

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Case Leasing & Rental, Inc.,	:	
	:	
Plaintiff-Appellee/ [Cross-Appellant],	:	
	:	
v.	:	No. 09AP-498
	:	(C.C. No. 2005-08034)
Ohio Department of Natural Resources,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant/ [Cross-Appellee].	:	
	:	
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D E C I S I O N

Rendered on December 15, 2009

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*Schottenstein, Zox & Dunn, Stephen P. Samuels, Kevin L. Murch and Jeremy M. Grayem, for appellee/cross-appellant.*

*Richard Cordray, Attorney General, and Randall W. Knutti, for appellant/cross-appellee.*

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APPEAL from the Ohio Court of Claims

TYACK, J.

{¶1} In July 2003, a severe storm at Grand Lake St. Mary's in Celina, Ohio resulted in the flooding of appellee, Case Leasing & Rental's ("Case") property. The Ohio Court of Claims found appellant, Ohio Department of Natural Resources ("ODNR"), liable for negligent construction and maintenance of a replacement spillway on the western shoreline of the lake.

{¶2} The damages portion of the bifurcated trial was tried to a magistrate who recommended damages in the amount of \$4,235,444 consisting of \$2,735,000 for loss of real property market value, \$551,119 in personal property loss, \$949,300 in interest costs, plus \$25 for the cost of the filing fee. The parties filed objections; the court disallowed all the interest costs, and ultimately awarded a total of \$3,286,144 in damages to Case.

{¶3} ODNR appealed from the judgment assigning the following as error:

[I.] The trial court erred by making a liability determination that failed to consider the relative benefits doctrine.

[II.] The trial court erred by determining that Case's real property was "permanently" harmed as a result of the 2003 flood.

[III.] The trial court erred by basing its damages calculation on an objectively flawed appraisal.

{¶4} Case filed a cross-appeal assigning as error the following:

[I.] The trial court erred in holding that Case Leasing and Rental, Inc. ("Case") could not recover any costs related to the restoration of its facility or the ancillary expenses incurred in restoring the facility that was damaged as a result of the Ohio Department of Natural Resources' negligence.

[II.] The trial court erred in holding that Case could not recover its lost revenue for the time period that its facility was closed due to damage caused by the Ohio Department of Natural Resources' negligence.

{¶5} Since 1949, Grand Lake St. Marys ("GLSM") and surrounding acreage have been owned and operated as a state park by ODNR. The lake was created in the mid-1800s by the construction of an earthen dam at the headwaters of The Wabash and St. Marys rivers and flooding the area between. A 34.9 foot spillway constructed in 1914 had been the outlet for virtually all the water flow out of GLSM prior to the construction of a new spillway.

{¶6} In 1997, ODNR approved the design, directed and oversaw construction of a 500-foot spillway to replace the 1914 spillway. Despite knowledge that the replacement spillway would result in more frequent and more severe flooding to downstream landowners, ODNR rejected alternative plans and proceeded with construction.

{¶7} Case is the owner of a sports and recreation complex comprised of approximately 21 acres of land, which originally included a nine-hole golf course, and an 87,500 square foot facility known as the Lake Front Racquet and Health Club (the "RecPlex"). The facility provided a wide variety of indoor and outdoor fitness and recreational activities for the general public.

{¶8} In July 2003, a severe storm resulted in the flooding of property downstream from the dam. The 2003 flood devastated the Case property. The lower-level RecPlex facilities which included locker and shower rooms, restrooms, whirlpools, a sauna, tanning equipment, racquetball courts, a "children's palace," and various storage and mechanical areas were completely submerged. The first floor facilities including tennis courts, a fitness center, an aerobics room, a Pilates room, a soccer field, a swimming pool, a restaurant, additional lockers, showers, and restrooms were flooded to a depth of approximately four feet. Additional damage was caused as a result of the flood water being contaminated by sewage. The golf course was destroyed and was not rebuilt.

{¶9} The magistrate found the damage to the property to be permanent in nature, even though Case had built a six-foot dike around the property to alleviate future flooding. The magistrate found that the source of the flooding, the 500-foot spillway,

had not been altered, and there had been subsequent flooding to the property, despite the presence of the dike.

{¶10} Case sought damages totaling \$5,296,344.80 consisting of four components: 1) loss of market value to the real property; 2) loss and/or damage to the personal property contained within the RecPlex, including ancillary expenses incurred in restoring some of the property; 3) loss of revenue during the eight months the RecPlex was closed following the flood and during the time it took to rebuild the customer base to its pre-flood level; and 4) interest paid and accruing on loans taken out to pay for restoration of the RecPlex.

{¶11} Case's expert testified as to the diminution in value of the real property. The appraiser assessed the loss in the market value of the property to be \$2,735,000. ODNR did not call an appraiser of its own to challenge Case's expert, electing to challenge the expert on his methodology, analysis, and findings. The magistrate recommended judgment for Case in the full amount of \$2,735,000 for loss of real property market value.

{¶12} The court agreed with the magistrate's analysis and found that, because the injury to the property was permanent, the proper measure of damages was the diminution in the market value of the property, and that the evidence supported the magistrate's finding.

{¶13} Thomas Case, the owner, and Cheri Kraska, his daughter, itemized the personal property and ancillary expenses incurred in restoring the RecPlex. Case's expert testified there was no overlap between the real property loss and the personal property losses and expenses. Case's witnesses testified that the personal property

loss damages totaled \$551,119. The magistrate found the methods used for evaluating the loss to be reasonable and the testimony to be reliable and trustworthy.

{¶14} The court awarded the full amount as damages.

{¶15} The magistrate disallowed damages for lost revenue on the basis that Case had failed to prove loss of profits with the required degree of specificity. Specifically, the magistrate stated that the evidence presented was based upon averaged loss of gross revenue with no deductions for staff salaries and other operating costs being considered. The magistrate found that although there was certainly a loss of profits during the period the RecPlex was closed and while it was rebuilding its customer base, Case had failed to provide competent proof of the extent of the loss.

{¶16} The court reiterated that the measure of damages for permanent injury to real property is the loss of market value. Therefore, the court determined that damages for lost profits were not warranted and would result in a windfall to Case.

{¶17} Case took out a loan of \$1,000,000, later increased to \$2,500,000, to pay for restoration and repair. Thomas Case testified that the funds from the first loan were used exclusively for rebuilding and re-equipping the RecPlex. Thomas Case testified that he took out additional loans totaling \$2,500,000 for additional work, to cover operating and maintenance costs, and to make payments on the first loan. The magistrate found that the first \$2,500,000 was used to pay for restoration and repair, and that the loan amount was reasonable. However, the magistrate found the evidence wholly insufficient that the proceeds from the additional loans were used for repairs and restoration. The magistrate recommended that Case be awarded the interest on the first \$2,500,000 loan.

{¶18} The court disallowed all the interest charged. The court reasoned that when Case chose to repair and reopen the business, it did so with full knowledge that the spillway design had not been changed, that it was likely to remain unchanged for some time, and that continued intermittent flooding was inevitable. Therefore, the court determined that it was error to award any interest charged upon sums borrowed to finance the repair, ongoing operation and maintenance, and the purchase of new equipment.

{¶19} In its first assignment of error, ODNR challenges the court's liability determination, asserting that the court should have applied the "relative benefits" doctrine to the facts of this case. ODNR claims that the court should have compared the amount of flooding after the new spillway was constructed with the level of flooding that would have occurred if no dam had been constructed at all. ODNR argues that the overall benefit to Case's property from the existing dam and spillway is greater than the damage from periodic flooding that occurs with the new spillway, and therefore there can be no finding of liability.

{¶20} The relative benefits doctrine is found in federal eminent domain proceedings. For example, farmers brought an action claiming that the federal government had taken a permanent easement on their land by operating two reservoirs and dams in such a way as to cause flooding on their property. *Herriman v. United States* (1985), 8 Cl.Ct. 411. The United States Claims Court found there was not a taking within the meaning of the Fifth Amendment because the net effect of the dam operation had been to alleviate or at least not aggravate sporadic flooding. In *United States v. Spontenbarger* (1939), 308 U.S. 256, 60 S.Ct. 225, the Supreme Court denied that a

taking occurs when a flood control program aggravates the volume or velocity of inevitably destructive floods that would occur anyway absent the flood control project, where the program in its entirety greatly reduces flood hazards.

{¶21} ODNR concedes that the relative benefits doctrine has not been applied by Ohio courts; nevertheless, it urges this court to overturn the liability determination on that basis.

{¶22} The man-made GLSM was built in 1835 as part of Ohio's canal system. In 1914 a spillway was installed on the western shore and existed until the current spillway was installed in 1997. Given this history, we find that it is simply unreasonable to ignore the effect of nearly 100 years of lake maintenance and flood control on property owners who have built on nearby land. Under ODNR's reasoning, the owner or operator of nearly every dam in the state could avoid liability for improper operation, construction, or maintenance, merely by comparing post-flood devastation to conditions existing prior to the construction of the dam.

{¶23} The complaint contained a claim for a taking of private property under the United States and Ohio Constitutions. However, the trial court did not find ODNR liable under that theory. The trial court found ODNR liable for negligent construction and maintenance of the replacement spillway resulting in damage to Case's property. Case's expert testified extensively on this issue, and the trial court found the evidence to be credible. ODNR's primary objective was to keep GLSM from overtopping its embankment. However, the court found that reasonable alternatives were available that would not increase flooding of downstream property, including the RecPlex. Because

there was sufficient competent credible evidence to support a finding of negligence, there is no need to address whether ODNR's actions constituted a taking.

{¶24} The first assignment of error is overruled.

{¶25} In its second assignment of error, ODNR challenges the trial court's determination that the injury to Case's property was permanent. ODNR argues that the injury to the property was only temporary because Case was able to and did repair and restore the property.

{¶26} In civil cases, if some competent, credible evidence supports all the essential elements of the case, a reviewing court will not reverse the judgment as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. In determining whether a civil judgment is against the manifest weight of the evidence, a presumption that the findings of the trial court are correct guides an appellate court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.*

{¶27} Under Ohio law, the measure of damages for permanent injury to real property is the difference in market value of the property as a whole, including the improvements thereon, before and after the injury. See *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, syllabus (removal of subjacent support). In cases of temporary injury, the rule was held to be as follows:

\* \* \* If restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value



of the loss of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure.

Thus, *Ohio Collieries* stood for the proposition that the diminished market value of the property provided a ceiling on restoration damages.

{¶28} More recently, however, the Ohio Supreme Court decided *Martin v. Design Const. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1. In that case, the Supreme Court did not alter the diminution in value measure of damages for permanent injury. Rather, it made explicit what it had implied in earlier cases regarding temporary injury. In determining the measure of damages for temporary damage to noncommercial real property, "the essential inquiry is whether the damages sought are reasonable." *Id.* at ¶25. The court stated that either party may introduce evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration. *Id.* at syllabus. Thus, loss of market value no longer serves as a ceiling on damages, but as one factor in determining the reasonableness of the costs of restoration.

{¶29} The magistrate and the court relied on *Klein v. Garrison* (1951), 91 Ohio App. 418, as the basis for the finding that the injury to the RecPlex was permanent. In *Klein*, the Montgomery County Court of Appeals held that removal of topsoil and the subsequent change to the grade of a lot resulted in permanent injury to the land. Interestingly, in the *Klein* decision, the court found the damage to the land to be permanent even though the raw land could be restored to its original condition by replacing the topsoil and grading the property.

{¶30} The key passage in *Klein* is as follows:

\* \* \* The case law which we have examined indicates that where the injury abates by discontinuance of the wrong, or where the owner by his act can abate the wrong, the injury is held to be temporary. \* \* \* Where the injury still remains after the discontinuance of the wrong and will exist indefinitely and require the expenditure of time, effort and money to restore the land to a semblance of its original condition, the injury is held to be permanent. In law an injury may be considered to be permanent although not perpetual. \* \* \*

Id. at 430.

{¶31} Turning to the present case, it is clear that before the 2003 flood, the RecPlex was an operational recreation and sports complex, complete with a full service restaurant and a nine-hole golf course. After the flood, the building and grounds could not be used for any recreational purposes. During the eight-month period following the flood, Case undertook cleaning, repair, replacement, and renovation. In an attempt to abate further flooding, Case built a dike approximately six-feet high around portions of its property to deter future flooding.

{¶32} Even with these extensive repair efforts, the magistrate concluded that the injury to the RecPlex is permanent, and that "continued intermittent flooding is inevitable." (Decision, at 4.) The magistrate highlighted its finding that the RecPlex experienced flooding in January 2005 and February 2008 and had to be closed again for a short time as a result of the flooding in 2008.

{¶33} In the liability portion of the trial, Thomas Case testified that, in a 2005 storm event, the water came within 12 inches of the top of the dike, and in 2006 within 12 to 18 inches:

Q. After the 2003 storm hit and destroyed your property, did you install a dike around portions of the property to protect it in the future?

A. Yes.

\* \* \*

Q. And approximately how high is this dike?

A. Five to six feet.

\* \* \*

Q. Okay. After '03, have there been any flooding events that have caused water to come up against the dikes around the property?

A. Yes.

Q. And how many times since 19 -- since 2003 has that happened?

A. Two times.

Q. And when was that?

A. January of '05 and May of '06.

Q. And during those events, did you observe the level of the water on the dikes?

A. Yes.

Q. And how high was it?

A. In the January of '05, it got to within 12 inches of the top of the dike.

Q. And in the other storm event that you mentioned.

A. Yes, it was probably, I'd say, 18 inches. 12 to 18 inches.

Q. Below the top of the dike?

A. Yes.

(R. 132 at 25-27.)

{¶34} In the damages phase of the trial, Thomas Case testified that one flood occurred in January 2005 and another in February 2008:

Q. After the flood that occurred in July of 2003, did you construct a dike around the property to prevent or minimize future flooding events?

A. Yes.

Q. Despite that, were there floods after the July 2003 flood that caused the Rec-Plex to shut down?

A. Yes.

Q. When did those occur?

A. One occurred in January of '05, and one occurred in February of '08.

(R. 134 at 87.)

{¶35} Thomas Case's daughter, Cheri Kraska, testified that the RecPlex was shut down from February 6 through February 11, 2008 due to flooding:

Q. Was there an occasion in February of 2008 when the Rec-Plex was shut down due to a flooding event?

A. Yes, from February the 6th through the 11th, a six-day period of time, we were closed due to flooding.

(R. 134 at 78-79.)

{¶36} From this testimony, it is clear that the dike Case built around its property did abate subsequent flooding with respect to the 2005 event and the 2006 event because the water never overtopped the dike.

{¶37} The February 2008 incident is problematic because it is unclear whether any real property was harmed. The only testimony regarding this incident was that the RecPlex was closed due to flooding. It is not clear whether that flooding came as a

result of the new spillway. There was no testimony as to the cause of the flooding or whether water overtopped the dike.

{¶38} Based on this record as to an event in 2008, the magistrate found that the injury to Case's real property was permanent. The magistrate wrote as follows:

\* \* \* Specifically, even though plaintiff was able to reopen the RecPlex, the spillway design has not been changed, nor is it conceivable that it will be in the near future; therefore, continued intermittent flooding is inevitable. Indeed the evidence establishes that flooding did again occur in January 2005 and in February 2008, and that the RecPlex closed for a short time in 2008 as a result of that flood. In addition, plaintiff testified that after the 2003 flood, he constructed a dike around the property to prevent or minimize future flooding but that such effort was to no avail.

(Decision, at 4.)

{¶39} After a review of all the evidence, it appears that the construction of the dike prevented flooding in 2005 and 2006. Even finding that the testimony regarding the 2008 flooding to be credible, there was no evidence that the flooding in 2008 was caused by water overtopping the dike. That the RecPlex spent large sums to repair and reopen, and constructed a dike to abate future flooding is evidence of temporary injury to the property. The magistrate's finding of permanent injury is not supported by some competent credible evidence, and is therefore against the manifest weight of the evidence.

{¶40} The injury to the Case property was temporary because it was repairable, and the owners took measures to alleviate the risk of further flooding. Therefore, Case is entitled to the reasonable cost of repair plus reasonable compensation for loss of use of the property.

{¶41} Regardless of whether the damage to Case's property was permanent or temporary, Case cannot recover damages for both the diminution in value of its property and the costs of restoration and repair (including interest). Such an award would provide a windfall to Case. As discussed in *Ohio Collieries*, the measure of damages for a repairable injury is the reasonable cost to repair, plus reasonable compensation for the loss of the use of the property between the time of the injury and the restoration. *Id.* at 248. Here, the magistrate and the trial court never made a factual determination of the total cost of repair because Case sought diminution of market value. The court never made a finding of reasonableness regarding the cost of repair or the loss of use of the property. Accordingly, we remand the matter for a determination of damages for a temporary injury to the property. Whether the court decides to go forward on the record and reevaluate the evidence presented, or to accept additional briefing, or to take additional evidence, is within the sound discretion of the Court of Claims.

{¶42} The second assignment of error is sustained.

{¶43} In the third assignment of error, ODNR challenges the court's award of damages for the diminished market value of the property. On remand, the evidence of diminution of the market value is relevant in deciding whether the actual costs of repair and restoration are reasonable.

{¶44} Case's expert was subject to cross-examination on the issues raised by ODNR attacking the validity of his calculations. The magistrate found the expert's appraisal methods and the data he relied upon to be both reasonable and well considered. ODNR did not have an expert of its own. There was some competent

credible evidence as to the loss of market value of the property, and the court's decision on that issue was not against the manifest weight of the evidence.

{¶45} The third assignment of error is overruled.

{¶46} The first cross-assignment of error concerns the decision of the court to award damages for the interest on the loans Case took out to restore the property. Our resolution of the second assignment of error renders this cross-assignment moot as the matter is remanded for a determination of the reasonable costs of repair and restoration. As the magistrate found, interest on loans taken out to restore the property can be a reasonable cost of repair.

{¶47} Likewise, the second cross-assignment of error takes issue with the court failing to award damages for Case's lost revenue for the time from July 2003 through March 2004 while the RecPlex was closed, and the time from March 2004 through December 2005 as Case attempted to bring the RecPlex back to functioning at its pre-flood level.

{¶48} The magistrate found that Case incurred damages for loss of use of its property, but it failed to prove its lost profits with specificity, in particular, because it did not separate overhead expenses from gross revenue. The court went further and found all such damages unwarranted because it awarded Case the diminished market value of its property. On remand, the court must determine the reasonable value of the loss of the use of the property between the time of the injury and the restoration. Reasonable certainty as to the amount of damages is required, and we leave that determination to the Court of Claims.

{¶49} The cross-assignments of error are overruled as moot.

{¶50} Case filed a motion to strike portions of ODNR's reply brief. Such motion was submitted to the court for determination with the merits, and for good cause, we overrule the motion.

{¶51} Based on the foregoing, the judgment of the Ohio Court of Claims is affirmed with respect to liability and reversed for further determination on the issue of damages. Assignments of error one and three are overruled; assignment of error two is sustained, and the cross-assignments of error are overruled as moot.

*Motion to strike overruled;  
judgment affirmed in part; reversed  
in part and remanded for further proceedings.*

KLATT and SADLER, JJ., concur.

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