

**IN THE SUPREME COURT OF IOWA**

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

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**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.**

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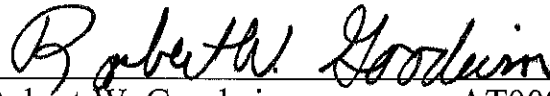
**APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR LINN COUNTY  
THE HONORABLE CHIEF JUDGE PATRICK R. GRADY**

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**APPELLEE'S RESISTANCE TO APPELLANT'S APPLICATION  
FOR FURTHER REVIEW OF COURT OF APPEALS DECISION  
FILED APRIL 14, 2021.**

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GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin AT0002986

2211 Philadelphia Street, Suite 101

Ames, IA 50010-8767

Telephone: (515) 232-7390

Facsimile: (515) 232-7396

E-mail: goodwinlawoffice@fbx.com

**ATTORNEY FOR  
DEFENDANT/APPELLEE**

*/s/ Kara L. Bullerman*

Kara L. Bullerman ATM570017

ALLEN, VERNON & HOSKINS, P.L.C.

1080 9th Avenue, First Floor

Marion, IA 52302

(319) 377-3277

(319) 319-377-8147 (Fax)

E-Mail: Kbullerman@allenvernon.com

**ATTORNEY FOR CITY OF MARION  
DEFENDANT/APPELLEE**

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## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

The issue presented for review, although stated by Appellant in three forms, is that the Plaintiffs' son, James Rausch, a lay witness, pursuant to Iowa Rule of Evidence 5.701, was correctly not allowed to testify as to his opinion of three sales he wanted to claim to be comparable to the Trust's property because he has no personal knowledge of those sales.

## BRIEF

The Appellant fails to acknowledge the distinction between testimony of fact and opinion. Whether a sale of property is comparable to the Trust's property is an opinion. Black's Law Dictionary defines opinion evidence as follows:

“Evidence of what the witness thinks, believes or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves; ...”

The Appellant failed to have an expert witness for trial, and instead had her son, James Rausch, testify in his opinion that the Trust's property was worth \$12.00 per square foot, or \$522,720.00 per acre, and the damages were \$800,000.00. Tr. P. 104 ll. 11-23; p. 110 ll. 13-17; p. 110 l. 23 – p. 111 l. 23.

The City's appraiser testified the Trust's property is worth \$120,000.00 per acre, and the Trust's damages are \$82,900.00, with which the jury agreed.

James Rausch was qualified, as a beneficiary of the Trust, to testify as to his opinion of the value of the Trust's property. The Court of Appeals cites Holcomb v. Hoffschneider, 297 N.W.2d 210, 213 (Iowa 1980) in support of that principle. In accord with that principle are the cases of Friest v. Friest; Newlands v. Iowa Ry. & Light Co.; State v. Savage; and State v. Boyken, cited on page 28 of the City of Marion's Brief filed May 20, 2020.

James Rausch correctly was not allowed to express his opinion of certain sales of real estate being comparable to the Trust's property because he has no personal knowledge of those sales. Reading the assessor's website about sales does not give James Rausch personal knowledge of those sales.

The following are some factors to be considered in forming an opinion of whether a sale is comparable to the subject property:

- Size.
- Use.
- Location and character of land.
- Mode of sale, cash or otherwise.

“Size, use, location and character of the land, time made and nature of the sale, all have a bearing on the admissibility of such evidence.

...

Much must necessarily be left to the sound discretion of the trial court as to whether or not the conditions are met which make the admissibility rule applicable.” Redfield v. Iowa State Highway Commission, 99 N.W.2d 413, 418-419 (Iowa 1960).

“Other similar sales need not be identical but must have a resemblance in order to be shown in evidence. Size, use, location and character of the land and time, mode and nature of the sale all have a bearing on the admissibility of such evidence. Much must be left to the sound discretion of the trial court in determining whether the other properties and conditions surrounding sale thereof are sufficiently similar so evidence of such sales is admissible. Redfield case, at pages 418-419 of 99 N.W.2d; 5 Nichols on Eminent Domain,

Third Ed., section 21, 31, pages 280-282.” Iowa Development Company v. Iowa State Highway Commission, 108 N.W.2d 487, 492 (Iowa 1961).

In accord is Belle v. Iowa State Highway Commission, 126 N.W.2d 311, 313-314 (Iowa 1964).

“However, it must be shown that there is sufficient similarity to the subject property before such evidence is admissible. Redfield v. Iowa State Highway Commission, supra, p. 342, 99 N.W.2d 413; Iowa Development Co. v. Iowa State Highway Commission, 252 Iowa 978, 986, 990, 108 N.W.2d 487; Belle v. Iowa State Highway Commission, Iowa, 126 N.W.2d 311, 314.” Martinson v. Iowa State Highway Commission, 134 N.W.2d 340, 344.

In accord is Booras v. Iowa State Highway Commission, 207 N.W.2d 566, 568 (Iowa 1973).

Pursuant to Iowa Rule of Evidence 5.701, Wyngharden v. Iowa Judicial Branch, 922 N.W.2d 105 (Table) (Iowa App. 2018), p. 9, Meeker v. Clinton, 259 N.W.2d 822, 830-831 (Iowa 1971), and Whitley v. C.R. Pharmacy Serv., Inc., 816 N.W.2d 378, 390 (Iowa 2012), James Rausch was not allowed to testify as to his opinion of whether three sales, which he saw online, are comparable to the Trust’s property, because he does not have personal knowledge of those sales.

The City Appraiser, Mr. Passmore, on cross-examination was asked about the sales that James Rausch wanted to say are comparable to the Trust’s property. Mr.



Passmore testified that they are not comparable to the Trust's property. Tr. p. 248 ll. 15-17; p. 250 ll. 24-25; p. 252 l. 21 - p. 253 l. 23.

### **CONCLUSION**

The Court of Appeal's April 14, 2021 Ruling correctly ruled that its review of evidentiary rulings is on the basis of an abuse of discretion, citing Hall v. Jennie Edmondson Mem'l Hosp., 812 N.W.2d 681, 685 (Iowa 2012). It correctly ruled that James Rausch is not qualified to testify as to his opinion regarding comparable sales, citing Sennek v. Warren, 522 N.W.2d 45, 50 (Iowa 1994). The Court of Appeal correctly ruled "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."

The Appellant's Application For Further Review Of The Court Of Appeals Decision Filed April 14, 2021 should be denied.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin AT0002986

2211 Philadelphia Street, Suite 101

Ames, IA 50010-8767

Telephone: (515) 232-7390

Facsimile: (515) 232-7396

E-mail: goodwinlawoffice@fbx.com

**ATTORNEY FOR DEFENDANT/APPELLEE**

*/s/ Kara L. Bullerman*

Kara L. Bullerman ATM570017

ALLEN, VERNON & HOSKINS, P.L.C.

1080 9th Avenue, First Floor

Marion, IA 52302

(319) 377-3277

(319) 319-377-8147 (Fax)

E-Mail: Kbullerman@allenvernon.com


**ATTORNEY FOR CITY OF MARION**

**DEFENDANT/APPELLEE**

**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 1,776 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 14 point Times New Roman.

GOODWIN LAW OFFICE, P.C.

  
\_\_\_\_\_  
Robert W. Goodwin, AT0002986

GOODWIN LAW OFFICE, P.C.

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

**ATTORNEY FOR DEFENDANT/APPELLEE**

*/s/ Kara L. Bullerman*

\_\_\_\_\_  
Kara L. Bullerman ATM570017

ALLEN, VERNON & HOSKINS, P.L.C.

1080 9<sup>th</sup> Avenue, First Floor

Marion, IA 52302

(319) 377-3277

(319) 319-377-8147 (Fax)

E-Mail: [Kbullerman@allenvernon.com](mailto:Kbullerman@allenvernon.com)

**ATTORNEY FOR DEFENDANT/APPELLEE**

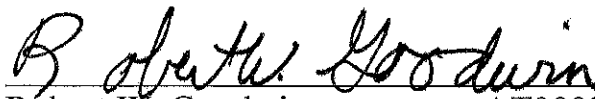
**CERTIFICATE OF FILING AND SERVICE**

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellee's Resistance To Appellant's Application For Further Review Of Court Of Appeals Decision Filed April 14, 2021 with the Clerk of the Iowa Supreme Court on May 19, 2021.

I, Robert W. Goodwin, hereby further certify that on May 19, 2021, I served the foregoing Appellee's Resistance To Appellant's Application For Further Review Of Court Of Appeals Decision Filed April 14, 2021, by the electronic filing system, to the following attorney of record:

Bradley & Riley PC  
Dean A. Spina AT0007455  
2007 First Avenue SE  
PO Box 2804  
Cedar Rapids, IA 52406-2804  
Phone: 319-861-8725  
Fax: 319-363-9824  
Email: [Dspina@bradleyriley.com](mailto:Dspina@bradleyriley.com)

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin AT0002986

2211 Philadelphia Street, Suite 101

Ames, IA 50010-8767

Telephone: (515) 232-7390

Facsimile: (515) 232-7396

E-mail: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

**ATTORNEY FOR DEFENDANT/APPELLEE**

*/s/ Kara L. Bullerman*

---

Kara L. Bullerman ATM570017  
ALLEN, VERNON & HOSKINS, P.L.C.  
1080 9th Avenue, First Floor  
Marion, IA 52302  
(319) 377-3277  
(319) 319-377-8147 (Fax)  
E-Mail: [Kbullerman@allenvernon.com](mailto:Kbullerman@allenvernon.com)  
**ATTORNEY FOR CITY OF MARION**  
**DEFENDANT/APPELLEE**

**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 \$1.40, and that amount has actually been paid in full by Robert W. Goodwin.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin AT0002986  
2211 Philadelphia Street, Suite 101  
Ames, IA 50010-8767  
Telephone: (515) 232-7390  
Facsimile: (515) 232-7396  
E-mail: goodwinlawoffice@fbx.com  
**ATTORNEY FOR DEFENDANT/APPELLEE**

*/s/ Kara L. Bullerman*

---

Kara L. Bullerman ATM570017  
ALLEN, VERNON & HOSKINS, P.L.C.  
1080 9th Avenue, First Floor  
Marion, IA 52302  
(319) 377-3277  
(319) 319-377-8147 (Fax)  
E-Mail: Kbullerman@allenvernon.com  
**ATTORNEY FOR CITY OF MARION  
DEFENDANT/APPELLEE**