



motions, Docs. No. 220-222, 225, for being filed after the court-imposed deadline for filing motions in limine. *Motion*, Doc. No. 232.

The Defendants have moved to quash a subpoena issued to the Defendant's expert, Kim Koenig. *Motion*, Doc. No. 230.

Intervening Defendant Community Oversight Foundation has moved to be dismissed because there are no claims for compensatory damages against it. *Motion*, Doc. No. 214.

The Plaintiff has moved to have its proposed stipulations read to the jury at trial. *Motion*, Doc. No. 205.

The Court will address each motion in turn.

## **I. MOTIONS IN LIMINE**

### **A. Standard of Review**

Motions in limine allow the Court to rule on the admissibility of evidence in advance of trial in order to expedite proceedings and give the parties advance notice of the evidence upon which they may not rely to prove their case. *See Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d. 436, 440 (7th Cir. 1997). To prevail on a motion in limine, the moving party must show that the evidence is clearly inadmissible. *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Oh. 2004). Courts are typically "reluctant to grant broad exclusions of evidence in limine because a court is almost always better situated during the actual trial to assess the value and utility of evidence." *Black v. Columbus Pub. Sch.*, No. 2:96-CV-326, 2007 U.S. Dist. LEXIS 68672, at \*2 (S.D. Oh. Sept. 17, 2007); *accord Sperberg v. Goodyear Tire & Rubber Co.*, 519 F. 2d. 708, 712 (6th Cir. 1975). If the Court does deny a motion in limine, however, the Court can reconsider the admissibility of the evidence as the proceedings give context to the

pretrial objections. *Black*, 2007 U.S. Dist. LEXIS 68672, at \*2.

### **B. Evidence Relating to Liability Determination**

The Defendants essentially request that the scope of the background information, concerning the imposition of the unconstitutional Instructions and the resulting litigation, provided to the jury be restricted. They identify five specific subject areas in which they allege the evidence is irrelevant or unfairly prejudicial or both. The Plaintiff opposes the motion, *Opposition*, Doc. No. 228, on the ground that this information is necessary to provide context for the jury.

First, the Defendants request that the events of 1991 and 1992 surrounding zoning decisions be excluded as irrelevant. They contend that the only relevant zoning facts are those concerning the current zoning on the Plaintiff's property and the reasons for the denial of the Plaintiff's June 29, 2004 zoning permit application. The Plaintiff counters that the 1991 and 1992 zoning history is necessary to lay the foundation for its expert's testimony, which relies on the possible uses of the Plaintiff's property in 2004. The Court concludes that this evidence is not irrelevant as it may be required to lay a contextual foundation for the jury and to establish the zoning status of the Plaintiff's property before the imposition of the Instructions. In other words, in order for the Plaintiff to prove damages resulting from a diminished capacity for commercial development as set forth in the Instructions, it is necessary to have evidence of the commercial development capacity of the property under the zoning regulations as they existed before the Instructions. These regulations come from the 1991 and 1992 zoning decisions. This portion of the Defendants' motion is accordingly **DENIED**.

Second, the Defendants request that the events leading up to the issuance of the January

19, 2004 Instructions imposing restrictions in the amount of permissible commercial development on the Plaintiff's property be excluded as irrelevant. They propose that the jury only be allowed to learn that commercial building restrictions were in place, that the Plaintiff's zoning application was denied because of those restrictions, that the Court has determined that those restrictions shouldn't have been imposed, that the Court ordered the restrictions lifted, and that multiple courts have determined that the application was properly lifted for other reasons. The Court agrees in part with the Defendants. The motivations behind the Instructions are not relevant to this claim for compensatory damages, and evidence on this point shall be excluded. *Howard v. Grinage*, 82 F.3d 1343, 1352 (6th Cir. 1996) (holding that defendants' motivation is "simply irrelevant in a post-deprivation procedural due process case"). The history of the zoning applicable to the Plaintiff's property, however, including the adoption and subsequent overruling of the Instructions, is relevant to the extent and duration of the unlawful restrictions on the commercial development of the Plaintiff's property. This history is also relevant to the Plaintiff's ability to rebut the Defendants' mitigation defense since the status of the Instructions affected the Plaintiff's ability to sell its property. The Court accordingly concludes that this portion of the Defendants' motion is **DENIED** in part and **GRANTED** in part.

Third, the Defendants move to exclude any evidence relating to anti-Wal-Mart sentiment on the part of local residents and Defendant Liberty Township Trustees as irrelevant. The Plaintiff argues that the anti-Wal-Mart bias is relevant to explain why the Instructions were instituted and why its zoning application was denied. The Court finds the Plaintiff's arguments unpersuasive. As stated above, the motivations behind the Instructions do not illuminate the existence or extent of the damages suffered by the Plaintiff as a result of their imposition,

*Howard*, 82 F.3d at 1352, nor do they provide useful background information. The Court accordingly **GRANTS** this portion of the Defendant's motion.

Fourth, the Defendants request that any pejorative references to the Instructions, such as "illegal," "unconstitutional," or "pretextual," be prohibited. They argue that these words serve only to inflame the jury and are not relevant to the determination of damages. The Plaintiff retorts that the Instructions are, as a matter of law, unconstitutional, and that there is no basis for the Defendants' request. This Court agrees. The reason the Defendants were enjoined from enforcing the Instructions is that this Court has concluded that they are unconstitutional. "Unconstitutional," "illegal," and similar words are merely accurate descriptors, and their use may provide useful contextual background for the jury. The Court therefore **DENIES** this portion of the Defendant's motion.

Fifth, the Defendants move to exclude evidence of the state court litigation, arguing that these issues should not be re-litigated and are irrelevant; the Plaintiff does not specifically address this request. The Court finds that evidence of the state court litigation cannot be excluded in its entirety at this time and will reserve ruling on this objection until trial. Although wary of the introduction of copious details about this litigation, this Court ultimately finds that this subject may be relevant to provide contextual information for the jury and to establish the status of the Plaintiff's zoning application at any particular moment in time. Accordingly, the Court **DENIES** this portion of the Defendants' motion.

### **C. Testimony of Plaintiff's Damages Expert**

The Defendants argue that Dr. Weiler's testimony should be excluded because his opinions are unreliable, speculative, irrelevant, and beyond his expertise.

The Defendants argue that Dr. Weiler's testimony is unreliable for two reasons. First, because Dr. Weiler assumed that the damages flowed from the unfulfilled Wal-Mart contract, which was unfulfilled because of the unconstitutional Instructions. They contend that the project failed for reasons unrelated to the Instructions; hence, Dr. Weiler's opinion is based on a false assumptions and is unreliable. *See Rose v. Truck Centers, Inc.*, 2010 U.S. App. LEXIS 16396, at \*19-20 (6th Cir. 2010) (affirming exclusion of expert testimony where expert assumed that position of bolts was identical at the time of his report and at the time of the accident). *Rose* is distinguishable from this case because the faulty assumptions alleged by the Defendants are matters of fact for the jury. The relationship between the Instructions and the Plaintiff's damages is the question of causation at the heart of this damages trial, *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 936 (6th Cir. 2004) (noting that "causation is a question of fact"), and the Court declines to grant such a broad exclusion of evidence at this time.

Second, the Defendants argue that Dr. Weiler's testimony is unreliable because he improperly ignored half of the land as valueless. *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1576 n.11 (11th Cir. 1989) (relevance of alternate uses); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004) (excluding expert testimony as unreliable when antitrust expert "failed 'to incorporate all aspects of the economic reality'") (citations omitted). The Defendants contend that Dr. Weiler's second theory, in which he calculated the value to the loss of temporary deprivation of the total use of land, is based on the value of the 16.874 out of 34.02 acres available for commercial development; this analysis ignores the alternate uses or value of the other 17.2 acres. The Plaintiff retorts that Dr. Weiler did not assume that the 34.02 acres would be split into two parcels but instead valued the entire parcel with 16.874 acres available

for commercial development. These arguments and the bases for Dr. Weiler's opinions are factual disputes which are appropriately to be decided by a jury; the Court concludes that the Defendants' motion on this point is without merit. Hence the Defendants' motion that Dr. Weiler's testimony should be excluded as unreliable is **DENIED**.

The Defendants next argue that Dr. Weiler's testimony is speculative because he assumes without support that the proceeds from the Wal-Mart sale would have gone into real property earning a 9% annual rate of return. For support of their position, the Defendants rely on *Joy v. Bell Helicopter Textron*, 999 F.2d 549, 569 (D.C. Cir. 1993) for support. In *Joy*, the plaintiff's expert, Dr. Glennie, testified in a products liability action to the value of the real estate investments of the deceased husband of the plaintiff over his estimated lifetime. *Id.* at 568. The appellate court concluded that the district court should have excluded this testimony on the ground that it was improper speculation. *Id.* at 569. Dr. Glennie based his estimate of the appreciation of a single piece of land in the Virgin Islands on the assumption that the deceased would have built a house on it and that the house would appreciate at 11% per year for the remainder of the deceased's projected life. *Id.* at 568. He arrived at 11% appreciation based on the value of the house the deceased has recently sold in the District of Columbia and on inflation. *Id.* Dr. Glennie did not research the experience of investors in the Virgin Islands housing market, and the circuit court concluded that his testimony was too speculative to have been admitted. *Id.*

Unlike in *Joy*, Dr. Weiler has stated that he arrived at the value of the property without the restrictions, the value of the property with restrictions, and the 9% rate of return after researching local market conditions and based upon his decades of experience in real estate.

These calculations are not speculative, and the Defendants have not shown that Dr. Weiler's testimony is clearly admissible. Although they may raise some of these arguments at trial to contest the weight the jury should give to Dr. Weiler, the Defendants' motion in limine on this ground is **DENIED**.

Finally, the Defendants contend that Dr. Weiler's testimony should be excluded because it exceeds the scope of his expertise. Dr. Weiler has conceded that he is not an expert on the time value of money, and the Defendants argue that he is therefore unqualified to testify on the rate of return the Plaintiff would achieve. The Plaintiffs argue in opposition that Dr. Weiler has opined on the rate of return on an investment in real estate, and that the depth of his training and experience in real estate development make him more than qualified to give such an opinion. The Court finds that the Defendants' objections go to the weight to be accorded Dr. Weiler's testimony, but not to the admissibility of such testimony. The Defendants' motion on this ground is also **DENIED**.

#### **D. Motion to Strike**

The Defendants have moved to strike all four of the Plaintiff's motions in limine for the tardiness of their filing. The Court ordered on October 15, 2010 that the Parties submit any motions in limine by November 8, 2010. *Order*, Doc. No. 189. Responses to any such motions were to be filed by November 15, 2010. All four of the Plaintiff's motions were filed on November 15, one week after the expiration of the motions deadline, with no explanation for their tardiness. The Defendants contend that none of the issues raised by the Plaintiff in its motion is a matter that could not have been anticipated by the November 8<sup>th</sup> deadline and that the motions should therefore be stricken. Having reviewed the Plaintiff's motions and the



Defendants' arguments, the Court concludes that the Defendants' motion is **GRANTED** in part. The Plaintiff's motions regarding offers of purchase, *Motion*, Doc. No. 221, and the testimony of Kim Koenig, *Motion*, Doc. No. 225, shall be stricken from the record. The Court notes, however, that the grant of the Defendants' motion does not preclude the Plaintiff from renewing its objections to this – or any other evidence – it considers inadmissible at trial.

The Court found that the explanations for the late-filing of the Plaintiff's motions regarding witness Mike Delhendorf, *Motion*, Doc. No. 220, and payment by Wal-Mart of the Plaintiff's attorneys' fees, *Motion*, Doc. No. 222, to be sufficient. It will therefore consider these motions on their merits.

**E. Mike Delhendorf and Testimony Regarding Alleged Threats Made by Charles Ruma**

The Court indicated at the final pretrial conference that it would only consider this motion to the extent that it sought to exclude the testimony of Mike Delhendorf, identified as a witness for the Defendants on November 8, 2010.

Ibex Development and Wedgewood Limited Partnership I were in negotiations for Ibex to purchase Wedgewood's property. Charles Ruma, the principal of Wedgewood Limited Partnership I, and Jim Coker of Ibex, had a phone conversation in 2008 in which Ruma allegedly made a threat to Coker. This threat is alleged by the Defendants to be the cause of the termination of the purchase agreement between the two companies. At the 2009 annual shareholders meeting of Wedgewood, Inc., Ruma allegedly lied to the shareholders about the reason the Ibex deal fell apart. Mike Delhendorf has been offered as a witness to testify as to the substance of Ruma's comments at the shareholders meeting.

The Defendants argue that Ruma's threats and statements to the shareholders are relevant

because they go to his efforts at selling the property – i.e. mitigation of damages – and that Delhendorf’s testimony is relevant because it goes to Ruma’s credibility. Delhendorf will testify that Ruma misrepresented having threatened Coker and that he misrepresented the reasons the Ibex deal fell through. The Plaintiff argues that Delhendorf’s testimony is irrelevant because it goes to comments made at a shareholder meeting of a company not a party to this case.

The Court finds the Defendants’ arguments persuasive. The truthfulness of Ruma’s remarks to the shareholders goes to his credibility on the demise of the Ibex deal, which goes towards the Defendants’ mitigation defense. Where the remarks occurred is of no import. The Plaintiff’s Motion is accordingly **DENIED**, and the Defendants may introduce Mike Delhendorf’s testimony on matters relevant to their mitigation defense and to the credibility of Charles Ruma.

#### **F. Payment by Wal-Mart of Plaintiff’s Attorneys’ Fees**

Wal-Mart’s payment of attorney fees to the Plaintiff comes from the testimony of Ron Belnap. Belnap has stated in deposition testimony that Wal-Mart contributed to the cost of litigation in furtherance of the Plaintiff’s attempt to obtain the requisite zoning permissions for the Wal-Mart plan to move forward. Plaintiff contends that any payments made by Wal-Mart towards the Plaintiff’s attorneys’ fees are irrelevant and should be excluded at trial. The Defendants argue that the payment of fees is relevant to demonstrate that on an ongoing basis, consideration was conveyed to Wedgewood for the right to acquire the property. In other words, Defendants argue that Wal-Mart’s continued pursuit of the litigation after the imposition of the Instructions shows that the property was worth at least \$155,000 per acre, or the price per acre in the original Wal-Mart contract, after the Instructions.

The Court is not persuaded by the Defendants' argument. The payment of fees goes to the apportionment of the fees between the Plaintiff and Wal-Mart for the litigation to secure a zoning permit for the project. It does not go towards the value of the property or any other issue relevant in this trial. The Plaintiff's Motion is **GRANTED**.

## **II. MOTION TO QUASH**

The Defendants have moved to quash the subpoena issued by the Plaintiff to Kim Koenig for a deposition and to produce documents on November 19, 2010 at 9 a.m. At the final pretrial conference held on November 17, 2010, the Court orally **DENIED** the motion. The Court allowed the deposition to go forward on what additional information Mr. Koenig has reviewed or in what manner his opinions have changed.

## **III. MOTION TO DISMISS**

Intervening Defendant Liberty Township/Powell Neighborhood Community Watch Foundation moves to be dismissed from the action because there are no claims for damages against it. The Intervenor states that its only connection to the case is the Plaintiff's Interim Motion for Attorneys' Fees and Costs, *Motion*, Doc. No. 188, and that the Plaintiff may not as a matter of law recover attorneys' fees from the Intervenor, *see Response*, Doc. No. 213. In its Reply, the Intervenor modified its request. Conceding that it would remain a party to the case for the purpose of the motion for fees, the Intervenor now moves only that it be dismissed for the purposes of the damages portion of the litigation and that the Court declare that the Intervenor is not subject to any damages award that may be issued at trial. *Reply*, Doc. No. 250. The Plaintiff has filed a notice that it does not oppose the Intervenor's amended request. *Notice*, Doc. No. 252.

The Court finds the Intervenor's amended arguments to be meritorious. The Intervenor's Motion to Dismiss for the purposes of the damages portion of the litigation is **GRANTED**. The Intervenor is still a party for purposes of determining whether Intervenor can be held responsible for Plaintiff's attorneys' fees and costs.

#### **IV. MOTION TO READ STIPULATION**

The Plaintiff has moved to read its proposed Stipulations 1 through 38 to the jury to provide necessary background information to the jury without the need for live testimony. *Motion*, Doc. No. 205. The Defendants object that Stipulations 2 through 38 are irrelevant to the issues at trial and prejudicial to the Defendants. *Response*, Doc. No. 224.

As discussed above in reference to the motions in limine, the Court finds that some information relating to the zoning history and liability determination is relevant to provide useful context for the jury on the claim for compensatory damages. With that in mind, the Court concludes that Stipulations 1-7, 25, 30, 31, 32, and 34 are relevant to provide context and are not prejudicial to the Defendants. Those Stipulations may be read to the jury.

Stipulations 8, 9, 11, 16, 17, 22, 24, 28, 29, 33, 35, 37 and 38 are not relevant or confuse the issues for the jury. Those Stipulations may not be read to the jury.

Stipulations 10, 12, 13, 14, 15, 18, 19, 23 are motivation evidence that the Court has ruled inadmissible. These Stipulations may not be read to the jury.

Stipulations 20 and 21 are relevant. The statement in Stipulation 20, however, that "the Trustees responded to the public's demands by issuing what they called" is impermissible motivation evidence and may not be read to the jury. Similarly, the statement "that prevented Wedgewood from developing a Wal-Mart SuperCenter" is a conclusory statement not supported

by the record. The Stipulation may instead read as follows: “On January 19, 2004, the Trustees issued the ‘Public Statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood Commerce Center Development Plain’ (the ‘January 19 Instructions’).” Stipulation 21 may be read to the jury as-is.

Stipulation 26 is partially relevant. The Stipulation may be read to the jury up to the word “certificate.”

Stipulation 27 is partially relevant. Only its first sentence may be read to the jury.

Stipulation 36 is relevant but misleading. The Stipulation may read as follows: “On October 21, 2008, the BZA upheld the September 30, 2004 denial of Wedgewood’s zoning application.”

The Motion is therefore **GRANTED** in part and **DENIED** in part.

#### **V. CONCLUSION**

For the foregoing reasons, the Court concludes

That the Motion in Limine of Defendants Concerning Facts Related to Court’s Liability Determination, *Motion*, Doc. No. 206, is **GRANTED in part** and **DENIED in part**. The motion is granted only with respect to evidence of the motivation of the Township or its residents that led to the adoption of the Instructions, which may not be introduced at trial;

That the Defendants’ Motion to Exclude the Testimony of Plaintiff’s Damages Expert Witness, Robert J. Weiler, *Motion*, Doc. No. 208, is **DENIED**;

That the Motion of Defendants to Strike, *Motion*, Doc. No. 232, is **GRANTED in part**. Accordingly, the following motions are stricken: Plaintiff’s Motion to Exclude Evidence Related to Offers Wedgewood has Received to Purchase the Property at Issue and Mary Bresnahan,

David Ruma, Paul Lukeman, and Tom Burrows, *Motion*, Doc. No. 221; and Plaintiff's Motion to Exclude Kim Koenig, *Motion*, Doc. No. 225;

That Plaintiff Wedgewood Limited Partnership I's Motion to Exclude Mike Delhendorf and Testimony Regarding Alleged Threats Made by Charles Ruma, *Motion*, Doc. No. 220, is **DENIED**;

That Plaintiff Wedgewood Limited Partnership I's Motion to Exclude Evidence Regarding Any Payment by Wal-Mart of Plaintiff's Attorneys' Fees, *Motion*, Doc. No. 222, is **GRANTED**;

That the Motion of Defendants to Quash Subpoena, *Motion*, Doc. No. 230, is **DENIED**;

That the Intervening Defendant Community Oversight Foundation's Motion to Dismiss, *Motion*, Doc. No. 214, is **GRANTED**. It is further **DECLARED** that the Intervenor is still a party for purposes of determining whether Intervenor can be held responsible for Plaintiff's attorneys' fees and costs; and

That the Motion of Plaintiff Wedgewood Limited Partnership I To Have Its Proposed Stipulations Read to the Jury at Trial, *Motion*, Doc. No. 205, is **GRANTED** in part and **DENIED** in part.

**IT IS SO ORDERED.**<sup>1</sup>

**Dated: November 24, 2010**

s/Algenon L. Marbley  
**ALGENON L. MARBLEY**  
**UNITED STATES DISTRICT COURT**

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<sup>1</sup>Remaining for trial are the Parties' cross-objections to the designations of deposition portions. *Defendants' Designation*, Doc. No. 200; *Plaintiff's Objection*, Doc. No. 219; *Plaintiff's Designation*, Doc. No. 204; *Defendants' Objection*, Doc. No. 224. The Court will issue a ruling on these objections on Monday, November 29, 2010.