of sales of comparable property has been admissible as substantive evidence of the fair market value of the subject property. However, it must be shown that there is sufficient similarity to the subject property before such evidence is admissible. (Emphasis added.) Martinson v. Iowa State Highway Commission, 134 N.W.2d 340, 344 (Iowa 1965).
>
> It is true "since Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413, 85 A.L.R.2d 96, evidence of sales of comparable property has been admissible as substantive evidence of fair market value of the subject property. However, it must be shown that there is sufficient similarity to the subject property before such evidence is admissible. (Citations.) Martinson v. Iowa State Highway Commission, 257 Iowa 687, 694-695, 134 N.W.2d 340, 344; Belle v. Iowa State Highway Commission, 256 Iowa 43, 48 126 N.W.2d 311, 314 (Emphasis added.). Bellew v. Iowa State Highway Commission, 171 N.W.2d 284, 288 (Iowa 1969).

Again, I. R. Ev. 5.701 requires the lay witness to have firsthand, personal knowledge of a sale before expressing an opinion that it is comparable to the subject property.

Likewise, I. R. 5.702 requires an expert witness to have knowledge, skill, experience, training and education to form an opinion as to whether a sale is comparable to the subject property. Even with an expert witness, the foundation of the expert witness testimony must be established.

> "The foregoing determination does not aid defendants in sustaining their contention that the facts related by plaintiffs' expert witnesses were insufficient to furnish an adequate foundation for the opinions expressed.
> This statement of law announced in Bernal v. Bernhardt, 180 N.W.2d 437, 441 (Iowa 1970) is also adverse to defendants' position:
> 'Before a witness who has been qualified as an expert in the pertinent field can express his opinion on the particular issues involved, whether he is testifying in whole or in part from his personal knowledge and observation or in response to a hypothetical question, the facts upon which the opinion is based must be stated by the witness or in the hypothetical question. From this evidence the court, in the first instance, can determine whether the

> factual foundation is sufficient for a valid opinion or the answer would be nothing more than mere conjecture or guess, and the trier of fact, in the last instance can determine whether the alleged facts justify his conclusion. The acceptance or rejection of opinion testimony does not depend upon the expert's abstract qualifications alone. * * * (citing authorities).' See also Albrecht v. Rausch, 193 N.W.2d 492, 495 (Iowa 1972).
> It is obvious under the record the trial court determined in the first instance the factual foundation was sufficient for a valid opinion. It then properly submitted to the jury the question whether the alleged facts justified the opinions expressed." (Emphasis added.) Dolezal v. City of Cedar Rapids, 209 N.W.2d 84, 91-92 (Iowa 1973).

The Plaintiff cites seven (7) cases for the proposition than an owner is qualified to express an opinion of value of their own property in a condemnation case. That proposition is not denied. See discussion on page 28. In fact, James Rausch, as an owner, did testify as to his opinion of value of the Trust property being $12.00 per square foot, which is $522,720.00 per acre. The seven (7) cases cited by the Plaintiff are: Redfield v. Iowa State Highway Commission, 99 N.W.2d 413 (1959); Simkins v. City of Davenport, 232 N.W.2d 561 (Iowa 1975); Heins v. Iowa State Highway Commission, 185 N.W.2d 804 (Iowa 1971); Van Horn v. Iowa Public Service Co., 182 N.W.2d 365 (Iowa 1970); Reeder v. Iowa State Highway Commission, 150 N.W.2d 642 (Iowa 1967); Iowa Development Company v. Iowa State Highway Commission, 122 N.W.2d (1963).

It is noted in the Redfield case that the owner testified as to opinion of value. However, the primary issue in the Redfield case was whether expert witness Froning's comparable sales could be entered into evidence.

The Plaintiff cites five (5) other cases in regard to comparable sales. The case of Henry County v. RJR Management One, LLC, 659 S.E.2d (Ga. App. 2008) involved the condemning authority's expert witness using four comparable sales that were admitted into evidence during the cross-examination of the condemning authority's expert witness. After the comparable sales had

been admitted into evidence, the condemning authority's attorney objected that the proper foundation for the deed's admission had not been laid. The trial court thereupon ruled that an adequate foundation had been laid, which was affirmed by the appellate court.

The case of Department of Transportation v. Mendel, 517 S.E.2d 365, 368 (Ga. App. 1977) held that an expert witness may refer to comparable sales that the witness considered after suitable foundation has been laid to show similarity of the property evidence of the sale can be admitted into evidence by an expert witness or by a lay witness. This is consistent with Ia. R. Ev. 5.701 and 5.702 and the Wyngarden, Whitley, and Meeker cases allowing a lay witness to testify as to an opinion if the lay witness's testimony is based upon firsthand, personal knowledge.

The case of Walter C. Diers Partnership v. State Department of Roads, 767 N.W.2d 113, 125 (Neb. 2009) involved one of the partners', Charles Diers', testimony about sales prices of developed lots on the north 125 acres of the Partnership's property, with which Charles Diers had personal involvement and knowledge. This is consistent with Ia. R. Ev. 5.701 and the Wyngarden, Whitley, and Meeker cases allowing a lay witness to testify as to an opinion if the lay witness's testimony is based upon firsthand, personal knowledge.

The case of U.S. v. 4.85 Acres of Land, 546 F.3d 613 (9th Cir. 2008) involved the issue of whether post-taking sales could be admissible in evidence. That issue is not relevant to our present case.

The case of State ex re Department of Transportation v. Sherrill, 276 P.3d 1060, 2063 (Ok. Civ. App. 2012) involved whether the owner testifying concerning sales prices of various parcels of his own property in the area. This is consistent with Ia. R. Ev. 5.701 and the Wyngarden,

Whitley, and Meeker cases allowing a lay witness to testify as to an opinion if the lay witness's testimony is based on firsthand, personal knowledge.

James Rausch is a beneficiary of the Trust. Therefore, James Rausch testified as an owner of the Trust property. The owner of property is considered to be a competent witness to testify as to the market value of the property. Friest v. Friest (In Re Marriage of Friest) (Iowa App. 2019); Newlands v. Iowa Ry. & Light Co., 159 N.W. 244, 246 (Iowa 1916); State v. Savage, 288 N.W.2d 502, 504 (Iowa 1980); State v. Boyken, 217 N.W.2d 218, 220 (Iowa 1974); Ruth v. O'Neill, 66 N.W.2d 44, 54 (Iowa 1954).

Mr. Rausch testified in his opinion that the value of the Trust property was $12.00 per square foot. Tr. p. 104 ll. 11-23; p. 110 ll. 13-17. He testified that the damages were roughly 800 thousand. Tr. p. 110 l. 23 – p. 111 l. 23.

The Plaintiff presented to the jury Mr. Rausch's opinion that the Trust property was $12.00 per square foot, which is $522,720 per acre. Presumably, the jury found Mr. Passmore's appraisal and testimony convincing, and entered a verdict in the amount of $83,900.00.

It became apparent in this case that the Plaintiff's attorney could not find an appraiser who would provide an appraisal more than, or even equal to, the $403,000.00 award of the Compensation Commission. Instead, the Plaintiff's strategy was to have the jury consider the value for $12.00 per square foot. However, the City's appraiser, David Passmore, on cross examination, was asked by Mr. Spina about properties that sold for $9.00 per square foot and $11.00 per square foot. Tr. p. 248 ll. 15-17, p. 250 ll. 24-25. On redirect examination, Mr.

Passmore testified that those properties were not comparable to the Trust property, and that Mr. Rausch's figure of $12.00 per square foot was not reasonable. Tr. p. 252 l. 21 – p. 253 l. 23.

Mr. Passmore again explained, on redirect examination, why the value of the Trust property was $120,000 per acres. Tr. p. 253 l. 24 – p. 255 l. 17.

Mr. Spina argued to the Jury that the value of the Trust property was $12.00 per square foot. Tr. p. 270 l. 22 – p. 271 l. 3, p. 271 ll. 18-20. Mr. Spina ultimately asked the Jury to return a finding of $345,400. Tr. p. 279 ll. 8-9.

The Jury determined the difference in the fair market value of the Trust property before and after the condemnation was $82,900.00.

The Jury returned a verdict in the amount of $82,900.00, which is undoubtedly based upon David Passmore's testimony and appraisal. The Plaintiff did not challenge the Jury's verdict by Motion To Vacate or Modify Judgment, or otherwise.

A jury verdict in a condemnation case is binding and is peculiarly within the province of the jury.

> "If a jury's verdict is supported by substantial evidence in the record, we are bound by it. See Beeman v. Manville Corp. Asbestos Disease Comp. Fund, 496 N.W.2d 247, 254 (Iowa 1993). Because an award of damages in a condemnation actions is 'peculiarly within the province of the trier of fact,' we will not 'interfere absent a showing the award was wholly unfair or unreasonable.' See Sunrise Developing Co. v. Iowa Dep't of Transp., 511 N.W.2d 641, 645 (Iowa Ct. App. 1993) ("In jury trials, the controverted fact issues are for the jury to decide, not the court")." City of North Liberty v. Weinman (Iowa App. 2017) p. 5.

In accordance with the above are Van Horn v. Iowa Public Service Company, 182 N.W.2d 365, 372 (Iowa 1970), and Twin State Engineering & Chemical Co. v. Iowa State Highway Commission, 197 N.W.2d 575, 583 (Iowa 1972).

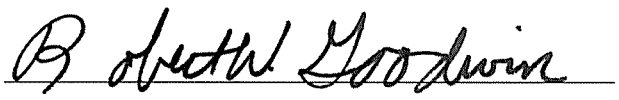
The $82,900.00 jury verdict in this case is supported by the evidence and is, therefore, binding.

CONCLUSION

James Rausch was properly allowed to testify as a beneficiary of the Trust, concerning his opinion of value of the Trust property. James Rausch, in accord with Ia. R. E. 5.701 and the Wyngarden, Whitley, and Meeker cases was not allowed to express his opinion as to whether various sales were comparable to the Trust property because James Rausch did not have firsthand, personal knowledge of any of the sales that he sought to opine were comparable to the Trust property. The jury verdict in this case should be affirmed.

REQUEST FOR ORAL ARGUMENT

The Defendant/Appellee hereby requests to be heard in oral argument upon submission of this appeal.



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COST CERTIFICATE

I, Robert W. Goodwin, Attorney for Defendant/Appellee, hereby certify that the actual cost of reproducing the necessary copies of the preceding Defendant's/Appellee's Brief was $4.00, and that amount has actually been paid in full by Robert W. Goodwin.

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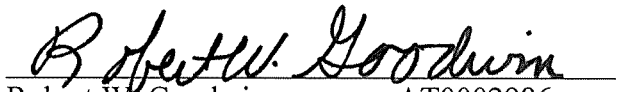

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,618 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word in 12 point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellants Proof Brief with the Clerk of the Iowa Supreme Court on May 20, 2020.

I, Robert W. Goodwin, hereby further certify that on May 20, 2020, I served the foregoing Appellants Proof Brief, by the electronic filing system, to the following attorney of record:

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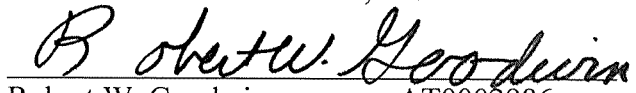

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