DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOWN OF GILBERT, a political subdivision of the State of Arizona, Plaintiff/Appellant, v. ALLEN WAYNE FREEMAN and HELEN LOUISE FREEMAN, husband and wife, individually and as Trustees and their successors as Trustees of the Allen Wayne and Helen Louise Freeman Trust, dated May 1, 1997, Defendants/Appellees.	1 CA-CV 09-0660 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-023156

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Ayers & Brown P.C. Phoenix
By Charles K. Ayers
and Melinda A. Bird
Attorneys for Plaintiff/Appellant

Snell & Wilmer L.L.P. Phoenix
By Kevin J. Parker
Attorneys for Defendants/Appellees

N O R R I S, Judge

¶1 This appeal arises out of a lawsuit filed by plaintiff/appellant Town of Gilbert to condemn a small strip of land, including an inoperative irrigation well, owned by defendant/appellee, the Allen Wayne and Helen Louise Freeman Trust. The superior court entered judgment on a jury verdict awarding the Trust $227,873 for the land and well as of the date of value, December 13, 2007. On appeal, the Town argues the superior court should not have admitted testimony introduced by the Trust regarding, first, the Town's statutory offer to purchase the property and, second, the well's value. We disagree with the Town's arguments and affirm the judgment.

DISCUSSION[1]

I. Admission of the Town's Statutory Offer to Purchase

¶2 The Town first argues the superior court should not have admitted evidence of its $62,408 pre-filing offer (along with a supporting appraisal) to the Trust to purchase the property. *See generally* Ariz. Rev. Stat. ("A.R.S.") § 12-1116(A) (Supp. 2008) (condemnation plaintiff must deliver written offer to purchase and supporting appraisal to property owner at least 20 days before filing condemnation action).

[1]We review evidentiary rulings for an abuse of discretion and will generally affirm a superior court's decision to admit evidence "absent a clear abuse or legal error and resulting prejudice." *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 543, ¶ 33, 96 P.3d 530, 541 (App. 2004).

According to the Town, this evidence was barred by statute, A.R.S. § 12-1116(O);[2] rule, Ariz. R. Evid. 408; and case law. *State ex rel. Miller v. Superior Court*, 189 Ariz. 228, 232-33, 941 P.2d 240, 244-45 (App. 1997). Assuming for purposes of this appeal the superior court should not have admitted this evidence, and committed legal error in doing so, the record reflects no resulting prejudice. *Bogard v. Cannon & Wendt Elec. Co.*, 221 Ariz. 325, 332, ¶ 20, 212 P.3d 17, 24 (App. 2009).

¶3 As the Town acknowledges on appeal and as the record amply supports, the principal valuation issue in dispute concerned the well, not the land. Although the Town argues the Trust introduced this evidence solely to suggest to the jury the Town was "low-balling and punishing [the Trust] for not settling the case," the record contains no support for this argument. Further, the Town's expert witness, who prepared the appraisal supporting the offer, convincingly explained at trial why her valuation of the land as of the date of value ($55,409) was less than the Town's pre-filing offer. Indeed, her explanation was so convincing that at the conclusion of the case, the Trust agreed to her valuation as of the date of value. Accordingly,

[2]Section 12-1116(O) states: "Any stipulation that is made or any evidence that is introduced pursuant to this section shall not be introduced in evidence or used to the prejudice of any party in interest on the trial of the action."

with the Town's agreement, the superior court instructed the jury as follows:

> In addition, the parties have agreed the value of the land, excluding the well and the temporary construction rights, is $55,409. Consequently, you should find this is the correct amount and use it appropriately in rendering your verdict.

¶4 "The improper admission of evidence is not reversible error if the jury would have reached the same verdict without the evidence." *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 88, ¶ 7, 977 P.2d 807, 810 (App. 1998). That is the case here.

II. Admission of Fain Valuation Testimony

¶5 For multiple reasons, the Town argues the superior court should not have allowed the Trust's well expert, Norman Fain, to testify about the value of the well as of the date of value. As we explain below, we see no legal error in the court's admission of this testimony.

A. Rule 702

¶6 Using what he characterized as a variation of "reconstructed cost new less depreciation" valuation method,[3] Fain valued the well at either of $409,850 or $157,485 as of the date of value. The Town argues the court should have precluded

[3]Fain and the Town's well expert, Dennis Hustead, agreed the other two common appraisal methods, the sales comparison and the income approaches, were inapplicable to the well.

this testimony, asserting Fain never actually rendered a valuation opinion because he testified to alternative valuations and, thus, "simply threw out numerous figures" of no assistance to the jury. Accordingly, the Town argues the court should have disallowed this testimony pursuant to Arizona Rule of Evidence 702.

¶7 In this case, the parties disagreed -- sharply -- over the value of the well. The value of an irrigation well is simply not an issue within the common knowledge of an average juror, and the Town does not argue to the contrary on appeal. Instead, the real focus of the Town's objection to Fain's testimony is that he did not render a single opinion of value but instead testified the well could have differing values as of the date of value based on different drilling techniques, as discussed in more detail below. Rule 702, however, does not require an expert to render an opinion in the sense of a single conclusion. The rule states an expert may testify "in the form of an opinion *or otherwise*." Ariz. R. Evid. 702 (emphasis added). An expert, thus, does not need to express an opinion regarding the issues involved in the case. Instead, "the key concern is whether expert *testimony* will assist the trier of fact in drawing its own conclusion as to a 'fact in issue.'" *United States v. Rahm*, 993 F.2d 1405, 1411 (9th Cir. 1993); *see*

also Livermore et al., *Law of Evidence* § 702.1, at 275 (4th ed. 2000).

¶8 Here, Fain's testimony was based on two different drilling techniques, one that was more expensive than the other. Fain testified both techniques would "work," explained the differences between them, and provided information the jury could use in deciding the well's value. We agree with the Trust -- Rule 702 did not require Fain to "pick a specific number" in testifying about the well's value.

B. Replacement Cost New Less Depreciation[4]

[4]The parties refer to this appraisal method as "reconstruction cost new less depreciation." This method, often called the "cost approach" by Arizona courts, *e.g., State ex rel. Miller v. Wells Fargo Bank of Ariz., N.A.*, 194 Ariz. 126, 130, ¶ 24, 978 P.2d 103, 107 (App. 1998), is also known as replacement cost new less depreciation; this nomenclature appears to be preferred by authoritative treatises. Appraisal Institute, *The Appraisal of Real Estate* 385 (13th ed. 2008); 4 Julius L. Sackman, *Nichols on Eminent Domain*, ch. 12C, § 12C.01[3][b] (Matthew Bender ed., 3d ed. 2009). We use the preferred terminology here.

¶9 The Town next argues the superior court should have barred Fain's valuation testimony because he misapplied the replacement cost new less depreciation method[5] and valued a hypothetical well, rather than the well that actually existed as of the date of value, in violation of Arizona law. Neither the record nor Arizona law supports the Town's arguments.

¶10 Fain, as well as other witnesses the Trust called, testified the well -- which was inoperable on the date of value -- could be rehabilitated, that is, repaired, and if repaired would have value. Fain then quantified that value by determining the well's replacement cost new and deducting

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We also note this method can be premised on either a replacement or reproduction cost basis. 7 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain*, ch. 4, § G4.03[5][c][ii] (Matthew Bender ed., 3d ed. 2009). Replacement cost is the estimated cost to build a substitute for the structure being appraised using contemporary materials and standards. Reproduction cost is the estimated cost to construct the exact duplicate or replica of the structure being appraised. Appraisal Institute, *supra,* at 385. Replacement cost is generally lower than reproduction cost because the former does not incorporate obsolescent features that would not be included in a new structure. *Id.* at 386; *see also Am. Express Fin. Advisors, Inc. v. Cnty. of Carver*, 573 N.W.2d 651, 660 (Minn. 1998). The record reflects Fain used replacement cost in valuing the well.

[5]The Town incorrectly asserts the replacement cost new less depreciation method is only used to value public utility assets. This method is, however, appropriately used when there are no sales of comparable property. *City of Phoenix v. Consol. Water Co.*, 101 Ariz. 43, 45-46, 415 P.2d 866, 868-69 (1966); *see generally* Sackman, *supra* note 4, ch. 12C, § 12C.01[3][b].

depreciation based on a repair estimate.[6] Applying this formula, Fain testified the fair market value of the well as of the date of value was either $409,850 or $157,485.

¶11 The method Fain used to calculate the replacement cost new less depreciation value of the well was not improper, as the Town contends. The replacement cost new less depreciation approach to valuation requires the appraiser to first determine the current cost of replacing the structure using contemporary materials and standards. The appraiser next estimates the degree or dollar amount of depreciation for the existing structure by taking into account physical deterioration and, as appropriate, functional and external obsolescence. The appraiser then deducts the estimated depreciation from the current cost of replacing the structure. *See generally* Appraisal Institute, *The Appraisal of Real Estate*, ch. 17, at 377-93 (13th ed. 2008) (the cost approach).

¶12 Consistent with this method, Fain determined the replacement cost new of the well by relying on well-established

[6]To determine replacement cost new, Fain relied on two different drilling methods -- a more expensive, but quicker, dual rotary method and a less expensive, but slower, cable tool method. From these estimates, $488,500 and $236,135 respectively, Fain deducted the amount it would cost to repair the well in its then current condition using a repair estimate ($63,670), which he then adjusted upward to $78,650 to take into account "unknowns that we couldn't see in the sand."

drilling techniques. *See supra* note 4. Fain then made a significant deduction to depreciate the value of the existing well based on its physical deterioration. He did so by estimating the cost to repair the well. Using the cost of repair -- often referred to as cost-to-cure -- to estimate curable, physical deterioration is one accepted way of estimating depreciation. Appraisal Institute, at 391-92, 424-25; *see also State ex rel. Dep't of Highways v. Callens*, 273 So. 2d 558, 560-61 (La. Ct. App. 1973) (expropriation action; depreciation included estimated "physical depreciation" based on cost-to-cure or cost to repair); *Correla v. New Bedford Redevelopment Auth.*, 377 N.E.2d 909, 912 (Mass. 1978) (reproduction cost new less deduction for physical depreciation and any functional or other obsolescence); *State v. Red Wing Laundry and Dry Cleaning Co.*, 93 N.W.2d 206, 209 (Minn. 1958) (in determining depreciation, must consider physical wear and tear as well as economic and functional obsolescence); *Travellers Bldg. Ass'n v. Providence Redevelopment Agency*, 256 A.2d 5, 9 (R.I. 1969) (building's value determined by reproduction cost less depreciation; depreciation includes physical deterioration of structure); *State v. Wilson*, 493 P.2d 1252, 1257 (Wash. Ct. App. 1972) (depreciation includes wear and tear).

¶13 The Town's assertion Fain valued only a hypothetical well and not the well as it existed on the date of value is, thus, wide of the mark. To be sure, Fain used estimated costs for replacing the current well as his starting point. But he then depreciated the value of the existing well based on repair estimates. Fain did not, as the Town argues, ignore the depreciation element of the reconstruction cost new less depreciation method.

¶14 Finally, although not argued explicitly, the Town appears to suggest Fain's application of replacement cost new less depreciation failed to reflect "real world" value because no one would invest substantial sums to have the well repaired due to its limited water rights. The problem with this view of the "real world" is that Fain *and* the Town's well expert both testified the well, if repaired, would be of value to an entity that had existing water rights and could use the well for the removal of groundwater.[7]

C. Disclosure of Fain's Valuation Reports and Trial Testimony

¶15 The Town argues the superior court should have precluded Fain's valuation testimony under Arizona Rules of Civil Procedure 26.1 and 37(c) because he testified to

[7]The Roosevelt Water Conservation District was one such entity. *See infra* ¶ 17.

information and valuations contained in an April 2008 report that had been superseded by a December 2008 report. Fain's April 2008 report valued the well based on the more expensive dual rotary drilling method while his December 2008 report valued the well based on the cable tool drilling method. The superior court rejected the Town's nondisclosure argument and so do we.

¶16 Although Fain's December 2008 report replaced his April 2008 report, in April 2009 the Trust disclosed it "anticipated" Fain would testify as to both drilling methods and would present to the jury "alternative scenarios," valuing the well using each method. The Trust's disclosure was detailed and provided more than ample notice to the Town that the Trust would present the alternative drilling methods to the jury as the basis for Fain's valuation testimony. Under these circumstances, the superior court did not abuse its discretion in rejecting the Town's nondisclosure argument.[8]

III. Admission of Michael Leonard Testimony

¶17 At trial, the Trust called Michael Leonard, the Roosevelt Water Conservation District's general manager. The

[8]The Town also argues Fain improperly included extra compensation in his valuation because its acquisition of the well was involuntary. But, as the Trust points out, Fain's trial testimony did not include any compensation based on the involuntary nature of the Town's acquisition of the well.

District is a quasi-municipal entity that delivers water to land in Mesa, Gilbert, Chandler, and other areas in Maricopa County. After the Town notified the Trust it was going to condemn the property, Kelly Freeman contacted Leonard about the well. Leonard testified he told Freeman the District would have an interest in potentially purchasing the well if the well was operational and absent condemnation by the Town. In addition to Leonard's trial testimony, Fain testified he relied on information from Leonard (which he obtained from reading Leonard's pretrial deposition) in determining the well "had value to somebody." Fain also testified he relied on Leonard's deposition testimony that, assuming the well was rehabilitated and running, it had a value between $175,000 and $250,000; Fain stated, Leonard's opinion "substantiated our conservative evaluation." Because the Town objected to Fain testifying about what Leonard had said in his deposition, Fain read excerpts from Leonard's deposition testimony to the jury during his testimony on direct.

¶18 On appeal, the Town argues the court should have barred Leonard's testimony and Fain's testimony stating he relied on information from Leonard in formulating his own valuation of the well because, first, Leonard never actually offered to purchase the well; second, the Trust fabricated

Leonard's interest in the well because it had contacted him *after* the Town had notified it of the condemnation; and, third, his testimony violated the "one expert limitation." We disagree with each argument.

¶19 Before and during trial, the Town took the position the well had zero value because, as the Town's counsel put it in his opening statement, "[t]his is simply not an asset that anyone with any sense would buy because no one is going to ever be able to economically make it into a viable paying asset." Leonard's testimony that the District would have been interested in acquiring the well if operational undercut this argument and supported the Trust's position that the well had value and a market existed for the well. Leonard's testimony he (for the District) would be potentially interested in acquiring the well was admissible evidence for this point even though he never made an offer to buy it.[9]

¶20 Leonard's testimony regarding his interest in the well was not inadmissible because the Trust contacted *him* about the well, not vice versa, and then only after the Town had notified

[9]Leonard did not testify the District ever made an offer for the well. The Town's reliance on case law holding options and unaccepted offers to purchase inadmissible to establish market value is misplaced. *See State v. McDonald*, 88 Ariz. 1, 8-9, 352 P.2d 343, 347-48 (1960); *Phoenix Title & Trust Co. v. State ex rel. Herman*, 5 Ariz. App. 246, 255, 425 P.2d 434, 443 (1967).

the Trust it intended to condemn the property. The Town vigorously cross-examined Leonard regarding his interest in the well and whether his interest was legitimate or fabricated. The circumstances surrounding Leonard's interest in the well and his communications with Trust representatives relate to the probative value and weight of Leonard's testimony, not to its admissibility. The court did not, thus, abuse its discretion in admitting Leonard's testimony.

¶21 Nor did the court abuse its discretion in allowing Fain to testify during direct examination he had relied on Leonard's deposition testimony regarding the value of the well. Arizona Rule of Evidence 703 allows an expert to testify as to his or her opinion based on "facts or data" not in evidence but perceived or "known" to him or her before trial. Applying this rule, our supreme court has explained an expert witness on direct examination may disclose facts or data that have not been admitted in evidence for the limited purpose of showing the basis for the expert's opinion, not to prove the truth of the matter asserted, assuming the other requirements of the rule

have been met. *State v. Lundstrom*, 161 Ariz. 141, 148, 776 P.2d 1067, 1074 (1989).[10]

¶22 Finally, we reject the Town's argument the superior court improperly allowed the Trust to have a second expert when it allowed Fain to testify about Leonard's opinions regarding the value of the well if rehabilitated and running. First, as discussed, this evidence was admitted to show the basis for Fain's valuation opinion, and second, it was the Town, not the Trust, that insisted Fain read excerpts from Leonard's deposition testimony to the jury.

IV. Admission of Kelly Freeman Testimony

¶23 At trial, the Town objected to the Trust's introduction of evidence from Kelly Freeman, as an owner representative of the Trust, concerning the property's value. Although the Town acknowledges a property owner may testify as to the value of his own property, it argues "there was no evidence" Kelly Freeman actually had an ownership interest in

[10]Effective January 1, 2010, the Arizona Supreme Court amended Rule 703. The amended rule, in pertinent part, states facts or data otherwise inadmissible "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Before the amendment to the rule, the supreme court had explained a court could, but was not required to, weigh the probative value of the facts or data against the dangers of unfair prejudice. *Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074.

the property.[11] In making this argument, however, the Town overlooks Kelly Freeman's trial testimony he was a beneficiary of the Trust as well as a successor trustee.[12]

V. Admission of Evidence Regarding the Town's 2007 Purchase of Another Well

¶24 Over the Town's objection, the superior court allowed the Trust's counsel to cross-examine the Town's well expert, Dennis Hustead, about the Town's 2007 purchase of another well for $250,000. The Town argues "[t]his testimony was completely irrelevant to the case and prejudicial." We disagree.

¶25 On direct, Hustead testified the well had no value and had been fully depreciated. On cross-examination, he acknowledged he had relied on his inspection of the well and "authoritative references," indicating wells have a "service life" of 30 years, in concluding the well (constructed in 1951

[11]The Town also argues Kelly Freeman should not have been allowed to testify as to value because he based his opinion on the "impermissible evidence" offered by Fain and Leonard. But, as discussed above, Fain and Leonard's evidence was not impermissible.

[12]During Kelly Freeman's cross-examination, the Town's counsel asked him to bring a copy of the Trust Agreement to court. Although Freeman said he would do so, he did not. The Town did not, however, raise any objection to Freeman's failure to bring a copy of the agreement to court. The Town has, therefore, waived any such argument on appeal. *See Woodworth v. Woodworth*, 202 Ariz. 179, 184, ¶ 29, 42 P.3d 610, 615 (App. 2002).

or 1952) had been fully depreciated.[13] To impeach Hustead on this point, counsel for the Trust questioned him as follows:

> Q. Mr. Hustead, would that be important to your analysis? If, in fact, the Town of Gilbert in 2007 bought a well from [the District] for $250,000 and that well was drilled in 1954, would that affect your -- if it's over 30 years, I understand depreciation, would that affect your analysis?
>
> A. It would -- it would be important.

¶26 The Trust's questioning of Hustead was, thus, directly related to challenging his testimony that the well was fully depreciated based, at least in part, on age.[14]

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[13]During cross-examination, Hustead also testified as follows:

> Q. You don't think that's a fair way to do it? You think you have to apply the formula?
>
> A. I think you have to depreciate it.
>
> Q. You think you have to depreciate it at 100 percent if it's over 30 years old?
>
> A. Yes.

[14]In its rebuttal case, the Town recalled its water resources administrator and she explained the differences between the well and the well purchased by the Town in 2007.

CONCLUSION

¶27 For the foregoing reasons, we affirm the judgment of the superior court. We deny the Trust's request for attorneys' fees and damages as sanctions for the Town taking a frivolous appeal. Although we have affirmed the judgment, the Town's appeal was not frivolous. As the prevailing party, we award the Trust its costs on appeal under A.R.S. § 12-1128 (2003) contingent on its compliance with Arizona Rule of Civil Procedure 21.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge