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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-791**

State of Minnesota, by its Commissioner of Transportation, petitioner,
Respondent,

vs.

David F. Persson, et al.,
Respondents Below,

William R. Billington, et al.,
Appellants,

and

State of Minnesota,
Appellant Below.

**Filed November 28, 2011
Reversed and remanded
Wright, Judge**

St. Louis County District Court
File No. 69DU-CV-10-1437

Lori Swanson, Attorney General, Erik M. Johnson, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Harold A. Frederick, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota
(for appellants)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this condemnation dispute, appellants challenge a jury's award of compensation for the condemnation of appellants' real property, arguing that the district court abused its discretion when making several evidentiary decisions. Appellants also argue that the district court erred by reinstructing the jury following closing arguments and by denying appellants' motion for a new trial based on erroneous evidentiary rulings. Because appellants were prejudiced by the district court's erroneous exclusion of certain expert testimony, we reverse and remand for a new trial.

FACTS

Appellant William Billington owned a 47.8-acre parcel of real property located along State Highway 53 in St. Louis County. The property consists of 7.8 acres of residential property and 40 acres of undeveloped land. In 2003, Billington entered a five-year lease with appellant KGM Contractors, Inc., granting KGM the exclusive right to excavate, remove, sell, or use subsurface materials from the undeveloped 40 acres. As of the date of the condemnation at issue here, KGM had not initiated any excavation on the Billington property.

On August 14, 2006, respondent State of Minnesota, by its Commissioner of Transportation, acquired several parcels of property required for construction of a new portion of Highway 53, including 16.02 acres of Billington's undeveloped land and 0.24 acres of Billington's residential property (collectively the Billington property). The state

paid Billington a quick-take payment of \$33,865.¹ Following a hearing to determine an award of just compensation pursuant to Minn. Stat. § 117.085 (2010), three court-appointed commissioners awarded \$194,000 as just compensation for the Billington property and \$5,000 for reimbursement of appraisal costs.

Billington appealed for a de novo determination of compensation by jury trial, and the state cross-appealed. Pursuant to Minn. Stat. § 117.155 (2010), Billington and KGM demanded three-fourths of the appealed damage award, and the state paid \$111,974.25, which, when combined with the \$33,865 quick-take payment, constituted three-fourths of the commissioners' award.

At the jury trial that followed, two appraisers testified regarding the value of the Billington property. John Hoff testified on behalf of Billington and KGM regarding his appraisal of the Billington property. He explained that the determination of the "highest and best use" of the property is the foundation of a market-value appraisal. As part of the highest-and-best-use determination, Hoff considered the presence of subsurface gravel at the Billington property, which he concluded contributed to the property's value. Hoff used an income-capitalization valuation approach, which assesses value based on the income that the property can reasonably produce. He calculated the contributory value of the presence of subsurface gravel by considering the likely quantity of subsurface gravel

¹ A district court may transfer title to and possession of condemned property to the condemning authority in a quick-take proceeding before court-appointed commissioners determine just compensation if the condemning authority has given the property owner proper notice and paid to the owner or deposited with the district court an amount equal to the condemning authority's approved appraisal of the property's value. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 868 (Minn. 2010).

that could be extracted from the property each year, the potential market for the gravel, and the market price for each cubic yard of gravel. Based on the contributory value of the subsurface gravel and the surface value of the land, Hoff concluded that the value of the property before the taking was \$501,000, the value after the taking was \$36,000, and the diminution in value from the taking was \$465,000.

Matt Seppi, the owner of Seppi Brothers Concrete, which is based in the region, testified on behalf of Billington and KGM regarding the availability and quality of the gravel on the Billington property and in the vicinity. But the district court did not permit Seppi to testify regarding the market value of the property because the district court determined that Seppi's testimony as to value was cumulative and lacked relevance. The district court also excluded this aspect of Seppi's testimony on the ground that Seppi lacked the expertise necessary to offer an opinion of value.

Gary Battuello testified on behalf of the state regarding the appraisal he conducted of the Billington property. He determined that the highest and best use of the Billington property was as residential and recreational land. Battuello used a comparative-sales approach, which involves identifying properties that are similar in character or use to the property being appraised and evaluating the value of the property being appraised based on the actual sale prices of the comparable properties. Battuello identified eight property sales in the vicinity of the Billington property that he found to be comparable to the Billington property. Some of the properties contained subsurface gravel deposits, but Battuello did not limit the comparable sales he considered to properties containing gravel. Because no gravel had been extracted from the Billington property, he deemed the impact

of the gravel to be speculative and declined to include the contributory value of gravel in his valuation. Based on the eight comparable sales that he identified, Battuello concluded that the value of the land before the taking was \$53,000 and that just-compensation damages for the condemned property were \$18,500. At the end of trial, Billington and KGM moved to strike Battuello's testimony on several grounds. The district court denied the motion.

At the close of the evidence, the district court instructed the jury before closing arguments. In response to certain aspects of the closing argument of counsel for Billington and KGM, the district court instructed the jury again after closing arguments about the establishment of facts and the evaluation of witness credibility. The jury returned a verdict of \$25,000 in just compensation.

Billington and KGM moved for judgment as a matter of law or a new trial. Pursuant to Minn. Stat. § 117.155, the state moved for entry of judgment in its favor in the amount of \$120,839.25, which represents the difference between the state's payments for the condemned Billington property and the amount of the verdict. The district court denied the motion of Billington and KGM for judgment as a matter of law or a new trial and ordered entry of judgment in the state's favor for \$120,839.25. This appeal followed.

D E C I S I O N

In an appeal from a commissioner's condemnation award, the issue presented to the district court is the amount of damages necessary for just compensation. *City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn. 1981). Compensation in a condemnation action is measured based on the market value of the condemned property

at the time of the taking. *City of St. Paul v. Rein Rec., Inc.*, 298 N.W.2d 46, 49 (Minn. 1980); *see also Anda*, 789 N.W.2d at 876 (stating that condemning authority generally must give property owner “the market value of the property at the time of the taking contemporaneously paid in money” (quotation omitted)). Fair-market value is calculated by considering the “highest and best use” of the property and the probable price for which the property in its highest and best use can be sold on the open, competitive real estate market. *Rein*, 298 N.W.2d at 49-50.

Courts traditionally have relied on the following three methods to determine fair-market value of real property: (1) market data based on comparable sales, (2) income capitalization, and (3) reproduction costs minus depreciation. *Cnty. of Ramsey v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). Other valuation approaches may be used when supported by sufficient competent and reliable expert testimony. *State v. Harbor City Oil Co.*, 486 N.W.2d 455, 456 (Minn. App. 1992), *review denied* (Minn. Aug. 11, 1992); *see, e.g., Miller*, 316 N.W.2d at 922 (holding that development-cost approach to valuation is permissible in some circumstances when sufficient evidentiary foundation is established).

Billington and KGM challenge several of the district court’s evidentiary decisions, including the admission of the state’s appraisal expert’s testimony regarding the value of the Billington property; the exclusion of Seppi’s testimony on the issue of the Billington property’s value; the admission of testimony regarding gravel material located near the Billington property, the price Billington paid for the Billington property, and the Billington property’s tax value; and the exclusion of evidence as to the state’s benefit

from the taking and testimony as to the annual volume of asphalt that can be produced at the Billington property.

I.

We first address the contention of Billington and KGM that the district court abused its discretion by declining to strike the state's appraisal expert testimony regarding the Billington property's value. Billington and KGM argue that this expert opinion lacks foundational reliability because the state's appraisal expert failed to correctly conduct the highest-and-best-use analysis and failed to comply with professional appraisal standards.

A qualified expert witness may testify in the form of an opinion as long as the testimony has foundational reliability and is helpful to the fact-finder. Minn. R. Evid. 702; *Cont'l Retail, LLC v. Cnty. of Hennepin*, 801 N.W.2d 395, 399 (Minn. 2011). The district court has wide latitude to determine whether there is sufficient foundation on which an expert may state an opinion. *Benson v. N. Gopher Enters.*, 455 N.W.2d 444, 446 (Minn. 1990). Even if an appellate court would have reached a different conclusion as to the sufficiency of the foundation, the district court's decision will not be reversed absent a clear abuse of discretion. *Id.*

Billington and KGM argue that the state's appraisal expert did not properly conduct the highest-and-best-use analysis because he did not conclude that gravel extraction is the highest and best use of the Billington property. They rely on *State v. Horman*, in which the Minnesota Supreme Court observed that the presence of "a valuable deposit of sand or gravel," the gravel's quality, the demand for gravel, and the

gravel's market value are relevant to determining the market value of a property in a condemnation proceeding. 188 Minn. 252, 255, 247 N.W. 4, 5 (1933). But the *Horman* court merely identifies these factors as relevant to the inquiry. *Horman* establishes neither that these factors must be considered in a market-value appraisal nor that gravel mining is the highest and best use of a property with subsurface gravel deposits.

In a similar condemnation dispute, the United States Court of Appeals for the Eighth Circuit affirmed a valuation based on an appraisal of property containing gravel deposits in which the appraiser did not conclude that the highest and best use of the property was for gravel operations. *United States v. 9.20 Acres of Land*, 638 F.2d 1123, 1128 (8th Cir. 1981). In that case, the appraiser testified that the property's highest and best use was agricultural, with the potential for residential development. *Id.* The appraiser concluded that the highest and best use of the parcel was not sand and gravel development because it was too speculative. *Id.* The Eighth Circuit held that, notwithstanding the presence of sand and gravel deposits on the property, the commission was justified in accepting the appraiser's conclusion, based in part on the appraiser's demonstrated consideration of the sand and gravel potential of the property. *Id.*

Here, the state's appraisal expert testified that the highest and best use for the Billington property was as residential and recreational property. He opined that the value of the gravel deposits was too speculative to conclude that gravel extraction is the highest and best use of the property. In reaching this conclusion, the state's appraisal expert considered the presence of subsurface gravel on the Billington property and other information relevant to determining whether a market exists for the gravel, which he

identified as a critical factor in determining value. Such information included, but was not limited to, the necessity of obtaining a conditional use permit to conduct commercial gravel operations on the property, the market for gravel deposits, and sales of properties in the region with gravel deposits. Based on his consideration of these factors, the state's appraisal expert concluded that "the land might be used for gravel, but its value was really going to be the same as residential or recreational or timber land that sells in this area."

This testimony evinces ample consideration of factors relevant to determining the market value of the Billington property. *See Horman*, 188 Minn. at 255, 247 N.W. at 5 (holding that relevant factors include presence of a sand or gravel deposit, gravel quality, demand for gravel, and gravel's market value). The opinion of the state's appraisal expert rests on sound factual bases and analysis that are consistent with Minnesota law. *See Rein*, 298 N.W.2d at 50 (stating that fair-market value is calculated by considering highest and best use of property and likely price for which property in its highest and best use can be sold). Moreover, the bases for this appraisal expert's opinion were presented through the appraisal expert's testimony. The jury was able to evaluate his methodology and credibility to determine what weight, if any, to give his opinion of value. *See Behlke v. Conwed Corp.*, 474 N.W.2d 351, 357 (Minn. App. 1991) (stating that credibility and weight of expert testimony are decided by jury), *review denied* (Minn. Oct. 11, 1991). Accordingly, the testimony of the state's appraisal expert has foundational reliability.

The assertion of Billington and KGM that the valuation testimony of the state's appraisal expert is inadmissible because it violated standards of professional practice also

lacks support. Minnesota law requires an appraiser to act according to the Uniform Standards of Professional Appraisal Practice (USPAP). Minn. Stat. §§ 82B.021, subds. 26, 29, 82B.195, subd. 1 (2010). The USPAP requires that, when necessary in developing a market-value opinion, an appraiser must, among other tasks, “identify and analyze the effect on use and value of existing land use regulations, . . . economic supply and demand, . . . and market area trends” and “develop an opinion of the highest and best use of the real estate” after analyzing “the relevant legal, physical, and economic factors to the extent necessary to support the appraiser’s highest and best use conclusion(s).” Uniform Standards of Professional Appraisal Practice, Standards Rule 1-3 (Appraisal Found. 2010-2011).

The testimony of the state’s appraisal expert reflects his consideration of these elements. Moreover, even if the appraisal violated these standards, Billington and KGM cite, and our legal research identifies, no authority establishing that a violation of professional standards renders an appraiser’s valuation inadmissible. Indeed, we observe that jurisdictions that have considered this issue have concluded that failure to comply with the USPAP is relevant to the weight, not the admissibility, of an appraisal expert’s opinion. *See Whitehouse Hotel Ltd. P’ship v. Comm’r of Internal Rev.*, 615 F.3d 321, 332 (5th Cir. 2010) (holding that tax court acted within its discretion to determine that USPAP compliance is relevant to weight an appraiser’s report should be given, rather than its admissibility); *Cincinnati v. Banks*, 757 N.E.2d 1205, 1212 (Ohio Ct. App. 2001) (stating that expert opinion testimony on fair-market value is not restricted by law to opinions founded on methods prescribed by USPAP; rather, “each case must be

considered in the light of its own facts, and every element that can fairly enter into the question of value . . . should be considered” (quotation omitted)).

On this record, we conclude that the district court did not abuse its discretion by admitting this evidence.

II.

We next address the district court’s decision to exclude Seppi’s testimony regarding the value of the Billington property. A district court’s decision on the admissibility of an expert opinion rests within the district court’s sound discretion and will not be reversed unless it is based on an erroneous view of the law or is an abuse of discretion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). To constitute reversible error, an evidentiary ruling must be prejudicial. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

Billington and KGM offered Seppi as an expert to testify regarding the value of the Billington property in light of the property’s subsurface gravel. According to their offer of proof, Seppi has more than 30 years of experience working in the gravel industry. He owns a concrete-production company in the region where the Billington property is located that requires a consistent source of gravel. In this capacity, Seppi’s company has purchased eight local properties with subsurface aggregate materials and leased similar property in the region. Seppi’s company owns property near the Billington property that contains subsurface materials comparable to those found on the Billington property. Billington and KGM proffered Seppi’s opinion that the market value of the Billington property was at least \$475,000. They argued that Seppi’s opinion reflects a comparative-

sales approach to valuation because it is derived from his knowledge of the market value of comparable properties based on his experience purchasing property for his gravel business.

The district court excluded Seppi's testimony as to value on the grounds that the testimony would be cumulative of other expert testimony regarding value, the testimony was not relevant, and Seppi lacks expertise to render an opinion on value.

To determine market value in a condemnation proceeding, “[a]ny competent evidence may be considered if it legitimately bears on the market value.” *Anda*, 789 N.W.2d at 877 (quotation omitted). Evidence concerning any factor that would affect “the price a purchaser willing but not required to buy the property would pay an owner willing but not required to sell it” is admissible. *State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992).

Under rule 702, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Minn. R. Evid. 702. The fundamental consideration when admitting expert testimony under rule 702 is whether the testimony will assist the fact-finder in resolving the factual questions presented. *Id.*; *Hayes v. Comm’r of Pub. Safety*, 773 N.W.2d 134, 136 (Minn. App. 2009); *see also Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 388 (Minn. App. 2001) (stating that whether expert testimony is required depends on nature of question to be decided by trier of fact and

whether specialized knowledge will assist trier of fact), *review denied* (Minn. May 16, 2001).

Under the Minnesota Rules of Evidence, an expert need not be formally trained in an area in order to offer an expert opinion on the topic. *Law v. Essick Mfg. Co.*, 396 N.W.2d 883, 887 (Minn. App. 1986), *review denied* (Minn. Jan. 27, 1987). The knowledge necessary to qualify as an expert may be acquired by sufficient occupational experience, *Gross*, 578 N.W.2d at 761, such as that “obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood,” *Kastner v. Wermerskirschen*, 295 Minn. 391, 394, 205 N.W.2d 336, 338 (1973) (quotation omitted). For example, a farmer may offer an opinion as to the value of nearby farmland without additional foundation because the farmer’s personal knowledge of the character of the land and the nature of neighborhood farms “presumptively makes [the farmer] familiar with their value” and assures competent testimony. *Grimm v. Grimm*, 190 Minn. 474, 475, 252 N.W. 231, 232 (1934).²

² In a case similar to the one before us, the Arizona Court of Appeals upheld a district court’s decision to permit expert testimony on the value of condemned land used as a sand and gravel mine from witnesses with knowledge derived from experience similar to Seppi’s. *Maricopa Cnty. v. Barkley*, 812 P.2d 1052, 1057 (Ariz. Ct. App. 1990). The witnesses in *Barkley*, like Seppi, possessed extensive experience in the sand and gravel business, including familiarity with sand and gravel operations in the vicinity of the condemned parcel and previous evaluations of sand and gravel properties for possible purchase. *Id.* The *Barkley* court applied Arizona Rule of Evidence 702, which, like Minnesota’s rule 702, requires an expert to have “specialized knowledge [that] will assist the trier of fact” and held that the district court did not abuse its discretion by permitting the witnesses to offer valuation testimony. *Id.*

The state argues that Seppi lacks the credentials to testify as an expert because he is not an appraiser, does not hold an appraisal license, and did not prepare an appraisal in this case. The state's objection to Seppi's testimony rests largely on Minn. Stat. § 82B.03, subd. 1(a) (2010), which restricts a person without an appraisal license from acting as a real-estate appraiser. But Seppi did not claim to be an appraiser, he did not prepare an appraisal, and his testimony would not constitute "act[ing] as a real estate appraiser." Minn. Stat. § 82B.03, subd. 1(a). Indeed, the statute is inapposite as to the admissibility of Seppi's testimony.

The offer of proof demonstrates that Seppi possesses extensive experience in the gravel industry in the region where the condemnation occurred. He has evaluated properties with aggregate materials for purchase, and he has experience purchasing comparable properties for his concrete-production company. Seppi also owns land with comparable subsurface gravel in the vicinity of the Billington property. Like the farmer in *Grimm*, Seppi's experience in the gravel industry and personal knowledge of the character of the land and local market for comparable properties establish that he would provide competent testimony as to the market value of the Billington property.

Seppi's lengthy occupational experience in the gravel industry, experience evaluating properties in the region with comparable subsurface materials, familiarity with the local gravel market and the Billington property, and ownership of a nearby comparable property qualify him to provide an expert opinion as to the value of the Billington property. Based on his specialized knowledge and experience, Seppi's testimony as to value would have assisted the jury in determining the Billington

property's highest and best use and market value. Accordingly, the district court erred by excluding Seppi's testimony on the ground that he lacked expertise to render an opinion of the Billington property's value.

If the expert testimony satisfies rule 702, the testimony may nonetheless be excluded if its probative value is substantially outweighed by "considerations of . . . needless presentation of cumulative evidence." Minn. R. Evid. 403. Here, the district court also excluded Seppi's testimony on the ground that it would be cumulative of other expert testimony. But when Seppi's valuation testimony was offered, the record contained no expert testimony regarding the value of the property. Therefore, Seppi's proffered valuation testimony was not cumulative of any other expert testimony. Moreover, Seppi's proffered testimony was not cumulative of the subsequently admitted expert testimony. The appraisal expert for Billington and KGM testified about the value of the property using the income-capitalization approach. Seppi's proffered testimony was not cumulative of this expert testimony because Seppi offered a comparative-sales approach to valuing the property. No other expert testified for Billington and KGM using a comparative-sales approach to determine value. The state's appraisal expert later offered his opinion as to value using the comparative-sales approach, but Seppi's testimony was not cumulative of this testimony either because Seppi was testifying on behalf of Billington and KGM and offered a significantly different value. The district court erred by excluding Seppi's testimony on the ground that it would be cumulative.

The district court also excluded Seppi's valuation testimony on the ground that the testimony was not relevant. "All relevant evidence is admissible" Minn. R. Evid.

402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. In a condemnation proceeding, evidence “concerning any factor which would affect the price a purchaser willing but not required to buy the property would pay an owner willing but not required to sell it” is admissible. *Strom*, 493 N.W.2d at 559.

At issue here is the amount of damages necessary to compensate Billington and KGM for the condemnation of the Billington property, which contains subsurface gravel. Seppi derived his opinion of value from the amount and quality of gravel located at the Billington property, his knowledge of the local gravel industry, his experience evaluating properties containing gravel for purchase, and his assessment of the market for comparable properties. Seppi’s opinion is probative of the Billington property’s pre-condemnation market value, which is an essential factor when determining just compensation for the condemnation. Indeed, the valuation testimony of the state’s expert using a similar comparative-sales approach, but without considering the value of the gravel on the property, was later admitted as relevant evidence. The district court erred when it excluded Seppi’s valuation testimony as not relevant.

Because Seppi had expertise to render an opinion of the Billington property’s value, his testimony was not cumulative, and his valuation was relevant, the district court erred by excluding such testimony. But a new trial on the grounds of an improper evidentiary ruling is warranted only if Billington and KGM demonstrate that the error was prejudicial. *See Kroning*, 567 N.W.2d at 45-46 (stating that to constitute reversible

error, an evidentiary ruling must be prejudicial). Seppi's market valuation of the Billington property at \$475,000 was approximately \$422,000 greater than the valuation of the state's appraisal expert. Seppi's comparative-sales valuation approach was within approximately \$25,000 of the market value derived from the income-capitalization approach, which the expert for Billington and KGM offered. Based on Seppi's extensive relevant experience and expertise, Seppi's valuation could have cast doubt on the lower value set by the state's appraisal expert and bolstered the higher value derived by the expert appraisal that was offered by Billington and KGM. The corroborative nature of Seppi's proffered testimony could have led the jury to find a higher value for the Billington property, warranting a higher amount for just compensation. Because Seppi's opinion of value reasonably could have changed the outcome of trial, the exclusion of Seppi's valuation testimony was prejudicial error warranting a new trial. We, therefore, reverse and remand to the district court for a new trial.³

Reversed and remanded.

³ In light of our decision, we need not reach the other issues raised in this appeal.