

IN THE MISSOURI SUPREME COURT

No. SC 83912

CITY OF SPRINGFIELD, MISSOURI
Respondent

v.

THOMPSON SALES COMPANY, et al.,
Appellants

Appeal from the Circuit Court of Greene County, Missouri
The Honorable Calvin R. Holden Presiding

SUBSTITUTE BRIEF OF APPELLANTS
THOMPSON SALES COMPANY, et al.

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JURISDICTIONAL STATEMENT

This appeal arises out of a condemnation action in which the City of Springfield (“City”) took the property of Thompson Sales Company, et al. (“Thompsons”). At issue are the trial court’s rulings on procedures and evidence during the jury trial on the parties’ exceptions to the commissioners’ award. On July 24, 2001, the Court of Appeals reversed the judgment of the trial court on the jury verdict and ordered the case remanded. The Court of Appeals held that the trial court had abused its discretion in the manner in which it invited and allowed jurors to ask questions of witnesses during the trial, and therefore found it unnecessary to address the Thompsons’ other allegations of error.

On September 25, 2001, this Court granted the City’s application for transfer. This appeal does not involve the validity of a statute or treaty of the United States, nor a statute or provision of the Constitution of the State of Missouri. Jurisdiction is proper in this Court. Mo.Const., Art. V, § 3.

STATEMENT OF FACTS

1. The Property and Commencement of Condemnation

The City needed the Thompsons' land. In connection with a "Civic Park" project, the City commenced condemnation proceedings to acquire approximately 5 ½ acres owned by the Thompsons in downtown Springfield ("Property").¹ LF

1. The Thompson family had been in the car business in downtown Springfield since 1919. TR 351. The Thompsons operated their full-line new and used car business on the Property since 1954. *Id.* The case involved the total taking of the Property, including improvements. LF 25-27.

Commissioners appointed in the case assessed total damages for the taking in the amount of \$3,046,000. LF 50. Both the City and the Thompsons filed exceptions to the award and requested a trial by jury. LF 56, 58. The case went to trial on January 31, 2000, and lasted six days.

2. Motions in Limine

The parties presented a number of matters via motions in limine. Germane to this appeal are items 3 and 5 in the City's First Motion in Limine, in which the City sought to exclude any and all evidence, testimony or mention regarding the

¹ Technically, four parcels were involved, under two ownerships – Thompson Sales Company and GM Investments. LF at 2-3. The four parcels were used as one property in the running of the car dealership. For purposes of this appeal, the distinction among the parcels and ownership interests is irrelevant.

commissioners' award or pre-trial negotiations, and item 2 of the Thompsons' Motion in Limine seeking to exclude the videotaped testimony of Ben Hicks, the City's expert on car dealerships. LF 60-61, 65. The Thompsons consented to items 3 and 5, and the trial court sustained the City's Motion on those points, ruling that no mention of the pre-trial negotiations or commissioners should occur during trial. TR 100-107. The trial court denied the Thompsons' Motion to exclude the Ben Hicks video. TR 1097-1100.

3. Voir Dire

During voir dire, counsel for the City made the following statement:

Before the condemnation proceeding can be filed, there has to be an attempt at negotiations to buy the property willingly. And if that fails, then the suit is filed, commissioners decide –

TR 100. Counsel for the Thompsons interrupted with an objection and request for mistrial. The court denied the request for mistrial, but sustained the objection at a sidebar conference. TR 104-107.

Later in the City's voir dire, the City's counsel made the following statement:

Now there may be somebody on the panel that feels like well, look, if I award Thompsons this money, my taxes might go up as a –

TR 124-25. Counsel for the Thompsons immediately objected and asked for a mistrial. After a lengthy conference outside of the hearing of the jury, the trial

court sustained the objection and took the motion for mistrial under advisement. TR 125-130.

4. Conference on Juror Questions

After the conclusion of voir dire, the court held a conference with counsel. Despite the fact that both parties objected, the court informed counsel that it would permit jurors to ask questions of witnesses, stating “[y]ou know I’m a big fan of juror questioning.” TR 215-16. Counsel for the City had previously tried a case before the same trial judge in which jurors were permitted to ask questions, and was familiar with the process. TR 216. Counsel for the Thompsons, on the other hand, had no experience with the concept prior to this trial.

The City objected to jurors asking questions on the basis that the case relied heavily on expert testimony. TR 214. The Thompsons’ initial objection focused on the fact that one of the City’s experts would be presented by video, meaning that jurors could question all of the Thompsons’ witnesses, but not all of the City’s. TR 216-17. To this, the Court responded that in his experience that would be a detriment to the City’s case. TR 217.

The following morning, before opening statements, the Thompsons renewed their motion for mistrial based upon the statements made by the City during voir dire, and again objected to the juror questioning procedure on the basis that it would be prejudicial to their case. TR 229. The trial court again took the motion for mistrial under advisement. TR 234. As for the juror question issue,

counsel for the Thompsons reminded the trial court of its statement the previous day, arguing:

Mr. Cowherd [City's attorney] also had objected to the jurors being permitted to pose questions, and in response to our argument the Court said, well, in my judgment it will work more in your favor and against their favor, or words to that effect. But a clear statement from the Court that it would, in effect, be prejudicial to [the City] but not prejudicial to us. I suggest, with all due respect, that that is the stuff that reversals are made of. It concedes that it works to their detriment and our benefit. Having conceded that, I don't think we can go forward with the questions, Your Honor.

TR 236-37.

The trial judge disagreed with counsel's characterization of his previous statement, explaining that he only meant that, in his experience, jurors preferred live testimony and that he did not see prejudice to either side. TR 237. The trial judge maintained his decision to permit jurors to ask questions.

5. The Modified MAI 2.01

The trial court then brought the jury in and read Instruction 1, which was Instruction 2.01 of the Missouri Approved Instructions ("MAI"), modified to reverse the parties as necessary in a condemnation action (the defendant property owner has the burden, and proceeds with its case first). At the end of the approved

instruction, the trial court added language on the jurors' ability to submit questions to the witnesses:

You will be given the opportunity to ask written questions of any of the witnesses called to testify in this case. You are not encouraged to ask large numbers of questions because that is the primary responsibility of counsel. Questions may only be asked in the following manner.

After all lawyers have finished asking questions of a witness then you will be allowed to ask questions. Each of you will be requested to write a question or write something on a sheet of paper after each witness. You will then pass all sheets to the bailiff.

The Court and lawyers will then review the questions and I will determine if your question is legally proper. The attorneys may then ask the question of the witness. No inference is to be drawn by which attorney asks the question of the witness. No adverse inference should be drawn if the question is not allowed by the Court or if the question is not asked by one of the attorneys.

LF 87.

The trial court had not advised counsel that MAI 2.01 would be so modified, and did not hold an instruction conference prior to reading Instruction 1 to the jury. At this stage in the proceeding, Instruction 1 was the only guidance provided to counsel on how the juror question procedure would operate.

6. Juror Questions During Trial

Throughout trial, jurors submitted written questions to be asked of every material witness, except the City's expert Ben Hicks, who appeared by videotape. The only live witness not questioned was Leo Cologna, a records witness from the Missouri Department of Transportation, who took the stand for a matter of minutes to identify records. TR 1052-54. For the first witness, ten of the jurors submitted questions, with the most questions from any single juror being two. TR 460. By the end of the trial, only three jurors continued to submit questions, with one juror asking approximately thirty questions of a single witness. TR 1264. As the Court of Appeals noted, the "total number of questions propounded is impossible to ascertain with exactness." Court of Appeals Opinion ("Opinion"), n.3 (a copy of the Opinion is included in the Appendix hereto at A-1. The Court of Appeals calculated that the jurors asked a total of one hundred twenty-seven questions, with a single juror asking thirty-two questions of one witness. Id.

7. Opinion Testimony

The issue in the case was the value of the Property, and both sides used opinion testimony to support their respective positions. George and Lynn Thompson testified to their opinions of value of \$5.25 million and \$5.5 million respectively. TR 396, 503. The Thompsons' experts opined a value of \$3,630,000 to \$3,745,000, including fixtures and equipment. TR 688, 783, 930. The City's experts concluded the Property was worth \$2.4 million, including equipment. TR 1193, 1372.

The Thompsons objected to certain aspects of the City's case. First, the City called Newman, who was permitted to testify as to traffic counts despite the Thompsons' objections that the City had not identified him as an expert prior to trial. TR 1041-48, 1055-56. The court also permitted the showing of the videotaped testimony of Ben Hicks, despite the Thompsons' objection that, by appearing on video, Hicks was unfairly protected from the juror questioning process. TR 1097. The trial court permitted the City's appraiser, Fred Wagner, to testify regarding "trends" in car dealership locations over the objection of the Thompsons that such facts and opinions had not been disclosed in Wagner's pre-trial deposition. TR 1347.

8. The Verdict and Appeal

At the conclusion of the evidence, the trial court denied Thompsons' pending motion for mistrial. TR 1456. The jury returned its verdict: \$2,430,000 for the Thompson Sales Property, and \$113,000 for the GM Investments Property, for a total of \$2,513,000. LF 98-99. The Thompsons timely moved for a new trial, which motion was denied. LF 112. The Thompsons timely appealed to the Court of Appeals, which reversed and remanded. App. 2. This Court granted the City's application for transfer.

POINTS RELIED ON

- 1. THE TRIAL COURT ERRED IN PERMITTING THE JURORS TO ASK QUESTIONS OF WITNESSES, BECAUSE THE COURT ABUSED ITS DISCRETION IN THE MANNER IN WHICH IT ALLOWED JURORS TO ASK QUESTIONS, IN THAT THE COURT PROVIDED NO GUIDANCE TO COUNSEL ON THE PROCEDURE BY WHICH JUROR QUESTIONS WOULD BE HANDLED, IMPROPERLY AMENDED MAI 2.01 TO PROVIDE FOR SUCH QUESTIONS, CHANGED THE PROCEDURE DURING THE COURSE OF THE TRIAL, PERMITTED JURORS TO INQUIRE OF ALL OF THE THOMPSONS' WITNESSES BUT NOT ALL OF THE CITY'S WITNESSES, AND ACTIVELY ENCOURAGED THE JURORS TO SUBMIT QUESTIONS.**

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)

Chapman v. Bradley, 478 S.W.2d 873 (Mo.App. 1972)

Commonwealth v. Urena, 632 N.E.2d 1200 (Mass. 1994)

DeBenedetto v. Goodyear Tire and Rubber Co., 754 F.2d 512 (4th Cir. 1985)

Means v. Sears, Roebuck & Co., 550 S.W.2d 780 (Mo. banc 1977)

United States v. Ajmal, 67 F.3d 12 (2nd Cir. 1995)

United States v. Johnson, 892 F.2d 707 (8th Cir. 1990)

Rule 70.02(b), Mo.R.Civ.P.

Rule 70.02(e), Mo.R.Civ.P.

Rule 70.02(f), Mo.R.Civ.P.

2. **THE TRIAL COURT ERRED IN DENYING THE THOMPSONS' REQUESTS FOR A MISTRIAL DURING VOIR DIRE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO STRIKE THE VENIRE PANEL, IN THAT THE CITY'S REFERENCE TO TAXES AND TO MATTERS PRECEDING THE TRIAL, INCLUDING NEGOTIATIONS AND THE COMMISSIONERS, WERE SO IMPROPER AND PREJUDICIAL AS TO POISON THE PANEL AND MANDATE A NEW TRIAL.**

Stucker v. Rose, 949 S.W.2d 235 (Mo.App. 1997)

Huggins v. City of Hannibal, 280 S.W. 74 (Mo.App. 1926)

Jones v. Kansas City, 76 S.W.2d 340 (Mo. 1934)

St. Louis Housing Auth. v. Barnes, 375 S.W.2d 144 (Mo. 1964)

Kansas City v. Peret, 574 S.W.2d 443 (Mo.App. 1978)

3. **THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM EARL NEWMAN ABOUT TRAFFIC COUNTS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT EARL NEWMAN WAS NOT DISCLOSED AS AN EXPERT PRIOR TO TRIAL.**

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo. banc 1997)

Ellis v. Union Elec. Co., 729 S.W.2d 71 (Mo.App. 1987)

Rule 56.01(b)(4)(a), Mo.R.Civ.P.

Rule 56.01(b)(4)(b), Mo.R.Civ.P.

4. **THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM FRED WAGNER ABOUT TRAFFIC COUNTS AND TRENDS IN THE RELOCATION OF AUTOMOBILE DEALERSHIPS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT SUCH OPINIONS WERE NOT REVEALED IN THE EXPERT'S REPORT OR DEPOSITION.**

Green v. Fleishman, 882 S.W.2d 219 (Mo.App. 1994)

Gassen v. Woy, 785 S.W.2d 601 (Mo.App. 1990)

5. **THE TRIAL COURT ERRED IN PERMITTING THE CITY TO SHOW THE HICKS VIDEO TO THE JURY, BECAUSE THE COURT ABUSED ITS DISCRETION IN THAT JURORS COULD NOT ASK QUESTIONS OF HICKS.**

Doe v. Alpha Therapeutic Corp., 3 S.W.3d 404 (Mo.App. 1999)

6. **THE TRIAL COURT ERRED IN DENYING THOMPSONS' MOTION FOR NEW TRIAL, BECAUSE THE FOREGOING ERRORS HAD A CUMULATIVE, PREJUDICIAL EFFECT.**

DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526 (Mo.App. 1991)

ARGUMENT

1. **THE TRIAL COURT ERRED IN PERMITTING THE JURORS TO ASK QUESTIONS OF WITNESSES, BECAUSE THE COURT ABUSED ITS DISCRETION IN THE MANNER IN WHICH IT ALLOWED JURORS TO ASK QUESTIONS, IN THAT THE COURT PROVIDED NO GUIDANCE TO COUNSEL ON THE PROCEDURE BY WHICH JUROR QUESTIONS WOULD BE HANDLED, IMPROPERLY AMENDED MAI 2.01 TO PROVIDE FOR SUCH QUESTIONS, CHANGED THE PROCEDURE DURING THE COURSE OF THE TRIAL, PERMITTED JURORS TO INQUIRE OF ALL OF THE THOMPSONS' WITNESSES BUT NOT ALL OF THE CITY'S WITNESSES, AND ACTIVELY ENCOURAGED THE JURORS TO SUBMIT QUESTIONS.**

A. Standard of Review.

The decision to allow jurors to ask questions of witnesses is reviewed for abuse of discretion. Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 867 (Mo. banc 1993).

B. The manner in which the court allowed juror questioning to take place was an abuse of discretion.

1. The trial court abused its discretion in failing to provide adequate advance warning and guidance to counsel on the juror questioning procedure.

In the absence of any approved procedures in the Missouri Rules or Missouri precedent to inform trial counsel of what to expect, it was particularly important for the trial court to give the details of its procedure to counsel well in advance of trial. This would have permitted objections to be raised and addressed prior to the morning of trial, and also would have allowed counsel to know the rules in order to develop a trial strategy for use during the court's experiment. As the Court of Appeals noted, "[a]dequate warning and inclusion of the lawyers in developing a jury questioning procedure would have promoted a more consistent juror questioning process and an opportunity for equal understanding of it by all litigants" and would have made the procedure more fair. Opinion at 9-13.

This conclusion was reached in Commonwealth v. Urena, 632 N.E.2d 1200 (Mass. 1994). There, the Massachusetts Supreme Court held that "[w]hen a judge decides that it would be appropriate to allow jurors to ask questions of witnesses, the judge must inform the parties and give them an opportunity to be heard in opposition to the practice or to suggest the procedure to be followed." Id. at 1206.

The conclusion is sound: fairness dictates that parties and their counsel be informed of the rules before a trial begins. In the case of a novel innovation by a

trial court, fairness and judicial economy require that adequate warning of the procedure be given sufficiently in advance of the rush of trial, so that fully-developed objections may be made. This would provide the judge more time to consider counsels' objections and to attempt to formulate, with the input of counsel, a procedure all parties could live with, thus eliminating the need to seek guidance from a superior tribunal. Such advance warning also would provide counsel with the ground rules well ahead of the morning of trial, so that a trial strategy could be developed taking into account the court's innovation.

Here, the trial court provided no early warning to counsel. The trial judge informed counsel the day of trial that he would let jurors ask questions of witnesses. TR 215-16. This provided no opportunity to research and present fully-developed objections to the procedure. The procedure had not been explained prior to trial, so that counsel could not incorporate it into their trial strategy.

In addition, the record reveals the absence of any advance guidance from the trial court on the procedure that would be used. In a sidebar during the consideration of questions submitted for the first witness, the court stated:

I don't explain anything [to the jurors about why some questions will not be asked] – I've already given them the instruction. All we do is, you go back out, you ask the questions you want to ask. Ms. Tracy asks the questions she wants to ask. If you want to ask some follow up – just like normal, when you're done, we're done.

TR 465.

This was the first time the trial court attempted to explain to counsel how the process would work. The record reveals that the trial court failed to provide the pre-trial warning to counsel required by fairness as held by the Court of Appeals and the Urena court. The failure was an abuse of discretion by the trial court, which prejudiced the Thompsons by denying them an opportunity to formulate a trial strategy, advance more fully-developed objections to the procedure, and be prepared to participate in the mechanics of the procedure at trial. This Court should therefore reverse and remand for a new trial.

2. The court erred in improperly modifying MAI 2.01 and failing to abide by Rule 70.02.

The trial court, without warning to counsel, read as its Instruction 1 a modified version of MAI 2.01 that included language of the court's own invention encouraging jurors to ask questions of witnesses. Instruction 1 read as follows:

INSTRUCTION NO. 1

This instruction and other instructions which I will read to you near the end of the trial are in writing, and all of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts which you will be called upon to decide.

The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. At the close of the evidence, the lawyers may make arguments on behalf of their clients. Neither what is said in opening statements or in closing arguments is to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of his client, the other party is relieved of the responsibility of proving that fact.

After the opening statements, the defendants will introduce evidence. After that, the plaintiff may introduce evidence and there may be rebuttal evidence after that. The evidence may include the testimony of witnesses who appear personally here in court, the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you, and exhibits such as pictures, documents, and other objects.

While the trial is in progress, I may be called upon to determine questions of law and to decide whether these matters may be considered by you under the law. No ruling or remark which I may make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with the issues of fact, which you must decide. We will not be trying to keep secrets from you.

After all the evidence has been presented, and you have received my final instructions and heard the closing arguments of the lawyers, you will retire to the jury room for your deliberations. At that time it will be your duty to select a foreperson, to decide the facts, and to arrive at a verdict.

Justice requires that you not make up your mind about the case until all the evidence has been seen and heard. You must not comment on or discuss what you may hear or learn in the trial until the case is concluded and you retire to the jury room for your deliberations. During the trial, you should not remain in the presence of anyone who is discussing the case when the Court is not in session. Otherwise, some outside influence or comment might influence a juror to make up his or her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed.

When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence to which I have referred. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude, and behavior of the witnesses, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully, and the probability or improbability of the witness' statements. You may give the testimony of any witness such weight and value as you believe that testimony is entitled to receive.

There will be some matters which will be offered by the parties and to which objections will be made. If I overrule the objections, you may consider that matter when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded and must not be considered by you in your deliberations.

Each of you may take notes in this case but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that notetaking may interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During your deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict, your notes will be collected and destroyed. No one will be allowed to read them.

You will be given the opportunity to ask written questions of any of the witnesses called to testify in this case. You are not encouraged to ask

large numbers of questions because that is the primary responsibility of counsel. Questions may only be asked in the following manner.

After all lawyers have finished asking questions of a witness then you will be allowed to ask questions. Each of you will be requested to write a question or write something on a sheet of paper after each witness. You will then pass all sheets to the bailiff.

The Court and lawyers will then review the questions and I will determine if your question is legally proper. The attorneys may then ask the question of the witness. No inference is to be drawn by which attorney asks the question of the witness. No adverse inference should be drawn if the question is not allowed by the Court or if the question is not asked by one of the attorneys.

LF 87.

The trial court's Instruction 1 violated the Rules of Missouri Civil Procedure. Rule 70.02(e) provides:

The court shall hold an instructions conference with counsel to determine the instructions to be given. The court shall inform counsel as to the instructions that are to be given prior to the time they are delivered to the jury....An opportunity shall be given for counsel to make objections on the record, out of the hearing of the jury, before the jury retires to deliberate.

Mo.R.Civ.P. 70.02(e)

The trial court did not hold an instruction conference on Instruction 1 and did not inform counsel of the court's intention to add language to MAI 2.01 relating to juror questions. The first time counsel heard the addition was when the court read it to the jury. Counsel for the Thompsons were thus deprived of their right under the Rules to see the instruction before it was read to the jury and to object and make a record outside of the presence of the jury.

Moreover, use of MAI 2.01 is mandatory in all Missouri civil cases, and failure to give the approved instruction is presumptively prejudicial. Mo. R.Civ.P. 70.02(b); Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 786 (Mo. banc 1977)(“a deviation from MAI is not only error, it is presumptively prejudicial error”); Chapman v. Bradley, 478 S.W.2d 873 (Mo.App. 1972). In addition, the Rules provide that a trial court may only give other preliminary instructions with the consent of both sides: “[w]ith agreement of all parties, the court may give such other preliminary instructions during the trial as will assist the jury in understanding its role or the issues in the case.” Mo.R.Civ.P. 70.02(f).

Here, the Thompsons objected to the juror questioning procedure before the trial court read Instruction 1, so that the matter is properly preserved, particularly in light of the fact that the trial court read the instruction to the jury before counsel for the Thompsons knew of its existence. The improper modification of MAI 2.01 warrants reversal. Chapman, 478 S.W.2d at 873. Instruction 1 misdirected, misled and confused the jury by encouraging them to interrogate witnesses in a manner never before approved in Missouri. It improperly imposed upon the jurors

a new duty: “[e]ach of you will be requested to write a question or write something” for each witness. The error materially affected the merits of the case by imposing on jurors the role of inquisitor, rather than neutral factfinder, and by subjecting counsel to a novel procedure, the mechanics of which were not disclosed prior to the reading of Instruction 1. As such, the trial court abused its discretion by giving Instruction 1, and this court should reverse.

3. The trial court abused its discretion in allowing the procedure to change as the trial progressed.

As noted before, no guidance was provided to counsel on the procedure to be used. What guidance provided in Instruction 1, which counsel heard for the first time when it was read to the jury, was inadequate. Instruction 1 provided that, once a jurors question was approved by the court, “[t]he attorneys may then ask *the question* of the witness.” LF 88. This was the procedure used for the first witness, George Thompson, when the sponsoring attorney was the only one asking the questions, and asked the questions only as submitted by the jurors. TR at 465-67.

The court changed the procedure after that witness. During the sidebar on questions submitted to the second witness, Lynn Thompson, after the court read the first question to attorneys, the following transpired:

Mr. Cowherd: I’ll do that.

The Court: It’s not your witness, but –

Mr. Cowherd: I don’t think that’s the point here, is it?

TR 566. After the conference, counsel for the Thompsons asked the jurors' questions of Lynn Thompson, as they were written, as had been the procedure with George Thompson, with one follow-up question as to when an incident occurred. TR 571-575.

Counsel for the City then began an inquiry beyond the terms of the juror's question he wanted to read. Counsel for the Thompsons objected:

Mr. Wallach: Your honor, if I may, isn't the procedure to just read the question?

The Court: No. That's not the procedure. We'll go over that in a minute.

Mr. Wallach: This is new ground for me, sir, with all due respect.

The Court: I understand.

TR 576. When the City's counsel began to expand the examination of the witness to include questions relating to an exhibit that was not mentioned in the juror's question, counsel for the Thompsons asked to approach, seeking guidance on the procedure. The transcript of the sidebar reveals the foreign nature of the process to the Thompsons' counsel, and the lack of clarity over exactly what procedure was being used.

Mr. Wallach: [T]he jury question process is new to us.

Yesterday we just read the questions and they answered, and neither side really followed up. And today we're – we think that's not the process and it's compounded on this particular question because there is a dispute that we discussed regarding the listing price in the City of Springfield case.

* * *

We approached seeking clarification on the jury question process and also to object to any further inquiry down this road.

The Court: The jury question process is not – you can ask if that question comes from the jury. You don't have to. Many times they're bringing up just an area, and if they ask the question in a way that you think your witness can understand it, then that's fine.

But if you need to restate it, lead them up to it, because sometimes, you know, if you just start reading off the questions they've come and they're talking about maybe four or five different areas of his testimony. So it's okay to just lead up to it and say, you know, and we want to know – you don't have to ask the exact question.

In other words, you can put it in lawyerese and lead them up to it.

TR 577-582.

These instructions by the court varied from the procedure used with the first witness and from the procedure outlined in Instruction 1, which stated that “*the question*” written by a juror would be asked, not a “lawyerese” version of the question or follow-up questions by counsel. While the process started out having the sponsoring attorney ask all approved questions as written by the jurors, by the end of the trial the process had developed into a reopening of examinations by the attorneys. The re-examination of Troy Willis in the juror questioning process

takes up 23 pages of transcript. TR 1269-87. The juror question process for the last witness, Fred Wagner, takes up 19 pages of transcript. TR 1421-41.

The changes in the procedure highlight the trial court's failure to provide adequate warning of the way in which the juror questioning component of the trial would be handled. This deprived Thompsons' counsel of the ability to structure a trial strategy responsive to the court's innovation, and seriously distracted counsel from the task at hand of trying a lawsuit of enormous significance to their clients. Despite counsels' extensive experience in trying cases of this nature, they appeared inexperienced and unprepared, being lectured in front of the jury by the trial judge: "No. That's not the procedure. We'll go over that in a minute." TR 576. As the Court of Appeals pointed out, this created "an increased chance the jury might view Defendants' lawyers as incompetent or unprepared, thus raising the specter of prejudice to Defendants." Opinion at 12.

By failing to provide any guidance to counsel on the procedure, and by changing the procedure during trial, the court abused its discretion. The court's innovation was not authorized by any Missouri precedent. The way in which it was implemented ran afoul of the Missouri Rules of Civil Procedure (in the court's failure to share his instruction on the process with counsel) and basic fairness – counsel should be advised of the rules in advance of trial. The Thompsons suffered prejudice as a result, particularly in light of the fact that opposing counsel had the advantage of having tried a case before under the

procedure. In light of the trial court's abuse of discretion, this Court should reverse.

4. The court abused its discretion by permitting jurors to interrogate all of the Thompsons' witnesses, but shielding one of the City's witnesses from the same fate.

The fact that one of the City's witnesses, Ben Hicks, appeared via videotape precluded a uniform application of any juror questioning procedure, because the jurors, of course, could not inquire of the video. When the Thompsons raised this point in the pre-trial hearing, the trial court stated its belief that the jurors' inability to question Hicks would be a detriment to the City, not the Thompsons. TR 217. Prior to the commencement of evidence, the trial court stated that what it meant was that jurors in general prefer live witnesses. TR 237. Because all of the Thompsons' witnesses were subjected to interrogation by the jurors, while not all of the City's witnesses were, there was a disparity of treatment. The trial court abused its discretion in encouraging and permitting this disparity, and this Court should reverse.

5. Active encouragement of juror questions is an abuse of discretion.

This Court has never approved of a trial judge actively encouraging jurors to interrogate witnesses. Callahan, 863 S.W. 2d at 867 (finding that the trial court had merely permitted, not encouraged, juror questions, and therefore the Court did "not reach the question of whether a trial judge by actively encouraging jurors to ask questions commits an abuse of discretion"). It should not do so now. There is

a difference between the circumstances of Callahan, in which a juror inquired as to his ability to ask a question of a witness and was allowed to do so, and the proactive encouragement by the trial judge of such active juror participation.

In United States v. Ajmal, 67 F.3d 12 (2nd Cir. 1995), the Second Circuit held that the trial court abused its discretion, where, as here, the court “established at the outset of the trial that jurors would be allowed to question witnesses” and “encouraged juror questioning throughout the trial by asking the jurors at the end of each witness’s testimony if they had any queries to pose.” Id. at 14-15. The court found that no extraordinary circumstances existed to justify such encouragement, given the straightforward facts of the case and that the procedure was not prompted by the urging of the jurors themselves. Id. Because the “questioning tainted the trial process by promoting premature deliberation, allowing jurors to express themselves through non-fact-clarifying questions, and altering the role of the jury from neutral fact-finder to inquisitor and advocate”, the Second Circuit held that the trial court had abused its discretion, and remanded the case for a new trial. Id. at 15.

The Ajmal court’s observation that juror questions permit premature deliberation supports the conclusion that the practice should not be encouraged in Missouri. By submitting questions, a juror communicates to the other jurors his thoughts, doubts and conclusions about the case at that point. This violates MAI 2.01, which requires that jurors refrain from deliberations until the close of all

evidence. In DeBenedetto v. Goodyear Tire and Rubber Co., 754 F.2d 512 (4th Cir. 1985), the court addressed this problem:

Human nature being what it is, one or two jurors often will be stronger than the other jurors, and will dominate the jury inquiries....Moreover, since these questions are from one or more jurors, the possibility that the jury will attach more significance to the answers to these jury questions is great....To the extent that such juror questions reflect consideration of the evidence – and such questions inevitably must do so – then, at the least, the questioning juror has begun the deliberating process with his fellow jurors. Certainly, this is not by design, but stating the question and receiving the answer in the hearing of the remaining jurors begins the reasoning process in the minds of the jurors, stimulates further questions among the jurors, whether asked or not, and generally affects the deliberative process.

Id. at 516-17. Despite its misgivings over the process, the DeBenedetto court refused to reverse because the appellants did not object to the procedure at the time of trial and the court found no prejudice. Id. at 517. *See also* United States v. Johnson, 892 F.2d 707, 711 (8th Cir. 1990)(opinion of Lay, J., concurring)(“The factfinder who openly engages in rebuttal or cross-examination, even by means of a neutral question, joins sides prematurely and potentially closes off its receptiveness to further suggestions of a different outcome for the case. While nothing can assure the jury will remain open-minded to the end, keeping the jury out of the advocacy process increases the probability.”).

The concerns recognized by the foregoing courts apply with equal force here. In essence, the trial court invited the jurors to become active inquisitors, rather than fact finders, without any extraordinary circumstances in this case to justify such encouragement. This distortion of the jurors' traditional role delayed the proceedings and interrupted the orderly presentation of evidence performed by counsel. The delay is evident from the transcript – the court and counsel had to consider more than 120 questions, then read those approved by the court, with follow-up questions by counsel. The juror question process takes up 111 pages of transcript, which, does not include the off-transcript time during which the jurors formulated their questions, wrote them down, and passed them to the bailiff.

The procedure implemented by the trial court, in which every juror was requested to ask questions of every witness, cannot coexist with MAI 2.01's prohibition on premature deliberations. As opposed to the situation where a juror wants to ask a question, the solicitation by the trial court of juror questions for each witness fostered premature deliberations. The questioning jurors, whether intentionally or not, were communicating their consideration of the evidence, through their 120 questions. DeBenedetto, 754 F.2d at 516-17. The juror submitting 30 questions of one witness was attempting to dominate and impose his influence on the proceedings. Because of the conflict between the active solicitation of juror questions and MAI 2.01, and in light of the other perils discussed above, this Court should reverse, holding that it is inappropriate for a trial judge to invite or actively encourage juror questioning.

2. THE TRIAL COURT ERRED IN DENYING THE THOMPSONS' REQUESTS FOR A MISTRIAL DURING VOIR DIRE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO STRIKE THE VENIRE PANEL, IN THAT THE CITY'S REFERENCE TO TAXES AND TO MATTERS PRECEDING THE TRIAL, INCLUDING NEGOTIATIONS AND THE COMMISSIONERS, WERE SO IMPROPER AND PREJUDICIAL AS TO POISON THE PANEL AND MANDATE A NEW TRIAL.

A. Standard of Review.

The standard of review on this point is set forth in Stucker v. Rose, 949 S.W.2d 235 (Mo.App. 1997). Under that standard, the decision whether to grant a mistrial “rests in the sound discretion of the trial court, and absent a manifest abuse of that discretion, appellate courts will not interfere.” Id. at 238.

B. The trial court manifestly abused its discretion in denying Thompsons' requests for a mistrial during voir dire.

During voir dire, counsel for the City committed two glaring transgressions, for which the only proper remedy was a mistrial. As set forth below, the trial court manifestly abused its discretion in denying a mistrial, and this court should reverse.

- 1. The reference to taxes made by the City’s counsel during voir dire was so inflammatory and prejudicial that it spoiled the venire panel, making a mistrial the only appropriate remedy.**

Missouri courts have long held that arguments referring to taxpayers’ money or the taxpayers’ burden to pay damages in an action against the government are improper and highly prejudicial. Huggins v. City of Hannibal, 280 S.W. 74 (Mo.App. 1926); Jones v. Kansas City, 76 S.W.2d 340 (Mo. 1934). The issue is extraneous (no evidence could properly be introduced on the relationship between the damages award and taxpayers’ money), and highly inflammatory. The Missouri Supreme Court in Jones affirmed the trial court’s granting of a new trial because of prejudicial argument about the precedent that would be set if plaintiff recovered damages from the city, holding:

[T]he conduct of counsel in so designedly pressing upon the attention of the jury a matter wholly extraneous to the case for the inferentially admitted purpose of gaining a verdict was highly improper.

Jones, 76 S.W.2d at 341.

In St. Louis Housing Auth. v. Barnes, 375 S.W.2d 144 (Mo. 1964), counsel for the condemning authority referred to taxpayers’ money in argument: “The Authority feels that it’s using taxpayers’ money. It feels that when it does that, it must pay no more than what the property is worth at that time.” Id. at 148.

Counsel for the property owner objected. The trial court sustained the objection and immediately advised the jury: “Objection sustained to any reference to

taxpayers' money. It will be stricken and the jury is instructed not to take or consider that in any decision they return in this court.” Id. The court denied the property owner's request for a mistrial. Id.

On appeal, the Missouri Supreme Court declined to reverse the ruling. The court could not find an abuse of discretion in light of the trial court's “prompt action” in the fact that “the objection was promptly sustained and the jury instructed to disregard the statement.” Id.

In the case at hand, counsel for the City, in voir dire, made an improper and highly prejudicial reference to the jurors' personal interest in the outcome of the case as taxpayers:

Now there may be somebody on the panel that feels like well, look, if I award Thompsons this money, my taxes might go up as a –

TR 124-25. Counsel for the Thompsons immediately objected and asked for a mistrial. After a lengthy conference outside of the hearing of the jury, the trial court advised that it would sustain the objection and take the motion for mistrial under advisement. TR 125-130. When the proceedings returned to open court, the court stated in front of the jury: “I'll sustain the objection. Mr. Cowherd, you may proceed on on another line of questioning.” TR 131.

The following morning, counsel for the Thompsons renewed their motion for mistrial. TR 229-231. The court again ruled that it would take the motion for mistrial under advisement. TR 234. At the conclusion of the case, the court denied the motion. TR 1456.

The trial court should have granted the mistrial. The City's injection into the case of the jurors' fear over their own taxes going up as a result of any award to the Thompsons was highly improper, and spoiled the panel. Unlike the trial court in Barnes, the court below did not promptly strike the reference and instruct the jurors not to take the matter into consideration. It did not rebuke the City's counsel. It made no offer of a corrective instruction, but did ask "[n]ow do you want me to say anything, other than that I have sustained your objections and Mr. Cowherd, you shall continue on with another line of remarks ... your objection is sustained and proceed on with another line of questioning, that's all I plan on saying." TR 130. Once the specter of the jurors' personal taxes was wrongfully brought into the courtroom by the City, it could not be dispelled. Believing no magic words could undo the harm, the Thompsons' counsel maintained their demand for the only appropriate remedy, a mistrial.

While it was impossible to unring the bell, the trial court's action of merely sustaining the objection fell short of the prompt "appropriate and sufficient action" required under Missouri precedent. Jones, 76 S.W.2d at 341. The prejudice of the court's error is evident in the trial's outcome: a verdict only \$143,000 over the City's proposed figure, while more than \$1.1 million under the Thompsons' lowest expert and more than \$2 million under the Thompsons' own opinion of value. Because the court abused its discretion in denying a mistrial, this court should reverse and remand for a new trial.

2. The City's reference to pre-trial negotiations and the condemnation commissioners was so improper and prejudicial as to mandate a mistrial.

A jury trial on exceptions in a condemnation case is a trial de novo appeal from the commissioners' award. It is well established that no reference is to be made to the commissioners. *See Kansas City v. Peret*, 574 S.W.2d 443 (Mo.App. 1978)(reference by property owners' counsel to commissioners' award mandated mistrial). Any such references have no bearing on the issue at hand, and only serve to confuse and inflame the jury.

Counsel for the City knew such references were improper. The City's First Motion in Limine sought to preclude references to the commissioners' award and pre-trial negotiations, and was sustained by consent on those points. LF 60; TR 103. During voir dire, however, the City's counsel stated:

Before the condemnation proceeding can be filed, there has to be an attempt at negotiations to buy the property willingly. And if that fails, then the suit is filed, commissioners decide –

TR 100. Thompsons' counsel interrupted with an objection and request for mistrial. The court denied the request for a mistrial. TR 104. The court sustained the objection at sidebar, but no statement was made to the jury that the objection had been sustained or that the question was improper and should not be considered. TR 107.

The City violated its own Motion in Limine by discussing the commissioners and negotiations. Its statements were an attempt to paint the Thompsons as greedy and as protracting the process through a jury trial in order to get more money. This intent may be seen in comments made immediately before the reference to the commissioners:

If there's a property owner that's involved in this project that says I don't want to sell, and that property owner may say I don't want to sell because he's greedy, he wants to up the price because he knows they need to come through his property....

TR 99-100. The reference to negotiations and the commissioners was thus part of a calculated plan to taint the panel by insinuating that the Thompsons were being unreasonable and were motivated by greed. Moreover, the comments could do nothing but confuse the panel, given that the amount of the commissioners' award could never be told to them.

The trial court manifestly abused its discretion in failing to grant a mistrial in light of the City's prejudicial comments during voir dire. While an appellate court must give a trial court great deference on the implementation of the drastic remedy of mistrial, sometimes that is the only proper remedy. Such was the case here. The venire panel was so poisoned by the City's deliberate and calculated injection of extraneous and inflammatory matters that no unbiased jury could be selected. As stated by the Peret court, "the size of the jury verdict stands in silent

witness to [the] adverse effect” of the improper references. This court should reverse and order a new trial.

3. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM EARL NEWMAN ABOUT TRAFFIC COUNTS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT EARL NEWMAN WAS NOT DISCLOSED AS AN EXPERT PRIOR TO TRIAL.

A. Standard of Review.

This point is reviewed for abuse of discretion. Wilkerson v. Prelutsky, 943 S.W.2d 643, 647-48 (Mo. banc 1997)(trial court has broad discretion over exclusion of testimony based on non-disclosure during discovery). The reviewing court will “look only for an abuse of this broad discretion which results in prejudice or unfair surprise.” Ellis v. Union Elec. Co., 729 S.W.2d 71, 74 (Mo.App. 1987).

B. Because the City failed to disclose Earl Newman as an expert prior to trial, resulting in prejudice and surprise on the part of the Thompsons, the trial court abused its discretion in permitting his testimony.

A party has a right, through interrogatories, to discover the experts its opponent intends to call at trial and the matters upon which those experts will testify. Rule 56.01(b)(4)(a). Once that information is obtained, “a party may discover by deposition the facts and opinions to which the expert is expected to

testify.” Rule 56.01(b)(4)(b). Untimely disclosure, or nondisclosure of an expert is one of the cardinal sins in litigation. As the Ellis court put it:

Particularly with regard to expert witnesses, untimely disclosure or non-disclosure is so offensive to the underlying purpose and intent of discovery rules that prejudice may be inferred unless, under the circumstances of the particular case, such an inference is dissipated.

Ellis, 729 S.W.2d at 75.

The Ellis court reversed and remanded for a re-trial, where the trial court improperly allowed experts, identified only six working days before trial and who had not been deposed by the plaintiffs, to testify on behalf of the defendant. The court recognized the importance of the discovery process as it pertains to experts:

Competent trial preparation requires identification of an adverse party’s expert in sufficient time before trial to allow for investigation of the qualifications of the proposed expert, his opinions, conclusions and the basis therefor, his experience with the same or similar incidents, his relationship with the parties or their attorneys, the nature and extent of his prior experience as an expert witness, and the cases in which he has previously testified regarding the identical subject, among other matters. A competent lawyer’s trial preparation usually entails consultation with a friendly expert regarding the opinions expressed by the adversarial expert in deposition.

Id. at 75. Under the circumstances, the Ellis court concluded that the disadvantage imposed upon the plaintiffs as a result of the defendant's belated disclosure required either the exclusion of the testimony or a delay of the trial to permit adequate preparation for discovery relating to the testimony. Id. The trial court's failure to use either remedy constituted an abuse of discretion, and the appellate court reversed. Id. at 76.

In the instant case, the City never disclosed Earl Newman as an expert it intended to call at trial. Mr. Newman was called to testify on traffic counts. When the Thompsons objected, counsel for the City claimed that Mr. Newman was a fact witness, not an expert. TR 1030.

Counsel for the Thompsons then conducted a voir dire of Mr. Newman, which revealed the following credentials: Mr. Newman holds a bachelor's degree in civil engineering and a master's degree specializing in traffic engineering; he is registered with the State of Missouri as a professional engineer; and he is registered by the Institute of Transportation Engineers as a professional traffic operations engineer. TR 1032-33. The following examination by Thompsons' counsel demonstrates that Mr. Newman's testimony was that of an expert, and not merely a fact witness:

Q: Is that, putting together information of that type [traffic counts], is that something that requires some special knowledge or training?

A: I guess as I understand, the traffic counting procedures does [sic] require some special training and knowledge.

Q: And requires some special direction from you, sir, or someone such as yourself?

A: That's correct.

Q: It requires expertise in direction and control of people that go out and actually do it?

A: That's right.

Q: You don't just send the street department out and say report back on how many cars are going around here?

A: No, sir, it does take special training.

Q: And special direction?

A: And special direction.

Q: And expertise to interpret and report on that information?

A: That's correct.

TR 1033-34.

Following the foregoing examination, the court ruled that it would not strike the testimony, but would allow counsel for the Thompsons to take Mr. Newman's deposition over lunch. TR 1034. Counsel for the Thompsons accepted the offer. TR 1037. Counsel for the City then objected that it could not take its witnesses out of order. TR 1037-38. As a result, a recess was taken so that counsel could informally interview Mr. Newman. After the interview, the Thompsons renewed their objection. TR 1041. The Thompsons' counsel made exactly the point recognized in the Ellis case:

The other side of the coin with an expert is we should have time to respond by going out and finding our own expert on the same subject. If he had been fairly disclosed early on, we could have done that. To examine this witness and not have our own expert in reserve on the same topic to examine the same data, a mere examination of this witness doesn't really solve the problem, from our perspective.

TR 1040. The court ruled that Mr. Newman could testify, but that the court would give the Thompsons leave to reopen their case and put on their own traffic expert after the City rested. TR 1048. Mr. Newman then testified about traffic counts at specific locations in the Springfield area selected by Mr. Cowherd. TR 1057. Among those locations was the intersection of Kimbrough and St. Louis, represented as being "fairly close to" the Property. TR 1059. He did not have a traffic count for the Hammons Parkway traffic at its point nearest the Property. TR 1070-72.

As noted above, prejudice is assumed when a party fails to disclose an expert prior to trial. Ellis, 729 S.W.2d at 75. Here, the surprise and prejudice are obvious. The City did not disclose Mr. Newman prior to trial. His testimony was that of an expert, as demonstrated in his voir dire. As an expert, he was assigned specific tasks by the City's trial counsel: to make and testify to traffic counts at certain locations, and not at others. In particular, Mr. Newman did not offer an opinion as to the traffic counts at the Property.

The trial court's attempts to remedy the surprise were inadequate. Neither the opportunity to visit briefly with Mr. Newman, nor the offer to reopen the Thompsons' case remedied the surprise. The brief interview on the fifth day of trial was no substitute for the formal protections of discovery and the ability to amply prepare for expert testimony in advance of trial. The offer for the Thompsons to reopen their case was meaningless – no search, selection and preparation of a rebuttal expert witness could possibly have been accomplished during the last day of trial.

Because of the foregoing, the trial court abused its discretion in permitting Mr. Newman to testify. Prejudice and unfair surprise resulted. Accordingly, this Court should reverse and remand for a new trial.

4. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM FRED WAGNER ABOUT TRAFFIC COUNTS AND TRENDS IN THE RELOCATION OF AUTOMOBILE DEALERSHIPS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT SUCH OPINIONS WERE NOT REVEALED IN THE EXPERT'S DEPOSITION.

A. Standard of Review.

The standard of review on this point is abuse of discretion. "A trial court is vested with broad discretion as to its choice of a course of action during trial when evidence has not been disclosed in response to appropriate discovery, and in the

sound exercise of its discretion the trial court may reject such evidence or impose such other appropriate sanctions.” Green v. Fleishman, 882 S.W.2d 219, 222 (Mo.App. 1994). Judicial discretion is abused “when the trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” Id. at 223.

B. Once an expert has been deposed, the party sponsoring the expert has a duty to disclose any change in the expert’s opinions and any new or different facts upon which the expert will base his opinion at trial.

As discussed in the prior point, a party may discover the opinions of its opponent’s experts through deposition prior to trial. Changes from that deposition testimony must be disclosed:

[W]hen an expert witness has been deposed and he later changes his opinion before trial or bases that opinion on new or different facts from those disclosed in the deposition, it is the duty of the party intending to use the expert witness to disclose that new information to his adversary, thereby updating the responses made in the deposition.

Gassen v. Woy, 785 S.W.2d 601, 604 (Mo.App. 1990).

In Green v. Fleishman, a medical malpractice action, the court of appeals held that the trial court properly struck the testimony of the plaintiffs’ expert,

where the expert testified on deposition that he had no opinion as to blood levels of an antibiotic, and at trial expressed an opinion on that subject. Green, 882 S.W.2d at 221-22. In Gassen, also a medical malpractice case, the expert for the defense testified on deposition that he had not seen certain x-rays. At trial, he offered an opinion based upon those x-rays, and the plaintiff claimed surprise. The court of appeals held that the trial court did not abuse its discretion in refusing to strike the opinion, where the trial court offered plaintiff's counsel the opportunity to interview the expert on this point, and the plaintiff declined. Gassen, 785 S.W.2d at 604.

C. The trial court abused its discretion in allowing Fred Wagner to testify to matters not disclosed in deposition.

Prior to trial, counsel for the Thompsons took the deposition of Fred Wagner, one of the City's expert witnesses testifying on value. The deposition covered all of Mr. Wagner's opinions and his report, and included the question "are there any other areas or subject matters on which you are likely to render an opinion on in this case that are not contained in this report?" to which Mr. Wagner answered "no." TR 1357.

At trial, Mr. Wagner testified as to trends in the relocation of automobile dealerships. TR 1341. In essence, he testified that most of the dealers used to be located together downtown, but since have moved out to areas with higher traffic counts. Id. These facts and opinions were not disclosed prior to trial in Mr. Wagner's deposition, and counsel for the Thompsons objected on the basis of

surprise. TR 1341-42. The City's sole response was that Mr. Wagner was merely a fact witness on this point. TR 1342. The court allowed the City to proceed, recognizing the continuing objection of counsel for the Thompsons. TR 1344-45. Mr. Wagner then testified that he had noticed the trend of dealerships moving to the South and East of town, and that he considered that trend in evaluating the Thompson Property. TR 1345-47.

The court abused its discretion in permitting Mr. Wagner to testify as to matters not disclosed in his deposition. Even assuming, for the sake of argument, that traffic counts and trends in the car dealership business are matters of fact and not of expert opinion, the testimony was improper. This is because a party must disclose if its expert will base his opinion "on new or different *facts*" from those disclosed in his deposition. Gassen, 785 S.W.2d at 604 (emphasis added). Here, the Thompsons had no warning that Mr. Wagner would testify as to traffic counts and trends in the car business. Prejudice from surprise at trial is inferred. Ellis, 729 S.W.2d at 75. The court should have sustained the objection and granted such appropriate relief as necessary to remedy the prejudice and surprise suffered by the Thompsons. Id. Its failure to do so was an abuse of its discretion, and this Court should reverse.

5. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO SHOW THE HICKS VIDEO TO THE JURY, BECAUSE THE COURT ABUSED ITS DISCRETION IN THAT JURORS COULD NOT ASK QUESTIONS OF HICKS.

A. Standard of Review.

The trial court has substantial discretion on the admissibility of testimony, and its ruling will not be disturbed on appeal absent an abuse of discretion. Doe v. Alpha Therapeutic Corp., 3 S.W.3d 404, 421 (Mo.App. 1999).

B. The trial court should not have permitted the City to play the Hicks video because jurors could not question Hicks.

Once the court decided to allow jurors to ask questions of live witnesses, then allowing the City to put on a video witness, immune from juror questioning, was an abuse of discretion. Fairness dictates that rules and procedures be applied equally and uniformly. The court should have required all witnesses to be live so that jurors could interrogate them, or permit video witnesses in this case and save testing the court's innovation for some other case with live witnesses. By trying to have it both ways, the trial court created a disparity of treatment: each of the Thompsons' witnesses were subjected to examination by jurors, but not all of the City's witnesses suffered the same fate. Hicks was not, and could not have been questioned by jurors. The disparate treatment and uneven application of the juror question procedure amounted to an abuse of discretion, and this Court should reverse.

6. THE TRIAL COURT ERRED IN DENYING THOMPSONS' MOTION FOR NEW TRIAL, BECAUSE THE FOREGOING ERRORS HAD A CUMULATIVE, PREJUDICIAL EFFECT.

A. Standard of Review.

As stated for each point above, the standard of review on each of the errors is abuse of discretion.

B. This court should reverse and remand because of the cumulative, prejudicial effect of the trial court's errors.

An appellate court may order a new trial "due to cumulative error, even without deciding whether any single point would constitute grounds for reversal." DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526, 536 (Mo.App. 1991). The errors noted above had a cumulative, prejudicial effect on the Thompsons. The Thompsons were surprised when the City violated its own Motion in Limine during voir dire. From the outset, they faced a jury tainted by insinuations of greed and unreasonableness on the part of the Thompsons in pre-trial negotiations. The jury had been caused to fear making a fair award: fear that their own taxes would go up based on their award was placed into the jurors' minds by the City. The Thompsons were not able to try their case on a level playing field. A procedure of juror questioning was used, which the Thompsons' counsel had never seen or heard of, while the City's counsel had experience with the process. The Thompsons' counsel were surprised as the unexplained procedure seemed to change and spin out of control as the trial progressed. The process was not

uniformly applied – all of the Thompsons’ witnesses were interrogated by the jurors, while one of the City’s experts was not. The Thompsons suffered further surprise when an undisclosed expert, Newman, took the stand. Even further surprise occurred when a disclosed and deposed expert, Wagner, showed up at trial with new opinions based on new facts.

In sum, the errors discussed herein made it impossible for the Thompsons to have a fair trial and obtain a fair determination of the just compensation guaranteed them under the Constitution. Therefore, even if this Court decides that any one of the alleged errors, standing alone, may not warrant reversal, it should nonetheless reverse and remand based on the cumulative effect of the errors.

CONCLUSION

The trial court abused its discretion in denying a mistrial during voir dire. No fair panel could have been selected after the improper comments made by the City. The trial court abused its discretion in the manner in which it encouraged and permitted jurors to ask questions of witnesses. Because of the surprises sprung upon the Thompsons by the undisclosed testimony of Newman and the undisclosed new facts and opinions of Wagner, the trial court abused its discretion in permitting such testimony. The Thompsons were disadvantaged by the trial court’s decision to permit the showing of the Hicks video, in that the ruling permitted the City to proffer a witness immune from juror interrogation. Allowing such videotaped testimony under the circumstances constituted an abuse of discretion.

Under the case law, the prejudice stemming from the foregoing surprises is inferred. It is also revealed in the record, in the confusion and distraction caused by the juror questioning process, in the surprise at undisclosed testimony appearing for the first time at trial, and, ultimately, in the deficient verdict.

In light of the errors, and their cumulative effect, this Court should reverse the trial court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the foregoing brief and a disk containing the brief were served via Federal Express, overnight delivery, on October 16, 2001, on: Charles Cowherd and JoAnn Tracy Sandifer, Husch & Eppenberger, LLC, 750 N. Jefferson, Springfield, Missouri 65802.

Stanley J. Wallach

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Appellant complies with the requirements contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the number of words contained in the Substitute Brief, excluding the cover page, certificate of service, signature block, appendix and certificate of compliance, is 11,167. Furthermore, the disk filed herewith has been scanned for viruses and is virus free.

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