STATE OF MICHIGAN

COURT OF APPEALS

CITY OF HOWELL, a Michigan Municipal Corporation,

Plaintiff-Appellant,

v

JOSEPH SORENTINO and KATHLEEN SORENTINO,

Defendants-Appellees.

UNPUBLISHED
November 26, 1996

No. 172748
LC No. 92-12138-CC

Before: McDonald, P.J., and White and P.J. Conlin, JJ.*

PER CURIAM.

Plaintiff appeals a judgment entered on a jury verdict in defendants' favor in this condemnation proceeding in which plaintiff brought suit for condemnation to obtain an easement involving a portion of defendants' commercial property. The jury awarded defendants $154,165.43 for just compensation, as well as damages for inverse condemnation, trespass and intentional infliction of emotional distress. Only the just compensation award is challenged on appeal. Plaintiff challenges the admission of defendants' expert's testimony regarding comparable values and the denial of its motion for directed verdict, as well as the trial court's exclusion under MRE 408 of an opinion of defendants' expert given during the course of settlement negotiations with plaintiff. We affirm.

Defendants called Eugene Chandler, Jr., as their expert. Chandler testified that he conducted a physical inspection of defendants' property. He opined that defendants' property, which he described as "a corner parcel with frontage on two main roads with full City services—water, sewer, gas, concrete curb, sidewalk, and street lighting—" was "an excellent commercial property."

Chandler explained that he used the market approach, rather than the cost or income approach, in his appraisal, and described that approach as

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* Circuit judge, sitting on the Court of Appeals by assignment.

> a value approach which is a result of a search of market data of sold properties, which are good substitutes for the subject property. These comparables are then analyzed, logged in—generally put into a grid—and then if adjustments are necessary, then adjustments are made to those sale prices or dollar values. And then they're applied to the subject property.

After several more general questions regarding Chandler's use of comparables, plaintiff's counsel moved in limine, outside the presence of the jury, to strike two comparables from Chandler's report, which involved condemnations, rather than open-market sales. While counsel referred to both condemnation comparables in making his motion, his argument was directed to the comparable that was established by jury verdict in another condemnation case. The trial court denied plaintiff's motion, ruling from the bench:

> . . . I'm going to allow that to go to the jury, that is the mention of that comparable being based on a jury verdict. Again, I think, more properly, it is a matter for impeachment; in other words, the opposing counsel has an opportunity to challenge that as a valid comparable.
>
> I don't know about prejudicial value, if it would do any good to purge that. We would, if we took out the fact that it was a jury verdict, then we leave that with a judge's verdict. I suppose that is the implication, if it was a trial, if the Court decided it that it may carry more weight—possibly less weight—than a jury verdict.
>
> It is not a verdict directly on this property—the subject property—it's the verdict on another piece of property. These lawsuits can contain all kinds of different issues. It may be that the comparable involving jury verdicts involved lawsuits and issues that are not present in this one. I don't know. But that's something for counsel to explore in cross-examination. But I don't think it's either unfairly prejudicial or is it a matter that should be stricken for any other reason as being an invalid comparable.
>
> The fact of the matter is, is that an expert has the right to rely on his or her data. If it's bad data, then that's the purpose of the cross-examination, to point out that it's—it really undermines the opinion and does not support the opinion being expressed in the courtroom. So I'll deny your motion in limine. You have established a record on that.

Chandler resumed testifying, stating that he initially examined "quite a number of comparables" so as to cast out the ones that are not truly comparable. He said he looked for similar neighborhoods, streets, and city features in terms of commercial properties, size, and improvements. Chandler testified that he found two comparable commercial properties immediately across the street and about 100 feet from defendants' property, a Total gas station and an auto-parts store, both the subject of condemnation proceedings by the state.

As to the two comparables, the Total gas station and auto parts store, Chandler testified that he interviewed the district appraiser whose job it was to oversee the taking of those two properties, and

that the data the appraiser gave Chandler was "supported by appraisls [sic] that were done by not only Michigan Department of Transportation appraisers at that time, but the land owners each had a fee appraiser representing them." Chandler had the appraisal data. For the auto-parts store, the parties arrived at an agreed-upon price per square foot. The Total station proceedings went to jury verdict.

Chandler testified that he arrived at the market value of the subject property by using the auto-parts store value:

> . . . Since there were three parts to be valued, it would be the taking, the improvements, and the damages. And since comparable number two, the one on the auto parts store was a negotiated value that was settled, I chose to use that comparable to apply the dollar amounts to the subject property. . . . [1]

Chandler testified that he arrived at a figure for the land value, and then adjusted it downward by fifty percent because defendants, unlike the auto-parts store owner, were keeping their surface rights.

Chandler next explained that he arrived at a figure for the damage the parent parcel would suffer as a result of the taking by looking at the auto parts store comparable's value per square foot. Chandler testified that in that case the parties agreed the damage to the property was $9.06 per square foot. Chandler again testified that the auto-parts store figures were not from a jury verdict; rather, the parties had negotiated a value around 1990. He testified that the figures would be valid today because there had not been a great deal of increase in commercial values in the last three to four years. Chandler applied the $9.06 figure and arrived at a damage value of $144,176. Chandler assessed the value of the improvements within the take area at $5,500. Chandler then testified that if he used the Total gas station comparable, the numbers would be lower by approximately twenty thousand dollars.

Chandler opined that the market value of the loss of the property, the damage to the property, and the loss of the use of the property was $170,000. He testified that the land value was something less than $270,000, and when asked how one could square that figure with the $170,000 figure, Chandler responded:

> My opinion would be that the property will be damaged for all time. This can never be changed. The restrictions that will be put up on this property by the placement of this easement will diminish the amount of building area, and parking area, that can be put on the piece according to City ordinance. Therefore, if you can build a smaller building and less parking, it limits the number of types of properties that can be built on it—limits the future market of the property to the extent of this $170,000.

Chandler's written appraisal report was admitted into evidence without objection. Regarding the damages element of value, the appraisal stated:

> The next element of value involved in this taking is the damage factor. It is very difficult to estimate damages on this parcel which was clearly burdened by a diagonal storm

> sewer easement running from the Northwest corner to the Southeast corner of the property. This additional taking will reduce the amount of usable area on the surface due to construction "set back" requirements. Also, the surface directly above the proposed easements are generally not considered buildable because of perpetual maintenance rights which will run with the easement. **My best estimate of the damage value based on my experience and judgment would be 10% of the total value of the parcel in question or: $9.02/Sq.Ft. which was the same as Comparable #2.** [Emphasis added.]

Chandler was cross-examined at length regarding his appraisal and his conclusion that the condemnation parcels were valid comparables.

On re-direct, Chandler testified that the value of the land taken, about 15,000 to 16,000 square feet, was approximately $26,000. He further testified that there is a reduction in value of approximately $144,000 due to damage to the remainder of the parcel, and that the damage to the improvements on the property was about $5,500. Chandler testified that even though he did not do a full appraisal as to the value of the entire parcel before the taking, he had an opinion as to the value based on several factors, including his general knowledge of the commercial real estate business in Howell and his knowledge of defendants' property's unique location and size. Chandler opined that before the taking, the entire parcel had a value of $240,000, that the low value would be $220,000 and the high value would be $270,000. He computed the latter figure by taking the price per square foot of the auto-parts store, $3.29, and multipling it by 77,000 square feet in the Sorentino property. Chandler testified that the value of the property after the taking was $65,000.

Plaintiff renewed its objection to the admission of the comparables evidence in its motion for directed verdict. The trial court stated:

> . . .I believe his use of comparables was adequate. I think it's a matter of argument and a matter of weight . . . . and that the instructions will take care of that. I make that clear. So, therefore I will deny the motion for a directed verdict as it applies to the condemnation action, in general. . . .

I

Plaintiff argues that the trial court abused its discretion in admitting the evidence of comparables used by Chandler in his appraisal because condemnation sales are not market value sales, and thus run afoul of the definition of "market value" set forth in SJI2d 90.06. Plaintiff argues that this issue has been dealt with inferentially, although not frontally, in *Consumers Power v Allegan St Bank*, 20 Mich App 720, 745; 174 NW2d 578 (1969), aff'd 388 Mich 568 (1972), which plaintiff argues precludes use of condemnation values as comparables.

Defendants argue that plaintiff objected at trial only to use of the comparables, and not to Chandler's ultimate opinions. Defendants further argue that plaintiff has provided no support for its argument that Chandler, an expert qualified during trial without objection, should have been barred from

stating his ultimate opinion simply because underlying data which he used may be objectionable. Defendants argue that under MRE 702 and 705, Chandler could have stated his ultimate opinions, without discussing the underlying data relied on. Defendants additionally argue that Chandler's testimony concerning the two comparables does not constitute substantive evidence as a matter of law under SJI2d 90.16; rather, Chandler's ultimate expert opinions were what actually comprised the evidence in this case.

In *Consumers Power, supra*, this Court stated:

> The rule on the use of comparable land sales by experts in opinion evidence is set forth in the case of *State Highway Commissioner v Schmidt* (1966), 3 Mich App 415, 419, 420:
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> > 'The comparable land sales used by the appraisers are not evidence; they are tools used by them to arrive at their estimate of a fair price and value for condemned property. The comparisons used by the appellants' appraisers were in the general vicinity of the land in dispute, as were the comparisons used by the appellee's appraisers. All land is unique. These were capable of, or suitable for, comparison with the land involved, although not identical. Such comparisons do not exist in fact or in reality, but need interpretation by the party using said comparisons.' [Citations omitted.]
>
> Similar sales and purchases on the open market without benefit of condemnation . . . could be used as proper comparables as a basis for an opinion on market value . . . . [20 Mich App at 745-746.]

Consumers Power also defined "market value" of real property as tied to the open market:

> A definition of market value as relating to real property . . . is found in 55 CJS, Market, p 798:
>
> > '*The market value of land or real estate* is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used; the amount which land would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged to buy; what the land would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale; what the property will sell for on negotiations resulting in sale between an owner willing but not obliged to sell and a willing buyer not obliged to buy; what the land would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect a sale.'

While the *Consumers Power* Court referred to "similar sales and purchases on the open market, without benefit of condemnation," this reference must be evaluated in the context that Consumer's Power argued that because it had to acquire the formations at issue by condemnation, the enhanced value of the formations should not be considered. *Id.* at 744. We do not read *Consumers Power* as establishing an absolute rule disallowing all reference to condemnation parcels as comparables.

Nevertheless, we conclude that because condemnation comparables may not be the equivalent of open-market sales, and may present additional problems when the result of jury verdicts, they are not preferred and should be used with caution. The introduction of evidence regarding a jury verdict in a condemnation case involving a neighboring property is virtually certain to be more prejudicial than probative. While underlying facts concerning the parcel and its appraisal history may be considered by the expert, the jury's verdict should not be introduced into evidence. Comparables resulting from negotiated sales of property subject to condemnation are somewhat less problematic because the buyer and seller have agreed to a value. However, these comparables still raise the possibility that, while the standard is the same – the fair market value, the element of compulsion and the prospect of litigation may have forced the condemning authority to pay more, or the seller to accept less, for the property..

In the instant case, however, we conclude that the use of the condemnation comparables does not mandate reversal. Chandler testified that he had considered a number of parcels before narrowing down the comparables to two, and that he did not utilize other parcels because they were dissimilar to defendants' property in several ways. Chandler's written report, which was admitted into evidence, stated:

> No parcels meeting the above description could be found in the subject's neighborhood or in the City of Howell, except for the two comparables used in this report.

Thus, Chandler attempted to find and use market sale comparables as a basis for market value, but concluded he was unable to do so. Further, the comparable Chandler relied on principally in arriving at his appraisal value was the auto-parts store, regarding which the parties and appraisers had reached agreed-upon values. The Total station involving the jury verdict was discussed only peripherally.

Regarding the auto-parts store, Chandler testified that appraisals had been conducted by both parties to the condemnation, that he had that appraisal data, and that he had interviewed the district appraiser in charge of the taking. Thus, Chandler had considered not just the agreed-upon value arrived at by the parties, but also the underlying data. Further, Chandler explained why he thought those values were appropriately applied to the instant property. Additionally, in his written report, Chandler stated:

> The appraiser has examined both sales which have been selected to be used in this analysis. These sales are good indicators of value because of their close proximity to the subject property (across the street). Using the "principal of substitution", the appraiser believed these sales are the best data to be used in the analysis. Each of these sales are very near the subject property and were put to a general commercial use at the

time of their "taking" or "sale". The logical assumption is that land from the same neighborhood would have a value not unlike the subject property.

Chandler also testified that he relied on his experience and knowledge of the commercial real estate business in Howell. Under the circumstances, we conclude that Chandler's ultimate opinion was admissible, and was based on more than just the final negotiated figures involved in the auto-parts store condemnation.

Moreover, the jury was properly instructed with SJI2d 90.16:

> The witnesses who have expressed opinions about market value have relied upon various market transactions to help them arrive at their opinions. These transactions are referred to as "comparables" and may include sales, offers to sell, offers to buy and rentals.
>
> These witnesses have been permitted to testify as to the price and other terms and circumstances of these transactions which they consider to be comparable to the owner's property as shedding light on the value of the owner's property. Generally, the more similar one property is to another, the closer the price paid for the one may be expected to approach the value of the other.
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> * * *
>
> You should also consider the extent to which the witness has taken into account whatever dissimilarities may exist. **If you are not satisfied that the transactions being used as comparables are, in fact, comparable, then you may consider that fact in weighing his or her opinion.**
>
> **You should bear in mind that comparable sales are not themselves direct evidence of value, but merely the basis on which the witnesses have formed their opinions of value.**
>
> **You should apply these standards to all witnesses rendering an opinion of value.**

Further, a major dispute at trial was whether the remainder of defendant's property was damaged by the taking of the easement. Chandler's testimony in this regard was based on his opinion regarding the effect of the taking on the parent parcel, and his assessment of the amount of damage was based on his experience as well as the auto-parts store comparable. (See page 5, *supra*).

We also conclude that the trial court properly denied plaintiff's motion for directed verdict because, viewing the evidence in a light most favorable to the defendants, the verdict was supported by adequate evidence. *Paulitch v Detroit Edison Co,* 208 Mich App 656, 658-659; 528 NW2d 200 (1995), *app grtd on other grounds* 451 Mich 899 (1996).

II

Plaintiff next argues that the trial court reversibly erred by excluding under MRE 408 an opinion expressed by Chandler regarding the value of the easement. We disagree.

During cross-examination of Chandler, plaintiff's counsel attempted to introduce into evidence a letter written by Chandler to defendant, for presentation to plaintiff, regarding the value of the easement. Defendants' counsel pointed out, in a side-bar conference on the record, that the letter was not an appraisal, and plaintiff's counsel agreed. A separate record was then made, in which defendants' counsel asserted that the letter was provided as part of the negotiation process in an attempt to settle the matter before suit. Plaintiff's counsel disagreed and the trial court ruled the evidence would not be admitted, but allowed plaintiff to further research the issue and revisit it the following day. At that time, the court again ruled the evidence inadmissible under MRE 408, noting that the rule precludes admission of statements made in compromise negotiations, and that facts gathered as an aid to prepare for settlement negotiation have also been held inadmissible. The court further noted that the document contained "sufficient statements in there indicating that this was not a full appraisal by any means . . ." We conclude that the letter did not clearly involve a statement of an independent fact, and that given the representations and arguments of counsel, the trial court did not abuse its discretion in ruling that the letter was inadmissible.

Affirmed.

/s/ Gary R. McDonald
/s/ Helene N. White
/s/ Patrick J. Conlin

[1] In his written appraisal, introduced into evidence, Chandler stated that the auto-parts comparable was also chosen because it was the larger parcel.