

IN THE COURT OF APPEALS OF IOWA

FILED

APR 26 1979

CLERK SUPREME COURT

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ELWOOD JOE LUNDGAARD and  
JANICE KAY LUNDGAARD,

Appellees,

vs.

BOARD OF SUPERVISORS OF  
CHEROKEE COUNTY, IOWA;  
CHEROKEE COUNTY, IOWA,

Appellants.

Filed April 26, 1979

768  
2-61622

Appeal from Cherokee District Court - Hon. Richard W. Cooper, Judge.

Defendant-Board of Supervisors appeals judgment rendered pursuant to section 306.17, The Code 1975, which awarded plaintiff-landowners damages of \$135,600.00 resulting from defendant's vacation of one-half of a dedicated county road. AFFIRMED.

James L. McDonald, Cherokee County Attorney, of Cherokee, Iowa, for appellants.

John H. Cook of Herrick, Ary, Cook & Cook, Cherokee, Iowa, for appellees.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

Defendant, Cherokee County Board of Supervisors,<sup>1</sup> appeals from the trial court's judgment which awarded plaintiffs damages in the amount of \$135,600.00 resulting from the defendant's vacation of one-half of a dedicated county road adjacent to plaintiffs' property.<sup>2</sup> Trial court's judgment was entered following plaintiffs' appeal, pursuant to section 306.17, The Code 1975, of defendant's Final Order which denied damages to plaintiffs.

Defendant asserts that trial court erred: (1) in finding that the defendant had jurisdiction to vacate the right-of-way in question; (2) in overruling defendant's objection to plaintiffs' expert opinion testimony on the grounds that the testimony was not based on facts in the record; (3) in concluding that plaintiffs' evidence of damages was sufficient to justify the award; and (4) in overruling defendant's motion for directed verdict and motion to dismiss. We affirm.

In 1972, plaintiffs purchased a 157 acre tract of land in Cherokee County, the southern boundary of which was the centerline of a segment of road which had been dedicated by the Cherokee Board of Supervisors on August 30, 1870. Except for approximately 475 feet at its east end, which was utilized as a public right-of-way until 1928, the dedicated road had never been constructed, opened, or maintained as part of the county's secondary road system, although the county continued to carry it on the county highway plat book.

Plaintiffs purchased the land with the intent of subdividing it into residential and commercial lots and, in February, 1976, petitioned the defendant Board to install approximately 3,173 feet of the platted road. The defendant Board, however, resolved that the road should be vacated pursuant to chapter 306, The Code 1975, and issued its Final Order vacating the dedicated road and denying plaintiffs' claim for damages.

#### I. Jurisdiction

Defendant argues that the proceedings under chapter 306 were for the sole purpose of clarifying the county secondary road records because the evidence establishes that the road had been abandoned. As a result, defendant asserts, the vacation proceedings were void for lack of subject matter jurisdiction because the road

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<sup>1</sup> Hereinafter referred to only as defendant or defendant Board.

<sup>2</sup> The city limits of the City of Cherokee were extended in 1873 to include the south one-half of the dedicated road. Thus the present proceedings involve only the north one-half of the road.

was not subject to the Board's authority. Plaintiffs maintain that defendant admitted jurisdiction, as a matter of law, in the notice of hearing published pursuant to section 306.12 and that defendant's failure to raise the issue of its lack of jurisdiction to proceed under chapter 306 in the trial court precludes defendant from raising the issue for the first time on appeal.

The general rule is that subject matter jurisdiction cannot be conferred by waiver, estoppel, or consent and can be raised for the first time on appeal. Myers v. Caple, 258 N.W.2d 301 (Iowa 1977); Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1979). We then must determine whether defendant is correct in asserting that, due to abandonment, it lacked jurisdiction to initiate vacation proceedings regarding the road in question.

A county has jurisdiction over a right of way, and can maintain it as part of its secondary road system, if the right of way meets the definition of a public road and has been officially established as provided by statute<sup>3</sup> or by common law dedication and acceptance.<sup>4</sup> See City of Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510 (1953); Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W.2d 986 (1977). The facts, as found by trial court, show that the road was dedicated and officially accepted by the Cherokee County Board of Supervisors in August, 1870, and was formally acknowledged as a part of the county's secondary road system by its inclusion in the county highway plat book. See Bowersox v. Johnson County Board of Supervisors, 183 Iowa 645, 167 N.W. 582 (1918).

The road, once established, could be removed from the defendant's jurisdiction by official vacation proceedings or abandonment. See Sterlane v. Fleming, 236 Iowa 480, 482, 18 N.W.2d 159, 161 (1945). The decision to vacate is within the defendant's discretion and is not subject to challenge. Crowley v. Johnson County, 234 Iowa 142, 12 N.W.2d 244 (1943). On March 22, 1976, defendant, acting under the specific provisions of section 306.10, The Code 1975, resolved that the road should be vacated and thereafter meticulously followed the mandatory procedure under chapter 306.<sup>5</sup> A final order was

<sup>3</sup> See sections 306.4, 306.10, 306.19, 306.20, The Code.

<sup>4</sup> A road or highway may also be established by prescription. Culver v. Converse, 207 Iowa 1173, 224 N.W. 834 (1929); Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986 (1927).

<sup>5</sup> See Bowen v. Story County Board of Supervisors, 209 N.W.2d 569, 572 (Iowa 1973); See also Heery v. Roberts, 186 Iowa 62, 66, 170 N.W. 405, 407 (1919), reh'g. denied, 186 Iowa 61, 172 N.W. 161.

entered which denied plaintiffs' claim for damages.<sup>6</sup> Plaintiffs thereafter followed the proper procedure for appeal to the district court under section 306.17, which limits the appeal to a consideration of the amount of damages only in the manner and form prescribed in chapter 472 with regard to appeals from condemnation actions. The court has no authority under chapter 472 or 306 proceedings to adjudicate the issue of abandonment.<sup>7</sup>

Nowhere in Iowa law do we find support for defendant's assertion that a governmental agency, having once acquired jurisdiction over an established road, loses jurisdiction to commence vacation proceedings due to an abandonment. In our review of Iowa cases involving dedicated roads, we find the issue of abandonment has been limited to actions in which a landowner sought to enjoin efforts of the governmental authority to install an allegedly dedicated road,<sup>8</sup> a landowner sought to enjoin efforts of the governmental authority to remove landowner's improvements or obstructions on an allegedly dedicated road,<sup>9</sup> a governmental agency sought to compel removal of obstruc-

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<sup>6</sup> Section 306.16 provides, in pertinent part, that "[a]fter [the] hearing [set forth in section 306.11], the agency which instituted [the vacation] proceedings and conducted such hearing, shall enter an order. Said agency may dismiss the proceedings, or it may vacate and close such road...in which event it shall determine...the amount of damages allowed to each claimant. Said order...shall be final except as to the amount of the damages."

<sup>7</sup> The court, of course, could hear evidence of abandonment in determining its effect on damages claimed by the landowner as a result of the vacation.

<sup>8</sup> Kelroy v. City of Clear Lake, 232 Iowa 161, 5 N.W.2d 314 (1942) (owners of certain lots sought to enjoin city from opening a street between their lots and the lake on grounds that city had abandoned the street or was estopped to deny there was no street due to landowner's reliance); Clark v. Wogan, 204 Iowa 1021, 216 N.W. 739 (1927) (owner of farm sought to enjoin Board of Supervisors from opening a road he had used as part of his farm on grounds of abandonment). See also Clinton National Bank v. City of Comanche, 251 N.W.2d 248 (Iowa 1977).

<sup>9</sup> City of Sioux City v. Johnson, 165 N.W.2d 762 (Iowa 1969) (city brought action to abate nuisance against owner of mobile trailer court due to trailer court's construction on established street; owner asserted abandonment); Clarken v. Lennon, 203 Iowa 359, 212 N.W. 686 (1927) (land owner sought to enjoin Board of Supervisors on grounds of abandonment and estoppel from removing fences as obstructions from alleged public highway).

tions from an allegedly dedicated road,<sup>10</sup> or an injured motorist sought recovery against a railroad based on its negligence in failing to warn of the train's approach to a public highway.<sup>11</sup>

We conclude therefore that defendant had jurisdiction to vacate the road in question and has no authority to raise the issue of abandonment as a challenge to its jurisdiction.

## II. Admissibility of Expert Testimony

Defendant's second assertion is that trial court erred in admitting the valuation testimony of plaintiffs' expert over defendant's objection on the ground that the testimony was in response to a hypothetical question which assumed facts not established by the record. Plaintiff alleges that the testimony was received without objection by defendant and that failure to make a timely objection at trial precludes defendant from raising the issue for the first time on appeal.

From our review of the record, we conclude that defendant adequately preserved the record on this matter. The test is whether the alleged error has been called to trial court's attention and an opportunity given for prompt correction. See Panesgraw v. Collins, 247 Iowa 632, 637, 75 N.W.2d 249, 252 (1956). When plaintiffs' expert was asked his opinion as to the value of the land "[i]f [the] road might go in . . .," defendant objected on the ground that the opinion assumed facts not in the record and facts that could not be in the record because it involved supervision or jurisdiction of the Board which had not agreed to put in a road. The court responded by saying "I am going to let him answer, and I will say this goes to the weight of his testimony." (App. p. 76). Plaintiffs' expert then testified as to value of the land by assuming "that the road had gone in or some definite commitment was made which would make the road certain of going in." (App. p. 77). Defendant's counsel subsequently moved to strike all the valuation testimony (on other grounds). The court then stated that "[t]he objection is overruled and the motion to strike is overruled." (App. p. 81).

<sup>10</sup> Polk County v. Brown, 260 Iowa 301, 149 N.W.2d 314 (1969) (action by county to compel landowner to remove obstructions from alleged public highway; landowner asserted abandonment).

<sup>11</sup> Sterlane v. Fleming, 236 Iowa 480, 18 N.W.2d 159 (1945) (railroad asserted defense of abandonment by governmental agency as basis for relieving it of duty to sound warning whistle).

The court in Stutsman v. Des Moines City Railway Co., 180 Iowa 524, 532, 163 N.W. 580, 583 (1917), said "[w]here an objection has once been made in a proper and timely way, it is ordinarily held that the party against whom the ruling is made does not waive the error by failing thereafter to repeat the objection every time other testimony of the same character is offered."<sup>12</sup> Although defendant's record in this case is not the model of procedural perfection, we believe trial court was sufficiently apprised of defendant's objection to the totality of plaintiffs' valuation testimony to give trial court the opportunity for prompt correction had the court deemed it necessary. Defendant, therefore, is not precluded from raising the issue on appeal.

The merits of defendant's objection, as stated above, challenge the admissibility of plaintiffs' valuation testimony as being in response to impermissible hypothetical questions. Plaintiffs argue that their expert was not asked any hypothetical question but rather based his testimony as to the reduction in value of plaintiffs' land due to the road vacation on facts entirely within his own personal observations and inquiry and his experience in land values in the areas as a realtor and land developer.

Admissibility of expert testimony is a matter largely within the trial court's discretion and will be disturbed on appeal only if manifest abuse appears. Speed v. State, 240 N.W.2d 901, 908 (Iowa 1976). An expert's opinion should not be admitted if it is based partially or wholly on facts not disclosed in the record. Speed v. State, 240 N.W.2d at 910. These facts must be stated by the witness or found in other evidence and incorporated into a hypothetical question. Albrecht v. Rausch, 193 N.W.2d 492, 495 (Iowa 1972); Bernal v. Bernhardt, 180 N.W.2d 437, 439 (Iowa 1970).

Plaintiffs' expert testified to three valuations of plaintiffs' land. The first was based on the possibility that a road might be installed; the second focused on the fact that the road actually had been vacated;<sup>13</sup> the third assumed that a road had been constructed or some definite commitment had been made that the road would be installed. Defendant asserts that the first and third valuations are based on

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<sup>12</sup> Stutsman, unlike the instant case, involved a situation in which trial court had overruled an objection because the objecting party had not raised an objection to the first witness' testimony but had objected on grounds of irrelevancy when the second witness testified to the same facts.

<sup>13</sup> Defendant does not challenge the basis of this valuation.

hypothetical facts not established in the record because the only conclusion to be drawn from the evidence is that there was no possibility that a road could have been constructed.

After examining the entire record, we conclude that testimony concerning the first valuation is based on facts within the record which were of the expert's own knowledge obtained by personal examination and experience.<sup>14</sup> The valuation testimony based on the certainty of installation, however, stands in a different light. Plaintiffs' expert was asked to "assume that the road had gone in or some definite commitment was made which would make the road certain of going in." (App. p. 77). There is absolutely no evidence in the record upon which to base such an assumption. Thus, the response is not an expression of a valid opinion but mere speculation and should not have been admitted over timely objection. Albrecht v. Rausch, 193 N.W.2d at 441.

In a law action tried to the court, improperly admitted evidence is presumed to be prejudicial, unless the record shows affirmatively that the evidence was not considered. Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497, 508 (Iowa 1972); Bellew v. Iowa State Highway Comm'n., 171 N.W.2d 284, 291 (Iowa 1979). Trial court's findings of fact demonstrate that its determination of damages was based solely on testimony as to the value of plaintiffs' land if the possibility of a road existed and the value of the land subsequent to the road's vacation. Under these circumstances, defendant has not been prejudiced.

### III. Evidence of Damages

Defendant's challenge to the sufficiency of evidence in support of trial court's determination of damages is closely related to its objections to plaintiffs' expert's testimony of valuation. The thrust of defendant's argument is that plaintiffs could suffer no damages due to the road's vacation because the evidence shows that there was never any possibility that a road would or could be constructed on the vacated right of way.<sup>15</sup> We disagree and find that trial court's determination of damages is supported by substantial competent evidence.

<sup>14</sup> The "possibility" of the road's installation was based essentially on the existence of a dedicated road as determined by an examination of the highway plat book.

<sup>15</sup> The south half of the right of way, as noted above, is under the jurisdiction of the City of Cherokee and has not been vacated.

The proper measure of damages to realty, where the damage is permanent or not capable of easy repair and substantially affects the value of the entire property as a unit, is the difference between the value immediately prior and after the injury. Watson v. Mississippi River Power Co., 174 Iowa 23, 38, 156 N.W. 188, 194 (1916). The plaintiffs' expert's testimony, upon which trial court relied, took into account, inter alia, the fact that the road had been established for some 107 years with no installation activity, that landowners south of the centerline could have resisted future construction, and that plaintiffs had offered to remove any existing obstructions in the right of way. Defendant offered no expert testimony to rebut plaintiffs' evidence but relied on its assertions of the speculative and improper nature of plaintiffs' testimony and the impossibility of a road ever being constructed. We conclude that trial court properly found that plaintiffs sustained their burden of proof as to damages resulting from vacation of the road. The possibility that a future road could have been constructed on the established roadway to provide access to plaintiffs' property existed until defendant's decision to vacate. The possibility has been eliminated by action of the defendant. Competent evidence before trial court showed total damages to plaintiffs' land in the amount of \$135,600.00.

#### IV. Ruling on Motion for Directed Verdict and to Dismiss

Defendant's final assertion is that trial court erred in overruling its motion for directed verdict<sup>16</sup> and dismissal of plaintiffs' action. Defendant argues that it was entitled as a matter of law to have judgment in its favor due to plaintiffs' failure to establish that they suffered any damages as a result of the action of the defendant. This argument too must fail.

In a law action tried to the court, trial court's decision on the facts must stand unless (1) the court failed to draw the only reasonable conclusion which could have been drawn from the proof; (2) the facts are clearly established by unconflicting evidence; (3) there is no substantial proof to overcome a prima facie case; (4) by giving the opposite party the benefit of the most favorable view of the evidence, judgment against that party is demanded. Roth v. Headlee, 238 Iowa 1340, 1343, 29 N.W.2d 923, 924 (1947).

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<sup>16</sup> Defendant's label is technically inaccurate because the action was tried to the court.

In view of our analysis under the second and third issues in this opinion, further discussion of this issue is unnecessary. Trial court correctly overruled defendant's motion. The judgment of trial court is affirmed.

AFFIRMED.