

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
LAWRENCE COUNTY

Gordon Proctor,	:	
Director of Transportation,	:	Case Nos. 05CA3
State of Ohio,	:	05CA8
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND JUDGMENT ENTRY</u>
John Hall, Jr., et al.,	:	
Defendants-Appellants.	:	<b>Released 4/27/06</b>

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APPEARANCES:

Gus M. Shihab and Robert J. Mann, Of Counsel, Shihab & Associates Co., LPA, Columbus, Ohio, for Appellant John Hall.

Jim Petro, Attorney General of Ohio, Robert L. Schlatter and Y. Janice Schwartz, Assistant Attorneys General of Ohio, Columbus, Ohio, for Appellee.

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Harsha, P.J.

{¶1} Following a bench trial in an eminent domain proceeding, the trial court awarded John Hall, Jr., \$33,200 as compensation for two parcels of land Ohio Department of Transportation appropriated for highway improvements. Hall appeals from the court's judgment, and its denial of his motions for new trial and to vacate the court's judgment, claiming he was denied a fair trial and "just" compensation.

{¶2} Hall first argues that the trial court denied him a fair trial by (1) allowing his attorney to withdraw eight days

before trial, (2) failing to continue the trial, and (3) allowing Hall to represent himself at trial. Because the record reflects that Hall took no action to oppose his counsel's withdrawal or to request a continuance, and the court cautioned him regarding the dangers of self-representation, Hall's argument is meritless.

{¶3} Hall next claims the trial court denied him the right to have a jury assess the amount of compensation to which he was entitled. However, the record shows that Hall waived his right to a jury trial in this matter.

{¶4} Hall finally contends the trial court abused its discretion in denying his motions for new trial and to vacate judgment. Hall's motions were largely predicated on arguments raised in his first and second contentions here. Having found no merit in these contentions, we see none in the trial court's rejection of them. To the extent they have independent basis of argument, they have no merit. Accordingly, we conclude the trial court did not abuse its discretion in denying Hall's motions for new trial and to vacate judgment. We affirm the trial court's judgment in this case.

#### I. FACTS

{¶5} Hall owns a 3.72-acre roughly, "L"-shaped piece of property that abuts State Route 7 west of Proctorville, Ohio, and is contiguous to the 31<sup>st</sup> Street bridge ramp crossing the

Ohio River to Huntington, West Virginia. The property is predominantly grassy, located in a flood zone, and has a residential structure on it.

{¶6} In February 2002, ODOT's Director filed a complaint under R.C. Chapter 163 to appropriate two parcels of Hall's land for use in a highway improvement project to bypass Proctorville. The first parcel (Parcel 199-WL1) is 0.131 acres that fronts State Route 7 on the south; Parcel 199-WL1 was previously subject to a highway right-of-way easement. The second parcel (Parcel 119-WL2) is 0.332 acres that abuts part of the 31<sup>st</sup> Street bridge ramp on the property's west side. The property's residential structure is not located within either of these parcels. Legal and physical access to Hall's property is provided by roads to the north and east of the property and is not impacted by ODOT's appropriation of the two parcels.

{¶7} Following the statutory procedure, ODOT deposited the sum of \$15,900, which ODOT determined to be the fair market value of the two parcels, with the clerk of the common pleas court. In his answer to ODOT's petition, Hall did not contest the taking but asserted the \$15,900 compensation is inadequate and requested a jury trial. ODOT appropriated the two parcels in May 2002.

{¶8} Trial was originally set for August 2002, but was continued four times upon Hall's request. One such continuance

occurred in April 2003, five days before a scheduled trial date, to allow Hall to hire new counsel after his original counsel withdrew from the case the previous November.

{¶9} Twenty days before the trial scheduled on September 23, 2004, Hall's second counsel filed a motion to withdraw, which the trial court granted on September 16, 2004. In its judgment entry allowing Hall's second counsel to withdraw, the court affirmed the September 23, 2004 trial date and expressly cautioned Hall to be prepared for trial.

{¶10} On September 17, 2004, a telephone conference occurred between the trial court, Hall, and ODOT's counsel. According to statements in the record by ODOT's counsel and the trial court, Hall informed the court during the telephone conversation of his intent to represent himself at trial and his agreement to waive a jury trial, and the trial court then directed the parties to submit written waivers of jury trial. At the beginning of the September 23, 2004 bench trial, the trial court documented the September 17, 2004 telephone conversation and affirmed Hall's waiver of his right to a jury trial into the record:

COURT: Prior to starting the case, normally an appropriation case is tried to a jury, though in a telephone conversation with Mr. Hall and the Attorney General I was advised by both parties that they were willing to waive their right to a jury, which simplifies the case to try it to the court. I've received a plaintiff's waiver of "Right to Trial by Jury" on behalf of the State of

Ohio. I also received a letter from Mr. Hall, the property owner, indicating that he requested that I hear the case. I just want to verify for the record that the State of Ohio is in fact waiving their right to a jury trial.

[ODOT'S COUNSEL]: That is correct, Your Honor.

COURT: And in fact the property owner is waiving his right to a jury trial?

JOHN HALL: Yes Sir.

COURT: The case will be tried to the bench.  
[Tr., 4.]

Hall raised no objection and proceeded pro se at the trial.

{¶11} The court accepted a written opening statement from Hall and allowed him to give his opinion, as the property owner, of the property's value. However, the court precluded Hall from admitting into evidence two written appraisals of his property because the appraisers who prepared them were not present at trial. The court then sustained an objection to Hall's testimony that the value of the appropriated property is approximately \$150,000 based upon amounts the State of Ohio paid for two other parcels it had appropriated in the area. The court ruled the transactions did not reflect the fair market value of the properties and could not be used as comparables because they were "forced" sales. Next, relying on two commercial transactions involving nearby properties that sold for \$450,000 and \$350,000, Hall testified that the average price

for a half-acre of property is approximately \$200,000. Under cross-examination, however, Hall admitted that the commercial transactions reflected a value of only \$76,013.51 for a half-acre of commercial property.

{¶12} ODOT's appraiser testified that the property's highest and best use was as secondary commercial development property. Utilizing sales of comparable properties in the area, adjusted to reflect the characteristics of Hall's property, the appraiser opined that the fair market value of Hall's entire property was \$320,100 before ODOT's appropriation of the two parcels and \$286,900 after the taking. The appraiser testified that the difference of \$33,200 is the value of the part of the property that ODOT appropriated and reflects the damage to Hall's residual property.

{¶13} The trial court agreed with ODOT's valuation and entered judgment awarding Hall \$33,200 in damages as just compensation. Later, the court denied Hall's motions for new trial and to vacate the court's judgment.

## II. ASSIGNMENTS OF ERROR

{¶14} Hall now appeals and assigns the following errors:

1. The trial court erred as a matter of law in allowing Mr. Hall's attorney to withdraw eight days before the trial, and in not continuing the trial to allow Mr. Hall to retain another counsel, and in not advising Mr. Hall against proceeding without a counsel; thus, the trial court

also abused its discretion and denied Mr. Hall of a fair trial.

2. The trial court erred in depriving Mr. Hall of his right to a jury trial as there is no document filed with the clerk of the trial court evidencing that Mr. Hall voluntarily waived his right to a jury trial.
3. The trial court erred in denying Mr. Hall's motion for a new trial.
4. The trial court erred in denying Mr. Hall's motion to vacate judgment.

### III. DENIAL OF FAIR TRIAL DUE TO SELF-REPRESENTATION

{¶15} In his first assignment of error, Hall asserts he was denied a fair trial because the trial court allowed Hall's counsel to withdraw eight days before the trial in this case, leaving Hall "naked" and unrepresented at a critical juncture of the trial proceedings. Hall contends the trial court abused its discretion in denying his oral request for a continuance to obtain new legal counsel for trial and to enable Hall to attend a medical appointment for serious health problems that impaired his ability to represent himself at trial. Hall maintains he was left with no option but to represent himself at trial, which ultimately resulted in him being denied "just" compensation because he did not know how to present evidence and to secure attendance of appraisers and other witnesses at trial.

{¶16} The grant or denial of a trial counsel's motion to withdraw is within the discretion of the trial court. *Kott Enterprises Ltd. v. Brady*, Lucas App. No. L-03-1342, 2004-Ohio-7160, appeal not allowed, 105 Ohio St.3d 1563, 2005-Ohio-2447, ¶28, citing *State v. Cowans* (1999), 87 Ohio St.3d 68, 83. We will not reverse the trial court's decision absent an abuse of that discretion. *State v. Murphy* (2001), 91 Ohio St.3d 516, 523.

{¶17} There is no generalized right to counsel in civil cases. *State ex rel. Jenkins v. Stern* (1987), 33 Ohio St.3d 108, 110. The attorney-client relationship is consensual, subject to termination by either party. *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839. While the client may terminate the relationship at any time, *Ross v. Woyan* (1980), 1 Ohio App.3d 39, 41, an attorney is not free to withdraw from the relationship absent notice to the client and, if required by the rules of the court where the attorney is representing the client, permission from the court. DR 2-110(A)(1) and (2)<sup>1</sup>; *Kott*, supra. The purpose of DR 2-110(A)(1) and (2) is to ensure

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<sup>1</sup> DR 2-110(A)(1) and (2) provide that "(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission[, and] (2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to his or her client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.



that the client is not prejudiced by the withdrawal of counsel. *Kott*, supra, ¶32.

{¶18} Hall's second legal counsel served notice around September 2, 2004 of his motion to withdraw and filed the motion with the court on September 3, 2004, giving Hall approximately twenty days to obtain substitute counsel before trial. The record does not reflect that Hall opposed his counsel's withdrawal.

{¶19} Hall claims on appeal that during his September 17, 2004 telephone conference with the trial court and ODOT's counsel, he requested a continuance of the trial scheduled for September 23, 2004 so that he could obtain new counsel and so that he could attend a medical appointment for "life-threatening" health problems he allegedly suffered. The telephone conference was not recorded or transcribed, and Hall has submitted no settled or agreed statement of the conversation that occurred. Hall relies on his own affidavit and the supporting documents that he filed in support of his motions for new trial and to vacate judgment, which contain identical averments. While the items are part of the record, they are merely assertions of what happened. They do not constitute a memorialization of the communications that occurred during the conference.

{¶20} Hall, as the appellant, bears the burden of showing error by reference to matters in the record. *State v. Skaggs* (1978), 53 Ohio St.2d 162. Where a transcript is unavailable or a proceeding is otherwise not recorded, an appellant may provide a settled or agreed statement of the proceeding as the record for review upon appeal. See, App.R. 9(C) and (D), and *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Absent a substitute statement of the record, we presume the regularity of the proceedings and the validity of the court's judgment. *Id.*

{¶21} In its decision denying Hall's post-trial motions, the trial court directly contradicted Hall's averments regarding the September 17, 2003 telephone conference. Specifically, the court found that Hall did not inform the court prior to the September 23, 2004 trial that he had serious health problems<sup>2</sup> and the court stated that Hall never requested a continuance of the September 23, 2004 trial date—either for health reasons or to obtain new counsel.

{¶22} Because there is nothing in the record that confirms Hall's averments, either in a transcript or through a substitute statement of the record, as permitted under App.R. 9(C) and (D), we must presume the regularity of the proceedings and accept the

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<sup>2</sup> In oral arguments before this court, Hall's appellate counsel conceded that Hall did not inform the trial court *before* the September 23, 2004 trial date that he had serious health problems or was too unhealthy to try the case.

trial court's account of the September 17, 2004 telephone conference between the parties.

{¶23} Although Hall further claims that the trial court did not caution him of the dangers of self-representation in an appropriation trial, he acknowledges that when the trial court granted his counsel's motion to withdraw from the case on September 16, 2004, the trial court cautioned him to be prepared for trial. Furthermore, the trial court expressly indicated in its January 20, 2005 judgment entry that when Hall informed the court on September 17, 2004 of his intent to proceed to trial without counsel, the court advised Hall that appropriation trials are difficult and complex and cautioned him to obtain counsel.

{¶24} In light of the numerous continuances already afforded to him, because the record does not reflect that Hall requested a continuance of the September 23, 2004 trial to obtain new counsel or for health reasons, and since the record indicates that Hall was expressly cautioned regarding the dangers of self-representation, we conclude the trial court did not deny Hall a fair trial in allowing him to represent himself at trial. Hall's first assignment of error is overruled.

#### IV. RIGHT TO A JURY TRIAL

{¶25} In his second assignment of error, Hall asserts that he was deprived of his constitutional right to a jury trial, as

provided in Section 19, Article I of the Ohio Constitution. Hall contends he did not properly waive his right to a jury trial because he neither filed a formal waiver of a jury trial with the court clerk, nor entered into an agreement in open court to waive a jury trial in this matter. Hall argues that his agreement to have the court decide the matter was not voluntary, and was therefore invalid, because he mistakenly believed he could not have a jury trial if he did not have legal counsel. Moreover, he contends he felt coerced by the trial court and ODOT's counsel into waiving his right to a jury trial in order "to simplify matters."

{¶26} Section 19, Article I of the Ohio Constitution provides that "compensation shall be assessed by a jury" in cases involving land appropriation. See, also, R.C. 163.14. However, in *In re Appropriation for Hwy. Purposes (Bethesda Hosp. Assn. v. Preston)* (1963), 175 Ohio St. 277, the Ohio Supreme Court held that parties in an appropriation case may waive the jury provision by stipulation or agreement in open court. *Id.*, paragraph two of the syllabus. See, also, *Wray v. Deters* (1996), 111 Ohio App.3d 107, 112.

{¶27} The fact that Hall's letter to the trial court is not contained in the lower court file is not fatal to an otherwise effective waiver. The trial court noted at the trial that it received a fax from Hall waiving his right to a jury trial. And

Hall sent a virtually identical letter to that referenced by the trial court to ODOT's counsel, who made it a part of the record. Even if Hall's written waiver is not given effect, Hall made an effective, valid waiver in open court when he unequivocally agreed that he was "waiving his right to a jury trial[.]" *In re Appropriation for Hwy. Purposes; Deters, supra.*

{¶28} To the extent that Hall may have had a mistaken belief that he did not have a right to a jury trial if he did not have legal counsel, he has not shown this misconception was due to communication from the trial court or opposing counsel. Indeed, the trial court stated on the record before the bench trial began that Hall, as the property owner, had a "right to a jury trial."

{¶29} Because the record reflects that Hall made a valid waiver of his right to a jury trial, we hold that Hall was not improperly deprived of his right to have a jury decide the amount of just compensation to which Hall was entitled. Accordingly, we overrule Hall's second assignment of error.

#### V. MOTION FOR NEW TRIAL

{¶30} In his third assignment of error, Hall asserts the trial court erred in denying his Civ.R. 59(A) motion for new trial based on the following grounds:

- (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of

the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

\* \* \*

- (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

\* \* \*

- (7) The judgment is contrary to law;

\* \* \*

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

{¶31} Generally, a trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion. See *Wagner v. Roche Laboratories* (1999), 85 Ohio St.3d 457, 460. However, to the extent the decision under protest was based upon a question of law, we afford no deference to the trial court's decision. *Id.*

{¶32} Hall's claim that he is entitled to a new trial is largely premised on arguments raised in his first two assignments of error. Specifically, Hall claims he is entitled to a new trial because the court denied him a fair trial by leaving him without legal representation eight days before trial, refusing to continue the trial date, and denying his right to a jury trial. Because we have found the claims to be meritless, we conclude that the trial court did not abuse its

discretion or err as a matter of law in concluding Hall is not entitled to a new trial on these bases.

{¶33} Hall nevertheless contends that he is entitled to a new trial pursuant to Civ.R. 59(A)(4), on the basis of inadequate damages. Hall argues that the \$33,200 damage award was inadequate and violated his constitutional right to just compensation because the trial court did not allow Hall to fully present evidence of the maximum value of his property.

{¶34} In an eminent domain proceeding, the admission and exclusion of evidence concerning the value of property rests largely in the discretion of the trial court. *In re Appropriation by Ohio Turnpike Comm. (Ohio Turnpike Comm. v. Ellis)* (1955), 164 Ohio St. 377, paragraph two of the syllabus. Absent a clear showing that the court has abused its discretion and prejudice has resulted to the appellant, we will not disturb the trial court's decision. *Id.*

{¶35} "When the director of transportation appropriates private property, the property owner is entitled to 'just compensation'; that is, 'compensation for the property actually taken and damages for injury to the property which remains after the taking, i.e., the residue.'" *Wray v. Goeglein* (Dec. 2, 1998), Meigs App. No. 97CA9, quoting *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 762-763. See, also, *Proctor v. Thieken*, Lawrence App. No. 03CA33, 2004-Ohio-7281, ¶24. "Damage to the

residue is measured by the difference between the fair market values of the remaining property before, and after, the taking." Id., citing *City of Englewood v. Wagoner* (1987), 41 Ohio App.3d 324, 326. See also, *Masheter v. Brewer* (1974), 40 Ohio St.2d 31, 33; *Masheter v. Hoffman* (1973), 34 Ohio St.2d 213.

{¶36} Consistent with the owner-opinion rule, the trial court permitted Hall, as the owner of the real property, to testify to his property's fair market value. See, *Proctor v. Bader*, supra at ¶24, ¶30; *City of Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 291 (stating that "[u]nder the owner-opinion rule, an owner of real property, by virtue of his ownership and without qualification as an expert, is competent to testify to his property's fair market value"). However, although a property owner may testify to the underlying factors that serve as the basis for his or her opinion, only an expert witness may testify concerning values of real property that are based in whole or in part upon hearsay. *Proctor v. Bader*, supra at ¶30-31, citing *Weir v. Miller* (Apr. 13, 1983), Butler App. No. 82-04-0044.

{¶37} Because the two appraisals of his property that Hall proffered into evidence were themselves hearsay, i.e., out of court statements offered for the truth of the matter they asserted, See Evid.R. 801(C), they were not admissible since the experts who prepared them did not testify. See Evid.R. 802,



which precludes the admission of hearsay unless otherwise provided by law. Thus, the trial court did not abuse its discretion in excluding those appraisals. *Id.*

{¶38} Nor did the trial court abuse its discretion in ruling that Hall's valuation testimony was inadmissible to the extent it was based upon sales in which the State of Ohio appropriated nearby properties for public use. The price paid in "forced" sales of comparable property is not competent evidence to establish fair market value of property taken for purposes of determining just compensation. *Masheter v. Brewer* (1974), 40 Ohio St.2d 31. Sales done under compulsion, such as property purchased by a condemning authority for public use, are generally not admissible to show "fair market value." *Toledo v. Kim's Auto & Truck Serv., Inc.*, Lucas App. No. L-02-1318, 2003-Ohio-5604, ¶38. See, also, 5 Nichols, *Eminent Domain* (Rev. 3 Ed 1997), Sections 21.05, 21.06.

{¶39} The amount of "just compensation" awarded by the trial court was consistent with the valuation testimony presented by ODOT's appraiser, which was appropriately based on the difference in the value of the property before and after the taking. Because the trial court's damage award was supported by competent and credible evidence and Hall does not contend that the amount of damages awarded by the court were given under the

influence of passion or prejudice, Hall is not entitled to a new trial under Civ.R. 59(A)(4).

{¶40} There being no basis under Civ.R. 59(A) entitling Hall to a new trial, we hold the trial court did not abuse its discretion or err as a matter of law in overruling Hall's motion for new trial. Hall's third assignment of error is overruled.

#### VI. MOTION TO VACATE

{¶41} In his final assignment of error, Hall asserts the trial court abused its discretion in denying his motion to vacate its judgment under Civ.R. 60(B).

{¶42} Under that rule, a court may relieve a party from a final judgment for reasons including mistake, excusable neglect, or any other reason justifying relief from the judgment, provided that the motion is made within a reasonable time. In order to prevail on a motion under Civ.R. 60(B), a movant must demonstrate: (1) a meritorious defense or claim, (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1) through (5), and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151. The movant must satisfy all three of the requirements before being entitled to relief. The absence of any one of them is fatal. *Id.*, 151.

{¶43} Hall first contends he is entitled to relief from judgment because the inadequacy of the \$33,200 damage award as

"just" compensation constitutes a meritorious defense. Assuming without deciding that he has properly framed this issue, we have already concluded the damage award is not inadequate. Because he cannot satisfy this element, the trial court did not abuse its discretion in deciding Hall is not entitled to relief from judgment. *GTE Automatic Elec., Inc.*, supra. Hall's fourth assignment of error is accordingly overruled.

#### VII. CONCLUSION

{¶44} Having overruled all of Hall's assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, J.: Concurs in Judgment and Opinion.  
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Presiding Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

