[Cite as *Proctor v. Hankinson*, 2009-Ohio-4248.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GORDON PROCTOR, DIRECTOR ODOT	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08 CA 0115
JOHN E. HANKINSON, et al.	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas Case Nos. 06-CV-1432 and 06-CV-1585

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 20, 2009

APPEARANCES:

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Gwin, P. J.

{¶1} Plaintiff-Appellant, Gordon Proctor, Director of the Ohio Department of Transportation, appeals the August 4, 2008 judgment of the Licking County Court of Common Pleas denying ODOT's motion for new trial. Defendants-Appellees are John and Betty Hankinson. ODOT raises two Assignments of Error:

{¶2} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT BY NOT STRIKING JUROR DAVIS FOR CAUSE.

{¶3} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT IN OVERRULING PLAINTIFF-APPELLANT'S MOTION FOR NEW TRIAL."

{¶4} ODOT initiated a two-phase project to construct a four-lane limited access divided highway running parallel to existing S.R. 161 which would connect the existing four-lane limited access divided highway outside the Village of New Albany with the exiting four-lane limited access divided highway outside the Village of Granville.

{¶5} The Hankinson property is located on both sides of S.R. 161 and east of S.R. 37 in St. Albans and Granville Townships. The property consists of approximately 400 acres of farmland, three residential structures, and numerous farm buildings. ODOT appropriated land owned by the Hankinsons, designated as Parcels 209, 213 and 226 on the ODOT highway plans. The taking bisected part of the Hankinsons' property and took two rental houses, and various secondary farm buildings as well as land.

{¶6} Parcel 209 was rectangular, largely used for agricultural purposes. The taking of Parcel 209 involved 6.683 acres of land and bisected the farmland with a newly constructed service road to run along the entire frontage.

{¶7} Parcel 226 was irregular in shape and included the Hankinsons' personal residence, two rental homes, and several farm buildings. The taking from Parcel 226 involved 6.403 acres of land, including the two rental houses and certain ancillary farm buildings, but not the Hankinsons' personal residence nor the main farm buildings.

{¶8} Parcel 213 involved a small taking and the parties settled the matter prior to trial for $970.

{¶9} On October 9, 2006, ODOT filed a petition to appropriate the property and to fix compensation. The Hankinsons answered the petition and requested a jury to assess compensation for the taking and damages to the residue.

{¶10} At trial, the Hankinsons' experts testified that as a result of the taking, the highest and best use of Parcel 209 was residential and commercial development. One of the experts, Robert Weiler, stated in his opinion compensation for the taking of the land should be $126,977, and the damage to the residue was $290,023. As to Parcel 226, Weiler valued the land as $116,887 and damages to the residue as $458,113. The Hankinsons' other expert, Jayne Young, testified the value of the two rental homes as $362,000, and the farm buildings and other improvements as $424,078. The total compensation for the taking on Parcel 226 as opined by the Hankinsons' experts was $902,987 and damage to the residue was $458,113.

{¶11} A secondary issue regarding Parcel 226 was the driveway constructed by ODOT to give the Hankinsons access from Parcel 226 to S.R. 161. The driveway

constructed by ODOT had a 12% grade. The Hankinsons' expert testified a 12% grade was considered dangerous, and to correct the grade to 8% would cost $124,514.

{¶12} ODOT's evidence was that the highest and best use for Parcel 209 is potential rural residential development, or hobby farm, and the compensation for Parcel 209 should be $116,900 and damage to the residue, $16,050. As to Parcel 226, ODOT's expert testified the highest and best use was agricultural for which the total compensation for the taking of the land, homes, structures and improvements should be $254,300 and damage to the residue was $58,700.

{¶13} As to Parcel 209, the jury awarded $126,977 for the property taken, $290,023 as damages to the residue, for a total award of $417,000. On Parcel 226, the jury assessed compensation for the property taken as $812,433, damages to the residue as $458,113, and a total award of $1,270,546.

{¶14} ODOT had submitted Interrogatories. Interrogatory No. 1 stated, "Regarding Parcel 209, what amount, if any, of the jury award for damages to the residue was attributed to the elimination of direct access to SR 161 (aka Worthington Road)?" The jury answered, "290,023." Interrogatory No. 2 stated, "Regarding Parcel 226, what amount, if any, of the jury award for damages to the residue was attributed to elimination of direct access to SR 161 (aka Worthington Road)?" The jury answered, "458,113.00."

{¶15} Interrogatory No. 3 stated, "Regarding Parcel 226, what amount, of the jury award for compensation for the take was attributed to the two residential homes, farm structures, and other improvements?" The jury answered, "333,524.00."

{¶16} The trial court journalized the jury verdicts and ODOT filed a timely Motion for New Trial, arguing the jury's answers to the interrogatories demonstrated jury confusion. After a hearing, the trial court overruled the motion. It is from this decision ODOT now appeals.

I

{¶17} In its first Assignment of Error ODOT argues the trial court erred in overruling its motion to strike a juror for cause. We disagree.

{¶18} R.C. 2313.42(J) contemplates that "good cause" exists for the removal of a prospective juror when "he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." A prospective juror challenged for cause should be excused "if the court has any doubt as to the juror's being entirely unbiased." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 105 citing R.C. 2313.43; see *State v. Cornwell* (1999), 86 Ohio St.3d 560, 563, 715 N.E.2d 1144; *State v. Allard* (1996), 75 Ohio St.3d 482, 495, 663 N.E.2d 1277.

{¶19} Trial courts have discretion in determining a juror's ability to be impartial, *State v. Williams* (1983), 6 Ohio St.3d 281, 288, 452 N.E.2d 1323, and such a ruling "will not be disturbed on appeal unless it is manifestly arbitrary * * * so as to constitute an abuse of discretion." *Roberts*, supra, at ¶ 106 citing *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576. Accord *State v. Williams* (1997), 79 Ohio St.3d 1, 8, 679 N.E.2d 646. The term "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary or capricious. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶20} The challenged juror in question was Mr. James Davis. Davis indicated he was acquainted with the Hankinsons from church, and had known them for approximately nine to ten years.

{¶21} In response to the court's inquiry Davis said he would not give greater or lesser weight to the Hankinsons' witnesses. Davis stated he did not believe his acquaintance with the Hankinsons would hurt his ability to be fair or impartial. Davis stated both he and Hankinson served as deacons of the church, and he considered Hankinson a friend. Nevertheless, Davis indicated he would make his decision based on the evidence. Davis stated with his accounting background, he could be fair and impartial in determining the fair market value of the property. The court seated Davis over ODOT's objection, and subsequently the jury selected Davis as foreperson.

{¶22} We find the trial court did not abuse its discretion in denying ODOT's request to discharge Davis for cause. A juror's credibility is a matter for the trial judge, and we must defer to the trial judge who sees and hears the juror. *Wainwright v. Witt* (1985), 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841. The trial court was in the best position to determine Davis' credibility and we find no error in its decision.

{¶23} ODOT's first Assignment of Error is overruled.

II

{¶24} In its second Assignment of Error ODOT argues the trial court abused its discretion in denying its Motion for New Trial. ODOT argued it was entitled to a new trial based on Civ.R. 59(A)(1), (4) and (7). Civ.R. 59(A) states in pertinent part:

{¶25} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶26} "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

{¶27} "* * *

{¶28} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

{¶29} "* * *

{¶30} "(7) The judgment is contrary to law;

{¶31} "* * *

{¶32} ""In addition to the above grounds, a new trial may be granted in the sound discretion of the court for good cause shown."

{¶33} In reviewing a trial court's decision regarding a motion for new trial, we apply the abuse of discretion standard. *Sharp v. Norfolk & Western Railway Company,* 72 Ohio St.3d 307, 1995-Ohio-224, 649 N.E. 2d 1219

{¶34} ODOT's Motion for New Trial argued the jury's answers to the interrogatories demonstrates the jury was confused in determining compensation for the taking of the property and damages to the residue of the property.

A. Interrogatories Nos. 1 and 2

{¶35} At trial, one of the Hankinsons' experts, Robert Weiler, testified to the highest and best use of Parcels 209 and 226 before and after the appropriation. Weiler testified the removal of direct access to S.R. 161 and the creation of service roads to the properties were factors in his determinations that the highest and best use of the

property went from commercial and/or residential development to no commercial development, and in his opinion, reduced the fair market value of the parcels.

{¶36} ODOT objected to any testimony relating to access to S.R. 161, arguing the Hankinsons' loss of direct access to S.R. 161 caused by the appropriation was not compensable as damage to the residue. The trial court ruled the Hankinsons' expert could not testify about circuity of travel, but could testify about access to the property.

{¶37} A diversion of traffic resulting from an improvement in the highway, or the construction of an alternate highway, is not an impairment of a property right for which damages may be awarded; mere circuity of travel does not of itself result in impairment of the right of ingress and egress to and from a property, where the interference is an inconvenience shared in common with the general public. *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53.

{¶38} Expert witnesses may state their opinions regarding damages to the residue of the property. *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469, 846 N.E.2d 559, ¶ 10. Damage to the residue is measured by the difference between pre- and post-appropriation fair market value of the residue. *Bd. of Cty. Commrs. of Clark Cty.*, supra citing *Hilliard v. First Indus., L.P.*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441, ¶ 5.

{¶39} In determining both pre-and post-appropriation values, a jury must consider every element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property. *Hilliard*, 2005-Ohio-6469, ¶ 10 citing *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 763,

607 N.E.2d 1155, quoting *In re: Appropriation for Hwy. Purposes of Land of Winkelman* (1968), 13 Ohio App.2d 125, 138, 42 O.O.2d 232, 234 N.E.2d 514.

{¶40} A jury verdict is adequate if it falls within the range of valuation testimony presented at trial. *Preston v. Rappold (1961),* 172 Ohio St. 524, 528, 178 N.E.2d 787. We find the jury's determination of the damages to the residue was within the range of valuation presented by both parties' experts.

B. Interrogatory No. 3

{¶41} ODOT also argues in its second Assignment of Error that the jury exhibited confusion in its answer to Interrogatory No. 3. On the general verdict form for Parcel 226, the jury awarded $812,433 for compensation for the property taken. Interrogatory No. 3 stated, "[r]egarding Parcel 226, what amount, of the jury award for compensation for the take was attributed to the two residential houses, farm structures, and other improvements?" The jury answered "333,524." ODOT concludes the balance of the award must represent the award for the value of the land itself. This amount would be nearly four times higher than any value suggested at trial.

{¶42} The court should make every reasonable effort to reconcile the jury's answers to the interrogatories with the general verdict. In doing so, the court must consider all of the interrogatories and answers as a whole, and indulge any reasonable hypothesis that will reconcile the interrogatory answers with the general verdict. *Klever v. Reid Brothers Exp*. (1949), 151 Ohio St. 467 at 474; *PPG Industries, Inc. v. Heritage Fireplace Equip.* (March 27, 1985), Summit App. No. 11695, citing *David v. Turner* (1903), 69 Ohio St. 101, 118.

{¶43} Civ. R. 49(B) gives a trial court three options if it is forced to conclude the jury's answers to the interrogatories are internally inconsistent or inconsistent with the verdict: 1. the court may enter judgment consistent with the answers, notwithstanding the verdict; 2. the court may return the matter to the jury for further consideration, or 3. the court may order a new trial.

{¶44} The preferred option is to return the matter to the jury. When an interrogatory response is inconsistent and irreconcilable with the general verdict, the Ohio Supreme Court has held that "the clear, best choice [is] to send the jury back for further deliberations." *Shaffer v. Maier* (1994), 68 Ohio St. 3d 416, 421. For this reason, courts have held if a party does not bring the inconsistency to the trial court's attention at the time when the court may resolve the issue, the inconsistency is waived. *Napierala v. Szczublewski,* Lucas Co. App. No. L-02-1025, 2002-Ohio-7109, paragraph 17.

{¶45} "The policy reasons behind requiring an objection are '(1) to promote the efficiency of trials by permitting the reconciliation of inconsistencies without the need for a new presentation of evidence to a different trier of fact, and (2) to prevent jury shopping by litigants who might wait to object to an inconsistency until after the original jury is discharged.' " Id. citation deleted.

{¶46} If a party does not bring the alleged inconsistency to the court's attention while the jury is still seated, but instead later files a motion for a new trial, this has effectively curtailed the court's discretion by eliminating two of its options under Civ. R. 49, including the option the Supreme Court found to be the clear best choice. Id. Thus, we find ODOT should have complied with Civ. R. 49 in challenging the jury's verdict, rather than utilizing Civ. R. 59, and ODOT's failure to do so constitutes waiver.

{¶47} ODOT argues courts make an exception to the waiver rule if the inconsistency between the interrogatories and the verdict is not apparent on the face of the documents. *O'Connell v. Chesapeake & Ohio Railroad. Co.* (1991), 58 Ohio St.3d 226, 569 N.E.2d 889. In *O'Connell,* the Ohio Supreme Court found plain error and excused the appellant from its failure to object while the jury was present because the trial was long and complicated. The problem with the six interrogatories was that one juror who signed the interrogatory apportioning fault between plaintiff and defendant had not signed any interrogatory finding either party negligent and did not sign the interrogatory concerning proximate cause. The Supreme Court found there had been no immediate indication there was a problem with the interrogatories because they all bore sufficient signatures and were consistent with the verdict. Id. 229-30.

{¶48} ODOT argues the claimed discrepancy of nearly one half million dollars was not immediately apparent and ODOT is excused from failing to comply with Civ. R. 49. We disagree. We find this alleged error was not plain error on the part of the trial court and was apparent on the face of the interrogatories. *Napierala* at paragraph 27, citations deleted.

{¶49} On the general verdict form the total award for Parcel 226 is $1,270,546, of which $812,433.00 is the total “compensation for property taken”, including structures and land. The jury’s answer to 2, the value of the structures and improvements, is $333,524.

{¶50} The answer to 2 is very close to expert Young’s valuation of just the two houses taken, $362,000. The jury could have misread the interrogatory and not included

the value of all the structures in its answer to 2. This interpretation would make the interrogatories consistent with the total verdict.

{¶51} Besides objecting while the jury was still present, ODOT had another option, which would have prevented this problem. Three elements make up the award for Parcel 226: 1. the value of the damage to the residue; 2. the value of the structures on the land; and 3. the value of the land itself. Interrogatories 2 and 3 inquire about the first two elements. ODOT could simply have submitted another interrogatory inquiring what the jury found to be the value of the land. This would have eliminated any speculation as to how to interpret the jury's verdicts.

{¶52} We find ODOT waived its right to a new trial and to raise this issue on appeal.

{¶53} ODOT's evidence set the total compensation for Parcel 226 at $254,300; the Hankinsons' valuation was $902,987. The jury awarded a total of $812, 443.00, well within this range.

{¶54} We find the trial court did not err in finding ODOT was not entitled to a new trial. Accordingly, the second assignment of error is overruled.

{¶55} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By: Gwin, P.J., and

Edwards, J., concur;

Delaney, J., concurs in part

and dissents in part

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

WSG:clw 0701

Delaney, J., concurring in part and dissenting in part,

{¶56} I concur in the majority's disposition of Assignment of Error One and disposition of Assignment of Error Two in regards to Interrogatories No. 1 and 2, but dissent in regards to Interrogatory No. 3.

{¶57} I would find the jury's answer to Interrogatory No. 3 and the general verdict was not inconsistent because the jury was asked to make two different valuations. Interrogatory No. 3 specifically asked the jury to determine the compensation for the take of the two residential houses, farm structures, and other improvements. It did not ask the jury the value of the land taken. The general verdict, however, required the jury to record their decision as to the compensation for the total property taken on Parcel 226. Compensation for all of the property taken included the fair market value of the two residential houses, the farm structures, other improvements *and* the land. Interrogatory No. 3 and the general verdict form asked the jury to make two different valuations. The question then, was their verdict as to compensation for the land taken on Parcel 226 ($478,909) within the range of valuation testimony presented at trial?

{¶58} In *State Dept. of Highway v. Bixler* (1936), 6 O.O. 182, the trial court, in considering a motion for new trial, addressed the role of a jury in appropriation cases. The court stated: "In eminent domain cases, jurors cannot use their own judgment as to the value of the property and the damages sustained from their personal view. While they must be governed by the evidence adduced, they can and should judge the weight and force of the evidence given by the respective witnesses in the light of their own general knowledge of the subject of the inquiry, and apply their general knowledge and

experience to the evidence in determining the weight to be given to the opinions expressed in the testimony of the several witnesses, and thus allow the testimony of the respective witnesses to control only as the jury may find it to be reasonable under all the facts and circumstances. * * * Where testimony as to values has been offered by both parties, a jury cannot disregard all the testimony as to values, and substitute their own opinion, because that would be permitting the jury to regard their view as evidence, which is not authorized. [Citation omitted.] *Id.* at 183. See also, *Proctor v. Bader*, Fairfield App. No. 03 CA 51, 2004-Ohio-4435, ¶ 17, citing *Bixler,* supra.

{¶59} At trial, Mr. Weiler testified that he valued the land of Parcel 226 taken by the appropriation at $116,887. The Hankinsons' other expert, Jane Young, appraised the two residences, farm structures and other improvements located on Parcel 226. She valued them at a total of $768,100. The Hankinsons' argued the total compensation for the taking of Parcel 226 should be $902,987. ODOT stated that the compensation for the taking of Parcel 226, including land and the structures, should be $254,300.

{¶60} The total range of values for compensation for the taking of Parcel 226 varied from $254,300 to $902,987. In answering Interrogatory No. 3, the jury valued the two residences, farm structures and improvements at $333,524. In rendering their general verdict for compensation for the taking of Parcel 226, the jury answered, "$812,433.00." While the jury award on the general verdict for compensation is within the range of testimony, it does not comport with the value given by the jury in Interrogatory No. 3. There is a gap of $478,909 that presumably should be

compensation for the land. $478,909 is clearly not within the range of testimony presented at trial for the fair market value of the land.

{¶61} "The essential purpose to be served by interrogatories is to *test the correctness of a general verdict* by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 336-337, 504 N.E.2d 415 (Emphasis added).[1] I would agree the jury's answers to Interrogatory No. 3 and the general verdict as to compensation for the taking of Parcel 226 exhibits confusion in the calculation of damages. Indeed the majority believes the jury could have misread the interrogatory.

{¶62} I would find the correctness of the jury's general verdict is in question due to the excessive damages for the value of the land taken. ODOT properly brought this matter to the trial court's attention by filing a motion for new trial pursuant to Civ.R 59, as opposed to Civ. R. 49, as no inconsistency exists between the general verdict and Interrogatory No. 3, rather it is simply a matter of the proper measure of damages.

{¶63} As such, I would sustain ODOT's second Assignment of Error in part. I would reverse and remand to the trial court for a new trial on the issue of compensation for the property taken from Parcel 226.

_____

JUDGE PATRICIA A. DELANEY

[1] Although I question whether the use of interrogatories pursuant to Civ.R. 49 are proper in an eminent domain case; the issue is not before us.

[Cite as *Proctor v. Hankinson*, 2009-Ohio-4248.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

GORDON PROCTOR, DIRECTOR ODOT	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JOHN E. HANKINSON, TRUSTEE, et al.	:	
	:	Case No. 08 CA 0115
Defendants-Appellees	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to Appellant.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY