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.

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS DECISION FILED APRIL 14, 2021

BRADLEY & RILEY PC

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QUESTIONS PRESENTED FOR REVIEW

I. Whether in this eminent domain case, the Court of Appeals' decision is in conflict with the law of Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413 (1959) when a trust beneficiary is allowed to give an opinion of damages but is denied the opportunity to provide the jury with evidence of his knowledge of the sales of property supporting his opinion?

II. Whether in this eminent domain case, the Court of Appeals' decision erroneously treated a trust beneficiary's proffered evidence of comparable sales to be lay opinion evidence?

III. Whether the Court of Appeals decision is contrary to the right of owners to receive just compensation based on sales of comparable property where the knowledge of an interested beneficiary is excluded from the evidence because of an erroneous requirement that an expert opine as to what real property is comparable.

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STATEMENT SUPPORTING FURTHER REVIEW

This is a lawsuit to determine the amount of just compensation 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. Phyllis Rausch became unable to participate in hearings or trial of the condemnation. The Trust was represented at trial by her son, James Rausch.

Notwithstanding the Court's opinion in Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413, 85 A.L.R.2d 96 (1959), Appellant's evidence of the sales of comparable property was kept from the jury. In Redfield the Court changed Iowa law. Id., 251 Iowa at 341-342, 99 N.W.2d at 418-419. For the first time the Court allowed a witness, testifying as to the value of land in a condemnation, to testify as to the sale of comparable property on direct examination. Prior to Redfield, such evidence was limited to cross examination of a witness.

The witness in Redfield was an appraiser. In that case, the owner also testified as to the damages. In this case, James Rausch testified as to the damages, which were substantially more than the opinion on damages rendered

by Marion's appraiser. It is commonplace for owners and owner representatives to give an opinion of value in condemnation cases. The Trial Court effectively limited the Redfield decision to evidence of the sale of comparable properties when presented by an expert. By requiring that an expert first conclude that property is comparable before evidence of the sale price of that property can be received, the Trial Court restricted a recognized right of an owner's representative to testify as to the amount of just compensation. The jury was denied having before it the sales of commercial property that James Rausch used as the basis for his opinion of the value of the land taken by Marion.

The Court of Appeals approach to the appeal was short. The Court of Appeals couched its decision in terms of "adequate foundation", "personal knowledge" and "witness's perception." James Rausch admittedly was not a party to any of the comparable sales, did not broker the sales or have any relationship to the parties in the sales. However, the witness knew of the sales from changes in the properties (i.e., the demolition of a bank building for a convenience store, the construction of a medical building on vacant land and the purchase of a small restaurant followed by demolition and construction of a strip mall) and readily available public records. From deeds and public records, he developed personal knowledge of the sales and the parties to the sales, observed the construction of new commercial properties, perceived the

similarities in location and other features and had more than enough basis to describe the properties to the jury.

The Trial Court abused its discretion in its ruling on the admissibility of the proffered testimony.

The Court of Appeals decision lets stand a Trial Court ruling that is contrary to the logical application of the Redfield opinion to owners.

BRIEF

Prior to trial, the City of Marion filed a Motion in Limine. The Motion in Limine was granted prohibiting James Rausch from testifying at trial regarding comparable sales. 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 sales could be presented to the jury.

In seeking to value the subject commercial property located on a four-lane divided highway near the commercial center of Cedar Rapids/Marion, an appraiser may, as did Marion's appraiser, identify properties located on arterial streets zoned for multi-residential or industrial uses as comparable. Moreover, an appraiser such as Marion's might look to a suburban community with minimal commercial development for a property chosen because it had trees that might have to be cleared.

In contrast, an owner's self-interest dictates that where the property is zoned for intense commercial uses, comparable property be identified with particular attention to traffic counts on a four-lane divided highway in and among concentrated commercial uses such as another retail mall area. Finding completed sales of property that are vacant or primed for redevelopment, an owner is well equipped to make a rational decision on the value of the subject property.

Based upon the deposition of James Rausch and the testimony of James Rausch entered into the record prior to the commencement of trial, Appellant established a basis for James Rausch to testify as to the property taken. At the trial, he stated the value of the property before the taking and after the taking. His trial testimony, however, was not connected to any comparable sale evidence because of the Trial Court's ruling excluding evidence of comparable sales.

James Rausch is knowledgeable about properties that had sold in Cedar Rapids and Marion. He knew enough about the sold properties, the location, size, characteristics and sale price of the properties to establish that the properties were comparable to the Trust property. He testified (without the jury present) as to sale information on the comparable properties.

Phyllis Rausch requires around the clock care and supervision, which James Rausch almost single handedly provides. 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. 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. He was responsible for many aspects of the real estate owned by the Trust, by Phyllis Rausch or by her own trust.

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. He became knowledgeable about and used the readily available public records and methods of finding public records online.

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. 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. Personal observations reveal when property undergoes development, leading to discovery of sales and the price paid for the

property. In addition, assessors have searchable databases to find sale transactions.

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. 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. The transfer tax can be used to determine the price paid for the real estate within $500. 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.

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); Van Horn v. Iowa Public Service Co., 182 N.W.2d 365, 373 (Iowa 1970) (owners each testified as to market value decline); Iowa Development Company v. Iowa State Highway Commission, 255 Iowa 292, 298, 122 N.W.2d 323, 327 (1963) (president of owner).

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. 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. In front of the jury his limited trial testimony of the 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.

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.

The owner of property should be treated differently from lay witnesses regarding a requirement of personal knowledge. 31A Am. Jr. 2d, Expert and Opinion Evidence §241 (2012). A witness qualified as "expert" on land value may fortify testimony with comparable sales. Id. §247. An owner of real property is presumed to have special knowledge of value and is therefore competent to testify. Id. §248. An owner's opinion of value goes to weight of testimony not its admissibility. Id. §249. Opinion based on specialized knowledge within the scope of Iowa R. Evid. 5.702 should be removed from lay opinion rule and evaluated under expert opinion rules. 7 Ia. Prac., Evidence §5.701:1 nn 30-36.

Logic and fairness support the approach taken by courts applying rules of evidence similar to Iowa's. In a series of federal court cases applying the federal rules of evidence, the owner is treated as an expert entitled to the privileges of an expert. That includes the privilege of relying on knowledge the witness has been made aware of or on personal knowledge. U.S. v. Laughlin, 804 F.2d 1336, 1341 (5th Cir. 1986) (owner's testimony in eminent domain is within expert opinion exception to hearsay); LaCombe v. A-T-O, Inc., 679 F.2d 431, 434-36 n.4 (5th Cir. 1982) (prejudicial to exclude owner's evidence of value of his property in eminent domain).

In these cases it is understood that the testimony of the owner is admissible and the weight to be given the testimony is for the jury.

The federal court cases are predicated in part on the Advisory Committee Notes accompanying Federal Rule of Evidence 702: The rule [702] is broadly phrased.

> The fields of knowledge which may be drawn upon are not limited merely to "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects,

but also the large group sometimes called "skilled" witnesses, such as bankers, or landowners testifying to land values." (emphasis added)

From the standpoint of the jury, contrast James Rausch's naked opinion of value allowed in this case to the opinion of the paid appraiser. It is fundamentally unfair to exclude comparable sales that form the basis of the opinion of an owner. To permit a witness to express an opinion of value without allowing testimony as to basis for opinion denies the trier of fact a basis for weighing and evaluating the evidence. 31A Am. Jur. 2d, Expert and Opinion Evidence §226 (2012).

Exclusion of comparable sale evidence resulted in a verdict that denied Appellant just compensation. Exclusion of the comparable sale information was predicated on an erroneous application of the rules of evidence.

CONCLUSION

The Trial Court ruling on the Motion in Limine unfairly and unjustly denied Appellant the opportunity to obtain just compensation. The Court of Appeals decision failed to correct the trial court's error. 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.

/s/ Dean A Spina
Dean A. Spina

May 4, 2021
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:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond 14-point font, and contains _____ words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

[ ] this brief has been prepared in a monospaced typeface using [state name of typeface] in [state font size] and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/ Dean A Spina — May 4, 2021

Dean A. Spina — Date

CERTIFICATE OF SERVICE AND FILING

I certify that on May 4, 2021, I served the foregoing Application for Further Review upon the Clerk of the Supreme Court of Iowa by electronically filing the document through the EDMS, which will notify all parties of the electronic filing.

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Dean A. Spina

COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Application for Further Review is $0.

/s/ Dean A. Spina
Dean A. Spina

DECISION OF THE COURT OF APPEALS AND ORDER ENTERED BY THE DISTRICT COURT

Pursuant to Rule of Appellate Procedure 6.1103(1)(c)(5), a copy of the Court of Appeals decision, filed April 14, 2021, is attached as Attachment A. In addition, a copy of the District Court's Order dated August 19, 2019, is attached as Attachment B.

IN THE COURT OF APPEALS OF IOWA

No. 19-1582
Filed April 14, 2021

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 for Linn County, Patrick R. Grady, Judge.

Phyllis M. Rausch, as trustee of the William J. Rausch Family Trust, appeals a condemnation award. **AFFIRMED.**

Dean A. Spina of Bradley & Riley PC, Cedar Rapids, for appellant.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, and Kara L. Bullerman of Allen, Vernon & Hoskins, P.L.C., Marion, for appellee.

Considered by Doyle, P.J., and Tabor and Ahlers, JJ.

ATTACHMENT A

DOYLE, Presiding Judge.

Phyllis M. Rausch, as trustee of the William J. Rausch Family Trust, appeals a condemnation award providing compensation for a portion of trust property the City of Marion obtained to connect Armar Drive to Highway 100. A compensation commission awarded $403,000 in damages to compensate for the decrease in fair and reasonable market value of the property. Rausch appealed the commission's decision to the district court, claiming the property's value decreased by at least $1,000,000. After a jury found the property's fair and reasonable market value decreased by $82,900 as a result of the taking, the district court denied and dismissed the condemnation appeal.

At issue on appeal is the exclusion of comparable sales evidence at trial. We review evidentiary rulings for an abuse of discretion. *See Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012). An abuse of discretion occurs when the trial court bases its ruling on unreasonable or untenable grounds. *See Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 718 (Iowa 2014). Grounds for a ruling are untenable if the court erroneously applies the law. *See id.* We reverse only if the ruling prejudices the complaining party. *See Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 385 (Iowa 2012).

Rausch sought to introduce evidence of comparable sales, in part, through the testimony of her son, James Rausch. Although the district court allowed James to give his opinion as to the value of the land,[1] it ruled that James could not testify

[1] *See In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("In ascertaining the value of property, its owner is a competent witness to testify to its market value."). James was a contingent beneficiary of the trust. The issue of whether he was qualified to give an opinion of the value of the property as an owner of the

regarding specific sales he believed to be comparable because he had no personal knowledge or familiarity with those sales.[2] Rausch argues James was qualified to present evidence regarding sales of similar properties as a trust beneficiary.

A property owner may testify as to the market value of that property. *See Holcomb v. Hoffschneider*, 297 N.W.2d 210, 213 (Iowa 1980). Based on his interest in the trust, the court allowed James to give his opinion that the land's value is $12 per square foot or $522,720 per acre. But this interest alone does not qualify James to testify regarding comparable sales. The court will exclude lay opinion evidence without adequate foundation. *Sonnek v. Warren*, 522 N.W.2d 45, 50 (Iowa 1994). Our rules of evidence limit lay witness testimony to matters within the witness's personal knowledge. *See* Iowa R. Evid. 5.602. And any opinion offered by a lay witness must be rationally based on the witness's perception. *See* Iowa R. Evid. 5.701(a). Because James had no personal knowledge of the sales he claimed are comparable, the district court properly excluded the evidence. Finding no abuse of discretion, we affirm.

AFFIRMED.

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trust property was contested before the district court, but not contested on appeal. The city's appellate brief concludes James "was properly allowed to testify as a beneficiary of the Trust, concerning his opinion of value of the Trust property." Because the issue of whether a contingent trust beneficiary has an ownership interest in trust property sufficient to qualify the beneficiary to opine to the property's value is not raised on appeal, we express no opinion on the issue.

[2] During his deposition testimony, James admitted he had no personal knowledge of the three sales he believed to be comparable; his only knowledge of the sales was gleaned from the county assessor's website.

E-FILED 2019 AUG 14 3:11 PM LINN - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

PHYLLIS M. RAUSCH, TRUSTEE OF THE WILLIAM J. RAUSCH FAMILY TRUST	)	**LACV087659**
	)	**CVCV087911**
Plaintiff,	)	
vs.	)	
	)	**ORDER**
CITY OF MARION,	)	
Defendant.	)	
IN THE MATTER OF THE CONDEMNATION OF CERTAIN RIGHTS IN LAND FOR THE EXTENSION OF ARMAR DRIVE PROJECT BY THE CITY OF MARION, IOWA	)	

The Court has now read the depositions of James Rausch, Jonathan Westercamp and James Angsman. It is clear that, under Rule 1.508, and Morris-Rosdal v. Schechinger, 576 N.W.2d 609, 611-12 (Iowa App. 1998), that the opinions they seek to give are expert in nature rendered by witnesses who would otherwise qualify as experts based on their training and education. 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 because it is not based on his personal experience or familiarity with the transactions he wishes to call comparable and his information about the market value of the subject property is based on hearsay about how others valued the property at different times.

Thus, Defendant's Motions to Strike are granted subject to Plaintiff's offers of proof.

The Court will more fully discuss Plaintiff's Motion in Limine on August 14, 2019, at 8:30 a.m.

Clerk to notify.

ATTACHMENT B

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State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV087659	PHYLLIS M RAUSCH VS CITY OF MARION ET AL

So Ordered

Patrick R. Grady, Chief District Court Judge,
Sixth Judicial District of Iowa