

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

JERRY WRAY, DIRECTOR,
OHIO DEPARTMENT OF
TRANSPORTATION, STATE OF
OHIO,

Plaintiff-Appellee,

VS.

CHARLES J. FRANK, et al.,

Defendants-Appellants.

Case No. 14CA2

DECISION AND JUDGMENT ENTRY

Released: 09/28/15

APPEARANCES:

Bruce L. Ingram, Joseph R. Miller, and John M. Kuhl, Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, for Appellants.

Mike DeWine, Attorney General of Ohio, and Gregory S. Severance and L. Martin Cordero, Assistant Attorneys General, Columbus, Ohio, for Appellee.

McFarland, A.J.

{¶1} Charles J. Frank, Appellant, appeals the judgment entry on the verdict entered December 24, 2013 in the Pickaway County Court of Common Pleas.

Appellant assigns two errors on appeal: (1) that the trial court erred by way of evidentiary rulings which, according to Appellant, allowed unlawful appraisals and valuation testimony; and (2) that the trial court erred by refusing to give

Appellant's proposed jury instruction on abutter's rights and access, which was a

correct statement of the law and applicable to the facts of this case. Having reviewed the record, we find the trial court did not err and abuse its discretion. Appellant's arguments have no merit. As such, we affirm the judgment of the trial court.

FACTS

{¶2} This appeal arises from a partial appropriation action. On June 28, 2012, Appellee Jerry Wray, Director of the Ohio Department of Transportation (ODOT), filed a petition in the Pickaway County Court of Common Pleas to appropriate property from Appellant and to fix compensation. Appellant is a farmer and life-long resident of Pickaway County who owned approximately 116 acres of land at the southwest corner of Duvall Road and Bulen-Pierce Road. Duvall Road runs east and west between U.S. Route 23 and Ashville Pike in northern Pickaway County, and to the southwest of Rickenbacker Air Base. The property was rectangular-shaped and had frontage along both roads. The property was located approximately one mile east of U.S. Route 23.

{¶3} Attached to the petition was a copy of the Findings, Declarations and Resolution to Appropriate which contained a statement of the purpose of the appropriation, the description of the property and the rights, titles, interests, and estate to be appropriated, and the amount Appellee determined to be the fair market value of the property to be appropriated, along with the amount of damages

to the residue. Appellant's property was to be acquired in connection with ODOT's "Pickaway 762 Project." The project was designed to facilitate increased flow of traffic from Rickenbacker Airport to U.S. Route 23. The State of Ohio was in the process of constructing a new highway from the intersection of Duvall Road and U.S. Route 23 to the west. The new highway was to continue east to the intersection of Ashville Pike and Old Duvall Road. Most of existing Duvall Road would be replaced. ODOT also planned to relocate Bulen-Pierce Road approximately 60 feet east of its location to form a new intersection with State Route 762. Appellant had access to his property by way of an ordinary gravel field drive along Duvall Road. This field drive would need to be relocated farther west and reconstructed.

{¶4} Appellee's petition also stated Appellee had deposited with the Pickaway County Clerk of Courts a sum of money, \$44,954.00, which Appellee determined to be the fair market value of the property to be appropriated, along with damages to the residue. And, Appellant filed with the Pickaway County Engineer a copy of the highway plans for the purposes of making available a description of the property to be appropriated in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement.

{¶5} The property to be appropriated from Appellant, nearly 9 acres, consisted of two parcels, known in these proceedings as "Parcel 11-WD" and

“Parcel 11-WDV2.” Parcel 11-WD consisted of an approximately 3.453 acre tract of land in fee simple that encompassed frontage on the former Duvall Road.

Duvall Road was to be removed. Parcel 11-WDV2 consisted of approximately 6.310 acres that encompassed 1800 feet of frontage along Bulen-Pierce Road.

Exhibit A, the legal description of the property attached to the petition, contained detailed legal descriptions of each parcel and contained the following language:

“PARCEL 11-WD
PIC-762-11.18
ALL RIGHT, TITLE AND INTEREST IN FEE SIMPLE
IN THE FOLLOWING DESCRIBED PROPERTY
WITHOUT LIMITATION OF EXISTING ACCESS RIGHTS

Grantor/Owner, for himself and his heirs, executors, administrators, successors and assigns, reserves all existing rights of ingress and egress to and from any residual area * * *.”¹

{¶6} When the matter came on for trial to determine the compensation due Appellant for the taking of his property and the damage to the residue, the jury heard three days of testimony and argument concerning ODOT’s taking and the effect on Appellant’s property. Appellant and an appraiser, Debi Wilcox, testified on his behalf. Appellant testified he acquired the farmland in 1981 because of its

¹“PARCEL 11-WDV2
PIC-762-11.18
ALL RIGHT, TITLE AND INTEREST IN FEE SIMPLE
IN THE FOLLOWING DESCRIBED PROPERTY
WITHOUT LIMITATION OF EXISTING ACCESS RIGHTS
IN THE NAME AND FOR THE USE OF THE
TRUSTEES OF HARRISON TOWNSHIP, PICKAWAY COUNTY, OHIO

Grantor/Owner, for himself and his heirs, executors, administrators, successors and assigns, reserves all existing rights of ingress and egress to and from any residual area* * *.”

extensive frontage, proximity to Route 23, and potential for future development. Appellant testified that, based on the legal description set forth by Exhibit A attached to ODOT's petition, Appellant had no access to ODOT's newly created roadways. Appellant opined that the potential for development of his property was eliminated by ODOT's taking.

{¶7} Debi Wilcox, who was qualified as an expert appraiser, testified regarding the scope of the take, valuation of the take, and valuation of the residue. Wilcox opined the highest and best use of Appellant's property before the take was for future industrial development with agricultural use as an interim use. She valued Appellant's property at \$12,000.00 per acre for a total value of \$1,396,236.00 prior to the take.

{¶8} Wilcox also testified the highest and best use of Appellant's property after the take was agricultural or rural residential uses. She testified ODOT's legal descriptions did not reserve an easement of ingress and egress to the residue. She opined the loss of access, loss of frontage, and the shape of Appellant's residue adversely affected the development potential and the highest and best use of the property. She valued the residue at \$5,600.00 per acre for a total value of \$570,954.00 after the take.

{¶9} ODOT presented testimony from two expert appraisers - Brian Barnes and Frank Hinkle. Brian Barnes testified that Appellant's property's highest and

best use was as agricultural or low-density residential home sites. Barnes opined the land value before the taking was \$5,150.00 per acre. Barnes also testified that Appellant's property continued with the same agricultural use after the taking and thus suffered no damages.

{¶10} Hinkle testified the highest and best use of the property was agricultural until utilities were extended for development. Hinkle testified the value of the land before the taking was \$10,000.00 per acre. Hinkle testified that after the take, the property was similar in size, shape, and frontage, and that whatever potential for development that existed prior to the taking remained unchanged. Hinkle also concluded Appellant suffered no damages. ODOT also presented testimony from Robert Weiler, Jr., a realtor, appraiser, and developer. Weiler testified the uncertainty of public utilities made development in the reasonably anticipated future unlikely.

{¶11} Prior to the close of ODOT's case, Appellant moved to exclude the testimony of ODOT's appraisers on the grounds that their appraisals were premised upon access that did not exist, due to the legal description provided by ODOT. ODOT also moved to strike the valuation testimony of Appellant and Debi Wilcox, on the basis that they testified there was no access to State Route 762. The trial court denied Appellant's objections to the appraisers' testimony and denied the motion to strike. Appellant also proposed jury instructions on access,

which were titled as “Proposed Jury Instruction No. 4.” The trial court denied the request and did not give the jury the proposed instructions.

{¶12} The jury awarded Appellant \$104,748.00 for the taking and \$100,000.00 in damages to the residue, for a total award of \$204,748.00. The verdict was journalized on December 24, 2013. Appellant was also awarded statutory attorney fees and costs. This timely appeal followed.

{¶13} Where relevant, additional facts are set forth below.

ASSIGNMENT OF ERROR ONE

“I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING APPELLANT’S OBJECTIONS TO THE STATE’S APPRAISERS’ TESTIMONY AND REPORTS WHICH FALSELY CLAIMED THAT THERE WAS NO CHANGE IN ACCESS TO THE PROPERTY AS A RESULT OF THE TAKING; THE EVIDENCE WAS UNDISPUTED THAT THE STATE TOOK APPELLANT’S PROPERTY ABUTTING TWO ROADWAYS IN FEE SIMPLE, ABOLISHED THOSE ROADS, AND THEN BUILT NEW ROADS ON THE PROPERTY TAKEN BY THE STATE IN FEE WITHOUT RESERVING AN EASEMENT OF ACCESS TO THE NEW ROADS. [TR. AT 438-439; 483-486].”

STANDARD OF REVIEW

{¶14} Decisions regarding the admission of evidence are within the sound discretion of the trial court and may not be reversed absent an abuse of discretion. *Proctor v. NJR Properties, L.L.C., et al.*, 175 Ohio App.3d 378, 2008-Ohio-745, 887 N.E.2d 376, (12th Dist.) ¶ 14, citing *O’Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). An abuse of discretion connotes more than an error

of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *NJR Properties, supra*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

LEGAL ANALYSIS

{¶15} This case involves the State's right of eminent domain and involves a partial taking. As such, a review of the principle of eminent domain as well as the pertinent statutes and case law is in order. Section 19, Article I of the Ohio Constitution provides: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken * * * for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money * * *." *Proctor v. Thieken*, 4th Dist. Lawrence No. 03CA33, 2004-Ohio-7281, at ¶ 12. Similarly, the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." *Id.* See, also, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231, 104 S.Ct. 2321 (1984).

{¶16} A fee simple is the highest right, title and interest that one can have in land. *Masheter v. Diver*, 20 Ohio St.2d 74, 253 N.E.2d 780 (1969). It is the full and absolute estate in all that can be granted. *Id.* See, for example, 1 Tiffany, Real Property (3 Ed.), 38, Section 27. R.C. 163.01 and 163.22 govern the procedure by

which ODOT may appropriate private property. See *Thieken, supra* at ¶ 3. See R.C. 5519.01. ODOT may commence appropriation proceedings only if it is unable to agree with the owner to a purchase of the property. *Id.* at ¶ 12. See R.C. 163.04. See also, *Highland Cty. Bd. of Commrs. v. Fasbender*, 4th Dist. Highland No. 98CA24, 1999 WL 595359, *3.

{¶17} “Where the appropriating authority acquires property in fee simple, pursuant to Sections 5519.01 and 5501.11, Revised Code, and designates the interest taken as ‘all right, title and interest,’ he takes all that the owner possesses including the invisible as well as the visible.” *Masheter v. Diver, supra*; See, *State, ex rel. Lindemann v. Preston*, 171 Ohio St. 303, 170 N.E.2d 489 (1960). The owner of property abutting on a public highway has the right to use that highway in common with other members of the public, and also the right of ingress and egress to and from his property, which latter right may not be destroyed without compensation. *Masheter v. Diver, supra*; *State ex rel. Merrit v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1955) (Citations omitted.) The director is empowered to purchase land for highway purposes in fee simple in the name of the state (Section 5501.11, Revised Code). *Masheter v. Diver, supra*. When he does so, it necessarily must be assumed that he fully intended to take all rights and interest in the land, including rights of access to the abutting land. *Id.*

{¶18} “In a partial takings case, the owner is entitled to receive compensation not only for the property taken, but also for damage to the residue as a result of the take.” *Beasley v. Watkins-Alum Creek Co., et al.*, 12th Dist. Fayette Nos. CA2010-09-021, CA2010-09-027, 2011WL 692073, ¶ 17, quoting *NJR Properties, supra*, 887 N.E.2d 376, 2008-Ohio-745, ¶ 15. “The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use, but what it is worth generally for any and all uses for which it can reasonably and practically be adapted.” *Beasley, supra*, quoting *Masheter v. Kebe*, 49 Ohio St.2d 148, 151, 359 N.E.2d 74 (1976). Accordingly, “[d]amage to the residue is measured by the difference between the fair market values of the remaining property before and after the taking. * * * When determining the fair market value of the remaining property before and after the taking, those factors that would enter into a prudent business person’s determination of value are relevant. * * * Factors may include loss of ingress and egress, diminution in the productive capacity or income of the remainder area, and any other losses reasonably attributable to the taking.” *Beasley, supra*; (Citations omitted.) *NJR Properties, supra*, at ¶ 5. The law makes clear that property owners in a partial takings case can recover compensation for any damage to the residue resulting from the appropriation. *Id.* See *Englewood v. Wagoner*, 41 Ohio App.3d 324, 326, 535 N.E.2d 746 (2nd Dist. 1987). Therefore, if a partial taking affects the property owner’s access to the

remainder of the property, that factor can be considered in determining damage to the residue. *NJR Properties, supra*, at ¶ 16. (Citation omitted.) *Thieken, supra*, at ¶ 5.

{¶19} Under his first assignment of error, Appellant argues the trial court's decisions overruling his objections and motion to strike the incorrect legal opinion of ODOT's appraisers are subject to a de novo review because the legal interpretation and significance of the legal descriptions attached to ODOT's petition concern a matter of law. Appellant further contends that ODOT's appraisers erroneously valued his property on the basis of Frank having unlimited rights of ingress and egress to the new state highway and the relocated Bulen-Pierce Road. Appellant argues the Ohio Revised Code obligates ODOT to specify the precise interest being taken within the Director's Resolution and Findings, but ODOT's legal description, which purports to reserve "existing rights of ingress and egress to and from any residual area," actually reserved no rights at all because the roads to which Appellant had access no longer exist following ODOT's take in this case. Despite the fact that the sole issue for the jury's determination in this proceeding was compensation for the land taken and the damages to the residue, Appellant concludes he was unquestionably prejudiced by the introduction of erroneous legal opinions that his property had unlimited access to the new roadways.

{¶20} Appellant directs our attention to the transcript at pages 438-439

where Frank Hinkle testified on behalf of ODOT as follows:

Q: * * * [A]re you saying that [Appellant] after the taking, continues to have access rights to what is just the relocated Duvall Road?

A: Yes.

Q: Could you please read for the jury the next paragraph below the bold print for 11-WD?

A: Grantor/owner, for himself and his heirs, executors, administrators, successors and assigns, reserves all existing rights of ingress and egress to and from any residual area * * *.

Q: Okay. And when that legal description describes the existing rights of ingress and egress to and from the residual area, that's the residue of [Appellant's] property?

Mr. Miller: Objection.

A: Yes.

The Court: Overruled.

Q: Now if you turn to a couple of pages further from parcel 11-WD, we have 11-WDV2. Do you see that?

A: Yes.

Q: It is a permanent fee simple taking without limitations to existing access rights.

A: That is correct.

Q: And the same paragraph with regard to reserving all existing access rights appears on parcel 11-WDV2?

A: That is correct.

Q: With respect to the residue, is the WDV2 with respect to now Bulen-Pierce Road?

Mr. Miller: Objection.

The Witness: Yes.

The Court: Overruled.

By Mr. Cordero:

Q: So does [Appellant] have access to Bulen-Pierce Road along the taking area from State's Exhibit H?

Mr. Miller: Same objection.

Q: Yes.

The Court: Overruled.

Appellant moved to strike the testimony of both the ODOT appraisers on the basis that their testimony that no damages occurred to the residue of the property as a result of the taking was based upon their review of the legal descriptions of the take and a false premise that the State reserved the easement of access to him. However, the trial court overruled the motion to strike and allowed the testimony.

{¶21} Appellee responds that Appellant invited error in this proceeding by first eliciting testimony about access from his own appraiser, Debi Wilcox. Wilcox testified ODOT's legal descriptions did not reserve an easement of ingress and egress to the residue. Appellee also argues that the *Watkins-Alum Creek* case

cited by Appellant was actually interpreted to his benefit. As such, no prejudice occurred to Appellant by the trial court's evidentiary rulings.

{¶22} Both parties cited *Watkins-Alum Creek* in the briefs. In *Watkins-Alum Creek*, ODOT filed a petition for appropriation seeking to take 15.925 acres of Watkins' property and establish just compensation for the real property appropriated and the value of damages to the residue. The acreage was sought as part of the extension of State Route 753 which was being constructed in order to alleviate tractor-trailer traffic going through Fayette County. ODOT deposited the required amount with the trial court and a jury trial commenced in 2010. The only issue before the jury was the amount of compensation owed for the property taken and the damages to the residue. The jury heard testimony from the parties' appraisers regarding the amount due to Watkins. After a three-day trial, the jury arrived at its awards for compensation for the property permanently taken, a temporary easement, and damages to the residue. ODOT appealed and Watkins filed a cross-appeal.

{¶23} Under the first assignment of error in *Watkins*, ODOT argued that the trial court improperly permitted Watkins, over ODOT's repeated objections, to present evidence that it was harmed by loss of access to the proposed new state route. Further, ODOT argued that the court erred by allowing Watkins to present evidence that the residue was damaged by the loss of "access points" from a road

that did not exist on Watkins' property. The trial court permitted Watkins to introduce into evidence a map of the property which contained an image of a roadway running through the property. The map * * * depicted a private roadway nearly identical to the proposed state route extension project, except the roadway was not limited access. The map of the roadway contained various arrows which were intended to represent point of access from the roadway to Watkins' property. Although the depicted roadway was never built, Watkins' repeatedly referred to the six different points of access from the non-existent road that it claimed were lost as a result of ODOT's taking.

{¶24} The *Watkins* court reviewed the principles regarding the owner's entitlement to compensation in a partial takings case, the measure of damages, and the factors involved when considering damages. The appellate court also noted that loss of ingress and egress is a factor that should be considered in determining the fair market value of the remaining property after a taking. *Proctor v. NJR Properties, supra*, at ¶ 15. The *Watkins* court concluded although Watkins was entitled to present evidence of the devaluation in the fair market value of its property after ODOT's taking, Watkins went beyond what was permissible when it argued and presented testimony that the residue was harmed by the loss of specific access points from a roadway that had never been constructed on the property. *Id.* at ¶18. It further went beyond what is permissible when it presented testimony that

the residue was devalued because it loss access to the proposed extension of the state route.

{¶25} The appellate court in *Watkins* observed that compensation for the obstruction of access to a public highway occurs only when access to an existing roadway is being denied or limited by governmental taking. The court held:

“The reasoning is simple. At the time of the taking, there is no easement of access to the new road inuring to the benefit of abutting land not taken. No existing right has been taken.

* * *

Accordingly, because the new limited access highway is being built where no prior road existed, *Watkins* is not entitled to compensation for the loss of access to the new road. Allowing *Watkins* to present evidence to the contrary was prejudicial and a reversible error. Further, *Watkins* was not entitled to present evidence that it was harmed by the loss of specific access points along the non-existent roadway depicted in [Byrd & Houck]map.”

{¶26} *Watkins* is distinguishable from the case at bar. In *Watkins*, ODOT was appealing the impermissible testimony and evidence presented at trial by the landowner. *Watkins* impermissibly introduced a map depicting a non-existent roadway having various points of access when no such roadway existed. The dispute in *Watkins* was over a non-existent roadway. As emphasized in its decision above, allowing *Watkins* to present evidence where no existing right had been taken was prejudicial and reversible error.

{¶27} By contrast, in the case sub judice, the legal description of the property taken included “existing rights of ingress and egress.” Appellant attempts to frame the issue as a legal one. We disagree. In our view, the conflicting testimony as to the rights of ingress and egress was permissible as being a relevant factor in determining the fair market value of the property remaining after ODOT’s taking. As we have previously observed above, when determining the fair market value of remaining property before and after a taking, loss of ingress and egress is relevant. *Beasley, supra* at ¶17. The trial did not err.

{¶28} Furthermore, at trial, Appellant’s appraiser Debi Wilcox first testified to her review of the legal descriptions as follows:

Q: Did the legal descriptions that specify what ODOT is taking in this case state that ODOT’s fee simple interest is subject to an easement for ingress and egress to the remainder?

Mr. Severance: Objection.

The Court: Overruled.

The Witness: No. They do not. They are - - actually they’re taking the total fee simple interest without limitation of existing access rights.

Q: Do the legal descriptions attached to the final resolution that describes what they are taking, specify the location of any easement for ingress or egress?

Mr. Severance: Objection.

The Court: Overruled.

The Witness: No, they do not.

{¶29} We further agree with Appellee that the testimony of Debi Wilcox, that Appellant was deprived of all rights of ingress and egress, indeed opened the door to the testimony of Brian Barnes and Frank Hinkle, who opined as set forth above, that Appellant continued to have access rights to Duvall Road and Bulen-Pierce Road. Under the doctrine of “invited error,” it is well-settled that “a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make.” *Proctor v. King*, 5th Dist. Licking No. 2007CA00133, 2008-Ohio-5413, 47, 48. quoting, *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, 646 N.E.2d 1115, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359, 626 N.E.2d 950. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, 50 N.E.2d 145, paragraph one of the syllabus. As the Supreme Court of Ohio has stated:

“The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible.” *Lester* at 92-93, 50 N.E.2d 145, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91, 49 N.E.2d 952.”

See also *State v. Byrd*, 4th Dist. Scioto No. 96CA2427, 1998 WL 1403, *14, citing *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 313, 511 N.E.2d 106. Appellant cannot complain of an alleged error in allowing ODOT's appraisers to testify concerning ingress and egress when, in fact, Appellant opened the door to this testimony through the testimony of Debi Wilcox.

{¶30} For the foregoing reasons, we find the trial court did not abuse its discretion by overruling Appellant's objections and motion to strike the testimony of Barnes and Hinkle. Appellant's first assignment of error is without merit. Accordingly, it is hereby overruled.

ASSIGNMENT OF ERROR TWO

"II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED BY APPELLANT, THAT THE STATE'S ACQUISITION OF THE FEE SIMPLE TITLE EXTINGUISHED ALL EXISTING EASEMENTS OF ACCESS TO THE ABUTTING ROADWAYS AND THE STATE FAILED TO RESERVE TO APPELLANT IN THE LEGAL DESCRIPTION OF THE PROPERTY TAKEN AN EASEMENT OF ACCESS TO THE NEW ROADWAYS. MASHETER V. DIVER, 20 OHIO ST.2D 74 (1970). [TR. AT 498]."

STANDARD OF REVIEW

{¶31} The standard of review when it is claimed that improper jury instructions were given, is to consider the jury charge as a whole and determine whether the charge misled the jury in a manner affecting the complaining party's substantial rights. *Westerville v. Taylor*, 10th Dist. Franklin No. 13AP-806, 2014-

Ohio-3470, ¶ 10, citing *Dublin v. Pewamo Ltd.*, 194 Ohio App.3d 57, 2011-Ohio-1758, ¶ 28, (10th Dist.), citing *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93,1995-Ohio-84, 652 N.E.2d 671. The decision to give or refuse to give jury instructions is within the trial court's sound discretion. *Columbia Gas of Ohio, Inc. v. R.S.V. Inc.* 7th Dist. Jefferson No. 05-JE-29, 2006-Ohio-7064, ¶55; *State v. McCleod* (Dec. 12, 2001), 7th Dist. No. 00-JE-8, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. Thus, we will not reverse a verdict on this basis absent a trial court's abuse of discretion. An inadequate instruction that misleads the jury constitutes reversible error. *Taylor, supra*, citing *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985).

LEGAL ANALYSIS

{¶32} Under the second assignment of error, Appellant argues his proposed jury instruction four was a correct statement of the law and was compiled from holdings of the Supreme Court of Ohio in *Diver, supra*, and *Wray v. Wymer*, 77 Ohio App.3d 122, 601 N.E.2d 503 (4th Dist. 1991). Appellant argues ODOT's and his own valuation witnesses provided fundamentally inconsistent interpretations and testimony concerning the legal descriptions defining ODOT's take. As such, Appellant argues, the jury was free to determine what, if any, legal right of access he had to ODOT's new roadways. Appellant concludes the trial court's failure to properly instruct the jury was reversible error.

{¶33} Appellant proposed the following proposed jury instruction number four regarding abutter's rights and access:

“An owner of real property that abuts a public street or highway has a right to access that public street or roadway upon which his or her property abuts. In addition, an owner of real property that abuts a public street or highway has a right to an unobstructed view over the public highway or street. A property owner is entitled to compensation for any governmental action that substantially or unreasonably interferes with that property owner's access to or visibility over the public street or roadway. A property owner has such an interest in the portion of the street or roadway he abuts, that the closing of it is a taking of private property for a public use that cannot be done without compensation.

The property and property rights taken by ODOT from Defendant are defined in the Resolution and Finding and the legal descriptions attached thereto. If the director of transportation wishes to take a fee simple title but reserve the landowner the right to ingress and egress to and from the residue, he must specify in the Resolution and Finding that the appropriation is of a fee simple title subject to an easement for the purposes of ingress and egress with the location being specified.

Where lands are taken in fee simple, without reserving to the owner an easement for purposes of ingress and egress to and from the residue and specifying that location, the appropriating authority takes all rights and interest in the land, including all access to and from the residue.”

{¶34} The trial court should give a requested jury instruction when the instruction is a correct statement of the law pertaining to the facts of the case and when reasonable jurors might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828. Upon review of jury instructions, the appellate court should

determine whether the record contains evidence that might lead reasonable minds to reach the conclusion sought by the instruction. *Id.* When reviewing an omitted instruction, an appellate court must do so within the context of the entire charge and not in and of itself. *Columbia Gas, supra*, at ¶60; *Delbalso v. Kippen*, 8th Dist. No. 86717, 2006-Ohio-2731, at ¶ 6, citing *State v. Hardy* (1971), 28 Ohio St.2d 89, 92, 276 N.E.2d 247.

{¶35}Therefore, we must consider the charge given to the jury. The trial court did not specifically address abutter's rights and access in the jury instructions. However, as this was a partial appropriation action, the jury had to determine: (1) the amount of compensation for the property taken and (2) the amount of any damage to the residue. The trial court instructed as follows regarding compensation and damages:

“There are portions of Mr. Frank's land that were not appropriated and continue to be owned by Mr. Frank. The property that remains after the taking is called the ‘residue’ or ‘remainder.’

Ohio laws give the Ohio Department of Transportation the right to appropriate this property subject to the requirement that compensation for such take and any damages to a residue shall be assessed by a jury.

The jury acts as an assessing body in determining the amount of compensation and the amount of any damages. As to the amounts of compensation of property and any damages, there is no burden of proof as in other civil cases. Compensation is payment of the fair market value of the property taken.

Damages are the loss in value of the residue of the property because of its severance from the property taken.

Compensation and damages to residue, if any, shall be determined as of the 13th day of December 2012, which is referred to as ‘the date of take.’

* * *

You will award to the property owner the amount of money you determine to be the fair market value of the property taken. Fair market value is the amount of money which could be obtained on the market at a voluntary sale of the property. It is the amount a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all the circumstances involving the value and use of the property. You should consider every element that a buyer would consider before making a purchase. You should take into consideration the location, surrounding area, quality and general condition of the premises, the improvements thereon and everything that adds to or detracts from the value of the property.

The property must be valued at its worth for the most valuable use which it may reasonably, lawfully and practically be used. This is called highest and best use.

The value is not to be increased or decreased because of the necessity of the Ohio Department of Transportation to take the property nor because these proceedings require the owner to part with his property, nor because of any benefits that may accrue to the owner because of the project.”

{¶36}The court further instructed the jury as to the factors of potential use, zoning, and holding property for further development. Then, the trial court instructed as follows:

“In addition to the compensation for the property taken, the owner is entitled to any decrease in the fair market value of the residue that is a direct result of the appropriation. If the residue is less valuable because of the severance, then you must consider such injury and

determine the amount of such decrease in the fair market value caused by the severance. This will be the amount awarded for damages to the residue.

Damage to the residue resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages such as noise, vibrations, circuitry, loss of travel, loss of traffic volume, dust and inconvenience suffered by the owner in common with the public are not to be considered.

Construction plans for the project have been placed in evidence and should be considered by the jury in assessing damages. These plans and specifications including the commitment by ODOT to construct the State Route 762 project will be contained in the judgment entry in this case and can be enforced by the property owner.”

{¶37} Appellee argues in response that Appellant’s proposed instruction number four is not a proper statement of Ohio law in cases where ODOT expressly reserves access. Appellee contends that the *Diver* decision is not applicable to the facts of this case because ODOT’s legal description clearly and unambiguously included the reservation required under Ohio law. Appellee concludes that the failure to give Appellant’s proposed instruction did not mislead the jury.

{¶38} We agree. The jury was charged with determining amounts for compensation and damages. In reviewing the charges given regarding compensation and damages, we find the trial court’s instructions were correct statements of the law.

{¶39}By contrast, Appellant’s proposed jury instruction number four would not have been appropriate to the evidence presented in the case. In this case, the legal description of the taking, set forth above at Paragraph 5, provides a reservation of “all existing rights of ingress and egress to and from any residual area.” As we previously stated, although Appellant has attempted to create a legal issue concerning the rights of ingress and egress, we find the appraisers’ testimony on this issue to be relevant as a factor in determining compensation and damages. The trial court did not abuse its discretion by failing to give the requested instruction because the instructions given were correct statements of the law and Appellant’s proposed instruction had the potential to mislead the jury. Appellant’s proposed instruction had the potential to mislead the jury into believing there was no reservation when, in fact, there was.

{¶40}For the foregoing reasons, we find no merit to Appellant’s argument. As such, we overrule the second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellants any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway 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.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.