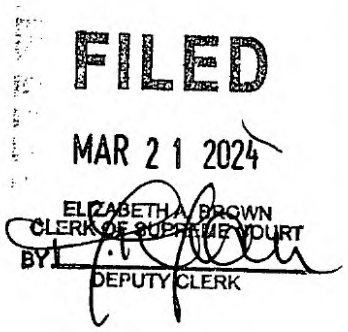
IN THE SUPREME COURT OF THE STATE OF NEVADA

MOUNTAIN VISTA HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY, WHICH AQUIRED TITLE AS "MOUNTAIN VISTA HOMES LLC, A NEVADA LIMITED LIABILITY COMPANY",
Appellant,
vs.
TRANSWEST EXPRESS LLC, A DELAWARE LIMITED LIABILITY,
Respondent.

No. 84692



ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment entered in a condemnation action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

In this eminent domain case, respondent TransWest Express LLC (TransWest) acquired a permanent easement to install power transmission lines across appellant Mountain Vista Holdings, LLC's (Mountain Vista) property. Mountain Vista stipulated to TransWest's right of possession prior to trial. The only remaining issue at trial was the value of just compensation for the taking.

Mountain Vista asserts that the district court erred by excluding (1) Mountain Vista's opinion of value as the landowner, (2) evidence of what the Nevada Department of Transportation (NDOT) paid to the previous landowner in a settlement for a similar sized taking from the same parcel, and (3) an opinion of value from Mountain Vista's appraisal expert.

"We review a district court's evidentiary decision for an abuse of discretion, but, to the extent the decision 'rests on a legal interpretation of the evidence code,' we review that legal interpretation de novo." *Abid v. Abid*, 133 Nev. 770, 772, 406 P.3d 476, 478 (2017) (quoting *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012)). "Where a trial court exercises its discretion in clear disregard of the guiding legal principles, it may constitute an abuse of discretion." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (internal quotation marks omitted).

Mountain Vista asserts that the landowner's opinion of value from Mr. Motis, the minority owner and manager of Mountain Vista with 20 years of experience and knowledge of property values in the area, was admissible, that any issues with his opinion went to weight and not admissibility, and that the district court's exclusion of the opinion was an abuse of discretion that requires reversal. TransWest asserts that Mountain Vista failed to disclose a landowner opinion of value in its initial damages calculation or responses to discovery independent of its expert opinion report and the unrelated NDOT settlement, both of which the district court subsequently deemed inadmissible, and thus that the exclusion was proper as a discovery sanction.

Our further review of this issue is stymied by the fact that the bench conference immediately preceding the district court's ruling does not appear in the record.[1] We take the opportunity to again reiterate that bench conferences must be recorded. *See Preciado v. State*, 130 Nev. 40, 43, 318

[1]We note that TransWest's citations to the record do not state that the opinion of value was in fact excluded as a discovery sanction, thus it is unclear what the district court's basis was for excluding the opinion.

P.3d 176, 178 (2014) (holding that due process requires "a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward").

We agree with Mountain Vista that the landowner opinion of value was admissible, as Mr. Motis' opinion of value was not solely based on evidence the district court deemed inadmissible but also based on market values and his general knowledge of commercial real estate and multifamily-home land values in Las Vegas. *See State ex rel. Dep't of Highways v. Olsen*, 76 Nev. 176, 180-81, 351 P.2d 186, 188-89 (1960) (stating the landowner was a competent witness where the landowner "had owned this property for ten years, owned other business properties in Reno and leased the same, was aware of market values of her own and surrounding properties and had compared recent sales of nearby lands"); *Dep't of Highways v. Campbell*, 80 Nev. 23, 29-30, 388 P.2d 733, 736-37 (1964) (affirming the district court where it relied on a landowner opinion of value that was based in part on "checking with the owners and the sellers and talking to them and through conversations with the purchasers" throughout Pershing County). Therefore, the district court abused its discretion by excluding this evidence.[2]

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[2]Even if Mr. Motis' opinion of value had been based entirely on inadmissible evidence, his opinion of value itself would still be admissible. *See City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984) ("The question of the landowner's competency to form an opinion of the land's value may be exposed on cross examination and affects the weight to be given to the testimony, not its admissibility."). Thus, regardless of the admissibility of the NDOT settlement or the expert appraisal, Mr. Motis' landowner opinion of value was admissible.

To the extent that TransWest claims this exclusion was proper as a discovery sanction, we review an exclusion for failure to comply with the disclosure requirements of NRCP 16.1 for an abuse of discretion. *Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733-34 (2018).

We cannot sustain the exclusion of Mr. Motis' opinion of value as a discovery sanction. Here, the dispute is not whether the opinion of value was disclosed but whether that initial disclosure of Mr. Motis' opinion had to include a computation that was independent of evidence the district court subsequently deemed inadmissible, in order for the opinion to be admissible at trial. If, as TransWest asserts, the district court excluded this evidence as a discovery sanction, then the district court abused its discretion.

Mountain Vista next asserts that the district court abused its discretion by excluding the NDOT settlement. They argue that the price NDOT paid was not inadmissible compromise evidence under NRS 48.105, because the bar is claim specific and does not operate against non-offeror parties in different cases. TransWest argues that the district court properly excluded evidence of the settlement agreement both under NRS 48.105(1), and because the NDOT settlement was not relevant.

NRS 48.105(1)(b) states in pertinent part that "[a]ccepting . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." "An offer of compromise is an offer by one party to settle a claim where an actual dispute or a difference of opinion exists at the time the offer is made." *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 509 (2012) (internal quotations omitted). NRS 48.105(1)(b) does not bar the NDOT settlement, because

NRS 48.105 is claim specific, and the claim in the current issue is different than the claim in the NDOT settlement. *See id.*, 128 Nev. at 312, 278 P.3d at 509 (interpreting NRS 48.105 in line with its Federal analogue FRE 408); *Wine & Canvas Dev., LLC v. Muylle*, 868 F.3d 534, 541 (7th Cir. 2017) (interpreting the FRE 408 and stating "[t]he Rule's use of the singular term 'claim' suggests that settlement discussions concerning a specific claim are excluded from evidence to prove liability on that claim, not on others.").

We likewise agree with Mountain Vista that the NDOT settlement was relevant. The taking was from the same property, was a comparable area, and essentially the same size. The gap in time between the NDOT settlement and the current condemnation likewise remains relevant. *See State, Dept. of Transp. v. Cowan*, 120 Nev. 851, 858, 103 P.3d 1, 5-6 (2004) (holding a five-year gap in time was not an abuse of discretion). Any differences here go to weight and not admissibility.[3] Thus, the district court abused its discretion by excluding the NDOT settlement.

Mountain Vista next asserts that the district court abused its discretion by excluding the expert witness opinion of Mr. Harper, arguing that juries in eminent domain trials should not be limited in their exposure to expert opinion. TransWest contends that the district court did not abuse its discretion in excluding Mr. Harper's opinion because he (1) used a date of value nine months after the statutory date of value, (2) valued 4.005 acres

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[3]We disagree with the argument that the NDOT settlement is not relevant to fair market value, simply because it was a settlement in a condemnation action. This is essentially an attempt get to the "amount" language in NRS 48.105 while ignoring the claim specific language. The fact that it was a settlement agreement goes to the weight of the evidence, not the admissibility. We further note that all of the citations here are from other jurisdictions, and are thus merely persuasive.

instead of 3.185 acres, (3) relied on outdated site plans, and (4) relied on site plans that included property that Mountain Vista did not own. TransWest further asserts that the district court should exclude valuations that do not provide a value of the property as of the date of valuation, as irrelevant even if the expert asserts that his opinion would not change.

"This court reviews a district court's decision regarding the admissibility of expert testimony for an abuse of discretion." *Capanna*, 134 Nev. at 894, 432 P.3d at 733. "If a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue."[4] *Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008). "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." *Id.*; *see also Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 243, 955 P.2d 661, 667 (1998) (stating that "the admissibility of [expert testimony] must also satisfy the prerequisites of all relevant evidence"). However, expert testimony is properly excluded when it is "irrelevant or if it impermissibly encroaches on the trier of fact's province." *In re Assad*, 124 Nev. 391, 400, 185 P.3d 1044, 1050 (2008). "The standard for admissibility varies depending upon the expert opinion's nature and purpose." *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005). In discussing the expert opinion of condemned property, this court stated:

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[4]NRS 50.275 states: "[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 special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

> [t]he methods used to evaluate the worth of condemned property are not highly regulated. It is a field dominated by expert opinion. Triers of fact should not be limited in their exposure to such expert opinion where such opinion may shed light on the true value of the condemned property. It is often appropriate to determine the fair market value of property which has no relevant market by any method of valuation that is just and equitable.

City of Sparks v. Armstrong, 103 Nev. 619, 622, 748 P.2d 7, 9 (1987).

Here, the district court abused its discretion by excluding Mountain Vista's expert appraisal because the appraisal was relevant and would have assisted the trier of fact in determining fair market value. First, the district court abused its discretion by rigidly applying the date of valuation under NRS 37.120(1).[5] Nowhere in NRS 37.120(1) does it state that the date of valuation is the only relevant date regarding value for the purposes of expert testimony, and we have previously ruled that "a date other than the date of summons could be appropriate to provide 'just compensation.'" *City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 625 n.6, 331 P.3d 896, 900 n.6 (2014) (discussing the statutory date of valuation in *Klopping v. City of Whittier*, 500 P.2d 1345, 1349 (Cal. 1972)). We likewise have upheld a valuation that was four days after the date of service. *See Zillich*, 100 Nev. at 369, 683 P.2d at 7. Thus, the district court abused its discretion by finding that Mr. Harper's testimony was irrelevant due to a date of valuation other than the date proscribed by NRS 37.120 and therefore would not assist the trier of fact.

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[5]NRS 37.120(1) states in pertinent part that "[t]o assess compensation and damages as provided in NRS 37.110, the date of the first service of the summons is the date of valuation."

Second, the district court abused its discretion by excluding the expert opinion based on errors of material fact, as these are issues of weight, not admissibility. *State ex rel. Dep't of Highways v. Shaddock*, 75 Nev. 392, 396, 344 P.2d 191, 193 (1959) ("That [an expert witness's] determination failed to take into consideration a fact material to value would tend to lessen the weight of his testimony, not to render it incompetent."). We reject these assertions regarding material fact because "the valuation of property is an illusory matter for which there exists no absolute mathematical formula." *State ex rel. Dept. of Highways v. Tacchino*, 92 Nev. 286, 287, 549 P.2d 755, 755 (1976). Thus, the district court's determination that Mr. Harper's appraisal used the wrong acreage and old site plans were issues of material fact that may have lessened the weight of Mr. Harper's testimony, but not its admissibility. Any errors or problems with Mr. Harper's expert opinion could be exposed on cross examination. Therefore, the district court abused its discretion by finding that Mr. Harper's expert opinion would not assist the trier of fact.[6]

In sum, the district court erred by excluding evidence on the value of the land. Because we conclude the district court's errors affected Mountain Vista's substantial rights, we reverse. *See Rish v. Simao*, 132 Nev. 189, 195, 368 P.3d 1203, 1208 (2016) ("When the district court abuses its discretion in determining whether to admit or exclude evidence, this

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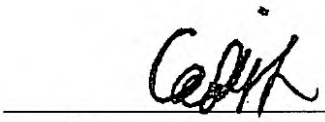
[6]We note that Mountain Vista was able to call one of TransWest's expert witnesses in rebuttal to dispute the valuation of another one of TransWest's expert's appraisal. Although this helps explain the jury's upward departure from the expert appraisal valuation, it is undisputed from the record that the only number given for valuation in evidence was the one given by TransWest's expert appraiser.

court will overturn the district court's determination."); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008) ("[R]eversible error occurs when the error substantially affects the rights of the complaining party.").

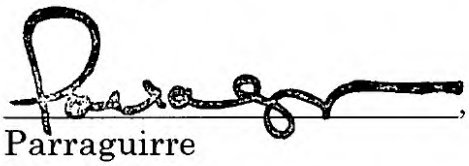
We therefore

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Cadish

_____, J.
Herndon



_____, J.
Parraguirre

PICKERING, J., with whom STIGLICH and BELL, JJ., agree, concurring:

I agree with the majority that the district court reversibly erred when it excluded Mountain Vista's testimony as to the value of its land and the evidence of the NDOT settlement. However, I disagree that the district court abused its discretion in excluding the expert's valuation opinion. The appraisal contained errors and rested on questionable assumptions that made it unhelpful, such that it was within the district court's discretion to exclude opinion testimony about it. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (explaining that expert testimony will assist

the factfinder only if it is the product of reliable methodology); *City of Elko v. Zillich*, 100 Nev. 366, 369, 683 P.2d 5, 7 (1984) (recognizing the district court's "wide discretion" on matters related to expert testimony of land valuation in condemnation cases). While I concur in the decision to reverse and remand, I would not include as a reason therefor the district court's decision to exclude the expert testimony.

Pickering, J.
Pickering

We concur:

Stiglich, J.
Stiglich

Bell, J.
Bell

LEE, J., concurring:

While I agree with the order from the majority, I write separately to express my disagreement regarding the admissibility of the NDOT settlement. I do not believe that the district court erred by excluding the NDOT settlement because it is not relevant to the fair market value of the land.

"[A] sale to a company possessing the power of eminent domain is more likely to show a compromise value [rather] than the true market value of the land." *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 18 (5th Cir. 1969). As a result, the general rule is that "[t]he price paid by a

condemnor in settlement of condemnation proceedings or in anticipation of such proceedings is inadmissible to establish value of comparable land as 'such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value.'" *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339 (9th Cir. 1980) (quoting *Slattery Co. v. United States*, 231 F.2d 37, 41 (5th Cir. 1956)).

Here, the NDOT settlement was inadmissible because it lacked relevance to the fair market value of the parcel, as the price paid necessarily reflected the expense and uncertainty of litigation. *See* NRS 48.025(2) ("Evidence which is not relevant is not admissible."); *see also, e.g., 10.48 Acres of Land*, 621 F.2d at 340 (affirming the district court's determination that "the price paid by the condemning authority for the easement in the comparable sale was not relevant to the issues at trial," particularly where "defendant appears to have argued below only that the jury was entitled to this information in order to determine value."). Thus, even if NRS 48.105(1)(b) did not bar this evidence, I would nevertheless affirm the district court on this issue, even though the reasoning may differ. *See Blackjack Bonding v. City of Las Vegas Mun. Ct.*, 116 Nev. 1213, 1222, 14 P.3d 1275, 1281 (2000). ("We will affirm the order of the district court if it reached the correct result, although for different reasons.").

I concur with the majority in all other respects.

_____, J.
Lee

cc: Hon. Joanna Kishner, District Judge
Stephen E. Haberfeld, Settlement Judge
Kaempfer Crowell/Las Vegas
Fennemore Craig P.C./Reno
Eighth District Court Clerk