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IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC92470

ST. LOUIS COUNTY, MISSOURI,
Appellant,

v.

RIVER BEND ESTATES HOMEOWNERS ASSOCIATION *et al.*,
Respondents.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 36
HON. ELLEN H. RIBAUDO

Brief of Appellant St. Louis County, Missouri

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JURISDICTIONAL STATEMENT

This action involves *inter alia* the question whether Sections 523.039 and 523.061 R.S.Mo, which require the post-trial addition of "heritage value" onto the jury's verdict of just compensation in an eminent domain case, violate Missouri Constitution. Article I, Section 26 (requiring the payment of just compensation for the taking of private property for public use), and Missouri Constitution, Article III, Section 38(a), Article VI, Section 23 and Article VI, Section 25 (all prohibiting the expenditure of public funds for private purposes).

This appeal involves the validity of a statute of this State and the Supreme Court of Missouri therefore has exclusive jurisdiction under Missouri Constitution Article V, Section 3.

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STATEMENT OF FACTS

This case centers on a parcel of real property located at 1653 Creve Coeur Mill Road in Chesterfield, Missouri ("Subject Property"), *Legal File ("L.F.") at 43*, consisting of approximately 15 acres of undeveloped property. *Trial Transcript ("Tr.") 45:4-5*. From approximately 1968 forward, the Subject Property has been unoccupied and not used by the owners who are Defendants herein, the Novel family ("the Novels"). *Tr. 258:16-25; 259:8-15*. On the date of the taking, the property was heavily wooded, including a creek, steep bluff, and sloping terrain. *Tr. 297:7-19; Exh. 10.*

County obtained an Order of Condemnation on February 11, 2010, which provided for acquisition of Subject Property in its entirety. *L.F. at 63*. The Condemnation Commissioners appointed by the trial court awarded the Novels $320,000 as damages for the acquisition of Subject Property. *L.F. at 77-80*. The Novels filed exceptions to the Commissioners' award and requested a jury trial. *L.F. at 90-91*. Subsequently, the Commissioners filed an Amendment to their original report noting that the Novels had owned Subject Property for over fifty years. *L.F. at 92-93*. The Novels then filed a Motion for Assessment of Heritage Value. *L.F. at 95-97*. The Circuit Court entered an Order assessing heritage value in the amount of $160,000.00, resulting in a total award of $480,000. *L.F. at 98*.

Prior to trial of the Novels' exceptions, County and the Novels filed Motions in Limine on December 12, 2011. *L.F. at 134-148*. The Novels filed a Motion in Limine to exclude testimony about prior statements of value made by the owner. *L.F. at 134; Tr. 15-20*. County argued that an owner's opinion of value was admissible because it was

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made during the public hearing before the Condemnation Commissioners, the statutes do not preclude inquiry into such matters, and such statement could be used in cross examination. *Tr. 20:13-25*. The court sustained the Novels' Motion in Limine as to the opening statements and indicated that the issues would be further addressed during the trial. *Tr. 27:1-24.*

The Novels also filed a Motion in Limine to exclude evidence or testimony about the addition of Heritage Value to the jury verdict. *L.F. at 136; Tr. 29-30*. County argued that exclusion of reference to Heritage Value while allowing the Novels to testify to the family history and sentimental value to the Novels was prejudicial to County. *Tr. 30-31*. The court sustained the Novels' motion to exclude reference to Heritage Value. *Tr. 35:19-21*. County also objected that the application of Heritage Value pursuant to Section 523.061 R.S.Mo. violated multiple provisions of the Missouri Constitution. *Tr. 170-171; 252.*

Despite County's objections when the issue arose in the Motion in Limine and upon reference by the Novels' Appraiser, Ernest Demba, owner Derek Novel was allowed to testify at length about his family's history with and the sentimental value of Subject Property. *Tr. 170-171; 252*; *Tr. 255-264*. In fact, the sole topic of Mr. Novel's testimony was the family's connection to Subject Property; he subsequently testified that he did not have and had never had an opinion of value for it. *Tr. 284:24-285:7.* County sought to offer evidence that Mr. Novel had indeed previously testified to the value of Subject Property, but the trial court sustained the Novels' objection to such evidence. County then made an offer of proof with testimony by James Herries, a St. Louis County

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Project Representative, that Mr. Novel had publicly asserted an opinion of value of $496,000 at the Condemnation Commissioners' Hearing held for Subject Property. *Tr. 428:24-433:21; 429:7-430:3; 431:19-432:15.*

The Novels filed a separate Motion in Limine to exclude testimony by officials from the City of Chesterfield ("Chesterfield") about the challenges associated with potential development of Subject Property. *L.F. at 139-145.* The court indicated that the Chesterfield officials lacked authority to speak for the Chesterfield City Council, but did not rule on the motion at that time. *Tr. 38:11-13.* Further discussion of this Motion in Limine occurred when County called its first witness from the City of Chesterfield and Novels' raised their objection, however, unbeknownst to the parties, that portion of the trial was not recorded by the court clerk. *Tr. 398*; *Motion to Remand, Exh. 1, Stipulation.* The court's ruling limited the testimony of the Chesterfield officials to general descriptions of Chesterfield's development requirements and prohibited specific analysis and application of Chesterfield's requirements to the Subject Property. *Motion to Remand, Exh. 1, Stipulation, No. 4-5.*

The Novels' retained appraiser, Ernest Demba, testified that the fair market value of the Subject Property was $1,296,746.00. *Tr. 211:15-16.* Mr. Demba's testimony about "value" emphasized the Novels' unwillingness to lose Subject Property, concurring with counsel's suggestion that the Novels' had given up their property with "a gun to [their] head," *Tr. 338:13-339:4.* Mr. Demba's testimony also highlighted the Novels' long history with Subject Property, thereby underscoring their sentimental attachment to it and, again, their unwillingness to give it up. *Tr. 170-171.* Mr. Demba also speculated

about the lack of sophistication of the seller of property on which Terra Vista Subdivision was then developed adjacent to the Subject Property, which sale had been used by County's appraiser as a comparable sale. *Tr. 183:9-184:11; 184:22-185:3; 185:11-13; 248:3-5.*

Jeffrey Gonterman, the professional appraiser retained by County, opined that the fair market value of the property, including adjustments for topography, was $208,384. *Tr. 327; Tr. 331:10-17.* When County attempted to inquire about Mr. Gonterman's observations of the level of sophistication of Terra Vista's seller, the Novels objected to the testimony, arguing that the Project Influence doctrine precluded testimony about the sale transaction. *Tr. 313:22* (unrecorded side bar); *Motion to Remand, Exh. 1, Stipulation, No. 7.* The court sustained Novels' objection and County could not inquire further into the issue for the purpose of rebutting Mr. Demba's speculation about the legitimacy of the sale. *Tr. 313:22* (unrecorded side bar); *Motion to Remand, Exh. 1, Stipulation, No. 7.* County also offered by deposition a valuation opinion by appraiser Emerson Sutton, *Tr. 464,* who testified that the value of the Subject Property was $238,154. *Tr. 473:1-5.*

On December 15, 2011, the jury assessed damages for the Novels in the amount of $1,300,000.00, an amount $31,000 greater than the amount asserted by the Novels as fair market value. *L.F. at 149.*

Pursuant to 523.061 R.S.Mo, Novels filed a Motion for Assessment of Heritage Value and Entry of Judgment on December 20, 2011. *L.F. at 150-152.* County filed its Memorandum in Opposition to Application of 523.061 R.S.Mo. on December 29, 2011.

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L.F. at 153-155. The court granted the Novels' Motion, added $650,000 to the jury's determination as Heritage Value and assessed $158,760.00 as interest under 523.045 R.S.Mo. *L.F. at 156-158*. Although the jury's determination of just compensation was $1,300,000.00, the trial court entered judgment in the amount $1,628,760.00 for the Novels on December 29, 2011. *L.F. 156-158*.

County filed a Motion for New Trial on January 30, 2012. *L.F. at 159-169*, which motion was on March 5, 2012. *L.F. at 170*. Upon timely filing its Notice of Appeal on March 13, 2012, *L.F. at 171-189*, County requested a copy of the electronic recording for transcription by a court reporter for this appeal. Upon receipt of the trial transcript, County learned that there were 146 instances of inaudible testimony or argument and that portions of the trial had not been transcribed because the recording device was not running when objections were raised and argued at the bench.[1] *Motion to Remand, Exh. 1, Stipulation*. The gaps in recording occurred when counsel requested to approach the bench to take up County's objections, including those that had been raised but deferred by the court in County's Motion in Limine. *Tr. 102, 108, 170, 171, 252, 269, 313, 399, 448*. At such times, the judge accommodated the parties at sidebar, relocating the bench microphone with her and implicitly suggesting thereby that the discussions were being recorded. *Motion to Remand, Exh. 1, Stipulation, ¶2*.

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[1] The trial had been heard in Associate Circuit Court and recorded by an electronic recording device operated by the court clerk. *Motion to Remand, Exh. 1, Stipulation, ¶1-3*.

At no point did the judge state that the discussions were "off the record," nor could she appropriately have done so. *Motion to Remand, Exh. 1, Stipulation,* ¶*2*. The judge and both parties operated as if making a record of objections and argument. *Motion to Remand, Exh. 1, Stipulation,* ¶*2*. The issues on appeal are those which were repeatedly discussed and evaluated at the bench. Prior to the filing of this brief, County filed a Motion to Remand for New Trial based on the inadequacy of the transcript for appellate review, which motion remains pending.

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POINTS RELIED ON

I. TRIAL COURT ERRED BY FAILING TO PROVIDE FOR RECORDATION OF THE ENTIRE TRIAL, BECAUSE AN APPELLANT IS ENTITLED TO FULL AND COMPLETE TRANSCRIPTS FOR THE APPELLATE COURT'S REVIEW IN THAT APPELLANTS CANNOT OTHERWISE DOCUMENT THE TRIAL OBJECTIONS AND RULINGS FOR APPEAL OR PROVE THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

Cases

1. *Goodman v. Goodman*, 165 S.W.3d 499 (Mo. App. 2005)
2. *Loitman v. Wheelock*, 980 S.W.2d 140 (Mo. App. 1998)
3. *Lynn v. Plumb*, 808 S.W.2d 439 (Mo. App. 1991)
4. *State v. Cooper*, 16 S.W.3d 680 (Mo. App. 2000)

II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE RELATING TO THE NOVELS' ATTACHMENT TO AND UNWILLINGNESS TO SELL THE SUBJECT PROPERTY WHILE EXCLUDING EVIDENCE THAT THE JURY VERDICT WOULD BE INCREASED TO ACCOUNT FOR THE PROPERTY'S HERITAGE VALUE, BECAUSE THE COMBINED EFFECT OF THESE RULINGS WAS TO INFLAME AND PREJUDICE THE JURORS AGAINST COUNTY, IN THAT THE TESTIMONY SUGGESTED THE NOVELS DESERVED MORE THAN JUST COMPENSATION BECAUSE OF THEIR

LONG ASSOCIATION WITH THE PROPERTY WHILE CONCEALING THE FACT THAT THE NOVELS WOULD ALREADY BE AWARDED ADDITIONAL HERITAGE VALUE COMPENSATION BY THE JUDGE.

Cases

1. *State ex rel. Mo. Highway & Transp. Comm'n v. Goodson*, 281 S.W.2d 858 (Mo. 1955)
2. *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300 (Mo. 1965)
3. *City of Jackson v. Barks*, 476 S.W.2d. 162 (Mo. App. 1972)
4. *St. Charles County v. Olendorff, et al*, 234 S.W.3d 492, 495 (Mo. App. 2007)

Missouri Constitution

Article I, Section 26

Statutes

523.039 R.S.Mo. (2006)

III. THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY OF OWNER DEREK NOVEL'S PREVIOUSLY STATED OPINION OF VALUE, BECAUSE HIS OPINION WAS LEGALLY RELEVANT AND ADMISSIBLE IN THAT IT SERVED BOTH AS IMPEACHMENT AND AS AN ADMISSION AGAINST INTEREST.

Cases

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1. *Land Clearance for Redevelopment Authority of the City of St. Louis v. Henderson,* 358 S.W.3d 145 (Mo.App. 2011)
2. *State ex rel. Missouri Highway and Transp. Com'n v. Sisk*, 954 S.W.2d 503 (Mo. App. 1997)
3. *City of Maryland Heights v. Heitz*, 358 S.W.3d 98 (Mo. App. 2011)
4. *Carpenter v. Davis*, 435 S.W.2d 382 (Mo. banc 1968)

IV. THE TRIAL COURT ERRED IN ADMITTING APPRAISER DEMBA'S SPECULATIVE TESTIMONY DISPARAGING COUNTY'S TERRA VISTA COMPARABLE SALE WHILE EXCLUDING REBUTTAL TESTIMONY SUPPORTING SAID SALE DUE TO THE "PROJECT INFLUENCE" DOCTRINE, BECAUSE SPECULATIVE EVIDENCE IS NOT ADMISSIBLE AND WAS FURTHER SUBJECT TO COUNTY'S REBUTTAL TESTIMONY IN THAT SAID REBUTTAL TESTIMONY WAS ADMISSIBLE AND NOT SUBJECT TO THE "PROJECT INFLUENCE" DOCTRINE.

Cases

1. *Quality Heights Redevelopment Corporation v. Urban Pioneers*, 799 S.W.2d 867 (Mo. App. 1990)
2. *Myers v. Bi-State Dev. Agency*, 567 S.W.2d 638 (Mo. banc 1978)
3. *St. Louis Elec. Terminal Ry. Co. v. MacAdaras*, 257 Mo. 448, 166 S.W. 307 (1914)

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V. THE TRIAL COURT ERRED IN PROHIBITING TESTIMONY BY COUNTY'S EXPERT WITNESSES CONCERNING POTENTIAL DEVELOPMENT OF SUBJECT PROPERTY, BECAUSE SUCH TESTIMONY WAS RELEVANT AND ADMISSIBLE IN THAT A PROPER FOUNDATION COULD HAVE BEEN LAID FOR THE TESTIMONY AND THE TESTIMONY WAS NEEDED TO REBUT SPECULATIVE TESTIMONY BY THE NOVELS' EXPERT WITNESSES.

Cases

1. *State ex rel. Mo. Highway & Transp. Comm'n v. Gannon*, 898 S.W.2d 141 (Mo. App. 1995)
2. *State ex rel. Missouri Hwy. & Transp. Com'n v. Pedroley,* 873 S.W.2d 949 (Mo. App. 1994)
3. *State ex rel. Missouri Highway and Transportation Commission v. Our Savior Lutheran Church*, 922 S.W.2d 816 (Mo. App. 1996)
4. *City of Maryland Heights v. Heitz*, 358 S.W.3d 98 (Mo. App. 2011)

VI. TRIAL COURT ERRED BY DENYING COUNTY'S MOTION FOR NEW TRIAL AND INSTEAD ENTERING JUDGMENT FOR NOVELS IN THE

AMOUNT OF $1,628,760 , BECAUSE THE JURY VERDICT WAS EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT IT EXCEEDED THE HIGHEST AMOUNT OF DAMAGES INTRODUCED INTO EVIDENCE.

Cases

1. *Heins Implement Co. v. Mo. Highway & Transportation Com'n*, 859 S.W.2d 681 (Mo. banc 1993)
2. *State ex rel. State Highway Commission v. Hamel*, 404 S.W.2d 736 (Mo. 1966)

VII. THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY REQUIRE COUNTY TO PAY AN AMOUNT GREATER THAN JUST COMPENSATION FOR PROPERTY IN VIOLATION OF MISSOURI CONSTITUTION ARTICLE I, SECTION 26.

Cases

1. *Bauman v. Ross*, 167 U.S. 548 (1897)
2. *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300 (Mo. 1965)
3. *Dickerson v. United States*, 530 U.S. 428 (2000)

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Article I, Section 26

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523.039 R.S.Mo. (2006)

523.061 R.S.Mo. (2006)

VIII. THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY REQUIRE COUNTY TO EXPEND PUBLIC FUNDS WITHOUT A PUBLIC PURPOSE IN VIOLATION OF MISSOURI CONSTITUTION ARTICLE III, SECTION 38(a) AND ARTICLE VI, SECTIONS 23 AND 25.

Cases

1. *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300 (Mo. 1965)
2. *Curchin v. Mo. Indust. Dev. Bd.*, 722 S.W.2d 930 (Mo. banc 1987)

Missouri Constitution

Article III, Section 38(a)

Article VI, Section 23

Article VI, Section 25

Statutes

523.039 R.S.Mo. (2006)

523.061 R.S.Mo. (2006)

IX. THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE MISSOURI CONSTITUTION ARTICLE I, SECTION 26 BY INVADING THE PROVINCE OF THE JURY IN DETERMINING JUST COMPENSATION FOR LAND TAKEN BY EMINENT DOMAIN.

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ARGUMENT

I. TRIAL COURT ERRED BY FAILING TO PROVIDE FOR RECORDATION OF THE ENTIRE TRIAL, BECAUSE AN APPELLANT IS ENTITLED TO FULL AND COMPLETE TRANSCRIPTS FOR THE APPELLATE COURT'S REVIEW IN THAT APPELLANTS CANNOT OTHERWISE DOCUMENT THE TRIAL OBJECTIONS AND RULINGS FOR APPEAL OR PROVE THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

Standard of Review

"`Missouri Supreme Court rules are to be interpreted in the same fashion as statutes.'" *Joshi v. Ries*, 330 S.W.3d 512, 514-515 (Mo. App. 2002), *quoting Dynamic Computer Solutions, Inc. v. Midwest Mktg. Ins. Agency, L.L.C.*, 91 S.W.3d 708, 713 (Mo. App. 2002). "Statutory interpretation is a question of law, which we review *de novo." Id.* at 515, *citing Lindquist v. Mid–Am. Orthopaedic Surgery, Inc.*, 269 S.W.3d 508, 510 (Mo. App. 2008).

Argument

Mo.R.Civ.P 81.12(a) requires appellants to prepare a record on appeal which "shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented, by either appellant or respondent, to the appellate court for decision." The transcript is a critical part of the record on appeal; without a transcript, appellate courts "lack the necessary information to rule with any degree of confidence in the fairness, reasonableness and accuracy of our final decision." *Dale v. Director, Mo.*

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Dept. of Social Services, Family Support and Children's Div., 285 S.W.3d 770, 772 (Mo.App. 2009). A complete record of the trial proceedings is required if the appellate court is to determine "whether the judgment is supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Krastanoff v. Williams*, 231 S.W.3d 205, 207 (Mo.App. 2007).

Unfortunately and through no fault of County, a complete record of the trial proceedings does not exist in this case. Upon receipt of the trial transcript herein, County discovered that significant portions of the trial had not been recorded and were therefore unavailable for transcription. *See Tr. 102, 108, 170, 171, 252, 269, 313, 399, 448*. None of the omitted portions, which occurred when counsel asked to approach the bench with objections, were preceded by a request or directive that the proceedings be "off the record," nor did the court imply that this would be the case.[2] Because virtually all of County's objections were raised and resolved at sidebar, it is impossible to determine the extent to which the court's rulings were erroneous and/or arbitrary, nor can this Court ascertain whether properly admitted evidence supported, or would have supported, the verdict (beyond ascertaining that the verdict exceeded the highest amount of any testimony in the record, *see Point VI, infra*).

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[2] To the contrary, the trial judge relocated her microphone from the front of the bench to the sidebar when the parties approached the bench with objections, thereby implying that the proceedings were in fact being recorded. *See Motion to Remand to Trial Court for New Trial, Exh. 1, Stipulation*.

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The missing elements of the transcript correspond to the issues raised on appeal. The court took pre-trial Motions in Limine under submission for further consideration when the testimony occurred. During the trial, the parties asked to approach and the court heard arguments pertaining to objections and further discussion of Motions in Limine at the bench, out of the hearing of the jury. *See Tr. 102, 108, 170, 171, 252, 269, 313, 399, 448*. The judge moved the bench microphone to one side of the bench and both parties argued their positions for the record. Neither the court nor the parties were informed that the electronic recording had been stopped and all parties operated as if making an official record of objections and argument. Therefore, through no fault of the parties, critical components of the trial were not recorded and are unavailable for use in this appeal.

Omission of bench conferences affects the court's ability to resolve the issues on appeal. Evidentiary rulings and argument on objections occurred during the bench conferences. The issues of this appeal were repeatedly discussed and evaluated at the bench. These issues include: exclusion of Owner Derek Novel's prior opinion of value, *Tr. 269: 8-17*; admission of the Novels' speculative evidence of comparable sale and exclusion of admissible rebuttal evidence offered by County, *Tr. 170: 22-24*; *313:18-22*; assessment of Heritage value over objection that the authorizing statute is unconstitutional; admission of irrelevant and unfairly prejudicial evidence of "Heritage Value" proffered by the Novels while prohibiting the County from informing jury that "Heritage Value" would be added by the court to the verdict, *Tr. 252*; and exclusion of testimony by the County's non-retained expert witnesses, *Tr. 398-399*.

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Critical evidentiary matters were argued, including testimony regarding application of Section 523.061 R.S.Mo and the Missouri Constitution, specifically Article I, Section 26 and Article 6, Sections 23 and 25. *Tr. 170-171, 252*. The court also sustained the Novels' objection based on the "Project Influence Doctrine" to testimony by County expert witness Jeff Gonterman sought for impeachment purposes. County argued that the "Project Influence Doctrine" did not apply to preclude such testimony, but none of the argument was recorded by the court. After taking the issue under submission during the Motions in Limine, the court limited the testimony of County expert witnesses Jeff Paskiewicz, Professional Engineer, Certified Flood Plain Manager, for the City of Chesterfield, Missouri and Aimee Nassif, Planning and Development Services Director, City of Chesterfield, Missouri. The transcript does not include the Novels' objections or any of County's argument that the experts had the knowledge and expertise to testify as to the City of Chesterfield's requirements for development and the possible challenges to such development. *Tr. 398-399*. In addition to the components of trial that the court failed to record, 146 instances are "inaudible" in the transcript. *See, e.g., Tr. 6:24; 46: 21; 189:18-19; 309: 6; 341: 21; 342: 7; 349: 18; 391:9, 24-25; 393:21*. The inaudible portions occur throughout the trial, from the Motions in Limine through direct and cross examination of witnesses, and include argument of objections and the court's subsequent evidentiary rulings. *See Tr. 189: 18-19; 269: 15-17; 309: 6; 341: 21; 342: 7; 349: 18; 391:9, 24-25; 393:21*.

An appellate court "will not enter a judgment based upon speculation. The appropriate remedy when 'the record on appeal is inadequate through no fault of the

parties' is to reverse and remand the case to the trial court." *Goodman v. Goodman*, 165 S.W.3d 499, 501-502 (Mo.App. 2005) (citation omitted). In *Lynn v. Plumb*, 808 S.W.2d 439 (Mo.App. 1991), a case also tried before an associate circuit judge, one of the three recording tapes was subsequently lost. The appellate court reversed and granted a new trial, holding that the inability to prepare a transcript was not the fault of either party and the right of appeal was prejudiced by the absence of a complete transcript. *Id.* at 440. In *Loitman v. Wheelock*, 980 S.W.2d 140, 142 (Mo. App. 1998), the court held that:

> In the event it is not possible to correct and reconstruct the record on the missing events, including the offer of proof, the court shall grant a new trial in order to provide an opportunity for the parties to preserve a record including the testimony of the witnesses, objections, and rulings on objections and other proceedings required for appellate review.

See also Empire Bank v. McRobert, 247 S.W.3d 160 (Mo. App. 2008) (court remanded case for new trial when transcript of the Associate Circuit Court recording was unavailable through no fault of the appellant).

Missouri courts have set forth a two-prong test for determining when a new trial is required due to an inadequate record: "Defendant is entitled to a new trial only if he exercised due diligence to correct the deficiency in the record and was prejudiced by the incompleteness of the record." *State v. Cooper*, 16 S.W.3d 680, 681 (Mo.App. 2000). Here, County has exercised due diligence to reconstruct the arguments and objections, by

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submitting a proposed stipulation to the Novels for approval.[3] However, the jury trial was concluded on December 14, 2011, and the Notice of Appeal was filed three months after the completion of trial. *L.F. 171*. The trial transcript was not completed until June 13, 2012. Given the lapse of time between trial and the discovery of the missing record, it is unrealistic to believe that a fair and complete reconstruction of omitted transcript portions can occur. County cannot recall every trial objection and every argument made in support of its objections, cannot recall every exact ruling of the trial court, and should not be penalized for being unable to reconstruct a trial months after it ended (or for not trying to "over remember" its objections, arguments, and the exact rulings to the objections).

As to the second prerequisite for a new trial, it is beyond dispute that County is prejudiced by the missing components of the transcript. In this instance, critical evidentiary decisions are not contained in the court record. Counsel for both parties argued during the discussions at the bench out of the hearing of the jury. *See* County's *Motion to Remand for New Trial, Exh. 1, Stipulation*. The court evaluated the subjects that had been raised in the Motions in Limine and objections to trial testimony. Without a record of the argument and court's decisions, the appellate court does not have the material necessary to evaluate the issues and County is clearly prejudiced. *See Loitman*, 980 S.W.2d at 142.

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[3] Stipulation discussions are in progress but are not complete due to the significant scope of the omitted portions.

In addition to the absence of evidentiary decisions rendered at the bench, the transcript revealed 146 instances when the recording was "inaudible." The "inaudible" recordings include arguments during the Motions in Limine, after objections made in the course of direct and cross examination, and the court's rulings on such matters, as well as portions of closing argument. These gaps cannot be remedied by an attempt at reconstruction of the testimony, argument, and rulings given the unrecorded rulings on objections and the sheer number of inaudible portions. The proper remedy is remand to the trial court for a new trial so that a full and complete transcript can be created.

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II THE TRIAL COURT ERRED BY ADMITTING EVIDENCE RELATING TO THE NOVELS' ATTACHMENT TO AND UNWILLINGNESS TO SELL THE SUBJECT PROPERTY WHILE EXCLUDING EVIDENCE THAT THE JURY VERDICT WOULD BE INCREASED TO ACCOUNT FOR THE PROPERTY'S HERITAGE VALUE, BECAUSE THE COMBINED EFFECT OF THESE RULINGS WAS TO INFLAME AND PREJUDICE THE JURORS AGAINST COUNTY, IN THAT THE TESTIMONY SUGGESTED THE NOVELS DESERVED MORE THAN JUST COMPENSATION BECAUSE OF THEIR LONG ASSOCIATION WITH THE PROPERTY WHILE CONCEALING THE FACT THAT THE NOVELS WOULD ALREADY BE AWARDED ADDITIONAL HERITAGE VALUE COMPENSATION BY THE JUDGE.

Standard of Review

Circuit courts have "broad discretion to admit or exclude evidence." *State v. Tisius*, 362 S.W.3d 398, 405 (Mo. banc 2012). "The admission of evidence is reviewed for abuse of discretion and disturbed only when the decision is 'clearly against the logic of the circumstances.'" *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009), *citing State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Argument

Mo. Const. Art. I, Section 26, requires "just compensation" for the taking of any private property for public purposes. This Court has defined just compensation as "the full and perfect equivalent in money of the property taken . . . but no more, for to award

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more than the value of the condemned property would result in the unjust enrichment of the condemnee." *City of St. Louis v. Union Quarry & Construction Co.*, 394 S.W.2d 300, 305 (Mo. 1965). Just compensation generally means "fair market value," which 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.*; *see also Byrom v. Little Blue Valley Sewer District*, 16 S.W. 3d 573, 577 (Mo. banc 2000).

By statute enacted in 2006, the General Assembly has purported to displace this Court's constitutional interpretation of just compensation with a new definition that encompasses more than fair market value of the property.[4] In the case of property which has been owned by one family for fifty or more years, "just compensation" has been legislatively redefined as being not merely fair market value alone but instead as "an amount equivalent to *the sum of* the fair market value *and* heritage value." Section 523.039(3) R.S.Mo (2006) (emphasis added). "Heritage value" is that amount equal to fifty percent of the property's fair market value. Section 523.001(2) R.S.Mo. The new statute requires heritage value to be added on by the judge following trial, Section 523.061 R.S.Mo (2006), but does not otherwise disturb the law for determination of "fair market value." Presumably, then, fair market value is to be determined in the same manner as it was determined prior to enactment of the heritage value statute.

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[4] County does not believe the General Assembly had the power to override the Court's interpretation of the Constitution, but that argument is addressed in Points VII-IX and need not be repeated here.

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Determination of fair market value does not include, and in fact specifically prohibits, emotional statements about the sentimental value specific to a particular owner or about his unwillingness to sell. The only duty of the jury in a condemnation case "ha[s] to do with the question of compensation and damages." *State ex rel. State Highway Com'n v. Huddleston*, 52 S.W.2d 33, 34 (Mo. App. 1932) (reversing a verdict following the owner's testimony that "I don't want to sell it; I love the place, and I wanted to keep it"). Emotional statements from the property owner "present . . . no fact issue and embrace . . . no constitutive element for consideration in arriving at the damages, the sole issue for the jury." *State ex rel. State Highway Commission v. Goodson*, 281 S.W.2d 858, 861 (Mo. 1955) (reversing a condemnation verdict after the trial judge acceded to the property owners' request for an instruction that the State could take their property "without consent and against their will").

Here, the Novels' testimony was filled with references both to the sentimental value of the property *and* the forced nature of County's acquisition. Owner Derek Novel rambled on at length about his family's history with and ownership of the Subject Property:

> At the time my grandfather was 85, so [the farm] was corn and wheat and things of that nature. He was obviously much too old for that kind of thing, but fortunately he had a young grandson who was able to bring in the cows from the fields who was able to slop the hogs, that's the expression back in those days, and feed the chickens. So those are the kinds of things I did there on the farm for him.

Tr. 257:9-16. He testified that he fished on the property as a boy but didn't catch

anything, because he "was not very good as a fisherman, but I did try." *Tr. 263:14-16.* He identified to the jury "a picture of First Baptist Church of Creve Coeur" and informed the jury that he has cousins who still attend that church. *Tr. 260:23-261:8.* The Novels' appraiser reiterated their attachment to the property in hearsay testimony that Mr. Novel had said "We've had it in the family. I lived on it. I went to school. I walked across that whatever land it was to go to school there. And it's been in the family that long." *Tr. 252:10-13.*

Even more problematic than Mr. Novel's sentimental discussion of the property was the continual, blatant droning throughout the trial that the Novels *did not* wish to part with the property that was taken from them by County:

MR. DENLOW: Did you turn down any offers?

MR. NOVEL: Offers were turned down.

MR. DENLOW: Is there a reason why you did not want to develop it at that time?

MR. NOVEL: There was an interest in keeping the property for the family because after all that's what we have left from our grandparents. But certainly one of the things that our grandparents taught us was to hold property as something that was better than having money in the bank because property always has value.

Tr. 260:10-19.

MR. BECKER: When you say unfortunately that's the date we're working with, what do you mean by that?

MR. DEMBA: That's when the subject property owners are forced to sell

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their property. . . . They're forced to sell during the recession. They wouldn't choose to sell it, but that's the date that I'm to give an opinion of value. . . .

Tr. 251:15-21.

Counsel for the Novels went so far as to use, repeatedly, the visually disturbing image of County's condemnation being like having "a gun to the head":

MR. DENLOW: When you talk about a willing seller, *he or she doesn't have a gun to her head*. It's his or her choice to put it on the market or not put it on the market.

MR. GONTERMAN: That is correct.

MR. DENLOW: There is a choice, right?

MR. GONTERMAN: Yes.

MR. DENLOW: They can hold it, they can sell it, whatever they want, okay. All other sales, of course, are premised on having a willing seller?

MR. GONTERMAN: Yes, that is correct.

MR. DENLOW: When you get to the issue of what is the Derek Novel and his family property worth, the question you ask yourself is what would a willing seller, *note without having a gun to his or her head*, agree to sell the property for . . . ?

Tr. 338:13-339:4 (emphasis added).

There was no legitimate purpose to this line of questioning; the only information which was elicited, indeed highlighted and emphasized, was that the Novels were forced to give up their property. Counsel's repeated questioning along this line served only to

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elicit sympathy for the Novels and bias against County. Counsel then made this sympathy the foundation of his closing argument, which he began by reminding the jury that the Novels had been subjected to a forced taking:

> MR. DENLOW: Eminent domain, as you know, is not because the Novels had the property listed for sale. It's taken . . . . Kind of controversial (inaudible)[5] and just compensation has got to be agreed.

Tr. 478:25-479:5. Counsel continued to remind the jury that the property had been seized from the Novels despite the Novels' long history with the property:

> MR. DENLOW: [T]he dispute took place out on the street. It wasn't listed. It wasn't for sale. He didn't want it. . . . All the property is taken for the project.

Tr. 479:25-480:4.

> MR. DENLOW: Are the Novels to be punished because they didn't sell the property? No. It was taken.

Tr. 482:10-12.

> MR. DENLOW: Holding the property for 100 years and then be told you're - we're going to pretend you're selling it in a market which their county appraiser says no one in their right mind would put their property up for sale today unless you had foreclosure, you lose your job. He said that, okay. Are we going to

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[5] The incompleteness of the record precludes County from ascertaining the full extent to which the Novels incited passion and prejudice in this particular instance, underscoring the need to remand this case for retrial as set forth in Point I, *supra*.

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punish the Novels for that? I would hope not.

Tr. 483:6-12.

MR. DENLOW: Read over it and then to add insult to injury, put it that way the -

MR. BECKER: Your honor, I'm going to object to the characterization. This is about just compensation, not insult or any emotion.

COURT: The court will overrule the objection. The jury will be guided by the evidence.

Tr. 486:24-487-4.

MR. DENLOW: Think about this. *They've held on to a property for 100 years. It's taken against their will*. And if they have to give it up, at least be treated fairly.

Tr. 502:23-25 (emphasis added).

This tactic is impermissible and has been explicitly rejected by Missouri courts. In *City of Jackson v. Barks*, 476 S.W.2d 162 (Mo. App. 1972), counsel for the property owners pointed out during closing argument that the property had been forcefully taken from them. The appellate court stated that "[s]uch an argument is prejudicial since it tends 'to inflame the minds of the jurors, to arouse their sympathy for the defendants and prejudice against the plaintiff, and for a verdict in a larger amount than warranted by an impartial consideration of the evidence.'" *Id.* at 165, *quoting State ex rel. State Highway Commission v. Goodson*, 281 S.W.2d at 861. *See also State ex rel. State Highway Commission v. Thurman*, 552 S.W.2d 42, 45 (Mo. App. 1977) (reversing condemnation

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verdict because inflammatory argument was outside the evidence and unfairly prejudicial).

Compounding the error in allowing such emotionally charged testimony and argument was the court's refusal to let the jury know that the Novels would in fact be receiving additional compensation, fifty percent beyond that awarded by the jury, to compensate them for the "heritage value" of the property. The trial court sustained the owners' motion in limine to exclude any "comments or evidence that heritage value [Section 523.061, R.S.Mo.] may be awarded to the [owners]," *L.F. 136-137,* even though the Novels provided no case law or statutory authority to support this position. *L.F. 136-137; Tr. 30:2-1; 31:1-4*. At trial, the trial court again sustained the Novels' objection and prohibited County from inquiring into or referencing heritage value. *Tr. 269.*

Even were one to construe "heritage value" as being a lawful component of the compensation due the Novels, *but see Points VII-IX infra*, it was error for the trial court to keep the jury in the dark that this component would be *added* to their verdict and therefore did not need to be reflected in their verdict as well. The trial court's decision to let the Novels invite an implicit addition of "heritage value," by testifying to their history with and attachment to the property, resulted in double compensation for heritage value: first from the jury, which was allowed to consider "heritage value" in determining just compensation, and then by the judge, when she added 50% to the verdict which was already based on "heritage value" testimony.

Parties should not be allowed to recover twice for a single injury. *See, i.e., Lewis v. Gilmore*, 366 S.W.3d 522, 525 (Mo. App. 2011) (election of remedies doctrine is

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intended to preclude double recovery for single injury). Property owners are entitled to be compensated for their loss, and "[t]he ultimate objective in any condemnation case is to provide the owner with just compensation for the taking of his or her property for public use." *Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. v. Ames Realty Co.*, 258 S.W.3d 99, 107 (Mo. App. 2008). But they are not entitled to be compensated twice for the same "heritage value" loss; as in the case of *McGuire v. Kenoma, LLC*, __ S.W.3d __, No. WD 74022 (Mo.App. 6/12/12) (citation omitted), "this type of double recovery constitutes plain error, which constitutes a manifest injustice. 'It was error for the trial court to enable the jury to return verdicts for redundant damages.'"

In condemnation cases, the appellate court should reverse when error produces substantial or glaring injustice. *St. Charles County v. Olendorf*, 234 S.W.3d 492, 495 (Mo. App. 2007). The fact that the jury's verdict exceeded the highest value placed on the property by the owners' own appraisal corroborates that the jury was successfully infused by the Novels with sympathy for their loss and prejudice against the County that brought about that loss. That bias was exacerbated by the court's refusal to let the jury know that the Novels' sentimental loss was accounted for with the post-judgment addition of "heritage value." The verdict was based on passion and prejudice, not be a reasoned calculation of the property's worth. Accordingly, the judgment should be vacated and the case remanded for a new trial.

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III THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY OF OWNER DEREK NOVEL'S PREVIOUSLY STATED OPINION OF VALUE, BECAUSE HIS OPINION WAS LEGALLY RELEVANT AND ADMISSIBLE IN THAT IT SERVED BOTH AS IMPEACHMENT AND AS AN ADMISSION AGAINST INTEREST.

Standard of Review

"The admission of evidence is reviewed for abuse of discretion and disturbed only when the decision is 'clearly against the logic of the circumstances.'" *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009), *citing State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Argument

A. Owner Derek Novel's Publicly Stated Opinion of Value was Admissible for Impeachment Purposes.

At trial, the owners' appraiser testified to his opinion of value as being $1,296,746. *Tr. 211:15-16*. Thereafter, Defendant Derek Novel ("Mr. Novel"), one of the owners, testified upon cross-examination that he had never had an opinion of value as to the property:

Q: Do you have today an opinion of value what the property is worth?

A: No, I do not. I'm not an appraiser or an engineer, so I would have, from a laymen's point of view, would not have a way to determine the value of the property.

Q: Did you at any other time have an opinion of value as to the property?

A: No, I did not.

Tr. 284:24- 285:7; *see also* Tr. 269:8-13.

The Novels had made an oral motion in limine to exclude any testimony regarding Mr. Novel's opinion of value. *Tr. 272:6-15*. County later made an offer of proof, through the testimony of St. Louis County Project Representative James Herries that Mr. Novel did in fact publicly state an opinion of value while at the condemnation commissioners' hearing for the Subject Property. *Tr. 428:24-433:21, 429:7- 430:3*. Upon being asked by the condemnation commissioners his opinion of value, Mr. Novel had told the commissioners that his opinion of value for the Subject Property was $496,000. *Tr. 431:19 – 432:15, 432:11-15, 433:15-18*. The difference between appraiser Demba's trial opinion of value and Mr. Novel's opinion at the commissioners' hearing was an extraordinary $800,746. In spite of this, the trial court overruled County's offer of proof. *Tr. 432:16-18, 437:7- 438:3*.

Testimony which is given at a condemnation commissioner's hearing is admissible at the jury trial of the exceptions to show prior inconsistent statements. *State ex rel. Mo. Highway and Transp. Com'n v. Sisk*, 954 S.W.2d 503 (Mo. App. 1997). In *Sisk*, the trial court permitted the condemnor to question the owner about testimony at a prior condemnation hearing, at which the owner had stated the amount of damages was $193,275. *Id*. at 510. This prior statement was inconsistent with the owner's trial testimony; at trial, the owner's opinion had escalated to $738,000, an amount nearly quadruple his earlier professed opinion of value. The appellate court succinctly affirmed the trial court's decision to admit the earlier statement into evidence:

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> The fact is that a landowner's prior estimate of damages presented to the commissioners is admissible to show its inconsistency with his testimony at trial, so long as there is no mention or reference to the commissioners' hearing, and so long as the amount of the commissioners' award is not revealed.

Id., *citing State ex rel. City of Warrensburg v. Stroh*, 690 S.W.2d 215, 216–217 (Mo. App. 1985).

The admissibility of prior inconsistent statements in condemnation cases is beyond dispute, and applies to the condemnor as well as the condemnee. In *Land Clearance for Redevelopment Authority of the City of St. Louis v. Henderson*, 358 S.W.3d 145 (Mo. App. 2011), the owner's counsel read a statement at trial indicating the condemnor had previously taken the position of a value twice the amount it argued at trial. *Id*. at 157. The condemnor's argument of inadmissibility was rejected on appeal:

> If a commissioner and a landowner can be impeached using previous statements made to the commission, so long as any reference to the commissioners' report is removed and the commissioners' award is not disclosed, we cannot see how a condemnor should be able to avoid previous statements made concerning the sole issue at trial . . . .

Id. at 158 (citations omitted).

Impeachment testimony is also admissible regardless of its admissibility in other applications. "To enable fair cross-examination, it is permissible to use evidence that is relevant and material for impeachment purposes, even if the same evidence would be inadmissible for another purpose." *City of Maryland Heights v. Heitz*, 358 S.W.3d 98,

112 (Mo. App. 2011), *citing* *Houfburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 548–49 (Mo. 1955).

As noted in *Mo. Highway and Transp. Com'n v. Our Savior Lutheran Church*, 922 S.W.2d 816, 818-819 (Mo. App. 1996) (citation omitted):

> Because the only issue in a condemnation case is damages, the admissibility of evidence depends on whether it tends to aid the jury in determining value and thus resolving the issue of damages. Therefore, all evidence of value which an ordinarily prudent person would consider in reaching a conclusion regarding the fair market value of the condemned property is admissible.

In the present case, similarly to what occurred in *Mo. Highway and Transp. Com'n v. Sisk, supra*, owner Derek Novel publicly stated his opinion of value at the commissioners' hearing as being $496,000. *Tr. 429:7 – 430:3; 431:19 – 432:15; 433:15-18.* At trial, he then stated he had *never* had an opinion of value. *Tr. 284:24 – 285:7.* The trial statement was clearly contradictory to Mr. Novel's previous opinion of value at the commissioners' hearing and was admissible as a prior inconsistent statement under *Sisk*. Further, the Novels' retained expert witness, appraiser Ernest Demba, testified to his opinion of value as $1,296,746. *Tr. 211:15-16.* Under *Land Clearance for Redevelopment Authority of the City of St. Louis v. Henderson*, *supra*, Mr. Novel's opinion of value for trial purposes would be his appraiser Demba's opinion of value. 358 S.W.3d at 158. Thus, the $800,746 difference between Mr. Novel's prior opinion of value and his opinion of value via his appraiser Demba, $1,296,746, was even more than the $544,725 difference in *Sisk.*

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In reaching a conclusion, an ordinarily prudent person would certainly want to consider Mr. Novel's prior opinion of value at the commissioners' hearing, and the fact that he then expressed no opinion, other than his appraiser's opinion, at trial. *See Mo. Highway and Transp. Com'n v. Our Savior Lutheran Church*, 922 S.W.2d 816, 818-819 (Mo. App. 1996). Furthermore, an ordinarily prudent person would definitely want to consider the $800,746 disparity between Mr. Novel's prior opinion of value, and his opinion of value at trial via his appraiser Demba. Thus, the exclusion of Mr. Novel's prior opinion of value, which prohibited the jury from considering the significant $800,746 disparity in opinions, was against all logic and so "arbitrary and unreasonable as to shock the sense of justice." *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130 (Mo. banc 2007).

B. Owner Derek Novel's Publicly Stated Opinion of Value is Admissible as an Admission Against Interest.

In addition to impeachment through prior inconsistent statements, a party's prior statement, if against that party's interest, is also admissible. "Admissions against interest are those made by a party to the litigation or by one in privity with or identified in legal interest with such party, and admissible whether or not the declarant is available as a witness." *Carpenter v. Davis*, 435 S.W.2d 382, 384 (Mo. banc 1968). As stated in *Nettie's Flower Garden, Inc. v. SIS, Inc*., 869 S.W.2d 226, 229 (Mo. App. 1993)(citation omitted) :

> A statement by a party-opponent is an admission and admissible as an exception to the hearsay rule if it meets the following requirements: (1) a conscious or

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voluntary acknowledgment by a party-opponent of the existence of certain facts; (2) the matter acknowledged must be relevant to the cause of the party offering the admission; and (3) the matter acknowledged must be unfavorable to, or inconsistent with, the position now taken by the party-opponent.

In the present case, regardless of whether he testified or not, Mr. Novel's $496,000 opinion of value was admissible as an admission against interest. *Carpenter v. Davis*, 435 S.W.2d at 384. Mr. Novel, a party opponent, made a conscious and voluntary acknowledgment of a $496,000 opinion of value at the commissioners' hearing; his opinion is highly relevant to the only issue, fair market value; and his opinion of value was unfavorable and inconsistent with the $1,296,746 opinion of value he took at trial. *See Nettie's Flower Garden, Inc. v. SIS, Inc*., 869 S.W.2d at 226. The trial court's refusal to allow the jury to hear this relevant information was an abuse of discretion which requires reversal of the judgment entered herein.

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IV. THE TRIAL COURT ERRED IN ADMITTING APPRAISER DEMBA'S SPECULATIVE TESTIMONY DISPARAGING COUNTY'S TERRA VISTA COMPARABLE SALE WHILE EXCLUDING REBUTTAL TESTIMONY SUPPORTING SAID SALE DUE TO THE "PROJECT INFLUENCE" DOCTRINE, BECAUSE SPECULATIVE EVIDENCE IS NOT ADMISSIBLE AND WAS FURTHER SUBJECT TO COUNTY'S REBUTTAL TESTIMONY IN THAT SAID REBUTTAL TESTIMONY WAS ADMISSIBLE AND NOT SUBJECT TO THE "PROJECT INFLUENCE" DOCTRINE.

Standard of Review

Circuit courts have "broad discretion to admit or exclude evidence." *State v. Tisius*, 362 S.W.3d 398, 405 (Mo. banc 2012), including expert testimony. *McGuire v. Seltsam*, 138 S.W.3d 718, 720 (Mo. banc 2004). "The admission of evidence is reviewed for abuse of discretion and disturbed only when the decision is 'clearly against the logic of the circumstances.'" *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009), *citing State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009).

Argument

One of the comparable sales used by County's appraiser Jeffrey Gonterman was the property upon which Terra Vista subdivision ("Terra Vista") was then developed. *Tr. 307:23-25.* Terra Vista is immediately adjacent to Subject Property to the south, off Creve Coeur Mill Road, *Tr. 301:6-14*, and was likewise situated in both flood plain and flood way. *Tr. 409:25 -410:6, 350:10-14; 353:1-5; 181:1-7; 181:23 – 182:7; 182:9-14.*

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Prior to Terra Vista's development, Lawrence E. Walsh ("Seller") owned the property, and maintained his personal residence on the property. *Tr. 308:21- 309:13.* Seller had negotiated the sale of a portion of his property to Terra Vista's developer, Ed Levinson ("Developer"), at a price of $0.30/sq.ft. *Tr. 308:21- 309:15.* When Seller sold Developer the Terra Vista property, he wanted to maintain the rural-like setting, so he and Developer entered into several stipulations, including a requirement for driveway access and ponds just south of his home. *Tr. 311:6-20.* Seller's residence was in a park-like setting, with a chipping and putting green, a pool, and a sand volleyball court. *Tr. 310:7-10.* After the development of Terra Vista, Seller sold his personal residence and land to MB Properties, Inc. ("Millstone"). *Tr. 312:14- 313:15.*

The Owners' appraiser, Ernest Demba, did not use the similarly situated Terra Vista sale at $0.30/sq.ft. as a comparable sale. Instead, he used sales including non-flood plain properties such as Paddington Villas at $6.02/sq.ft. and another property at $4.59/sq.ft. *Tr. 209:17-22; Tr. 247:5-15; Tr. 249:1-3.* In a clear effort to disparage the obviously more similar Terra Vista sale as a comparable sale, Mr. Demba baldly asserted that the Terra Vista Seller was not a sophisticated seller. *Tr. 183:9- 184:11; 184:22 - 185:3; 185:11-13; 248:3-5.* Mr. Demba also speculated that Developer was likely privy to "leaked" information that planned changes to the Howard Bend Levee District would positively affect the development of the Terra Vista property by reducing the flood way. *Tr. 181:5-22; 183:19- 184:8.* Thus, Mr. Demba hypothesized, Seller was duped by a more sophisticated buyer. *Tr. 185:19 -186:2.*

Mr. Demba also made disparaging remarks about governmental entities, to no

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relevant end and with the apparent intent of provoking bias against governments such as County. Attacking FEMA, Mr. Demba suggested that the agency simply does a "flyover" to create its flood maps, while inserting derogatory remarks. *Tr. 235:17-25; 236:17- 237:1*. When asked what wetlands studies he reviewed, Mr. Demba answered that the latest was from County and, unprovoked, stated "which I hope was not just a flyover." *Tr. 239:14-20*.

On direct exam, County began to ask its appraiser Gonterman what Millstone's purchase price was for the Walsh residence, *Tr. 313:16-20*; after Mr. Demba's disparagement, this was an effort to illustrate that Seller not only obtained a sale price above the fair market value, but that he was so savvy as to incorporate into the sale the twenty-five percent homestead value increase that might have been available to him had his residence been condemned. *See* Sections 523.039 and 523.061 R.S.Mo. The Novels objected, arguing that the sale price of Seller's property was not relevant and was inadmissible due to the "project influence" doctrine. *Tr. 313:22* (unrecorded side bar); *Motion to Remand, Exh. 1, Stipulation* ¶*7*. The trial court sustained the Novels' objection on the basis of the project influence doctrine. *Id*.

Under the project influence doctrine, "[a] proposed project cannot entitle the landowner to any appreciation value or enhancement that the project would bring to the landowners' property . . . ." *Quality Heights Redevelopment Corp. v. Urban Pioneers*, 799 S.W.2d 867, 870 (Mo. App. 1990). This principle was first enunciated by Missouri courts in *St. Louis Elec. Terminal Ry. Co. v. MacAdaras*, 166 S.W. 307 (Mo. 1914), wherein the court found:

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> The proper rule, when the whole property is being taken, is not to allow the jury to consider either enhancements or depreciation brought about by the construction of the improvement for which the property is being taken. In other words, the value should be determined independent of the proposed improvement.

Id. at 310. *See also Quality Heights Redevelopment Corp. v. Urban Pioneers*, 799 S.W.2d at 870.

Missouri courts also recognize that experts must not be allowed to speculate as to facts not in evidence. For example, in *Myers v. Bi-State Dev. Agency*, 567 S.W.2d 638 (Mo. banc 1978), this Court upheld the trial court's exclusion of an expert's speculative testimony alleging that a piece of sand could cause brake failure, because there were no facts in evidence to suggest the truth of that speculation. *Id*. at 642. The *Myers* court reasoned that "opinion testimony of an expert witness *must* be based on facts in evidence and may not be a guess." *Id*. (emphasis added; citations omitted). Because there were no facts in evidence to support the speculative testimony, the effect of admitting it would have been to increase the speculation and confusion surrounding the issue of the brake failure. *Id*.

In the present case, there were no facts in evidence to support Mr. Demba's repeated and baseless speculations about Seller's lack of sophistication, Buyer's access to "secret" information, or the manner in which levee district boundaries are changed. But once Mr. Demba's various derogatory and speculative remarks were (improperly) in evidence, County should have been permitted to rebut his testimony by showing that Seller was in fact a sophisticated seller, thus justifying Terra Vista as a valid comparable

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sale and Gonterman as an appraiser. The testimony sought was for the purpose of illustrating the sophistication of the Seller in the sale of his home to an arm's length and sophisticated buyer, Millstone. There was no evidence suggesting that the purchase price and terms of the sale of the home had anything to do with the "proposed improvement," the highway, thus the project influence doctrine would simply not apply. *St. Louis Elec. Terminal Ry. Co. v. MacAdaras*, 257 Mo. 448, 166 S.W. 307 (1914); *Quality Heights Redevelopment Corporation v. Urban Pioneers*, 799 S.W.2d at 870. Rather, County's inquiry would have focused on the sale price for a private, arm's length transaction between a sophisticated buyer, Millstone, and a sophisticated seller, Walsh. The admission of rebuttal evidence regarding Gonterman's Terra Vista appraisal was crucial to address Mr. Demba's speculative and derogatory remarks regarding FEMA and County. Precluding testimony to illustrate that Seller was in fact sophisticated, and therefore that appraiser Gonterman's Terra Vista comparable was valid, was severely prejudicial and clearly against the logic of the circumstances. *See State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009).

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V. THE TRIAL COURT ERRED IN PROHIBITING TESTIMONY BY COUNTY'S EXPERT WITNESSES CONCERNING POTENTIAL DEVELOPMENT OF SUBJECT PROPERTY, BECAUSE SUCH TESTIMONY WAS RELEVANT AND ADMISSIBLE IN THAT A PROPER FOUNDATION WAS COULD HAVE BEEN LAID FOR THE TESTIMONY AND THE TESTIMONY WAS NEEDED TO REBUT SPECULATIVE TESTIMONY BY THE NOVELS' EXPERT WITNESSES.

Standard of Review

Although the trial court's decision whether to admit an expert's testimony will not be disturbed on appeal absent an abuse of discretion, "[a] trial court will be found to have abused its discretion when a 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." *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 760 (Mo. 2010), *citing Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 129–130 (Mo. banc 2007) and *McGuire v. Seltsam*, 138 S.W.3d 718, 720 (Mo. banc 2004).

Argument

Section 490.065.1 R.S.Mo. specifies that "[i]n any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

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The Novels offered extensive expert testimony postulating aggressive, dense development of Subject Property. Civil engineer Dan Wind described the Planned Environmental Unit concept and described how it would function to allow for a villa development under the existing zoning, asserting that the "precedent" was set by approval of the overlays for adjacent villa developments. *Tr. 106: 7-13.* He referenced the specific zoning overlay that would be required for construction of villas, *Tr. 108-109,* and suggested that Chesterfield's review process would have been a "formality," thereby downplaying the complexity of development issues and of the review process. *Tr. 106:7-13; 109:20-111:6.*

The Novels' retained expert, appraiser Ernest Demba, followed up with an opinion of fair market value based on a highest and best use of Subject Property as densely developed villas, *Tr. 198:12-17*; he opined there could be 23 villa units, even while admitting that he was "not a designer" and was "not going to lay it out." *Tr. 189-190.* He made repeated definitive statements such as "it will be done" and operated on the assumption that because particular developments on neighboring properties were approved, the approval of such development on Subject Property would also be approved. *Tr. 223:1; 223:11-12; 223:16-17; 223:18-24.* He downplayed the impact of the creek and flood way and testified that the creek "really has no detrimental effect on the property" and that the property had merely "a little bit of flood plain issues." *Tr. 173:15-20; 191:10-11.* Mr. Demba testified freely that approval of the required zoning overlay by Chesterfield would be a "pretty good certainty," without laying any foundation for this assumption. *Tr. 223:18-24.*

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The Novels' experts' speculative testimony about potential development of Subject Property invited, if not demanded, rebuttal testimony. The facts were similar to those addressed in *State ex rel. Mo. Highway and Transportation Com'n v. Our Savior Lutheran Church*, 922 S.W.2d 816, wherein the appellate court rejected the condemnees' argument that the trial court had acted improperly by admitting rebuttal evidence relating to zoning and development considerations:

> [D]uring direct examination Mr. Barton offered testimony regarding the 1974 zoning application and indicated there were no 'development problems' with the property. *Having opened the subject of the zoning application and the property's ability to be developed, the Bartons may not complain of the Commission's efforts to rebut the evidence*.

Id. at 820, *citing State ex rel. State Highway Com'n v. Klipsch*, 392 S.W.2d 287, 292 (Mo. 1965) (emphasis added). Yet County was denied the opportunity to rebut the Novels' speculative testimony by introducing the testimony of two knowledgeable and impartial experts, neither of whom had any interest in the outcome of the case.

County identified and called two witnesses employed by the City of Chesterfield ("Chesterfield"), the municipality in which Subject Property is located. The witnesses, Jeff Paskiewicz, a Civil Engineer and a Certified Flood Plain Manager, and Aimee Nassif, Director of Planning (the "Chesterfield experts"), possessed the knowledge and experience to assert opinions about the development of Subject Property. *Tr. 399:21-403:11; 442:13-25.* County proffered the testimony of the Chesterfield experts to address the impact of development challenges on the value of Subject Property. In

addition to relevant testimony as to the impact on value, the Chesterfield experts were prepared to provide admissible rebuttal testimony regarding the proposed villa development which served as the basis for the opinion of fair market value to which the Novels' appraiser testified.

The first witness of the two witnesses, Jeff Paskiewicz, had been employed by Chesterfield since June 2003. *Tr. Exh. 23; 402:1-9.* Mr. Paskiewicz, who has a Bachelor's Degree in Civil Engineering, obtained licensure as a Professional Engineer in 2002. *Tr. 403:4-8.* He became a Certified Flood Plain Manager in 2005. *Tr. 403:9-10.* As a Civil Engineer for Chesterfield, Mr. Paskiewicz's duties included "management of some capital improvement projects within the City, various improvements from roadway to other projects [the City] may have, do[ing] plan review, [and] site plans and construction plans for residential and commercial development." *Tr. 402:5-9.* Mr. Paskiewicz also served as Chesterfield's Flood Plain Administrator, which involves review of development proposals for compliance with applicable flood plain regulations. *Tr. 402:9-12.* He also utilized flood insurance rate maps known as "FIRM," that are generated by FEMA and used to illustrate flood plain and flood way. *Tr. 404:11-14.* In his role as a Civil Engineer and Flood Plain Administrator, Mr. Paskiewicz was completely familiar with Chesterfield's ordinance establishing flood plain management guidelines for Chesterfield development projects. *Tr. 422:15-25.* In summary, Mr. Paskiewicz possessed a detailed and comprehensive understanding of the required steps in the review of development plans, the processes involved in projects proposed for construction in flood plain and flood way, and the potential impacts analyzed by

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Chesterfield. *Tr. 426:12-427:18.*

In his capacity as a Civil Engineer for Chesterfield, Mr. Paskiewicz participated in plan review, specifically addressing flood issues, for the developments at Terra Vista and Mill Ridge, which were subdivisions adjacent to and on either side of the Subject Property. *Tr. 406: 24- 407:1*. With respect to Subject Property, Mr. Paskiewicz reviewed the location of flood way and flood plain designated by the FIRM maps. *Tr. 420:7-20.* He also considered challenges and procedural requirements for development of the Subject Property due to its location in the flood way and flood plain. Mr. Paskiewicz was called by the County to testify about FEMA requirements and the processes required for development in flood way and flood plain. But despite Mr. Paskiewicz's education and licensure, and his expertise with respect to flood way and flood plain development, capital improvement projects, roadway improvements, and site and construction plans, and despite his expertise and knowledge with respect to potential development of the Subject Property, the trial court erroneously granted the Novels' motion in limine and prohibited Mr. Paskiewicz from testifying with respect to the development of the Subject Property and the potential developmental problems associated therewith. *Tr. 398:2-399:1; See also Motion to Remand, Exh. 1, Stipulation ¶8.*

In *State ex rel. Mo. Highway & Transp. Com'n v. Gannon*, 898 S.W.2d 141, 143 (Mo. App. 1995), the court specified that a proper foundation based upon investigation of relevant factors would allow for expert testimony about the probability of rezoning. In this case, Mr. Paskiewicz's engineering and flood management experience, review of the

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controlling FEMA and Chesterfield documentation for the Subject Property and adjacent subdivisions, and participation in the plan review process for the region provided sufficient foundation for him to offer an expert opinion on the probability of and risks tied to development of Subject Property. The trial court's exclusion of this testimony constituted an abuse of discretion. The trial court unfairly deprived the jury of the benefit of relevant expert testimony relating to the potential developmental problems associated with the Subject Property.

As to Chesterfield expert Aimee Nassif, she had worked since 2003 in the Planning and Development Services division of Chesterfield's Planning and Public Works Department. *Tr. Exh. 24; Tr. 440:18-441.* Ms. Nassif possessed a Master's Degree in Political Science-Public Policy Administration and had belonged to the American Institute of Certified Planners (AICP) since 2008. *Tr. Exh. 24.* In 2008, Ms. Nassif became the Planning and Development Services Director for Chesterfield, a position she held at the time of trial. *Tr. Exh. 24; Tr. 442:13-16.* As Planning and Development Services Director, she "supervise[s] all of the project planners in the department, also supervise[s] engineering, oversee[s] code enforcement, zoning enforcement inspections, any planning and development applications that come to the city, site plans, plats, zoning petitions, any type of development or redevelopment the folks would like to do for commercial or residential or industrial development." *Tr. 442:19-25.*

Ms. Nassif's duties included supervising a division that addresses long range planning, current zoning, traffic modeling, financial sureties, permitting, and inspections.

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Tr. Exh. 24. She testified that when a developer applied to initiate the site planning application process, she would obtain comments on proposed developments from other agencies, including the Metropolitan St. Louis Sewer District, fire districts, and the Missouri Department of Transportation. *Tr. 447:15-18.* Ms. Nassif reviewed residential development plans for compliance including "requirements for [Chesterfield's] creek, stream buffer, water quality requirements, that you can't touch or disturb land within 50 feet top of bank. There's lighting requirements, structures setbacks, parking, how much parking is going to be provided, length of roads to cul-de-sac [and] turning radius." *Tr. 453:17-23.*

Ms. Nassif testified that she also reviewed planning and development applications for specific property, including zoning, density, and engineering considerations. *Tr. 442: 19-25.* Ms. Nassif's responsibilities included review of special zoning requests, such as Planned Environment Units and oversight of the development process for compliance with applicable Chesterfield ordinances. Ms. Nassif was thoroughly conversant with the specific ordinances for development of the Terra Vista and Mill Ridge Subdivisions adjacent to Subject Property. *Tr. 448:11-14.* She personally participated in the site plan and review process for the Terra Vista development. *Tr. 444:5-445:24.* Ms. Nassif's training, experience, and review of the controlling Chesterfield ordinances for the Subject Property and adjacent developments provided sufficient foundation for her to offer an expert opinion on the application of the Chesterfield's zoning requirements and risks tied to development of Subject Property. *See State ex rel. Mo. Highway & Transp. Com'n v. Gannon* 898 S.W.2d at 143 (finding that an expert could testify about the probability of

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rezoning if there was a proper foundation based upon investigation of relevant factors). She also possessed the knowledge to analyze merits of the development proposal relied upon by the Novels' expert. Ms. Nassif testified that she had participated in multiple development projects, noting that "each development has its own unique problems and issues and concerns with it." *Tr. 452:16-17.* Ms. Nassif was called to testify regarding the development process, including that each proposed development would be evaluated on its own merits based upon the specific conditions that exist.

Again, despite Ms. Nassif's extensive education, membership in professional organizations, and her expertise with respect to all matters relating to current planning and zoning (including review of zoning petitions, site plans and plats), code enforcement, zoning enforcement, as well as long range planning and traffic modeling, the trial court erroneously prohibited her from testifying with respect to potential development issues relating to the Subject Property. *Tr. 443:2-4.; See also Motion to Remand, Exh. 1, Stipulation* ¶*9.* This ruling by the trial court constituted an abuse of discretion. The trial court unfairly deprived the jury of the benefit of relevant expert testimony relating to the potential developmental problems associated with the Subject Property. The trial court also unfairly barred the County from eliciting testimony regarding the Novels' expert's proposed development plans for the Subject Property.

In the recent case of *City of Maryland Heights v. Heitz*, 358 S.W.3d 98, 110 (Mo. App. 2011) (citations omitted), the court found that after a proper foundation is laid, "assuming those carefully examined facts are of the type reasonably relied upon by experts in the field and are otherwise reasonably reliable, then an expert's opinion based

upon them is admissible." In the case at hand, the Chesterfield experts were familiar with and reviewed the site-specific Chesterfield ordinances and FIRM documentation from FEMA describing the adjacent developments of Terra Vista and Mill Ridge, as well as Subject Property. *Tr. 406: 24-407:1; 448:11-14*. The FIRM documents are issued by FEMA and depict the flood plain and flood way as mapped through the efforts of FEMA, local government agencies, and engineering consultants. *Tr. 413:6-415:14.* FEMA documents are a reliable resource utilized by the Chesterfield in development to protect and maintain areas at risk for flooding. *Tr. 413:9-414:7.* The *Heitz* court also holds that "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." *Id*. Again, the trial court erred in excluding County's expert testimony, rather than allowing the jury to give such evidence appropriate weight.

Mr. Paskiewicz's testimony about the requirements, challenges, and risks associated with development on property in a flood plain and flood way, and Ms. Nassif's testimony about the development limitations based upon the Chesterfield zoning ordinances and the procedures and analysis required to obtain a change in zoning, were relevant and admissible to the central issue at stake: damages, as measured by the fair market value of the property. "The exclusion of proper evidence is ground for a new trial where the ruling is prejudicial." *State ex rel. Missouri Hwy. & Transp. Com'n v. Pedroley*, 873 S.W.2d 949, 954 (Mo. App. 1994) (citation omitted). County was prejudiced by the exclusion of admissible expert testimony because zoning and flood way considerations substantially impacted the fair market value of the Subject Property.

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"Because the only issue in a condemnation case is damages, the admissibility of evidence depends on whether it tends to aid the jury in determining value and thus resolving the issue of damages." *State ex rel. Mo. Highway and Transp. Com'n v. Our Savior Lutheran Church,* 922 S.W.2d 816, 819-820 (Mo. App. 1996) (citation omitted). "Therefore, all evidence of value which an ordinarily prudent person would consider in reaching a conclusion regarding the fair market value of the condemned property is admissible." *Id.* "The jury may hear all facts that a potential buyer of the land would naturally take into account." *Land Clearance for Redevelopment Authority of the City of St. Louis v. Henderson,* 358 S.W.3d 145, 153 (Mo. App. 2011) (citation omitted).

County did not have the opportunity to lay a proper foundation and elicit testimony from the Chesterfield experts to rebut testimony relating to the feasibility of the development hypothesized by the Novels' appraiser. *Tr. 398-399.* Mr. Paskiewicz, a Civil Engineer and Certified Flood Plain Manager, had the knowledge and expertise to offer an opinion as to engineering, flood plain and flood way considerations for development of the Subject Property. Mr. Paskiewicz reviewed the FIRM and Chesterfield materials relating to the Subject Property to evaluate challenges that could arise due to the presence of flood way, flood plain and the topography of the area. He was prepared to testify to the complexity of the study required for residential development in flood way and flood plain. The Novels' expert engineer, Mr. Wind, minimized the impact of the flood plain and flood way, and in doing so, opened the door for rebuttal via testimony from Mr. Paskiewicz to counter Mr. Wind's assertions.

Ms. Nassif, as the Director of Planning for the Chesterfield, had the knowledge

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and expertise to offer an opinion as to the zoning and planning considerations required for development of subject property. While the Novels' appraiser assumed approval of the zoning overlay required for the villa development that he used as the basis for his opinion of value, Ms. Nassif was in a position to testify that such approval was far from automatic. Ms. Nassif reviewed information about Subject Property, including the current zoning and density limitations for development in such an area, including Chesterfield's ordinances establishing the developments at the adjacent Terra Vista and Mill Ridge Subdivisions. *Tr. 448:11-14.* The Novels' expert did not conduct such analysis, rather he made a repeated assumption that "it will be done." *Tr. 223:1; 223: 11-12; 223:16-17; 223:18-24.* Mr. Paskiewicz and Ms. Nassif were identified to testify to their opinions with respect to challenges and difficulties in development of the Subject Property. *Tr. 37:14-23.* Ms. Nassif testified that the development process can be complex and long, but her testimony was limited to general statements rather than specific challenges that a developer would encounter on Subject Property. *Tr. 446:11-23.* Unlike Mr. Demba, who was allowed to state what the government entity would decide, both Ms. Nassif and Mr. Paskiewicz could have testified that in reality, Chesterfield individually analyzed each development proposal and approval is not automatic. Because these challenges and difficulties were minimized and glossed over by Novels' expert, *Tr. 191:21-25* and *Tr. 192:1-4*, the trial court's exclusion of the County's evidence unfairly resulted in the jury hearing an incomplete and inaccurate prediction of the likelihood and difficulties of development.

Therefore, the County's expert opinion testimony, which was based upon specific

facts related to those experts' areas of expertise, should have been admitted into evidence. When the trial court prohibited such testimony regarding the Chesterfield experts' opinions as to this issue, the trial court prejudiced the County and committed plain error. The extent to which Subject Property could have been developed clearly impacted its value, and the Chesterfield experts possessed the requisite knowledge and experience to describe Chesterfield's requirements, analyze the Subject Property, and rebut any assertions that minimized the challenges of development of the Subject Property. The exclusion of this evidence was an abuse of discretion requiring reversal of the judgment and the granting of a new trial.

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VI TRIAL COURT ERRED BY DENYING COUNTY'S MOTION FOR NEW TRIAL AND INSTEAD ENTERING JUDGMENT FOR NOVELS IN THE AMOUNT OF $1,628,760 , BECAUSE THE JURY VERDICT WAS EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT IT EXCEEDED THE HIGHEST AMOUNT OF DAMAGES INTRODUCED INTO EVIDENCE.

Standard of Review

"[T]he trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), *citing Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Argument

In condemnation cases, "the record must establish some basis for the jury's verdict, whether it be evidence presented by the condemnor, evidence elicited by the condemnor on cross-examination of an owner or expert, or some reasonable construction of a portion of the owner's evidence." *Heins Implement Co. v. Mo. Highway & Transportation Com'n*, 859 S.W.2d 681, 693 (Mo. banc 1993), *abrogated on other grounds by Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008). Although disparity in witnesses' testimony is not sufficient reason to disturb a verdict, the verdict must be supported by substantial evidence. *See State ex rel. State Highway Commission v.*

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Hamel, 404 S.W.2d 736, 739 (Mo. 1966).

There was no substantial evidence to support the $1.3 million verdict upon which the trial court's judgment was based.[6] County's two appraisers offered opinions of value of $208,000 and $238,000.[7] The Novels' appraiser, Ernest Demba, testified to fair market value of $1,269,000 - an amount $31,000 less than the fair market value as found by the jury. Thus, the jury returned a verdict that was not within the range of competent evidence. *Cf. State ex rel. Mo. Highway and Transportation Com'n v. Meramec Valley Elevator, Inc.*, 782 S.W.2d 642, 648 (Mo. App. 1989) (declining to disturb a condemnation verdict which was within the range of competent evidence).

Because the jury's verdict was outside the range of competent evidence, the trial court erred in denying County's motion for new trial to the extent the motion was made "on the grounds that the verdict is excessive and against the weight of the evidence." *L.F. at 186-187*. County recognizes that it is generally "most difficult to determine in any given case whether a particular judgment is excessive," *McCaffery v. St. Louis Public Service Co.*, 252 S.W.2d 361, 371 (Mo. banc 1952), and that size of a verdict alone does not indicate bias and prejudice by the jury. *Chism v. Cowan*, 425 S.W.2d 942, 950 (Mo.

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[6] The court's judgment of $1,628,760 included a credit for the amount previously paid into court, and added sums for the Subject Property's "heritage value" and for prejudgment interest.

[7] Appraiser Jeff Gonterman testified at trial, and appraiser Emerson Sutton's deposition was read to the jury.

1967). But when the size of the verdict is larger than even the plaintiffs (here, the Novels) are able to support with any testimony or evidence, it is clear that a particular judgment is excessive.

Considering the Novels' efforts to bias the jurors against County by injecting remarks about having "a gun to their head" and detailed testimony about their sentimental attachment to the property, *see Point II, supra*, it is hardly shocking that the jurors responded by awarding the Novels even more than the highest appraisal of value in the case. The excessive verdict was against the weight of the evidence and should not be allowed to stand; the trial court erred in failing to recognize this, and the court's decision to deny County's motion for new trial should be reversed.

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VII THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY REQUIRE COUNTY TO PAY AN AMOUNT GREATER THAN JUST COMPENSATION FOR PROPERTY IN VIOLATION OF MISSOURI CONSTITUTION, ARTICLE I, SECTION 26.

Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

Argument

By the giving of M.A.I. 9.01, the jury was instructed that:

> You must award defendants such sum as you believe is the fair market value of defendant's property immediately before the taking on March 11, 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. . . .

Subsequent to the verdict, which awarded the Novels $1,300,000 as the fair market value of the Subject Property, the trial court calculated and added a "heritage value" to the

amount awarded by the jury as part of the composition of the final judgment. This addition to the amount awarded by the jury, under the auspices of Sections 523.039 and 523.061 R.S.Mo., was erroneous because it resulted in an award to the Novels of an amount well beyond that amount required as just compensation for the loss of their property, in violation of Missouri Constitution, Article I, Section 26.

This section of the constitution is part of Missouri's Bill of Rights, and mandates "[t]hat private property shall not be taken or damaged for public use without just compensation." The people, in adopting Article I, Section 26, did not elect to define the term "just compensation." However, the Missouri Supreme Court has clarified that "[t]he 'just compensation' referred to, generally speaking, is the 'fair market value' of the property at the time of the taking." *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300, 305 (Mo. 1965). It is the "full and perfect equivalent in money of the property taken … but no more. *Id. (citation omitted).*

It is important to remember that the just compensation clause is intended not only to protect the rights of persons whose property is taken for public use, but also the rights of the public represented by the condemning authority. More than a century ago, the Supreme Court declared that "just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual." *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See also United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 512 (1979) ("[T]he dominant consideration always remains the same: What compensation is 'just' both to an owner

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whose property is taken and to the public that must pay the bill."). Addition of heritage value fails to satisfy this requirement for "just" compensation.

Section 523.039 R.S.Mo., in derogation of the Supreme Court's definition of "just compensation," expressly defines the term as including the heritage value if such inclusion would result in a higher compensation to a landowner. The plain language of the statute is starkly indicative of the intent of the General Assembly to alter the very meaning of just compensation. This exercise of statutory manipulation was *ultra vires*, and not a legitimate exercise of legislative power. Not only does the General Assembly lack authority to enact a statute operating against a precise constitutional provision, the General Assembly cannot enact a statute operating against the Supreme Court's pronouncement of the meaning of a constitutional provision. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."). *See also Dickerson v. United States*, 530 U.S. 428, 444 (2000) (pointing out that constitutional rule cannot be legislatively superseded). Because the Supreme Court has given clear guidance of the meaning of "just compensation" as used in the constitution, the General Assembly lacked power to enact a statute that contravened the meaning, and the trial court erred in applying the statute to give the Novels excessive, rather than just, compensation for their property.

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VIII THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY REQUIRE COUNTY TO EXPEND PUBLIC FUNDS WITHOUT A PUBLIC PURPOSE IN VIOLATION OF MISSOURI CONSTITUTION ARTICLE III, SECTION 38(a) AND ARTICLE VI, SECTIONS 23 AND 25.

Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

Argument

Missouri Constitution Article III, Section 38(a), Article VI, Section 23; and Article VI, Section 25 all prohibit the granting of public money to a private person or entity. Public funds that are spent to serve the interests of the public are within the parameters of the Missouri Constitution, but when public funds are spent to serve the interests of a private individual, the expenditure is unconstitutional.

Courts have given further guidance as to what constitutes a public interest within the meaning of the Constitution. The Supreme Court in *Curchin v. Mo. Indust. Dev. Bd.*, 722 S.W.2d 930 (Mo. banc 1987), reiterated that a statute serves a public purpose if the primary effect of that statute is to promote a public interest and conversely, a statute

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serves a private interest if it primarily promotes a private interest, regardless of whether there is an incidental benefit to the public:

> "[T]he true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose…. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent."

State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101 (Mo. 1941) (citation omitted).

The payment of an amount equal to just compensation as defined by the Supreme Court is for a public purpose because it recompenses a landowner the value of the property taken for public use. On the other hand, payment of the heritage value serves an entirely private end, even if is incidental to the exercise of eminent domain. It is an award of more than just compensation, and would impermissibly result in "unjust enrichment of the condemnee." *See City of St. Louis v. Union Quarry & Const. Co*., 394 S.W.2d at 305. This is so because the public receives nothing for the heritage value, which reflects an inchoate value worth something only to the landowner, and to no one else. The heritage value is not tied to a loss suffered by the landowner that is measureable in any sense of the word. A potential buyer who is not under pressure to

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buy would not be willing to pay a landowner anything greater than fair market value simply because the landowner's family had held the property for fifty years.

Similarly, the potential "buyer" of the Novels' property (in the case of this condemnation, the public), receives no added value associated with acquiring land that by operation of Section 523.039 R.S.Mo. earns its owners the heritage value. The value to the public acquiring property subject to the heritage value is the same, whether the parcel of land happened to have been held in a family for fifty years or a day less than fifty years. Payment beyond the amount of just compensation does not give County its money's worth – it serves only to compensate a loss idiosyncratic to the Novels. This Court should take note of the astute observation in *United States v. Norwood*, 602 F.3d 830, 835 (7th Cir. 2010), that:

> [J]ust compensation is less than full compensation… Full compensation will often exceed fair market value – many people would not sell their homes for its fair market value, if only because of the moving expenses. But while acknowledging that fair market value is not always full compensation, the Supreme Court in *Kimball Laundry Co. v. United States.*, 338 U.S. 1 (1949), blunted this point by saying that the shortfall "is properly treated as part of the burden of common citizenship."

A judgment ordering County to pay for something that is part of the Novels' burden of citizenship common with all residents of St. Louis County gives a special gain to the Novels that is primarily for the private benefit of the Novels and in no respect for a

public purpose. The trial court's judgment adding heritage value to the jury's verdict of just compensation therefore violated the constitution and should be reversed.

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IX THE TRIAL COURT ERRED IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE MISSOURI CONSTITUTION ARTICLE I, SECTION 26 BY INVADING THE PROVINCE OF THE JURY IN DETERMINING JUST COMPENSATION FOR LAND TAKEN BY EMINENT DOMAIN.

Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008).

Argument

The "just compensation" provision of the constitution includes the mandate that just compensation, in relevant part, "shall be ascertained by a jury." Missouri Constitution, Article I, Section 26. This mandate requires determination of just compensation must be made by the jury and not by the judge. Keeping in mind that Section 523.039 R.S.Mo. mixes the heritage value into the definition of just compensation, the trial judge mistakenly and unconstitutionally made the ascertainment of the amount of just compensation herself. None of the instructions with which the jury was charged operated to allow the jury to find the heritage value, which by operation of Section 523.039 R.S.Mo. is part of the amount of just compensation. Accordingly, when

the trial court added the heritage value to the finding made by the jury of fair market value, it usurped a function constitutionally reserved for the jury. This was error and should not be affirmed by this Court.

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CONCLUSION

Because the deficiencies of the trial transcript do not permit appellate review of claimed error, the trial court's judgment should be reversed and the case remanded for a new trial in which all testimony is recorded and transcribed (Point I).

Alternatively, the trial court's judgment should be reversed and the case remanded for new trial due to prejudicial evidentiary rulings which were an abuse of the trial court's discretion (Points II-V), and/or because the verdict was excessive and outside the scope of the evidence (Point VI). Upon remand, the trial court should be instructed not to add any further "heritage value" amount onto the jury's verdict (Points VII-IX).

Alternatively, if the Court declines to remand for new trial, the judgment should be reversed and remanded and the trial court should be instructed to enter judgment based only upon the jury's verdict and without reference to or addition of any "heritage value" (Points VII-IX).

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains 16,925 words in total. The font is Times New Roman, proportional spacing, 13-point type.

I certify that a copy of this brief was served electronically this 27th day of August, 2012, on Robert Denlow, Esq. and Paul G. Henry, Esq., attorneys for Respondents.

/s/ Carl W. Becker
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