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MAY 20 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RONALD F. SMITH and DONNA MAE SMITH,

Appellants,

v.

IOWA STATE HIGHWAY COMMISSION,

Appellee.

Filed May 20, 1977

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2-58483

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Appeal from land condemnation judgment entered upon a district court jury award. Affirmed.

John D. Randall and Ronald W. Wendt, of Cedar Rapids, for appellants.

Richard C. Turner, Attorney General, Asher E. Schroeder, Special Assistant Attorney General, and Forrest W. Rosser, of Cedar Rapids, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiffs Ronald F. and Donna Mae Smith appeal from a land condemnation award following a district court jury verdict. The appeal challenges three evidentiary rulings and trial court's overruling of plaintiffs' motion for allowance of expert witness fees as a part of costs.

I. Plaintiffs assert trial court erred in sustaining defendant's motion to strike the opinion testimony of Richard Shaffer as to the fair market value of their farm before the condemnation of a strip of land running through it. Shaffer testified as to his opinion of market value prior to taking but he was unable to give an opinion of value immediately after condemnation. Trial court's ruling was founded upon Shaffer's inability to provide both opinions consistent with the measure of damages.

The measure of damages for a partial taking is, of course, the difference in the fair market value of the subject property immediately before and immediately after condemnation. The fair market value of land is the price a willing buyer under no compulsion to buy would pay and a willing seller under no compulsion to sell would accept. A condemnee is damaged to the extent his property is diminished in value by the condemnation. This is the ultimate fact to be determined by the jury. Jones v. Iowa State Highway Comm., 259 Iowa 616, 621-622, 144 N.W.2d 277 (1966).

Plaintiffs contend Shaffer's inability to express an opinion as to the fair market value of their land after the condemnation does not render vulnerable his opinion of its fair market value prior to taking, citing 27 Am.Jur.2d Eminent Domain, § 425, p. 321 and the Mississippi decision relied upon by the text. These authorities declare ". . . it is not necessary that each witness give a before and after value of the property, because some witnesses may know the fair market value before the taking but

not afterward, and vice versa." 27 Am.Jur.2d Eminent Domain, supra.

The admission of expert testimony is a matter which lies largely within the discretion of the trial court. We are unable to say trial court abused its discretion in striking part of Shaffer's testimony because he was unable to supply each element of the proper measure of damages. In this connection, American Jurisprudence comments:

> As a general rule, a witness who is competent to give the value of particular real estate may give his opinion of its value immediately before particular damage to it, and its value immediately after such damage and as affected thereby, provided the witness discloses a sufficient knowledge of the property *in both conditions*. (Emphasis added). 27 Am.Jur.2d Eminent Domain § 426, p. 322.

See also, Martinson v. Iowa State Highway Comm., 257 Iowa 687, 690-693, 134 N.W.2d 340 (1965); Nelson v. Iowa State Highway Comm., 253 Iowa 1248, 1252-1253, 115 N.W.2d 695 (1962); 30 C.J.S. Eminent Domain § 431, p. 569; 5 Nichols on Eminent Domain § 18.4 (Rev. 3d ed. 1969) pp. 18.94 - 18.95.

II. Nor are we able to agree that trial court erred in admitting exhibits P and DD into evidence and permitting them to go to the jury room. The data contained on each exhibit was used by the witness Holmes in comparing sales prices of selected comparable real estate. Where proper foundation is laid, as was done in this case, evidence of the sale price of comparable real estate is admissible upon the issue of fair market value of property in condemnation proceedings. Redfield v. Iowa State Highway Comm., 251 Iowa 332, 99 N.W.2d 413 (1960). Moreover, plaintiffs' counsel extensively utilized the exhibits during cross examination and added to each markings and figures which remained on the exhibits during jury deliberations. Trial court

may in its discretion permit the jury to have during their deliberations writings received in evidence. Heth v. Iowa City, 206 N.W.2d 299, 303 (Iowa 1973); Mongar v. Barnard, 248 Iowa 899, 910, 82 N.W.2d 765 (1957); rule 198, Rules of Civil Procedure; *see also,* Kennedy v. Oleson, 251 Iowa 418, 424-425, 100 N.W.2d 894 (1960). We find neither abuse of discretion nor prejudice to plaintiffs.

III. Plaintiffs also assert trial court erred in refusing to strike testimony of the witness Douglas as to adjusted values of his comparable sales because four of eight sales dates he used to determine time adjustments were shown to be incorrect. Although this cast doubt upon his testimony, the question is one of weight to be given it by the jury and not one of admissibility for the court. Nelson v. Iowa State Highway Comm., 253 Iowa 1248, 1253, 115 N.W.2d 695 (Iowa 1962); *see* Fanning v. Mapco, Inc., 181 N.W.2d 190, 196 (Iowa 1970).

IV. Plaintiffs' final complaint that trial court erred in overruling their motion for allowance of fees for their expert valuation witness Lehman as a part of the costs also is without merit. The issue is settled by City of Ottumwa v. Taylor, 251 Iowa 618, 102 N.W.2d 376 (1960). *See also,* Peel v. Burk, 197 N.W.2d 617 (Iowa 1972).

We conclude trial court in all respects acted well within the latitude of its discretion and committed no reversible error. Accordingly, we affirm.

SNELL and OXBERGER, JJ., concur; DONIELSON and CARTER, JJ., dissent.

CARTER, J. (dissenting)

I reluctantly dissent. I believe it was error for the trial court to strike the testimony of the witness, Richard Shaffer, as to the fair market value of the farm before the taking.

The majority seeks to justify this action as the exercise of trial court discretion. It is clear from the record that the ruling was not based upon any general exercise of discretion but was for the specific reason that Shaffer was unable to provide an opinion as to the value of the property after the taking. This is not a proper reason for excluding the evidence of "before value."

The trial court and the majority jusify the exclusion of this testimony on the basis that Shaffer was unable to supply an essential element of the proper measure of damages. This contention misconceives the true area of expertise involved in land evaluation testimony by expert witnesses in eminent domain proceedings. It assumes that the area of expertise lies in the giving of an opinion as to the damages sustained from the taking. Actually, the area of expertise lies in the giving of an opinion as to the value of the subject property at a particular point in time. Given the values at the proper times (before and after the taking) there is no expertise involved in arriving at the measure of damage. That involves a simple arithmetical process of subtracting one figure (the after value) from another (the before value) and could be performed by someone completely unfamiliar with land values.

There is no logical reason why a condemnee in seeking to establish the extent of just compensation for the taking of his property cannot rely upon one witness to establish the value of the property before the taking and another witness to establish the value after the taking provided each witness is qualified to express an opinion as to value at the particular point in time to which his testimony relates.

The condemnor's motion to strike the testimony in the trial court and the court's ruling were as follows:

> MR. ROSSER: At this time, Your Honor, I would like to move to strike the witness' valuation testimony before the taking because he's unable to complete the proper standards in measure of damages, and that the jury be instructed to disregard it.
>
> THE COURT: That's sustained, and the jury is instructed to disregard the evidence of this witness as not being a proper measure of damages in this case.

No claim was made in the foregoing motion and ruling that Shaffer was not qualified to express an opinion as to the value of the property before the taking. Because his testimony supported a value of the land before the taking which is higher than the testimony of the condemnor's witnesses the error must be deemed prejudicial.. I would reverse and remand for a new trial.

DONIELSON, J., joins in this dissent.