[Cite as *Wray v. Wessell*, 2016-Ohio-8584.]

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

JERRY WRAY, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION :		
Plaintiff-Appellant,	:	Case No. 15CA3724 15CA3725
vs.	:	
LINDA JEAN CORIELL WESSELL, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Michael DeWine, Ohio Attorney General, William J. Cole, Assistant Attorney General, and Nicholas S. Bobb, Assistant Attorney General, for appellant

Michael Braunstein, Clinton P. Stahler, and Matthew L. Strayer, Columbus, Ohio, for appellees

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CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-19-16
ABELE, J.

{¶ 1} This is a consolidated appeal from Scioto County Common Pleas Court judgments that appropriated two parcels of property (409-WL and 412-WL) and fixed compensation.[1] A jury awarded Linda Jean Coriell Wessell and Lynn R. Wessell,[2] the property owners of both parcels and the defendants below and appellees herein (1) for one of the parcels $22,800 as compensation for the land taken; $14,000 as damages to the 26.971-acre right residue (and the

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1 On March 28, 2016, we sua sponte consolidated 15CA3724 and 15CA3725.

2 The proper spelling of appellees' last name appears to be "Wessel." We, however, use the spelling as it appears in the

sole basis for this appeal); and $14,000 to the 7.537-acre landlocked left residue, and (2) for the other parcel not the subject of this appeal $46,330 as compensation for the land taken; and $189,355 as damages to the residue.

{¶ 2} Jerry Wray, the director of the Ohio Department of Transportation (ODOT), plaintiff below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN ALLOWING THE LANDOWNERS' APPRAISER TO TESTIFY TO CONSEQUENTIAL DAMAGES."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY REGARDING CONSEQUENTIAL DAMAGES."

{¶ 3} This case arises out of an eminent domain proceeding to appropriate property to build a new highway in Scioto County. In order to build the highway, appellant filed separate petitions to partially appropriate two parcels of appellees' property and to fix compensation. Parcel 409-WL is 122.658 acres, and parcel 412-WL is 44 acres. Appellant appropriated 9.492 acres in fee simple from parcel 412-WL, leaving a 7.537-acre landlocked left residue, and a 26.971-acre right residue. The issue in this appeal concerns parcel 412-WL's 26.971-acre right residue.

{¶ 4} Before trial, appellant objected to parts of appellees' appraiser's report concerning parcel 412-WL. Appellant requested the trial court to prohibit appellees from introducing into evidence the appraiser's statements that the 26.971-acre right residue sustained proximity

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captions of trial court's judgment entries being appealed.

damages as a result of the appropriation and highway construction. Appellant particularly objected to the appraiser's statements that the appropriation and resulting highway construction diminished the market value of appellees' residual property by creating increased safety hazards, increased noise, diminished views, the loss of recreational uses, fear of recurrent catastrophic events, and "cuts and fills." In support of this objection, appellant asserted that the appraiser's opinion that the appropriation damaged appellees' right residual property is based upon elements of damage that are not compensable in an appropriation action, and hence, his opinion regarding these noncompensable attributes should be deemed to be inadmissible. In particular, appellant argued that the elements of damage the appraiser cites constitute consequential injuries that flow from the highway construction that are shared in common with the public, and thus, are noncompensable as a matter of law.

{¶ 5} Appellees asserted that their appraiser's report properly considers elements of value that an ordinarily prudent businessperson would consider and that none of the report is inadmissible. Appellees argued that when a jury ascertains the fair market value of residual property, it should consider every element a buyer would consider before making a purchase. Appellees claimed that diminished view, increased noise, increased safety hazards, and fear of recurrent catastrophic events are all elements a buyer would consider before purchasing property. Appellees thus contended that these elements are compensable elements that a jury may consider when ascertaining damages to the residue.

{¶ 6} Before the trial court allowed appellees' appraiser, Richard M. Vannatta, to testify, the court permitted appellant to question him outside of the jury's presence. Vannatta explained that in valuing the right residue, he considered the increased safety hazards created by

cars veering off the highway. He further stated that the highway created a fear of catastrophic events and increased noise. Vannatta also explained that the highway construction changed the elevations so as to diminish the view. Vannatta admitted, however, that other properties in the area suffered similar damages to varying degrees. After hearing Vannatta's statements and the parties' arguments relating to the admissibility of his opinion regarding the damages to appellees' residue, the court permitted Vannatta to testify.

{¶ 7} During his trial testimony, Vannatta explained that before the appropriation, appellees' property was most suitable for recreational purposes, such as hunting, snowmobiling, and driving all-terrain vehicles. He stated that pre-appropriation, the property was secluded and remote. Vannatta testified that before the highway construction, the view from the property consisted of a tree line, but after the highway construction the view consists of a highway. Vannatta stated that in evaluating the post-appropriation value of the right residue, he considered the loss of recreational use, increased noise, fear of safety hazards, and the diminished view. In his opinion, the highway construction re-contoured the land and "drastically affect[ed] the view" from appellees' right residue. Vannatta testified that because the pre-appropriation value of the right residue was $2,400 per acre and the post-appropriation value is $1,100 per acre, the right residue's per acre value decreased by $1,300.

{¶ 8} Appellant's appraiser, C. Eric Kirk, testified that before the appropriation, the highest and best use of parcel 412-WL was recreational. He valued parcel 412-WL before appropriation at $1,000 per acre. Kirk opined that the post-appropriation value of the landlocked left residue was $500 per acre. He further testified that parcel 412-WL's right residue did not sustain any damages.

{¶ 9} Before the trial court submitted the case to the jury, the court, over appellant's objection, gave the jury the following instruction:

> "Damages to the residue resulting from the exercise of eminent domain may be recovered only for damages not common to the public and considering whether or not the residue of the property has sustained any damages as a result of ODOT's appropriation, elements of inconvenience, danger, noise, diminished view, and interference with the enjoyment and use of the Wessell's property particularly affecting it's [sic] market value may be considered in determining the fair market value of the residue [un]less suffered by the owner in common with the public."

{¶ 10} On October 28, 2015, the jury returned a verdict, along with interrogatories. The interrogatories asked the jury to answer whether they assigned damages to the right residue for "increased safety hazards," "fear of recurrent catastrophic events," "cuts and fills," "increased noise," and "diminished view." The jury answered that it did not assign damages for "increased safety hazards," "cuts and fills," or "fear of recurrent catastrophic events," but that it did assign damages "for increased noise" and for "diminished view." The jury awarded (1) $22,800 as compensation for the land appropriated; (2) $14,000 for the landlocked left residue; and (3) $14,000 for damages to the right residue. This appeal followed.

I

{¶ 11} In its first assignment of error, appellant asserts that the trial court erred by allowing appellees to present Vannatta's testimony that the appropriation damaged appellees' right residual property by causing increased noise, diminished views, increased safety hazards, fear of recurrent catastrophic events, and "cuts and fills."[3] Appellant claims that these elements

[3] The phrase "cuts and fills" is not fully defined in the record, but it appears to mean the cutting and filling of the land that appellant appropriated in order to construct the highway. Vannatta's report indicates that the appropriation caused the right residue to

of damage constitute "consequential damages" that are shared in common with the public and, therefore, are not compensable elements of damage to the residue. Appellant contends that because appellees' consequential damages are noncompensable, the trial court erred as a matter of law by permitting the jury to hear Vannatta's testimony pertaining to these damages.

{¶ 12} Appellees, on the other hand, assert that the trial court did not abuse its discretion by allowing Vannatta to testify that the appropriation damaged appellees' property by causing increased noise, diminished views, increased safety hazards, fear of recurrent catastrophic events, and cuts and fills. Appellees argue that when the jury assesses damages to the residue, the jury must consider "every element a buyer would consider before making a purchase." Appellees contend that increased danger, increased noise, diminished views, and loss of enjoyment are among the elements that a buyer would consider before making a purchase. Appellees recognize, however, that for these types of damages to be compensable, they must be particular to the residual property and not simply suffered in common with the public. Appellees thus argue that whether certain elements of damage are suffered in common with the public is a question for the jury to decide, and not a question of law for the court to decide as a prerequisite to admissibility. Appellees thus posit that a trial court has discretion to decide whether to admit evidence regarding damages to residual property.

A

STANDARD OF REVIEW

{¶ 13} The first disputed issue that we must resolve concerns the applicable standard of

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suffer "diminished views and the loss of many desirable recreational uses" as a result of "the substantial amount of cuts and fills causing modifications to the natural topographical contours."

review. We agree with appellees that a discretionary standard of review ordinarily applies to trial court decisions concerning the admissibility of evidence. State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶19 ("It is well established that a trial court's decision to admit evidence is an evidentiary determination within the broad discretion of the trial court and subject to review on an abuse-of-discretion standard."). We observe, as well, that in an appropriation proceeding, "the admission and exclusion of evidence as to the value of the land and other related subjects rests to large extent in the discretion of the trial court, and, where it is apparent that such court did not abuse its discretion in these respects and that no prejudicial error has intervened, a reviewing court will not interfere." Ohio Turnpike Comm'n v. Ellis, 164 Ohio St. 377, 131 N.E.2d 397, paragraph two of the syllabus (1955). When, however, an appellant alleges that a trial court's evidentiary ruling was "'based on an erroneous standard or a misconstruction of the law,'" an appellate court reviews the trial court's evidentiary ruling using a de novo standard of review. State v. Morris, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶16, quoting Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2nd Dist.1992); accord Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 909 N.E.2d 1237, 2009–Ohio–2496, ¶13 (stating that "[w]hen a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate"); Wagner v. Roche Laboratories, 85 Ohio St.3d 457, 460, 709 N.E.2d 162 (1999) (explaining that when "trial court decision being challenged did not involve the exercise of discretion, but was based on a question of law, no deference is afforded"); Rohde v. Farmer, 23 Ohio St.2d 82, 89, 262 N.E.2d 685 (1970) ("where a specific action, ruling or order of the court is required as a matter of law, involving no discretion, the test of 'abuse of discretion'

should have no application"); Shaffer v. OhioHealth Corp., 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, 2004 WL 35725, *2, ¶6 ("however, where the trial court has misstated the law or applied the incorrect law, giving rise to a purely legal question, our review is de novo."); Painter and Pollis, Ohio Appellate Practice, Appendix G (2015) (stating that although trial court decisions involving the admission of evidence are generally reviewed as a discretionary matter, but they are "subject to de novo review if a clear legal rule obtains").

{¶ 14} In the case sub judice, appellant asserts that the trial court incorrectly interpreted the law when it concluded that Vannatta's testimony was admissible. Appellant alleges that because appellees' damages are noncompensable consequential damages that are shared in common with the public, evidence pertaining to those damages is inadmissible as a matter of law. Thus, appellant argues that by admitting the evidence, the court wrongly allowed the jury to consider and determine whether appellees' injuries were suffered in common with the public. Appellant asserts that whether certain elements of injury to residual property are suffered in common with the public is not a jury question, but rather is a question of law that the court must determine. Appellant thus claims that the court erred as a matter of law by admitting Vannatta's testimony.

{¶ 15} Appellees, on the other hand, assert the opposite. Appellees argue that (1) the trial court did not abuse its discretion by admitting Vannatta's testimony, and (2) whether injuries to residual property are suffered in common with the public is a factual question for the jury to decide.

{¶ 16} Consequently, in the case at bar the determination of whether the trial court's decision to admit Vannatta's testimony is subject to either discretionary or de novo review

requires us to examine whether the trial court erroneously applied the law by allowing the jury to consider whether appellees' claimed injuries to their residual property are suffered in common with the public and, hence, compensable. Whether the court correctly interpreted the law by determining that the jury decides the compensability of certain elements of damage to the residue is a question of law that we review de novo. E.g., Morris, supra; Schlotterer, supra.

{¶ 17} Once we determine whether the trial court correctly applied the law by permitting the jury to decide whether appellees' injuries were suffered in common with the public, we can then ascertain the appropriate standard of review that applies to the court's decision to admit Vannatta's testimony. If the court correctly applied the law by allowing the jury to decide whether appellees' injuries were suffered in common with the public, our review of its decision to admit Vannatta's testimony is discretionary. If, on the other hand, the court erred as a matter of law by allowing the jury to decide whether appellees' injuries were suffered in common with the public, our review of its decision to admit Vannatta's testimony is plenary. Resolving this issue necessitates a review of eminent domain principles.

B

NO TAKING WITHOUT JUST COMPENSATION

{¶ 18} Generally, the state has an inherent right to take private property for public use (i.e., the power of eminent domain). Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶39. However, the United States and Ohio Constitutions limit the state's eminent domain power by requiring a taking of private property to be for "public use" and by

requiring "just compensation."[4] Id. at ¶40; State ex rel. Shemo v. Mayfield Hts., 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002) ("The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation."). Thus, eminent domain cases involve a "binary constitutional inquiry" that examines whether the taking satisfies the "public use" and "just compensation" requirements. Horney at ¶42.

{¶ 19} The case at bar does not involve the "public use" requirement, but rather involves the "just compensation" requirement. "[Just] compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." United States v. Miller, 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1943); accord United States v. Reynolds, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970) (footnotes omitted) ("And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.").

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[4] The Fifth Amendment states that private property shall not "be taken for public use, without just compensation."

Section 19, Article I of the Ohio Constitution states:

> "Private property shall ever be held inviolate, but subservient to the public welfare. * * * [W]here private property shall be taken for public use, a compensation therefor shall first be made in money * * * and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Although the United States Constitution employs the phrase, "'just compensation[,]' instead of the single word 'compensation[,]' the intendment of the two is manifestly identical." State ex rel. Steubenville Ice Co. v. Merrell, 127 Ohio St. 453, 454, 189 N.E.

1

COMPENSATION FOR COMPLETE APPROPRIATION

{¶ 20} When the state completely appropriates a landowner's property, the test of "just compensation" is relatively simple---it is the "'fair market value' of the property" appropriated. Masheter v. Brewer, 40 Ohio St.2d 31, 33, 318 N.E.2d 849 (1974), quoting Masheter v. Hoffman, 34 Ohio St.2d 213, 221, 298 N.E.2d 142 (1973); accord Horne v. Dept. of Agriculture, 135 S.Ct. 2419, 2432, 192 L.Ed.2d 388 (2015), quoting United States v. 50 Acres of Land, 469 U.S. 24, 29, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984), quoting Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934) ("'The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking."'"); Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 10, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) ("'Just compensation,'" we have held, means in most cases the fair market value of the property on the date it is appropriated."); United States v. Reynolds, 397 U.S. 14, 16, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970) (footnotes omitted) (stating that "the owner is entitled to the fair market value of the property at the time of the taking"). The fair market value of property "is the price which would be agreed upon at a voluntary sale by an owner willing to sell to a purchaser willing to buy." In re Appropriation of Easements for Hwy. Purposes, 174 Ohio St. 441, 450, 190 N.E.2d 446 (1963); Kirby Forest, 467 U.S. at 10, quoting United States v. 564.54 Acres of Land, 411 U.S. 506, 511, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979), quoting United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943) (stating that under the fair market value "'standard, the owner is entitled to receive "what a willing buyer would pay in cash

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116, (1934).

to a willing seller" at the time of the taking'"). "'In determining the amount of compensation, or the market value of the property taken, each case must be considered in the light of its own facts, and every element that can fairly enter into the question of value, and which an ordinarily prudent business man would consider before forming judgment in making a purchase, should be considered.'" Sowers v. Schaeffer, 155 Ohio St. 454, 459, 99 N.E.2d 313 (1951), quoting 29 Corpus Juris Secundum, Eminent Domain, p. 971, Section 136. "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 might be suitable, including the most valuable uses to which it can reasonably and practically be adapted." Id. at paragraph three of the syllabus.

2

COMPENSATION FOR PARTIAL APPROPRIATION

{¶ 21} When the state partially appropriates a landowner's property and leaves a residue, the test of "just compensation" may become more complicated. In a partial appropriation proceeding, the owner is entitled to not only compensation for the fair market value of the land taken, but also for "damages, if any, to the residue." R.C. 163.14(B)[5]; e.g., Norwood v. Forest Converting Co., 16 Ohio App.3d 411, 415, 476 N.E.2d 695 (1st Dist. 1984) (explaining that owner whose property partially appropriated entitled to compensation for land taken and for

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5 R.C. 163.14 reads, in part:

(A) In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

(B) The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners.

"'damages' for injury to the property which remains after the taking, i.e., the residue"). Thus, in Ohio the constitutional concept of "just compensation" in a partial appropriation action includes not only compensation for the land taken, but also "damages, if any, to the residue." R.C. 163.14(B); e.g., Fleming v. Noble, 111 Ohio App. 289, 292, 171 N.E.2d 739 (9th Dist. 1959) (stating that "the constitutional requirement of just compensation means that compensation must be given for damages to the remainder [i.e., residue] as well as for the part taken"); accord Bauman v. Ross, 167 U.S. 548, 574, 17 S.Ct. 966, 976, 42 L.Ed. 270 (1897) (stating that when land partially appropriated, value of the part taken "is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account"); Grant v. Village of Hyde Park, 67 Ohio St. 166, 65 N.E. 891 (1902), paragraph one of the syllabus ("In a proceeding brought by a municipality to condemn land for a street, the inquiry necessarily embraces not only an ascertainment of compensation to the landowner for the land taken, but damages to the residue of the abutting land of such owner."); Cincinnati & S. Ry. Co. v. Longworth's Ex'rs, 30 Ohio St. 108, 111, 1876 WL 170, *2 (1876) (stating that determining compensation in appropriation proceeding "involve[s] an inquiry into the actual value of the land sought to be appropriated, irrespective of any benefits, and the diminished value of the remainder of the tract"); accord Symonds v. City of Cincinnati, 14 Ohio 147, 174–75, 45 Am.Dec. 529, 1846 WL 18, *17 (Ohio 1846) (stating that "cases may occur where the full value of the property will not be a just compensation. [The owner's] house may be taken down, and he and his family thrown out of employment, and, in addition to the value of his house, he would clearly be entitled

to consequential damages, or he would not receive full compensation").

{¶ 22} In general terms, "'"[c]ompensation" means the sum of money which will compensate the owner of the land actually taken or appropriated * * *. "Damages," in the strict sense in which the term is used in an appropriation proceeding, means an allowance made for any injury that may result to the remaining lands by reason of the taking.'" Norwood v. Forest. Converting Co., 16 Ohio App.3d at 415, quoting 38 Ohio Jurisprudence 3d, Eminent Domain, Section 103, 154–155 (1982); e.g., Cincinnati v. Gilbert, 1st Dist. Hamilton No. C-120626, 2013-Ohio-4145, 2013 WL 5432093, ¶8; Wray v. Goeglin, 4th Dist. Meigs No. 97CA9 (Dec. 2, 1998); Am. Louisiana Pipe Line Co. v. Kennerk, 103 Ohio App. 133, 137, 144 N.E.2d 660 (6th Dist.1957), quoting 19 Ohio Jurisprudence 2d, Section 68, 479 ("[c]ompensation is that amount which will compensate the owner for the estate actually taken or appropriated. Damages is an allowance made for any injury that may result to the residue.").

{¶ 23} In the case sub judice, appellant limits its appeal to the damages awarded for appellees' right residue. Our review, therefore, involves the second element of "just compensation" in a partial appropriation proceeding–damages to the residue.

C

DAMAGES TO THE RESIDUE

1

DIMINUTION IN VALUE

{¶ 24} The general measure of damages to the residue is its diminution in value. In other words, "'[t]he difference in the value of the owner's property with the appropriation and that without it is the rule of compensation.'" Columbus, H.V. & T. Ry. Co. v. Gardner, 45 Ohio

St. 309, 324, 13 N.E. 69 (1887),, quoting Powers v. Railway, 33 Ohio St. 435 (1878). Thus, "the formula for calculating residual damages" is "'the difference between the fair market values of the remaining property before, and after, the taking.'" Cuyahoga Cty. Bd. of Commrs. v. McNamara, 8th Dist. Cuyahoga No. 95833, 2011-Ohio-3066, 2011 WL 2519514, *3, ¶19, quoting Englewood v. Wagoner, 41 Ohio App.3d 324, 326, 535 N.E.2d 736 (2nd Dist. 1987) (stating that); Lucas Cty. Commrs. v. Mockensturm, 119 Ohio App.3d 223, 226–27, 695 N.E.2d 15, 17 (6th Dist. 1997) ("Damages to the remainder (known as the residue) are calculated by deducting the fair market value of the property after the taking from the fair market value of the property prior to the taking"); Norwood, 16 Ohio App.3d at 415 ("Damage to the residue is measured by the difference between the pre-appropriation fair market value of [the] property and * * * the post-appropriation fair market value of [the] remaining property"); e.g., Proctor v. NJR Properties, L.L.C., 175 Ohio App.3d 378, 2008–Ohio–745, 887 N.E.2d 376 (12th Dist.), ¶15; Proctor v. Hall, 4th Dist. Lawrence No. 05CA3, 2006-Ohio-2228, ¶35; Proctor v. Thieken, 4th Dist. Lawrence No. 03CA33, 2004-Ohio-7281, ¶24.

{¶ 25} When ascertaining the post-appropriation fair market value of residual property, "reference must be had to the immediate consequences," Lake Shore & M.S.R. Co. v. Cincinnati, S. & C.R. Co., 30 Ohio St. 604, 623–24, 1876 WL 216, *12–13 (1876), and the property owner may show "any facts calculated to * * * increase the damage to the residue of the tract." Cincinnati & S. Ry. Co. v. Longworth's Ex'rs, 30 Ohio St. 108, 111–12, 1876 WL 170, *2 (1876); e.g., Wray v. Frank, 44 N.E.3d 998, 2015-Ohio-4248 (4th Dist.), ¶18 (citations omitted) (stating that property owner in partial appropriation case may recover for "any damage to the residue resulting from the appropriation"); Hilliard v. First Indus., L.P., 165 Ohio App.3d 335,

343, 2005-Ohio-6469, 846 N.E.2d 559, (10th Dist.), ¶10 ("In determining both pre-and postappropriation values, every element should be considered that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before forming judgment in making the purchase."); Proctor v. French Hardware, Inc., 12th Dist. Fayette No. CA2002-06-010, 2003-Ohio-4244, 2003 WL 21904848, ¶8, quoting Knepper & Frye, Ohio Eminent Domain Practice, Section 9.06, 270-271 (1977) (explaining that "any element of damage that makes 'the residue less valuable in its separate state after its taking than it was as a part of the whole before the taking' may properly be considered."); Hurst v. Starr, 79 Ohio App.3d 757, 763, 607 N.E.2d 1155 (10th Dist. 1992) (internal quotations omitted) (stating that when determining market value of residual property, "every element" should be considered); Norwood, 16 Ohio App.3d at 415, quoting In re Appropriation for Hwy. Purposes, 13 Ohio App.2d 125, 138, 234 N.E.2d 514 (3rd Dist. 1968) ("In determining both pre- and post-appropriation fair market value, 'every element that can fairly enter into the question of value, and which an ordinarily prudent business man would consider before forming judgment in making a purchase, should be considered.'"). Thus, "just compensation in cases involving [a] partial taking is generally the value of the part taken plus all the damage which the residue of the property suffers including a diminution in the value of the remainder by reason of the lawful use to which the portion being acquired will be put." In re Appropriation for Hwy. Purposes, 108 Ohio App. 1, 5, 160 N.E.2d 383 (4th Dist. 1959).

{¶ 26} Despite the apparent breadth of these rules,[6] limitations exist. First,

[6] We observe that most of the early Ohio Supreme Court cases that discuss compensation for injury or loss to residual property concerned property that abutted railroads and, in some of these situations when property had not been appropriated, a statute authorized an

"compensation is to be confined to such loss and injuries in the value of the owner's property as are appreciable at the time as the necessary or natural consequences, fairly and reasonably expected to follow, from the appropriation * * *, including * * * the incidental injury to the value of the residue of the land * * *." Ball, 5 Ohio St. at 576. Second, the loss or injury to residual property must not be "common to the community at large." Gardner, 45 Ohio St. at 319; accord Richley v. Jones, 38 Ohio St.3d 236, 310 N.E.2d 236 (1974) (disallowing compensation for damage to residue when injury shared in common with the public). Thus, when estimating damages, the jury is not "permitted to take into account the consequences of the [completed project] which were common to the community at large[.]" Id. However, "no sound reason exists for excluding from consideration such elements of inconvenience, annoyance, danger, and loss as result to the property, its use and enjoyment, from the 'smoke, noises, and sparks of fire occasioned by [the completed project],' if it be shown that these caused special injury and depreciation to the property." Id.; accord 38 Ohio Jur. 3d Eminent Domain, Section 166 (footnotes omitted) (stating that "compensation [for residual damages] cannot be recovered where the damage suffered is also suffered by the public in like manner and like degree or where the damage suffered is the same as that suffered by the public even though it is greater in degree"). Accordingly, while the general rule for valuing residual property is "the market value of what remains, or what will remain, after the improvement has been completed," "in some situations * * * [the market value] must be adjusted to exclude the impact of noncompensable attributes of value." In re Appropriation for Hwy. Purposes of Lands of Arnold, 23 Ohio App.2d

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abutting property owner to maintain an action against the railroad for damage to the owner's property. E.g., Gardner. Thus, while we recognize the factual differences among the early cases, they do seem to have formed the underpinnings of the basic principles applicable to

56, 71, 261 N.E.2d 142 (3rd Dist. 1970).

2

NONCOMPENSABLE ATTRIBUTES OF VALUE

{¶ 27} Courts have struggled to define which noncompensable attributes of value to exclude when ascertaining the market value of residual property. In particular, courts understandably have exhibited difficulty determining whether "consequential damages" are compensable attributes of value that may be considered or whether they are noncompensable attributes of value that must be excluded.

{¶ 28} Generally, "[c]onsequential damages" means "the lessening of the value of property adjoining land which has been condemned, because of the use to which the land condemned has been subjected." Lucas v. Carney, 167 Ohio St. 416, 421, 5 O.O.2d 63, 149 N.E.2d 238 (1958). In a partial appropriation case, they are "the incidental injury to the value of the residue of the land." Ball, 5 Ohio St. at 576.

{¶ 29} We initially note that the general rule regarding consequential damages in the absence of a taking is clear: a property owner cannot recover consequential damages. Smith v. Erie Rd. Co., 134 Ohio St. 135, 16 N.E.2d 310 (1938). In Smith at paragraph two of the syllabus, the court held: "When there is no taking altogether or pro tanto, damages consequential to the taking of other property in the neighborhood, or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is damnum absque injuria."[7] In its opinion, the Smith court explained:

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the case at bar.

[7] Black's Law Dictionary defines the phrase "damnum absque injuria" as follows: "Loss, hurt, or harm without injury in the legal

> "In the decisions of this court, reference has been made at times to consequential damages but in no instance has the right to them been recognized except when they have resulted from a taking. It is true damages to residue have been allowed where only part of the owner's property is appropriated (Grant v. Village of Hyde Park, 67 Ohio St. 166, 65 N.E. 891); but in such instances damages are allowed as a part of the compensation and not as consequential damages."

Id. at 144–45. Thus, in the absence of a taking, a property owner cannot receive compensation for diminished value to property "when the property owner suffers an injury to his property which differs in degree but not in kind from that sustained by the general public." Id. at 145.

{¶ 30} Smith remained in relative obscurity[8] until McKee v. Akron, 176 Ohio St. 282, 199 N.E.2d 592 (1964), overruled on other grounds in Haverlack v. Portage Homes, Inc., 2 Ohio St.3d 26, 442 N.E.2d 749 (1982). McKee interpreted Smith to mean that a property owner could receive compensation for "consequential damages" in a partial appropriation action. The court explained:

> "In cases where there has been a taking of his property, plaintiff is entitled to be compensated for consequential damage to his remaining property as well as for the market value of the property appropriated. However, if there has been no

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sense; that is, without such breach of duty as is redressible by a legal action. A loss or injury which does not give rise to an action for damages against the person causing it." Black's Law Dictionary (6th Ed. 1990), 393.

[8] Between 1938 and 1964, Smith appears to have been cited two times. See Lucas, supra, 167 Ohio St. at 421, 423; State ex rel. Ohio Turnpike Commission v. Allen, 158 Ohio St. 168, 175, 107 N.E.2d 345 (1952). Neither case examined the holding in Smith.

> taking of property, damages consequential to the taking of other property in the neighborhood are not recoverable. The loss suffered by the owner in such a situation is damnum absque injuria."

Id. at 285-286, citing Smith; accord State ex rel. Fejes v. Akron, 5 Ohio St.2d 47, 51, 213 N.E.2d 353 (1966), quoting Loomis v. Augusta, 151 Kan. 343, 346, 99 P.2d 988 ("'Where there is no actual appropriation of any property the owner is not entitled to claim damages for merely incidental, indirect and consequential injuries which his property may sustain by reason of a public work or construction, where the same is justified by a lawful exercise of the powers of government.'").

{¶ 31} Columbus v. Farm Bureau Cooperative, 27 Ohio App.2d 197, 198, 273 N.E.2d 888 (10th Dist. 1971), likewise relied upon Smith to conclude "that consequential damages which would be damnum absque injuria in the absence of a taking, may be compensable damages to the residue in the event of a taking of a portion of an owner's property." Id. at 202. In Farm Bureau, the city of Columbus appropriated the landowner's property in order to build a new and larger storm sewer culvert. At trial, the landowner sought to introduce evidence that the new culvert will increase water flow through the landowner's existing, privately-owned drainage ditch and culvert on its residual property. The trial court ruled that this evidence was inadmissible because the landowner's evidence pertained to consequential damages, which are not compensable. On appeal, the landowner asserted that the trial court erred by preventing it from introducing testimony that construction of the new culvert will damage the landowner's residual property. The landowner argued that the new culvert "will so accelerate the flow as to cause flooding of its property" and "that in order to restore the value of the residue of its property,

certain improvements will have to be made by it." Id. at 199.

{¶ 32} On appeal, the court observed that "[t]he law of Ohio appears clear that in the absence of a taking of any of defendant's property by plaintiff, the plaintiff could have increased the volume and accelerated the flow of the water in the ditch involved without incurring any liability to the defendant, the consequential damages in such a situation being damnum absque injuria." Id., citing Munn v. Horvitz Co., 175 Ohio St. 521, 196 N.E.2d 764 (1964). The court thus framed the issue as "whether damages consequential to the construction of an improvement, which would be damnum absque injuria, in the absence of the taking of any of a property owner's property, become compensable damages to the residue when a portion of the property of such property owner is taken for the improvement." Id. at 200. The court further explained the problem as follows:

> "The damages to the residue which defendant contends it is entitled to, being damnum absque injuria in the absence of a taking, are not compensable damages to the residue in connection with the taking involved unless damages which are damnum absque injuria in the absence of a taking, become compensable damages in the event of a taking of a portion of an owner's property."

Id.

{¶ 33} To reach its decision, the court interpreted Smith v. Erie Rd. Co. to mean "that consequential damages for which no recovery could be had in the absence of a taking are a part of compensable damages to the residue in the event of an actual partial taking." Id. at 201. The court thus determined that the trial court improperly excluded the landowner's evidence regarding damage to the residue.[9] Id. at 203.

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[9] We point out that in Farm Bureau, the potential flooding of the owner's property did not appear to be an element of damage to

{¶ 34} A few years after Farm Bureau, the Ohio Supreme Court held that in a partial appropriation case, a property owner cannot receive compensation for a diminution in the value of residual property as a result of circuity of travel, when the resulting circuity of travel is "an inconvenience shared in common with the general public and is necessary in the public interest to make travel safer and more efficient." Richley v. Jones, 38 Ohio St.3d 236, 310 N.E.2d 236 (1974), paragraph one of the syllabus. In Richley, ODOT appropriated the landowners' property in order to widen a two-lane road into a four-lane highway with a median divider. The landowners asserted that the median divider prevented traffic traveling in an easterly direction from turning directly onto their property and, thus, reduced the fair market value of their residual property. ODOT filed a motion in limine to prevent the landowners from presenting any evidence or argument that the median divider reduced the fair market value of their property. The trial court overruled ODOT's motion and permitted the landowners to present evidence and argument that the median divider would damage their residual property. A jury subsequently awarded the landowners $1,000 for damages to the residue. On appeal to the Ohio Supreme Court, ODOT asserted that the trial court erred by overruling its motion in limine. The Richley court first explained the two arguments that the landowners presented in support of the damage award. First, the landowners asserted that the general rule set forth in New Way Family Laundry v. Toledo, 171 Ohio St. 242, 168 N.E.2d 885 (1960), that circuity of travel is not a compensable

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the residue that was shared in common with the public. Moreover, depending upon the underlying facts, the flooding of the owner's property may have been construed as a taking in its own right, thus entitling the owner to compensation. State ex rel. Doner v. Zody, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶61, quoting United States v. Lynah, 188 U.S. 445, 470, 23 S.Ct. 349, 47 L.Ed. 539 (1903), overruled in part on other grounds, United States v. Chicago, Milwaukee, St. Paul & Pacific RR. Co., 312 U.S. 592, 598, 61 S.Ct. 772, 85 L.Ed. 1064 (1941) ("'[W]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to

taking,[10] did not apply in a partial appropriation case. The landowners asserted that when property is partially appropriated, circuity of travel is a compensable element of damage to the residue. Second, the landowners contended that "'"every element entering into the question of value" must be taken into consideration in determining the amount of compensation.'" Richley, 38 Ohio St.2d at 66, quoting Sowers v. Schaeffer, 155 Ohio St. 454, 459, 99 N.E.2d 313, quoting 29 Corpus Juris Secundum, Eminent Domain, p. 971, Section 136. The landowners thus asserted that a "change in flow should be taken into consideration in determining proper compensation in an appropriation proceeding." Id.

{¶ 35} In reviewing the appeal, the court noted:

> "The ordinary rule is that any change in traffic flow occasioned by placing medians in the road results from the exercise of the police power of the state. Any damages that might result from the doing of a lawful act are noncompensable-damnum absque injuria. If we allow this damage to be introduced in evidence, because there is a concurrent taking of land we are, in effect, allowing compensation for it.

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substantially destroy their value there is a taking within the scope of the 5th Amendment.'").

10 In New Way Family Laundry, the court held:

> "The construction of a divider strip in the middle of a highway resulting in the elimination of left turns from and into the abutting property and thereby permitting only right turns and requiring circuity of travel to leave or reach the opposite half of the highway does not constitute an actionable interference with the abutting property owner's right of ingress and egress."

Richley, 38 Ohio St.2d at 65, quoting New Way Family Laundry, paragraph three of the syllabus.

Id. The court ultimately determined that "the rationale behind New Way Family Laundry, supra, applied. The nature of the claimed losses is usually referred to as consequential damages." Id. at 68. The court explained:

> "Consequential damages are generally noncompensable on the theory that: '* * * Whatever injury is suffered thereby is an injury suffered in common by the entire community; and even though one property owner may suffer in a greater degree than another, nevertheless the injury is not different in kind, and is therefore damnum absque injuria.'"

Id. at 68-69, quoting Robert Mitchell Furniture Co. v. C.C.C. & St. Louis R.C. Co., 7 N.P. 639 (1900), affirmed 65 Ohio St. 571, 63 N.E. 1133 (citations omitted).

{¶ 36} The court next recognized the "problem" that "arises when there is a partial appropriation and the owner is allowed to present evidence of the impaired condition of the land because of the appropriation." Id. at 69. The court recognized that "some lower courts in the state have allowed evidence to be heard [in partial appropriation cases] that would ordinarily pertain only to consequential damages, on the theory that such damages have become severance damages." Id., citing In re Appropriation for Hwy. Purposes, 6 Ohio App.2d 6, 215 N.E.2d 612 (3rd Dist. 1966). The court continued:

> "The anomaly is well presented in Columbus v. Farm Bureau Cooperative Assn. (1971), 27 Ohio App.2d 197, 200, 273 N.E.2d 888, 890: 'This, the issue before this court is whether damages consequential to the construction of an improvement, which would be damnum absque injuria, in the absence of the taking of any of a property owner's property, become compensable damages to the residue where a portion of the property of such property owner is taken for the improvement.'
>
> The problem then revolves around our theory of just compensation. We

> usually define 'market value' as the amount of money that a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell, taking into consideration the reasonable uses to which the land may be put. But the landowner cannot profit because the state is exercising its power of eminent domain. The landowner is entitled to no special damages because he is compelled to part with his title."

Id.

{¶ 37} The court concluded that the jury's assessment of damages to the landowners' residue as a result of circuity of travel had "the effect of giving the landowner special damages," because

> "[a] neighbor who might have similar problems with traffic flow because of the construction of the median strip, but who has had no land taken by the state in connection with the project, will receive no recompense for whatever is done to his land. He has suffered an 'inconvenience shared in common with the general public,' which is damnum absque injuria."

Id., quoting New Way Family Laundry, 171 Ohio St. at 244. The court determined that the landowners suffered the "same 'inconvenience,' differing possibly in degree but not in kind. The fact that this loss is coincident with an appropriation of land in no way changes the noncompensable character of the damage." Id. at 70. The court thus reversed the appellate court's decision upholding the trial court's decision denying ODOT's motion in limine.

{¶ 38} In essence, Richley endorses the view expressed in the earlier railroad cases: In a partial appropriation case, consequential damage to residual property is not compensable when

the damage is "common to the community at large." Gardner, 45 Ohio St. at 319. Under the Richley rationale, neither an adjoining landowner (adjoining to the project for which the neighboring or nearby property was appropriated) whose property was not appropriated nor an adjoining landowner whose property was appropriated is entitled to compensation as a result of any diminution in value resulting from a consequential loss or injury shared in common with the public. For example, an adjoining property owner is not entitled to compensation for diminished view resulting from a project if none of the owner's property was appropriated for the project. State ex rel. Schiederer v. Preston, 170 Ohio St. 542, 11 O.O.2d 369, 166 N.E.2d 748, 84 A.L.R.2d 342 (1960), paragraph two of the syllabus ("There is no taking of property merely because the raising of the grade of a part of a street in front of land on that street, in making an improvement for street or highway purposes only, substantially interferes with the view that the owner of that land had over that street and with the relative harmony of the street with his land."). Applying the Richley rationale, an adjoining landowner whose property was appropriated also is not entitled to damages as a result of a diminished view caused by the project for which the owner's land was appropriated. Richley states, in essence, that it would be unjust to disallow compensation for an adjoining landowner whose property was not taken but to allow compensation for this same or similar damage to an adjoining landowner whose property was taken. In other words, allowing compensation to the appropriated property owner but not to the non-appropriated property owner for similar injuries or losses would have the effect of giving the appropriated property owner "special damages." The project results in a diminished view to both properties and affects market value to a similar degree. Thus, Richley appears to refute the proposition that an adjoining landowner whose property was taken is entitled to compensation for

damages to the residue, even if an adjoining landowner whose property was not taken is not. The court explained that to permit damages in this situation is to allow the appropriated property owner to collect special damages and to profit from the state's exercise of its eminent domain power. In other words, the damages awarded in this situation would not constitute "just" compensation. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 478, 93 S.Ct. 791, 797, 35 L.Ed.2d 1 (1973), quoting United States v. Fuller, 409 U.S. 488, 490, 90 S.Ct. 801, 35 L.Ed.2d 16 (1973), citing United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950) (stating that "'[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law'"); United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950) ("The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity[.]'").

{¶ 39} A case that pre-dates Richley illustrates the foregoing principles and resulting paradoxes. In re Appropriation for Hwy. Purposes of Lands of Williams, 15 Ohio App.2d 139, 239 N.E.2d 412 (3rd Dist. 1968). In Williams, the jury assessed $5,025 for damage to the residue of property that had been appropriated in order to improve a highway. On appeal, the state asserted that the trial court wrongly admitted evidence that the residual property suffered damage due to a change in traffic flow. The appellate court initially noted:

> "'The owner of land abutting on a highway has no property right in the continuation or maintenance of the flow of traffic past his property, and the diversion of traffic as a result of an improvement in the highway or the construction of an alternate highway is not an impairment of a property right of

such owner for which damages may be awarded.'"

Id. at 142, quoting State ex rel. Merritt v. Linzell, Dir. Of Highways, 163 Ohio St. 97, 126 N.E.2d 53, paragraph three of the syllabus. The court thus noted that the diminution in the value of land due to a decreased traffic flow resulting from a public improvement project is noncompensable, in the absence of a taking. Id. at 143. The court recognized, however, that a different rule might apply when a taking for a public improvement project occurs that decreases the value of the residual property due to a decrease in traffic flow. Id. The court explained the issue as follows:

> "* * * * The formula for determining the damages is essentially the difference in the fair market value of the property before the taking diminished by the fair market value of the portion taken less the fair market value after the taking. In In re Appropriation for Hwy. Purposes of Land of Winkelman, 13 Ohio App.2d 125, 234 N.E.2d 514, this court held that in the determination of fair market value '* * * every element that can fairly enter into the question of value, and which an ordinarily prudent business man would consider before forming judgment in making a purchase, should be considered, * * *.' In that case market value before the taking was under consideration, but the same elements enter into any determination of value, be it before, or, as here, after, the taking.
>
> Would not then an ordinarily prudent business man as a willing buyer, contemplating [the] best use of the premises * * * give consideration to the decreased traffic flow resulting from the provision by the state of an alternate limited-access route for transient traffic? It must be answered that he would. And would not this element in his judgment lower the value of the premises after the taking by a substantial amount? It again must be answered that it would.
>
> It would, therefore, appear at first glance that evidence pertaining to loss of traffic flow would be admissible on the question of damages to the residue.
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> However, we are faced with a paradox. Other owners along old U.S. Route No. 23, whose land was not in any way taken, still have no right to damages for the loss of traffic flow, but this landowner, because a comparatively small part of his land was taken, would apparently become eligible thereby to recover the same damage, differing only in degree from his neighbors but not in kind. This paradox is well stated in Johnson's Petition, 344 Pa. 5, at page 11, 23 A.2d 880, at page 883:
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> 'To adopt the contention of the landowner as a general legal principle would lead to absurd results. Assume, for the sake of argument, that the state had

taken only a few square feet from the northern tip of this land. Then under appellee's theory he would have been entitled to have diversion of traffic considered in determining the market value after the taking. This illustration shows that the claim made here is not for damages due to the taking * * * but for an ensuing result that was too remote to have relevance in fixing damages. * * * The results were not peculiar to this land owner but were shared to a greater or less degree by all properties located on the old road. It followed as a result of the highway department's determining that an additional route should be furnished for the accommodation of the public and the result is Damnum absque injuria.'

There is a further statement of the problem in the dissenting opinion in Pike County v. Whittington, 263 Ala. 47, 81 So.2d 288:

'The following illustrates the result reached by the majority. A and B could be adjacent landowners, each fronting 200 feet on a state highway. A's lot is 200 yards deep. B's lot is only 198 yards deep. Each has a filling station and grocery store facing the highway and do a comparable business. The highway is relocated so as to pass 199 yards behind their places of business. It thus takes one yard of A's property but none of B's. A would be entitled to compensation because the flow of traffic on the old highway was taken away from his while his neighbor B would, under practically all the decisions in all the states, be entitled to nothing. * * * there is something about such a result which to me seems unfair and unjust. * * *'"

Id. at 144-145.

The court further observed:

"'There are many injuries resulting from the opening of streets and roads for which landowners cannot receive compensation.' Should compensation be allowed for any such injuries in determining the market value of what remains of a parcel of land, a part of which has been taken for a road, it follows that the result will not be correct in law.'"

Id. at 145, quoting Elliott, Roads and Bridges, vol. 1, page 359.

After reviewing the foregoing authorities, the court determined:

"[T]he element of changed traffic flow should not be admitted into evidence and should not be considered either by experts in formulating their opinion as to the value of the residue after the taking or by the jury in determining the value after the taking. To rule otherwise would invoke the obviously unjust and unfair results whereby two landowners in the same situation would be treated differently simply because of the taking by appropriation of a small part of the one landowner's property."

Id. at 146.

The court thus concluded:

> "[T]he diminution in the flow of traffic past a business property by action of the state in relocating a highway is not the taking of a property right and, hence, where some of the land of that business property is taken, it is not a proper element of damage to be considered in arriving at the fair market value of the residue after the taking. For this reason the admission of testimony as to traffic flow on Marion Street after the taking and its possible impact on the landowner's business in the present case was error, and the valuation testimony of the expert witness who included this in arriving at fair market value after the taking was, to this extent, invalid and prejudicial and should have been excluded."

Id. at 147.

{¶ 40} In the case at bar, appellees do not necessarily dispute the foregoing principles of law. Appellees state "that the key factor in determining the compensability of certain damages is whether those damages are found to be specific to the property or rather suffered in common with the public." Appellees assert, however, that whether consequential damages are shared in common with the public is a matter for the jury to resolve, not a matter for the court to decide before it allows the jury to hear evidence pertaining to consequential damages. Consequently, we must determine whether the compensability of consequential damages (i.e., whether they are shared in common with the public) is a question of law or of fact.

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QUESTION OF LAW OR FACT

{¶ 41} To determine whether the court or the jury must decide whether injuries to residual property are suffered in common with the public, and hence noncompensable, we must ascertain whether this presents an issue of law or of fact. Resolving this issue also will inform

us as to the appropriate standard to review the trial court's decision to admit Vannatta's testimony.

{¶ 42} Determining "whether a ruling involves a legal question or a factual question is sometimes difficult." Painter and Pollis, supra, Appendix G. A "question of law" is "'[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" Henley v. Youngstown Bd. Of Zoning Appeals, 90 Ohio St.3d 142, 148, 735 N.E.2d 433 (2000), quoting Black's Law Dictionary (7th Ed.1999) 1260. Black's Law Dictionary defines a "question of fact" as "[a]n issue involving the resolution of a factual dispute and hence within the province of the jury in contrast to a question of law." Id. at 1246.

{¶ 43} Generally, appellate courts have "complete and independent power of review as to all questions of law." Hudson v. Petrosurance, Inc., 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶29, citing MCI Telecommunications Corp. v. Pub. Util. Comm., 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988); Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 563, 629 N.E.2d 423 (1994). Thus, "[o]n matters of law-choice, interpretation, or application--" appellate courts afford no deference to the trial court's decision, but instead examine "the correctness with which the trial court acted." Raceway Video & Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals, 118 Ohio App.3d 264, 269, 692 N.E.2d 656, 659, 1997 WL 805106 (8th Dist.1997). Unlike questions of law, however, appellate courts afford "'great deference'" to questions of fact. Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶38, quoting Nationwide Mut. Fire Ins. Co., 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶ 44} In an appropriation case, the jury acts only as an "assessor of the value of [a]

taking in an appropriation case."[11] Masheter v. Boehm, 37 Ohio St.2d 68, 77, 307 N.E.2d 533 (1974). Thus, a trial court may need to address threshold questions concerning the compensability of an alleged taking before it submits such evidence to the jury. Id. (stating that determining the extent of a taking is a threshold question of law for the court to decide). Otherwise, "confusion and unfairness * * * may easily result from needlessly inundating the jury with immaterial testimony." Id. at 78. In Boehm, the court determined that the trial court, before allowing testimony regarding "the value of numerous items of personal property," should have first determined whether the items of personal property were "fixtures," and were thus part of the "take." Id. at 77-78. The court explained that if the trial court had applied "the proper test," it "would likely have * * * found [the items] to be uncompensable personal property." Id. The court ultimately determined that "the scope of the appropriation" is a matter for the trial court to determine. Id. at 77.

{¶ 45} In Richley, the court did not explicitly state whether the court or the jury determines whether loss or injury is shared in common with the public, but the language the court used suggests that the court independently reviewed the trial court's decision regarding ODOT's motion in limine and treated the compensability of consequential damages (i.e., whether loss or injury is shared in common with the public) as a question of law. See our discussion of Richley, supra.

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[11] Black's Law Dictionary, supra, defines an "assessor," in part, as follows: "An officer chosen or appointed to appraise, value, or assess property." Id. at 117. It defines "assess" as: "To ascertain; fix the value of. To fix the amount of the damages or the value of the thing to be ascertained. To impose a pecuniary payment upon persons or property. * * * ." Id. at 116.

{¶ 46} In In re Appropriation of Easement for Hwy. Purposes (Preston v. Stover Leslie Flying Service, Inc.), 174 Ohio St. 441, 449, 190 N.E.2d 446 (1963), the Ohio Supreme Court expressly stated that the admissibility of certain evidence in an appropriation proceeding is a question of law. In Stover Leslie, the court considered whether the trial court erred by overruling a party's motion to strike testimony that valued certain elements of the property separately, instead of as the elements pertained to the market value of the land. Id. at 445. The court stated that the "[d]etermination of the question presented by the motion to strike the testimony is a question of law to be decided by the court." Id. at 449. The court thus concluded that the trial court "erred in overruling the appellant's motion to strike the testimony of the witness or in failing to instruct the jury incident to the overruling of the motion that it was not permissible for the witness to separately evaluate the separate components appurtenant to the land and add the total thereof to the value of the bare land as a basis for his opinion of the total value of the property taken." Id.; see Grant, 67 Ohio St. 166 (seeming to review trial court's evidentiary decision in appropriation action as a matter of law).

{¶ 47} In Norwood v. Forest Converting Co., supra, the court did not state whether the compensability of residual damages is a question of law or one of fact. The court appears, however, to have independently reviewed whether the trial court properly admitted evidence concerning an element of damage to the residue, thus treating the matter as a question of law. The court stated: "Improper inclusion of loss of on-street public parking in the calculation of the amount due means that the single determinative issue has not been presented free from error. As a result, the trial court's improper admission of the evidence taints the general verdict and constitutes prejudicial error." Later, when considering another element of damage to the

residue, the court stated: "Since there was a taking of Forest Converting's property, and since the changed condition of the building due to the appropriation had an effect on the value of the residue, introduction of testimony concerning damages to the building and inclusion by the experts of changes to the building in their calculation of the damage to the residue were proper." Id. at 415–16.

{¶ 48} In 1970, this court stated that "[t]he amount of compensation for * * * damages to the residue * * * and what constitutes damaged residue are questions of fact and not of law." In re Appropriation for Hwy. Purposes of Lands of White, 25 Ohio App.2d 169, 172–73, 267 N.E.2d 829 (4th Dist.1970). We further stated, however, that although these issues are questions of fact for the jury, the jury's determination must be based upon "proper evidence." Id. at 173. We thus intimated that the type of evidence a jury may consider when fixing damage to the residue is a question of law for the court to determine before submitting it to the jury.

{¶ 49} Accordingly, based upon the foregoing, as well as the basic principles underlying "just compensation," we believe that the compensability of damages to the residue of partially appropriated property is a question of law. Compensation for damages to the residue is part of the constitutional inquiry of "just compensation." See Horney, supra. The meaning of "just compensation" is a matter of constitutional interpretation. State ex rel. Steubenville Ice Co. v. Merrell, 127 Ohio St. 453, 454, 189 N.E. 116, 39 Ohio Law Rep. 653 (1934). The interpretation of a constitutional provision is a question of law. See Horney at ¶67 and 69 (explaining that whether proposed taking satisfies constitutional requirement of "public use" and "just compensation" involves a "constitutional inquiry"). Thus, the interpretation of "just compensation" is a question of law.

{¶ 50} As we indicated supra, "just compensation" in a partial appropriation action includes damages, if any, to the residue and those damages to the residue may also include consequential damages. The compensability of consequential damages, therefore, is essentially a question of whether compensating a property owner for those damages constitutes "just compensation." Because the interpretation of "just compensation" is a question of law, we likewise believe that the compensability of consequential damages is a question of law.

{¶ 51} The question of the compensability of consequential damages for residual property in a partial appropriation action hinges upon whether the injury or loss is shared in common with the public. Thus, because this question relates back to the concept of "just compensation," we believe that it also is a question of law. We therefore conclude that in a partial appropriation case seeking consequential damages, whether an injury or loss is shared in common with the public is a question of law. See Green v. Genovese, 9th Dist. Summit No. 23472, 2008-Ohio-1911 (reviewing evidentiary question pertaining to proper elements of damage to residue in appropriation proceeding as a matter of law); Smith v. Joseph, 6th Dist. Wood No. C.A. WD-85-40, 1986 WL 1044, *2–3 (Jan. 24, 1986) ("Since appellant was not entitled to 'damages' to the residue of his land, the trial court's exclusion of evidence as to this damage was proper."); In re Leas, 5 Ohio App.3d 120, 449 N.E.2d 780 (7th Dist. 1981) (determining that trial court improperly permitted landowners to present evidence regarding "consequential damages"); Dept. of Trans. v. Vanhoose, 4th Dist. Lawrence No. 1733, 1985 WL 11111, *3 (May 28, 1985) (seeming to review trial court's decision to admit evidence in appropriation action that pertained to damages as a matter of law, but not expressly stating so); Columbus v. Buchsieb, 10th Dist. Franklin No. 81AP-445, 1982 WL 3934, *4 (Jan. 14, 1982) ("Considering the totality of the

evidence of this case, the trial court's determination was correct in excluding appellants' proffered damage testimony, as such evidence is generally contrary to the rule of damages in appropriation cases, and in this particular case, such damages are too speculative to be proper"); Columbus v. Farm Bureau Cooperative, 27 Ohio App.2d 197, 198, 273 N.E.2d 888 (10th Dist. 1971) (stating that landowner's appeal from trial court's decision prohibiting landowner from introducing "consequential damages" involved "questions of law").

{¶ 52} In simpler terms: (1) just compensation includes damages, if any, to the residue in a partial appropriation case; (2) damages to the residue may include injury or loss resulting from the use to which the appropriated property is put (i.e., consequential damages); and (3) for consequential damages to be compensable in a partial appropriation case, the injuries must not be shared in common with the public. Each step of this analysis flows from the constitutional concept of just compensation. Because the issue of just compensation is a question of law and each step of the analysis likewise is a question of law. Each question in the analysis relates back to whether the partially-appropriated property owner receives just compensation.

{¶ 53} We recognize that under R.C. 163.14, the assessment of damages to the residue in a partial appropriation case is a matter for the jury. What elements of damage may enter into that assessment depends upon the constitutional concept of "just compensation." Thus, to this extent, the compensability of consequential damages is a question of law.

E

DE NOVO STANDARD OF REVIEW

{¶ 54} Having determined that whether a loss or injury is shared in common with the public is a question of law, we can now define our standard of review that applies to the trial

court's decision to admit Vannatta's testimony regarding appellees' consequential damages. Because the compensability of consequential damages is a question of law, a trial court's decision regarding the admissibility of evidence that pertains to those damages is a question of law subject to de novo review. If consequential damages are noncompensable because they are shared in common with the public, evidence regarding those damages is therefore inadmissible in an appropriation proceeding to fix damages, if any, to the residue. See Richley, 38 Ohio St.2d at 66 (stating that to allow such evidence is to allow compensation).

{¶ 55} Additionally, we believe that de novo appellate review of the compensability of consequential damages will "produce[] a more consistent jurisprudence." State v. Williams, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶27. Giving "'sweeping deference'" to jury determinations regarding the compensability of consequential damages "would lead to 'varied results [that] would be inconsistent with the idea of a unitary system of law.'" Id., quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). For example, the state may partially appropriate multiple parcels of real estate owned by different individuals in order to effectuate a public improvement, such as a highway. In this example, if the compensability of consequential damages were left to a jury, different results might be reached in each case. Jury A may award property owner B consequential damages upon its finding that those damages are not shared in common with the public. Jury C, on the other hand, may reject property owner D's claim for consequential damages upon its finding that the loss or injury (the same/similar injury or loss property owner B suffered) is shared in common with the public. Permitting one property owner to receive consequential damages, but not the other, seems contrary to the constitutional concept of "just compensation." "Moreover, 'legal rules * *

* acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, * * * legal principles.'" Id., quoting Ornelas, 517 U.S. at 697.

{¶ 56} We observe, however, that Ohio courts (this court included) have not always explicitly applied a de novo standard of review when examining a trial court's decision to admit evidence regarding damages to residual property in an appropriation proceeding. Proctor v. Hall, 4th Dist. Lawrence No. 05CA3, 2006-Ohio-2228, ¶34 (stating, with little discussion, that the abuse-of-discretion standard of review ordinarily applies in appropriation proceedings); Wray v. Hart, 4th Dist. Lawrence No. 91CA20, 1992 WL 208900, *5 (Aug. 13, 1992), citing Rigby v. Lake Cty., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991) (In Rigby, the court stated: "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence."); In re Appropriation for Hwy. Purposes (Noble v. Flowers), 108 Ohio App. 1, 3, 160 N.E.2d 383 (4th Dist. 1959) ("It must be remembered that the admission or rejection of evidence in appropriation proceedings is primarily a matter of discretion with the trial court, and reviewing courts have been loath, in the absence of abuse of that discretion, to tamper with the results."); accord Proctor v. N & E Realty, L.L.C., 11th Dist. Trumbull No. 2005-T-0051, 2006-Ohio-3078, ¶26 (determining that trial court abused its discretion by permitting jury to hear noncompensable element of damage to residue). To the extent the admission of evidence turns upon the correct interpretation of the law, however, we believe that de novo review is appropriate. Consequently, we will independently review whether the trial court properly admitted Vannatta's testimony regarding appellees' consequential damages.

F

ADMISSIBILITY OF EVIDENCE REGARDING CONSEQUENTIAL DAMAGES

{¶ 57} For evidence regarding consequential damages to be admissible in a partial appropriation proceeding, the injury or loss must not be shared in common with the public. See Richley. Whether injury or loss is shared in common with the public is a question of law. See id.; Green v. Genovese, supra. Thus, we independently review a trial court's decision regarding the compensability of consequential injury or loss to the residue in a partial appropriation proceeding. E.g., Hudson v. Petrosurance, supra. A trial court errs as a matter of law by admitting evidence of consequential damages that are not compensable. See Richley. In the case sub judice, we therefore independently review the trial court's decision to admit Vannatta's testimony.

{¶ 58} In the case at bar, Vannatta stated during his voir dire testimony that other properties in the area shared injuries similar to appellees' injuries, although perhaps to different degrees. Vannatta did not state that increased noise, diminished view, increased safety hazards, fear of recurrent catastrophic events, and cuts and fills are unique to appellees' residual property. Thus, we believe that Vannatta's voir dire testimony demonstrates that appellees' injuries were, in fact, shared in common with the public. The trial court, therefore, improperly permitted Vannatta to testify on this topic and allowed the jury to decide whether appellees' injuries were shared in common with the public.[12]

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[12] Interestingly, appellant did not ask Vannatta during his trial testimony whether other properties in the area suffered injury or loss similar to appellees' injuries. We can only speculate as to the reasons why appellant did not do so, but if it had, perhaps the jury would have reached a different verdict. In some circumstances, we might contemplate whether appellant even invited the jury's error in awarding

{¶ 59} We acknowledge that appellees point to Vannatta's trial testimony to show that their injuries are "particular" to their residual property. We, however, agree with appellant that appellees mischaracterize Vannatta's trial testimony. When appellees' counsel questioned Vannatta whether the highway construction affected the view from the residual property, Vannatta stated: "It effects [sic], it drastically affects the view. Because they are chopping on this particular property, their [sic] chopping off the top of the hill and it's like a lopsided, it's going to be lopsided and you've got a steep slope going down to the freeway here and then you've got no view." Appellees' counsel asked, "So you've got a view of a highway instead of a view of the woods?" Vannatta responded, "It's terrible, yea. Instead of a nice tree line." Vannatta did not testify that appellees' residual property, in particular, suffered diminished view and that other properties in the area did not share in this same injury. Rather, he stated that "they are chopping on this particular property." Vannatta did not clarify what he meant by "this particular property," but in any event he did not state that appellees' residual property was the only property in the area that suffered a diminished view as a consequence of the appropriation and highway project.

{¶ 60} We additionally note that appellant asserts that the question is not whether appellees' damages are, in fact, shared in common with the public, but instead whether appellees' damages were of the kind shared in common with the public. While we recognize the

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consequential damages due to its decision not to ask Vannatta during his trial testimony whether other properties shared similar injuries. E.g., State v. Jackson, 2016-Ohio-5488, ¶108, quoting State ex rel. Kline v. Carroll, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶27 (explaining that under the invited-error doctrine, "'a party is not entitled to take advantage of an error that he himself invited or induced the court to make'"). In the case at bar, however, appellant continually objected to Vannatta's testimony and argued that his testimony regarding consequential damages was inadmissible.

distinction appellant makes, we find it unnecessary to decide the issue at this juncture. Instead, Vannatta's testimony plainly indicates that appellees' injuries were shared in common with the public. We thus have no need to decide at this point whether increased noise, diminished view, increased safety hazards, fear of recurrent catastrophic events, and cuts and fills are of the kind shared in common with the public and categorically inadmissible.

{¶ 61} Consequently, we conclude that the trial court erred as a matter of law by admitting into evidence this portion of Vannatta's testimony that pertained to appellees' consequential damages when those damages were shared in common with the public. Accordingly, based upon the foregoing reasons, we hereby sustain appellant's first assignment of error.

II

{¶ 62} In its second assignment of error, appellant argues that the trial court erred as a matter of law by giving the jury an instruction regarding consequential damages when those damages are not compensable. Appellees assert that the trial court did not abuse its discretion by giving the jury a consequential damages instruction.

{¶ 63} Generally, a trial court has broad discretion to craft jury instructions. State v. White, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶46. A court must, however, "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." State v. Comen, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Additionally, "a jury instruction [must] present a correct, pertinent statement of the law that is appropriate to the facts." White at ¶46, citing State v. Griffin, 141 Ohio St.3d 392, 2014-Ohio-4767, 24 N.E.3d 1147, ¶5, and State

v. Lessin, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993). "Whether the jury instructions correctly state the law is a question that is reviewed de novo." State v. Dean, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶135.

{¶ 64} In the case sub judice, our disposition of appellant's first assignment of error also settles appellant's second assignment of error. Because the trial court should not have admitted testimony regarding appellees' consequential damages, it also should not have instructed the jury that it could consider consequential damages. Its instruction, therefore, was not appropriate given the noncompensability of appellees' consequential damages. See Gallagher v. Cleveland Browns Football Co., 74 Ohio St.3d 427, 435, 659 N.E.2d 1232 (1996), citing Murphy v. Carrollton Mfg. Co., 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991) ("No jury instructions on primary assumption of risk could have been appropriate * * * as there was no evidence before the jury to support the issue.").

{¶ 65} We note that appellees devote a considerable portion of their appellate brief to arguing why they believe the trial court's jury instruction was a correct statement of the law. They contend that Richley, supra, is distinguishable and further assert that the reasoning set forth in Hurst v. Starr, 79 Ohio App.3d 757, 607 N.E.2d 1155 (10th Dis. 1992),[13] is controlling. However, the entire premise of appellees' argument concerning the court's jury instruction is based upon their assumption that the issue of whether consequential damages are shared in common with the public so as to be compensable is a question of fact for the jury. Because we

[13] In Hurst, the court determined that the trial court correctly permitted the jury to consider evidence that an appropriation diminished the value of the property owners' residue by creating increased noise, increased danger, and inconvenience.

determined that the issue is instead a question of law for the court to decide, the jury instruction was not proper as a matter of law. Thus, appellees' reliance upon Hurst, and their attempt to distinguish Richley, is of no consequence to our decision. We therefore need not fully evaluate appellees' arguments regarding the trial court's jury instruction. Our decision that the evidence regarding consequential damages was inadmissible completely disposes of the issue.

{¶ 66} Accordingly, based upon the foregoing reasons, we sustain appellant's second assignment of error and reverse the portion of the trial court's judgment that awarded appellees $14,000 for damage to 412-WL's right residue.

JUDGMENT REVERSED IN PART
CONSISTENT WITH THIS OPINION.

Hoover, J., dissenting.

{¶ 67} I respectfully dissent from the lead opinion. When factual issues or questions exist as to whether injuries to residual property are suffered in common with the public, a jury should decide these questions, not the court. Therefore, I would overrule both of appellant's assignments of error and affirm the judgment of the trial court.

{¶ 68} First, I disagree with the lead opinion that the standard of review in this case is de novo. As the lead opinion notes, there exists a plethora of cases that stand for the proposition that the abuse of discretion standard of review ordinarily applies in appropriation proceedings. Those cases include decisions from this appellate court. *See* lead opinion, *supra*. Thus, the "abuse of discretion" standard of review should be utilized in this case.

{¶ 69} Next, the lead opinion relies heavily on Richley v. Jones, 38 Ohio St.3d 236, 310 N.E.2d 236 (1974), which I find to be inapposite to the case sub judice. In Richley, the landowners were attempting to claim damages for circuity of travel. The Ohio Supreme Court found that circuity of travel is not a compensable taking since the injury of having to travel farther than before the taking would be an injury suffered in common by the entire community. In contrast, this case does not deal with damages arising from circuity of travel. Another important distinction between this case and Richley is that in Richley the placing of the medians in the road was an exercise of the police power. The case at bar does not involve the police power.

{¶ 70} In contrast, the facts of Hurst v. Starr, 79 Ohio App.3d 757, 607 N.E.2d 1155 (10th Dist.1992) are more similar to this case than the facts of Richley. In Hurst, the court held that the trial court correctly permitted the jury to consider evidence that an appropriation diminished the value of the landowners' residue by creating increased noise, increased danger, and inconvenience.

{¶ 71} Moreover, in the case at hand the trial court took painstaking efforts in deciding whether to admit the testimony of appellees' expert, Vannatta. The trial court was aware of the highly contested issue involved in this case and first heard Vannatta testify outside the presence of the jury. During Vannatta's cross-examination outside the presence of the jury, appellant's counsel attempted to demonstrate to the trial court that any consequential damages that the appellees suffered were also suffered in common with the public. However, Vannatta did not acquiesce or agree with appellant's counsel. With respect to safety hazards, the following exchange took place between appellant's counsel and Vannatta:

> Q. Well Mr. Vannatta would any property that abuts the Portsmouth Bypass when it's built and it's not you can go 70mph. Whether the property was taken or not, if it abutted that highway wouldn't the presence of safety hazards be there?
>
> A. I don't think about properties that aren't affected by the taking and if there are [sic] no taking, it's of no concern of mine.

(Tr. Vol. 1 of 4, page 112 lines 9-16)

{¶ 72} As for increased noise, the following testimony was provided:

> Q. Was the presence of or was the increased noise that's going to occur once the highway is built. Was that a consideration and a factor in your determination of damages to the residue?
>
> A. Yes.

> Q. And would increase [sic] noise affect other property owners in the vicinity of the highway?
>
> A. Again every property up, down, level with the highway there is varying degrees of-
>
> Q. Varying degrees, if their [sic] in an ear shot would it affect them? Would they be able to hear the increase [sic] noise?
>
> A. It could, yes.
>
> Q. But alright and could it affect them whether-
>
> A. You're talking about other properties, again-
>
> Q. Whether they had their property taken or not?
>
> A. Again it may, but I have no concern with what's not taken.
>
> Q. But it may? You'll agree with that?
>
> A. Yes.

(Tr. Vol. 1 of 4, page 116 lines 3-24 and page 117 line 1)

{¶ 73} With respect to diminished view issues, Vannatta testified as follows:

> Q. You talked about diminished view, was that diminished view of the property do [sic] to taking down trees? Is that correct?
>
> A. Well, particularly on this parcel your [sic] chopping off half of it's highest peak area and so part of the free way [sic] as I understand is the elevations have changed drastically from the ones I saw from what they are actually going to do. So the cuts are bigger, but yet you're chopping off the top of the hills so part of the freeway is generally eye level. Let's say if you're standing there on part of their grounds, other's 60 foot down or so, so you're making huge cuts and fill so you're stripping the land over a 400-foot-wide path. You're taking everything off and putting this generally level freeway through there.
>
> Q. Well regardless of degree won't there be cuts and fills and

> clearings on other properties that are being appropriated, perhaps a different degree.
>
> A. Everything is to a degree differently, yes.
>
> Q. But there still will be clearing, cuts and fills on other properties, not just the Wessell properties, correct?
>
> A. There could be, I don't know—

(Tr. Vol. 1 of 4, page 117 lines 6-24 and page 118 lines 1-4)

{¶ 74} I do not believe that the above testimony constitutes a concession that the damage to appellees' residual property was shared in common with the public; especially since appellant's counsel and Vannatta had the following exchange during Vannatta's re-cross examination:

> Q. While I'm looking Mr. Vannatta, all these things you've talked about on the Wessell property they made cuts and fills, dangerous safety hazards, noise; you're not saying those didn't happen on other properties, you're just saying there is different degree, correct?
>
> A. I'm saying they affect this property; I don't think of other properties when I'm doing appraisal, I don't know why you try to and put words in my mouth here. On this property the things we just discussed is what happens in this property.

(Tr. Vol. 1 of 4, page 123 lines 12-22)

{¶ 75} If there was no dispute whatsoever whether the consequential damages were shared in common with the public, then it would have been proper for the trial court to exclude Vannatta's testimony. However, in this case, I believe there were questions of fact on whether the consequential damages were shared in common with the public. After examining the verdict and answers to the interrogatories, it seems that the jury also believed that the appellees' suffered

damages that were *not* in common with the general public.

{¶ 76} If the trial court would have ruled in favor of appellant and not permitted appellees to present the testimony of Vannatta, the trial court would have invaded the province of the jury because " '"every element entering into the question of value" must be taken into consideration in determining the amount of compensation.'" Richley, 38 Ohio St.2d at 66, quoting Sowers v. Schaeffer, 155 Ohio St. 454, 459, 99 N.E.2d 313, quoting 29 Corpus Juris Secundum, Eminent Domain, p. 971, Section 136.

{¶ 77} As a matter of clarification, I do not dispute the basic principles of appropriation law set forth in the lead opinion; however, I do interpret the case law cited by the lead opinion differently. I believe that in this particular case the compensability of consequential damages and whether they were shared in common with the public was a question of fact.

{¶ 78} It is also noteworthy that once the trial court permitted Vannatta to testify in the presence of the jury as to the consequential damages, the appellant never asked Vannatta on cross-examination if the purported damages were shared in common with the public. Moreover, appellant also failed to present any evidence through its expert that the damages claimed by the appellees were not shared in common with the public. This anomaly is even mentioned in footnote 12 of the lead opinion.

{¶ 79} In addition, the lead opinion concedes that the Richley court did not expressly state whether it is the court's or the jury's duty to determine whether loss or injury is shared in common with the public. Rather, the lead opinion concluded that the Richley decision *suggests* that the issue presents a question of law. In reaching this conclusion the lead opinion ignores case precedent from this appellate court. *See* In re Appropriation for Hwy. Purposes of Lands of

White, 25 Ohio App.2d 169, 172-173, 267 N.E.2d 829 (4th Dist.1970)("The amount of compensation for * * * damages to the residue * * * and what constitutes damaged residue are questions of fact and not of law.").

{¶ 80} In my view, we are taking away the jury's function as the assessor of value when we limit what the jury can consider when there is evidence that the landowner is suffering particular damage to his or her property, not in common with the public.

{¶ 81} Finally, I note that the standard jury instruction contains the language—"not common to the public".

> 4. ADDITIONAL. 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) (vibration) (circuity of travel) (loss of traffic volume) (dust and inconvenience suffered by the owner in common with the public) are not to be considered.

Ohio Jury Instructions, Title 6, Chapter CV 609, CV 609.09(4). Logic would dictate that this language would not be included in the standard jury instruction if a jury was not expected to decide the question when conflicting evidence exists.

{¶ 82} Because I would find that the trial court did not err by admitting testimony regarding appellees' consequential damages, I would also find that the trial court did not err in its jury instruction on consequential damages. I note that the jury instruction in this case did state that in order for the damages to be compensable, they could not be suffered in common with the public.

{¶ 83} In conclusion, I would overrule appellant's assignments of error and affirm the trial court's judgments on both cases.

JUDGMENT ENTRY

It is ordered that the judgment be reversed in part consistent with this opinion. Appellant shall recover of appellees the 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 Scioto County Common Pleas Court to carry this judgment into execution.

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

*Stautberg, J.: Concurs in Judgment Only
Hoover, J.: Dissents with Dissenting Opinion

For the Court

BY:_____
Peter B. Abele, 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.

*Judge Peter J. Stautberg, First District Court of Appeals, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.