

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1005

CITY OF BATON ROUGE AND PARISH OF EAST BATON ROUGE

VERSUS

JAY'S DONUTS, INC.

DATE OF JUDGMENT: FEB 10 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 588,811, SEC. 25, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

Mary E. Roper
Leo J. D'Aubin
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellant (2nd)
City of Baton Rouge and Parish of
East Baton Rouge

Lawrence E. Marino
George O. Luce
Baton Rouge, Louisiana

Counsel for Defendant-Appellant (1st)
Jay's Donuts, Inc.

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: MOTION TO DISMISS DENIED; REVERSED AND REMANDED.

KUHN, J.

Defendant-property owner, Jay's Donuts, Inc. (Jay's Donuts), appeals the trial court's judgment, which awarded it \$288,805.00 as just compensation in addition to the original deposit of \$599,000.00 (for a total of \$887,805.00) that the plaintiff-expropriator, the City of Baton Rouge and Parish of East Baton Rouge (the City/Parish), placed in the registry of court for its expropriation of property required for use for a public purpose. The City/Parish appeals the quantum of the trial court's award of attorney's fees in favor of Jay's Donuts. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2010, the City/Parish filed a petition seeking to expropriate immovable property owned by Jay's Donuts in connection with the acquisition of land necessary for the green light plan – South Harrell's Ferry Road (segment 2) improvements. In conjunction with the expropriation, the City/Parish estimated that the just compensation to which Jay's Donuts was entitled as a result of the expropriation of its property would not exceed \$599,000.00 and deposited that amount into the court's registry. Jay's Donuts answered the lawsuit, asserting that just compensation was in excess of \$599,000.00. The City/Parish subsequently deposited an additional amount of \$283,805.00 into the court's registry. The matter proceeded to trial and, on August 30, 2011, the trial court issued oral reasons for judgment, awarding Jay's Donuts \$5,000.00 in addition to the amounts already deposited into the court's registry for total just compensation in the amount of \$887,805.00.¹ After a hearing, the trial court awarded Jay's Donuts attorney's fees in the amount \$55,915.43, as well as interest and all unpaid court costs. A judgment

¹ The judgment states in particularity that Jay's Donuts is awarded "the additional amount of ... \$288,805.00 ... as just compensation for the expropriation herein, in excess of the original deposit of ... \$599,000.00"

in conformity with the trial court's rulings was signed on February 23, 2011. This appeal by the parties followed.

DISCUSSION

At the trial of this matter, the trial court refused to qualify as an expert Jay's Donuts' witness, Michael Daigle, whose testimony was to be a valuation of the full extent of the loss of the pecuniary position of Jay's Donuts as a result of the City/Parish's expropriation of the owner operated business's property. Jay's Donuts challenges the propriety of the trial court's ruling excluding its expert's testimony, suggesting that it was prejudicial error.

If 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. La. C.E. art. 702. The factual basis for an expert's opinion determines the reliability of the testimony. An unsupported opinion can offer no assistance to the fact finder and should not be admitted as expert testimony. *Miramon v. Bradley*, 96-1872 (La. App. 1st Cir. 9/23/97), 701 So.2d 475, 478. The trial court's inquiry must be tied to the specific facts of the particular case. The abuse of discretion standard applies to the trial court's ultimate conclusion as to whether to exclude expert witness testimony and to the court's decision as to how to determine reliability. *Brown v. City of Madisonville*, 2007-2104 (La. App. 1st Cir. 11/24/08), 5 So.3d 874, 881, writ denied, 2008-2987 (La. 2/20/09), 1 So.3d 498.

La. Const. Article I, § 4(B) provides, in pertinent part:

(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. ...

(5) In every expropriation ..., a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.

Accord La. R.S. 48:453C (stating that the Department of Transportation and Development (DOTD) shall compensate an owner of expropriated property to the full extent of his loss). The very purpose of this constitutional language is to compensate the owner for any loss he sustained by reason of the taking, not restricted to the market value of the property taken. *State through Dep't of Highways v. Constant*, 369 So.2d 699, 702 (La. 1979).

Thus, a landowner whose property is expropriated is to be compensated so that he remains in an equivalent financial position to that which he enjoyed before the taking. See *State, Dep't of Transp. and Dev. v. Restructure Partners, L.L.C.*, 2007-1745 (La. App. 1st Cir. 3/26/08), 985 So.2d 212, 220, writ denied, 2008-1269 (La. 9/19/08), 992 So.2d 937. The burden of proof on the property owner in an expropriation case is to establish his claims by a reasonable preponderance of the evidence; speculation, conjecture, mere possibility and even unsupported probability are not sufficient to support a judgment. *Id.*

Income figures of a defendant's business from which the capitalized value of their economic operations might be found and from which the capitalized value of the percentage of (or entire) loss of business income might be ascertained (or, rather, estimated) affords an appropriate basis for a pecuniary award for a business's loss occasioned through the taking of immovable property indispensable to defendant's business activities. See *Constant*, 369 So.2d at 704-05; see also *City of Baton Rouge/Parish of East Baton Rouge v. Broussard*, 2002-0166 (La. App. 1st Cir.

12/31/02), 834 So.2d 665, 667-68, writ denied, 2003-0652 (La. 5/30/03), 845 So.2d 1056 (costs for loss of business and profits, as well as for relocation, inconvenience and replacement are compensable items in the trial court's determination of the full extent of a business's loss as a result of expropriation of its immovable property).

In the testimony the parties were able to elicit prior to the trial court's disqualification of him as an expert, Mr. Daigle testified that he was certified as a public accountant and also certified in financial forensics (CPA/CFF). He explained that he had developed a specialty in expropriation litigation, particularly as it relates to owner occupied businesses. He has worked alongside with the DOTD for the State of Louisiana to develop a standardized methodology to use in the unique situation where the department has expropriated immovable property to expand two-lane highways into four-lane highways and many owner operated businesses have been displaced as a result of the expansion. His goal in valuation is to pay owners the full extent of their loss and pecuniary position.

During the City/Parish's *voir dire* of Mr. Daigle, the CPA/CFF was asked whether his valuation included the land and buildings. Mr. Daigle explained that the valuation included the value of all tangible and intangible assets as it related to the pecuniary position of the owner in those assets. Although he answered that "yes" the tangible assets included the land and buildings, Mr. Daigle clarified that his testimony was an estimate of the value of the owner's pecuniary position in those tangible assets, which was a different valuation than providing an estimate of the value of the assets themselves. Mr. Daigle further articulated that "pecuniary position" was concerned with cash flows produced by all the assets the business owned, including the land. His valuation was an estimate of the cost to restore the business to the cash flow it had lost as a result of the expropriation of its property.

In this case, Mr. Daigle testified that he believed Jay's Donuts was receiving \$231,000.00 per year in discretionary cash flow that he then capitalized to reach a total loss of \$1,580,000.00 as a result of the expropriation of its property.

Mr. Daigle explained that there were actually two pecuniary positions in the unique situation where an expropriation displaces an owner operated business. He described how one position dealt with the fair market value of the land and improvements; and that the other position, for which he was offering a valuation, was completely separate, distinct, and independent from a fair market valuation. That pecuniary position evaluated cash flows created by a business enterprise and converted that flow to value based on a market capitalization rate determined by the risk profile.

In ruling that Mr. Daigle was disqualified, the trial court honed in on Mr. Daigle's affirmative response to the City/Parish's inquiry of whether valuation of the business enterprise based on cash flows encompassed the land and improvements, without considering Mr. Daigle's explanation that the tangible property was included in a generic sense. Apparently, the trial court was convinced that Mr. Daigle's methodology in valuation usurped the role statutorily designated to real estate appraisers, see La. R.S. 37:3393,² to perform an appraisal, *i.e.*, "an analysis, opinion, or conclusion relating to the nature, quality, value, or utility of

² La. R.S. 37:3393C provides:

It shall be unlawful for any individual, for a fee or other valuable consideration, or with the intention or expectation of receiving or collecting a fee or valuable consideration from another, to do any of the following unless the individual is licensed under this Chapter:

(1) Be employed to perform or perform an appraisal as defined in this Chapter where the subject property of the assignment lies within the borders of the state of Louisiana.

(2) Present himself, or allow himself to be presented, as being able to perform an appraisal for which a license is required under this Chapter.

specified interests in, or aspects, including energy efficiency, of, identified real estate, for or in expectation of compensation.” See La. R.S. 37:3392(1). But as noted by the *Constant* court, income figures of a defendant’s business from which the capitalized value of their economic operations might be found and from which the capitalized value of the percentage of (or entire) loss of business income might be ascertained (or, rather, estimated) affords an appropriate basis for a pecuniary award for a business’s loss occasioned through the taking of immovable property indispensable to its business activities. Mr. Daigle clearly testified that his valuation was his opinion of the business’s loss of pecuniary position, not an analysis of the nature, quality, value, or utility of specified interests in identified real estate, *i.e.*, “an identified parcel or tract of land, including improvements.” See La. R.S. 37:3392(9). Accordingly, we find that the trial court’s exclusion of Mr. Daigle’s expert testimony on this basis was an abuse of its discretion, and that the CPA/CFF’s valuation of the full extent of Jay’s Donuts’ loss as a result of the expropriation of its property based on a loss of the business’s pecuniary position should have been considered in the determination of the amount of just compensation to which the property owner is entitled.³

Motion to Dismiss:

While the appeal was pending in this court, the City/Parish filed a motion to

³ The record does not support a finding that the trial court concluded that the proposed expert testimony was either irrelevant or unreliable, both of which are properly the subject of a separate hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). See *Fussell v. Roadrunner Towing and Recovery, Inc.*, 99-0194 (La. App. 1st Cir. 3/31/00), 765 So.2d 373, 377-78, writ denied, 2000-1264 (La. 6/23/00), 765 So.2d 1042. In light of the supreme court’s pronouncement suggesting that the valuation offered by Mr. Daigle was an appropriate valuation of an owner operated business’s loss as a result of the expropriation of its immovable property, see *State through Dep’t of Highways v. Constant*, 369 So.2d 699, 704-05 (La. 1979), the showing made on the record, and the lack of assertion by the City/Parish challenging the reliability of the expert’s testimony or its entitlement to a *Daubert* hearing, we find no basis on the record before us to order such a hearing in this case.

dismiss Jay's Donuts' appeal, suggesting that the property owner's failure to proffer Mr. Daigle's testimony at the time of the trial on the merits preclude it from complaining on appeal.

Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by counsel. See La. C.E. art. 103A(2); see also La. C.C.P. art. 1636A (requiring the court that rules against the admissibility of any evidence to either permit the party offering such evidence to make a complete record thereof or a statement setting forth the nature of the evidence). The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. *Emery v. Owens-Corporation*, 2000-2144 (La. App. 1st Cir. 11/9/01), 813 So.2d 441, 449, writ denied, 2002-0635 (La. 5/10/02), 815 So.2d 842.

Based on our review, the substance of Mr. Daigle's testimony was clearly articulated during the *voir dire* stage of the proceeding. And we find that the error of excluding the expert testimony of Mr. Daigle was prejudicial because a substantial right of Jay's Donuts was affected by the exclusion of testimony articulating another appropriate basis for valuation of the full extent of the business's loss as a result of the expropriation of its property since the trial court did not consider that alternative method for calculating the loss.

Because only a summary of the excluded expert testimony is contained in this record, and we have determined the evidence should have been admitted, mindful that a full articulation of the basis for Mr. Daigle's opinion is not before us and that the City/Parish was not provided the opportunity to cross examine this witness, we

remand the matter for the trial court to hear the entire evidence and to render judgment accordingly. See *Fussell v. Roadrunner Towing and Recovery, Inc.*, 99-0194 (La. App. 1st Cir. 3/31/00), 765 So.2d 373, 377-78, writ denied, 2000-1264 (La. 6/23/00), 765 So.2d 1042. Accordingly, we deny the City/Parish's motion to dismiss.

DECREE

For these reasons, the trial court's judgment, awarding to Jay's Donuts as just compensation \$288,805.00 in addition to the City/Parish's original deposit of \$599,000.00, attorney's fees, interest, and costs, is reversed.⁴ The matter is remanded to the trial court to admit the expert testimony of Mr. Daigle regarding the valuation of the full extent of Jay's Donuts' loss and to thereafter make a determination of the amount of just compensation to which the property owner is entitled. Appeal costs in the amount of \$2,691.00 are assessed against plaintiff-expropriator, the City of Baton Rouge and Parish of East Baton Rouge.

MOTION TO DISMISS DENIED; REVERSED AND REMANDED.

⁴ We have concluded that without expert testimony providing Jay's Donuts the opportunity to posit another appropriate valuation methodology, the trial court committed prejudicial error. The City/Parish has appealed the amount of attorney's fees that the trial court awarded. But that award of attorney's fees is intricately connected to the ultimate determination of just compensation reached by the trier of fact, see La. R.S. 48:453, and, as such, is necessarily affected by the improper exclusion of the expert testimony. Accordingly, review of the quantum of the attorney's fees is not properly before us in this appeal.