IN THE
Supreme Court of Virginia

RECORD NO. 140929

JAMES M. RAMSEY, JR.
and
JANET D. RAMSEY,

Appellants,

v.

COMMISSIONER OF HIGHWAYS,

Appellee.

BRIEF OF APPELLEE

David Oakley (VSB #72226)
James Webb Jones (VSB #07008)
POOLE MAHONEY, PC
860 Greenbrier Circle, Suite 401
Chesapeake, VA 23320
Telephone: (757) 962-6625
Facsimile: (757) 962-6180
doakley@poolemahoney.com
jjones@poolemahoney.com

Mark R. Herring
Attorney General of Virginia
Jeffrey M. Bourne
Deputy Attorney General
Jeffrey R. Allen (VSB #17710)
Senior Assistant Attorney General
Christopher D. Eib (VSB #19657)
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Facsimile: (804) 786-1991
jrallen@oag.state.va.us
ceib@oag.state.va.us

Counsel for Appellee

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 7

I. Summary 7

II. Standard of Review 9

III. Evidence of the Savage Appraisal was properly excluded by the trial court. (Appellants' Assignment of Error 1.) 10

A. A hearsay exception does not invalidate all other evidentiary rules. 10

B. Evidence of the Savage Appraisal's valuation opinion is inadmissible because it is evidence of the parties' statutorily imposed settlement negotiations. 11

C. Introduction of Mr. Savage's inadmissible opinions as to valuation would be more prejudicial than probative. 18

IV. The trial court properly limited cross-examination of the Commissioner's expert witness. (Appellants' Assignment of Error 2.) 26

CONCLUSION AND STATEMENT OF RELIEF SOUGHT 30

CERTIFICATE 31

TABLE OF AUTHORITIES

CASES

Anonymous B v. Anonymous C, 51 Va. App. 657 (2008) 11

Bainbridge v. State Road Department, 139 So. 2d 714 (Fla. Dist. Ct. App. 1962) 22, 24, 25

Bostic v. About Women, 275 Va. 567 (2008) 20

Campbell v. Campbell, 49 Va. App. 498 (2007) 27

Commonwealth, Department of Transport, Bureau of Highways v. Crafton-Duncan, Inc., 668 S.W.2d 62 (Ky. Ct. App. 1984) 22

Duncan v. State Highway Committee, 142 Va. 135 (1925) 13, 15, 17, 26

Food Lion, Inc. v. Cox, 257 Va. 449 (1999) 10

Gilbert v. Summers, 240 Va. 155 (1990) 14

Harmon v. Honeywell International, Inc., 758 S.E.2d 515 (Va. 2014) 19

Jackson v. Chesapeake & O. R. Co., 179 Va. 642 (1942) 27

Lewis v. Commonwealth, 269 Va. 209 (2005) 27

McMunn v. Tatum, 237 Va. 558 (1989) 19

Polythane System v. Marina Ventures International, Ltd., 993 F.2d 1201 (5th Cir. 1993) 20

Ryan v. Davis, 201 Va. 79 (1959) 8, 13, 14, 15

Siegfried v. Charlottesville, 206 Va. 271 (1965) 13

State v. Swarva, 86 Wa.2d 29 (Wash. 1975) 22

Stewart v. Commonwealth, 10 Va. App. 563 (1990) 9

United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979) ... 25, 26

United States v. A & S Council Oil Co., 947 F.2d 1128 (citing *United States v. Gillis*, 773 F.2d 549, 553-54 (4th Cir. 1985)) 20

Velocity Express Mid-Atlantic v. Hugen, 266 Va. 188 (2003) 10

Wash. Metropolitan Area Transit Authority v. One Parcel of Land, 548 F.2d 1130 (4th Cir. 1977) 21, 26

Worrell & Williams v. Kinnear Manufacturing Co., 103 Va. 719 (1905)..... 9

Young v. Waddell, 60 Va. Cir. 264 (Danville Cir. Ct. 2002) 28

STATUTES

2011 Va. Acts Ch. 190 16
Va. Code § 8.01-384 27
Va. Code § 8.01-401.1 ..... 27, 28
Va. Code § 25.1-204 ..... *passim*
Va. Code § 25.1-311(B) 14
Va. Code § 33.1-89 ..... 3, 12
Va. Code § 33.1-120 ..... 3, 12
Va. Code § 33.1-124 ..... 3, 4, 12, 14
Va. Code § 33.2-1001 18
Va. Code § 33.2-1023 (H) 14

RULES

Fed. R. Evid. R. 403 20
Fed. R. Evid. R. 705 20
Va. R. Evid. R. 2:403 19
Va. R. Evid. R. 2:408 14
Va. R. Evid. R. 2:803 11
Va. R. Sup. Ct. R. 5:25 27

TREATISES

5-18 *Nichols on Eminent Domain*, Section 18.12[2] at n. 38 ..... 22, 23, 24
Lewis on *Eminent Domain*, Vol. 2, § 666 13

STATEMENT OF THE CASE

This is an appeal of a final judgment in a condemnation proceeding. The final judgment established the amount of just compensation the landowners, James and Janet Ramsey (the "Ramseys" collectively), were entitled to under existing law. The Commissioner of Highways (the "Commissioner") instituted this condemnation action because a portion of the Ramseys' property was necessary for the construction of an interstate highway improvement.

The trial court properly excluded evidence of the parties' prior settlement negotiations and the pre-condemnation good faith estimate of just compensation. The excluded evidence was the property value opinion of a former VDOT employee who conducted an appraisal several months before the Commissioner filed for condemnation. That appraisal was created because condemnation proceedings in Virginia may not begin "until a bona fide but ineffectual effort to purchase from the owner the property sought to be condemned has been made." Va. Code § 25.1-204 (A).

That evidence was excluded because it was inadmissible under the case law of this Court, the Virginia Code, and the Virginia Rules of Evidence. The Court also properly limited—but did not prohibit—cross-

examination of the Commissioner's expert witness based on well-established evidentiary principles. The Ramseys contend on appeal that the Commissioner's initial appraisal should have, in effect, constituted a floor with regard to valuation of the property.

The jury found the Ramseys were owed just compensation in the total amount of $234,032.00. This amount was more than twice the amount of just compensation determined by the Commissioner's expert witness at trial but less than the amount testified to by the Ramseys' expert witness.

STATEMENT OF FACTS

Because a portion of their property was necessary for the improvement of I-264 in Hampton Roads, the Commissioner utilized the eminent domain process to acquire a portion of the Ramseys' property. One of the legal prerequisites to the Commissioner's filing for condemnation was to obtain a real estate appraisal, which was performed and completed by a VDOT employee, Mr. Thomas Moore Savage (the "Savage Appraisal"). Va. Code § 25.1-204. As required by the statute, the appraised value determined by Mr. Savage was the basis for the Commissioner's initial bona fide offer to purchase the Ramseys' property and was also the amount deposited with the filing of the certificate of take after the Ramseys refused the Commissioner's offer. The amount offered and deposited, based entirely upon the Savage Appraisal, was the amount the Commissioner believed in good faith to be an estimate of the just compensation owed to the Ramseys. Va. Code §§ 33.1-89, 33.1-120.

The Virginia Code also permitted the Ramseys to withdraw the funds deposited with the Circuit Court Clerk. Va. Code § 33.1-124. On or about January 7, 2011, the trial court entered an order allowing the Ramseys to withdraw the full amount deposited. The Virginia Code specifically provides condemnation proceedings in Virginia may not begin "until a bona fide but

ineffectual effort to purchase from the owner the property sought to be condemned has been made" (Va. Code § 25.1-204 (A)) and the parties are not "entitled to introduce *evidence of* any amount deposited with the court or represented by a certificate." Va. Code § 33.1-124(H) (emphasis added). The Virginia Code provides, and the parties agreed at trial, that "[n]either party shall introduce *evidence of* or mention to the jury the Certificate of Take value, the deposit of money into Court, or that the Ramseys may have to pay back a portion of the funds they drew down." (Consent Order at Trial entered February 11, 2014) (emphasis added).

At trial, the Ramseys made several attempts to introduce evidence of the amount deposited with the Clerk and the value represented on the Certificate of Take. The Ramseys attempted to introduce the Savage Appraisal in its entirety, and it was properly refused. (App. at 52.) The Ramseys also attempted to introduce evidence of Mr. Savage's report through the Commissioner's trial expert, Lawrence Colorito. Mr. Colorito relied upon certain facts in the Savage Appraisal because he was retained after construction on the project had begun. (App. 49-50.) Thus, the Savage Appraisal was the best source of information for Mr. Colorito regarding the physical condition of the property at the time of acquisition. *Id.* The only opinion contained in the Savage Appraisal upon which Mr.

Colorito actually relied was the $3,000 value of minor landscaping[1] which had been removed by the time Mr. Colorito was able to inspect the property. (App. at 36-44, 49-50.) The Ramseys were permitted to cross-examine Mr. Colorito regarding those portions of the Savage Appraisal upon which he actually relied. (App. at 45.) The trial judge appropriately prevented the Ramseys from testifying regarding the value of the property established by the Savage Appraisal. (App. at 85-86.)

Finally, on appeal the Ramseys assert the unfounded and unsupported suggestion that the Commissioner employs the tactic of using a second, lower appraisal at trial instead of the initial appraisal in this case and others in order to punish landowners. (Br. Appellants at 4, n.1.) There was no evidence at trial and nothing in the record supporting that assertion. The evidence presented at trial regarding why a second appraisal was necessary was that Mr. Savage had retired from VDOT. (Trial Tr. at 190.) The appraiser used by the Commissioner at trial valued the Ramseys' property significantly lower than did the Savage Appraisal because it considered other factors. For example, the Commissioner's trial appraiser recognized and placed significant emphasis on the fact the Ramseys' property was in the flight path for Oceana Naval Air Station and therefore

[1] The value of the landscaping was only 1.2% of the total value of the Ramsey's entire parcel according to by Mr. Colorito.

subject to development restrictions which prevented the subdivision of the Ramseys' property into multiple residential lots. (Trial Tr. at 216-220.) Thus, his opinion was that the undevelopable surplus property acquired had a value far lower than in the opinion contained in the Savage Appraisal. (Trial Tr. at 228-29.)

The Ramseys did not call (or even attempt to call) Mr. Savage as a trial witness. At a post-trial hearing, the Ramseys submitted (without any testimony or evidentiary foundation) a list of cases in which their counsel claimed the Commissioner employed a different appraiser for trial to offer an opinion of property value lower than the initial appraisal. (App. at 104.) Judge O'Brien, the trial judge, correctly refused the exhibit—and marked it as such—because the trial was over, no new evidence could be accepted, and the proposed exhibit was the hearsay work product of the Ramsey's counsel. (App. at 104-07.)

There was no evidence of such a tactic presented at trial because it does not exist. Rather, this supposed tactic was a story created by the Ramseys' counsel for use in its media campaign designed to influence the jury pool.[2] Before attempting to empanel a jury, Judge O'Brien recognized

[2] Both before and after the trial, the Ramseys and their counsel made numerous television appearances and were quoted in newspaper articles which contained false and misleading statements intended to invoke

the purpose of the media campaign: "I can see absolutely no reason why all of this publicity was given to this case save and except for an attempt by the landowners or the landowners' attorneys or the two together to try to influence and prejudice this jury panel. Okay. There can be no other reason for that at all." (Trial Tr. at 24.)

ARGUMENT

I. Summary

The trial court judge properly limited the evidence in this case to exclude the opinions of value contained in the Savage Appraisal. The Ramseys' argument before this Court misreads Va. Code § 25.1-204 by suggesting the condemnor's appraisal required by this statute must be made and presented to the landowner outside the context of settlement negotiations and prior to any bona fide offer being made (relying on Va. Code § 25.1-204 (E)). But, the statute at its beginning clearly states condemnation proceedings in Virginia may not begin "until a bona fide but ineffectual effort to purchase from the owner the property sought to be condemned has been made." Va. Code § 25.1-204 (A). Evidence of such

---

mistrust and prejudice against VDOT. The content of the television news stories and newspaper articles were placed in the trial court's record. (Trial Tr. at 8-23.)

bona fide efforts are not admissible at trial in Virginia. *Ryan v. Davis*, 201 Va. 79, 84 (1959).

The Savage Appraisal and the Commissioner's initial offer were required by statute, and they were simultaneously provided to the Ramseys; all of which was undertaken completely consistent with the statute in an effort to avoid litigation and to establish the value of the property as part of settlement negotiations. The General Assembly created this statutory process to foster meaningful settlement discussions early in the process—before any court filings. The requirement of an appraisal made in good faith serves as the basis for establishing an agreed value of the property rather than the parties' speculation and conjecture about land values. The Ramsey's First Assignment of Error is premised upon an incorrect reading of Va. Code § 25.1-204(E), and it fails upon an accurate reading of this statute.

A review of the statutes, case law and the Rules of Evidence reveals the General Assembly and this Court have made clear that certain types of evidence are not admissible at trial in eminent domain proceedings. First, evidence of settlement negotiations is not admissible at trial. Second, evidence which is more prejudicial than probative is inadmissible. Third, hearsay expert opinions, especially when the expert is not subject to cross

examination, are inadmissible. All of those factors support the trial court's exclusion of the Savage Appraisal and the valuation opinions contained therein.

II. Standard of Review

The Commissioner agrees the standard of review for the Ramseys' first assignment of error, the refusal to allow into evidence the Savage Appraisal and opinions as party admissions, is an evidentiary ruling analyzed on appeal under the abuse of discretion standard.

The Commissioner disagrees with the Ramseys' position that their second assignment of error, regarding the cross-examination of Mr. Colorito, is reviewed de novo. The proper standard of review is abuse of discretion. *Worrell & Williams v. Kinnear Mfg. Co.*, 103 Va. 719, 724 (1905) ("the latitude permissible in cross-examining a witness must be left largely to the sound discretion of the trial court; and the rule is well-established that an appellate court will not interfere, unless that discretion has been plainly abused"); *see also Stewart v. Commonwealth*, 10 Va. App. 563, 567 (1990).

The single case cited by the Ramseys does not support their contention that "Assignment 2 implicates the fundamental and absolute right of cross examination, and is reviewed de novo." (Br. Appellants at 5.)

In *Food Lion, Inc. v. Cox*, 257 Va. 449 (1999), this Court found the wholesale refusal of the trial court to allow any cross-examination whatsoever violated the defendant's right to cross-examine a witness. *Id.* at 450-51. It did not concern the limitation of cross-examination due to other evidentiary rules, as in the present case.

The trial court in this case did not prohibit cross-examination of the Commissioner's expert witness. Rather, Ramseys' counsel conducted extensive cross-examination of Mr. Colorito, with only some limitation by the trial court to avoid inadmissible evidence. The rule of law the Ramseys implore this Court to adopt would allow inadmissible evidence as long as it was discussed during the cross-examination of a witness. *See e.g. Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 205 (2003) (recognizing an absolute right to cross-examination while simultaneously affirming the trial court's refusal to admit otherwise inadmissible evidence—based upon relevancy—even during cross examination).

III. Evidence of the Savage Appraisal was properly excluded by the trial court. (Appellants' Assignment of Error 1.)

A. A hearsay exception does not invalidate all other evidentiary rules.

The Ramseys' first assignment of error concerns their belief the trial court should have allowed the introduction into evidence of the Savage Appraisal. Under statutory law, the Savage Appraisal was the basis for and evidence of the Commissioner's offer to purchase the property and the deposit of funds with the trial court. The Ramseys argue this evidence is admissible as a party admission. However, even if this was an admission by the Commissioner, that is merely an exception to the prohibition on admitting hearsay evidence. Va. R. Evid. R. 2:803. This hearsay exception does not simultaneously suspend all other rules of evidence whether derived from case law, statue, or the Virginia Rules of Evidence. *Anonymous B v. Anonymous* C, 51 Va. App. 657, 670 (2008) (evidence deemed a party admission may be inadmissible for a variety of other reasons—finding a party admission inadmissible as cumulative and repetitive).

B. Evidence of the Savage Appraisal's valuation opinion is inadmissible because it is evidence of the parties' statutorily imposed settlement negotiations.

The trial court appropriately ruled Mr. Ramsey could not testify as to the total value assigned to the property in the original Savage Appraisal. The Savage Appraisal was required by statutes: (1) to be provided to the

Ramseys (as part of the statutorily mandated settlement negotiations), and (2) to be the basis for the initial offer. Va. Code §§ 25.1-204; 33.1-89. The Savage Appraisal was also statutorily required as the basis for the Commissioner's deposit of funds with the clerk of court as part of the "quick take" process. Va. Code § 33.1-120.

The Savage Appraisal was in fact the basis for and evidence of the original offer made by the Commissioner for the Ramsey property. It was a good faith estimate of the amount of just compensation the Ramseys could be awarded at trial. The Ramseys rejected that settlement offer. The Savage Appraisal was also the basis for and evidence of the value for the Certificate of Take. Va. Code § 25.1-204. The Savage Appraisal valued the whole property and based on that valuation fixed the value of the Certificate of Take for the portion acquired and any damage to the residue not taken. The trial court properly rejected the proffered testimony regarding the Savage Appraisal, consistent with the Rules of Evidence, Virginia statutory law, and this Court's case law.

Section 33.1-124(H) of the Code of Virginia prohibits any party to a highway eminent domain proceeding from introducing "evidence of any amount deposited with the court or represented by a certificate." This statute and its predecessors codified long standing case law in Virginia. In

Duncan v. State Highway Comm., 142 Va. 135 (1925), this Court held the trial court properly refused to admit testimony showing the amount offered in settlement negotiations by the State Highway Commission. There this Court quoted with favor the treatise Lewis on *Eminent Domain*, Vol. 2, § 666, where it was stated: "[o]ffers made by the condemning party to the owner for the property in question, are in the nature of an attempt to compromise, and cannot be proved." Thus, "[i]t is well settled that offers made by the condemning party to the landowner are in the nature of an attempt to compromise and cannot be proved." *Siegfried v. Charlottesville*, 206 Va. 271, 277 (1965).

In *Ryan v. Davis*, 201 Va. 79 (1959), this Court upheld its decision in *Duncan*. There, evidence of the amount the State Highway Commissioner deposited into court was excluded where the tribunal returned a verdict for less than the deposit made by the State Highway Commissioner. In *Ryan*, this Court noted that statutorily mandated offers to purchase are inadmissible because such offers "are made in compliance with the statutory requirement that a bona fide effort be made to acquire the land *before resorting to condemnation*." *Id.* at 84 (emphasis added). Moreover, the General Assembly had codified the rule from *Duncan v. State Highway Commission,* through then Section 33-70.6 of the Code of Virginia, which

expressly precluded the introduction of evidence as to the amount deposited by the certificate of take. *Id.* That statutory prohibition continues to the present time in Section 33.1-124(H) of the Code of Virginia (now Section 33.2-1023 (H)).

Thomas Savage has since retired from State service, and neither party attempted to call him as a witness. Instead, a new appraisal was provided by Mr. Colorito.[3] Appraisal reports are inadmissible hearsay, and any evidence of just compensation must come from the testimony of an expert testifying at trial. The Savage Appraisal was the basis for the amount of the Certificate of Take and was part of the settlement package required by statute to be provided to the Ramseys. Allowing the Ramseys to introduce any of Mr. Savage's opinions (or the report) clearly violates the well-established evidentiary prohibition on admitting any evidence of settlement or compromise offers and responses. Va. R. Evid. R. 2:408. Further, admission of the Savage Appraisal would also defy the statutory exclusion of evidence concerning the amount of funds deposited with the trial court and withdrawn by the Ramseys. Va. Code § 25.1-311(B) and Va. Code § 33.1-124 (now recodified as Section 33.2-1023 (H)).

---

[3] Licensed appraisers must complete their own analysis and formulate their own opinions. They are not permitted to merely adopt wholesale the opinions of another appraiser. *See Gilbert v. Summers*, 240 Va. 155, 160 (1990).

In seeking to have this Court rule the valuations and opinions contained in the Savage Appraisal constituted an admission against interest, the Ramseys ignore *Ryan* and *Duncan*, which clearly established that evidence of any amount deposited with the court, represented by a certificate, or made during settlement discussions is inadmissible. Since both the offer and the Certificate in this case were based upon the Savage Appraisal, it is evidence of those actions and inadmissible.

The Ramseys argue they were not seeking to admit into evidence the amount of the compromise offer, but just the underlying evidence, opinions, and basis for the offer. Such a broad distinction and exception would obviate the need for this evidentiary rule of law, and eviscerate Virginia's longstanding and well-reasoned rule of law in these matters. The Ramseys want to introduce the entire Savage Appraisal report, but they cannot under current law. To argue that they want to introduce evidence of the conclusions and valuation opinions made by Mr. Savage is completely at odds with the clear inadmissibility of the report at trial. Mr. Savage's entire report, with all of its conclusions, was provided during the statutorily mandated settlement discussions and was part of a larger settlement package, all of which were required to be provided to the Ramseys by

statute. This requirement does not, however, make the Savage Appraisal admissible at trial.

The Ramseys next argue Va. Code § 25.1-204(E)[4] required disclosure of the Savage Appraisal and its conclusions *before* any settlement negotiations began. However, this is not what the Code section states. The Ramseys clearly misread the language of this Code Section. The subsection begins with "[b]efore initiating negotiations for real property, the state agency shall establish an amount which it believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established." Va. Code § 25.1-204(E)(1). The qualifier "[b]efore initiating negotiations" only applies to the agency's establishment of an estimate it believes to be the just compensation amount, i.e. obtaining an appraisal, not to the timing of its disclosure. It is not until several sentences later that the Commissioner is instructed to provide a copy of the appraisal to the landowner.

There is no requirement in the statute for the appraisal to be provided prior to initiating negotiations. The appraisal merely has to be created

---

[4] Va. Code § 25.1-204(E) was amended in 2011 by 2011 Va. Acts Ch. 190. The quotations from this Code section contained herein are from the prior version of the Code because this action was filed well before passage of 2011 Va. Acts Ch. 190. However, even under the current version of this Code section, as quoted by the Ramseys (Appellants' Brief at 6), the Ramseys' arguments still fail.

before negotiations begin. The appraisal is disclosed at the same time or after the bona fide offer is made to the landowner. Indeed the Code section states:

> The agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation, together with a copy of the agency's approved appraisal of the fair market value of such property *upon which the agency has based the amount offered for the property*, if such an appraisal is required.

§ 25.1-204(E)(1) (emphasis added). The requirement to provide the appraisal "upon which the agency has based the amount offered" is in the past tense. Thus, by the time the written statement and appraisal are disclosed to the landowner, the offer has already been made (or is at least made simultaneously as the disclosure) and settlement negotiations have already begun. This is the plain meaning of the statute and is consistent with prior case law indicating evidence of such statutorily mandated settlement negotiations is inadmissible.

The settlement negotiation process begins when the landowner is provided the initial offer and the underlying appraisal. *See Duncan*, 142 Va. 135. The appraisal guarantees the initial offer (which is part of settlement negotiations) has a good faith basis and is not based upon speculation and conjecture. The Ramseys' erroneous interpretation of this statute, if

correct, would void other statutory provisions expressly prohibiting such evidence at trial, something the General Assembly has not expressly provided for in § 25.1-204 (E).

Disclosing the appraisal is part of the settlement and compromise negotiation process. It ensures open and honest communications and settlement negotiations in good faith between the agency and the landowner. These provisions require state agencies to provide initial offers which are fair and well-reasoned at the outset of negotiations. The appraisal is not the only safeguard to ensure the agency provides a fair initial offer. The same Code provisions also require the offer to be equal to or higher than the current assessed value for real estate tax purposes. Va. Code § 33.2-1001. By requiring open, honest, and meaningful settlement negotiations, the General Assembly did not intend for the basis and reasoning of any settlement offer to automatically become admissible evidence at trial and set a floor for the amount of just compensation. Rather, should the case not settle, the question of the amount of just compensation or valuation is left to the commissioners or jurors.

C. Introduction of Mr. Savage's inadmissible opinions as to valuation would be more prejudicial than probative.

Even if this Court found the Savage Appraisal otherwise admissible, that evidence would remain more prejudicial than probative in violation of Rule 2:403 of the Virginia Rules of Evidence. This would particularly be the case here where Mr. Savage's expert testimony could not have been subjected to cross examination since the expert was not present in court. Numerous policy reasons militate against expanding the law in Virginia to allow this evidence. The Ramseys' argument would unduly set a floor for the amount of just compensation in all Virginia condemnation cases based entirely on the initial appraisal required by the statutes and not allow any correction of errors later discovered upon further examination. The effect would provide a new condemnation process different from the legislatively proscribed process. Moreover, the Ramseys' approach invades the well-established province of the jurors or commissioners to determine valuation in eminent domain proceedings. Finally, the out of state case law cited by the Ramseys is inconsistent with Virginia law.

First, trial courts must be extremely mindful when asked to accept hearsay expert testimony or opinions. *Harmon v. Honeywell Int'l, Inc.*, 758 S.E.2d 515, 519 (Va. 2014) ("The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party") (quoting *McMunn v.*

Tatum, 237 Va. 558, 566 (1989)). Virginia's common law does not allow for the admission of hearsay regarding expert opinions, and any statute in derogation of this common law rule must be strictly construed. *Bostic v. About Women*, 275 Va. 567, 576-77 (2008).

The Virginia Rule of Evidence regarding admission of underlying facts and data for an expert opinion is based upon and analogous to the corresponding Federal Rule of Evidence. Fed. R. Evid. R. 705. The Fifth Circuit Court of Appeals has ruled that an expert witness may rely upon the reports of other non-testifying experts, but those reliance materials are not admissible, even on cross-examination, because the non-testifying expert is not subject to cross examination. *Polythane Sys. v. Marina Ventures Int'l, Ltd.*, 993 F.2d 1201, 1207-1208 (5th Cir. 1993) ("to admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render an opinion"). Similarly, the Fourth Circuit Court of Appeals has found Rule 705 is tempered by Federal Rule of Evidence Rule 403's prejudice versus probative balancing test. *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 (citing *United States v. Gillis*, 773 F.2d 549, 553-54 (4th Cir. 1985)).

Second, under the Ramseys' theory, once a condemnor made a settlement offer and disclosed the supporting appraisal, as required by statute, the condemnor would have a difficult, if not impossible, burden to present any evidence contradictory to this initial appraisal no matter how factual or probative it might be at a later time.

> To permit the offer to be received in evidence in effect would put a floor on recoveries in condemnation proceedings. No amount of explanation would prevent the jury from giving the landowner at least that much. There would be less incentive to accept the offer, and the purpose of the Act would be frustrated.

Wash. Metro. Area Transit Auth. v. One Parcel of Land, 548 F.2d 1130, 1131 (4th Cir. 1977).

Additionally, the condemning agency should not be penalized for its initial offer being higher than the evidence presented at trial:

> Experience has shown that it is not at all uncommon for the appraisers charged with the duty of estimating the value of property to be acquired by eminent domain to commit an error in arriving at an estimate of value. Such errors customarily occur as a result of incorrect information, or through inadvertence, oversight or omission of the factors which may lawfully be considered in arriving at the true value of the property . . . the condemnor should not be penalized by a rule of law which would prohibit it, upon the discovery of such error, to rectify it in the preparation of evidence which it will present at the trial regarding the value of the property sought to be acquired. Any such principle

> of law would not only be contrary to every concept of fairness and justice, but would unduly penalize public bodies whose only resource for the payment of eminent domain awards is the taxes paid by all citizens who have a direct interest in the cost of the improvements which will utilize the property being condemned.

5-18 *Nichols on Eminent Domain*, Section 18.12[2] at n. 38 (quoting *Bainbridge v. State Road Dept.* 139 So.2d 714 (Fla. Dist. Ct. App. 1962); *see also Commonwealth, Dep't of Transp., Bureau of Highways v. Crafton-Duncan, Inc.*, 668 S.W.2d 62, 65 (Ky. Ct. App. 1984) (finding appraisal report required by statute to be prepared before beginning negotiations with the landowner and associated statements were inadmissible at trial as being part of settlement negotiations). The refusal of settlement offers and choosing to proceed to trial is a qualified gamble by a property owner, knowing they may be required to repay funds they have already received. *State v. Swarva*, 86 Wa.2d 29 (Wash. 1975) (finding settlement offers do not create a floor on valuation evidence to be used at trial and evidence of such offers is inadmissible).

The Ramseys cite 5-18 *Nichols on Eminent Domain,* Section 18.12[2], which deals with statements or admissions by a condemnor, but they do not provide to the Court the full text of the *Nichols* treatise which also provides:

> Statements made by or attributable to the condemning authority which are inconsistent with its valuation position at trial are admissible as admissions against interest. Statements of the condemning authority, *which may become admissions*, include:
>
> (1) appraisals of the property prepared and adopted for purposes *other than* acquisitions, negotiations or condemnations;
>
> (2) tax assessments of the property *when* the taxing authority and the condemning authority *are the same governmental entity*; and
>
> (3) determination of just compensation made pursuant to federal law.
>
> *[P]ayment of estimated compensation by the condemnor into the court registry as a part of a quick taking is not considered an admission against interest."*

Id. (emphasis added).

The *Nichols* treatise goes on to explain:

> Where, by statute, a condemnor is required, on filing a declaration of taking, to set forth the estimated just compensation, the declaration not being admissible in evidence, the condemnor is not bound by the estimate as an admission against interest and may introduce evidence of value in a sum less than that of the estimate. A statement which, by statute, has no evidentiary value cannot be said to be an admission against interest. The purpose of stating an estimate of just compensation in the declaration of taking is to fix a basis for withdrawal by the owner from the money deposited by the petitioner of a portion or all of said estimate,

> so that the owner may have the use of it, as the petitioner has the use and title to the land while the suit is pending and until the award is fixed and paid in full by the petitioner.

Id. Finally, *Nichols* confirms that several jurisdictions have found the approved value of the state and the appraisals on which they are based are not admissible in evidence. *Id.*

The Savage Appraisal was the basis for the Commissioner's settlement offer and the estimated compensation for payment into the trial court as a part of a quick taking, and thus, the trial court's exclusion of evidence regarding the Savage Appraisal was correct. The trial court would have also been correct under the above cited sections from the *Nichols* treatise. First, the Savage Appraisal was not prepared for a purpose *other than acquisition, negotiation or condemnation*. Second, VDOT is not a taxing authority. Finally, the determination of just compensation in this case was not a "determination of just compensation made pursuant to federal law."

The *Nichols* treatise makes clear that Virginia is not unique in disallowing evidence of appraisals prepared as the basis for a bona fide offer. One of the cases cited in *Nichols* is *Bainbridge v. State Road Dept.*, 139 So. 2d 714 (Fla. Dist. Ct. App. 1962) where the Court found it would be inappropriate to adopt a rule of law setting aside any jury verdict below the

amount paid into Court. The Florida Court indicated that such a holding would be "tantamount to holding that the minimum just compensation to be paid an owner for the taking of his land is the amount fixed by the condemnor [by a certificate of take or settlement negotiations], and not by the jury." *Id.* at 718.

The cases cited by the Ramseys indicating pre-condemnation statements of land value are admissible as party admissions do not represent the current state of the law in Virginia. This Court's opinions clearly support the inadmissibility of Mr. Savage's opinions. The out of state authorities relied on by the Ramseys simply do not apply to the case at bar because they do not deal with jurisdictions with statutes comparable to the Code of Virginia and the case law of Virginia.

The ruling in *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979) interpreted a federal statute under federal law. That court found pre-condemnation offers to purchase the landowner's property are not part of settlement negotiations. *Id.* at 7. Instead they are part of "the acquisition by purchase of privately-owned lands short of condemnation." *Id.* The court relied upon a technicality that since the statement was made as part of a pre-condemnation acquisition, there was no disputed claim to settle. *Id.* In other words, the court concluded that if the pre-condemnation offer is not

part of settlement negotiations, neither is the pre-condemnation statement of value which is provided along with the pre-condemnation purchase attempt. *Id.* However, that court was not faced with the clear law of Virginia where such pre-condemnation acquisition attempts are considered privileged settlement negotiations. *Duncan v. State Highway Comm.*, 142 Va. 135, 141-42 (1925). Moreover, not all federal appellate courts have interpreted the federal statute in the same manner as *320.0 Acres. Wash. Metro. Area Transit Auth.*, 548 F.2d at 1131. All of the other cases cited by the Ramseys for their argument that a pre-condemnation filing statement of value is a party admission rely heavily on *320 Acres* and suffer from the same infirmity.

IV. The trial court properly limited cross-examination of the Commissioner's expert witness. (Appellants' Assignment of Error 2.)

The Ramseys were not prohibited from cross-examining the Commissioner's expert witness.[5] As noted previously, the proper standard of review when a trial court limits cross-examination of a witness is abuse of discretion. The right to cross examination is always subject to the rules

[5] The extensive cross-examination of Mr. Colorito by the Ramsey's attorney is found on pages 263-334 of the trial transcript.

of evidence.[6] *Campbell v. Campbell*, 49 Va. App. 498, 504-05 (2007) ("the trial court may appropriately limit cross-examination, subject to the rules of evidence"). In other words, if an evidentiary rule prohibits evidence, a party cannot avoid the rules of evidence by claiming an absolute right of cross-examination. *Lewis v. Commonwealth*, 269 Va. 209, 214-15 (2005) (the right to cross-examination "may not be employed as a device to confuse the issues before the jury or to imply the existence of evidence that the jury is not permitted to consider").

The Virginia Code and the Rules of Evidence address the disclosure of the underlying facts and data supporting an expert witness's opinions. The expert may testify in terms of opinions or inferences even if the facts, circumstances or data would not ordinarily be admissible on direct examination. *See e.g.* Va. Code § 8.01-401.1. "[T]he expert *may* in any

---

[6] The Ramseys did not properly preserve for appeal their second assignment of error to the extent they argue they have a fundamental and absolute right to cross examination because such grounds were not stated as required by § 8.01-384 and Va. R. Sup. Ct. R. 5:25. *See also Jackson v. Chesapeake & O. R. Co.*, 179 Va. 642, 650-51 (1942) (finding objection to exclusion of evidence was not preserved because "[a] party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically.") The arguments raised by the Ramseys at trial and in their exceptions to the jury's report centered on the scope of cross examination permitted under Va. Code § 8.010-401.1, not the fundamental and absolute right of cross-examination argued now on appeal. (App. 36-38, 41-44, 98-99.)

event be required to disclose the underlying facts or data on cross-examination." *Id.* (emphasis added). Notably, this Code Section and the corresponding Rule of Evidence do not require such a disclosure. Moreover, "Section 8.01-401.1 permits the attorney to question an expert on cross-examination about language or content otherwise inadmissible, provided that the expert consulted or relied upon such content in forming his opinion." *Young v. Waddell*, 60 Va. Cir. 264, 264-65 (Danville Cir. Ct. 2002). Here, the trial court allowed cross-examination of Mr. Colorito regarding the Savage Appraisal. Cross-examination regarding opinions and facts which he did not study, analyze or rely upon would have been irrelevant, a source of confusion for the fact-finder and not within the scope of cross-examination allowed by § 8.01-401.1.

There is no merit to the contention that all of Mr. Savage's conclusions and opinions are admissible because Mr. Colorito relied upon only certain portions of the Savage Appraisal. Mr. Colorito testified that he relied upon the appraisal as to certain facts, such as the number of plants or shrubs along the property line that had been destroyed by construction, before he was engaged to appraise the property. This limited use of the Savage Appraisal by Mr. Colorito simply did not ever warrant a wholesale

introduction or cross-examination on the other opinions or facts contained in the Savage Appraisal which were not relied upon.

The Ramseys were permitted to extensively cross-examine Mr. Colorito on the portions of Mr. Savage's appraisal which he relied upon. The trial court properly excluded those portions of Mr. Savage's appraisal upon which Mr. Colorito did not rely, e.g. the final conclusions made by Mr. Savage regarding the value of the Ramseys' property not relied upon by Mr. Colorito. Thus, the trial court did not intrude upon the right to cross-examination, nor did the trial court abuse its discretion in limiting this cross-examination.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

In amending Section 25.1-204 of the Virginia Code, the General Assembly did not overturn existing case law, statutes, or other Virginia rules of evidence prohibiting the introduction of the Commissioner's initial appraisal. The Savage Appraisal was properly excluded by the trial court. The Commissioner respectfully requests that the final judgment of the trial court be affirmed, that this Court find no reversible error in the judgment of the trial court, and that this Court grant such further and other relief deemed necessary and just.

Respectfully submitted,

COMMISSIONER OF HIGHWAYS

By: _____
Of Counsel

David B. Oakley, Esquire (VSB #72226)
James Webb Jones, Esquire (VSB #07008)
POOLE MAHONEY PC
860 Greenbrier Circle, Suite 401
Chesapeake, Virginia 23320
Telephone: (757) 962-6625
Facsimile: (757) 962-6180
doakley@poolemahoney.com
jjones@poolemahoney.com

Mark R. Herring
Attorney General of Virginia
Jeffrey M. Bourne

Deputy Attorney General
Jeffrey R. Allen, Esquire (VSB #17710)
Senior Assistant Attorney General
Christopher D. Eib, Esquire (VSB #19657)
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Facsimile: (804) 786-1991
jrallen@oag.state.va.us
ceib@oag.state.va.us

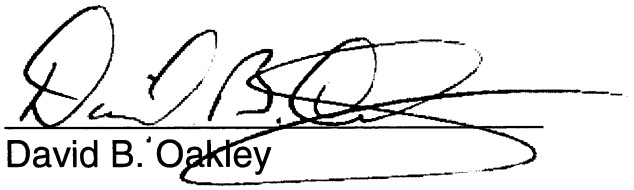
Counsel for Appellee
Commissioner of Highways

CERTIFICATE

1. Pursuant to Rule 5:6 and 5:26 the undersigned counsel certifies that fifteen paper copies and one electronic copy of this Brief of Appellee have been filed with the clerk of the Supreme Court of Virginia via hand delivery this 22nd day of December, 2014.
2. Pursuant to Rule 5:26, the undersigned counsel certifies that the foregoing Brief of Appellee does not exceed 50 pages.
3. All necessary copies of this Brief of Appellee have been sent to opposing counsel by first class mail at the below referenced addresses this 22nd day of December, 2014 at:

L. Steven Emmert, Esquire
Sykes, Bourdon, Ahern & Levy, P.C.
281 Independence Blvd., 5th Floor
Virginia Beach, Virginia 23462

Jeremy P. Hopkins, Esquire
Brian G. Kunze, Esquire
Waldo & Lyle, P.C.
301 Freemason Street
Norfolk, Virginia 23510



David B. Oakley