



1 **FACTUAL BACKGROUND**

2 This case involves extensive procedural and factual history that is well known  
3 to the parties and which will be discussed herein only to the extent necessary for an  
4 understanding of the present issues and analysis.

5 On January 24, 2008, GovGuam exercised its power of eminent domain to take  
6 private land in Inajaran, Guam, in order to construct a public landfill. In preparation  
7 for trial, Captain, Hutapea & Associates, Inc. ("CHA") prepared an expert appraisal  
8 report on behalf of GovGuam. On July 10, 2010, CHA submitted its report, which  
9 provided an estimate of just compensation for acquired property and damages to the  
10 remainder parcel in the amount of \$5,900,000.00. This amount assumed that special  
11 benefits relating to improved roads and utilities on the remainder parcel resulting  
12 from GovGuam's construction partially offset damages to the remainder.

13 The private landowners and defendants contested GovGuam's estimate of just  
14 compensation and the matter proceeded to a bench trial. To support its claim that just  
15 compensation for this eminent domain action amounted to \$5,900,000.00, GovGuam  
16 relied on the testimony and report of its expert appraiser, W. Nicholas Captain of  
17 CHA. At trial, when questioned about the CHA report and the amount of the  
18 estimate, Mr. Captain qualified that estimate stating that if the Court found that no  
19 special benefits apply then just compensation should be increased by \$3,600,000.00 –  
20 for a total of \$9,500,000.00. Following the close of Mr. Captain's initial examination  
21 the Defendants moved to strike Mr. Captain's testimony and report arguing that the  
22 evidence based on his expert testimony failed to conform to required standards of  
23 reliability under Evidence Rule 702.

24 However, after the close of Captain's testimony CHA, without GovGuam's  
25 knowledge, completed a Second Supplemental Report. Defendants were given the  
26 opportunity to depose Mr. Captain with respect to the new report and this Court  
27 permitted GovGuam to call Mr. Captain as a witness to testify regarding the second  
28 report. The Second Supplemental Report increased CHA's estimate of just

3 FRE 702 was amended in 2000 and again in April of 2011 (effective December 1, 2011). The Committee Notes to 2011 Amendment make clear that the current changes are stylistic and do not alter the substantive application regarding admissibility under the prior rule. For purposes of this discussion, reference to FRE 702 is a reference to the rule prior to the 2011 amendment.

instructive. See, *People v. Diaz*, 2007 Guam 3, ¶ 14, n. 4; e.g., *People v. Superior*

amendment ("FRE 702")<sup>3</sup> and thus federal authority interpreting FRE 702 is GRE 702. GRE 702 is identical to Rule 702 of the Federal Rules of Evidence (2000

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

702 provides:

the trial court must ensure the reliability of the expert's opinion and methods. Rule Guam Rule of Evidence 702 requires that prior to admitting an expert's testimony

*I. Admissibility of Captain's Testimony*

**DISCUSSION**

Guam's eminent domain statute.

appraisal estimate, GovGuam was required to supplement its deposit pursuant to also filed a motion to dismiss, arguing that upon receiving the new, increased in his opinion or reports go to the weight to be assigned to the testimony. Defendants meets the minimum threshold of reliability so as to be admissible and that any flaws Evidence Rule 702. GovGuam filed a response, arguing that Captain's testimony testimony and reports failed to conform to standards of reliability as required by filed their renewed and supplemental motion to strike arguing, again, that the no special benefits apply. Upon the conclusion of Captain's testimony, Defendants compensation to \$10,000,000.00 assuming special benefits apply and \$13,900,000.00 if

1 Court of Guam, 1998 Guam 24 (adopting federal test for admissibility of scientific

2 evidence under FRE 702).

3 Courts have acknowledged that “[a]s a general rule, questions relating to the

4 bases and sources of an expert’s opinion affect the weight to be assigned that opinion  
5 rather than its admissibility . . . .” Primrose Operating Co. v. Nat’l Am. Ins. Co., 382

6 F.3d 546, 562 (5th Cir. 2004) (citing United States v. 14.38 Acres of Land, More or

7 Less Situated in Leflore County, 80 F.3d 1074, 1077 (5th Cir.1996); accord In re Zurn

8 Pex Plumbing Products Lab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (citing Daubert

9 v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)); cf. In re Scrap Metal

10 Antitrust Litig., 527 F.3d 517, 531 (6th Cir. 2008) (noting that accuracy of experts’

11 opinion in light of the applied methodology goes to the weight to be assigned to the

12 testimony and results). The Supreme Court has noted that in the context of expert

13 testimony “[v]igorous cross-examination, presentation of contrary evidence, and

14 careful instruction on the burden of proof are the traditional and appropriate means

15 of attacking shaky but admissible evidence.” Daubert, 509 U.S. at 596.

16 Notwithstanding these general principles, Rule 702 clearly requires a trial court to

17 undergo a threshold determination as to the reliability of the testimony and methods

18 employed by an expert witness. Id. at 599. The burden is on the party seeking to

19 admit the testimony to prove that it is sufficiently reliable. Just v. Merrell Dow

20 Pharm., Inc., 89 F.3d 594, 598 (9th Cir. 1996).

21 FRE 702 incorporates the principles enunciated by the United States Supreme

22 Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and

23 Kumho Tire Co. v. Carmichael, 526 US 137, 150 (1999). FRE 702, Advisory Committee

24 Notes, 2000 Amend. In determining the standard for admitting expert scientific

25 testimony, the Daubert court outlined certain factors that may be considered in

26 determining whether the testimony meets threshold standards of reliability,

27 including: (1) whether the technique or theory can be tested; (2) whether the

28 technique or theory has been subject to peer review and publication; (3) the known or

potential rate of error of the technique or theory when applied; and (4) whether the technique or theory has been generally accepted in the scientific community. Daubert, 509 U.S. at 593-94; see also People v. Superior Court of Guam, 1998 Guam 24 (applying Daubert standards for admissibility of scientific evidence).

The Supreme Court has recognized, however, that the Rule 702 inquiry is "a flexible one" and the factors mentioned in Daubert "do not constitute a definitive checklist or test." Kumho Tire Co. v. Carmichael, 526 US 137, 150 (1999) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)). In Kumho Tire Co., the Court clarified that Daubert's general principles apply not only to scientific testimony, but to all testimony of a technical or specialized nature. 526 U.S. at 148-49. Where the expert testimony is not of a strictly scientific nature, the trial court must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline" and a trial court is granted wide latitude in determining reasonable measures of reliability. Id. at 149, 153. As stated in the Advisory Committee Notes to FRE 702:

Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.

In the specific context of real estate appraisal, courts have noted the uncertainty inherent in the discipline of real estate appraisal. For instance, in United States v. Miller, 317 U.S. 369, 374-75 (1943), the Supreme Court noted that

even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

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1 The Third Circuit has similarly recognized that "[a]ll opinion evidence of market  
2 value is to some extent inherently speculative for it seeks to describe in the form of a  
3 realistic event what is a theoretical construction something which in fact did not  
4 occur." United States v. 60.14 Acres of Land, Etc., 362 F.2d 660, 668 (3d Cir. 1966)  
5 (internal citations omitted). Thus, in considering the reliability of Captain's testimony  
6 and report, this Court must also consider that real estate appraisal is in some part  
7 science and in large part an art and thus may not lend itself to the strict factors or  
8 tests that aid in ensuring reliability of scientific testimony or testimony of other  
9 technical experts.

10 In the original twenty-page motion and the subsequent nineteen-page renewed  
11 and supplemental motion, CIU Defendants articulate numerous arguments as to why  
12 Captain's testimony and reports are speculative and unreliable and, therefore,  
13 inadmissible under Evidence Rule 702. Defendants argue that Captain failed to  
14 conduct an appropriate investigation of the highest and best use of the subject  
15 property; that his comparable sales are objectively incomparable to the subject  
16 property; that he utilized speculative, arbitrary, and unreliable adjustments to  
17 account for differences in the comparable properties and in determining special  
18 benefits; that he failed to provide an adequate accounting of the process he used in  
19 reaching his conclusions; that he manipulated his work file to fit a preconceived  
20 opinion of value; and that the averaging of his and his partner's opinion as to value  
21 constitutes invalid methodology. Moreover, the defendants argue that the cumulative  
22 effects of these unreliable methods and analysis render the entire report and  
23 testimony faulty. This Court, having reviewed each of the defendant's specific points  
24 of contention, generally agrees that Captain's testimony and report in some instances  
25 suffers from what could be described as a lack of rigor and varied inconsistency.  
26 However, upon review of the reports as well as the record of Captain's testimony, this  
27 Court believes that Captain offered sufficient foundation for the basis of his opinions  
28 to meet a minimum threshold of reliability, thus rendering the testimony admissible.

1 Captain offered explanations of the various potential uses and characteristics  
2 that he considered in determining the highest and best use of the property. And  
3 though this Court agrees that Captain could have offered a more thorough  
4 explanation regarding the adjustments for both the comparable properties and the  
5 special benefits, Captain's proffered bases for these adjustments—namely that size,  
6 shape, usability, apportionment of benefit to the subject property etc.—are adequate to  
7 meet minimum thresholds of reliability. Moreover, the mere fact that defendants  
8 disagree with Captain's selection of comparables is not a valid basis for excluding his  
9 testimony. Parties "do not have to demonstrate to the judge by a preponderance of the  
10 evidence that the assessments of their experts are correct, they only have to  
11 demonstrate by a preponderance of evidence that their opinions are reliable. . . . The  
12 evidentiary requirement of reliability is lower than the merits standard of  
13 correctness." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994). In  
14 this instance, Captain offered ample basis for his determination of comparable  
15 properties.

16 In their arguments, Defendants also place great weight on a data document  
17 within Captain's work file for which the print-out date suggests that it was printed –  
18 and therefore added to the work file – days after Captain submitted the file.  
19 Defendants suggest this proves that Captain determined just compensation in this  
20 case prior to his analysis and that the data he relied upon was "cherry-picked" to  
21 conform to his preconceived opinions. Again, while this Court acknowledges the  
22 suspect nature of this single document, other possible explanations could account for  
23 the late date stamp. Moreover, this document by no means represents the sole source  
24 of Captain's conclusions: his results are supported by other information, documents,  
25 and considerations. As such, the suspect nature of the document does not render the  
26 entire report or testimony unreliable.

27 Finally this Court is unconvinced that the averaging of Captain's and his  
28 partner's separate determinations of just compensation to reach the final figure

1 illustrates an inherent unreliability within Captain's entire testimony and report. It  
 2 is true that there is no indication that Captain or other appraisers have used such  
 3 methods in prior appraisals nor does there appear to be explicit support for such a  
 4 method in relevant real estate texts. However, the methodology was applied at the  
 5 end stage of the analysis and does not necessarily render the prior analyses,  
 6 assumptions, and information within the report utterly unreliable and inadmissible.

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 8 *II. Defendant's Motion to Dismiss and GovGuam's Obligation to*  
 9 *Supplement its Deposit*

10 On April 12, 2011, Mr. Captain submitted a second supplemental appraisal  
 11 report to GovGuam in which Mr. Captain increases his estimate of just compensation  
 12 from \$5.9 million to \$13.9 million (assuming no special benefits apply). There is no  
 13 indication that GovGuam was aware that Mr. Captain had decided to alter his  
 14 appraisal estimate and Mr. Captain apparently supplied the supplemental report to  
 15 the Government on his own initiative. Defendants argue that upon receiving  
 16 Captain's supplemental appraisal increasing his estimate of just compensation from  
 17 \$5.9 million to \$13.9 million (assuming no special benefits apply), GovGuam was  
 18 statutorily required to immediately supplement its deposit with the Clerk of Court so  
 19 the sum total deposits would match GovGuam's (i.e. Captain's) most recent estimate  
 20 of just compensation and that any failure to do so is grounds for dismissal.

21 Under title 21, section 15107 of the Guam Code, GovGuam must deposit funds  
 22 when it exercises its eminent domain authority. Section 15107 provides that the  
 23 declaration of taking must contain a statement of the estimated just compensation for  
 24 the taking and "[u]pon the filing of said declaration of taking and of the deposit in the  
 25 court . . . of the amount of the estimated compensation stated in said declaration, title  
 26 to the said lands in fee simple absolute . . . shall vest in the government of Guam."  
 27 Defendants essentially argue that if GovGuam's estimate of just compensation  
 28 changes prior to a final judgment, this statute requires that GovGuam deposit

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additional funds equal to the amount of its new estimate.<sup>4</sup> This argument is not supported by a plain reading of the statutory language.

The above statutory provision clearly requires that the Government deposit with the court only the amount of estimated compensation "as described in the declaration of taking." GovGuam met its burden under the statute: it deposited an amount equal to its estimate of just compensation upon filing the initial declaration of taking. GovGuam then supplemented its deposit twice more, but only after it took additional land and provided amended declarations of taking reflecting the corresponding increase in its estimate of just compensation. Nothing in the statutory language suggests an ongoing duty by the Government to supplement the deposit when an appraiser provides an unsolicited appraisal in the middle of trial and when no new declaration of taking has been filed.

Moreover, dismissal of the action is not contemplated under the Guam Rules of Civil Procedure. GRAP 71A governs condemnation actions. 71A(i)(3) specifically states:

(i) Dismissal of Action

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, *except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. . . .*

GRCP 71A(i)(3) (emphasis added).

In this instance, GovGuam met its burden under the statute when it filed its complaint and deposited funds. At that point title to the land vested with the Government and the only issue remaining was a determination of the amount owed to

<sup>4</sup> Defendants also cite to a California case applying a California statutory provision that is significantly different from Guam's statutory provision. The California statute *specifically* requires the party taking land to supplement a deposit upon a new appraisal or else risk dismissal of the case. This additional supplemental requirement cannot be found in Guam's eminent domain statutes. As such, this Court finds the defendants' California authority unpersuasive.

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Deputy Clerk, Superior Court of Guam

A. A. SANTOS

Date: 10/31/12 Time: 4:30 PM

CALVO FISHER JACOB, CUNIFFE & COOK  
AG'S, ARIOLA COLLAN ARIOLA

Service via Court Box  
I acknowledge that a copy of the  
original hereto was placed in the  
court box of:

HONORABLE ALBERTO C. TAMORENA III  
Superior Court of Guam

Dated this 31st day of October, 2012.

OCT 31 2012

Based on the foregoing, this Court finds that Captain's testimony and report are, on the whole, sufficiently reliable so as to be admissible. Defendants conducted thorough cross-examination and presented contrary and rebuttal evidence in response to Captain's opinions. Any weaknesses in Captain's testimony and report exposed by defendants will be properly considered in this Court's findings and determination as to what weight to assign Captain's testimony. Furthermore, GovGuam had no ongoing obligation during trial to deposit additional funds based on evidence presented at trial and dismissal is not warrant.

CONCLUSION

Although public policy may support a requirement that the Government deposit funds at any point that its estimate increases, the statute governing GovGuam's taking of the property in this case does not impose such obligations on the Government. As provided by statute and the rules of procedure the proper remedy for Defendants at this stage is not dismissal, but rather the award of just compensation as determined by this Court after it has thoroughly considered all the evidence presented at trial.

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