IN THE SUPREME COURT OF OHIO

The State of Ohio *ex rel.* Ohio History Connection, Plaintiff-Appellee, v. The Moundbuilders Country Club Company, Defendant-Appellant.	Case No. 2024-0198 On Appeal from Licking County Court of Appeals, Fifth Appellate District, Case No. 2023-CA-00071

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THE MOUNDBUILDERS COUNTRY CLUB COMPANY

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC INTEREST AND GREAT GENERAL INTEREST

When an eminent domain action reaches the "compensation" phase, the case essentially is a one-issue case: What is the fair market value of the property being taken? In this case, the trial court, shortly before the compensation-phase trial, excluded all of the property holder's evidence of value. After that ruling, the trial would be a trial in name only. The jury would hear but one side of the case. The property owner's right to present expert evidence and have a jury make an impartial determination of compensation became meaningless, making the ability to appeal immediately imperative.

Eminent domain actions generally are of public and great general interest:

- Eminent domain is the "magnificent power to take private property against the will of the individual who owns it." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 68. That governmental power is in tension with the people's "'inviolable' right of property." *Id*. The Ohio Constitution declares that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare." Ohio Const., Art. I, § 19. *Accord id*. at § 19b(B).

- "When the state elects to take private property without the owner's consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting." *Norwood* ¶ 68.

- The General Assembly has codified into law the proposition that every appropriation proceeding is "a matter of immediate public interest and concern." R.C. 163.22 (requiring courts to conduct such proceedings "at the earliest practicable moment").

This particular appeal presents the question of whether a pretrial order excluding all of the property holder's evidence of value can be a final, appealable order. It is of greater public and general interest than the typical eminent-domain case for six reasons.

First: The trial court excluded all of the property-owner's expert evidence, leaving the jury to hear evidence from only the appropriating government authority, Ohio History Connection ("OHC"). The trial court did not do so as a procedural sanction. Rather, the court substituted its

own judgment regarding valuation methodology for that of a competent and highly experienced valuation professional. The consequence of that decision is exceptional and far-reaching: OHC, exercising the State's appropriation power, has taken private property that all parties agree is unique and extraordinary, and now denies the property owner of its right to present the requisite and mandatory expert evidence of the property's value.

Second: The land involved is "an extraordinary piece of land: the Octagon Earthworks in Newark." *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, 171 Ohio St.3d 663, 2022-Ohio-4345, ¶ 1 (affirming OHC's appropriation in this case). These earthworks were erected by the Hopewell culture about 2,000 years ago. The earthworks are among the best-preserved of their kind on the planet and are part of Ohio's only UNESCO World Heritage Site. "These Earthworks are one of Ohio's greatest historic and cultural treasures[.]" (OHC's Petition to Appropriate Property, p. 1 (Nov. 28, 2018).)

Third: Because of the land's historical and cultural significance and future use as a public park, this litigation has attracted intense local and widespread publicity. *E.g.*:

- Sarah Bahr, Ancient Earthworks Trodden by Golfers Become a World Heritage Site, N.Y. Times (Sept. 19, 2023), available at https://www.nytimes.com/2023/09/19/arts/design/octagon-earthworks-ohio-world-heritage-site.html (as of Jan. 26, 2024);
- CBS News, Ancient Earthen Structures in Ohio become a UNESCO World Heritage Site (Jan. 21, 2024), available at https://www.cbsnews.com/sanfrancisco/video/ancient-earthen-structures-in-ohio-become-a-unesco-world-heritage-site/?intcid=CNM-00-10abd1h (as of Jan. 27, 2024);
- Deepa Fernandes and Gabrielle Healy, Why a UNESCO Site and a Golf Course Share the Same Place in Ohio, WBUR's Here & Now (Oct. 5, 2023), available athttps://www.wbur.org/hereandnow/2023/10/05/earthworks-golf-course-ohio (as of Jan. 27, 2024).

In rural Licking County, this lawsuit and the development of the Intel chip factory are the most notorious stories in the county. Since 2019, there have been at least 43 articles in the *Newark*

Advocate and other publications about this case or the mounds themselves.[1] And OHC has pursued a marketing campaign to generate notoriety for this property—specifically that the property is part of Hopewell Ceremonial Earthworks, one of only 1,199 sites on the UNESCO World Heritage List. https://whc.unesco.org/en/list/.

Fourth: Because of the notoriety of the case, the uniqueness of the property and because OHC, exercising the State's appropriation powers, can gain immediate possession of the property upon paying the verdict, delaying appellate review of the exclusion of the property-owner's expert evidence until after a first jury trial risks irreparable harm to the property-owner's case in the re-trial.

Fifth: This Court has already participated in this case, affirming the appropriation and remanding for a jury trial on the valuation issue. 171 Ohio St.3d 663, 2022-Ohio-4345, at ¶ 46.

Sixth: This appeal may or may not be characterized as presenting a constitutional *question*. But it does present a question that implicates the constitutional *interest* of the people's right to present evidence of the value of property the government takes from them. Determination of economic value is, in most cases, an uncertain endeavor, permeated with subjectivity. The subjectivity generally is greater with real property than it is with personal property, because "it is hornbook law that almost all real property is unique." *Steeple Chase Village, Ltd. v. City of Columbus*, 10th Dist. No. 19AP-736, 2020-Ohio-7012, ¶ 27. The real property in this case is unique beyond the ordinary meaning of that word. Citizens' constitutional right to compensation for appropriated property will be in jeopardy if a trial judge—in this case of all cases—can bar the property owner

[1] Google, *News*, https://www.google.com/search?sca_esv=0196012b5e182082&sxsrf=ACQVn0-KZycLQ18-udxB2slfd6QxkCQuIw:1706280519683&q=moundbuilders+country+club&tbm=nws&source=lnms&sa=X&ved=2ahUKEwj234yipvuDAxWYLkQIHVKJAY8Q0pQJegUIgAEQAQ&biw=1920&bih=947&dpr=1 (listing articles in the *Newark Advocate* and elsewhere).

from presenting expert evidence of value based upon the judge's personal beliefs regarding valuation methodology.

STATEMENT OF THE CASE AND FACTS

On November 28, 2018, OHC, exercising the State of Ohio's appropriation power, filed a complaint seeking to appropriate a leasehold held by Appellant The Moundbuilders Country Club Company ("MCC"). The leasehold covers 134 acres in Newark, Ohio that includes the aforementioned historical earthworks. Since 1910, MCC has operated a golf and country club on the land. MCC has leased the land from OHC since 1938. The current lease gives MCC the right to occupy the land until 2078.

On May 10, 2019, after a four-day trial, the Licking County Court of Common Pleas entered judgment granting the appropriation. On January 29, 2020, the Fifth District Court of Appeals affirmed. 5th Dist. No. 2019-CA-00039, 2020-Ohio-276. On December 7, 2022, this Court affirmed. 171 Ohio St.3d 663, 2022-Ohio-4345.

On January 25, 2023, the trial court issued a scheduling order for the compensation phase of the case, including a jury trial scheduled for October 17, 2023.

On March 31, 2023, pursuant to that scheduling order, MCC disclosed G. Frank Hinkle, II, MAI as its expert witness regarding the value of the appropriated leasehold, and produced Hinkle's appraisal report and *curriculum vitae*.[2] Mr. Hinkle is a Certified General Appraiser, a licensed real

[2] MCC disclosed and produced reports of two other experts for opinions on issues other than the value of the appropriated property. Veteran golf-course architect Michael Hurdzan opined on the cost to build a golf course similar to MCC's golf course. Hurdzan's opinion provides part of the foundation for Hinkle's opinion of value. MCC also disclosed and produced a report of certified appraiser Gary Papke as a rebuttal expert to critique OHC's expert evidence.

estate agent, and a licensed attorney, and his qualification as an expert witness is undisputed. Hinkle opined that MCC's leasehold was worth $22.7 million. OHC deposed Hinkle on June 19, 2023.

OHC disclosed and provided reports for two appraisal experts, Robert Weiler and Laurence Hirsch. Weiler opined that MCC's leasehold was worth $1.7 million; Hirsch's value was $1.18 million. OHC also disclosed and provided a report for David Sangree, a rebuttal appraisal expert, who opined that MCC's leasehold was worth $2 million.

On October 6, 2023—11 calendar days before the trial date—the trial court excluded both Mr. Hinkle and Mr. Hurdzan from testifying and excluded their expert reports.[3] A copy of the October 6, 2023, Decision and Orders on Pretrial Motions is attached at Appendix A-3 ("Exclusion Order"). Hinkle was MCC's only witness offering an opinion on the value of the appropriated leasehold. Thus, as a result of this Exclusion Order, MCC has no evidence of value to present to the jury.

On October 13, 2023, MCC filed a notice of appeal to the Fifth District Court of Appeals.

On January 16, 2024, the Court of Appeals dismissed the appeal on the basis that the Exclusion Order is not a final, appealable order. A copy of the Court of Appeals' Judgment Entry is attached at Appendix A-1.

On January 22, 2024, the trial court scheduled the jury trial on the issue of valuation for February 20, 2024.

On February 7, 2024, in the Supreme Court, MCC filed a notice of appeal and a motion for stay in advance of filing a memorandum in support of jurisdiction.

[3] As for Mr. Papke, the trial court permitted him to testify to critique OHC's expert evidence but specifically precluded him from testifying as to the value of the appropriated property. (Exclusion Order, [Appendix pp. A-16 to -17].)

On February 12, 2024, the Supreme Court denied the motion for stay. 02/12/2024 Case Announcements #4, 2024-Ohio-520.

On February 16, 2024, the trial court vacated the trial date. Currently nothing further is scheduled in the trial court.

This Memorandum in Support of Jurisdiction is timely filed pursuant to S.Ct.Prac.R. 7.01(A)(3)(b). MCC asks that this Court accept jurisdiction to review the Court of Appeals dismissal and decide whether the Exclusion Order is a final, appealable order.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of law: **When private property is being taken through eminent domain, and the trial court, in a pretrial order, excludes under Evid.R. 702 all of the property-owner's expert evidence on value, such pretrial order can be a final, appealable order.**

A. Introduction.

Under the Ohio Constitution, courts of appeals "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[.]" Ohio Const., Art. IV, § 3(B)(2). Certain interlocutory orders are final and appealable under R.C. 2505.02. The Exclusion Order in this case is final and appealable for three independent reasons:

- It is "[a]n order that affects a substantial right made in a special proceeding" under R.C. 2505.02(B)(2).
- It is [a]n order that grants . . . a provisional remedy" and otherwise satisfies R.C. 2505.02(B)(4).
- It is "[a]n order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code" under R.C. 2505.02(B)(7).

B. The Exclusion Order is "[a]n order that affects a substantial right made in a special proceeding" under R.C. 2505.02(B)(2).

R.C. 2505.02(B)(2) provides:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is . . . [a]n order that affects a substantial right made in a special proceeding[.]

Regarding the "special proceeding" element: An R.C. Chapter 163 appropriation proceeding is a "special proceeding" under R.C. 2505.02(B)(2). *Cincinnati Gas & Elec. Co. v. Pope*, 54 Ohio St.2d 12, 16 (1978) (abrogated on other grounds by amendment of R.C. 163.09(B)); *Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462, ¶ 11 (9th Dist.).

Regarding the "substantial right" element: "'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). *E.g.*, *Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462, ¶ 12 (holding that the R.C. 2710.03 mediation privilege is a "substantial right"). Rule 702 of the Ohio Rules of Evidence generally provides litigants the right to present expert testimony. Rule 702 provides: "A witness may testify as an expert if all of the following apply . . . ." *E.g.*, *State v. Midwest Pride IV*, 131 Ohio App.3d 1, 11 (12th Dist. 1998) (referring to "the[] right to introduce . . . expert . . . testimony" (italics omitted)). The common law of evidence also generally provides litigants the right to present expert testimony. *See Hall v. Nagel*, 139 Ohio St. 265, 271 (1942) (stating, in a decision pre-dating the Rules of Evidence: "Of course, on cross-examination the accuracy and correctness of Dr. Conwell's conclusion could be tested, and the defendant would have the right to introduce other expert testimony in contradiction").[4] The property owner in an appropriation action thus generally has a right to present expert

[4] Evid.R. 102 provides: "The principles of the common law of Ohio shall supplement the provisions of these rules, and the rules shall be construed to state the principles of the common law of

evidence regarding value, at least when the matter of value is "beyond the knowledge or experience possessed by lay persons." Evid.R. 702(A). In this case, expert evidence is not just permissible but is necessary to each side's case, because the land at issue currently has a rare use (as a golf course) and has extraordinary historical and cultural significance. The right of a property owner to present expert evidence of the value of the appropriated property is a "substantial right" within the meaning of R.C. 2505.02(B)(2).

The property owner also has a right to have a jury determine compensation in an impartial manner. Ohio Const. Art. I, §19; R.C. 163.14(A). As this Court previously stated, "[t]he law of Ohio, as found in the Constitution and the procedural statutes, provides that the jury shall assess the compensation and the damages and is entitled to make that determination from all the evidence in the case." *In re Appropriation of Easements for Highway Purposes*, 172 Ohio St. 524, 528 (1961). "It is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier-of fact." *Proctor v. Bader*, 5th Dist. No. 03 CA 51, 2004-Ohio-4435, ¶ 12. Further, "in an appropriation case, the jury's verdict must be within the range supportable by proof." *Wray v. Allied Indus. Development Corp.*, 7th Dist. No. 01-CA-188, 2002-Ohio-5214, ¶ 9.

It is true that a jury will determine the amount of compensation MCC is to receive. But that jury-trial right is hollow and empty if the jury is making a determination based solely on evidence presented by the appropriating governmental agency. The trial is merely a walk down a path to a predetermined ending, rather than a contested preceding where a jury is given a meaningful opportunity to weigh evidence presented by both parties. No doubt ODOT would relish having all of its appropriation cases decided on evidence only it presents. But the Ohio Constitution protects

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Ohio unless the rule clearly indicates that a change is intended."

property owners from this result.

For these reasons, the Exclusion Order is "[a]n order that affects a substantial right made in a special proceeding" and therefore a final, appealable order.

C. The Exclusion Order is "is [a]n order that grants . . . a provisional remedy" and otherwise satisfies R.C. 2505.02(B)(4).

R.C. 2505.02(B)(4) provides:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is . . . [a]n order that grants . . . a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4). The Exclusion Order satisfies all three elements of R.C. 2505.02(B)(4).

First: The Exclusion Order grants a "provisional remedy." "'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for . . . suppression of evidence[.]" R.C. 2505.02(A)(3). The word "suppression" usually connotes exclusion in a criminal action of evidence illegally obtained. *See State v. French*, 72 Ohio St.3d 446, 449 (1995). A pretrial motion to exclude evidence is "the functional equivalent of a motion to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation." *Id*. at 450 (italics omitted). And "the statutory phrase 'including, but not limited to' precedes a nonexhaustive list of examples." *State v. Muncie*, 91 Ohio St.3d 440, 448, 2001-Ohio-93 (holding "that a petition for forced medication under R.C. 2945.38 is a 'provisional remedy'"). *Cf.* Crim.R. 12(K) (providing for State's appeal "from an order suppress-

ing or excluding evidence" if such suppression/exclusion "has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed"). Thus, the Exclusion Order – which suppresses/excludes the only evidence MCC has to present on the only issue to be tried, grants a "provisional remedy.

Second: The Exclusion Order "in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy."

Some orders *in limine* constitute "a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue." *State v. Grubb*, 28 Ohio St.3d 199, 201-02 (1986). OHC's motion to exclude MCC's expert Mr. Hinkle did not characterize itself as seeking a tentative, precautionary, or anticipatory ruling. (Motion to Exclude Regarding Expert Report and Testimony of Frank Hinkle, p. 13 (Aug. 18, 2023); *see also* Motion to Exclude Regarding Expert Report and Testimony of Michael Hurdzan, p. 13 (Aug. 18, 2023).) OHC's motion sought ***conclusive*** exclusion of Hinkle's testimony and report. In any event, such conclusive exclusion is what OHC received. (Exclusion Order [Appendix pp. A-8 to -14, A-16 to -20, A-24]). Such a conclusive pretrial ruling is common in Ohio's trial courts:

> A trial court's grant or denial of a motion in limine is a tentative, preliminary, or presumptive ruling about an evidentiary issue that is anticipated but has not yet been presented in its full context. . . . . On the other hand, a motion to exclude expert witness testimony, once excluded, may not be revisited in the way that a motion in limine permits.

Lykins v. Hale, 12th Dist. No. CA2022-07-037, 2023-Ohio-752, ¶ 24. The Ninth District Court of Appeals put it this way:

> This court has described a motion in limine as a precautionary request to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury. Due to the preliminary nature of the ruling, in order to preserve the issue for appeal, one

> must object at the point during trial when the issue arises. . . . [R]renewing a motion and/or objection in the context of when the evidence is offered at trial is important because the trial court is certainly at liberty to consider the admissibility of the disputed evidence in its actual context. This concept of preserving the issue for appeal applies, however, only if the motion in limine is of a type that requests a preliminary ruling prior to the issue being presented in context during trial.
>
> Not all motions in limine are aimed at evidence that may later become relevant and admissible if and when a proper foundation has been laid at trial. Some evidence cannot ever become relevant and admissible. For instance, evidence that is subject to the mediation communication privilege and is not covered by an exception is neither discoverable nor admissible at trial. . . . . Whether evidence is privileged under the statute is not dependent on a foundation being laid at trial. Therefore, the ruling on this type of motion in limine is not preliminary. It is definitive.

Akron v. Carter, 190 Ohio App.3d 420, 2010-Ohio-5462, ¶ 12 (citations, quotation marks, and asterisks omitted). Similarly, here, the Exclusion Order was definitive. No "foundation laying" could change the legal analysis that resulted in the exclusion of Hinkle's testimony and report. Even the Court of Appeals, in its dismissal entry, acknowledged that the Exclusion Order "in effect prevents [MCC] from introducing testimony from two of its expert witnesses." (Judgment Entry, p. 1, ¶ 1 (Jan. 16, 2024) [Appendix p. A-1].) In other words, the Exclusion Order "in effect determines the action with respect to the provisional remedy [OHC's motion to exclude] and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," R.C. 2505.02(B)(4)(a).

In *Porter v. Sidor*, 8th Dist. No. 84756, 2005-Ohio-776, the court ruled that the trial court's exclusion of all of the plaintiff's expert evidence in a medical-malpractice action was a final, appealable order. The court's rationale was (1) that expert evidence of malpractice is a legal requirement to prove a medical-malpractice claim; (2) the trial court announced the exclusion so close to the commencement of trial that the plaintiff was prevented from obtaining another expert; and (3) the record was sufficient to allow the court of appeals to review the merits of the exclusion

order. *Id*. at ¶¶ 3-5 & n. 1. The facts of the MCC's case are similar: (1) "[T]here is only one ultimate issue for submission to the jury in an appropriation proceeding," *Richley v. Liechty,* 44 Ohio App.2d 359, 363 (3rd Dist. 1975)—namely, value of the appropriated property. In this case, at least, expert evidence of value is necessary to make out a case, and the trial court excluded all of MCC's expert evidence of value. (2) The trial court announced the exclusion so close to the commencement of trial (11 days) that MCC was prevented from obtaining another expert to appraise the golf course. (3) The record is sufficient to allow the court of appeals to review the merits of the exclusion order. The record contains Hinkle's report and the transcript of his deposition, and the admissibility of Hinkle's report and testimony was extensively litigated on the record.

The Exclusion Order "in effect determines the action" with respect to the exclusion of Hinkle's testimony and report and "prevents a judgment" in MCC's favor with respect to that issue.

Third: MCC "would not be afforded a meaningful or effective remedy by an appeal following final judgment" as to the value of the appropriated property. Few interlocutory orders satisfy this final element of R.C. 2505.02(B)(4). In most situations, appellate relief following the final judgment as to all claims and parties in the trial court is meaningful and effective. Not so here. This appropriation action has garnered much public attention. (*See* above, pp. 2-3.) A jury verdict on the value of the appropriated property would be a major news story in Licking County and likely would be known to jurors in a second trial. "In some instances, the proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage suffered by the appealing party." *State v. Muncie*, 91 Ohio St.3d 440, 451, 2001-Ohio-93 (quotation marks and brackets omitted). That would be so in this case if a jury verdict were reached and publicized without the jury having heard from MCC's expert. Such a verdict would irreparably harm MCC's

chance of selecting a jury in a second trial untainted by the news of the prior jury's verdict. The risk is the probability of the first jury undervaluing the property and the second jury being influenced toward a value lower than the jury might otherwise determine. R.C. 2505.02 should be construed so as to minimize the risk of the jury being biased by the conclusions rendered by a prior jury after a prejudicially erroneous exclusion of evidence under Evid.R. 702.

This irreparable harm would be exacerbated by OHC's gamesmanship. OHC announced an intention to present three expert appraisers, each of whom was on record providing a different valuation. After obtaining the Exclusion Order, OHC announced that it would refrain from presenting to the jury the testimony of the expert who had provided the highest of the three valuations. Thus, the second jury in this case would be tainted by publicity of a prior jury's valuation that was reached not only without hearing from the property-owner's expert but that was reached without even learning of the highest valuation determined by OHS's own experts.

Because of the unique nature of the property and the peculiarities of eminent domain law, delaying appellate review of the Exclusion Order risks two other forms of irreparable harm to MCC in a retrial. In exercising the State's appropriation power, OHC can, upon payment of the jury award, take immediate possession of the property. *See* R.C. 163.15(A). OHC's expressed intention is to operate the property as a park. 171 Ohio St.3d 663, 2022-Ohio-4345, ¶¶ 1, 2, 43, 44. OHC has no intention to operate or maintain the golf course. An unmaintained golf course will become unusable as a golf course in a single growing season and cost a substantial amount of money to restore to its pre-appropriation condition. OHC by its own admission is of limited financial means. *See generally* R.C. 149.30 (Public Functions of Ohio History Connection). OHC may be unable to pay MCC the compensation awarded by the jury. If that is the case, OHC would have

to abandon its appropriation. *See* R.C. 163.21(A)(1). But by then the golf course would be unusable, and it would cost a substantial amount to restore it. Another form of irreparable harm of delaying appellate review of the Exclusion Order is the risk that such neglect of the golf course would spoil (from MCC's perspective) the probative value of a jury view of the property, to which MCC is entitled under R.C. 163.12.

The Exclusion Order "is [a]n order that grants . . . a provisional remedy" and otherwise satisfies R.C. 2505.02(B)(4), and is a final, appealable order.

D. The Exclusion Order is "[a]n order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code" under R.C. 2505.02(B)(7).

R.C. 2505.02(B)(7) provides:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is . . . [a]n order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

R.C. 163.09(B)(3) generally provides: "An owner has a right to an immediate appeal if the order of the court is in favor of the agency in any of the matters the owner denied in the answer . . . ."

The Exclusion Order was "in favor of the agency."

The Exclusion Order also pertains to "a[] . . . matter[] the owner denied in the answer":

- OHC's Petition to Appropriate Property alleged that the property's value is "Eight Hundred Thousand Dollars ($800,000)." (Petition, p. 19, ¶ 91 (Nov. 28, 2018).)
- MCC in its Answer denied that allegation: "With respect to Paragraph ninety-one of Plaintiff's Petition, . . . Defendant denies that Eight Hundred Thousand Dollars ($800,000) is the fair market value of the property Plaintiff proposes to take." (Answer, p. 12, ¶ 92 (Jan. 8, 2019).)
- The Exclusion Order excluded evidence of the value of the appropriated property.

Therefore, the Exclusion Order pertains to "a[] . . . matter[] the owner denied in the answer" and is a final, appealable order.

E. Conclusion.

The Exclusion Order is a final, appealable order. This Court should reverse the January 16, 2024 Judgment Entry of the Fifth District Court of Appeals and remand to that court with instructions to review the merits of MCC's appeal.

CONCLUSION

This should accept jurisdiction and decide the merits of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by Electronic and/or regular U.S. Mail this 27th day of February, 2024, to the following individual(s):

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