12/19/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALAN HIRANO, Plaintiff and Appellant, v. DONALD HIRANO, Defendant and Respondent.	B190190 (Los Angeles County Super. Ct. No. SC060920)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Reversed.

Law Offices of Rosario Perry, Rosario Perry and Jacqueline M. Fabe for Plaintiff and Appellant.

Keller, Price & Moorhead and Jeffrey C. Sparks for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication only as to section 2 of the Discussion.

Plaintiff and appellant Alan Hirano and defendant and respondent Donald Hirano are brothers. Appellant sued respondent for, among other things, conversion and trespass. We reversed a prior judgment entered against appellant (case no. B167066).[1] The current appeal is from a judgment entered after the trial court granted respondent's midtrial motion for nonsuit, the basis of which was that appellant could not prove damages. Appellant contends the judgment must be reversed because the trial court improperly excluded evidence of damages which, had it been admitted, would have allowed appellant to overcome nonsuit. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's and respondent's mother owned a duplex which she held in the name of her living trust. Mother lived with respondent in the front unit of the duplex while appellant lived in the back unit and used the garage as a music recording studio. Some time in 1997, mother amended the trust to make respondent the sole successor trustee and to direct that all trust assets should go to respondent after mother's death. Mother died in early 1998.

Meanwhile, after commencing eviction proceedings against appellant in December 1997, respondent was awarded possession of the property and appellant moved out of the duplex in March 1998.

On the day he moved out of the duplex, appellant and some friends packed a van with equipment that had been left at the music studio by some of appellant's clients; appellant left most of his own musical and recording equipment at the studio because he believed he would be able to come back and retrieve it later. But a few days after moving

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[1] In our prior opinion, we noted that this is the third action between the brothers relating to ownership of a duplex. After respondent successfully sued appellant for unlawful detainer, appellant petitioned the probate court to remove respondent as trustee of their mother's trust. That matter was settled when respondent paid appellant $20,000.

out, appellant was hospitalized for several months. When his subsequent efforts to contact respondent during that time were unsuccessful, appellant asked two friends, Aaron Sunday and Randy Green, to retrieve the equipment appellant had left behind at the duplex.[2] Appellant eventually learned that, without his permission, respondent had moved appellant's equipment out of the studio and appellant's former unit, and into respondent's unit.

Appellant filed this action on March 22, 2000. When, after several continuances, it was called for trial on March 10, 2003, the trial court denied appellant's counsel's motion to once again continue the trial because appellant was in the hospital; it dismissed the action for failure to prosecute. (Code Civ. Proc., § 583.410.)[3] In an opinion filed on September 29, 2004, we reversed that judgment because the notice requirements of section 583.410 had not been met.

Following remand, a new trial date of September 12, 2005, was set. On the continued trial date of January 9, 2006, the trial court granted respondent's motion to preclude appellant from introducing any expert testimony because appellant had not complied with a demand for exchange of expert witness information respondent made in connection with the prior trial. After subsequently ruling that appellant could not testify as to his own opinion of the value of the property, the trial court granted respondent's motion for nonsuit, finding that appellant would be "unable to offer any evidence as to the fair market value of [his] property as was required to establish damages . . . ."

Appellant filed a timely notice of appeal.

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[2] On Sunday's return, he found the door to the music studio locked. On his second visit, Sunday noticed that the musical equipment he had previously seen in appellant's studio was now in respondent's unit. On a third visit, he found the door to the studio unlocked, but the studio empty. Sunday reported this information to appellant. Green, who had assisted appellant with the move, noticed that the studio was still filled with equipment when appellant locked the door at the end of the day. When Green went back two days later, he saw that all of the equipment that had been in the studio was now in the front unit.

[3] All future undesignated statutory references are to the Code of Civil Procedure.

DISCUSSION

1. *Standard of Review*

Upon review of a judgment of nonsuit, we view the facts in the light most favorable to the plaintiff. Nonsuit is improper if the plaintiff's evidence would support a jury verdict in the plaintiff's favor. " 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . . " [Citation.]' " (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214.)

" 'Where there is no evidence to review because the trial court excluded it, we review the trial court's evidentiary rulings to determine if the evidence was properly excluded. If relevant and material evidence was excluded which would have allowed the plaintiff to overcome a nonsuit, the judgment must be reversed. [Citation.]' [Citation.]" (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 746 (*Stonegate*) [reversing nonsuit where trial court erroneously excluded expert testimony]; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 887.)

[[Beginning of published portion.]]

2. *The Trial Court Improperly Excluded Appellant's Expert Witness Evidence*

Appellant contends the trial court prejudicially erred in precluding appellant from introducing the testimony of any expert witnesses. Appellant argues that his failure to timely exchange expert witness information prior to the 2002 "initial trial date" is irrelevant because discovery was reopened and a new "initial trial date" was set when the prior judgment was reversed. We agree.

The mechanism for obtaining pretrial discovery of information concerning each party's expert witnesses was virtually the same in March 2002 (the first initial trial date set before the judgment was reversed) and in September 2005 (the second initial trial date set after the judgment was reversed), only the code sections have changed.[4] That mechanism includes making a written demand for the mutual and simultaneous exchange of expert witness information on a specified date *no sooner than* 20 days after service of the demand or 50 days before the *initial* trial date, whichever is closer to the trial date. (§ 2034.230; see former § 2034, subd. (c), italics added.) Section 2034.260 sets forth the information that is required to be included in the exchange. (See former § 2034, subd. (f).) Section 2034.300 provides that, "on objection of any party who has made a complete and timely compliance with section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to" comply with the requirements for exchanging expert witness information and making the expert available for deposition. (See former § 2034, subd. (j).)

But only the party who makes a demand for exchange of expert witness information and the party upon whom the demand is made are required to comply with the statutory procedures for exchanging expert witness information. (*West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d 656, 659 (*West Hills*).)[5] From this, it reasonably

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[4] In March 2002, section 2034 governed pretrial discovery of expert witness information. In 2004, the discovery statutes were reorganized and section 2034 was replaced with section 2034.010 through 2034.470, operative July 1, 2005. (Stats. 2004, ch. 182, § 23, p. 658.)

[5] *West Hills* was a medical malpractice action involving three codefendants. Two of the codefendants addressed a demand for exchange of expert witness information to the plaintiff; they served a copy of the demand on the third codefendant. Based on the third codefendant's failure to participate in the exchange, the trial court granted the plaintiff's motion to preclude that codefendant from calling any expert witnesses at trial. The appellate court issued a peremptory writ of mandate vacating the order and directing the trial court to issue a new order denying the motion. The statutes at issue in *West Hills*, *supra*, 98 Cal.App.3d 656, were former sections 2037, et seq., from which former

follows that, where no demand is made by any party, no party is required to comply with the statutory exchange requirements.

It is now well settled that discovery automatically reopens following a mistrial, order granting new trial, or reversal on appeal. As our high court explained: "Each time an action is tried, the court sets an initial (i.e., first or beginning) date for the actual trial, and that date controls the discovery cutoff for the trial to which it relates. A case does not have one everlasting initial trial date, but may have a new initial trial date corresponding to a scheduled retrial or new trial of the action. . . . Thus, after reversal the time clock for the initial trial date" under the Discovery Act is reset. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245 (*Fairmont*); *Beverly Hospital v. Superior Court* (1993) 19 Cal.App.4th 1289, 1295 (*Beverly Hospital*).) There is no distinction between the different ways a new trial may come about, including mistrial, order granting new trial and following reversal on appeal. (See § 656 [defining new trial]; *Guzman v. Superior Court* (1993) 19 Cal.App.4th 705, 707-708.)

Here, after first initial trial date was set for March 2002, respondent served appellant with a demand for exchange of expert witness pursuant to former section 2034, subdivision (a); respondent subsequently served appellant with its expert witness information pursuant to former section 2034, subdivision (f). Respondent thereafter sought to preclude appellant, pursuant to former section 2034, subdivision (j), from introducing at trial any expert opinion evidence on the grounds that appellant had failed to comply with the expert witness demand.

After the judgment was reversed, a new trial date was initially set for September 12, 2005. Neither appellant nor respondent made a demand for exchange of expert trial witnesses after the new initial trial date was set (see § 2034.220 [demand for exchange of expert trial witness information shall be made 10 days after initial trial date

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section 2034 was derived. (See Stats. 1986, ch. 1336, §§ 2-3, pp. 4752-4758, operative July 1, 1987 [repealing former §§ 2037 through 2037.9, and replacing with former § 2034].)

has been set, or 70 days before that trial date]); accordingly, there was no exchange of expert witness information (see § 2034.230 [expert witness information exchange shall be set for a date that is 50 days before initial trial date or 20 days after service of demand, whichever is closer to the trial date].)

Although no demand had been made by either party, in a faxed letter to respondent's counsel dated December 21, 2005, appellant's counsel advised that appellant had "retained an expert witness pursuant to the reopening of discovery since the appeal was granted." The letter identified the expert as Steve McNeil of Mamba Sound & Recording/Mac West Group, and offered to make him available for deposition.

That same day, respondent filed a "Notice of Renewal" of his motion in limine to preclude appellant from introducing any expert witness evidence, to which he attached the original motion filed before the first trial. Appellant filed a "Notice of Renewal" of his opposition to the motion, to which he attached the original opposition filed before the first trial.

At the January 9, 2006 hearing on the renewed motion, appellant argued that discovery had reopened as a result of the reversal of the prior judgment. Since respondent did not file a new demand for exchange of expert witness information in conformance with section 2034.220, appellant was not required to exchange expert witness information. The trial court granted respondent's motion to exclude expert witness testimony, reasoning that respondent had made a demand for exchange of expert witness information in connection with the 2002 trial date, appellant did not comply with that demand and did not request leave to make a "late exchange" in connection with the new trial. The trial court erred.

When the prior judgment was reversed, the matter remanded and a new initial trial date set, discovery was automatically reopened. (*Fairmont, supra*, 22 Cal.4th at p. 250; *Beverly Hospital, supra,* 19 Cal.App.4th 1289.) Because neither party made a section 2034.210 demand for exchange of expert witness information in connection with the new initial trial date, neither was required to comply with section 2034.260. (*West Hills, supra,* 98 Cal.App.3d at p. 660.) Accordingly, the trial court erred in excluding

appellant's expert witness evidence on the grounds that appellant failed to make a timely exchange of expert witness information. Because the improperly excluded expert witness evidence regarding damages could have enabled appellant to overcome the nonsuit, the judgment must be reversed.[6] (*Stonegate, supra*, 144 Cal.App.4th at p. 746.)

We are not persuaded to the contrary by respondent's argument that *Fairmont* is inapplicable to this case because remand for a trial after reversal of a judgment of dismissal, as occurred here, is not the same as the "remand for a *new* trial after reversal of a judgment on appeal" discussed by the court in *Fairmont*. (*Fairmont, supra*, 22 Cal.4th at p. 247, italics added.) As we understand respondent's argument, it is that the court in *Fairmont* intended to apply the rule that reversal on appeal automatically reopens discovery and resets the discovery time clock only to reversal of judgments entered after a trial on the merits because; as such, where there has been no trial in the first instance, there can be no "new" trial. Respondent's exceedingly narrow reading of *Fairmont* is belied by that court's articulation of the reason for the rule: "Particularly in the case of a new trial following a dispositive judgment, e.g., on a demurrer or summary judgment, that was entered before the initial cutoff date for discovery, there will have been little or no opportunity for full discovery of facts involving issues or defenses that must now be addressed and litigated by the parties. For example, a party unsuccessfully opposing an early motion for summary judgment based on the statute of limitations, later reversed on appeal, is unlikely to have had sufficient time to complete discovery on the merits before the motion was granted." (*Id*. at p. 253.) Thus, the court in *Fairmont* expressly contemplated that the rule reopening discovery following a reversal on appeal would apply to all judgments reversed on appeal, whether or not preceded by a trial on the

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6 As the court in *Fairmont* observed, discovery in the event of a new trial is not unlimited. For example, a natural person may be deposed only once during the run of the litigation (Code Civ. Proc., § 2025, subd. (t)); specially prepared interrogatories and requests for admission are limited (§§ 2030, subd. (c)(1), 2033, subd. (c)(1)); and parties may seek protective orders from discovery that is unreasonably cumulative, duplicative, unduly burdensome or expensive in light of discovery completed in connection with any prior trial. (*Fairmont, supra*, 22 Cal.4th at pp. 254-255.)

merits. (See also *Beverly Hospital, supra,* 19 Cal.App.4th at p. 1296 [rejecting argument that the rule applied only to a completed trial and a mistrial was equivalent to no trial at all: "no rational distinction between a mistrial, order granting new trial and a reversal on appeal for purposes of restarting the discovery clock."].)[7]

The rule that discovery is automatically reopened following reversal on appeal is particularly applicable to expert witness discovery. This is because, as the court in *Fairmont* explained, in any trial of the matter following reversal of a prior judgment, the parties are not limited to the evidence introduced at a prior trial, but are entitled to introduce additional evidence. (*Fairmont, supra*, 22 Cal.4th at p. 253.) As applied to expert witnesses, this rule means that, following reversal of a prior judgment, the parties are entitled to change expert witnesses -- in fact, may be forced to do so because of the current unavailability of an expert selected perhaps years earlier; moreover, the parties may even elect to use an expert when they had not done so before. (See *Beverly Hospital, supra*, 19 Cal.App.4th at p. 1296 [automatic reopening of discovery, including deposing new experts, is consistent with policy of facilitating trial preparation, expediting trial and encouraging settlement because it will be more focused, intelligent and may lead the parties to rethink their settlement positions].)

We also find respondent's reliance on *Bonds v. Roy* (1999) 20 Cal.4th 140 to be misplaced. *Bonds* did not involve discovery of expert witness information in the context of a new trial following reversal of a judgment.

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[7] *Fairmont* referred to cases which were resolved in the trial court before the initial discovery cutoff date. We realize that the dismissal in the present case was *after* discovery was closed. The point we make in the text is that *Fairmont* acknowledged the reopening of the discovery time clock applied even where the appellate court's reversal does not follow a full trial on the merits.

3. *The Trial Court Improperly Excluded Evidence of Appellant's Opinion of the Value of His Property*

Also well taken is defendant's contention that the trial court erred in precluding him from testifying as to the value of the property he left at the duplex and recording studio.[8]

A property owner's opinion of the value of his property is generally competent evidence of that value. (Evid. Code, § 813, subd. (a)(2); see *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921 (*Schroeder*) [owner's opinion of value is sufficient to support a judgment based on that value].) The credit and weight to be given such evidence is for the trier of fact. (*Ibid*.)

But the generally recognized right of an owner to testify as to value is not absolute. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 661 (*Contra Costa*).) It is subject to Evidence Code section 814, which limits evidence of opinion of value to "such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property . . . ." In *Contra Costa*, *supra*, at page 661, the court held that, in "stating an opinion as to the value of property, an owner is bound by the same rules of admissibility as any other witness. [Citations.] To allow a witness's statement of reasons for his opinion to be used as a vehicle for bringing before the jury incompetent evidence would ' "create a disastrous break in the dike which stands against a flood of interminable investigation." ' [Citations.]"

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8 For the first time on appeal, appellant argues that his recording business lost "goodwill" when he was forced to move his studio and he should have been allowed to testify as to the value of that goodwill as a measure of damages. Since appellant did not raise the issue in the trial court, it has been waived on appeal. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776-777 ["It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial. [Citations.]"].)

"[T]he value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable." (Evid. Code, § 823.) *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, was an action for breach of a contract to sell the plaintiff certain restaurant and bar equipment. Following a nonjury trial, the trial court awarded the plaintiff specific performance or payment of $15,000 damages in lieu of specific performance.[9] Rejecting the defendant's challenge to the sufficiency of the evidence of damages, the appellate court found the plaintiff's testimony that he had owned and operated bars, was familiar with the cost of bar equipment, and that his investigation disclosed that the cost of obtaining similar equipment ranged from $25,000 to $75,000, was sufficient to support the award, reasoning that "[e]vidence of cost, uncontradicted by other evidence, is sufficient to support a finding of value. [Citations.]" (*Id*. at p. 218.)

In *Schroeder, supra*, 11 Cal.3d 908, the defendant was a common carrier from which husband and wife plaintiffs hired a driver to drive their van, loaded with their belongings, from Arizona to California. The van was totaled and most of its contents damaged when the van skidded off a mountain road during a sightseeing detour taken by the driver. A jury awarded the plaintiffs $25,000 on their action for breach of contract, fraudulent misrepresentation, and conversion of the contents of the van. Our Supreme Court affirmed, finding the evidence of damages sufficient to support the verdict where the wife based her opinion that the damaged property was worth $20,000 and had a salvage vale of $1,000 on the fact that she had accumulated the goods over a period of seven or eight years by using almost all the money from a $23,000 inheritance and an itemized list of the damaged items was introduced into evidence.

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9 In *Gerwin*, damages were governed by section 2713 of the Commercial Code, pursuant to which the measure of damages is the difference between the market price of and the contract price of undelivered goods. (*Id*. at p. 217.)

Here, pursuant to Evidence Code section 803, respondent sought to limit evidence of appellant's opinion of the value of the property he left behind at the duplex.[10] Respondent conceded that appellant could properly testify as to "when he bought it, what he paid for it, what he thought it was worth when he left it," but argued that he could not testify that the basis of his opinion was information provided to him by the excluded expert.[11] The trial court concluded that appellant could render his opinion as to value but could not "regurgitate" what the expert told him.

After appellant identified Exhibit 8 as a repair order for a Carruthers guitar, this colloquy followed: "[APPELLANT'S COUNSEL]: Do you recall the guitar? [¶] [APPELLANT]: I believe it was a Fender Precision Base. [¶] [APPELLANT'S COUNSEL]: Was that a guitar that was left at [the duplex]? [¶] [APPELLANT]: Yes. [¶] [APPELLANT'S COUNSEL]: Do you recall how much you paid for that guitar? It can be an approximate amount. [¶] [APPELLANT]: Between a thousand and $1,500. [¶] [APPELLANT'S COUNSEL]: How much was that guitar worth in March of 1998? [¶] [RESPONDENT'S COUNSEL]: Objection; foundation. [¶] THE COURT: Sustained. [¶] [APPELLANT'S COUNSEL]: Did you buy and sell guitars from the time you bought this Carruthers Guitar through March of 1998? [¶] [APPELLANT]: I bought and sold guitars, but not as a business. [¶] [APPELLANT'S COUNSEL]: Did you buy and sell different guitars? [¶] [APPELLANT]: Yes. [¶] [APPELLANT'S COUNSEL]: And were you familiar with the prices of Carruthers guitars? [¶] [APPELLANT]: Yes. [¶] [APPELLANT'S COUNSEL]: And in March of 1998, what

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10 Evidence Code section 803 provides that, upon objection, the court "shall[] exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

11 Respondent referred to a "list of equipment value for trial," which was apparently compiled by appellant's excluded expert and contained "internet printouts for equipment dated apparently within the last ten days. [¶] . . . Most of the printouts are dated sometime in 2006. They reference, I guess, a couple of internet sites."

do you estimate was the approximate value of this Carruthers guitar? [¶] [RESPONDENT'S COUNSEL]: Objection; foundation. [¶] THE COURT: Sustained. [¶] [APPELLANT'S COUNSEL]: Did you buy any Carruthers guitars in 1997? [¶] [APPELLANT]: No. [¶] [APPELLANT'S COUNSEL]: Did you buy any in 1996? [¶] [APPELLANT]: I don't recall. [¶] [APPELLANT'S COUNSEL]: Had you spoken to other musicians about the value of Carruthers guitars? [¶] [RESPONDENT'S COUNSEL]: Objection; calls for hearsay. [¶] THE COURT: Sustained. [¶] The question itself isn't a hearsay question, but the next bit of information would be, so I will sustain it on that basis."

After ascertaining that appellant was going to have to give evidence of the value of about 100 items he left at the duplex, the trial court ordered an Evidence Code section 402 hearing to determine how appellant was "going to prove to the court that the plaintiff can testify as to the fair market value of these items of property" as of March 1998.

At that hearing, appellant testified that he was a professional musician before he started buying recording equipment; he later sold some of that equipment in order to buy better equipment. He had read periodicals and done online research on the price of recording equipment. He also had experience buying and selling musical instruments. In the six months before March 1998, he did not buy or sell any musical instruments or musical equipment, but may have bought or sold recording equipment. In early 1998, appellant was familiar with the price of musical instruments and recording equipment in Los Angeles County. After sustaining respondent's relevance objection to the following question: "Now, if you were to testify as to the value of your property in 1998, how would you form your opinion?" the trial court found "there has not been proper foundation laid so that [appellant] can render an opinion as to the fair market value, fair market value, which is consistent with" CACI instruction 3501.

The trial court erred in finding appellant incompetent to testify as to the value of his property. First, the original premise of respondent's Evidence Code section 803 objection was that appellant could not properly base his own opinion on information

obtained from the excluded expert. Inasmuch as we have found the expert was improperly excluded, it was error to put this limitation on appellant's opinion evidence.

Second, under the reasoning of both *Schroeder, supra*, 11 Cal.3d 908 and *Gerwin, supra,* 14 Cal.App.3d 209, the evidence established that appellant was competent to opine as to the value of his musical and recording equipment. He was a professional musician with experience in buying and selling musical and recording equipment; he had kept abreast of the market by reading periodicals and doing online research. The weight and credibility of this evidence was for the trier of fact. (*Schroeder, supra,* at p. 921.)

Respondent's reliance on *Contra Costa* for a different result is unavailing. *Contra Costa* was an eminent domain action in which the landowner contended that the trial court improperly excluded evidence of the land's value, consisting of the opinions of an expert and the landowners. The appellate court affirmed, reasoning that the basis of each of the excluded opinions was a valuation methodology held improper under California law, as well as evidence of other methodologies not disclosed during discovery. (*Contra Costa, supra,* 5 Cal.App.4th at p. 656.) Here, the basis of appellant's opinion was not an improper methodology, or a valuation method not disclosed during discovery, but his own knowledge and experience buying and selling similar property.

DISPOSITION

The judgment of nonsuit is reversed. Appellant shall recover his costs on appeal.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.