FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILMA M. EVANS, MARIAN A. RICH, and JOHN A. STEPHENS,	)	
Plaintiffs-Appellees,	)	Filed April 20, 1988
vs.	)	
CITY OF AINSWORTH, IOWA,	)	8-20
Defendant-Appellant.	)	87-663

Appeal from the Iowa District Court for Washington County (No. CL 1729), Harlan W. Bainter, Judge.

Defendant appeals from a district court judgment awarding plaintiffs $80,000 as compensation for the City's taking of a portion of their property for a sewage lagoon. **AFFIRMED.**

Jay T. Schweitzer and Timothy K. Wink of Perry & Schweitzer, Columbus Junction, for defendant-appellant.

Kenneth L. Keith and Lloyd E. Keith of Keith & Orsborn, Ottumwa, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Defendant appeals from a district court judgment awarding plaintiffs $80,000 as compensation for the City's taking of a portion of their property for a sewage lagoon. We affirm.

In 1985, the City condemned land owned by the plaintiffs for a sewage lagoon. The condemnation commission awarded the plaintiffs $45,800 for their property. The plaintiffs appealed to district court. The district court jury awarded plaintiffs $80,000 for the taking of the condemned land. The City appeals.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. The City argues that the district court erred in not allowing the jury to consider the condemnation commission's award.

The instruction given to the jury in this regard stated the following:

> The amount of damages awarded to the plaintiffs by the condemnation commission may be known to you, or some of you, but should be given no consideration by any individual juror or the jury as a whole. The fact that plaintiffs' land was condemned is, of course, the material fact, because it gives the plaintiffs the right to recover from the City of Ainsworth, Iowa, but the amount of the award made by the condemnation commission is of no materiality in this proceeding, is not a fact that is proven by the record in this case, and must not be given any consideration by you.

The City contends this instruction misstated the law and prejudiced the City.

The plaintiffs agree that Iowa Code section 472.21 provides that "[t]he appraisement of damages by the condemnation commission is admissible"; they argue this code section allows but does not require the inclusion of the condemnation award. The plaintiffs contend that the defendant failed to preserve error concerning the jury instruction and that the defendant agreed to the instruction. They point out that the City at no time made an offer of any evidence

as to what the specific appraisement of damages by the condemnation commission was nor made an offer of proof on such matters and that the City was in complete agreement with plaintiffs that such evidence not be given to the jury.

If no proper objection is made to an instruction, it will stand as the law of the case. State v. Baskin, 220 N.W.2d 882, 886 (Iowa 1974). Failure to make a timely objection to instructions waives the right to later assert that the district court erred. Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 237 (Iowa 1974).

We find the City's argument to be without merit. No evidence was presented on what the condemnation commission award was; the jury would be required to speculate as to this matter. The City did not object nor except at trial on this issue. Furthermore, the City acquiesced in plaintiffs' motion in limine requesting exclusion of the condemnation commission award. Since there was no evidence of such amount of damages awarded by the condemnation commission and since the City did not preserve error, we affirm the district court in instructing the jury that the condemnation commission award could not be considered.

II. The City contends that the district court erred in ruling that the opinion testimony of Robert Duncan concerning the value of the real estate was inadmissible.

Prior to trial, Robert Duncan, an expert for the City, was deposed. He did not answer, nor was he asked, any questions dealing with the value of specific property involved. At trial, his proposed testimony as to the value of the specific property involved was ruled inadmissible pursuant to Iowa Rule of Civil Procedure 125(d). The district court ruled that pursuant to this rule, the City had a duty to update the testimony of the witness if he was going to testify beyond what he knew on the date of his deposition. At his deposition, Duncan testified he

didn't know which property was condemned; hence, he could have no opinion on the value of the entire farm affected by the taking.

Iowa Rule of Civil Procedure 125(d) specifically provides that, "the expert's direct testimony at trial may not be inconsistent with, or go beyond the fair scope of the expert's testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto." The supplementation of responses relative to expert witnesses is a mandatory rule and imposes a duty on the person seeking to use such expert testimony to supplement responses to expert interrogatories. Hoekstra v. Farm Bureau Mutual Insurance Company, 382 N.W.2d 100, 108-09 (Iowa 1986). The City agrees that the purpose of Iowa Rule of Civil Procedure 125 is to avoid surprise and prejudice. Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 442 (Iowa 1985).

We find that the City had an obligation to supplement plaintiffs' interrogatory which requested the opinions of any expert witnesses. At the time of Duncan's deposition, he testified he had not made an appraisal of the value of the farm before and after the taking involving the condemned land because he had not been instructed to do so; he was uncertain as to exact boundaries and the number of acres of land involved. Because it was obvious Duncan did not have the basic information on which to base an opinion on valuations, plaintiffs did not ask him at his deposition as to how the taking affected the rest of the farm and/or the difference in value between plaintiffs' land before and after the taking. If Duncan at a later time was made aware after his deposition of the requisite information in order to allow him to render an opinion, it was the City's duty to supplement its answer to plaintiffs' interrogatory regarding expert testimony. By not doing so, plaintiffs were surprised at trial that Duncan had an opinion on the market value of the land before and after the taking.

We reject the City's rationale that "plaintiffs' attorney did not request supplementation, therefore, a supplementation did not seem important, and was not done." We find that the district court did not abuse its discretion in ruling that Duncan could testify as to everything that was contained in the deposition and in the answer to plaintiffs' interrogatory question, but not beyond what he knew on the date of his deposition.

We affirm the district court in excluding Duncan's testimony as to the value of plaintiffs' property before and after the taking. In addition, we note Duncan's testimony concerning the value of the real estate would merely have been cumulative, as another witness for the City testified to a value of damages lower than Duncan contended in the City's offer of proof on this matter.

III. After judgment was entered, the district court decided that an award to the plaintiffs of attorney fees, costs, and expenses would wait until this appeal is completed. Plaintiffs request clarification as to the appropriate time for the allowance of these expenses. We find that the district court should have awarded the appropriate expenses at the conclusion of the trial; however, the district court did reserve the right to so assess the award upon appellate disposition. We reaffirm this duty by instructing the district court to timely enter an order determining these expenses, not to exceed that amount as provided for in Iowa Code section 472.33.

AFFIRMED.