

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
MAR 28 2011

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

City of Richmond Heights, Missouri)
)
Plaintiff/Appellant,)
)
vs.)
)
Ruth L. Gasway, et al.,)
)
Defendants/Respondents.)

No: ED95791

92039

FILED

SEP 22 2011

CLERK, SUPREME COURT

Brief of Appellant

Appeal from the Circuit Court of St. Louis County
The Honorable Richard C. Bresnahan, Circuit Judge

Kenneth J. Heinz #24242

kheinz@lawfirmemail.com

Carl J. Lumley #32869

clumley@lawfirmemail.com

Edward J. Sluys #60471

esluys@lawfirmemail.com

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

130 S. Bemiston, Suite 200

St. Louis, Missouri 63105

(314) 725-8788

(314) 725-8789 (FAX)

ATTORNEYS FOR APPELLANTS

SCANNED

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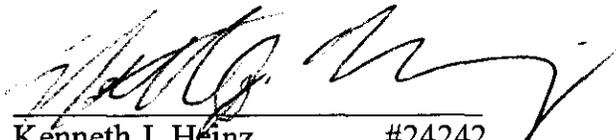
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MEMO TO COURT

CLERK, SUPREME COURT

Come now attorneys for Plaintiff/Appellant City of Richmond Heights, Missouri and advise the Court that after filing of Brief of Appellant on March 28, 2011, it has come to counsels' attention that the Table of Contents set forth in the bound version of the Brief of Appellant inaccurately reflects the contents and page numbering of the Appendix. A correct version of the Table of Contents with correct Appendix is shown on the disk provided to the court and is also attached hereto for the Court's reference.

Respectfully submitted,



Kenneth J. Heinz #24242

kheinze@lawfirmemail.com

Carl J. Lumley #32869

clumley@lawfirmemail.com

Edward J. Sluys #60471

esluys@lawfirmemail.com

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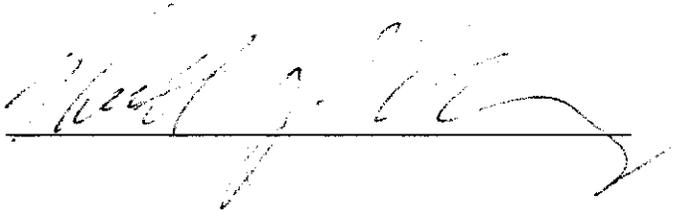
CERTIFICATE OF SERVICE

A copy of the foregoing Memo was mailed on the 29th, day of March 2011, to:

Steven E. Spoeneman
Spoeneman, Watkins, & Harvell, LLP
231 S. Bemiston, Suite 1070
St. Louis, Missouri 63105

and

Jennifer Mary West
800 Market Street, Suite 1660
St. Louis, Missouri 63101



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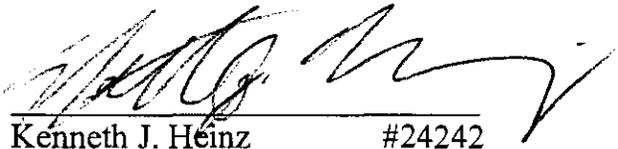
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kheinz@lawfirmemail.com

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clumley@lawfirmemail.com

Edward J. Sluys #60471

esluys@lawfirmemail.com

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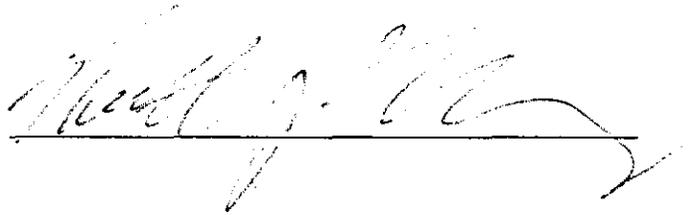
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kheinz@lawfirmemail.com
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clumley@lawfirmemail.com
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City of Richmond Heights v. Ernest Brooks and Brooks Interiors, Inc.,
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JURISDICTIONAL STATEMENT

This action involves a trial court's error in enhancing the Jury's award of damages in a condemnation action by adding 25% to the Jury award for Homestead value pursuant to Section 523.039 RSMo, as the trial court in so doing awarded the property owner more than "just compensation," in violation of Article 1, Section 26 of the Missouri Constitution.

Further, this action involves the erroneous and prejudicial admission into evidence of the opinions of a real estate appraiser as to an unfounded and artificially inflated value of Respondents' property, despite a Motion in Limine to exclude such testimony.

Jurisdiction over this appeal is vested in the Court of Appeals by Article V, Section 3, of the Missouri Constitution as if this Court finds in favor of Appellant and orders the matter remanded for a new trial, this case may be resolved without consideration of the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or the imposition of the death penalty. The Circuit Court of St. Louis County is within the territorial jurisdiction of this Court. Section 477.050, RSMo.

In the event that this Court does not determine that the instant appeal can be determined without consideration of the constitutional issues, Appellants respectfully request that this Court transfer the matter to the Missouri Supreme Court.

STATEMENT OF FACTS

This case involves a piece of real property located at 1517 Banneker Avenue, Richmond Heights, Missouri (“Subject Property”). (Supplemental Legal File (“S.L.F.”) at 10). The Subject Property is 6,000 square feet in area, and contains a house 900 square feet in livable area. (Plaintiffs’ Exhibit A at 1). The Subject Property fronts onto Banneker Avenue but backs onto the Mount Zion Missionary Baptist Church, which blocks the Subject Property completely from Hanley Road. (Trial Transcript (“Tr.”), 137-138; 171-172). Banneker Avenue comes to a dead end just to the south of the Subject Property. (Plaintiffs’ Exhibit A at 10). The Subject Property is depicted in the following street view photograph:



(Plaintiff’s Exhibit A, at 10)

On July 12, 2006, the Richmond Heights’ City Council adopted Ordinance 4991, approving the Hadley Township Redevelopment Plan (“the Plan”), and authorizing the

City to “take any and all actions as may be deemed necessary or convenient to carry out and comply with the intent of the Ordinance.” (S.L.F. at 17). The Hadley Township is an area generally bounded by Highway 40/Interstate 64 and Dale Avenue on the North, West Bruno Avenue on the South, Laclede Station Road on the East and Hanley Road on the West. (S.L.F. at 16). Pursuant to the Plan, the City of Richmond Heights (“Richmond Heights” or “City”) obtained an order of condemnation on March 26, 2008, over the Subject Property. (S.L.F. at 23).

On July 11, 2008, the Report of Commissioners was filed with the Circuit Court. (S.L.F. at 25). The Commissioners assessed Respondent Gasway’s (“Gasway”) damages to be in the amount of \$264,717 for the appropriation of the Subject Property. (S.L.F. at 26). Both Richmond Heights and Respondents Gasway (“Gasway”) timely filed their exceptions to the Commissioners’ award and a jury trial was requested. (S.L.F. at 30-33).

Gasway hired an appraiser, Ernest A. Demba (“Demba”), who prepared an Appraisal of the Subject Property. Demba’s Appraisal included his opinion that the Subject Property was worth \$324,000.00. (Tr. at 104). Demba based his valuation upon his opinion that the highest and best use of the Subject Property would be as part of a “Commercial-Assemblage.” (Tr. at 104). Further, Demba opined that there was a 99% “Probability of Assemblage” for a commercial development. (Tr. at 102). Demba’s theorized commercial assemblage would encompass other properties within the Hadley Township Redevelopment Area, which includes two hundred or so properties and covers some fifty acres of land. (Tr. at 82).

Although Demba's appraisal contained nine "Comparable Sales," only four were used in computing his final weighted average, which he in turn used to calculate his asserted value of the Subject Property. (Tr. at 104). The four properties that Demba used to calculate his fair market value were all purchased pursuant to commercial redevelopment projects and were sold in 1998 (The Promenade), 2000 (Brentwood Square), 2003 (Maplewood Commons) and 2004 (The Boulevard). (Tr. at 105-107). Demba was unsure as to what extent condemnation, or the threat of condemnation, had been involved in the acquisition of his comparable sales, but he acknowledged that at least the threat of condemnation and the use of Tax Increment Financing are always present in the market when developers are purchasing property. (Tr. at 114-116). To reach his final valuation for the Subject Property, Demba made a series of adjustments for inflation, "submarket," "retail market" and "land use." (S.L.F. 109).

On July 13, 2010, Richmond Heights filed its First Motion in Limine to Exclude Testimony of Ernest A. Demba. (L.F. at 10). Richmond Heights' Motion in Limine asserted that Demba's use of "an assemblage or plottage value is not supported under Missouri Law and on the facts of the case," and that "Demba's testimony is highly speculative and has no probative value other than to inflame and prejudice the jury." (L.F. at 10 & 11). Further, Richmond Heights sought an Order in Limine on the grounds that properties acquired through "public assemblage do not constitute comparable sales," that "Demba's narrative concerning the history of the Hadley Township project is hearsay," and that Demba's testimony violates the "Project Influence Doctrine." (L.F. at 11).

On August 12, 2010, the trial court ruled that it would take Richmond Heights' First Motion in Limine with the trial. (L.F. at 14). At trial Demba testified (and his appraisal was received into evidence), that in his opinion the highest and best use of the Subject Property would be as a commercial assemblage and that the value of the Subject Property was \$324,000.00:

“[Demba] And I rounded that to \$324,000 as value of the property that Mrs. Gasway would sell that property for to a reasonable buyer who could redevelop that property **as part of an assemblage and make money...**”

(Tr. at 103) (Emphasis added).

At trial, David Phillips (“Phillips”), the professional appraiser retained by Richmond Heights, opined that the value of the property was \$112,000.00. (Tr., at 186). Phillips testified at trial that:

“In this particular property, I looked at what the demand was for different types of uses for the property. This was in 2009. If you remember, in late 2006, early 2007, there was what was called the housing bubble bursting. At that time, it was just housing.

It has spread to commercial properties now, commercial properties are in the doldrums. And when I was writing this report, not only was residential housing going down in value on a quarterly basis, but commercial properties were also hurting as well, rents were going down and vacancies were going up.

So it was my opinion at the time that because of the current economic conditions that there really would not be a demand for this property to be converted to commercial. It is not surrounded by commercial. It only backs to a church building. I did not see a demand for this property being used for anything else other than single family residential.”

(Tr. at 171-172).

At the start of the trial, Gasway filed a Motion for the Supplementation of Judgment with Interest from Date of Commissioners’ Award and a Motion for Supplementation of Judgment **with Addition to Fair Market Value**. (L.F. 15-18). Said Motions sought an award of interest and homestead value, pursuant to Section 523.045 and Section 523.039 RSMo, respectively. (L.F. 15-18).

At the conclusion of the trial the jury returned an award of damages of \$300,000.00 in favor of Gasway. The trial court, at the behest of Gasway, and pursuant to Section 523.061 RSMo, added \$75,000.00 to the jury’s determination of fair market value, upon a finding by the Judge that a “homestead taking occurred” as defined by Section 523.039 RSMo. (L.F. at 19). Additionally, the trial court added \$38,519.92 to the jury’s determination of fair market value, pursuant to Section 523.045 RSMo for interest. (L.F. at 19). As such, the total amount of the judgment was for \$413,519.92, even though the jury’s determination of just compensation was \$300,000.00.

On September 10, 2010, Richmond Heights filed its Motion for a New Trial or in the Alternative for Remittitur, stating in part as grounds for relief that: (1) the trial court erred in denying Richmond Heights’ Motion in Limine “to exclude the testimony of

Defendants' expert witness Mr. Demba;" and (2) the trial court erred in awarding homestead value, because doing so added "a premium by multiplying the fair market value of the property by 125% which is in violation of Article I, Section 26 of the Missouri Constitution which provides that the owner of private property, taken through condemnation, is entitled to just compensation, which has been established as being the fair market value of the property and no more." (L.F. at 21-23). The trial court issued its Order denying Richmond Heights' Motion on October 21, 2010. (L.F. at 25). Richmond Heights timely filed its Notice of Appeal on October 28, 2010. (L.F. at 28).

Further, Richmond Heights wishes to bring to this Court's attention the unpublished opinion in *City of Richmond Heights v. Brooks*, 329 S.W.3d 399 (Decided November 20, 2010), which was decided, *per curiam*, after the Notice of Appeal was filed in this case. A copy of said opinion is provided in the Appendix. (Appendix at A4). *Brooks* involves a different piece of property in Richmond Heights. Although, the Court did not issue a published opinion in *Brooks*, and therefore it does not constitute binding precedent, it discussed some of the issues raised herein. However, *Brooks* and the instant appeal can be readily distinguished, as discussed in the "Argument" section of this Brief.

As of the date of this filing, the Subject Property has not been taken and if the excessive award of damages is allowed to stand, Richmond Heights may very likely have to abandon the taking, and the proposed redevelopment project will likely not occur, at least on a scale that would involve the Subject Property.

POINTS RELIED ON

- I. The trial court erred in adding 25% to the Jury's determination of fair market value for "homestead value," pursuant to Sections 523.039 and 523.061 RSMo, because to do so violated Article I, Section 26 and Article VI, Sections 23 and 25 of the Missouri Constitution, in that: (A) adding 25% to the verdict permits a premium for homestead value in excess of just compensation, causing the City to have to expend public monies for private gain; and (B) adding 25% to the verdict takes the decision of determining just compensation away from the jury.

City of St. Louis v. Union Quarry & Const. Co., 394 S.W.2d 300 (Mo. 1965)

Quinn v. Buchanan, 298 S.W.2d 413 (Mo. banc 1957)

U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa., 441 U.S. 506 (U.S. 1979)

Missouri State Park Bd. v. McDaniel, 513 S.W.2d 447 (Mo. 1974)

II. The trial court erred in admitting evidence of Demba's opinions pertaining to an enhanced valuation of the Subject Property, because the trial court abused its discretion in admitting such evidence in violation of the prerequisites for the use of a commercial assemblage value that there must be a reasonable probability that a party other than the City can accomplish the assemblage without resorting to the use of eminent domain, which abuse of discretion resulted in an excessive and substantially unjust award of damages, in that: (A) there was no evidence that it was reasonably probable that a party other than the City could accomplish the assemblage; (B) Demba's own testimony demonstrated that his theorized assemblage was impermissibly predicated upon the availability and use of condemnation to accomplish assemblage; and (C) the award exceeded the admissible evidence of value by at least \$170,000.00.

Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co., 500 S.W.2d

292 (Mo.App.1973)

Kansas City Power & Light Company v. Jenkins, 648 S.W.2d 555

(Mo.App.1983)

City of Richmond Heights v. Brooks, ED94474 (Decided November 20, 2010)

III. The trial court erred in admitting evidence of Demba’s opinions because the trial court abused its discretion in admitting such evidence in violation of the requirements that a comparable sales valuation be based upon voluntary transactions of similar properties that are reasonably proximate in time to the taking of the Subject Property and without the incorporation of project influence or speculative adjustments, which resulted in an excessive and substantially unjust award of damages, in that: (A) properties purchased as part of assemblage projects do not constitute “similar” properties to the Subject Property; (B) Demba used comparable sales that were acquired under the threat of condemnation and therefore not voluntary; (C) Demba used comparable sales that were too remote in time; (D) Demba relied on the value influences of Richmond Heights’ own redevelopment project; (E) Demba employed arbitrary and speculative adjustments to inflate the valuation of the Subject Property; and (F) the award exceeded the evidence of value by at least \$170,000.00.

Rigali v. Kensington Place Homeowners Association, 103 S.W.3d 839

(Mo.App.E.D.2003)

State ex rel. Missouri Highway and Transport Commission v. Zeiser

Motors, Inc., 949 S.W.2d 106 (Mo.App.E.D.1997)

Kansas City Power & Light Company v. Jenkins, 648 S.W.2d 555

(Mo.App.1983)

ARGUMENT

- I. The trial court erred in adding 25% to the Jury's determination of fair market value for "homestead value," pursuant to Sections 523.039 and 523.061 RSMo, because to do so violated Article I, Section 26 and Article VI, Sections 23 and 25 of the Missouri Constitution, in that: (A) adding 25% to the verdict permits a premium for homestead value in excess of just compensation, causing the City to have to expend public monies for private gain; and (B) adding 25% to the verdict takes the decision of determining just compensation away from the jury.

A. Standard of Review

"Construction of a statute is a question of law, which this Court reviews *de novo*." *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). "Statutes are presumed to be constitutional, and this Court will read the statute in a manner consistent with the constitution whenever possible." *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 442 (Mo. banc 2007). "Further, it should be obvious that a statute cannot supersede a constitutional provision, and neither the language of the statute nor judicial interpretation thereof can abrogate a constitutional right." *Doe* at 841. (Internal citations and quotations omitted).

B. The trial court's award of a homestead value violated Article I, Section 26 of the Missouri Constitution in that the trial court has awarded Gasway more than "just compensation"

Article I, Section 26 of the Missouri Constitution requires that "private property shall not be taken or damaged for public use without just compensation." "The ultimate objective in this case, as in all condemnation cases, is to enforce the constitutional mandate [t]hat private property shall not be taken or damaged for public use without just compensation." *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300, 305 (Mo. 1965) (Internal citations omitted). As the U.S. Supreme Court noted in *U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 512 (U.S. 1979), "the dominant consideration always remains the same: What compensation is "just" **both to an owner whose property is taken and to the public that must pay the bill?**" (Emphasis added).

The term "just compensation" has been interpreted by the Missouri Supreme Court as being "the full and perfect equivalent in money of the property taken, **but no more**, for to award more than the value of the condemned property would result in the unjust enrichment of the condemnee." *Id.* "The 'just compensation' referred to [in the Missouri Constitution], generally speaking, is the 'fair market value' of the property at the time of the taking." *Id.* "The fair market value of land is what a reasonable buyer would give who was willing but did not have to purchase, and what a seller would take who was willing but did not have to sell." *Id.*

Similarly, the U.S. Supreme Court, has “employed the concept of fair market value to determine the condemnee’s loss” in interpreting the 5th Amendment to the U.S. Constitution’s use of the term “just compensation.” *564.54 Acres of Land, supra*, at 511. “Under this standard, the owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time of taking.” *Id.* Therefore, the requirement for “just compensation” is not a minimum standard, requiring at least just compensation. Rather it is a requirement that the property owner receive just compensation, no more and no less.

The trial court in requiring that Richmond Heights pay a premium upon “just compensation” for homestead value violates the aforementioned concept of fair market value as being the price that a willing, but not obligated, buyer and seller agree upon. In essence, an additional award of homestead value is enhancing the fair market value awarded by a jury with a premium for the sentimental value the owner attributes to the property by virtue of the duration of ownership. Missouri courts, in conversion cases, have recognized that sentimental value and fair market value are two distinct concepts.

“The measure of damages in an action for conversion of ordinary personal property is the reasonable market value of the personal property at the time of the conversion.” *Ladeas v. Carter*, 845 S.W.2d 45, 53 (Mo. App. W.D. 1992). “In the case where the personal property is something of sentimental value, such as family pictures, heirlooms and the like and which cannot be replaced and have a value to the owner, a different rule requires the allowance of damages and compensation of the reasonable special value of such articles to their owner.” *Id.* “Therefore, the fair market value of certain of the goods may very well have amounted to a determinable figure but the video

tape of plaintiff's father's last words which, because of technical problems, had never been viewed, carries a value different than its fair market value." *Id* at 53-54.¹

Article I, Section 26 of the Missouri Constitution requires that Gasway receive fair market value for the Subject Property, but it provides no mandate for an award of sentimental value, as to do so vitiates the element of the constitutional provision that serves to protect the taxpaying public from paying too much for the taking of private property for a public purpose.

The U.S. Supreme Court in *564.54 Acres of Land, supra*, set forth the rationale for the use of fair market value to compensate the owner of private property taken by condemnation:

"The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker.

Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal

¹ Further, the Georgia Court of Appeals considered whether "sentimental value" comprises any part of "just and adequate compensation," and concluded that such considerations were irrelevant in determining the value of the property. *Department of Transportation v. Metts*, 430 S.E.2d 622, 623-624 (Ga. App. 1993) ("Unique value is based on the characteristics of the land and the use of the land by the owner, but not the characteristics of the owner.")

and variant standards as value to the particular owner whose property has been taken, **this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.** In view, however, of the liability of all property to condemnation for the common good, **loss to the owner of nontransferable values** deriving from his unique need **for the property or idiosyncratic attachment to it**, like loss due to an exercise of the police power, **is properly treated as part of the burden of common citizenship.**” *Id.* at 511-512. (Emphasis added).

The court-ordered premium for homestead value compensates Gasway for her “idiosyncratic attachment” to the Subject Property, which is not within the scope of Article I, Section 26 of the Missouri Constitution’s requirement for “just compensation,” and as such the trial court’s order violates said constitutional provision.

Article I, Section 26 of the Missouri Constitution forms part of the Bill of Rights, and as such is “a declaration of a fundamental right of individuals.” *Quinn v. Buchanan*, 298 S.W.2d 413, 418 (Mo. banc 1957). “It is self-executing to the extent that all provisions of the Bill of Rights are self-executing, namely: Any governmental action in violation of the declared right is void.” *Id.* at 418-419.

Missouri’s Eminent Domain Reform Law was enacted on July 13, 2006, through Mo. H.B. 1944 (2006), which became effective on August 28, 2006. The Eminent Domain Reform Law, enacted what is now Section 523.039 RSMo, which in the pertinent part provides:

“In all condemnation proceedings filed after December 31, 2006, just compensation for condemned property shall be determined under one of the three following subdivisions, whichever yields the highest compensation, as applicable to the particular type of property and taking:

...(2) For condemnations that result in a homestead taking, an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent...”

Therefore, to the extent that Sections 523.039 and 523.061² RSMo cannot be read consistently with Article I, Section 26 of the Missouri Constitution, they are void, as is the court-ordered premium.

Additionally, Article VI, Section 23 of the Missouri Constitution prohibits a political corporation from “grant[ing] public money or thing of value to or in aid of any corporation, association or individual...” Similarly, Article VI, Section 25 of the Missouri Constitution provides that “[n]o county, city or political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation...”

The award of a homestead allowance, pursuant to Sections 523.039 and 523.061 RSMo, constitutes an unconstitutional expenditure of public money for a private gain.

² Which provides that “the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred...”

This concept is consistent with the U.S. Supreme Court's expression of the purpose behind awarding a property owner "just compensation" as being "just" "both to an owner whose property is taken and to the public that must pay the bill." *564.54 Acres of Land, supra*, at 512.

The Missouri Supreme Court has considered whether the award of interest, pursuant to Section 523.045 RSMo, constitutes a grant of public money to a private person, in violation of the Missouri Constitution. *Missouri State Park Bd. v. McDaniel*, 513 S.W.2d 447 (Mo. 1974). The Missouri Supreme Court concluded that the award of interest did not violate the Missouri Constitution as "[i]t is only compensation for predictable loss to a landowner, who has the right to use the amount of a condemnation award from the time it is paid into court." *Id.* at 451. Further, the Court remarked that "the condemnor can be free from this liability by paying the amount of the commissioners' award to the condemnee or to the clerk of the court within thirty days after the filing of the commissioners' report." *Id.*

As such, interest is compensation for the deprivation of the right to use the proceeds of the condemnation award. Conversely, an award for homestead value is not compensation for the deprivation of any additional property interest that is not already compensated by the jury awarded damages. As such, the instant case is distinguishable from *McDaniel* as the trial court's judgment requires Richmond Heights to expend public money for a private gain. Again, to the extent that Sections 523.039 and 523.061 RSMo cannot be read in conformity with the Missouri Constitution, said statutes are void.

Further, the legislature has already added a premium to compensate a property owner if required to move because of a condemnation action, by awarding relocation benefits pursuant to Section 523.200 RSMo.

C. Article I, Section 26 of the Missouri Constitution requires that the jury, not the trial court, determine what constitutes “just compensation” for the Subject Property

Article I, Section 26 of the Missouri Constitution further requires that just compensation “shall be ascertained by a jury or board of commissioners of not less than three freeholders” Consequently, Article I, Section 26 of the Missouri Constitution requires that the jury or the commissioners determine the fair market value of the Subject Property, not the trial court. By filing exceptions pursuant to Section 523.050 RSMo, both parties had a right to have a jury determine “just compensation” for the Subject Property.

For Section 523.039 RSMo to be read in conformity with Article I, Section 26 of the Missouri Constitution, the appropriate “just compensation” must be determined by the jury. Gasway offered no instruction to the jury for a determination of fair market value based upon homestead value, and as such the Jury made no such finding that just compensation for the Subject Property equated to 125% of the fair market value. The jury was instructed on fair market value as follows:

“You must award defendants such sum as you believe was the fair market value of defendants’ property immediately before the taking on 8/31/2010. In determining the fair market value of defendants’ property,

you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

The phrase “fair market value” as used in this instruction means the price that the property in question would bring when offered for sale by one willing but not obliged to sell it and when bought by one willing or desirous to purchase it but who is not compelled to do so.” (Appendix at A16).

The jury was not instructed to consider duration of ownership, and therefore, the trial court’s, *sua sponte*, award of a 25% premium for homestead value invaded the province of the jury in determining what constitutes “just compensation” for the purposes of a taking by condemnation.

Again, to the extent that Sections 523.039 and 523.061 RSMo cannot be read in conformity with Article I, Section 26 of the Missouri Constitution, these statutes are void. *Quinn, supra*, at 418-419

II. The trial court erred in admitting evidence of Demba's opinions pertaining to an enhanced valuation of the Subject Property, because the trial court abused its discretion in admitting such evidence in violation of the prerequisites for the use of a commercial assemblage value that there must be a reasonable probability that a party other than the City can accomplish the assemblage without resorting to the use of eminent domain, which abuse of discretion resulted in an excessive and substantially unjust award of damages, in that: (A) there was no evidence that it was reasonably probable that a party other than the City could accomplish the assemblage; (B) Demba's own testimony demonstrated that his theorized assemblage was impermissibly predicated upon the availability and use of condemnation to accomplish assemblage; and (C) the award exceeded the admissible evidence of value by at least \$170,000.00.

A. Standard of Review

Appellate review of a trial court's admission or exclusion of evidence is for abuse of discretion. *St. Charles County v. Olendorf*, 234 S.W.3d 492, 495 (Mo.App.E.D.2007). In condemnation cases, the appellate court should reverse when the error produced substantial or glaring injustice. *Id.*

B. Demba's opinion of an enhanced value based upon a theory of assemblage violated the requirements of Missouri Law.

(1) Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co.

Mr. Demba's valuation resulted from his opinion that the highest and best use of the Subject Property would be as part of a commercial assemblage. (Tr. at 104). *Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co.*, 500 S.W.2d 292 (Mo. App. 1973) is the leading authority under Missouri Law on the limits of the use of such an assemblage valuation approach.

In *Greystone*, the Court concluded that the trial court erred in allowing evidence to be introduced pertaining to an assemblage value. *Greystone* involved the condemnation of a parcel of property, approximately 7 acres in size, as part of a larger redevelopment project to develop approximately 60 acres both above and below ground. *Id.* at 294. The underground development involved horizontal mining of limestone to create underground storage space. The condemnee in *Greystone* argued that it was entitled to admit evidence of an assemblage value because "any prospective purchaser of the subject tract, after considering the proximity of the defendant's property to the operating cold storage facility and the availability of limestone for mining purposes, would ascribe more value to the defendant's property." *Id.* at 295. The Court held that the condemnee's argument failed because of two defects. *Id.*

First, the court held that a condemnee "is not entitled to the benefit of an enhancement in value of its land which was caused by an improvement made as part of

the project for which [condemnee's] land is being condemned.”³ *Id.* In *Greystone* the condemnee was seeking an increased value of its property based upon the contiguous mine operation and cold storage facility, both of which were created by the same development project for which condemnee's project was being acquired.

Second, the court held that “a condemnee is not entitled to the benefit of a special value which can arise only by reason of the assemblage of its property with other property either already owned by the condemnor or which the condemnor is acquiring as part of the same condemnation project.” *Id.* at 296.

Under this second component of *Greystone*, all evidence of an assemblage value should have been excluded at the trial of the instant matter. This requirement arises from the universal principle that “the value of land in condemnation is that which it has to the condemnee, not to the condemnor.” *Id.* at 297. Any assemblage, involving the Subject Property, would necessarily involve the combination of the Subject Property with plots of land that either are already owned by Richmond Heights, the condemnor, or are currently subject to eminent domain as part of the same redevelopment plan. (S.L.F. at 7; Tr. at 82). Therefore, any theorized assemblage of the Subject Property would involve combining the Subject Property with all the properties in the Hadley Township Redevelopment Area. Such circumstances require the exclusion of any evidence of an assemblage value, as held in *Greystone*.

³ This first defect describes the Project Influence Doctrine, and is discussed more fully *infra*.

There is a singular exception to this exclusionary rule, whereby if the condemnee can demonstrate that a party, other than the condemnor, could accomplish the assemblage without resorting to eminent domain, then the condemnee is nevertheless entitled to introduce evidence as to an assemblage value. *Id.* at 298.

Consequently, there were two essential elements that would have to have been present in order for Demba to have properly employed an assemblage approach to his valuation under this exception: (1) that there was a reasonable probability that a party other than the condemnor could accomplish the assemblage; and (2) that party could accomplish the assemblage without the need to resort to the use of eminent domain. *Id.*

(2) Private Assemblage must be “probable” not merely “possible”

Under *Greystone*, an assemblage value is only attributable to a property when a theorized assemblage, without the use of condemnation, is probable and not merely possible. “*Greystone* required that a defendant must show a reasonable probability that some third party would have made a specially high bid for defendant’s land... had plaintiff’s taking by condemnation not occurred, for a purpose competitive to that of plaintiff.” *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 563 (Mo. App. 1983)

See also, Detroit/Wayne County Stadium Authority v. Drinkwater, Taylor and Merrill, Inc., 705 N.W.2d 549, 558 (Mich. App. 2005) (“This Court expressly employed the concept of “probability” rather than “possibility” to describe the degree of likelihood that was necessary to support a finding that the subject property’s fair market value would be affected by the prospect of a use for which assemblage was required.”); *City of*

New London v. Picinich, 821 A.2d 782 (Conn. App. 2003) (“There must be a reasonable [probability] that the owner could use the tract together with other [parcels for such] purposes or that another could acquire all lands or easements necessary for that use.”)

Demba asserted a 99% “probability” of assemblage. (Tr. at 102). Demba, as an expert witness in a civil proceeding was governed by Section 490.065, RSMo. *Rigali v. Kensington Place Homeowners Association*, 103 S.W.3d 839, 845 (Mo. App. E.D. 2003). Section 490.065, RSMo, provides in part as follows:

“3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.”

“[A]n expert’s opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rationale basis for the opinion.” *Rigali* at 845. Demba’s testimony of a 99% probability of assemblage was unfounded for two principle reasons: (1) Demba is not an urban planner and offers no basis for this alleged probability of assemblage; and (2) his assertion that assemblage was “probable” was derived from his belief that condemnation was readily available, even though pursuant to *Greystone*, reliance on the use of condemnation precludes the assertion of an assemblage value.

“The restriction on speculative testimony by expert witnesses is not a technical rule of evidence but rather a needed protection against evidence of improper measures of

damages being presented to the jury.” *Rigali* at 845. “The potential significant impact on a non-expert jury of expert testimony in the complex field of land appraisal seems to warrant extreme caution in the admission of such testimony.” *Id.*

Demba offered no calculations or methodology that allowed him to reach the figure of 99%, and as such his opinion as to the likelihood of success of his envisioned assemblage project was purely speculative and should have been excluded from the jury’s consideration.

Recently, this Court concluded that the trial court had erred in admitting speculative expert appraisal testimony as “[t]o have probative value expert opinion must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.” *Glaize Creek Sewer District of Jefferson County v. Gorham*, ED94958 at 8 (Decided March 22, 2011).⁴ (“In the instant case, Respondent’s expert’s opinion that the taking had no adverse effect on Appellants’ property was fundamentally unsupported because he had not examined or assessed the property prior to the taking and had no data or evidence to support his opinion.”).

In *Glaize Creek*, this Court further acknowledged that although generally, “questions as to the sources and bases of the expert’s opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury..., in cases where the sources relied on by the expert are so slight as to be fundamentally unsupported, the opinion should be excluded because testimony with that little weight would not assist the

⁴ A copy of the opinion is provided in the Appendix. (Appendix at A17).

jury.” *Id.* at 5. Demba’s testimony as to his 99% probability of assemblage should have been excluded in the instant case.

(3) **Demba’s opinion failed to demonstrate that a private commercial assemblage was achievable without the use of eminent domain**

Gasway also failed to introduce evidence establishing Demba’s hypothetical assemblage could be accomplished without the use of eminent domain. In fact, Demba acknowledged at trial: “I believe that eminent domain is always – is there. I mean, the threat is always there.” (Tr. at 114).

(4) **Demba’s opinion was impermissible under the precedents in Greystone**

Gasway did not offer evidence that there were potential third parties that could somehow accomplish the assemblage, and that any such hypothetical party could accomplish an assemblage without the use of eminent domain. Thus, Gasway failed to satisfy the requirements under *Greystone, supra*, for asserting an assemblage value. Parcels of land other than the Subject Property required for the assemblage are either already owned by Richmond Heights or are subject to acquisition by Richmond Heights as part of the Hadley Township redevelopment plan. (S.L.F. at 7; at Tr. 82). As such, Demba’s opinions pertaining to an assemblage value should have been excluded from the jury’s consideration at trial.

As discussed previously, this Court recently entered an unpublished opinion in another case involving the condemnation of a property pursuant to the Hadley Township

Redevelopment Plan. Similarly, the property owner employed Demba to perform an appraisal of the property and Demba valued the property based upon a theory of commercial assemblage. This Court upheld Demba's use of commercial assemblage in that case, in large part because this Court believed the "evidence showed a reasonable probability that the property would be used as part of a commercial assemblage irrespective of the use of eminent domain." *Brooks* at 6-7. While, Richmond Heights does not believe this Court's Opinion in *Brooks* was consistent with *Greystone*, as it has greatly altered the test for when assemblage value may be used in connection with condemnation proceedings, *Brooks* can in fact be distinguished from the instant case. *Brooks* was settled after this Court's Opinion was entered, but before an Application to Transfer was made to the Missouri Supreme Court.⁵

The two parcels in *Brooks*, which combined were almost twice the size of the Subject Property, were already used, in part, for a commercial purpose. *Brooks* at 2. Further, the property in *Brooks* was a more commercially viable location than Gasway's property, which is immediately behind a Baptist Church, surrounded by residential property and not located in as close a proximity to Hadley Road. (Tr. 171-172) Conversely, the property in *Brooks* was found by this Court to be "located in very close proximity to multi-family, commercial, and planned development commercial districts." *Brooks* at 6. Anyone seeking to assemble a commercial development involving

⁵ This Court denied Richmond Heights' Application to Transfer and Motion for Rehearing in *Brooks*.

Gasway's property, would have to contend with the immense practical difficulties of acquiring the church and purchasing nearby residential properties (if the owners even wanted to sell) and securing the necessary zoning changes. All this would have to be done without Tax Increment Financing or the use, or threatened use, of condemnation, which Demba referred to as the "stick" that developers use and "hold it over everybody." (Tr. at 115)⁶ These factors eliminate whatever "reasonable probability" of assemblage this Court found in the case of *Brooks*.

Richmond Heights urges this Court to reconsider the methodology it used in deciding the *Brooks* case and use the test for admissibility of assemblage value set forth in *Greystone*. However, even under the more permissive *Brooks* standard, Demba's use of a commercial assemblage value was improper here.

C. The trial court's error has caused the taxpayers of Richmond Heights to suffer substantial and glaring injustice.

The trial court's error in allowing the jury to hear and see Demba's opinions of an inflated valuation based on an assemblage value caused the taxpayers of Richmond Heights to suffer substantial and glaring injustice as evidenced by the Jury's award of \$300,000.00. Other than Demba's improper opinions **no** evidence was before the jury that the property was worth more than \$130,000.00. Demba admitted at trial that the

⁶ "I don't know. But TIF financing and the threat of condemnation is the market. That's what developers use, and they hold over everybody as a stick, but it has nothing to do with what they pay. The property owners still get what they get." (Tr. at 115).

residential value of the property was “130 something thousand.” (Tr. at 118). But for Demba’s improper evidence the jury’s award should have been between \$112,000.00 (Phillips’ appraised value) and approximately \$130,000.00 (Demba’s “residential value” of the Subject Property). Any other verdict would have been inconsistent with the evidence. The jury’s verdict was therefore excessive and the trial court’s error resulted in a substantial and glaring injustice to Richmond Heights.

III. The trial court erred in admitting evidence of Demba’s opinions because the trial court abused its discretion in admitting such evidence in violation of the requirements that a comparable sales valuation be based upon voluntary transactions of similar properties that are reasonably proximate in time to the taking of the Subject Property and without the incorporation of project influence or speculative adjustments, which resulted in an excessive and substantially unjust award of damages, in that: (A) properties purchased as part of assemblage projects do not constitute “similar” properties to the Subject Property; (B) Demba used comparable sales that were acquired under the threat of condemnation and therefore not voluntary; (C) Demba used comparable sales that were too remote in time; (D) Demba relied on the value influences of Richmond Heights’ own redevelopment project; (E) Demba employed arbitrary and speculative adjustments to inflate the valuation of the Subject Property; and (F) the award exceeded the evidence of value by at least \$170,000.00.

A. Standard of Review

Appellate review of a trial court’s admission or exclusion of evidence is for abuse of discretion. *St. Charles County v. Olendorf*, 234 S.W.3d 492, 495 (Mo.App.E.D.2007). In condemnation cases, the appellate court should reverse when the error produced substantial or glaring injustice. *Id.*

B. Demba's opinions were based on improper Comparable Sales

“The comparable sales approach consists of comparing **voluntary sales** of similar properties from the same general location which occurred close in time to when the subject property was taken.” *Rigali* at 845. (Emphasis added) (In *Rigali*, Demba was an expert witness and the appellate court concluded that Demba’s testimony should have been excluded as it was not based upon proper comparable sales). Demba’s comparable sales in the present case were improper as: (1) Demba’s Appraisal showed that three of the comparable sales used in the final valuation were not voluntary sales; (2) The majority of the comparable sales occurred between ten and twenty years before the date of the taking; and (3) the comparable sales were all purchased as part of assemblage projects and therefore do not constitute similar properties.

(1) Demba's comparable sales were not voluntary

As a general rule, “the sale price of property similarly situated to that involved in a condemnation proceeding is admissible to aid the jury in determining the compensation to which the landowner is entitled for the taking of his property.” *State ex rel. Missouri Highway and Transport Commission v. Zeiser Motors, Inc.*, 949 S.W.2d 106, 108 (Mo. App. E.D. 1997). “The party seeking to introduce evidence of such a sale has the burden to show that the sale was voluntary.” *Id.* “However, this burden is discharged *prima facie* by the aid of a presumption that the price of land sold was in fact fixed freely and not under compulsion.” *Id.* “Thus, the burden of coming forward with evidence to demonstrate that a particular sale was involuntary shifts to the opposing party.” *Id.*

Webster's Third International Dictionary defines "voluntary" as "not constrained, impelled, or influenced by another."

Demba testified at trial that he believed "that eminent domain is always – is there. I mean, the threat is always there." (Tr. at 114). Further, he stated that "TIF financing and the threat of condemnation is the market. That's what developers use, and they hold over everybody as a stick, but it has nothing to do with what they pay. The property owners still get what they get." (Tr. at 115).

"The price of property sold to a purchaser with the power of eminent domain is admissible **except** when either 1) the condemning authority has a fixed purpose to institute condemnation proceedings if it cannot acquire land by purchase at a satisfactory price, **or** 2) that the condemnor threatened the seller with condemnation if a satisfactory purchase price was not agreed upon." *Zeiser Motors*, at 108. (Emphasis in original). "The courts of this state have recognized that a sale under threat of condemnation to the condemnor is not strictly voluntary." *State ex rel Nealy v. Cole*, 442 S.W.2d 128, 132 (Mo. App. E.D. 1969).

Based upon Demba's acknowledgement of the ever present threat of eminent domain, and Demba's lack of knowledge as to whether his comparable sales involved the use of, or threat of, condemnation undermine any contention that he used "voluntary" comparable sales.

(2) Demba's comparable sales were not reasonably close in time

"Evidence of the sale price of property which is sold reasonably near the time of the taking is admissible to aid the triers of fact in determining the compensation to which

the owner is entitled for the taking of his property.” *State ex rel. Missouri Highway and Transportation Commission v. Sisk*, 954 S.W.2d 503, 509 (Mo. App. 1997). In *Shelby County R-IV School District v. Herman*, 392 S.W.2d 609, 614 (Mo. 1965), the Court held that a “purchase price 23 years before the valuation date, in an entirely different economic era, would be so remote in point of time as to afford no fair criterion of value at the date of valuation.” In *State ex rel State Highway Commission v. Pope*, 74 S.W.2d 265, 270 (Mo. App. 1934), the Court held that “[t]his evidence related to a time too remote to be of value or competent in estimating the market value of the property taken five years later and during a period, when, as the court well knows, property had greatly depreciated in value generally.” Further, the court held that “[t]he value of the land condemned relates to the time of appropriation.” *Id.* The five-year period in *Pope* encompassed the Great Depression, 1928 to 1933. *Id.* at 266. Similarly the comparable sales used by Demba all occurred before the economic recession which began in 2007, causing a decline in properties values which continues today. The date of the taking of the Subject Property was that of the Court’s Order entered on August 31, 2010, which was still in the midst of the current real estate decline.

Demba utilized comparable sales that occurred between 1998 and 2004, in reaching his final valuation of the subject property. (Tr. at 105-107). Property values from the 1990s and the early part of the last decade are so far removed from today’s economic climate that to compare current property values to that era is too remote to be considered sufficiently “close in time.”

(3) **Demba's comparable properties were not similar to the subject property**

In addition to Demba's valuation being derived entirely from sales that were either involuntary or that were too old to offer any legitimate basis for valuation, Demba's comparable sales are not "similar" to the subject property. As discussed *supra*, the subject property does not fit the criteria under Missouri Law for an enhanced valuation based upon a theory of assemblage. As an assemblage value was not permitted in this case, the use of comparable sales that were acquired as part of assemblage projects do not represent "similar" properties to the Subject Property.

Both Demba's assertion of an assemblage value and his comparable sales used to support it should properly have been excluded from the evidence at trial.

(4) **Demba used arbitrary "adjustments" to artificially inflate his valuation of the Subject Property**

Demba's opinions, testimony and Appraisal are devoid of any explanation as to how he reached such specific figures as 20.88%. (Tr. at 111). The fact is that Demba's seemingly precise numbers are not supported by any empirical data, instead they are based upon Demba's simple assertions, in the same manner as his asserted 99% probability of assemblage. Demba's use of such precise numbers, to express his subjective opinions pertaining to factors such as "retail market" and "submarket," mislead the jury into believing that Demba's mere opinions are in fact the result of extensive mathematical calculations.

(5) **Demba's assemblage valuation is improper and contrary to correct appraisal practices and as such should have been excluded**

Greystone is the applicable law in Missouri, and pursuant to that law evidence of assemblage is not admissible when the assemblage is not feasible without the use of condemnation. Therefore, Demba's valuation was improper and unauthorized. In *Rigali*, *supra*, the court held that the trial court erred in refusing to strike Demba's testimony where he had improperly used the sales comparison approach to value a parcel of land. *Rigali* at 845. In *Rigali*, Demba failed to testify as to any comparable sales. *Id.* As discussed *supra*, Demba's proposed comparable sales in this case are improper as they are too old, involved the threat of condemnation and compared the Subject Property to properties purchased under public assemblages. Therefore, Demba's use of a sales comparison approach in this case was not based upon any valid comparable sales.

Other jurisdictions have also held that "the testimony of a witness who uses an unauthorized and improper valuation method should be excluded." *Texas Fruit Palace Inc. v. City of Palestine*, 842 S.W.2d 319, 323 (Tex. App. 1993) The Texas appellate court concluded that where an appraiser had admitted that his theory of appraisal was unique and not standard practice, the trial court did not err in excluding his testimony. *Id.*

Demba's method of valuation was unauthorized and improper, in that he (1) admitted that he believed the threat of condemnation is an ever present market condition (2) admitted that he was unsure as to whether eminent domain, or the threat thereof, had been used to acquire his comparable sales; (3) admitted that his comparable sales were all

acquired prior to the current housing market decline; (4) relied upon comparable sales that were not similar to the Subject Property in that they were acquired pursuant to public assemblage projects; (5) used arbitrary “adjustment” figures to inflate the Subject Property’s valuation; and (6) used an unexplained arbitrary value of 99% to represent his asserted probability of assemblage.

C. Demba’s opinion violates the project influence doctrine

Missouri law prohibits the introduction of evidence that the value of a property is either increased or decreased as a result of the project for which it is taken. *Jenkins, supra*, at 557. This is premised upon the rule that the fair market value of the Subject Property is the value of the property to the condemnee and not the condemnor. *Id.* at 560. Value is to be considered independent of the proposed improvement. *Quality Heights Redevelopment Corp. v. Urban Pioneers*, 799 S.W.2d 867, 870 (Mo. App. 1990); *Jenkins*, at 560 (“In other words, the value should be determined independent of the proposed improvement”). Therefore, that Richmond Heights was acquiring the property for an assemblage project did not entitle Gasway to an increased value, based upon Richmond Heights’ intended use.

D. The trial court’s error has caused Richmond Heights to suffer substantial and glaring injustice.

The trial court’s abuse of discretion in allowing the jury to consider an inflated value of the Subject Property based upon Demba’s use of improper comparable sales, arbitrary adjustments to actual sales prices and Demba’s improper reliance on Richmond Heights’ intended use of the Subject Property, caused Richmond Heights to suffer

substantial and glaring injustice as evidenced by the Jury's award of \$300,000.00, on to which the trial Judge added another \$75,000.00. But for Demba's improper evidence the jury's award would have likely been between \$112,000.00 (Phillips; appraised value) and \$130,000.00. Any other verdict would have been inconsistent with the evidence. The jury's verdict was therefore excessive and the trial court's error resulted in a substantial and glaring injustice to Richmond Heights.

CONCLUSION

The trial court erred in awarding Gasway a premium of \$75,000.00 for homestead value in violation of Article I, Section 26 of the Missouri Constitution. The trial court further erred in admitting Demba's excessive and speculative valuation opinions and in denying Richmond Height's Motion for a New Trial.

As a result of the aforementioned errors, the jury awarded grossly excessive damages to Gasway, which in turn was exacerbated by the trial court's improper award of a homestead premium, causing Richmond Heights to be subjected to substantial and glaring injustice.

For the foregoing reasons, the judgment of the trial court should be reversed and remanded for a new trial with instructions to exclude any testimony from Demba or otherwise as to an assemblage value of the Subject Property. Further on remand, the trial court should be instructed not to award a premium on any jury award for homestead value.

Alternatively, Richmond Heights respectfully requests that this Court transfers this cause to the Missouri Supreme Court for consideration of the Constitutional issues raised herein.

Respectfully submitted,



Kenneth J. Heinz #24242
khein@lawfirmemail.com

Carl J. Lumley #32869
clumley@lawfirmemail.com

Edward J. Sluys #60471
esluys@lawfirmemail.com

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.

130 S. Bemiston, Suite 200

St. Louis, Missouri 63105

(314) 725-8788

(314) 725-8789 (FAX)

ATTORNEYS FOR APPELLANTS

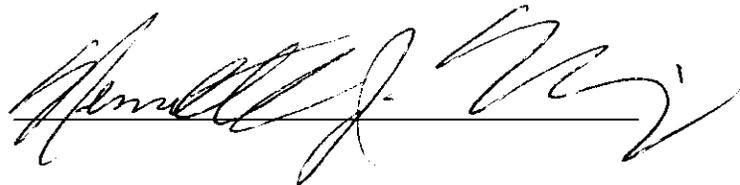
CERTIFICATE OF SERVICE

A copy of this brief and a disk containing the brief were mailed on the 28th, day of March 2011, to:

Steven E. Spoeneman
Spoeneman, Watkins, & Harvell, LLP
231 S. Bemiston, Suite 1070
St. Louis, Missouri 63105

and

Jennifer Mary West
800 Market Street, Suite 1660
St. Louis, Missouri 63101



CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 8,708, excluding the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Symantec anti-virus program.

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "Amanda J. [unclear]".

Appendix

FILED

**IN THE CIRCUIT COURT OF ST LOUIS COUNTY
STATE OF MISSOURI**

DIV. 18 2010 18

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

City of Richmond)
Heights)
Plaintiff)
vs.)
Ruth L. Gasway, et al)
Defendant)

Date: 8-12-10

Cause No. 08SL-CC04039
Division 18

ORDER AND JUDGMENT

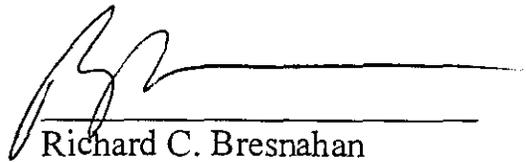
Plaintiff's Motion In Limine To Exclude Testimony of Ernest Demba, Appraiser is called, heard and ruled as follows:

Since rulings on Motions In Limine are always interlocutory and since the Court can generally only evaluate the testimony of an expert witness based upon the actual testimony in court, where the testimony must be preceded by the laying of a sufficient foundation for the admissibility of the opinion of the expert and further since a substantial portion of an expert's testimony, after the laying of a sufficient foundation for admissibility of said testimony, goes to the weight and not the admissibility of the evidence, the Court will take the Motion In Limine with the case and rule on the issues as they arise.

cc: Carl Lumley
Steven Spoeneman

SO ORDERED:

DATED: 8/12/10


Richard C. Bresnahan
Judge, Division 18

IN THE CIRCUIT COURT OF ST LOUIS COUNTY
STATE OF MISSOURI

FILED

JIV. 0113 3 1 2010 18

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

City of Richmond)
Heights)
Plaintiff)
)
vs.)
Ruth L. Gasway, et al)
Defendant)

Date: 8-31-10

Cause No. 08SL-CC04039
Division 18

JUDGMENT

This action came on for trial before the court and a jury, the parties having appeared by their respective attorneys, the issues having been duly tried, and the jury having duly rendered its verdict for the defendant Lillian Gasway as follows:

We, the undersigned jurors, assess the damages of defendant Lillian Gasway at \$300,000.00.

Pursuant to Sections 523.039 and 523.061 RSMo (2006) the Court finds that a homestead taking has occurred and therefore the above judgment is increased by an additional 25% equally \$75,000.00.

Pursuant to Section 523.045 RSMo the Court awards interest on the judgment of \$300,000.00 at 6% per annum from July 11, 2008, the date the report of commissioners was filed to the date of judgment in the amount of \$38,519.92.

It is therefore **ORDERED AND ADJUDGED** that the defendant Lillian Gasway have and recover of the plaintiff City of Richmond Heights the sum of \$413,519.92 together with the costs of this proceedings, and that execution issue therefore.

cc: Carl Lumley
Steven Spoeneman

DATED:

8/31/10

SO ORDERED:



Richard C. Bresnahan
Judge, Division 18



In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

CITY OF RICHMOND HEIGHTS,	)	No. ED94474
)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.)	
	)	Hon. Thomas J. Prebil
ERNEST BROOKS and BROOKS)	
INTERIORS, INC.,)	
	)	Filed:
Respondents.	)	November 30, 2010

Bfore Kurt S. Odenwald, P.J. and Robert G. Dowd, Jr. and Nannette A. Baker, JJ.

ORDER

PER CURIAM.

The City of Richmond Heights (“the City”) appeals from the judgment awarding Ernest Brooks, Brooks Interiors, Inc. (collectively referred to as “Brooks”) damages in the amount of \$649,400.00 on the City’s condemnation of Brooks’ property. In its first two points, the City contends the trial court erred and abused its discretion in admitting the opinions, testimony, and appraisal of Brooks’ expert. In its third point, the City asserts the trial court erred in denying its motion for remittitur.

We have reviewed the briefs of the parties and the record on appeal and find the claims of error to be without merit. An opinion reciting the detailed facts and restating principles of law would have no precedential value. The parties have been furnished with a memorandum for their information only, setting forth the reasons for this order. The judgment is affirmed in accordance with Rule 84.16(b).



In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

CITY OF RICHMOND HEIGHTS,	)	No. ED94474
)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.)	
	)	Hon. Thomas J. Prebil
ERNEST BROOKS and BROOKS)	
INTERIORS, INC.,)	
	)	Filed:
Respondents.	)	November 30, 2010

Bfore Kurt S. Odenwald, P.J. and Robert G. Dowd, Jr. and Nannette A. Baker, JJ.

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

The City of Richmond Heights (“the City”) appeals from the judgment awarding Ernest Brooks and Brooks Interiors, Inc. (collectively referred to as “Brooks”) damages

in the amount of \$649,400.00 on the City's condemnation of Brooks' property. In its first two points, the City contends the trial court erred and abused its discretion in admitting the opinions, testimony, and appraisal of Brooks' expert. In its third point, the City asserts the trial court erred in denying its motion for remittitur. We affirm.

On November 8, 2007, the City obtained an order of condemnation on property located at 1612 and 1614 Booker Place, Richmond Heights, Missouri ("the subject property") as part of the overall Hadley Township Redevelopment Plan. The Hadley Township is the area generally bounded by Highway 40/Interstate 64 and Dale Avenue on the north, Bruno Avenue on the south, Laclede Station Road on the east and Hanley Road on the west. The subject property is owned by Brooks. The property at 1612 Booker Place is improved with a one-story brick single family residence. The property at 1614 Booker Place is improved with a two-story commercial building. The subject property is collectively 11,877 square feet in area.

On January 23, 2008, the Report of Commissioners was filed with the circuit court. The Commissioners ordered the City to pay Brooks damages in the amount of \$534,465.00 for the appropriation of the subject property. Both the City and Brooks timely filed their exceptions to the Commissioner's award. A trial by jury was subsequently ordered by the circuit court.

Brooks hired an appraiser, Ernest A. Demba ("Demba"), who prepared "A Restricted Use Appraisal Report." Demba's appraisal report included an opinion that the subject property was worth \$764,000.00. Demba's opinion as to value was based upon his opinion that the highest and best use for the subject property would be as part of a

“Commercial-Assemblage.’ In the appraisal report, Demba opined there was a ninety-five percent “Probability of Assemblage” for the subject property.

Demba used nine sales as comparable sales to the subject property as the basis for determining his valuation of the subject property. Those comparable sales ranged in date from 1989 to 2004. The properties included: two 1989 sales of properties that are part of the Saint Louis Galleria (Comparable Sales Nos. 1 and 2); a 1998 sale of properties that are part of Brentwood Promenade (Comparable Sale No. 3); two 2000 sales of properties that are part of Brentwood Square (Comparable Sale Nos. 4 and 5); a 2003 sale of properties that are part of Maplewood Commons (Comparable Sale No. 6); a 1997 sale of property that is part of the Schnuck’s Des Peres Center (Comparable Sale No. 7); a 1995 sale of properties that are part of the Boulevard in Brentwood (Comparable Sale No. 8); and a 2004 sale of properties that are part of the Boulevard in Brentwood (Comparable Sale No. 9). Demba took the sale price of each of his comparable sales and put the prices through a series of adjustments.

Demba calculated his valuation through what he called a “Weighted Average Computation of Market Activity,” in which he attributed a “weight” to the adjusted sales price of the comparable sales. Demba only gave weight to six of the nine comparables. Demba gave no weight to Comparable Sale Nos. 1 and 2 because they took place fifteen years ago and he gave no weight to Comparable Sale No. 4, the residential portion of the Brentwood Square development. Demba’s weighted value of the subject property was \$67.64 per square foot. Demba then multiplied that amount by a ninety-five percent probability of commercial redevelopment resulting in a final value of \$64.26 per square foot, for a total valuation of \$764,000.00.

The City's appraiser, Michael Curran ("Curran") stated in his appraisal that the highest and best use for the subject property "as improved is future redevelopment when the economy improves and the credit markets resume lending activity for projects like the subject. Until that time, the current improvements are considered an interim use." Curran also used the sales comparison approach and valued the subject property at \$495,000.00.

At the conclusion of the trial, the jury returned an award of damages in the amount \$649,400.00 for the condemnation of the subject property. Thereafter, the City filed a motion for new trial or in the alternative for remittitur. The trial court denied the motion. This appeal follows.

In its first point, the City contends the trial court erred and abused its discretion in admitting Demba's opinions, testimony, and appraisal pertaining to an enhanced value of the subject property based upon a theory of commercial assemblage. We disagree.

In condemnation proceedings, we review admission of expert testimony for an abuse of discretion, and we will not reverse the trial court's determination absent a substantial and glaring injustice. St. Louis County v. Meyer Properties, LLC, 250 S.W.3d 833, 835 (Mo. App. E.D. 2008)(citing St. Charles County v. Olendorff, 234 S.W.3d 492, 495 (Mo. App. E.D.2007)). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable that it shocks the sense of justice, indicating a lack of careful deliberation. Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. v. Ames Realty Co., 258 S.W.3d 99, 107 (Mo. App. E.D. 2008).

To be admissible, expert testimony must comport with Section 490.065(3), RSMo 2000, which provides:

[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Here, Demba, as well as the City's expert, Curran, agreed with regard to the proper framework in appraising the subject property. Both experts agreed the value of the subject property should be determined using the sales comparison approach, substantiated by the four criteria of legal permissibility, physical possibility, financial feasibility, and maximal productivity. Further, both experts agreed that the highest and best use of the subject property was commercial assemblage and future redevelopment. The experts' employment of the "highest and best use" framework is consistent with MAI 9.01 which was given to the jury and provides:

[The jury] must award defendant such sum as [the jury] believes is the fair market value of defendant's property In determining the fair market value of defendant's property, [the jury] may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. [The jury] may give such evidence the weight and credibility [the jury] believe[s] appropriate under the circumstances.

Both experts used the appropriate approach. Essentially, the City challenges the source and bases of Demba's opinion. However, "[q]uestions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury." Olendorff, 234 S.W.3d at 495.

The City relies heavily on Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co., Inc., 500 S.W.2d 292 (Mo. App. 1973). In Greystone Heights Redevelopment Corp., the court held that a condemnee “is not entitled to the benefit of an enhancement in value of its land which was caused by an improvement made as part of the project for which [the condemnee’s] land is being condemned,” and that a condemnee “is not entitled to the benefit of a special value which can arise only by reason of assemblage of its property with other property either already owned by the condemnor or which the condemnor is acquiring as part of the same condemnation project.” Id. at 295-96. The court in Greystone Heights Redevelopment Corp. also set out an exception to this rule by stating where “the property has a special utility or availability, not only to the taker, but to other parties who could use the property for the particular purpose intended by the taker, then this utility or availability may be shown.” Id. at 297.

Here, there was evidence that there was a legitimate market demand for the subject property for assemblage in commercial redevelopment. Amy Hamilton (“Hamilton”), the City’s Manager, testified regarding the economically successful redevelopment of blighted areas in communities adjacent to the City. Hamilton further testified the citizens of the City were aware that the area within which the subject property is situated will soon be redeveloped, and that such awareness has prompted purchases of area homes as investments. In addition, the market demand was demonstrated by Curran’s testimony, in which he acknowledged the inevitability of commercial assemblage in the City along Highway 40/Interstate 64. Furthermore, in his appraisal, Demba noted the subject property was “located in very close proximity to multi-family, commercial, and planned development commercial districts.” The evidence

showed a reasonable probability that the property would be used as part of a commercial assemblage irrespective of the use of eminent domain. A value based on commercial assemblage is appropriate “where the possibility [is] considerable enough to be a practical consideration and actually to influence prices.” Greystone Heights Redevelopment Corp., 500 S.W.2d at 296 (citing McGovern v. N.Y., 229 U.S. 363 (1913)).

Thus, we see no substantial or glaring injustice in allowing Demba’s opinions, testimony, and appraisal considering commercial assemblage. Although the City did not cross-examine Demba specifically about the issue of commercial assemblage, his opinions were subject to cross-examination, and the City put forth a competing expert opinion. Under the circumstances, we cannot say the trial court abused its discretion in admitting Demba’s opinions, testimony, and appraisal. See Meyer Properties, LLC, 250 S.W.3d at 837. Point denied.

In its second point, the City asserts the trial court erred and abused its discretion in admitting Demba’s opinions, testimony, and appraisal because the comparables Demba used were not voluntary transactions of similar properties within a reasonably proximate time to the condemnation of the subject property. We disagree.

The admission of evidence of comparable sales in a condemnation case is within the sound discretion of the trial court. State ex rel. Missouri Highway and Transp. Com'n v. Zeiser Motors, Inc., 949 S.W.2d 106, 108 (Mo. App. E.D. 1997). We will not disturb the trial court's exercise of discretion unless it is manifestly abused. Id. That discretion is abused only when the trial court's ruling runs against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to show a lack of careful

consideration and shock the sense of justice. Id. If reasonable persons can differ about the action taken by the trial court, it did not abuse its discretion. Id.

First, the City contends the comparable sales used by Demba were not voluntary. The sale price of property similarly situated to that involved in a condemnation proceeding is admissible to aid the jury in determining the compensation to which the landowner is entitled for the taking of his property. Id. The party seeking to introduce evidence of such a sale has the burden to show that the sale was voluntary. Id. “However, this burden is discharged *prima facie* by the aid of a presumption that the price of land sold was in fact fixed freely and not under compulsion.” Id. Thus, the burden of coming forward with evidence to demonstrate that a particular sale was involuntary shifts to the party opposing the comparable sale. Id.

To support its assertion that the comparable sales were not voluntary, the City cites to the following language from Demba’s appraisal:

Comparable [No.] 3 is located in close proximity to the subject [property]. Although it transferred in 1998, it still gives an accurate picture of a local commercial assemblage. Additionally, it was transferred without being under the threat of condemnation. Therefore, it was given more weight than [C]omparables [No.] 4/5, [No.] 6 and [No.] 9 in our final analysis.

At the trial, Demba did not testify regarding this statement or whether the comparables were voluntary or involuntary. Further, the City did not cross-examine Demba as to whether the comparables sales were voluntary or involuntary. The City failed to meet its burden that the comparable sales were involuntary.

The City further contends Demba’s comparable sales were not reasonably close in time to the taking of the subject property and all occurred “before the economic downturn which began in 2007.” “Evidence of the sale price of property which is sold reasonably

near the time of the taking is admissible to aid the triers of fact in determining the compensation to which the owner is entitled for the taking of his property, and the trial court has considerable discretion in determining whether this test of admissibility is met.” State ex rel. Missouri Highway and Transp. Com'n v. Sisk, 954 S.W.2d 503, 509 (Mo. App. W.D. 1997).

There is no bright-line rule in which courts rely in determining whether a comparable sale is too remote in time to be admissible. Demba did not give weight to Comparable Sale Nos. 1 and 2, which occurred in 1989, because they took place over fifteen years ago. The trial court has broad discretion in admitting the evidence of the other comparable sales. The City has not made a persuasive argument that the trial court abused its discretion in admitting Demba’s comparables. The City’s reliance on Shelby County R-IV School District v. Herman, 392 S.W.2d 609 (Mo. 1965), State e rel. State Highway Commission v. Pope, 74 S.W.2d 265, 270 (Mo. App. 1934), and Sisk is misplaced.

The City further maintains Demba’s comparable sales were not similar to the subject property. Demba explained in detail why the comparable sales he was using were similar to the subject property. They were from surrounding neighbors and involved properties used in commercial assemblage projects. The sources and bases of an expert’s opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury. Olendorff, 234 S.W.3d at 495. Again, the City has not made a persuasive argument that the trial court abused its discretion in admitting Demba’s comparables.

The City next complains Demba used arbitrary adjustments to artificially inflate his valuation of the subject property. The City’s contention is without support. Demba

explained the nature and rationale for his adjustments. Demba was subject to cross-examination and the City presented its own expert. Under the circumstances, we cannot say the trial court abused its discretion.

Finally, the City asserts Demba's opinion violated the project influence doctrine citing Quality Heights Redevelopment Corp. v. Urban Pioneers, 799 S.W.2d 867 (Mo. App. 1990) and Kansas City Power & Light Co. v. Jenkins, 648 S.W.2d 555 (Mo. App. 1983). Essentially, the project influence doctrine prohibits the introduction of evidence that the value of a property is either increased or decreased as a result of the project for which it is taken. Id. Demba's opinion, testimony, and appraisal were not based solely on the City's project for which it was being taken. We find no violation of the project influence doctrine.

In conclusion, the trial court did not abused its discretion in admitting Demba's opinions, testimony, and appraisal based upon his comparables. Point denied.

In its third and final point, the City maintains the trial court erred in denying its motion for remittitur to reduce the jury verdict to a sum consistent with the admissible evidence. We disagree.

The trial court's denial of a motion for remittitur is reviewed for an abuse of discretion. Johnson v. Allstate Indem. Co., 278 S.W.3d 228, 236 (Mo. App. E.D. 2009). The trial court's determination will not be disturbed on appeal absent an abuse of discretion so grossly excessive that it shocks the conscience and convinces this Court that both the trial judge and the jury have abused their discretion. Id.

Remittitur is appropriate where the jury's verdict is excessive. Id. A jury's verdict will be deemed excessive when it exceeds fair and reasonable compensation for the

plaintiff's damages. Id. In reviewing whether or not a verdict is excessive, we consider only the evidence which supports the verdict, and exclude that which disaffirms it. Missouri Dept. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America, 97 S.W.3d 21, 40 (Mo. App. E.D. 2002). We may not weigh the evidence in a jury-tried case. Id. We determine only if there is sufficient evidence to support the verdict, and a jury's verdict will not be set aside unless there is a complete absence of evidence to support it. Id.

At the trial, the City presented evidence that a larger piece of property located on Hanley Road, adjacent to the subject property, was listed for sale at \$550,000.00 at the time of the trial. Curran testified that due to the property's highly visible location, it would be more attractive for commercial use than the subject property. The City asserts that absent Demba's impermissible, excessive valuation, the jury's verdict should have been between \$495,000.00, Curran's valuation which did not consider this other property, and \$550,000.00, the list price of the property adjacent to the subject property.¹

We find the jury's verdict was supported by the evidence. Demba valued the subject property at \$764,000.00 and the jury returned a verdict in favor of Brooks in the amount of \$649,000.00. The jury's verdict was within the range of the evidence presented at trial. The jury's verdict is not grossly excessive. The trial court did not abuse its discretion in denying the City's motion for remittitur. Point denied.

The judgment is affirmed.

PER CURIAM.

¹ The evidence regarding this \$550,000.00 figure was that it was only the list price for this larger property and there was no evidence that the property sold for that amount.

Instruction No. 6

You must award defendants such sum as you believe was the fair market value of defendants' property immediately before the taking on 8/31/2010. In determining the fair market value of defendants' property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

The phrase "fair market value" as used in this instruction means the price that the property in question would bring when offered for sale by one willing but not obliged to sell it and when bought by one willing or desirous to purchase it but who is not compelled to do so.

INSTRUCTION No. 6
GIVEN
JUDGE

MAI 9.01 (2008 Revision); 16.02 (2008 Revision)
Offered by Plaintiff City of Richmond Heights
City of Richmond Heights v. Gasway et al., Cause No. 08SL-CC04039, Circuit Court of St. Louis County



In the Missouri Court of Appeals
Eastern District

DIVISION THREE

GLAIZE CREEK SEWER DISTRICT	) ED94958
OF JEFFERSON COUNTY, MISSOURI,)
)
Plaintiff/Respondent,	) Appeal from the Circuit Court
	) of Jefferson County
v.)
)
GARY GORHAM and	) Honorable Mark T. Stoll
SHEILA GORHAM,)
)
Defendants/Appellants.	) Filed: March 22, 2011

Before Sherri B. Sullivan, P.J., Clifford H. Ahrens, J., and Lawrence E. Mooney, J.

Introduction

Gary and Sheila Gorham (collectively Appellants and respectively, Mr. Gorham and Mrs. Gorham) appeal from the trial court’s judgment entered upon a jury verdict assessing their damages from the appropriation of their property by Glaize Creek Sewer District of Jefferson County, Missouri (Respondent) to be \$0.00. We reverse and remand.

Factual and Procedural Background

Appellants live in Jefferson County. In 2008, Respondent filed a Petition in Condemnation, seeking to acquire a permanent sewer easement and a temporary construction easement through the back yard of Appellants’ property in order to place a sewer line. The permanent easement is 15 feet wide and 161 feet long.

Respondent commenced work on December 1, 2008, and worked for six months. During that time, Respondent used a thirty-foot wide temporary easement as a staging and storing area for machinery and equipment. Respondent cut down trees, brought in equipment to grind and chip the cut trees, cut through the roots of at least nine trees that were left standing, altered the grade of the back yard, and left a permanent manhole. Mrs. Gorham testified that the loss of trees spoiled the view from the back of her home, and that lights are visible from commercial properties at night, when they were not before.

The case proceeded to trial on the issue of Appellants' damages as a result of Respondent's taking. Appellants called Mrs. Gorham as a witness. Mrs. Gorham is a state certified appraiser since 1991, as well as the property owner. Mrs. Gorham testified as to the diminution in market value of the property due to the taking, including damage to the view from the home; the torn-up condition of the backyard; the inability to build a pool or other improvement across the buried sewer line; the loss of trees; and the loss of marketability of the property during Respondent's construction.

Mrs. Gorham appraised the property in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP). Using the comparable sales method, and the values of various comparable properties on her block, she concluded a before value for the property of \$200,000.00 and an after value of \$171,000.00, resulting in damages of \$29,000.00.

Respondent called an expert witness as well. Respondent's expert is a certified real estate appraiser since 1992 and also holds a real estate broker's license since 2005. Respondent's expert testified that he visited Appellants' property on January 13, 2010,

two weeks before trial, and again a few days before trial. Respondent's expert testified that he saw the property after "all the work had been done." He admitted that he did not inspect the entire property.

Respondent's expert testified that his assignment was "to determine whether or not there was an impact on the property from the easement; not to actually value the entire property but whether or not that easement had an adverse impact or effect on the property." He did not perform an appraisal on the property or render an opinion of the fair market value of the property either before or after the taking. He testified as follows:

Q: I just want to clarify, [Respondent's expert], what we're here today to determine is the fair market value on the date of the taking and the fair market value on the date after the taking. Do you have an expert opinion as to what that is?

A: An actual number, no.

Q: Do you have an opinion as to whether or not there was a diminution or a decrease in the value of the property before the taking and after the taking?

A: I do. And it was, as I said, as I understood the assignment was to determine whether or not that easement had an adverse impact on the property.

Q: And your opinion is?

A: It does not.

Appellants objected and asked that the testimony of Respondent's expert be stricken on the grounds that the opinion did not conform to the jury instruction, which

measures damages as the difference between the value before the taking and the value after the taking. Appellants further objected that “this witness brings nothing...he brings nothing to help them understand.” The trial court overruled Appellants’ objection and motion to strike.

On cross-examination, Respondent’s expert was questioned as to whether he followed USPAP standards, to which he responded: “I’m not testifying as to value as an appraiser. I didn’t do a report. I didn’t inspect the entire property.” He further stated:

A: If I render an opinion, a number, if I render a value, I am required to have a work file. But I am not testifying on a total value of this property. I was asked to give an opinion as to whether or not that easement had an adverse impact on the property. My opinion is, as a broker and as an appraiser, it does not.

Q: Okay.

A: I’m not talking about value.

At the conclusion of evidence, Appellants renewed their objection to Respondent’s expert’s testimony and offered a withdrawal instruction. The trial court overruled the objection and rejected the proffered instruction. After deliberation, the jury returned its verdict of \$0.00. This appeal follows.

Points on Appeal

In their first point, Appellants maintain that the trial court abused its discretion in admitting the testimony of Respondent’s expert, because the testimony failed to conform to the proper measure of damages, was irrelevant, lacked foundation, and served only to confuse the jury to the prejudice of Appellants.

In their second point, Appellants claim that the trial court erred in refusing to grant a new trial, because the verdict of \$0.00 in damages was against the weight of the evidence in that Mrs. Gorham's opinion of \$29,000.00 in damages was the only admissible evidence of Appellants' damages.

Standard of Review

The decision to admit or exclude expert testimony is a matter of trial court discretion and we will not overturn that decision absent an abuse of discretion. St. Charles County v. Olendorff, 234 S.W.3d 492, 495 (Mo.App. E.D. 2007), Rigali v. Kensington Place Homeowners' Assoc., 103 S.W.3d 839, 844 (Mo.App. E.D. 2003). In condemnation cases, trial court errors in the admission or exclusion of evidence will not typically result in our reversing a decision without a showing of substantial or glaring injustice. Olendorff, 234 S.W.3d at 495; Rigali, 103 S.W.3d at 844. "As a rule questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury." Olendorff, 234 S.W.3d at 495, quoting Doe v. McFarlane, 207 S.W.3d 52, 62 (Mo.App. E.D. 2006). However, in cases where the sources relied on by the expert are "so slight as to be fundamentally unsupported," the opinion should be excluded because testimony with that little weight would not assist the jury. McFarlane, 207 S.W.3d at 62, quoting Wulfing v. Kansas City Southern Industries, Inc., 842 S.W.2d 133, 152 (Mo.App. W.D. 1992); see also Goddard v. State, 144 S.W.3d 848, 854 (Mo.App. S.D. 2004).

Discussion

"The ultimate objective in this case, as in all condemnation cases, is to enforce the constitutional mandate 'that private property shall not be taken or damaged for public use

without just compensation.” City of St. Louis v. Union Quarry & Const. Co., 394 S.W.2d 300, 305 (Mo. 1965); Mo. Const. art. I, sec. 26. Section 26 of our Constitution goes on to dictate that “such compensation shall be ascertained . . . in such manner as may be provided by law.” Missouri law, in Section 523.001(1),¹ provides that in partial takings, the measure of compensation is “the difference between the fair market value of the entire property immediately prior to the taking and the fair market value of the remaining or burdened property immediately after the taking.”

Respondent’s expert testified that his assignment was “to determine whether or not there was an impact on the property from the easement; not to actually value the entire property but whether or not that easement had an adverse impact or effect on the property.” He *admitted* that he did not assess a fair market value of the entire property before and after the taking. Rather, he visited the property twice after the project was completed and formed an opinion as to whether or not there was a diminution in the property’s value by the easement. His expert opinion was there was none. He testified that the easement had no adverse impact on the property. He presented no data on how he reached this conclusion. This omission alone is fatal to his testimony. See State ex rel. Missouri Highway and Transp. Com’n v. McDonald’s Corp., 872 S.W.2d 108, 112 (Mo.App. E.D. 1994).

Mrs. Gorham testified that she used the comparable sales method in appraising the property, concluding that the property was worth \$200,000.00 before the taking, and \$171,000.00 after the taking, resulting in a decrease in value of \$29,000.00. She testified that the easement caused: damage to the view from the home from loss of trees; increased

¹ All statutory references are to RSMo 2006, unless otherwise indicated.

noise from the highway and decreased privacy from the number of trees lost; the torn up condition of her back yard; and the inability to build a pool across the buried sewer line.

Respondent's expert was not required to use the comparable sales method. "[O]ur Supreme Court has rejected the notion that an appraiser's opinion must be based on specific market data." Olendorff, 234 S.W.3d at 497, see also State ex. rel. State Hwy. Comm'n v. Koberna, 396 S.W.2d 654, 663 (Mo.1965). "In Koberna, the Court held that it is not necessary for an expert's opinion to be based on market data, such as comparable sales, so long as there is other factual basis for the expert's opinion." Olendorff, 234 S.W.3d at 497; Koberna, 396 S.W.2d at 663. However, in this case, Respondent's expert had no data to back up his opinion and the factual basis of his \$0.00 estimate of damages is unclear. Accordingly, we find that Respondent's expert testimony lacked foundation.

Even though questions as to the sources and bases of the expert's opinion normally affect the weight, rather than the admissibility, of the opinion, an expert's opinion still "must be founded on substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion." McFarlane, 207 S.W.3d at 62; Rigali, 103 S.W.3d at 845. The opinion should be excluded in cases where the sources relied on by the expert are so slight as to be fundamentally unsupported.

McFarlane, 207 S.W.3d at 62.

"The basic legal principles governing the valuation of real estate and calculation of damages in eminent domain proceedings by expert opinion are well established." State ex rel. Mo. Highway and Transp. Com'n v. Modern Tractor and Supply Co., 839 S.W.2d 642, 648 (Mo.App. S.D. 1992). Those principles applicable to a partial taking include the following. Id. "When part of a tract of land is condemned, the appropriate

measure of damage is the difference between the fair market value of the entire property before the taking and the fair market value after the taking.” Mo. Highway & Transp. Com’n v. Horine, 776 S.W.2d 6, 12 (Mo.banc 1989); McDonald’s Corp., 872 S.W.2d at 111). The value to be considered is the market value at the time of the taking. Modern Tractor, 839 S.W.2d at 648.

An expert opinion of the value of real property must not be based on speculation. Id. “To have probative value expert opinion must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.” Id. (citation and internal quotation omitted). An expert’s opinion of value must not be couched in terms that would mislead a jury. In re Armory Site in Kansas City, 282 S.W.2d 464, 472 (Mo. 1955). “An expert opinion of value, based upon a false premise, has no evidentiary value.” Modern Tractor, 839 S.W.2d at 648.

In the instant case, Respondent’s expert’s opinion that the taking had no adverse effect on Appellants’ property was fundamentally unsupported because he had not examined or assessed the property prior to the taking and had no data or evidence to support his opinion. During his cross-examination, his lack of knowledge of crucial facts supporting Mrs. Gorham’s assessment was revealed. When asked how many trees Respondent cut down in Appellants’ back yard, Respondent’s expert replied, “I have no idea.” Then he conceded that he has done appraisals where he assigned value to trees, and that a big tree can cost as much as \$1,000.00. Not only did the trees have their own intrinsic value, but Mrs. Gorham testified that they provided a buffer from the highway noise and commercial lights, as well as contributed to the view. In her opinion as an appraiser, houses with better views command higher prices than properties with inferior

views. Further, Respondent cut the roots of at least nine other trees on Appellants' property, which will likely die as a result and Appellants will bear the cost of removing them.

Based on the foregoing, we find that Respondent's expert's opinion was not founded upon substantial data but was based on mere conjecture. His opinion failed to take into account the value of the property at the time of the taking, did not assess fair market value as required by statute and case law, and thus was not in proper form. See McDonald's Corp., 872 S.W.2d at 112. Therefore, the expert testimony had no evidentiary value, misled the jury, and should have been excluded. Accordingly, Point I is granted. In light of our resolution of Point I, Appellants are entitled to a new trial on the issue of damages. Accordingly, Point II is granted as well.

Conclusion

The judgment of the trial court is reversed and this cause is remanded for a new trial on the issue of Appellants' damages.

Clifford H. Ahrens, J., and
Lawrence E. Mooney, J., concur.

Sherri B. Sullivan, P.J.