2010

Department of Transportation v. James Ivers, Katherine G Havas and P and F Food Services : Brief of Appellee

Utah Supreme Court

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Utah Department of Transportation, Plaintiff
James Ivers, Defendant
Katherine G Havas, Defendant
P and F Food Services, Defendant

IN THE UTAH SUPREME COURT

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff / Appellee,	:	
v.	:	Case No. 20100511-SC
JAMES IVERS; KATHERINE G. HAVAS; and P & F FOOD SERVICES,	:	
Defendants / Appellants	:	

BRIEF OF PLAINTIFF / APPELLEE

Appeal from a Jury Verdict of the Second Judicial District Court, Davis County, Judge Michael Allphin

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LIST OF ALL PARTIES

To the best of Plaintiff's / Appellee's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF PLAINTIFF / APPELLEE

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78A-3-102(3)(j) (West 2009).

STATEMENT OF THE ISSUES

1. This matter is now on appeal for the third time. Before the first appeal, the parties settled all issues other than whether the defendants were entitled to seek severance damages for loss of view and loss of visibility. Defendants were paid the stipulated amount and a final judgment was entered. Can the defendants now seek further severance damages apart from for loss of view and visibility?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: UDOT raises this issue as an alternative ground for affirmance. Accordingly, there is no district court decision to be reviewed.

2. Did the jury instructions, taken as a whole, fairly instruct the jury as to the standard to be used in considering the damages the defendants suffered due to their partial loss of view?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: Defendants have failed to show where in the record they preserved their objections to the jury instructions. "Whether a trial court properly instructed the jury is a question of law, which we review for correctness. In reviewing a jury instruction, we consider the challenged instruction in context." Jensen v. Intermountain Power Agency, 1999 UT 10, ¶16, 977 P.2d 474 (citations omitted) (if the jury instructions as a whole fairly instruct the jury, it is not reversible error if one instruction, standing alone, is not as accurate as it might have been).

3. Defendants filed a motion in limine asking the district court to strike portions of an appraisal report because it partially relied on hearsay evidence. Have the defendants failed to meet their burden to show that the district court's denial of their motion in limine was prejudicial and not harmless?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: This issue is unique to the appeal and does not involve the review of a district court decision.

4. Did the district court abuse its discretion when it permitted the use of J. Philip Cook's appraisal report which relied, in part, on hearsay evidence?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: This issue was raised below by defendants' motion in limine. R. 736-55. The district court denied the motion. R. 830-35. District courts enjoy broad discretion in determining whether expert testimony should be admitted. An abuse of that discretion will only be found if no reasonable person would take the view adopted by the district court. T-Mobile USA, Inc. v. Utah State Tax Comm'n, 2011 UT 28, ¶41, 254 P.3d 752.

DETERMINATIVE STATUTE

There are no such determinative statutes.

STATEMENT OF THE CASE

On December 20, 2002, UDOT initiated this action to condemn a .048-acre strip along the side and front of the defendants' property. R 1-12. Defendants answered and alleged that they were entitled to severance damages for the impact of the condemnation on the remaining property. R. 25. On March 14, 2003, UDOT filed a motion in limine asking the district court to preclude the defendants from introducing evidence at trial of certain alleged severance damages, including damages for alleged loss of the right to view and visibility. R. 42-67. On May 30, 2003, the district court granted UDOT's motion. R. 150-61.

Defendants' first effort to appeal the district court's ruling was dismissed without prejudice on May 14, 2004 by the Utah Court of Appeals. The appeal was dismissed for lack of jurisdiction because the challenged ruling was not eligible for certification as a final order pursuant to Utah R Civ. P. Rule 54(b). R. 220-223.

The parties then stipulated as to all other issues in the action and a final judgment was entered on March 1, 2005. R. 238-51. Defendants received $104,500 for the condemned .048 acres of property and for damages to the remaining property. R. 239 at ¶4; R. 244. The stipulation and judgment expressly preserved the defendants' right to appeal the district court's ruling on UDOT's motion in limine. R. 240, 244. The stipulation resolved all relevant severance damage issues except for any loss of view or visibility that the defendants might have suffered. All other damages for diminutions in fair market value of the remaining property had been settled and the stipulated damages paid to defendants by UDOT.

On certiorari, this Court ruled that there was no protectable property interest in visibility, but that an easement for view could be damaged by construction beyond the boundaries of the landowners' property if the use of the condemned portion of the property was essential to the completion of the project as a whole. Ivers v. UDOT, 2007 UT 19, ¶¶25-26, 154 P.3d 802 (Ivers I). On a second appeal, this Court emphasized that the mandate from the first appeal was for the district court to hold a trial on the issue of

whether the defendants suffered any damages from their loss of view due to UDOT's actions. UDOT v. Ivers, 2009 UT 56, ¶31, 218 P.3d 583 (Ivers II).

On March 31, 2010, defendants filed a motion in limine to strike part of the testimony of UDOT's appraiser, J. Philip Cook (R. 702-22) to which UDOT responded. R. 760-62. The district court denied the motion on April 12, 2010. R. 830-35.

After a three-day trial, the jury found that defendants had failed to prove damages for diminution of the fair market value of their remaining property caused by its loss of view. R. 864. The district court entered judgment for UDOT on May 17, 2010. R. 868-70. Defendants filed their notice of appeal on June 14, 2010. R. 872.

On October 4, 2010, briefing in this appeal was stayed pending this Court's issuance of its decision in UDOT v. Admiral Beverage Corp., Case No. 20081054. That decision was issued on October 18, 2011, with rehearing denied on February 22, 2012. Admiral Bev., 2011 UT 62, 275 P.3d 208.

STATEMENT OF FACTS

The defendants have failed to address the evidence presented at the jury trial. Indeed, no transcript has been provided of the testimony received on the first day of trial. R. 842-43. Defendants only reference trial evidence twice in their brief, each time pointing to portions of Philip J. Cook's testimony attached to their brief as an addendum. Brief of Appellants at 7 & 16.

SUMMARY OF ARGUMENT

Before this Court reached its first decision in this matter, the parties had already settled most of the condemnation action. The parties agreed to how much UDOT was to pay for the condemned property and "for such damages to other property as may be recoverable under law by virtue of the acquisition as defined in the Complaint." R. 239 at ¶4. The defendants reserved the right to appeal the district court's order that held the defendants were not entitled to damages for loss of view and visibility. The district court entered its judgment confirming the parties' agreement.

After this Court's decisions in Ivers I and Ivers II, the only damage issue for the jury to consider was the diminution of the fair market value of the defendants' property caused by the loss of view. After this Court's decision in Admiral Beverage, defendants are now entitled to a trial on severance damages, if any, for their loss of visibility. All other possible damage issues had been settled by stipulation and judgment.

The defendants had already been paid for all of their severance damages with the exception of those resulting from their loss of view or visibility. Defendants have not challenged the settlement before this Court or the district court. The jury's verdict was correctly limited to the severance damages, if any, caused by the defendants' loss of view. But defendants have failed to even argue that the evidence was insufficient to support the jury's decision. Plaintiff agrees that this matter should be remanded to the district court for consideration of the severance damages, if any, the defendants have suffered due to

their loss of visibility. But defendants should not be allowed double recovery for any other severance damages that were already covered by the stipulation and judgment.

The jury instructions repeatedly state that the measure for deciding the defendants' damages for loss of view is the diminution of the fair market value of the remaining property. This is the correct standard and the jury verdict should be upheld.

While defendants appeal the denial of their motion in limine, they fail to meet their burden of showing a reasonable likelihood that the verdict would have been different if that portion of UDOT's appraisal report using hearsay evidence had been excluded. Indeed, defendants have failed to provide this Court a complete record of the trial.

Expert witnesses are permitted to rely on hearsay if it is the type of information reasonably relied upon by experts in their particular field of expertise. The district court correctly held that the hearsay in question met this standard.

ARGUMENT

I. DEFENDANTS HAVE ALREADY BEEN PAID THEIR SEVERANCE DAMAGES WITH THE EXCEPTION OF THOSE DAMAGES, IF ANY, CAUSED BY THEIR LOSS OF VISIBILITY

In their first two arguments, defendants ask this Court to reverse and remand the jury verdict and allow them to recover the entire diminution of the fair market value of their remaining property as severance damages. Brief of Appellants at 10-16. Defendants, however, fail to mention that they were compensated for such severance damages before this Court's first decision in this matter.

A. Defendants Seek to Recover Again Damages They Were Already Paid

This action involves the condemnation of less than one twentieth of an acre of land. The defendants, pursuant to their stipulation and the district court's judgment, received $104,500 in compensation for that small parcel of land and "for such damages to other property as may be recoverable under law by virtue of the acquisition as defined in the Complaint." R. 239 at ¶4. The stipulation for judgment was filed on February 17, 2005, almost two years before this Court's decision in Ivers v. UDOT, 2007 UT 19, 154 P.3d 802. Ivers I acknowledged that only claims of loss of view and visibility remained in this action. Ivers I, 2007 UT 19 at ¶1. The compensation that the defendants received under the stipulation included $56,250 for all severance damages other than those caused by the alleged loss of view and visibility. Ivers I, at ¶2 n.1. While Ivers I has been overruled in part by Admiral Beverage, 2011 UT 62, 275 P.3d 208, at no time have the defendants challenged the stipulation and judgment that predated Ivers I.

In Admiral Beverage, this Court held that severance damages to the remaining property, caused by the condemnation of a portion thereof, should be based "on the fair market value of [the] property before and after the taking" and should include "all factors that impact the market value of [the] remaining property." Admiral Bev., 2011 UT 62 at ¶43. Admiral Beverage overruled that part of Ivers I that limited severance damages to only those caused by the loss of a protected property right. Admiral Bev., 2011 UT 62 at ¶¶31-35.

Here, with the exception of severance damages related to the loss of view and the loss of visibility, the defendants have already been paid the amount they agreed to for such damages. To remand this matter as requested by defendants would permit them a double recovery.

In Admiral Beverage, this Court stated that it was restoring its "long-standing precedent allowing recovery for all damages that are caused by a taking." Admiral Bev. at ¶43. Thus, the law today is the same law that existed at the time the settlement agreement was made. Plaintiff negotiated with the defendants in good faith and paid the agreed upon amount. By entering into that settlement agreement the defendants released their claims for any severance damages other than those related to loss of view or visibility.

If defendants desired to challenge the settlement, they should have done so in Ivers I. It was their duty to raise the issue in their opening brief in that appeal. Because the defendants did not properly raise it in that opening brief, this Court would not reach that issue. State v. Brown, 853 P.2d 851, 854 n.1 (Utah 1992). Failure to raise an issue in the opening brief constitutes waiver of that issue. Gildea v. Guardian Title Co., 2001 UT 75, ¶7 n.1, 31 P.3d 543 ("However, it is well settled that 'issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.'") (quoting Brown v. Glover, 2000 UT 89, ¶23, 16 P.3d 540).

By failing to challenge the settlement agreement in their appeal that led to Ivers I, defendants waived any claim that they should be relieved from that agreement. This failure led this Court to issue a very limited mandate in Ivers I. The only issue that remained was whether the defendants were entitled to severance damages for their loss of view. If the defendants' condemned property was essential to the highway construction project, the district court was to "award appropriate damages." Utah Dep't of Transp. v. Ivers, 2009 UT 56, ¶20, 218 P.3d 583. Given the partial overruling of Ivers I, the defendants are now also entitled to an award of appropriate damages, if any, suffered by their loss of visibility.

B. Defendants Failed to Marshal the Evidence That Supports the Verdict

Admiral Beverage involved an interlocutory appeal from a motion in limine seeking to exclude from evidence particular appraisals. The appraisers stated that they could not isolate the diminution of the remaining property's fair market value that was caused by the loss of view and visibility. Admiral Bev., 2011 UT 62 at ¶¶4-6.

To the contrary, in this action both parties presented evidence from appraisers as to the damages the defendants had suffered from the partial loss of view caused by the highway project. R. 841-45, 881, 882. Having heard the evidence, the jury determined that "defendants [had] failed to prove damages for diminution of fair market value for loss of view." R. 864. Defendants have not claimed that their appraiser and witnesses

were unable to testify to the loss of fair market value due to the loss of view. Instead, the defendants ignore the actual evidence presented to the jury.

Defendants have not sought to marshal the evidence that supports the jury's verdict. "When challenging the sufficiency of the evidence in support of a jury verdict, '[t]he appealing party has the heavy burden of marshaling the evidence in support of the verdict and showing that the evidence, viewed in the light most favorable to the verdict, is insufficient.'" Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶31, 163 P.3d 615 (affirming jury verdict where appellant did not marshal the evidence and did not provide trial transcript).

Defendants acknowledge their burden (Brief of Appellants at 2) but make no attempt to meet it. As in Tschaggeny, defendants have neither marshaled the evidence that supports the jury's verdict, nor have they provided transcripts of the entire trial. The record does not contain a transcript of the first day of the trial. Without a complete record, the defendants cannot substantiate their claim of jury error. This Court should affirm the jury's verdict.

II. THE JURY WAS CORRECTLY INSTRUCTED TO AWARD DEFENDANTS AS SEVERANCE DAMAGES ANY DIMINUTION IN THE REMAINING PROPERTY'S FAIR MARKET VALUE THAT WAS CAUSED BY THEIR PARTIAL LOSS OF VIEW

Defendants have failed to show that the jury instructions did not, as a whole, fairly instruct the jury. Jensen v. Intermountain Power Agency, 1999 UT 10, ¶16, 977 P.2d 474 (if the instructions as a whole fairly instruct the jury, it is not reversible error if one

instruction, standing alone, is not as accurate as it might have been). Instead, the defendants complain that, following this Court's mandate, the jury instructions were limited to what severance damages were caused by the defendants' partial loss of view.

Defendants cite to an appraiser's testimony in Admiral Beverage that he was unable to isolate and identify separate values for loss of view and visibility. Brief of Appellants at 15, n.2. But defendants do not cite to the record where appraisers and others testified to the diminution of the fair market value cause by the loss of view in this action.[1] The jury heard testimony as to the amount, if any, that the partial loss of view diminished the remaining property's fair market value. Defendants have failed to marshal or cite to the trial evidence in this action from appraisers for both the plaintiff and defendants who testified as to what the defendants severance damages were for their partial loss of view. Indeed, the defendants have failed to provide a complete record that includes all the testimony of all of the witnesses.

Nor were the jury instructions contrary to this Court's decision in Admiral Beverage. The jury was instructed that the defendants had been previously compensated for the fair market value of the taken property other than the loss of view. R. 863, Instruction 48. They were repeatedly instructed that they should award the defendants for any diminution of the fair market value of the remaining property caused by the loss of

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[1] R. 881 at 55; R. 882. Defendants have not provided a transcript of the testimony received on the first day of trial.

view. R. 859-92, Instructions 33-43. The unique circumstances presented by this action distinguishes it from Admiral Beverage. Defendants have already been compensated for all diminution of fair market value on their remaining property through the stipulation and judgment entered by the parties before Ivers I. What defendants ask this Court to order is to strike their settlement agreement without ever mentioning it to the Court. To do so would provide defendants double recovery and to free them from an agreement that they have not even challenged.

Defendants have failed to meet their burden to show that the jury instructions, taken as a whole, did not fairly instruct the jury. The jury verdict was the result not of improper instructions, but of the evidence that was presented to the jury.

III. DEFENDANTS FAILED TO MEET THEIR BURDEN TO SHOW A REASONABLE LIKELIHOOD OF A DIFFERENT VERDICT IF DEFENDANTS' MOTION IN LIMINE HAD BEEN GRANTED

Defendants appeal the denial of their motion in limine. The motion sought to exclude from evidence that portion of J. Philip Cook's appraisal that used hearsay evidence. District courts enjoy broad discretion in determining whether expert testimony should be admitted. An abuse of that discretion will only be found if no reasonable person would take the view adopted by the district court. T-Mobile USA, Inc. v. Utah State Tax Comm'n, 2011 UT 28, ¶41, 254 P.3d 752.

Further, defendants had the burden to show not only that the district court abused its discretion, but that there was a reasonable likelihood that the jury's verdict would have

been different if the district court had not abused its discretion. Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1347 (Utah 1993). This showing is made when, viewing the evidence in the light most favorable to the jury verdict, there is a reasonable likelihood that a different result would have followed. Redevelop. Agency of Salt Lake City v. Tanner, 740 P.2d 1296, 1304 (Utah 1987).

Defendants have not even attempted to make this necessary showing. They have not marshaled the evidence that was before the jury. Defendants have failed to show the reasonable likelihood of a different result if portions of the appraisal report had been stricken. Erroneous admission of evidence is harmless if its exclusion would not have resulted in a different verdict. Gaw v. Dept. of Transp., 798 P.2d 1130, 1134 (Utah App. 1990).

Because defendants failed to meet this burden, this Court should not consider defendants challenge to Cook's appraisal report.

IV. EXPERTS CAN RELY ON HEARSAY TESTIMONY WHEN IT IS OF A TYPE REASONABLY RELIED UPON IN THE WITNESS'S FIELD OF EXPERTISE

Defendants claim that inadmissible hearsay cannot be used by experts in reaching conclusions and forming their opinions. Brief of Appellants at 16-24. They asked the district court to strike that part of UDOT's appraisal report that presented hearsay evidence (information gathered from individuals involved with the comparable properties

that were used in the appraisal) that confirmed the conclusions that the appraiser had reached. R. 816 at 51-54.

In claiming that such hearsay is comprehensively banned, defendants rely on Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979). But Edwards acknowledged that experts can rely on hearsay in forming their opinions. "We recognize that expert evidence is sometimes justifiably based in part on evidence obtained outside the courtroom . . . [b]ut such evidence is usually the type that an expert relies upon as a matter of course in forming opinions and is sufficiently reliable to warrant an opinion based thereon." Id. at 1332 n.2.

In rejecting a challenge to a doctor's testimony because it was based on inadmissible hearsay, this Court held that "[t]his contention has no merit. Facts or data used by a properly qualified expert in forming an opinion need not be in evidence if they are of a type reasonably relied on by experts in the witness's field of expertise." Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 839 (Utah 1984) (footnote and citations omitted).

This Court also approved the use of otherwise inadmissible hearsay by an appraiser in a condemnation proceeding in State v. Peterson, 12 Utah 2d 317, 366 P.2d 76 (Utah 1966).

> But a great deal of information must of necessity be acquired from others. In fact practically all of the knowledge of which anyone is possessed, including such vital information as his own name, age, and parentage, comes from sources which, in the broad connotation of the term, might be

> called hearsay. This is also true of the accumulated learning of mankind, which has sufficient credibility that the conduct of our daily lives and the foundations of our civilization and culture rest upon it.
>
> Any judgment as to the value of the property in question must be based on values of similar land in the locality, which in turn must be related to sales thereof. It would completely frustrate the use of expert witnesses if they were obliged to have been a party to each transaction or to have undergone all of the experiences and experiments which provide the knowledge upon which their opinions were based. The witness must have learned the constituent facts through the usual and various sources of information. The fact that Mr. Baum is an expert who devotes his time to that business is sufficient assurance that the information would not be distorted or misused. If he did so, the frailty would be subject to exposure on cross-examination. But the important point is that his opinion depends not only upon his personal credentials, but largely upon the manner in which it was arrived at.

Id., 12 Utah 2d at 319-20.

In making their general claim that hearsay cannot be used by an expert, defendants have not addressed the district court's actual holding. The district court relied upon this Court's opinion in Patey v. Lainhart, 1999 UT 31, ¶30, 977 P.2d 1193 (permitting doctor testifying as an expert to rely on hearsay information obtained from other medical professionals) for the proposition that experts can rely on hearsay so long as it is the type reasonably relied upon by experts in their particular field. R. 832. The district court expressly held that market participant interviews, such as those at issue, are "an acceptable method in the field of real estate appraisal." Id. In reaching this decision, the district court relied, in part, on two texts on real estate appraisal. R. 832-33.

The actual holding of the district court was that the market participant interviews used by UDOT's appraiser were the type of information reasonably relied on by real estate appraisers. The district court did not abuse its broad discretion. Defendants have failed to even argue that real estate appraisers do not use such hearsay, let alone that no reasonable person would take the view adopted by the district court. T-Mobile USA, Inc. v. Utah State Tax Comm'n, 2011 UT 28, ¶41, 254 P.3d 752.

CONCLUSION

For the reasons presented above, plaintiff urges this Court to affirm the jury verdict as to severance damages for loss of view. Plaintiff agrees that this matter should be remanded for the district court to determine what severance damages, if any, defendants have suffered for loss of visibility.

DATED this 30th day of July, 2012.

BRENT A. BURNETT
Assistant Attorney General
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing BRIEF OF PLAINTIFF / APPELLEE, postage prepaid, to the following this 30th day of July, 2012:

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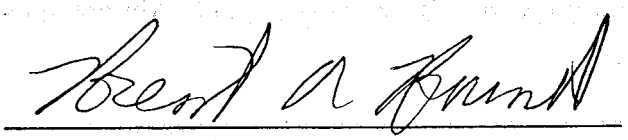

ADDENDUM "A"

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JAMES IVERS; KATHERINE G. HAVAS; P AND F FOOD SERVICES (Tenant); and ZIONS CREDIT CORPORATION, Defendants.	**RULING AND ORDER ON DEFENDANTS' MOTION IN LIMINE AND MOTION TO STRIKE PORTIONS OF J. PHILIP COOK'S APPRAISAL REPORT** Case No. 020700665 Judge Michael G. Allphin

This matter is before the Court on the defendants' motion in limine and motion to strike portions of J. Philip Cook's appraisal report. The Court has reviewed the moving and responding papers, as well as, their supporting documentation. Having considered all of the arguments, determined that a hearing is unnecessary for its ruling and order, being fully advised in the premises, and for the reasons set forth herein, the Court DENIES the defendants' motion.

RULING

Rule 702 of the Utah Rules of Evidence sets forth the basis upon which expert testimony may be admitted. *See* Utah R. Evid. 702(a) ("[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."). Pursuant to Rule 702:

> "Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case."

Utah R. Evid. 702(b). Moreover, "the threshold showing ... is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community." Utah R. Evid. 702(c). "When determining whether to allow expert testimony, the trial court must consider if there is a sufficient foundation for the expert's opinion. The trial court is allowed considerable latitude of discretion in the admissibility of expert testimony, and in the absence of a clear showing of abuse, [appellate courts] will not reverse." *Young v. Fire Ins. Exch.*, 2008 UT App 114, ¶21, 182 P.3d 911 (Internal quotations omitted); *see also Lamb v. Bangart*, 525 P.2d 602, 607-08 (Utah 1974).

Here, the defendants have argued that portions of J. Philip Cook's appraisal report should be stricken as unreliable and lacking adequate foundation. Specifically, the defendants argue that Mr. Cook's appraisal report relies upon inadmissible hearsay of lay persons, which is irrelevant and not of the type that an appraiser reasonably relies upon when forming an expert opinion. Additionally, the defendants assert that Mr. Cook's appraisal report fails to disclose the underlying methodology that he used to form his expert opinion.

With regard to an expert's reliance upon statements of lay witnesses, Rule 703 of the Utah Rules of Evidence states:

> "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 the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Utah R. Evid. 703. Further, the Utah Supreme Court has addressed the expanding scope of Rule 703, holding that:

> "The traditional rule has limited an expert's opinion testimony to personal experience and observation. ... More recently, *[Rule] 703 has broadened the basis for an expert's testimony* by specifying that facts or data used in forming an opinion or inference need not be admissible if of the type reasonably relied on by experts in the witness' field of expertise. ... [Accordingly,] once the expert is qualified by the court, the witness may base his opinion on reports, writings or observations not in evidence which were made or complied by others, so long as they are of a type reasonably relied upon by experts in that particular field. *The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility.*"

Patey v. Lainhart, 1999 UT 31, ¶30, 977 P.2d 1193 (quoting *State v. Clayton*, 646 P.2d 723, 725-26 (Utah 1982)) (Emphasis added).

In the instant matter, Mr. Cook's appraisal report indicates that he interviewed several market participants, i.e. certain managers of various neighboring businesses and similar fast food restaurants, regarding the effects that a loss of view would have on their businesses. *See* J. Philip Cook Appraisal Report, pg. 51-54. Mr. Cook then incorporated the information he obtained from these market participant interviews in conjunction with data research and case studies to establish his expert opinion on the value of the loss of view from the defendants' property. *See Id.* at pg. 54-55. Accordingly, the Court finds that Mr. Cook's market participant interviews were not the sole basis for his expert opinion. Further, the use of market participant interviews by real estate appraisers to aid in the formation of their opinion as to a property's value is an acceptable method in the field of real estate appraisal. *C.f.* Appraisal Institute, *The Appraisal of Real Estate*, pg. 272 (13th ed. 2008) (discussing the use of market participant interviews for the appraisal of

special-purpose buildings);[1] *see also* Appraisal Institute, *The Appraisal of Real Estate*, pg. 271 (12th ed. 2001) (discussing the market participants in the context of market definition and delineation).

Given that real estate appraisers use market participant interviews when determining property values, and that the scope of Rule 703 is expanding to permit expert testimony based upon observations not in evidence which were made by others, and because the subject interviews in this matter were not the sole basis of Mr. Cook's expert opinion, the Court finds that Mr. Cook's appraisal report is proper under Rules 702 and 703 of the Utah Rules of Evidence. Moreover, Mr. Cook's appraisal report discusses his qualifications to provide an expert opinion in this matter, which the defendants have not challenged, and addresses the data, analysis and basis for formation of an opinion as to the value of the subject property's "before condition" and "after condition." *See generally*, J. Philip Cook Appraisal Report. Mr. Cook also sufficiently identifies the market participants that were interviewed for his appraisal report, why these market participants were chosen for interview, and the information that was obtained from the interviews and how this information was implemented into the formation of his expert opinion. *See generally Id.* The Court, therefore, finds that sufficient foundation exists for the expert opinion rendered in Mr. Cook's appraisal report. In this matter, the defendants' challenges to Mr. Cook's appraisal report are more appropriately the subject of cross-examination and rebuttal expert opinion, rather than the instant motion in limine and motion to strike. *C.f.*

[1] The Court notes that while its specific citation to The Appraisal of Real Estate Thirteenth Edition discusses the use of market participant interviews in the appraisal of "special-purpose" buildings, the concept of using such interviews to aid in the determination of property values is, nevertheless, sufficiently analogous to the issues presented in the instant matter to draw an inference that market participant interviews are a method reasonably relied upon by experts in the field of real estate appraisal.

Lainhart, 1999 UT 31, ¶30, 977 P.2d 1193. Accordingly, the Court must DENY the defendants' motion in limine and motion to strike portion of J. Philip Cook's appraisal report.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the defendants' motion in limine and motion to strike portions of J. Philip Cook's appraisal report is DENIED.

Date signed: 4-12-10.

DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

MAILING CERTIFICATE

I certify that I sent, via email and the U.S. Postal Service, a true and correct copy of the foregoing **RULING AND ORDER ON DEFENDANTS' MOTION IN LIMINE AND MOTION TO STRIKE PORTIONS OF J. PHILIP COOK'S APPRAISAL REPORT** postage pre-paid, to the following on this date: 4/12/10.

Donald J. Winder
John W. Holt
WINDER & COUNSEL, P.C.
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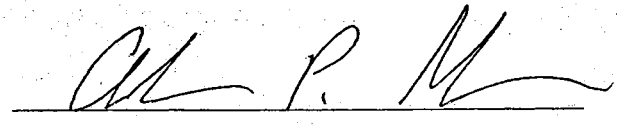

ADDENDUM "B"

IN THE SECOND DISTRICT COURT, DAVIS COUNTY

STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JAMES IVERS; KATHERINE G. HAVAS; and P AND F FOOD SERVICES (Tenant), Defendants.	**SPECIAL VERDICT** Case No. 020700665 Judge Michael G. Allphin

WE, THE JURY IN THE ABOVE ENTITLED ACTION:

1. _____ Find in favor of the defendants and against the plaintiff, and assess damages for diminution of fair market value for loss of view in the sum of $_____.

OR

2. _X_ Find in favor of the plaintiff and against the defendants in that the defendants have failed to prove damages for diminution of fair market value for loss of view and we decline to award the defendants a monetary sum.

DATED this 15 day of April, 2010.

Camille Bennion
FOREPERSON

ADDENDUM "C"

RANDY S. HUNTER (#9084)
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JAMES IVERS; KATHERINE G. HAVAS; P and F FOOD SERVICES (Tenant); and ZIONS CREDIT CORPORATION, Defendants.	**JUDGMENT ON VERDICT** Civil No. 020700665 Judge Michael Allphin

This matter came on for trial on April 13, 14 and 15, 2010, before the Honorable Michael Allphin of this Court. Plaintiff was represented by Randy S. Hunter, Assistant Attorney General, and Defendants were represented by Donald Winder and John Holt. A jury of eight persons was regularly impaneled and sworn to try said action. Witnesses on behalf of both parties were sworn and testified. After hearing the evidence, arguments of counsel and the instructions of the Court, the jury retired to consider their verdict, taking with them the exhibits which had been offered

and received and the written instructions of the Court. The jury subsequently returned to the Court and, through its foreman, said that they find a verdict for the Plaintiff and against the Defendants as follows:

> [We] find in favor of the Plaintiff and against the Defendants in that the Defendants have failed to prove damages for diminuation of fair market value for loss of view and we decline to award the Defendants a monetary sum.
>
> TOTAL AWARD $0.00

WHEREFORE, by virtue of the law and by reason of the premise aforesaid, it is

ORDERED, ADJUDGED AND DECREED that James Ivers and P and F Food Services, Defendants herein, recover from the State of Utah, no further monies; a stipulation and award of $104,500 having been stipulated to and ordered on the 6th day of June, 2003, leaving a balance of $0.00 owed by the State of Utah by Defendants.

DATED this 14 day of May, 2010.

BY THE COURT:

MICHAEL ALLPHIN
District Court Judge

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF UTAH

Approved as to Form:

DONALD WINDER
JOHN HOLT
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **JUDGMENT ON VERDICT** was mailed, postage prepaid, this 21st day of April, 2010, to:

Donald J. Winder
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/s/ Stacey K. Calvin
Secretary