[Cite as *Bd. of Trustees of Sinclair Community College Dist. v. Farra*, 2010-Ohio-568.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BOARD OF TRUSTEES OF SINCLAIR COMMUNITY COLLEGE DISTRICT	:	Appellate Case No. 22886
Plaintiff-Appellant/Cross-Appellee	:	T.C. Case Nos. 06-CV-2198 06-CV-2199
v.	:	
DONALD M. FARRA, et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellees/Cross-Appellants	:	

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O P I N I O N

Rendered on the 19th day of February, 2010.

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FAIN, J.

{¶ 1} Plaintiff-appellant Board of Trustees of Sinclair Community College District (Sinclair) appeals from a judgment awarding defendants-appellees Donald and Sharon Farra $366,400 for three parcels of land appropriated by Sinclair. The

Farras cross-appeal, contending that the trial court erred in finding that Sinclair's appropriation of the three parcels is necessary.

{¶ 2} Sinclair contends that the trial court erred in denying its motion for new trial, because the award is against the weight of the evidence and contrary to law. In the alternative, Sinclair contends that the trial court should have granted its motion for remittitur, because the award is excessive. Finally, Sinclair contends that the trial court should have granted an evidentiary hearing on an issue involving alleged juror misconduct.

{¶ 3} In their cross-appeal, the Farras contend that the trial court erred in applying eminent domain standards that are overly deferential to the appropriating public agency, and in concluding that Sinclair had demonstrated necessity for the taking of the Farras' property. The Farras further contend that the trial court erred in refusing to allow testimony concerning the county auditor's appraised value for the property.

{¶ 4} We conclude that the trial court did not err in denying the motion for a new trial, because the jury verdict is within the range of testimony presented at trial. For the same reason, remittitur is not warranted, because the verdict is not excessive. The trial court also did not err in refusing to hold an evidentiary hearing on juror misconduct, because there is no foundation of extraneous, independent evidence to impeach the jury verdict.

{¶ 5} In addition, the trial court did not err in concluding that Sinclair had demonstrated necessity for the appropriation. Under any applicable standard, Sinclair demonstrated necessity, and the Farras failed to present any evidence at all

on this issue. Finally, the issue of the admission of the county auditor's appraisal value is moot, since the award is being affirmed. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 6} In June 2004, Sinclair's Board of Trustees passed a resolution authorizing the appropriation of real property in the Bank Street area of Dayton, Ohio, for purposes of satisfying Sinclair's current parking needs and for future campus expansion. The land in question involves ten properties, three of which (117 Bank Street, 130-132 Sprague Street, and 136 Sprague) are owned by Donald and Sharon Farra.[1] In September 2004, Sinclair contacted the Farras about the purchase of their three properties. Subsequently, Sinclair sent the Farras copies of appraisals for the properties, and offered the Farras the fair market value shown by the appraisals. Because Sinclair and the Farras could not reach agreement, Sinclair filed two appropriation actions in March 2006. The two cases (Montgomery County Common Pleas Court Case Nos. 06 CV 2198 and 06 CV 2199) were consolidated, and a hearing on the necessity of the appropriations was held before a magistrate in September 2006. After hearing testimony from Mr. Farra and three Sinclair witnesses, the magistrate concluded that Sinclair had shown that the properties were being appropriated for a necessary purpose, and that Sinclair had negotiated appropriately with the Farras.

[1]These properties will be referred to respectively as Bank Street, Sprague Street, and the Lot. The properties consist of a single family residence, a duplex, and a vacant lot.

{¶ 7} The Farras filed objections to the magistrate's decision, which the trial court overruled. The trial court agreed with the Farras that the magistrate had improperly admitted and considered a few items of documentary evidence. However, the court also concluded that any error was harmless, because the necessity for the appropriation was demonstrated by other evidence in the record. The trial court further held that regardless of the standard to be applied, Sinclair had demonstrated, without a doubt, that the land was needed for present and future additional parking.

{¶ 8} The issue of compensation for the property was tried before a jury, which awarded the Farras the following sums: $234,000 for Bank Street, $124,000 for Sprague Street, and $8,400 for the Lot, for a total of $366,400. Sinclair moved for a new trial, or alternatively, for remittitur, contending that the award exceeded the values assessed by the real estate appraisers retained by both Sinclair and the Farras.

{¶ 9} Specifically, Sinclair's expert had testified to the following values, using a comparable sales approach: (1) Bank Street – $110,000; (2) Sprague Street – $56,000; and (3) the Lot – $1,500, for a total of $167,500. The Farras' expert also used comparable sales, and arrived at the following values: (1) Bank Street – $142,500; and (2) Sprague Street – $110,000, for a total of $252,500. These values included $14,000 and $10,000, respectively, which were added using "plottage," which occurs when lots increase in value because they are assembled together. The Farras' expert did not assign a value for the Lot on Sprague, because he was not the expert who had compiled the report and he had not studied the market.

{¶ 10} Bank Street is a single family residence, and Sprague Street is a duplex. Because both properties are more than 100 years old, Sinclair's expert did not use a cost approach, which includes deduction for depreciation. However, the Farras' expert did estimate the value using a cost approach. He concluded that this approach is appropriate, because Bank Street and Sprague Street have both been totally updated and renovated. The values using the cost approach were as follows: (1) Bank Street – $158,151; and (2) Sprague Street – $122,242, for a total of $280,393. The Farras' expert further indicated that the cost analysis approach used in his company's report was based on replacement figures from books, not the actual cost of the materials that were used. The expert stated that if he had actual knowledge of specific numbers, the analysis would be more reliable. In this regard, he noted that the property owner's estimate (in this case, Mr. Farra's), could be different, since the owner would know what had been done with the property.

{¶ 11} Mr. Farra valued the three properties at approximately $536,000, which included about $210,000 in improvements to Bank Street, $82,500 in improvements to Sprague Street, $50,000 for each parcel of land, and his own labor. Mr. Farra indicated that other lots in the area had sold for approximately $50,000 per lot. Mr. Farra also added a premium for "plottage," and asked the jury to award a total of $2,000,000. In addition, Mr. Farra testified at length regarding improvements he had made since purchasing the properties in 1975. Many improvements were made between 1995 and 2000, and included new roofs, new insulation and vinyl siding, new double-pane windows, all-new exterior doors, all-new copper plumbing, lead-abatement measures, and so on. The Bank Street house, which was used by

the Farras at times for a residence, had many high-quality improvements, like granite counter tops, ceramic tile, expensive carpeting, and six-panel, solid oak doors. Mr. Farra did not submit receipts for the improvements, but the photographs that were identified and admitted support his testimony about the quality of items that were installed. Mr. Farra also indicated that the duplex rents for about $1,000 per month ($500 for each side). Finally, regarding the Lot, Mr. Farra testified that he had purchased it in 1991 or 1992, for about $7,000. During rebuttal testimony, Mr. Farra spent a substantial amount of time criticizing the property that Sinclair had used in figuring comparable sales values.

{¶ 12} Sinclair's expert testified that he believed that Mr. Farra had probably spent the money on the improvements concerning which Farra had testified. However, Sinclair's expert stated that the improvements are "superadequate," because they exceed what is typical for the neighborhood. He indicated the market would not pay that much for the property. The Farras' own expert stated that a willing seller would probably not pay $300,000, which Mr. Farra had estimated to be the fair market value of the Bank Street property. (This estimate included the $210, 000 in improvements, Mr. Farra's labor, and the value of the lot). But the Farras' expert did testify that he would not say that Farra was wrong, and that every property owner knows his or her own property better than an appraiser.

{¶ 13} The jury awarded the Farras $366,400 as the market value of the three properties. After the verdict, Sinclair filed a motion for a new trial and a motion for remittitur, both of which were denied. Sinclair also asked for a new trial, based on alleged juror misconduct, which was denied as well. Sinclair then appealed, and the

Farras cross-appealed, raising two assignments of error. Because the issue of the necessity of the taking is the predicate for the appropriation action, we will initially discuss the Farras' First Assignment of Error, which relates to the necessity for the taking.

II

{¶ 14} The Farras' First Assignment of Error is as follows:

{¶ 15} "THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE PLAINTIFF HAD THE RIGHT TO USE EMINENT DOMAIN TO TAKE THE DEFENDANTS' PROPERTY. (MAGISTRATE'S DECISION, DOCKET ENTRY 59, ORDER OVERRULING OBJECTIONS TO MAGISTRATE'S DECISION, DOCKET ENTRY 111)"

{¶ 16} Under this assignment of error, the Farras contend that the trial court erred in three respects. The first alleged error is that the standard the trial court applied is overly deferential to the government.

{¶ 17} The appropriation in the case before us is governed by R.C. Chapter 163. At the time the appropriation action was filed, R.C. 163.09(B) provided, in pertinent part, that:

{¶ 18} "When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the owner. A resolution

or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity. If, as to any or all of the property or other interests sought to be appropriated, the court determines the matters in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of that determination. * * * "[2]

{¶ 19} The issue of necessity was heard before a magistrate, who issued a decision concluding that Sinclair had demonstrated a need for present and future additional parking, and that no evidence existed indicating that the appropriation was arbitrary, fraudulent, unconscionable, or an abuse of discretion.

{¶ 20} The Farras objected to the decision, challenging the legal standard applied, the admission of exhibits and testimony, and the magistrate's reliance on excluded evidence. The trial court overruled the objections and adopted the magistrate's decision. The court concluded that any error of the magistrate in admitting or relying on exhibits was harmless, since the magistrate's findings were corroborated by other evidence in the record. In addition, the court held that the Farras had the burden of proof under the applicable statute, and had failed to offer

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[2]R.C. Chapter 163 was amended, effective October 10, 2007, to place the burden of proof on the agency to show necessity for the taking, by a preponderance of the evidence. See R.C. 163.09(B)(1) and R.C. 163.021. An exception exists, indicating that an agency's resolution of determination of necessity creates a rebuttable presumption of necessity, if the appropriation is not a blighted parcel or in a blighted area. The amendments to R.C. Chapter 163 have explicitly been made inapplicable to appropriation actions pending on the amendments' effective date. See S.B. 7, Section 5, which became effective on October 10, 2007. Because the action before us was pending on that date, the amendments do not apply.

any evidence showing a lack of necessity for additional parking. Finally, the court concluded that Sinclair had demonstrated necessity, even if the more stringent standard of *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, were applied, because Sinclair had demonstrated, without a doubt, the need for additional parking.

{¶ 21} In challenging the trial court's necessity decision, the Farras focus on the abuse of discretion standard, and contend that this standard is too deferential in view of the Ohio Supreme Court's decision in *Norwood v. Horney*, supra. In *Norwood*, the city had entered into a redevelopment agreement with a private party who wished to develop a certain area of Norwood. When the developer could not persuade all the owners in the area to sell, the City of Norwood initiated appropriation proceedings, based on a study that had determined that the property was in a "deteriorating area." Id. at ¶ 18-22. The trial court concluded that Norwood had abused its discretion in finding that the area was a slum, blighted area, or deteriorating area. However, the trial court also held that Norwood did not abuse its discretion in finding that the area was "deteriorating." Id. at ¶ 26. The trial court, therefore, approved the taking of the property.

{¶ 22} On appeal, the Ohio Supreme Court engaged in a lengthy discussion of individual property rights and the history of eminent domain. Id. at ¶ 33 - 61. During this discussion, the Ohio Supreme Court noted that:

{¶ 23} "Almost all courts, including this one, have consistently upheld takings that seized slums and blighted or deteriorated private property for redevelopment, even when the property was then transferred to a private entity, and continue to do so. * * * These rulings properly employed an elastic public-use analysis to promote

eminent domain as an answer to clear and present public-health concerns, permitting razing and 'slum clearance.' " Id. at ¶ 59 (citations omitted).

{¶ 24} The Ohio Supreme Court observed, however, that to some, these rulings "also signaled an almost unbridled expansion of the notion of public use, which led commentators to suggest that the public-use requirement was dead or dying * * * , [and that] [i]n some jurisdictions, a belief has taken hold that general economic development is a public use." Id. at ¶ 60 (citations omitted). The Ohio Supreme Court then noted that *Kelo v. New London* (2005), 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439, had "confirmed this view for purposes of federal constitutional analysis, * * * despite the fact that many legal commentators have expressed alarm at the potential abuse of the eminent-domain power in such circumstances * * *." Id. (citations omitted).

{¶ 25} Although the Ohio Supreme Court acknowledged merit in the notion "that deference must be paid to a government's determination that there is sufficient evidence to support a taking in a case in which the taking is for a use that has previously been determined to be a public use," the court also stressed that "deferential review is not satisfied by superficial scrutiny." Id. at ¶ 66. In this regard, the Ohio Supreme Court emphasized that "[t]hough narrow in scope, judicial review is not meaningless in an eminent-domain case. To the contrary, 'defining the parameters[3] of the power of eminent domain is a judicial function,' * * * and we

[3]Without repeating the definition of "parameter" found in Miriam-Webster's Collegiate Dictionary, Eleventh Edition, it is a mathematical and scientific term that essentially means the variable (or variables) that drives a mathematical equation for purposes of analysis. Regrettably, in this author's view, the fourth definition in the cited work has thrown in the towel, recognizing that "parameter" has been corrupted in the

remain free to define the proper limits of the doctrine." Id. at ¶ 67 (citation omitted).

{¶ 26} The Ohio Supreme Court went on to note in *Norwood* that:

{¶ 27} "There can be no doubt that our role – though limited – is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state takes no more than that necessary to promote the public use * * *, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose. * * * In the proper exercise of our duty to ensure that property rights are protected, we have held that the state may not take to secure a financial gain by resale of, or taxation on, appropriated land. * * * Thus, our precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits. Accordingly, 'questions of public purpose aside, whether * * * proposed condemnations [are] consistent with the Constitution's "public use" requirement [is] a constitutional question squarely within the Court's authority.' * * * ('It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution') * * * " Id. at ¶ 69 (citations

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common usage to mean a border or limit, i.e., a perimeter.

omitted).

{¶ 28} The Ohio Supreme Court went on to stress that judicial review is even more imperative in situations where land is transferred to a private entity. Id. at ¶ 73-74. Accordingly, the gist of the holding in *Norwood* is that legislative decisions will be carefully reviewed to ascertain that an agency takes no more property than is necessary and acts without bad faith, pretext, discrimination, or improper purpose. Consistent with existing principles, this review is limited and deferential, but should not be superficial. Courts will also exercise independent judgment in deciding what uses are public, giving due regard to legislative declarations as to uses that are considered public in light of local exigencies.

{¶ 29} Economic benefit alone is also not a sufficient public use for a valid taking, and the court owes no deference to legislative findings that a proposed benefit will afford economic benefits to the community. Id. at ¶ 66-80.

{¶ 30} Prior to the time of the Ohio Supreme Court's decision in *Norwood*, the Ohio General Assembly had imposed a moratorium on taking of private property in non-blighted areas that resulted in ownership being vested in another private person. Id. at ¶ 5-6 and n.2. This moratorium was a response to the United States Supreme Court decision in *Kelo*, which allowed such takings, and the suggestion in *Kelo* that property owners might find redress in state courts and legislatures. Id. In this regard, the Ohio Supreme Court noted in a footnote at the end of *Norwood*, that:

{¶ 31} "Recognizing that the General Assembly is currently reviewing legislation in this area of law, we have limited our decision to those points of law that

we feel must be decided at this juncture. We note, however, that given our reaffirmation that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need requires it, there are significant questions about the validity of the presumption in favor of the state that is set forth in R.C. 163.09(B), which provides that a resolution or ordinance of an agency declaring the necessity of an appropriation shall be prima facie evidence of necessity in the absence of a showing by the property owner of an abuse of discretion. See *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus (holding that elements of adverse possession must be proved by clear and convincing evidence); *Addington v. Texas* (1979), 441 U.S. 418, 424, 99 S.Ct. 1804, 60 L.Ed.2d 323 (noting that the 'clear and convincing evidence' standard of proof is often used in cases in which the 'interests at stake * * * are deemed to be more substantial than mere loss of money' and 'to protect particularly important individual interests in various civil cases')." *Norwood*, 2006-Ohio-3799, at ¶ 136, n. 16.

{¶ 32} Notably, the Ohio General Assembly subsequently amended R.C. Chapter 163, to require agencies to establish necessity by a preponderance of the evidence, subject to the proviso that an ordinance or resolution creates a rebuttable presumption of necessity if the appropriation is not a taking of a blighted parcel or in a blighted area. R.C. 163.09(B)(1)(a), and 163.021. Furthermore, although the General Assembly indicated in Section 5 of the amended act that the amendments would not apply to cases pending on their effective date, the General Assembly also stated that Section 5 "is not intended to indicate that such appropriation proceedings do not have to apply with the constitutional requirements set forth in *City of Norwood*

v. Horney (2006), 110 Ohio St.3d 353." S.B. No. 7, Section 5, effective October 10, 2007.

{¶ 33} Considering the jurisprudential history recited above, one could argue that the trial court should have complied with the criteria set out in *Norwood*. We note that the comments in *Norwood* are dicta, and are not necessary to the court's decision. *Norwood* is also distinguishable, in that Sinclair is not appropriating property for economic development, and is not conveying the property to a private person. Accordingly, many of the Ohio Supreme Court's reservations about deferential review in those kinds of cases do not apply.

{¶ 34} Nevertheless, assuming for the sake of argument that the dicta in *Norwood* applies, the trial court specifically stated that Sinclair had demonstrated necessity, even if the more stringent standard in *Norwood* were to be applied, because Sinclair had demonstrated, without a doubt, the need for additional parking. We agree with the trial court. We also note that even under the amended statute, Sinclair would have only had to prove necessity by a preponderance of the evidence, with the resolution of the board of trustees being accorded a rebuttable presumption of necessity.

{¶ 35} The Farras' remaining arguments are based on claims that the magistrate relied on inadmissible evidence and that the evidence in the record is insufficient to show that Sinclair has a present need for the property. The trial court agreed that some of the evidence was either inadmissible or improperly considered. The court concluded, however, that the error was harmless, because other evidence in the record demonstrates a necessity for the taking. We agree with the trial court.

{¶ 36} Assuming for the sake of argument that the magistrate improperly admitted and considered some evidence pertinent to the parking situation, "the existence of error does not require reversal of a judgment unless the error is materially prejudicial to the complaining party. * * * Errors will not be considered prejudicial where their avoidance would not have changed the outcome of the proceedings." *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 500 (citation omitted).

{¶ 37} "Necessity means that which is indispensible [sic] or requisite especially toward the attainment of some end. * * * In statutory eminent domain cases it cannot be limited to an absolute physical necessity. It means reasonably convenient or useful to the public." *City of Dayton v. Keys* (1969), 21 Ohio Misc. 105, 112, citing *Solether v. Ohio Turnpike Commission* (1954), 99 Ohio App. 228. Accord, *City of Pepper Pike v. Hirschauer* (Feb. 1, 1990), Cuyahoga App. Nos. 56963, 56964, 56965 and 57667, and *City of Toledo v. Kim's Auto & Truck Service, Inc.,* Lucas App. No. L-02-1318, 2003-Ohio-5604, at ¶ 27.

{¶ 38} At the magistrate's hearing, Sinclair presented evidence from the following witnesses: Jeffrey Miller, who is Sinclair's current Director of Business Services; Charles Giles, who was the Director of Business Services for about 25 years prior to his retirement in 2005; and William Boudouris, Sinclair's Vice President and Chief Financial Officer. The office of Business Services is responsible for Sinclair's real estate projects, and Boudouris is responsible for overseeing Sinclair's finances and budget.

{¶ 39} According to the testimony, Sinclair became aware about fifteen years

ago that it was land-locked and needed space for expansion. Initially, Sinclair purchased fifty to sixty lots from willing sellers in the Bank Street area. At the time Sinclair first began acquiring property, its plans involved future expansion, not necessarily specific to parking. In the meantime, the college's need for additional parking increased. According to Miller, students currently are parking external to campus on various locations, some of which are leased by Sinclair and some of which are owned. Congestion issues, traffic flow, the routing of students, and shuttle bus routes pose continuous problems and challenges each quarter. Quality parking and easy access to campus are imperative to continue increased enrollment, and parking is a sensitive issue for students. When asked when Sinclair would like to begin construction of the anticipated parking lot in the Bank Street area, Miller stated that he would like construction to have begun "yesterday." Transcript of Necessity Hearing held on September 18 and October 20, 2006, Volume I, p. 149.

{¶ 40} Prior to the time the appropriation resolution was passed in June 2004, Sinclair had decided to develop the Bank Street area for parking, to alleviate current capacity problems with parking. Although there were two possible locations for parking (the Bank Street and Longworth areas), Bank Street is less expensive than Longworth, and is the primary target. Bank Street has been used for student parking in the past, but it is not currently being used on a temporary basis for student parking, because it is primarily dirt and grass and would not be safe for students. Sinclair plans to construct permanent parking as soon as it can acquire the properties. The college has set aside $8,194,444 for parking expansion. A study performed several years ago indicates options for parking in the Bank Street area

would cost approximately $5,000,000, which is below the amount that has been set aside.

{¶ 41} In response to the above facts, the Farras presented no evidence or testimony. Mr. Farra testified only about his negotiations with Sinclair concerning the purchase of his properties.

{¶ 42} Again, assuming that Sinclair had the burden of proving necessity, Sinclair met the burden. The fact that Sinclair has not yet asked for construction bids, and has not passed a resolution approving construction of a parking lot, is irrelevant. Taking these steps would be a waste of time until the college obtains the land that is needed for construction. As the case before us illustrates, substantial delays can occur in the process. The original appropriation resolution was passed five and a half years ago, and the matter is still not resolved. Sinclair officials testified that construction of a parking lot is necessary for the needs of the college and its students, that the Bank Street area is where they intend to construct the lot, and that money has been set aide in the budget for construction. To accept the Farras' position requires discrediting completely the testimony of college officials, which this court does not have the option of doing, since we defer to the trial court's determination of credibility. "The 'rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *In re J.Y.*, Miami App. No. 07-CA-35, 2008-Ohio-3485, at ¶ 33, quoting from *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. Furthermore, even if we

had the option of assessing credibility, the fact remains that the Farras failed to present any evidence on the issue.

{¶ 43} Accordingly, the Farras' First Assignment of Error is overruled.

III

{¶ 44} Sinclair's First Assignment of Error is as follows:

{¶ 45} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT SINCLAIR'S MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE REMITTITUR OF THE JUDGMENT. (JUNE 12, 2008, JUDGMENT ENTRY ON THE VERDICT; JUNE 18, 2008, JUDGMENT ENTRY ON MOTION FOR REMITTITUR OR NEW TRIAL)"

{¶ 46} Under this assignment of error, Sinclair contends that the trial court erred in refusing to grant a new trial or a motion for remittitur, because the judgment is not sustained by the weight of the evidence and is contrary to law.

{¶ 47} After trial, Sinclair filed a motion for new trial pursuant to Civ. R. 59(A)(2),(6), and (7). Sinclair argued that the verdict is against the manifest weight of the evidence, because the jury verdict is improperly based on Donald Farra's unsubstantiated, unqualified cost testimony. Sinclair also contended that the jury verdict is contrary to law, because the jury disregarded the principle that an appropriation award must be the fair market value of the properties that are taken. The trial court rejected Sinclair's motion, concluding that evidence in eminent domain cases is not limited exclusively to comparable property sales. The court observed that a "willing seller" is part of the equation, and that the jury reasonably considered

Mr. Farra's testimony that he had invested $536,000 in the properties. The court also overruled Sinclair's motion for remittitur, stating that the verdict is not excessive, because testimony ranges from Sinclair's expert evaluation of $167,000 to Mr. Farra's estimate of $2,000,000, which includes Mr. Farra's investment of $536,000 in the properties.

{¶ 48} Under Civ. R. 59(A)(6), a motion for new trial may be granted if the judgment is against the weight of the evidence. We evaluate the trial court's ruling for abuse of discretion, which means that the trial court's decision must be unreasonable, arbitrary, unconscionable, or unconscionable. *Miller v. Remusat*, Miami App. No. 07-CA-20, 2008-Ohio-2558, at ¶ 32 (citations omitted). "[A]n abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, at ¶ 11. "Decisions are unreasonable if they are not supported by a sound reasoning process." *AAAA Ent., Inc. v. River Place Community Urban Redevelopment Corp*. (1990), 50 Ohio St.3d 157, 161.

{¶ 49} With regard to manifest weight, the Ohio Supreme Court has held that:

{¶ 50} "[T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus ('Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence'). We have also recognized when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This

presumption arises because the trial judge [or finder-of-fact] had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' * * * 'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.' " *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶ 24 (parenthetical material added by the Supreme Court; citations omitted).

{¶ 51} The procedures to be followed in appropriation cases are outlined in R.C. Chapter 163. "When all of ones property is appropriated, the rule is simple – the property owner is entitled to receive the fair market value of his entire property interest." *City of Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 413. Fair market value is defined as:

{¶ 52} "[T]he amount of money which could be obtained on the open market at a voluntary sale of the property. It is the amount that a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all circumstances involving the value and use of the property. Market value is determined by the most valuable and best uses to which` the property could reasonably, practically, and lawfully be adapted which is referred to as 'the highest and best use.' " *Masheter v. Ohio Holding Co.* (1973), 38 Ohio App.2d 49, 54.

{¶ 53} "In calculating fair market value of real property, real estate appraisers

employ three recognized methods of appraisal: (1) cost of reproducing the property, less depreciation; (2) market data approach utilizing recent sales of comparable property; and (3) the income or economic approach based upon the capitalization of net income." *Wray v. Hart* (Aug. 13, 1992), Lawrence App. No. 91CA20, 1992 WL 208900, * 6, citing Knepper and Frye, Ohio Eminent Domain Practice (1977) 231-232, Section 8.08. The best evidence is comparable sales. Id. at *7.

{¶ 54} The trial court rejected the motion for new trial, because the verdict of $336,400 is within the ranges of the testimony of value for the three properties. The testimony in this regard is as follows. First, Sinclair's expert valued the properties using comparable sales. He valued Bank Street at $110,000, Sprague Street at $56,000, and the Lot at $1,500, for a total of $167,500. The Farras' expert also used comparable sales, and valued Bank Street at $142,500, and Sprague Street at $110,000, for a total of $252,500.[4] These latter figures include an added "plottage premium," which applies when various pieces of property are being assembled so that greater utility of the property can be made. A premium or higher price is then assigned to the property. In the case before us, the Farras' expert added $14,000 for Bank Street and $10,000 for Sprague Street, but indicated that the premium could be as much as 100% of the fair market value of the properties.

{¶ 55} Mr. Farra valued Bank Street at $300,000, Sprague Street at $186,000, and the Lot at $50,000, for a total of $536,000. This was based on Mr. Farra's estimate of his own costs and labor to improve the houses, plus $50,000 for the value of the land contained in each lot. Mr. Farra asked the jury to award a total of

[4]The Farras' expert did not assign a value for the lot.

$2,000,000, with the amount over $536,000 being a "premium factor," since his property was among the last that Sinclair needs to complete its expansion.

{¶ 56} The general rule in this context for adequacy of a jury verdict is "whether it falls within the range of testimony presented at trial." *Proctor v. Bader*, Fairfield App. No. 03 CA 51, 2004-Ohio-4435, at ¶ 13, citing *Preston v. Rappold* (1961), 172 Ohio St. 524, 528. Although Mr. Farra's testimony had certain deficiencies – his failure to include depreciation of the improvements, for example – the jury could reasonably have decided to award an additional amount as a premium for the assemblage of the Farras' land with land already belonging to Sinclair. The jury verdict was also substantially less than Mr. Farra's stated opinion.

{¶ 57} In presenting the testimony of their expert, the Farras presumably vouched for its accuracy. But their expert acknowledged that the cost of improvements, of which he lacked knowledge, was a legitimate factor; and he acknowledged, more generally, that an owner of property may have a better understanding of its value than an appraiser. To this extent, the testimony of the Farras' expert was not completely inconsistent with Mr. Farra's own testimony.

{¶ 58} In *Orange Village v. Tri-Star Development Co.* (March 15, 2001), Cuyahoga App. No. 77358, the defendant owned a one-acre parcel bordered by commercial properties and by a 26.8 acre parcel of land owned by the City of Cleveland. The City's parcel was landlocked, and the City decided to appropriate the defendant's property in order to create a roadway to the commercial property. The defendant's expert valued the parcel at $650,000, by considering it in conjunction with the City's landlocked parcel. The City, however, valued the

property at between $150,000 and $195,000, using comparison sales and a land residual approach. Ultimately, the jury awarded the defendant $650,000 for the land.

{¶ 59} On appeal, the City argued that the trial court had erred in instructing the jury that it could consider the enhanced value of the property though assemblage with the City's property. The Eighth District Court of Appeals rejected this argument, stating that:

{¶ 60} "The fact that the adjoining Cleveland property is landlocked has a tremendous impact on the subject property which provides the Cleveland property with the only means of ingress and egress. In fact, negotiations were entered into by Figgie International, the prior developer of the property, with the defendant, with the goal of making the Cleveland property accessible. After Figgie International discovered that the plaintiff was contemplating appropriating the property, however, the negotiations stalled.

{¶ 61} "It is simply not reasonable to conclude that if the appropriation did not occur, the City of Cleveland or the new developer of the land would have chosen to keep the property landlocked instead of entering into an agreement with the defendant. Such an arrangement is not speculative because the arrangement would have been the only choice the City of Cleveland would have in order to make any use of its property.

{¶ 62} "We acknowledge that this court in *Weir v. Kebe* (April 15, 1982), Cuyahoga App. No. 43722, 43723, unreported, held that in an appropriation proceeding a property owner may not enhance the value of his property by proof of

contingent and prospective uses of the property relative to the adjoining property of other persons. However, the reasoning behind this holding was that such evidence would be largely speculative. In the case before us, we find we have the unique circumstance where such evidence is not largely speculative.

{¶ 63} "The United States Supreme Court in *Olson v. United States* (1934), 292 U.S. 246, 256-257, 54 S.Ct. 704, 78 L.Ed. 1236 held:

{¶ 64} " 'The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value.

{¶ 65} "* * *

{¶ 66} "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value – a thing to be condemned in business transactions as well as in judicial ascertainment of truth.'

{¶ 67} "We find in the case herein that the assemblage of the parcel with the Cleveland property is a reasonable consideration in determining the market value, given the fact that the Cleveland property would be landlocked without entering into an agreement with the defendant, and the fact that negotiations had occurred with the prior developer of the Cleveland property. The defendant's expert also testified that, given the landlocked nature of the Cleveland property, an assemblage should

not be ignored in valuing the property * * * and stated that the prospect for such an assemblage was a strong likelihood. * * * ." *Orange Village,* 2001 WL 259190, * 2-3.

{¶ 68} Accordingly, the jury in the case before us was entitled to consider Sinclair's proposed non-residential use of the property, despite the fact that the property is currently zoned residential. "In a land appropriation trial, the property is valued on the basis of any and all uses for which it may be suited, including the highest and best uses to which it may reasonably be adapted." *Smith v. Walter* (March 9, 1987), Montgomery App. No. CA 10111, 1987 WL 7505, * 2. In *Smith*, we also noted that:

{¶ 69} "[I]n considering a purchase of real property, a prudent businessperson would be attentive to factors such as a changing real estate market and evolving patterns of land use in the area surrounding the property. We also think it likely that a knowledgeable purchaser would be aware of whether similarly situated property in the area had been re-zoned and whether other parcels in the vicinity had sold for amounts greater than was justified under their existing use classifications." Id. at * 3.

{¶ 70} In addition to offering expert testimony about plottage or assemblage premiums, Mr. Farra testified regarding a prior transaction between Sinclair and the City of Dayton in the Bank and Sprague Street area. At the time, the City of Dayton needed a small parcel owned by Sinclair in order to complete construction of the RTA Transfer Museum project. An ordinance was admitted into evidence, indicating that Dayton had conveyed four parcels of land in the area, or a total of approximately 12,394 square feet of land, to Sinclair, in exchange for Sinclair's transfer of 54

Sprague Street, which was a parcel of only 2,065 square feet. Mr. Farra offered this transaction as an instance of assemblage, where Sinclair had received a premium of approximately 600% for its land, because the City needed the final piece of property to complete the museum project.

{¶ 71} In view of these circumstances, and the fact that the jury verdict was well within the range of values for the land offered in evidence at the trial, we cannot say that the trial court abused its discretion in overruling Sinclair's motion for a new trial. For the same reasons, the trial court did not err in overruling the motion for remittitur.

{¶ 72} "A court has the inherent authority to remit an excessive award, assuming it is not tainted with passion or prejudice, to an amount supported by the weight of the evidence. * * * [T]he specific criteria that must be met before a court may grant a remittitur [are]: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages." *Wightman v. Consolidated Rail Corp*., 86 Ohio St.3d 431, 444, 1999-Ohio-119 (Citation omitted; bracketed material added by the Ohio Supreme Court). We review decisions on motions for remittitur for abuse of discretion. *Brady v. Miller*, Montgomery App. No. 19723, 2003-Ohio-4582, at ¶ 5, n. 1, and *Hollingsworth v. Time Warner Cable,* 168 Ohio App.3d 658, 2006-Ohio-4903, at ¶ 48. Because the verdict in the case before us is not excessive, the trial court did not abuse its discretion in denying the motion for remittitur.

{¶ 73} Sinclair's First Assignment of Error is overruled.

IV

{¶ 74} Sinclair's Second Assignment of Error is as follows:

{¶ 75} "THE TRIAL COURT ERRED BY REFUSING TO ORDER AN EVIDENTIARY HEARING ON JUROR MISCONDUCT AS REQUESTED IN SINCLAIR'S MOTION FOR NEW TRIAL AND REQUEST FOR HEARING. (JUNE 18, 2008, JUDGMENT ENTRY ON MOTION FOR REMITTITUR OR NEW TRIAL)"

{¶ 76} Under this assignment of error, Sinclair contends that the trial court erred in failing to hold an evidentiary hearing on an issue of juror misconduct. The evidence of alleged juror misconduct in the case before us was submitted in the affidavit of Sinclair's counsel, who testified about remarks made by juror John Barnett. Barnett asked counsel for Sinclair after the verdict if counsel thought the verdict was fair. Barnett then indicated that he would actively campaign against Sinclair's levy efforts if the verdict were appealed. Barnett also made comments about knowing how to use Montgomery County's electronic case-reporting system (the PRO system), and allegedly turned red, without answering, when asked to assure counsel that he had not accessed the system during trial. Sinclair also attached information indicating that the PRO system had been accessed during trial, including a substantial number of times during the evening before the jury began deliberating. The Farras' counsel countered this affidavit with evidence that the attorneys for the Farras had accessed the PRO system during trial, and that the Farras had accessed the County website the evening before jury deliberation. The Farras' counsel also stated that other persons, including his acquaintances and the

media were aware of the trial, and could have accessed the website at any of the times in question.

{¶ 77} The trial court rejected Sinclair's request for an evidentiary hearing, concluding that the only evidence aliunde (evidence other than jury deliberations and statements by jurors themselves) would be the number of hits on the Montgomery County Common Pleas Court's website. The court concluded that this evidence fell "woefully short" of establishing that any misconduct was caused by the introduction of extraneous information into jury deliberations.

{¶ 78} Sinclair contends that its attorney's affidavit is "outside" evidence, and does not betray juror communications. Sinclair also contends that the number of times the PRO system was accessed (21 times the day before the jury received the case), is circumstantial evidence warranting a hearing, when combined with Barnett's visible discomfort and his refusal to answer about accessing the PRO system.

{¶ 79} Evid. R. 606(B) provides that:

{¶ 80} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. * * * "

{¶ 81} In *State v. Schiebel* (1990), 55 Ohio St.3d 71, the Ohio Supreme Court stated that:

{¶ 82} "Evid.R. 606(B) governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict. The first sentence of Evid.R. 606(B) embodies the common-law tradition of protecting and preserving the integrity of jury deliberations by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations. The rule is designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties." Id. at 75 (citation omitted).

{¶ 83} The Ohio Supreme Court also noted in *Schiebel* that:

{¶ 84} "In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves, * * * and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. * * * Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence aliunde." Id. at 75-76 (citations omitted).

{¶ 85} The Farras cite *State v. Flagg* (June 18, 1999), Montgomery App. No. 17421, as support for the proposition that an attorney's testimony about juror

misconduct is incompetent and improper evidence aliunde when the evidence is learned from a juror. In *Flagg*, we did conclude that the trial court had properly refused to hear testimony from an attorney's employee, who had learned of alleged juror misconduct when she received a phone call from one of the jurors. We held that the employee was incompetent to testify as to the juror's hearsay statements.

{¶ 86} Likewise, in *State v. Kellum* (Sept. 10, 1982), Miami App. No. 81 CA 47, 1982 WL 3795, we held that the affidavit of the defendant's attorney, who had overheard a juror's comments to the prosecutor about extraneous information, was not evidence aliunde. We stated that "A third person's affidavit to the effect that he has heard jurors make, subsequent to trial, statements tending to impeach their verdict, is not evidence aliunde. This result is based on the fact that the evidence is received not from another source, but from the jurors themselves." Id. at * 8 (citations omitted).

{¶ 87} Sinclair argues that evidence pertaining to the number of online inquiries is external evidence of misconduct. However, as the trial court noted, there is no evidence linking the inquiries with the jury. If a means existed of tracing inquiries to particular sources, Sinclair's argument would, perhaps, carry more weight. However, there is no evidence in the record to justify an evidentiary hearing.

{¶ 88} Sinclair also cites *Lewis v. Pizza Rack, Inc*. (March 23, 1992), Stark App. Nos. CA-8528, CA-8530, in which testimony by a third party concerning a conversation concerning the case by two jurors in a hallway during the trial was held to satisfy the aliunde rule. But in that case, the evidence of juror misconduct was not supplied by a juror's statement; the evidence was supplied by a non-juror who

overheard the misconduct, itself.

{¶ 89} Sinclair's Second Assignment of Error is overruled.

V

{¶ 90} The Farras' Second Assignment of Error is as follows:

{¶ 91} "THE TRIAL COURT ERRED WHEN IT EXCLUDED FROM EVIDENCE THE COUNTY AUDITOR'S OPINION OF VALUE OF THE PROPERTIES. (ORDER SUSTAINING PLAINTIFF'S MOTION IN LIMINE, DOCKET ENTRY 137, TRIAL TRANSCRIPT AT 199, 625)"

{¶ 92} Under this assignment of error, the Farras contend that the trial court erred by excluding the county auditor's opinion of value from evidence. However, the Farras also indicate in their brief that this assignment of error would be moot if we affirm the judgment of the trial court as to damages. Since we are affirming the judgment as to damages, we agree that this assignment of error is moot, and need not be considered.

VI

{¶ 93} All of the assignments of error of both parties having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

BROGAN and GRADY, JJ., concur.

Copies mailed to:

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