[Cite as *Ohio Dept. of Natural Resources v. Knapke*, 2015-Ohio-1691.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO,
DEPARTMENT OF NATURAL
RESOURCES,

PLAINTIFF-APPELLANT, **CASE NO. 10-14-03**

v.

CHAD M. KNAPKE, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Mercer County Common Pleas Court
Trial Court No. 12-CIV-200

Judgment Affirmed

Date of Decision: May 4, 2015

APPEARANCES:

Scott D. Phillips **for Appellant**

Bruce L. Ingram and Thomas H. Fusonie **for Appellees**

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant the State of Ohio Department of Natural Resources ("ODNR") brings this appeal from the judgment of the Court of Common Pleas of Mercer County in favor of defendants-appellees Chad M. Knapke ("Chad"), Andrea M. Knapke ("Andrea"), Randy Grapner[1], David Kaiser[2], and the Bank of Geneva. For the reasons set forth below, the judgment is affirmed.

History of the Case

{¶2} This case is based upon a taking of property near Grand Lake St. Marys ("GLSM") to form a permanent flowage easement by ODNR. The Ohio Supreme Court has already determined that a taking occurred when ODNR constructed a new spillway that increased the likelihood that the real estate in question would flood regularly. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235. In *Doner*, approximately 80 landowners filed a writ of mandamus with the Ohio Supreme Court to compel ODNR to initiate appropriation proceedings for the taking of their property. *Id*. at ¶ 16. In its ruling the Court unanimously made the following findings.

> **First, relators presented substantial, credible, and uncontroverted firsthand testimonial and documentary evidence that following respondent's construction of the new spillway in 1997 and its subsequent abandonment of lake-level management, their properties flooded more frequently, over a larger area, for longer duration, and with greater damage.**

[1] Grapner was sued in his position as Mercer County Auditor.
[2] Kaiser was sued in his position as Mercer County Treasurer.

Second, relator's primary expert, engineer Pressley L. Campbell, testified that the redesigned spillway caused frequent and severe flooding in the Beaver Creek-Wabash River area. This flooding would have been "highly unlikely, if not impossible" without the new spillway and respondents' subsequent failure to manage the lake level. Notwithstanding respondents' claims to the contrary, Campbell's conclusions were not based simply on his *Case Leasing* work. Other engineers in Campbell's company visited the properties and took photographs of the area, which Campbell reviewed.

Third, the reliance of respondents and their expert on a 1981 United States Army Corps of Engineers report to discount Campbell's expert opinion is misplaced. According to engineer James Moir, the current conditions differ substantially from those in existence when that report was completed. There are now no trees along Beaver Creek, and thus the creek has a much greater capacity to convey water than it had previously.

Fourth, significantly, respondents' own expert, Stantec, concluded in its hydrologic and hydraulic analysis that for the 15-year rain event that respondents claim to be the applicable frequency for a takings analysis, ten of relators' parcels suffered increased maximum depth and duration of flooding, and 46 of their parcels experienced increased duration of flooding since the redesign of the spillway and the abandonment of lake-level management. That is, even Stantec concedes that flooding of at least some of the relators' property was caused by the new spillway and the lack of lake-level management.

Fifth, Stantec also concluded that the peak flow from the new spillway in even ten year rain events now exceeds the peak flow from historical 100-year rain events with the old spillway. For a 96-hour ten-year rain event with the new spillway, Stantec determined that the peak spillway flow was 650 cubic feet per second ("cfs"), which exceeds the 345 cfs peak spillway flow for a 96-hour 100-year rain event with the old spillway. According to the stipulations that ODNR agreed to in *Case Leasing*, Beaver Creek has a capacity of approximately 480 to 500 cfs, meaning

> **that if the water discharged into the creek exceeds this capacity, Beaver Creek will overtop its banks. Therefore, based on respondents' own expert's analysis, since the 1997 construction of the new spillway and their cessation of lake-level management for GLSM, flooding in excess of prior 100-year rain events is occurring on at least a ten-year frequency, with the banks of the Beaver Creek overtopping enough to create the inevitably recurring flooding downstream that all the relators testified to experiencing.**
>
> **Finally, the flooding caused by respondents' new spillway and lake-level management practices was foreseeable. ODNR was warned repeatedly by landowners, the Mercer County Engineer, and public officials about the likelihood of greater flooding. As the county engineer concluded, ODNR made a conscious choice to disregard that foreseeable risk in favor of recreational users of the lake and landowners on the southern end of the lake.**

Id. at ¶¶ 69-74. The Court then granted the writ of mandamus on December 1, 2011, and ordered ODNR to begin appropriation proceedings. *Id*. at ¶ 86.

{¶3} On November 27, 2012, ODNR filed a petition to appropriate a flowage easement and to fix compensation for the approximately 81 acres of land owned by Chad and Andrea. Doc. 3, Defendant's Exhibits O and P. The complaint alleged that the value of the property was $162,000.00. *Id*. Chad and Andrea filed their answer on December 26, 2012, and objected to the value set by ODNR. Doc. 17. On October 18, 2013, ODNR filed a motion for a jury view of the property that was the subject of the easement. Doc. 44. ODNR also filed a motion to exclude reference to photographs contained in the appraisal report created by Chad and Andrea's expert witness, Richard M. Vannatta ("Vannatta").

Doc. 45. This motion claimed that the photos were irrelevant because they did not depict the property at issue and were prejudicial. *Id.* ODNR then filed a motion to prevent Chad and Andrea from using the language "frequent, severe, and persistent flooding" at any time during the trial. Doc. 46. Chad and Andrea filed their responses to the above motions on October 22, 2013. Doc. 50-52. The motions were addressed by the trial court on the first day of trial. The trial court overruled the motion for a jury view holding that it would be prejudicial and confusing to the jury. Tr. 7. The motion to exclude certain photographs from Vannatta's report was overruled as they were part of the basis for the appraisal and were thus relevant to the valuation. Tr. 9. The trial court also overruled the motion to prohibit the use of the language "frequent, severe, and persistent flooding" on the grounds that they were not inconsistent with the Supreme Court's decision in *Doner*. Tr. 22-23. A jury trial was held from October 23 to October 25, 2013.[3] After deliberating, the jury assessed the damages in the amount of $644,250.00. Tr. 520, Doc. 63. On November 25, 2013, ODNR filed its notice of appeal from this judgment. Doc. 72.

[3] At trial, the date of the take was referenced as being from the time of trial forward. ODNR's expert used October 24, 2013, as the date of the take in his report. The expert for the Knapke's used October 23, 2013, as the date of the take. The small discrepancy in time is not prejudicial to either party as it was not raised by the parties on appeal and there is no allegation that the value of the land changed during that short time frame. Irrespective of the date, there is no dispute between the parties that the flowage easement encompasses 100% of the land in this case.

Trial Testimony

{¶4} From October 23 to October 25, 2013, a jury trial was held. Doc. 59. Chad and Andrea presented their case first. The first witness to testify was Chad. Chad testified that he farms land in Mercer County. Tr. 157. He and Andrea purchased the land from her family in 2000. Tr. 158. Prior to buying the farm, Chad had observed the farm for approximately five years and had not observed flooding. Tr. 159. The land consisted of 71 tillable acres and approximately 10 acres of woods near the river that is not farmed. Tr. 159-60. The soil on the farm is a "sandy-silty-loam type of soil" that is good for farming because the crops get more air, it doesn't get saturated with water, and the plants roots will go deeper. Tr. 160. The first time the farm flooded was 2003. Tr. 162. The high point of the water was eight to ten feet in that flood. Tr. 163. At the time of the flood, the fields were planted with corn and beans, but those crops were washed away. Tr. 164. The water stayed on the land for ten to fourteen days and the crops did not recover. Tr. 165. All of the property was underwater at that time. Tr. 165. Chad testified that during this flooding, he could not access his home, which was by the farm, or the farm by road due to the high water. Tr. 166. Chad identified Exhibit G as a picture of the road in front of his home and farm. Tr. 166. In his 37 years of living in Mercer County, he had never seen any flooding like this. Tr. 166.

{¶5} The next flooding incident was in February of 2005. Tr. 167. The flooding on this occasion again lasted ten to fourteen days and covered all of his land. Tr. 167. The water at that time was six to eight feet deep. Tr. 167. The land flooded again in 2007, 2008, 2009, 2010, 2011, and the Spring of 2013. Tr. 167. The floods of 2007, 2008, and 2009, were not as big and the water ranged from a couple inches in places up to three feet. Tr. 167-68. Thirty to fifty percent of his farm was covered by the flood waters in those years. Tr. 168. Chad did not remember having any crops in the fields during those floods. Tr. 168.

{¶6} In June of 2010, there was another flood which prevented them from putting nitrogen on the corn crop. Tr. 168. The water was too high for them to get the tractors into the field. Tr. 168. The nitrogen was necessary to get maximum yield potential from the corn crop. Tr. 168. This flood also lasted a week to ten days and the water was two to three feet deep. Tr. 169. Thirty to fifty percent of the farm was covered by the flood waters. Tr. 169. The corn lived, but there was a "big yield dip." Tr. 169.

{¶7} In March of 2011, the farm flooded again. Tr. 169. Chad identified Exhibit I as an aerial picture of his farm underwater. Tr. 169. During that flood, the property could only be accessed by boat. Tr. 169-70. One hundred percent of the farm was underwater during that flood and the floodwaters reached a depth of six to eight feet. Tr. 170. This flood lasted ten to fourteen days. Tr. 170.

{¶8} The flooding in 2013 was also extensive. Chad identified Exhibit M as a photograph of his farm taken in April 13, 2013, showing the farm underwater. Tr. 172. At that time, the farm was almost entirely under two to three feet of water. Tr. 172-73. That flood lasted approximately one week. Tr. 173.

{¶9} Chad testified that the effect of the flooding on the soil was soil compaction, tile blowouts, and debris. Tr. 174. Soil compaction is a problem because roots cannot penetrate it. Tr. 175. This leads to higher fuel costs and the necessity of using expensive equipment to prepare the soil for planting. Tr. 175. Fixing soil compaction takes approximately two to three years and no more flooding. Tr. 175. Any future flooding will lead to additional soil compaction. Tr. 176.

{¶10} Chad explained that tile blowouts occur when there is too much water draining and it puts too much pressure on the main tile drain. Tr. 176. This causes the tile to rupture and creates a "suck hole the size of, you know, 2 or 3 feet." Tr. 176. Chad identified Exhibit N as a picture of a suck hole. Tr. 176. The issue with suck holes is that they cause top soil to be washed away and can cause damage to the equipment. Tr. 176-77. To fix a suck hole, the farmer must rent a backhoe, dig out the broken tile and patch it with new tile. Tr. 177. Chad testified that he has had to do this every year. Tr. 177. If suck holes are not repaired, they just get bigger. Tr. 177. The holes are caused by the back pressure

from the river, so until the river is no longer flooded, the pressure cannot be alleviated because the tiles will not drain. Tr. 177. Tiling costs approximately $1,000 to $1,200 per acre. Tr. 178. According to Chad, as long as ODNR is flooding the property, the tile blowouts will continue to be an issue. Tr. 178.

{¶11} Chad testified that during 2003, 2005, and 2010, he suffered crop loss due to flooding. Tr. 178. As long as ODNR is flooding the farm, it will continue to be a problem. Tr. 178. Additionally, Chad has experienced delays in planting due to flooding, which has resulted in lower yields. Tr. 178-79. Before crops can be planted, the compacted soil must be chiseled and any tile blowouts must be repaired. Tr. 179. Chad also testified that when his property floods, he has to clean up the debris that piles up on his property from the water. Tr. 179. This occurs every time it floods and takes at least one day if not more to physically clean it up. Tr. 180.

{¶12} Chad testified that in addition to the fields, the woods was also damaged by the flooding. Tr. 182. The debris washes into the woods where it lays and rots. Tr. 182. This has resulted in a reduction of new tree growth and affects the wildlife. Tr. 182. The flooding has also caused bank erosion, which increases the amount of flooding over time. Tr. 182. According to Chad, the purpose of the easement was to allow ODNR to flood his property whenever it needs to do so until the end of time and it is not something he wanted. Tr. 183.

As a result of the easement, ODNR has no responsibility for the damage caused by any flooding in the future. Tr. 184. Chad testified that he believed the amount offered by ODNR as compensation was too low. Tr. 187. In addition to the financial cost, the flooding also increases his stress because every time it rains, he has to be concerned that his crops will be lost to flooding. Tr. 188.

{¶13} On cross-examination, Chad admitted that he knew the land was low and sometimes flooded when he bought it. Tr. 189. Andrea's grandfather told him that it flooded about every ten years. Tr. 190. Since Chad purchased the property in 2000, it has flooded approximately seven out of thirteen years. Tr. 191. However, Chad testified that he only suffered significant losses in 2003 and 2010. Tr. 191. Chad identified Plaintiff's Exhibit 4 as a video of his property showing crops growing on it. Tr. 191-192. Chad testified that the video accurately portrayed the property as it was at the time of the trial. Tr. 192. Chad admitted that prior to purchasing the farm, he did not know what the yields were on the farm. Tr. 195. Chad then testified to what his crop yields were for the years in which there was no flooding. Tr. 199-211.

{¶14} On redirect examination Chad testified that to plant crops, he has expenses for tillage, fuel, equipment, seed costs, fertilizer costs, and the cost of crop insurance. Tr. 217-218. Chad further testified that he may have to stop farming the property if it becomes too expensive. Tr. 222.

{¶15} The next witness for the defense was Andrea. Andrea testified that she has lived in the area all 37 years of her life. Tr. 224. Prior to her and Chad buying the farm, it had been owned by her family since the late 1800s. Tr. 225. The house on the farm was the one in which her father was raised. Tr. 225. They sold the house and the lot on which it was located in 2007. Tr. 226. Prior to her family moving in to the home, her grandmother lived there, so she was there frequently as a child. Tr. 226. She remembered puddles that were inches deep on the property, but did not recall flooding of the extremes seen after they purchased the property. Tr. 227. In 2003 and 2005, the flooding was so bad that the family had to evacuate the home. Tr. 227. The flooding in 2003 was so severe that there were currents with whitecaps moving through the field and geese and ducks were swimming on it. Tr. 228. The corn was completely underwater. Tr. 228. They had to be out of their house for a week due to the flooding, though the home did not flood. Tr. 229. When they were able to return, there was debris everywhere. Tr. 230.

> **There was a lot of debris, a lot of tree branches, a lot of when you saw the dirt on the roads and things, a lot of litter. There were actually fish that were actually out there, tires; there was a pop machine. And when all the water was down, horrid smell.**

Tr. 230. The crops were completely gone and had to be mown down. Tr. 231. The family had to evacuate the home again in 2005. Tr. 232. They were not able to access the house by boat that year because it was winter and the water was

freezing. Tr. 232. According to Andrea, the flooding has become so frequent that a permanent sign has been added to State Line Road that can be unfolded when needed. Tr. 236. She also testified that she did not want the easement on the farmland. Tr. 238. No cross-examination of Andrea was done. Tr. 238.

{¶16} The final witness for the defense was Vannatta, who performed an appraisal on the land in question to determine the value of the flowage easement. Tr. 251. Vannatta testified that he had been to the Knapke farm four times and had visited comparable sites as well. Tr. 252. Vannatta testified that he had reviewed deposition testimony and the Supreme Court opinion in *Doner*, as well as the evidence for that case in forming his opinions. In his understanding, the perpetual easement being taken by ODNR was one covering the entire property and permitted ODNR to flood the property at any time and for any duration. Tr. 254-55. Vannatta then identified the farm on Exhibit A and described the property as follows.

> **This is State Line Road here. This is Skeels Road, and then this treeline running down through here, that's the Wabash River, and then 29 is a little bit further south. And it's generally level. It has the woodlands running across here and some up in here. There is a rear ditch line back here, small ditch line. This is their main access point here. And it's two parcels. One parcel that runs somewhere right through here is about 30 acres, a little over 30 acres, and the other is 40 some acres. Between the two they total about 80 acres.**
>
> **Q. And could you describe the utility and soils in the before, before the easement?**

> **A. Well, other than the woodlands it's essentially about 85 percent tillable. It has some of the best soils ratings according to AgriData that I've seen anywhere.**
>
> **Q. In your experience in appraising property in Mercer County, what yields would be attainable, do you believe, from this farm in the before instance?**
>
> **A. I believe it was 127 acres of corn and – I got it right here – 127 corn and about 44.4 in soybeans.**

Tr. 256. AgriData was identified as a data service company that provides independent reports on crop yields for properties. Tr. 257. Due to the high quality of the soil absent flooding, the farm should be producing yields of 200 bushels per acre for corn and 60-70 bushels per acre for beans. Tr. 258. Vannatta testified that he determines the value of the taking by determining the value as if no changes to the property had occurred and the value after the changes had occurred. Tr. 259. The difference between the two numbers is the value of the taking. Tr. 259. Vannatta then identified the photos of the Knapke farm in a flooded state in his report. Tr. 260-61. According to Vannatta, the effect of the flooding on the farm is that the owner loses the utility of the farm. Tr. 262. Additionally, the flooding prevents access to the farm and away from the farm. Tr. 262. This limited access was considered when he determined the residual value of the farm after the easement was taken. Tr. 263. Vannatta testified that a willing buyer

would have access to all of this information and would consider the effects of the flooding before purchasing the property. Tr. 264.

{¶17} After considering all the information he had available, Vannatta testified that the value of the farm prior to the taking was $1,067, 600.00. Tr. 268. This figure was determined by a sales comparison approach. Tr. 268. Vannatta testified that he only considers fair market value sales rather than family sales that may be below market value. Tr. 269. Once you eliminate those sales, he looked for three or so properties that most closely resembled this farm to determine the value of the land. Tr. 269. In addition, the sales prices need to be adjusted for varying factors in the land, yield configurations, and time of sale as prices for farmland had been steadily rising in Mercer County. Tr. 270. The three sales Vannatta used were chosen due to their sizes, yields, and location in Mercer County. Tr. 271. The first comparable was two parcels like the one at issue, had a yield close to the one at issue, and was 87% tillable while the subject farm was 85% tillable. Tr. 272. With that comparable, the cropland portion of the farm was sold for $12,800 per acre. Tr. 274. The second comparable was a 40 acre site that was all cropland. This property sold for $14,545 per acre in December of 2012. Tr. 274. The property consisted of two parcels which were both tillable, but its yields were less. The third comparable was located in Mercer County as well and consisted of two parcels approximately 40 acres each. Tr. 275. The yields were

smaller than those of the subject farm, but the land was otherwise similar. Tr. 275-76. This comparable sold in 2012 for $13,753 per cropland acre. Tr. 276.

{¶18} In Vannatta's experience, being in a 100 year floodplain has not had a negative effect on the value of farmland. Tr. 277. The bigger effect is the utility of the land. Tr. 277. When it came to assessing the value of the subject farm, Vannatta took into consideration the amount of cropland versus the amount of woodlands, it's overall rating for yield, and the internal circuity of travel to farm the land. Tr. 279. Vannatta then adjusted the prices of the comparables for these differences and for the time adjustment to the date of trial, which raised the value for the first comparable by eight percent and the values of the second and third comparables by ten percent. Tr. 279. Based upon this information, Vannatta concluded that the woodlands was worth about $4,423 per acre and the croplands were worth about $13,845 per acre in sale one. For sale two, the croplands were worth $16,000 per acre. Tr. 279. For sale three, the woodlands were worth $5,000 per acre and the croplands were worth $15,000 per acre. Tr. 2793. After all of the adjustments, the range of cropland prices as of the date of trial was $13,800 per acre on the low side to $16,000 on the high side with $15,100 per acre as the mid-range. Tr. 280. Vannatta testified that the value of the Knapke farm was $15,000 per acre. Tr. 280. The woodlands were valued at $4,500 per acre. Tr. 280.

{¶19} Vannatta testified that on October 15, 2013, another sale of farmland occurred in Mercer County. Tr. 282. The value of this farmland was $15,000 per acre. Tr. 282. Vannatta testified that the quality of this land was not as good as the Knapke farm. Tr. 283. This sale confirmed that the USDA's annual survey showing an increase in value of Ohio farmland was accurate for Mercer County farmland. Tr. 283.

{¶20} Vannatta testified that prior to the taking, the value of the farm was $1,067,600. Tr. 283 According to Vannatta, the effect of the perpetual easement on the property was as follows.

> **[B]y having the perpetual easement, the State at any time can flood it recurrently over and over. And with that comes physical and economic damage. You're losing crops, inputs anytime it floods. Then you're getting deposits of sand, silt, even animal carcasses. And I've seen different types of contaminant, drums and stuff on other properties, big boulders, lots of other undesirable things because this water gets anywhere from 6 to 10 foot on this property. And so it can literally move anything it's so swift and deep. And then we have compaction which you can imagine what a gallon of milk weighs. Well, if you've got ten of those stacked up 6 or 8 foot, that's a lot of pressure on land. So you're compacting your soils and then you do lose some topsoil when the water goes out. You have the probability of tile blowouts because of hydrology. The pressure is so great, the tile can't take it; it blows out. Then you end up with sinkholes where the water's going to down, and then you have cloggings and lost seasons and diminished yields that can occur over and over and over.**
>
> *** * ***

> **Now, this easement will encumber all of the property including the roadway, which means it's overtopping the road.**
>
> **Q. Now in reviewing the easement document, were there any restrictions upon the easement that you saw?**
>
> **A. No, there's no reservations (sic) to the owner. The State has virtually all occupancy-use rights at any time, without warning, forever.**
>
> *** * ***
>
> **There is no restriction on this thing. They could flood it today, and enough water could be there to last for weeks; and then a week later, before it even dries out, they could flood it again because they have no control.**

Tr. 284-86. After the perpetual easement is resolved, Chad and Andrea will be forever barred from asking the State to pay for the damage caused by the flooding, no matter how much it costs. Tr. 289. Based upon all the information Vannatta had before him, he testified that the value of the woodlands after the taking was $450 per acre and the value of the croplands was $1,500 per acre. Tr. 291. Thus, the total value of the property after the taking was estimated to be $100,680. Tr. 291-92. The loss to Chad and Andrea was $960,800. Tr. 292.

{¶21} On cross-examination ODNR questioned Vannatta about the number of appraisals he has done related to the spillway for owners of property allegedly damaged by the spillway. Tr. 295-98. Vannatta also testified that he was paid $150 an hour to testify at trial and $9,000 to prepare the appraisal report. Tr. 298. On cross-examination Vanatta admitted that he had previously been hired to work

for Franklin County, but was fired. Tr. 301. However, he denied that this was impacting his testimony. Tr. 303. Vannatta also admitted that the property in question was double banked, which indicated that there may have been previous flooding. Tr. 310. As to the comparables, Vannatta admitted that none of them were located in floodplains. Tr. 318. Following redirect of Vannatta and the admission of exhibits, defendants rested their case. Tr. 334-36.

{¶22} ODNR then presented its sole witness, Thomas Horner ("Horner"). Horner testified that he is a real estate appraiser hired by the State to appraise the subject farm. Tr. 338, 348. When hired by ODNR, Horner began his appraisals by researching sales in Mercer County. Tr. 350. Horner testified that he uses the sales comparison method for determining the value of the property. Tr. 350. Since August of 2012, Horner has visited the subject farm on three different occasions. Tr. 351. Horner identified Plaintiff's Exhibit 1C as the subject woodlands by the Wabash River. Tr. 351. When Horner visited the site, there were crops growing in the field. Tr. 351. The fields had corn and soybeans in them and the crops appeared to be healthy. Tr. 352. Horner identified several photos as exhibits showing the crops.[4] Tr. 351-54. On the August visit, it had rained approximately a ½ inch the previous day, so there was some water in the fields. Tr. 353. Horner testified that he wanted to ask Chad and Andrea about the

[4] Unfortunately, the record is not clear as to the identity of the Exhibits as they were merely identified as "next one" in the record if identified at all.

history of the property at that site visit, but was not permitted to do so by their attorney. Tr. 355. The questions he wanted to ask were not answered during the depositions either. Tr. 355. After the site visit, Horner prepared an appraisal report. Tr. 356. As part of the appraisal, Horner pulled up flood maps and found one from 1989. Tr. 356. All of the Knapke farm was in the 100 year floodplain, which would restrict the right to build anything on the property. Tr. 357-58.

{¶23} Horner testified that the flooding that occurred in 2003 was very rare and was more like a "500-year flood event". Tr. 358. The fact that the Knapke farm was in a 100 year floodplain increases the risk of ownership and lowers the value. Tr. 360. The property value was lowered more because it is located on the north shore of the Wabash River. Tr. 361. To prevent flooding, the property had been previously double banked. Tr. 361. Horner also testified as follows.

> **The sales research that we went through, talking to knowledgeable people from the area, they all mentioned that this area is known as the bottoms and has flooded for as long as they can remember.**

Tr. 362.

{¶24} After the initial report, Horner prepared a supplement to it, which was identified as Exhibit 1A. Tr. 365. His research showed that the price of the comparables was based upon the impact of flooding. Tr. 366. His research also showed that the area had a history of flooding. Tr. 367. In 2000, Chad and Andrea paid $2,500 per acre for the farm. Tr. 370. They then sold part of the

property in 2003 to Chad's uncle for $3,203 per acre. Tr. 370. The major increase in property values in the last few years were caused by the increases in commodity prices according to Horner. Tr. 371-72. In 2013, the commodity prices dropped, so the prices for farmland did not increase. Tr. 372. The sales prices for farmland in the southern portion of Mercer County ranged from $10,000 to $14,500 per acre, with an average being $12,500 per acre. Tr. 373. In the northern portion of Mercer County, the sales prices ranged from $8,500 per acre to $11,500 per acre, with the average being $10,000 per acre. Tr. 373. Horner testified that he used multiple listings because he believed using only three would result in misleading conclusions. Tr. 374-75.

{¶25} Horner testified that he visited the farm on January 14, 2013, when there had been significant rainfall, which led to some flooding in the area. Tr. 375. There was flooding in the area by the river, but the fields were snow covered. Tr. 375-76. Horner then inspected the property again on September 26, 2013, and took photos identified as Exhibit 1E. Tr. 376. The crops appeared to be healthy. Tr. 376. Based upon all the information he learned, Horner determined that the adjusted prices for the comparables ranged from $4,409 per acre to $13,965 per acre. Tr. 379. Horner testified that the value of the property prior to the perpetual easement was $8,750 per acre. Tr. 381. According to Horner, the comparables used by Vannatta had other factors that raised their values that were

not considered by Vannatta. Tr. 383-86. Horner then explained how he reached his starting price of $8,750 per acre from the $12,000 per acre average price for farmland in that area of Mercer County. Tr. 390.

> **I looked at properties that were influenced by floodplain. For instance, John Gamble, the farmer that bought two properties on the same day, he paid more for the one without floodplain and less for the one with floodplain. I think that showed a 14 percent difference. And that was only 41 percent floodplain. The subject property is 35 floodplain and 65 floodway. So definitely the influence of the floodplain on the subject property – and this is still the before condition – is greater than the floodplain influence sale that Mr. Gamble purchased.**
>
> *** * ***
>
> **So you have woodland and wasteland. And you have 15 percent of the subject property is woodland and wasteland. So that's at $5,000 per acre would be $750 per acre. So let's just say theoretically that the subject property is the best farm in the northern two-thirds of Mercer County, and you have woodland valued at $5,000 per acre and you have the tillable land at $12,000 per acre. What I'm trying to do here is just set the upper end of the bracket to bracket the subject property.**
>
> **So you take 85 percent times $12,000 per acre for the tillable land, and you take $5,000 per acre times 15 percent for the woodland and wasteland; and it works out to a maximum possible value, I believe, of $10,950 per acre blended. So this 80 acres, the maximum value it could be is about $11,000 per acre which would be – I think it's – doing the math in my head which I don't always trust, but it's about $880,000. That would be the maximum.**
>
> **But then you have this flood influence. What does this flood influence do? You know, in deposition there was talk of flooding every ten years, losing crops once every ten years. It's going to affect yields forever, so no farmer is going to pay that $10,950**

> **per acre. So I used flood influenced sales compared to ones that weren't flood influenced, and I determined there's a 20 to 25 percent downward adjustment to that maximum value if it didn't have flood influence.**

Tr. 290-92. Part of this determination was the crop losses suffered from the flooding in 2003 and 2010. Tr. 392. In Horner's opinion, the easement would not affect the value of the property because there would be no expectation of increased flooding. Tr. 393. To determine the after value, Horner looked at other properties that were subject to the flowage easement and how they had sold after the flood of 2003. Tr. 395. One such property sold in bankruptcy for $8,157 per acre and 33 percent of the property was subject to the flowage easement. Tr. 396. Although the property is subject to an easement, it can still be collateral for financing. Tr. 397. Horner testified that he determined that the value of the property after the perpetual easement is taken is $6,500 per acre. Tr. 399. According to his calculations, the compensation for the easement should be $182,250. Tr. 399. This determination was based upon the fact that the Knapke's will still own the property and can still farm it. Tr. 399. Horner also testified that the Knapke's purchased the entire farm for $300,000, sold a portion to Chad's uncle for $110,500, and sold the house and five acres for $89,000, so only have $100,000 invested in the farm. Tr. 400.

{¶26} On cross-examination, Horner testified that he has done the appraisals for 18 properties being taken in relation to the spillway. Tr. 404. Prior

to these, Horner had never before performed a flowage easement appraisal. Tr. 408. Horner admitted that none of his comparables had flowage easements recorded on them. Tr. 409. Horner admitted that he was paid $4,800 for the first appraisal in this case and was anticipating an additional $13,000 in expenses for the second appraisal and for the trial work. Tr. 414-15. Horner also admitted that the soil on the Knapke farm had the highest productivity index of any of the comparables. Tr. 423-24. Horner also admitted that the USDA set an appreciation index of 13.6 for the farmland in Mercer County, but testified that he disagreed because he did not see a change in value in the property and the lack of change was consistent with the commodity prices. Tr. 434. When questioned about the flood maps, Horner admitted that he did not know if the Knapke farm flooded in the years when flooding was indicated. Tr. 437. Following redirect examination and the admission of exhibits, ODNR rested its case. Tr. 448-54. No rebuttal evidence was offered. Tr. 454.

{¶27} The trial court then addressed the jury instructions with counsel. ODNR objected to the phrase "frequently, severely, and persistently" being used in regards to the flooding. Tr. 460. The trial court overruled the objection finding use of the term to be consistent with the Supreme Court's holding in *Doner*. Tr. 461. Closing arguments were made and the jury was given its instructions by the trial court.

{¶28} On appeal, ODNR raises the following assignments of error.

First Assignment of Error

The trial court erred by refusing to grant ODNR's request for a jury view.

Second Assignment of Error

The trial court erred by admitting Landowner's irrelevant, prejudicial exhibits and testimony, but at the same time excluding ODNR's relevant probative evidence.

Third Assignment of Error

The trial court erred by providing the jury with prejudicial jury instructions.

Prior Related Opinions

{¶29} Prior to this case being heard by this court, two previous and similar cases from ODNR were reviewed on appeal. The first was *Department of Natural Resources v. Ebbing, et al.*, 3d Dist. Mercer No. 10-13-24, 2015-Ohio-471 ("*Ebbing*"). In *Ebbing*, ODNR was required to pay $764,518 in damages to the Ebbings for the flowage easement over approximately 40% of their farm. Part of this award was for damages to the residual farmland not covered by the easement which, thus, was not part of the taking. This court, in a plurality opinion, reversed the jury verdict finding that the jury view should have been granted, the admittance of cumulative photos of the spillway was prejudicial, the failure to strike the portion of the expert's report regarding the extent of the take which

exceeded the take stipulated was error, and by prohibiting ODNR from presenting the testimony of an additional witness with knowledge of the GLSM area both before and after the construction of the spillway to testify as to how new lake management procedures would prevent the expansion of the taking, which allowed the Ebbings' expert to testify about the expanded take without contradiction. However, this court did not find error in the use of the words "frequent, severe and persistent" in the jury instructions because it was not a mischaracterization of the flooding. This plurality opinion stated that the recognized errors were prejudicial and reversible individually and as a group.[5]

{¶30} The second case addressed by this court was *Department of Natural Resources v. Mark L. Knapke Revocable Living Trust, et al.*, 3d Dist. Mercer No. 10-13-25, 2015-Ohio-470 ("Mark Knapke"). In *Mark Knapke*, the flowage easement covered 99% of the land and the jury returned a verdict of $293,250 in damages. This court, in another plurality opinion, affirmed this judgment holding that the denial of a jury view in this case was not prejudicial error.[6] All of the judges agreed that the trial court erred in allowing testimony regarding the newspaper article and pictures of a near drowning. However, the plurality opinion in *Mark Knapke*, found that this error alone was not reversible error because it was

[5] The plurality opinion was written by Judge Rogers. Judge Preston concurred in judgment only. Judge Shaw dissented.
[6] The plurality opinion was written by Judge Shaw. Judge Preston concurred in judgment only. Judge Rogers dissented.

merely "one page out of a 55 page report full of pictures, which itself was only one of many exhibits introduced into evidence at the trial." *Id*. at 40. This opinion also found no error in the exclusion of the testimony of one of ODNR's witnesses and in the use of the terms "frequent, severe and persistent" in the jury instructions as it was not a mischaracterization. Having found only one harmless error, it was not necessary to address the cumulative effect of any errors in this opinion.

{¶31} This court now has the current case before it with the same assignments of errors raised by ODNR. Factually, this case is most similar to the *Mark Knapke* case in that the percentage of the farm affected by the flowage easement in this case was 100%. In *Mark Knapke* the percentage was 99%, but in *Ebbing*, the percentage was only 40%. Thus, like in *Mark Knapke*, but unlike in *Ebbing*, there is no issue regarding whether the extent of the take could be expanded in the future because the entire farm is currently subject to the easement.

First Assignment of Error – Denial of Jury View

{¶32} In the first assignment of error, ODNR claims that the trial court erred to its prejudice by denying the request for a jury view of the land. A trial court's determination of whether to grant a request for a jury view is reviewed under an abuse of discretion standard. *Proctor v. Wolber*, 3d Dist. Hancock No. 5-01-38, 2002-Ohio-2593. "The abuse-of-discretion standard is defined as '[a]n appellate court's standard for reviewing a decision that is asserted to be grossly

unsound, unreasonable, illegal, or unsupported by the evidence.' " *State v. Gutierrez,* 3d Dist. Hancock No. 5–10–14, 2011–Ohio–3126, ¶ 43 quoting *State v. Boles,* 187 Ohio App.3d 345, 2010–Ohio–278, 932 N.E.2d 345, ¶ 18 (2d Dist.). "A view of the premises to be appropriated * * * shall be ordered by the court when requested by a party to the proceedings." R.C. 163.12. The failure to comply with the mandatory nature of the statute which provides that the trial court "shall" grant the jury view is an error in this case. *See Ebbing*. This court notes, as discussed below, that there are certain unusual circumstances that would justify denial of a request for a jury view. However, in this case, the trial court did not set forth sufficient justification for the denial of the jury view to satisfy the requirements and avoid a finding that the denial was an error. The trial court therefore erred in denying the request for a jury view.

{¶33} The mere fact that the trial court made an error does not automatically result in a reversal. "To find that substantial justice has not been done, a court must find (1) errors and (2) that without those errors, the jury probably would not have arrived at the same verdict." *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 25. The question then becomes whether this error is prejudicial and reversible.

> **The view of the premises by the jury in an appropriation proceeding is not evidence. Rather, it is solely for the purpose of enabling the jurors better to understand the evidence offered by the parties. * * ***

> **Appellant contends that this provision is mandatory and requires the court to order a view of the premises when demanded by a party.**
>
> **A consideration of this statute in the light of Section 19, Article I of the Ohio Constitution, and the well-established rule that the view of the premises is not evidence brings the court to the conclusion that it can not agree with this contention.**

City of Akron v. Alexander, 5 Ohio St.2d 75, 77, 214 N.E.2d 89 (1966).[7] This court has previously held that a trial court can exercise its discretion and deny a jury view in certain situations. *Proctor, supra* at ¶ 57.

> **Denial of the view is appropriate where the only purpose it could serve would be to show the property in an unfair light, legislative purpose would not be served in granting the view of the premises, and the benefits of the view are outweighed by the injustice to the property owner and would deprive him of compensation to which he is entitled.**

Id.

{¶34} In this case, ODNR requested a jury view and the trial court denied the request. The trial court in its ruling stated as follows.

> **The court specifically has a concern in instructing the jury if a jury view was granted in this case since the law would require that the jury be instructed that what they see at the jury view is not evidence but merely there to help them understand the evidence, and when they see the other evidence with the photographs to be submitted on both sides, it may be confusing and their decision may improperly be based on what they view during the jury view.**

[7] The statute cited in *Alexander* is similar to the current statute.

Tr. 7. Any jury view would only allow the jury to see the state of the property on that given day. If it had rained several inches the night before the view, the property could be flooded and the jury would not get an accurate view of how the land usually appeared. Likewise, if it was dry and sunny, the jury view would not give an accurate representation of how the land appeared when flooded. The visual condition of this property ranged from fully covered with growing crops and woodlands near the river to land that is 100% covered by water several feet deep that covers the crops completely to the piles of debris left behind after the floodwaters recede. Given this situation, the jury view would not have been of assistance to the jury because of the temporary nature of the usage of the easement. Given the temporary infringement on the land, the "mere snapshot of the land in one condition without any similar visual by the jury of the land in a completely different extreme" would not have been fairly representative. *Mark Knapke, supra*. at ¶ 27.

{¶35} Additionally, ODNR was permitted to present numerous photos of the land with crops on it. See Plaintiff's Exhibits 1, 1C, 1E, 3A, 3B, 3C, 3D, and 3E. ODNR also presented a video of the property taken October 14, 2013, which panned the property from the road and clearly showed the fields with apparently healthy crops of corn and soybeans awaiting harvest. Ex. 4. This video showed exactly what the jury would have seen had a jury view been granted. Horner

testified that he had been out to the property in the days before trial, saw crops growing in the fields, and that the crops looked healthy. On cross-examination Chad admitted that he farms the land and that in most years, he had not suffered any losses of crops due to flooding. Chad also admitted that he intended to keep farming the land after the easement as well. ODNR also presented evidence which indicated the yields obtained from the fields in the years in which crops were not destroyed by flooding. Ex. 5. Thus, there is no doubt that the jury was aware that the flooding, unlike the easement, was not permanent and that Chad could continue to grow crops on the land. The jury was presented evidence that as of the date of trial, there was no flooding on the land and crops were awaiting harvest. Although there were many images of the property in a flooded state presented to the jury, the testimony was that this condition was temporary and only lasted for a week or two. There were also numerous photographs of the property in a non-flooded state with crops growing on it. The evidence clearly showed the jury that the flooded state was not the norm for the farm. Given all the exhibits, which were admitted as evidence, and the testimony of the witnesses, ODNR has failed to show how a denial of the jury view in this instance resulted in prejudice. Therefore, the first assignment of error is overruled.

Second Assignment of Error – Admission of Evidence

{¶36} In the second assignment of error, ODNR argues that the trial court erred in excluding evidence it wished to present, but allowing evidence that Chad and Andrea wished to admit. "The admission of evidence is normally within the discretion of the trial court, and the trial court's decision will be reversed only upon a showing of an abuse of that discretion." *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St.3d 529, 533, 2001-Ohio-1276, 751 N.E.2d 1032.

Admission of Photos in Vannatta's Report

{¶37} ODNR first argues that the trial court erred by allowing the admission of photos of property other than the subject farm to be admitted as part of Vannatta's appraisal report. The photos at issue were similar to the photos, and in some cases identical, to the photos used in Vannatta's report for his testimony in the *Mark Knapke* case. Like in that case, ODNR objected to the use of the photos before and during trial. These objections were overruled. Also like in *Mark Knapke*, Vannatta testified that these photos were representative of factors that a willing buyer would take into account when determining the value of the property. These photos were also indicative of the severity and extent of the flooding which affected the subject farm. The photos also showed how access to the land would be limited during times of extreme flooding. This is supported by the report from Horner which indicated that the flooding affected the access to the

land and the value of the property. Also, like the photos in the prior case, the photos in the report were clearly identified by subject, so the jury knew exactly what property it was viewing and when the photos were taken. Given the almost identical nature of the evidence and testimony in this case to that in *Mark Knapke*, we agree with the holding in that case that the trial court did not err in admitting the photographs as part of the report as they were relevant to the value and were not overly prejudicial.

Admission of Newspaper Article in Vannatta's Report

{¶38} This court does agree with ODNR that the newspaper article and photos depicting the near drowning of a woman were irrelevant, prejudicial in nature, and constituted error. The article and related photos should have been excluded as they were more prejudicial than probative. See *Mark Knapke* and *Ebbing*. However, like in the *Mark Knapke* case, "we cannot find that the prejudicial impact to the trial as a whole of this single page [page 43] in Vannatta's report constitutes reversible error given that it is only one page out of a [56] page report full of pictures, which itself was only one of many exhibits introduced into evidence at the trial." *Mark Knapke* at ¶ 40.

Exclusion of ODNR Witness

{¶39} ODNR also argues that the trial court erred by excluding the testimony of Brian Miller ("Miller"). After the admission of its exhibits, ODNR made the following proffer regarding Miller's expected testimony.

> **Based on the court's directive prior to trial as well as in other trials, it's our understanding that the court would not allow an ODNR representative to testify if called. So, your Honor, if it had been permitted, Brian Miller of ODNR who is the park manager for Grand Lake Saint Marys State Park would testify about his knowledge of issues impacting the area generally. He would talk about the work he's done after the *Doner* decision on lake-level management. He would talk about ODNR's policy for lake level-management. He would talk about the coordination of local public – a local, public committee that ODNR has participated in two drawdowns of Grand Lake Saint Marys which occurred in the winter of 2012 and in the late winter-early spring of 2013, that ODNR, that ODNR today has a lake-management policy in effect, that ODNR expects to continue with lake management in light of the Supreme Court directive in *Doner* and ODNR's practice of abandoning lake-level management after 1997 was based on reliance of an engineering expert opinion regarding the fact that the reconfigured, damaged spillway was self-regulating and did not warrant the ongoing use of lake-level management.**
>
> **The Court: And the – so that the court understands the purpose for which you would offer that evidence is what?**
>
> **Mr. Phillips: In order to establish that the reason why lake-level management is not, had not been used from 1997 to 2011 and lake-level management continuing to be – is continuing to be utilized today; and we expect it to continue today such that the jury would have an understanding as to what ODNR's current practices are.**
>
> **Mr. Fox: And that it would impact the value of the property.**

Tr. 449-50. The testimony was excluded by the trial court because the trial court believed that the extent of the take was defined by the Ohio Supreme Court as the 2003 level. Unlike in *Mark Knapke*, ODNR did not present an argument at trial as to why the testimony was relevant and admissible. The trial court did not provide an in depth analysis as to why it was being excluded. The parties proceeded as if the same arguments and determinations as were made in *Mark Knapke* applied here as well.[8] Given that the testimony and basis was identical in both cases, this is not an unreasonable procedure, but it does hinder the ability of one to fully understand what occurred by merely reading the record. Although this court does not have the extensive analysis by the trial court as was present in *Mark Knapke*, the same logic does apply. ODNR's last appraisal on the subject farm was dated September 12, 2012. Ex. 1. This is after the new lake-level management plan instituted in 2011 began. The supplemental report stated as follows.

> **In addition to these physical land changes, public information indicates the property is subject to more frequent flooding of greater duration and severity. This is also cited in the Knapke's depositions, where instances of flooding at greater depths and of longer duration are noted, including times when the site could not be accessed or crops replanted. A large amount of trash, requiring clean-up, is also noted as being present after flooding. The affects [sic] of these flood conditions on the subject are also considered in the value estimate.**

[8] At trial, ODNR's counsel stated that it was proffering the evidence based upon "the court's directive prior to trial as well as in other trials."

Ex. 1 at 42. Horner considered the changes to the lake-level management when reaching a value in the supplemental appraisal which occurred after the changes were implemented. Thus there was no need for additional testimony on the topic.

{¶40} Additionally, the sole question before the jury was to determine the value of the property taken by the easement. Whether or not ODNR intends to use the easement in the future, or the extent it intends to use it, is irrelevant. The fact remains that ODNR is acquiring an easement whereby it can flood this property whenever it chooses for whatever duration into perpetuity. The jury only had to determine what this right was worth. Thus, the testimony of Miller as to the intentions of ODNR to not make use of the easement proffered by ODNR was not relevant to the issue before the jury.

{¶41} This court notes that in *Ebbing*, the exclusion of the testimony of ODNR's witness on a similar subject was deemed to be prejudicial. The plurality opinion in *Ebbing* reached this conclusion for three reasons. First, the author of the plurality opinion determined that since ODNR's witness would be testifying to what was being done prior to and at the time of the take, it was relevant.[9] We disagree with this because how ODNR intends to use the easement does not change the fact that it has the easement and can change its mind at any given time about the use of that easement and the landowners have no recourse for damages.

[9] Judge Rogers' opinion held this, Judge Preston concurred in judgment only, and Judge Shaw dissented.

Second, in *Ebbing* the issue of the effect on residual farmland not covered by the easement was raised by the Ebbings. In fact, the landowner's appraiser in *Ebbing* was allowed to opine that the future flooding thereof may exceed the level of the taking. The plurality opinion held that it was error not to allow ODNR to present evidence that any future flooding would not exceed the level of the taking. This is distinguishable from the facts of this case in that the taking in this case is 100% of the property. There is no possible way that future flooding could affect land not covered by the easement. Finally, in *Ebbing* the witness wanted to testify concerning his general knowledge of the GLSM area. The plurality opinion noted that the landowners had presented images of flooding of areas besides their farmland, so ODNR should have also been permitted to present evidence regarding the area as well. In the case before us, the landowners were allowed to show images of the general area in a flooded state. However, Horner testified that the property in question was known to be low and subject to frequent flooding and also testified to the general nature of the GSLM area and, specifically, to the land in Mercer County. Thus, ODNR was able to present evidence regarding the general nature of the land in this case. Thus, the testimony was not necessary. The second assignment of error is overruled.

Third Assignment of Error – Jury Instructions

{¶42} The final assignment of error raised by ODNR is that the trial court erred by providing prejudicial jury instructions. ODNR argues that the trial court erred by using the terms "frequent, severe, and persistent" flooding. "Jury instructions are within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is shown." *Ebbing* at ¶102. A jury charge must be considered as part of the whole and should only be reversed if the charge misled the jury in a manner that affected a party's substantial rights. *Id.* The use of these terms in the jury instructions has been addressed by this court in both *Ebbing* and *Mark Knapke*. In both cases, this court concluded that the use of those terms in the jury instructions was not error as it was not a mischaracterization of the evidence.

{¶43} A review of the record indicates that the jury was instructed as follows.

> **[T]his case is an appropriation action brought by the [ODNR] to acquire a permanent and perpetual flowage easement across the entirety of the Knapke's 80.999 acre farm located in Liberty Township, Mercer County, Ohio to grant to the State the right to frequently, severely, and persistently flood those acres.**
>
> *** * ***
>
> **In this case the permanent and perpetual flowage easement which has been taken is for the increased flooding that occurred and will continue to occur as a natural result of the reconstruction of the western spillway of Grand Lake in 1997**

> **and lack of lake-level management by the [ODNR], which flooding is intermittent but frequent, severe, and persistent. It has been determined that such intermittent and temporary flooding will inevitably recur with regularity and is greater in frequency, extent, and duration than any flooding that naturally occurred on the Knapkes' farm prior to the construction of the 500-foot western spillway in 1997 and the lack of lake-level managements by ODNR. The Knapkes retain ownership of the farm subject to ODNR's permanent and perpetual flowage easement and may continue to farm the property and use it for all purposes not inconsistent with the easement.**

Tr. 508-509. ODNR argues that describing the flooding as frequent, severe and persistent was overly prejudicial because the easement "did not include the right to cause 'frequent, severe, and persistent' flooding." ODNR's Brief, 12. According to ODNR, this language was misleading. However, the testimony in this case was that the Knapke farm flooded in 2003, 2005, 2007, 2008, 2009, 2010, 2011, and 2013. This certainly qualifies as frequent flooding. The severity of the flooding was supported by the testimony of all of the witnesses, including Horner, who testified that at times, the depth of the water was eight foot and covered the entirety of the Knapke farm. That could legitimately be described as severe. As to persistent, the testimony was that the flooding lasted anywhere from a couple of days for the more minor floods to two weeks for the extreme floods. This is persistent. Additionally, Horner's report specifically stated that the "Flowage Easement grants to the State of Ohio the right, during periods of sufficient levels of precipitation, to intermittently, frequently, severely, and persistently flood" the

property at issue. Ex. 1 at 3. Along with this language, the jury instructions clarified that the flooding would be intermittent and temporary. "While it may have been better practice for the trial court to simply use the language contained in the syllabus of *Doner*, we cannot find that the court's use of the words, frequent, severe, and persistent, was erroneous or prejudicial in these specific circumstances." *Ebbing* at ¶ 107. Thus, like in *Ebbing* and *Mark Knapke*, this court finds no prejudicial error in the jury instructions. The third assignment of error is overruled.

Cumulative Error

{¶44} Although not assigned as error, ODNR in its conclusion raises the question of the cumulative effect of the errors.

> **The cumulative effect of the trial court's errors prevented ODNR from receiving a fair trial. Each error described above demonstrates an abuse of discretion that must be corrected. * * * The combination of these errors left the jury with a false impression that the Property was continuously underwater, unusable, and devoid of all value.**

ODNR Brief, 13-14. As noted by this court in both *Ebbing* and *Mark Knapke*, the courts in Ohio are split on the issue of whether the cumulative error doctrine is appropriate for use in civil cases. *See Ebbing* at ¶109 and *Mark Knapke* at ¶55. Both cases then provide overviews of how the different districts have held. In *Ebbing*, the plurality opinion stated that it need not apply the cumulative error doctrine because the individual errors were prejudicial and reversible. The

opinion then stated that since the individual errors were reversible, they would also constitute reversible error if the cumulative error doctrine were applied.

{¶45} However, in *Mark Knapke*, this court held that it did not need to address the doctrine of cumulative error because the alleged errors did not deny ODNR a fair trial. Like in *Mark Knapke*, the doctrine of cumulative error would not apply in this case because the errors alleged did not deny ODNR a fair trial. Merely alleging multiple errors "does not require reversal if those errors still, when taken in context of the entire trial, do not produce an unfair trial." *Mark Knapke* at ¶57.

{¶46} In this case, a review of the entire trial shows that both sides brought in their own experts to testify as to the value of the flowage easement, which applied to 100% of the property. Vannatta testified that the value of the taking was $960,800. Horner testified that the value of the flowage easement was $182,250. The jury returned a verdict for $644,250. This amount is well within the range of the two valuations. The jury was given ample testimony as to the damage that was caused when the land flooded and about the additional costs associated with farming the land due to the flooding. The flooding not only could destroy crops, it also affected the future yields of the soil, required extra work to prepare the soil for planting, caused damage to field tiles, and caused leftover

debris to be deposited on the land, which required work to remove it from the land. These additional costs are not subject to future compensation.

{¶47} When viewed as a whole, the verdict reached by the jury is not clearly unreasonable. There was competent evidence provided to support both appraisals and the amount awarded is within the range provided by the experts. The only two errors found by this court was the denial of the jury view and the inclusion of one page in the appraisal report that was only one of many exhibits entered into evidence. The denial of the jury view was harmless because there was significant evidence submitted which provided the same information that would have been obtained by the jury view, including a video of the land. The admission of a single page in and of itself in this case was not prejudicial. These two harmless errors, when viewed as part of the entire trial did not deny ODNR a fair trial and thus do not form the basis of a cumulative error claim.

{¶48} Having found no prejudicial error in the particulars assigned and argued by ODNR, either individually or cumulatively, the judgment of the Court of Common Pleas of Mercer County is affirmed.

Judgment Affirmed

PRESTON, J., concurs.

/jlr

ROGERS, P.J., dissents.

{¶49} For the reasons stated more fully in the opinion of *Dept. of Natural Resources v. Ebbing*, 3d Dist. Mercer No. 10-13-24, 2015-Ohio-471, I must respectfully dissent from the opinion of the majority.

First Assignment of Error

{¶50} I believe the clear and unambiguous language of R.C. 163.12 should be followed and that the trial court erred when it arbitrarily denied ODNR's request for a jury view. In matters of statutory construction, "it is the duty of this court to give effect to the words used, *not delete words used* or insert words not used." (Emphasis added.) *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969). In essence, the trial court deleted the word "shall" from R.C. 163.12 and ignored the clear intent of the General Assembly. Unfortunately, the majority opinion does not correct this mistake, but condones it.

{¶51} The majority agrees that the trial court acted arbitrarily when it denied ODNR's request for a jury view, but states that there are "certain unusual circumstances" that justify the denial of ODNR's request. (Majority Opin., ¶ 32). Specifically, the majority states that because the jury could not view the property when it is both free from ODNR's easement and when it is encumbered by it, it could be prejudicial to either party. *See* (*id.* at ¶ 34). However, the majority admits that both sides were able to present evidence at trial of the land flooded and

evidence of the land dry with crops growing on it. Indeed, the majority notes that ODNR was able to show a video, "which panned the property from the road and clearly showed the field with apparently healthy crops of corn and soybeans awaiting harvest. *This video showed exactly what the jury would have seen had a jury view been granted.*" (*Id.* at ¶ 35). ODNR was able to offer evidence that depicted "exactly what the jury would have seen" had the jury view been granted, but somehow granting the jury view would have been prejudicial to the Knapkes? I cannot make sense of the majority's illogical justification for why the jury view would have been prejudicial.

{¶52} Moreover, the point of a jury view is to give the jury context of the evidence that will be presented at trial. The evidence of valuation is complex, due to all of the evidence the Knapkes offered. They were able to admit numerous photographs of the spillway and of properties other than their own farm. The jury should have had the ability to view the property in order to give context to all of the evidence the Knapkes produced at trial (to the extent relevant to their property) to determine the importance and weight this evidence would have on the valuation of the Knapkes' farm.

{¶53} Because I believe courts must follow the clear and unambiguous language of the General Assembly, I would sustain ODNR's first assignment of error.

Second Assignment of Error

{¶54} I agree with the majority opinion only to the extent that the admission of the photograph of the near drowning girl was prejudicial and should have been excluded from the trial. I must emphasize that I believe that such a photograph has absolutely no relevance to the issue of valuation and was used by the Knapkes solely to enflame the passions of the jury. These photographs should have been excluded as being irrelevant and highly prejudicial.

{¶55} However, I disagree with the majority opinion that the exclusion of Brian Miller's testimony was proper. As the majority correctly noted, Miller was offered to testify about the general GLSM area and its resumption of lake-level management practices in 2011. While the majority argues that the resumption of lake-level management practices is not relevant to the valuation, I disagree for my reasons stated in the opinion of *Dept. of Natural Resources v. Ebbing*.

{¶56} The majority also states that Miller was properly excluded from testifying about the general GLSM area because Horner, ODNR's expert, was able to testify about the general GLSM area, and thus, Miller's testimony "was not necessary." (Majority Opin., ¶ 4). If ODNR is limited to only one witness to testify about the general GLSM area, the Knapkes should have been subject to the same limitation. However, they were allowed to present three different witnesses who all testified about the general GLSM area. For example, Vannatta testified

about the general GLSM area at great length. *See* Trial Tr., p. 262 (testifying about road closures in neighborhood); p. 263 (testifying about general flooding in the area and identifying photographs of general flooding on pages 32, 44, 45, 46, 47[10] of his report); p. 264 (testifying about general flooding, identifying photographs of property not being valued by jury); p. 266 (testifying as "the entire scope of the project" and "general things" affecting properties not being valued by jury; identifying Exhibit T which depicts *more than 65 aerial photographs* from "the western spillway of the Grand Lake St Marys west along the Beaver Creek to where it meets the Wabash River, and then continuing along the Wabash River to the Indiana State line.").[11] Chad Knapke also testified as to the general GLSM area several times. *See* Trial Tr., p. 157-158 (testifying as to surrounding roads, rivers, and creeks); p. 162 (testifying as to the west bank spillway); p. 170-172 (testifying about the spillway again); p. 186 (testifying generally as to Mercer County land). Andrea Knapke was the *third witness* to testify as to the general GLSM area. *See* Trial Tr., p. 233-234 (testifying about the spillway and identified two exhibits depicting the spillway); p. 235 (testifying about surrounding roads).

{¶57} These three witnesses were in addition to the numerous exhibits the Knapkes offered into evidence that depicted the general GLSM area—land that

[10] While one picture on page 47 of Vannatta's report depicted the Knapkes' property, the other photograph was a picture depicting the spillway.

[11] These are only a few instances of Vannatta testifying generally about the GLSM area. For sake of brevity, I will not cite to every time Vannatta testified about the spillway and general GLSM area.

was not being valued by the jury. The Knapkes argued at trial that pictures of, and testimony concerning, the spillway and the general GLSM area was relevant to "establish the background for the jury." Trial Tr., p. 171. The trial court agreed and admitted the evidence. However, when ODNR sought to admit their evidence regarding the spillway and the general GLSM area in order to establish "background for the jury," the same judge found the testimony to be irrelevant. Either evidence of the general GLSM area is relevant or it is not. It cannot be relevant when the Knapkes offer it, but irrelevant when ODNR attempts to offer it.

{¶58} Accordingly, I would sustain ODNR's second assignment of error.

Third Assignment of Error

{¶59} I concur with the majority's analysis and disposition of ODNR's third assignment of error regarding the jury instructions.

Cumulative Error

{¶60} Both the majority opinion and I recognize that there is a split in Ohio and Federal Appellate Courts as to whether it is appropriate to apply cumulative error in a civil case. I believe that some of the errors are prejudicial and reversible on their own. However, in the alternative, I would apply the cumulative error doctrine to the unique circumstances of this case. The trial court first arbitrarily and erroneously denied ODNR's request for a jury view, despite the clear and unambiguous language of R.C. 163.12 that mandates that the view be granted

when requested. It then allowed for the one-sided presentation of evidence. Finally, it allowed the Knapkes to introduce photographs depicting a teenage girl who nearly drowned in her car; photographs that both the majority and I agree are prejudicial and irrelevant.

{¶61} There is no doubt that ODNR has taken a permanent flowage easement from the Knapkes and that the Knapkes deserve just compensation for the taking. I also agree with the Supreme Court of Ohio that ODNR should try to obtain "[a]n efficient, orderly, and prompt resolution of all of the relators' claims * * *." *State ex rel. Doner v. Zehringer*, 139 Ohio St.3d 314, 2014-Ohio-2102, ¶ 15. However, I cannot sit idly by and watch ODNR be denied a fair trial even if I do not agree with certain litigation tactics of ODNR.

{¶62} For reasons stated more fully in the opinion of *Dept. of Natural Resources v. Ebbing*, I would reverse the trial court's judgment and remand this matter for further proceedings.