

Filed 5/25/18

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN BERNARDINO COUNTY
TRANSPORTATION AUTHORITY

Plaintiff and Respondent,

v.

JONG UK BYUN et al.,

Defendants and Appellants.

D073458

(Super. Ct. No. CIVDS1302767)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Donna Gunnell Garza, Judge. Affirmed.

Daniel E. Park Law Corporation, Daniel E. Park, and Christopher C. Cianci for
Defendants and Appellants.

Nossaman, Richard E. Rayl, and Bernadette M. Duran-Brown for Plaintiff and
Respondent.

Jong Uk Byun and Central Metal, Inc. (collectively, appellants) seek to reverse the
trial court's exclusion of the testimony of their valuation expert, property owner Jong Uk

Byun, and a variety of undesignated witnesses who planned to testify regarding bids and proposals submitted to Central Metal for work related to moving and replacing items damaged during a government partial taking of the property where Central Metal operates. Appellants raise three arguments on appeal. First, they contend the court's exclusion of their valuation expert was improper because the expert was qualified to offer his opinion. Second, they contend the court's exclusion of their undesignated witnesses, including the property owner, was improper because they were percipient fact witnesses. Third, they contend the court's exclusion of all valuation-related witnesses is a per se error that justifies reversal because it was a violation of due process to exclude all valuation-related testimony. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2013, San Bernardino County Transportation (San Bernardino) filed an eminent domain complaint against Jong Uk Byun, Bok Soon Byun, and Central Metal Inc., as well as several easement holders and lien holders. There was no dispute as to the taking of the property, and the parties set trial on the valuation issue for August 18, 2014. On July 31, 2014, the parties exchanged expert witness lists and valuation statements under terms outlined in Code of Civil Procedure section 1258.230. Appellants deposed each of San Bernardino's designated experts by mid-September 2014. San Bernardino had difficulty taking the depositions of the appellants' expert witnesses, and in November San Bernardino filed a motion to compel the deposition of appellants' valuation expert.

Before the motion could be heard, appellants' counsel moved to withdraw, citing a breakdown in communication with appellants. In early February 2015, the court relieved

appellants' counsel from representation and set a new trial date for October 26, 2015. At the same time, the court ordered appellants to produce their valuation expert by August 28 or risk the expert's exclusion at trial.

In early July, new counsel substituted in as counsel for Jong Uk Byun and Central Metal, Inc. By the end of September 2015, appellants still had not produced their experts for deposition, and the court excluded their testimony from trial. In October, the court granted appellants' motion to continue trial and reopen discovery. It also set a new trial date of February 8, 2016. At the hearing on discovery in early November, the court set the deadline for the supplemental witness list 10 days out and ordered appellants to make their newly identified witnesses available for deposition on or before January 19, 2016.

Appellants met their supplemental designation deadline with a statement that two of the newly identified witnesses would "adopt" the statements of valuation data provided by the previously excluded experts. On November 19, San Bernardino served deposition notices for the various experts for two and one-half weeks later without first conferring with appellants' counsel. Appellants' counsel replied they were not available on any of the noticed dates. San Bernardino sent amended deposition notices for dates offered by appellants' counsel. Appellants' counsel replied they were unavailable on the amended dates. Finally, on January 13, 2016, appellants offered one expert for deposition January 18 or 19, and San Bernardino set the deposition for January 19. San Bernardino filed a motion to compel the deposition testimony of the remaining supplemental witnesses, or to alternatively exclude their testimony at trial. Before the hearing, appellants offered valuation expert Anthony Ghosn for deposition on January 21, two

days past the established deadline. At the hearing, appellants' counsel reported one of the two remaining experts was unavailable for six to eight weeks due to surgery, and had no specific information about the other expert's availability. The court granted the motion to exclude the testimony of the two experts whose depositions had not been scheduled at the time of the hearing, and it ordered Ghosn's deposition to go forward.

San Bernardino filed motions in limine seeking to exclude the testimony of the two deposed experts, as well as the undesignated valuation witnesses, including the property owner. The court held an Evidence Code section 402 hearing regarding the qualifications of one of the deposed designated experts, Tiffany Park, and subsequently granted the motion to exclude her testimony.¹ The court also held an Evidence Code section 402 hearing regarding the foundation of the valuation testimony Ghosn was adopting. Following the hearing and arguments, the court excluded Ghosn's testimony. Finally, after the court reviewed San Bernardino's supplemental briefing and heard arguments on the motion to exclude valuation testimony by undesignated witnesses for failure to comply with valuation exchange requirements, the court excluded that testimony as well. The result was that appellants were unable to present any valuation evidence because all valuation witnesses had been excluded.

¹ Appellants twice comment in the opening brief that they disagree with the trial court's exclusion of testimony by designated expert Tiffany Park. However, appellants do not offer any substantive argument for why the trial court's decision was made in error, so we deem this argument waived. (*Orange County Water Dist. v. Sabic Innovative Plastics U.S., LLC* (2017) 14 Cal.App.5th 343, 383 [noting failing to support a point with reasoned arguments and citations to the record results in waiver].)

Final judgment was entered October 3, 2016.

DISCUSSION

I.

Exclusion of Testimony of Expert Witness Anthony Ghosn

Appellants contend the exclusion of valuation expert Ghosn was an error because Ghosn properly relied on hearsay opinions in forming his own opinion, and any concerns about the quality of his work product could have been raised on cross-examination challenging the weight of the evidence.

A. Additional Background

The court heard testimony by Ghosn during a multi-day Evidence Code section 402 hearing. Ghosn testified that he was adopting the valuation opinion of one of the previously excluded experts.² He testified he reviewed financial information for Central Metal in preparation for earlier cases, so he was "very familiar with the financials of the company." None of that work involved reviewing financial information specific to the San Bernardino location, which is where the taking occurred. Ghosn testified he had reviewed the complaint, some deposition testimony, and some photographs, but was not aware of the notice of partial abandonment. He visited the location once, and he spoke with the former CFO, as well as with the owner, the property manager, and appellants'

² Because Ghosn only relied on one of the excluded experts for his opinion, we refer to that expert herein as the "excluded expert."

counsel. Ghosn also consulted several occupational reference guides to draw some conclusions.

Ghosn did not prepare his own written evaluation report. While he sampled some of the data, he did not review and analyze underlying raw financial data; nor did he prepare any financial schedules as part of his work on the case. Ghosn acknowledged during the hearing that he could not explain how some of the key financial information was determined. For example, he initially stated that the financial information for the San Bernardino facility should not include any information for the Barstow facility, and he could not explain why the excluded expert's report combined the information for these two facilities. He also did not know how the excluded expert calculated the salaries and wages numbers, and could only discuss how this data would typically be derived or extrapolated.

Ghosn also acknowledged on several occasions in his deposition and during the hearing that he was making assumptions about the accuracy of the financial information, stating he assumed the excluded expert did what Ghosn would have done had he done the work himself, and explaining he trusted that the excluded expert properly exercised professional judgment. Ghosn did not talk to the excluded expert, and he could not explain how the expert used the data to arrive at the numbers Ghosn used to reach his valuation conclusion.

B. Legal Principles

A trial court's ruling on admissibility of evidence is generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197; *Austin B. v. Escondido*

Union School Dist. (2007) 149 Cal.App.4th 860, 885.) In eminent domain cases, a trial court has considerable discretion to admit or reject valuation evidence. (*Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 86.) In the absence of a clear abuse of discretion, we will not disturb a trial court's determination that a witness is not qualified to testify as to value. (*County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, 119, fn. 2.) An abuse of discretion is one that no reasonable person could agree with because it is so irrational or arbitrary. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772 (*Sargon*).

"Trial judges have a substantial gatekeeping responsibility when it comes to expert testimony." (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493 (*Dry Canyon*)). The goal of the court as a gatekeeper is to ensure an expert employs the same intellectual rigor in the courtroom as he does in practice in the field. (*Sargon, supra*, 55 Cal.4th at p. 772.) This means the court must determine if the matter relied upon by the expert provides a reasonable basis for the expert's opinion or if it is based on conjecture or a leap of logic. (*Ibid.*)

It is proper for an expert to use hearsay facts provided by another expert to show the foundation of the expert's opinion. (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 709 (*Behr*)). When an expert relies on hearsay to develop an opinion, the court should strongly consider the necessity and reliability of the hearsay supporting the expert's opinion. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524 (*Korsak*), quoting 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 29.3, pp. 1001-1002.) Reliance on hearsay to support the expert opinion is not proper if

indications of reliability are not present. (*Korsak*, at p. 1524.) When an expert relies on hearsay without necessity for doing so and there is little indication of trustworthiness, a court is justified to find the expert's reliance was unreasonable. (*Ibid.*) Moreover, an expert cannot "relate an out-of-court opinion by another expert as independent proof of fact." (*Mosesian v. Pennwalt Corporation* (1987) 191 Cal.App.3d 851, 860 (*Mosesian*), citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 893-896, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250.) Instead, an "expert should base the opinion upon facts personally observed or upon a hypothesis supported by the evidence." (*Mosesian*, at p. 860.)

While an expert's reliance on the statements of another expert usually affects the weight of the testimony more than admissibility of the expert's opinion, when an expert's opinion relies substantially upon other opinions, it makes the expert's opinion worthless. (*Mosesian, supra*, 191 Cal.App.3d at pp. 861-862, citing *Pfingsten v. Westenhaver* (1952) 39 Cal.2d 12, 20.) "[A]n expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*).

C. Analysis

The trial court's decision to exclude Ghosn's valuation testimony was not arbitrary. It came after briefing, a multi-day Evidence Code section 402 hearing, and arguments.

The trial court carefully considered the information before it when it excluded the testimony. (See *Sargon, supra*, 55 Cal.4th at p. 776.) The purpose of the Evidence Code section 402 hearing was to evaluate the basis for Ghosn's testimony because the initial exchange of valuation information indicated he planned to adopt the opinion of a previously excluded expert.³ The court explained: "Mr. Ghosn wasn't able to independently take the foundational facts submitted, whether they be from the CPA or someone who calculated those basic categories of opinions and substantiate how those numbers presented and the conclusions that [the excluded expert's] report stated, how those numbers went from the foundational facts to [the excluded expert's] report were ascertained." As a result, the court concluded Ghosn "did not independently form an opinion based upon his own reasoning with respect to the valuation, rather he concurred and basically just somewhat repeated [the excluded expert's] opinion without substantiating the foundational facts and how they arrived at that decision."

Ghosn testified he based parts of his opinion on personally observed general facts, like his general knowledge of Central Metal's business plan and how it derived its income. Even though Ghosn met with the owner and the manager, as well as with appellants' counsel to gather information, the foundational facts, including assumptions developed from initial data gathered by the first expert, derived almost entirely from the excluded expert's report. For example, when questioned about detailed financial

³ The court excluded the testimony of the first valuation expert designated by appellants because the expert failed to appear at deposition despite the court's order to do so.

assumptions on which the valuation opinion was based, Ghosn was not able to explain how the excluded expert relied on those assumptions or why they were appropriate foundational facts on which he could rely. (See *Mosesian, supra*, 191 Cal.App.3d at p. 860.) While Ghosn could offer some possibilities for how the excluded expert might have arrived at the financial assumptions on which the valuation amount was based, he could not do so with certainty, demonstrating that the foundational information lacked reliability. (See *Korsak, supra*, 2 Cal.App.4th at p. 1524.) Because the excluded expert's data was not reliable and Ghosn did not independently gather the necessary data for use in valuation, the court was justified in excluding the testimony. (See *ibid.*) Although an expert may rely on another expert's hearsay opinions (*Behr, supra*, 172 Cal.App.2d at p. 709), what Ghosn did extended beyond such reliance—his wholesale adoption of the excluded expert's opinion without the ability to justify or explain the excluded expert's assumptions made Ghosn's opinion of no value. Ghosn's testimony would not have provided meaningful assistance to a jury charged with determining valuation based on his opinion. (*Jennings, supra*, 114 Cal.App.4th at p. 1117.)

The court exercised its discretion reasonably, and we will not disturb it here on appeal.

II.

Exclusion of Testimony of the Property Owner and Other Percipient Witnesses

Appellants contend it was an abuse of discretion to prevent various witnesses from providing evidence on costs. Specifically, appellants contend the court erred when it prevented the property owner and business manager, as well as those submitting bids and

proposals to repair or replace items damaged on the property, to provide testimony related to damages appellants suffered, including lost profits and replacement costs. They further contend the failure to allow this testimony, particularly when the designated expert testimony was excluded, constituted a per se error justifying reversal. We disagree.

A. *Legal Principles*

"[A] general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*Rose v. State of California* (1942) 19 Cal.2d 713, 723-724.) California has a unique set of statutes that govern valuation in eminent domain matters, including the procedures parties follow for discovery. (Code Civ. Proc., § 1258.230 et seq.)⁴ Thus, while general rules of civil procedure are relevant, in condemnation cases, the more specific eminent domain statutory scheme applies.

The eminent domain statutes expressly state the measure of compensation for property taken via eminent domain is "fair market value." (§ 1263.310; *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 743-744 (*Neumann*); *San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 925 (*Cushman*).) Fair

⁴ Further undesignated statutory references are to the Code of Civil Procedure unless otherwise noted.

market value is the highest price on the date of valuation that would be agreed to by a willing buyer and seller under no necessity and with full knowledge of how the property could reasonably be adapted and available. (§ 1263.320, subd. (a).) If the acquired property is part of a larger property, the owner must be compensated both for the property taken and for injury to the land the owner retained, reduced by the amount of benefit to the retained land, also called severance damages. (*City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678-679 (*Rudvalis*), citing § 1263.410; *Neumann*, at pp. 744-745.)

Severance damages are typically measured by comparing the fair market value of the land retained before and after the taking. (*Rudvalis, supra*, 109 Cal.App.4th at pp. 678-679; *Neumann, supra*, 6 Cal.4th at p. 745.) Severance damages can also be measured using a cost-to-cure method, which is the expense to "restor[e] the injured property to the same relative position to the public work in which it stood before its construction." (*People ex rel. Dept. of Public Works v. Hayward Bldg. Materials Co.* (1963) 213 Cal.App.2d 457, 465 (*Hayward*)). Evidence of replacement costs bears on the net loss in the market value of remaining property after the property has been severed. (*Id.* at pp. 467-468.) Thus, testimony regarding costs to move machinery and structures and to replace property, as well as the bids for doing the work, is evidence of cost-to-cure, and is part of the valuation analysis.

A party may also be compensated for goodwill. (*Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 366 (*Attisha*), citing *City of Vista v. Fielder* (1996) 13 Cal.4th 612, 616; see §§ 1263.510, subd. (b), 1263.520.) Goodwill is "the benefit[] that accrue[s] to a business as a result of its location, reputation for

dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage." (§ 1263.510, subd. (b).) It is the "amount a willing buyer would pay for a going concern above the book value of the assets." (*Attisha, supra*, 128 Cal.App.4th at p. 367.) Goodwill analysis requires evidence that establishes value and represents the present value of anticipated profits. (*Id.* at p. 368, quoting *City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 389; see *Dry Canyon, supra*, 211 Cal.App.4th at pp. 493-494 [discussing goodwill].) Thus, the lost profits testimony helps establish the business's goodwill and is part of the valuation analysis.

Section 1258.250, which applies here, requires "[a] statement of valuation data [to] be exchanged for each witness who will testify to his opinion regarding *the value of the land and any other amount of compensation* required under the Eminent Domain Law." (*Escondido Union School Dist. v. Casa Sueños De Oro, Inc.* (2005) 129 Cal.App.4th 944, 977 (*Escondido Union*), italics added; § 1258.250, subds. (a)-(d).) The statement of valuation should include replacement cost calculations. (*Escondido Union*, at p. 977.)

Moreover, "[n]o party required to serve statements of valuation data on the objecting party may call a *witness* to testify on direct examination during his case in chief to his opinion on any matter listed in Section 1258.250 unless a statement of valuation data for such witness was served." (§ 1258.280, subd. (b), italics added.) The statute is not limited to any class of witnesses; it applies to all witnesses who testify regarding valuation, including property owners. (See *Padre Dam Municipal Water Dist. v. Burkhardt* (1995) 38 Cal.App.4th 988, 992 (*Padre Dam*); *Contra Costa Water Dist. v.*

Bar-C Properties (1992) 5 Cal.App.4th 652, 661 (*Bar-C Properties*) [owner is bound by same rules of admissibility as other witnesses]; *Attisha, supra*, 128 Cal.App.4th at p. 378 [owner testimony regarding goodwill must comply with eminent domain disclosure requirements].)

B. Analysis

As an owner, Byun had the right to testify as to his property's value and goodwill (Evid. Code, § 813), but he was nonetheless bound to follow the disclosure exchange requirements because he was offering valuation testimony. (*Bar-C Properties, supra*, 5 Cal.App.4th at p. 661.) Thus, Byun's right to testify did not excuse his failure to sign and exchange a supporting statement of valuation data. (See *Padre Dam, supra*, 38 Cal.App.4th at p. 993.) The other witnesses similarly were bound by the discovery exchange requirements of section 1258.280 because their testimony as to the costs associated with moving and replacing property damaged by the government's taking regarded valuation, and the disclosure exchange requirements apply to all witnesses. (See Eminent Domain Law (Dec. 1975) 13 Cal. Law Revision Com. Rep. (1976) p. 1187 [explaining section 1258.250 "requires that a statement of valuation data be provided for each person who is to testify to his opinion . . . whether or not that person is to qualify as an expert" and using an owner as an example of the type of witness to whom the provision applies].) Because Byun, the Central Metal property manager, and the witnesses prepared to testify as to their bids and proposals regarding repair and replacement costs did not exchange valuation data as required under the statute, the court was well within its discretion to exclude their testimony.

On appeal, appellants contend they would have introduced evidence of "incidental/related costs." They do not identify what these costs are separate from the costs-to-cure. Though there are situations where alternative measures of damages may be used because fair market value cannot offer just compensation, there is nothing in the record to suggest why that would be the case here.⁵ (See *Pacific Gas & Electric Co. v. County of San Mateo* (1965) 233 Cal.App.2d 268, 274-275 (*Pacific Gas*) [listing possible alternative methods of measuring damages, including the cost of making repairs]; but see *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807-808 [noting the "cost of repair" is only appropriate when warranted by peculiar facts like those found in *Pacific Gas*].) Here, the unidentified "incidental costs" relate to valuation because they identify the value lost to the property owner from the taking. Thus, they are governed by the same disclosure and testimony rules that govern other valuation methods, including the exchange requirements of section 1258.250.

Byun and the other witnesses did not comply with the disclosure requirements, so the court did not abuse its discretion by excluding their testimony.

⁵ Appellants cite *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327 (*Locklin*) and *Paterno v. State of California* (2003) 113 Cal.App.4th 998 (*Paterno*) as evidence an owner can testify about costs. Neither supports appellants' contention. *Locklin* explains the constitutional basis for compensating a property owner for uncompensated damage caused by a public improvement in an inverse condemnation action. (*Locklin*, at p. 362.) The court did not discuss how to measure the actual physical injury; it focused on liability issues. (*Id.* at p. 362.) In *Paterno*, the court recognized the public should bear its share of costs for a public improvement, including damages, but it did not discuss how to measure damages. (*Paterno*, at p. 1015.) Neither is relevant to the requirement that valuation witnesses comply with the statutory disclosure requirements.

Appellants' contention that the exclusion of all their valuation witnesses was a *per se* reversible error because it deprived them of a fair hearing is unpersuasive. The premise of the argument is that the court's exclusion of all witness testimony was erroneous. (See *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114.) As explained *ante*, it was not. Accordingly, appellants suffered no failure of due process. It is also not a violation of due process to exclude witnesses when there is repeated failure to comply with discovery requirements because a trial court has wide discretion to determine if there is good cause for delay in presenting valuation data to an opposing party. (*City of Santa Clarita v. NTS Technical Systems* (2006) 137 Cal.App.4th 264, 275-276.) Here, San Bernardino repeatedly attempted to take discovery of the initially-designated witnesses without success, resulting in their exclusion from trial. Then, appellants failed to comply with the court-ordered deposition deadline after the court reopened and extended the discovery deadline. While the court was within its discretion to permit the deposition testimony to move forward after the deadline, there was evidence of a pattern of delay in providing valuation information to San Bernardino. Moreover, the percipient witnesses never disclosed any statements of valuation. Allowing testimony on valuation for the first time at trial is inconsistent with the requirement for timely disclosure of the valuation evidence so that parties can properly prepare for trial. (*Id.* at p. 277.) There was no violation of due process here.

DISPOSITION

The judgment is affirmed. San Bernardino shall recover its costs on appeal.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

05/25/2018



KEVIN J. LANE, CLERK
By _____
Deputy Clerk

A handwritten signature in blue ink, appearing to read "Kevin J. Lane", written over the printed name and title.