

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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April 29, 2016

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RE: *State of Delaware upon the Relation of the Secretary of the Department of Transportation v. Emil Lewis Lesko, Trustee Under Revocable Trust Agreement of Emil Lewis Lesko, Dated June 4, 2003, and 7835.1765 Square Feet of Land (Permanent Easement), and 458.4545 Square Feet of Land (Temporary Construction Easements)*, C.A. No. S13C-01-032 RFS

Defendant's Motion *in Limine*: Denied.

Dear Counsel:

Defendant's Motion *in Limine*, filed on January 15, 2016, has been reviewed together with Plaintiff's contrary position. For the following reasons, the Motion is denied.

This condemnation case has been considered in several rulings. Multiple issues were decided for and against positions advanced by the parties. These rulings are incorporated by

reference as a matter of convenience and to avoid needless repetition.¹

Defendant's Motion seeks to exclude the "after value" opinion of the Department of Transportation's ("Plaintiff" or "State") expert, Joseph A. Chico ("Chico"). Essentially, the argument is that the rulings caused an imbalance, which in turn has created an unfair playing field. In the November 18, 2015 decision, the Court considered whether a letter dated July 27, 2015 ("July Letter"), authored by James R. Huston ("Huston"), would be admissible.² Huston is Defendant's commercial real estate expert. The July Letter was presented in an effort to lay a foundation to permit testimony from Russell Carlson ("Carlson") – a forensic arborist – about replacement costs for landscaping amounting to \$40,000. Through this avenue, Emil Lesko ("Lesko" or "Defendant") would state his opinion about the value of the property.

Earlier, in the February 2, 2015 decision ("February Decision"), the Court ruled that "Carlson's estimate, if it is to be admitted at all, must be tied to the contributory value of landscaping to market value."³ In the July Letter, Huston could not find matched pairs, *i.e.*, sales of properties with or without equivalent landscaping. The July Letter sought to demonstrate that the contributory value of landscaping could not be calculated for a market value opinion. Consequently, Carlson's estimate of \$40,000 as a replacement cost would be factored in the equation to provide just compensation.

¹*State v. Lesko*, C.A. No. S13C-01-032, at 27 (Del. Super. Feb. 2, 2015) (TRANSCRIPT) (denying defendant's motion *in limine*); *State v. Lesko*, 2015 WL 7776636, at *8 (Del. Super. Nov. 18, 2015) (granting plaintiff's motion *in limine*); *Lesko v. State*, 2015 WL 8773765, *1 (Del. Dec. 14, 2015) (refusing defendant's application for interlocutory review).

²*Lesko*, 2015 WL 7776636, at *3.

³*Lesko*, C.A. No. S13C-01-032, at 17-18 (Del. Super. Feb. 2, 2015) (TRANSCRIPT).

Yet, the absence of exactly matched pairs in the context of landscaping is not conclusive. Other properties, similar in size and location, were found, albeit without the extent of landscaping. Nonetheless, a real estate expert could make an upward adjustment for the contribution of landscaping as an improvement to market value based upon knowledge, experience, and research. According to a well-recognized treatise on the subject, “Appraisers have long recognized the important contribution of trees to real estate values. Numerous studies have been done that show conclusively that people are willing to pay more for treed lots.”⁴ The treatise cites publications, studies, and other sources to advance this proposition. An expert could potentially rely upon professional materials to support an upward percentage adjustment.⁵

Indeed, Section III of Lesko’s “Owner Opinion Market Value,” titled *Improvements Taken*, discusses contribution of the landscaping to market value. Addendum E lists fifteen sources of information including the National Association of Realtors. Market surveys, recognized research and studies, and polling of realtors also may be done when questions of market value are considered.⁶ Materials of this nature have the potential to further support an opinion of an expert that landscaping contributes to market value and should be reflected by a percentage adjustment.⁷ Lesko attempted to use hearsay information from a realtor on the subject

⁴2 Rathkopf’s *The Law of Zoning and Planning* § 20:16 (4th ed.).

⁵In principle, the opinion could reduce the after value by a percentage. The result should be the same as an upward adjustment to the before value.

⁶*See New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 2012 WL 5578866, at **3-4 (Del. Super. June 18, 2012), *rev’d on other grounds*, 65 A.3d 607 (Del. 2013).

⁷*See* D.R.E. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or

but cannot do so as he is not an expert.

Defendant argues that since Huston's opinion, as expressed in the July Letter, was not allowed, the Chico opinion using "before and after values" should be stricken as well. The February Decision addressed a similar type of objection. It was not persuasive and was rejected. In sum, Chico said he considered landscaping as a potential, contributory factor for fair market value. As previously ruled, Chico could be cross-examined as to how he formed his opinion.⁸ In other words, Chico could opine that the land was merely reduced in size without an adverse market effect with an explanation why no further adjustments were made.

Following the February Decision, Defendant had another opportunity to reconsider his approach to the case. As Huston is a qualified commercial property expert, he should be similarly qualified to give a residential opinion. An expert opinion explaining how landscaping contributed to fair market value was a plausible avenue that could have been developed. If properly done, such an expert opinion providing for a positive adjustment could be admissible. Like the Chico situation, it would be subject to cross-examination. The Commissioners would weigh the worth of competing opinions.

Despite Defendant's complaint, the rulings are balanced. Defendant declined to present an expert residential real estate opinion that used the before and after measure of just compensation with appropriate adjustments. The July Letter was an attempted bridge for Lesko

inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Upon objection, facts or data that are 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.").

⁸*Lesko*, C.A. No. S13C-01-032, at 4-6 (Del. Super. Feb. 2, 2015) (TRANSCRIPT).

ultimately to quote Carlson and to offer the Owner's Opinion that required expert support. Early on, the Court noted that Lesko could seek just compensation which may be variable depending upon what the highest or best use of the property may be. But, these variances must be supported "by competent evidence."⁹ Perhaps there was hesitation to use Huston in dual roles as a residential and commercial appraiser. His market value opinion on a commercial use was substantially less than what Lesko thinks the property is worth for residential purposes.

Finally, the issue posed by Defendant is like the proverbial straw man. At this juncture, Lesko seemingly wants to carry the day himself. As an owner, Lesko can give his opinion supported by nontechnical reasons consistent with Delaware law.¹⁰ However, there is no contest between experts on the measure of damages. Since Lesko has the burden of proof to show the fair market value of his property, the State has no obligation to present Chico's testimony. If Chico does not testify, Defendant's objection is moot.

Considering the foregoing, Defendant's Motion *in Limine* is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office

⁹*Id.* at 6 (emphasis added).

¹⁰Previously, Lesko was found to have sufficient familiarity with the comparable sales in Chico's report, and his opinion could reference them. *Id.* at 25.