

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

OHIO POWER COMPANY,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	Case No. 09CA1/09AP1
	:	
	:	<b>Released: November 3, 2009</b>
vs.	:	
	:	
CHARLES R. OGLE, et al.,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendants-Appellants/ Cross-Appellees.	:	

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APPEARANCES:

Ray R. Michalski and D. Joe Griffith, Dagger, Johnston, Miller, Ogilvie & Hampson, LLP, Lancaster, Ohio, for Defendants-Appellants/Cross-Appellees.

Brian L. Buzby, Porter, Wright, Morris & Arthur, LLP, Columbus, Ohio, and Charles Gerken, Logan, Ohio, for Plaintiff-Appellee/Cross-Appellant.

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Per Curiam:

{¶1} Charles and Melanie Ogle, Defendants-Appellants/Cross-Appellees, appeal the decision of the Hocking County Court of Common Pleas granting an easement on their property to Plaintiff-Appellee/Cross-Appellant, Ohio Power Company. In a cross-appeal, Ohio Power challenges the trial court's decision denying their motion for a directed verdict on the issue of damages to the residue of the property. Ohio Power also argues the

trial court erred in failing to instruct the jury that there was no evidence of such damage.

{¶2} Because the Ogles fail to show that Ohio Power abused its discretion in determining the easement is necessary for a public use, their assignment of error fails. In our view, because the jury could have reasonably concluded the taking of the easement created a diminution in value of the residue, Ohio Power's assignments of error also fail. Accordingly, we overrule both parties' assignments of error and affirm the decision of the trial court.

#### I. Facts

{¶3} Ohio Power Company commenced this action in June 2007 to obtain an easement across real property owned by the Ogles. Ohio Power sought the easement in order to install a power line which would serve a communications tower being constructed on property adjacent and to the south of the Ogles' property. The purpose of the proposed tower is to facilitate Ohio Power's communications with its employees in the field. When approached about the possibility of an easement, the Ogles told Ohio Power they would not consent to having power lines cross their property unless the installation was underground.

{¶4} The Ogles' property, consisting of approximately 88 acres, is bisected by Donaldson Road, running north and south through the length of

the property. Since purchasing the land in 1990, the Ogles have improved the property by building their residence there and in constructing various outbuildings, fenced pastureland and other amenities. The Ogles' electricity needs are completely met by their own solar power plant and they are not connected to any outside electrical source. Ohio Power's easement and proposed power line would run along the length of Donaldson Road as it runs through the property.

{¶5} Pursuant to R.C. 163.09, the trial court bifurcated the matter, first holding a hearing to determine if the proposed easement was a public necessity and reserving for later the issue of compensation. Ohio Power's easement would be approximately 1,500 feet long and 30 feet wide, constituting approximately one acre in total. After a full hearing on the matter, the trial court determined the taking was necessary. Subsequently, a jury trial was held to determine the amount of compensation the Ogles would receive for the easement and for the damage to the residue.

{¶6} After a two-day trial on the issue of compensation, Ohio Power moved for a directed verdict on the issue of damage to the residue of the property and, in the alternative, moved that the trial court issue an instruction that the jury could not award damages on the residue. The trial court denied both motions. The jury then awarded the Ogles \$4,000 for the

market value of the granted easement and \$50,000 for damages to the residue of the property.

{¶7} Subsequent to the jury's decision, the Ogles timely filed the current appeal and Ohio Power timely filed their cross-appeal.

## II. Assignment of Error

- I. THE TRIAL COURT ERRED, AS A MATTER OF LAW AND FACT, IN DETERMINING THAT THE APPELLEE'S APPROPRIATION OF AN ELECTRIC LINE EASEMENT OVER AND ACROSS THE REAL ESTATE OF THE APPELLANTS IS NECESSARY FOR A PUBLIC USE.

## III. Cross-Assignments of Error

- I. THE TRIAL COURT ERRED IN DENYING OHIO POWER'S MOTION FOR DIRECTED VERDICT ON THE ISSUES OF DAMAGES TO THE RESIDUE.
- II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD NOT AWARD DAMAGES FOR DAMAGE TO THE RESIDUE.

## IV. Assignment of Error

{¶8} In their sole assignment of error, the Ogles argue the trial court erred in determining the easement granted to Ohio Power was necessary for a public use. The Ogles do not dispute that, under R.C. Chapter 163, Ohio Power is a public utility which has the right, under certain circumstances, to appropriate property for public service. Rather, the sole basis for their argument is that, in this instance, the appropriation was not a public necessity.

{¶9} When Ohio Power filed its appropriation petition, R.C. 163.09(B) stated that, when an answer to such a petition denies the necessity for the appropriation: “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.”<sup>1</sup>

{¶10} Ohio Power adopted a resolution of necessity for the appropriation. Thus, under R.C. 163.09(B), the burden of proof fell upon the Ogles to demonstrate that the appropriation was not necessary. Further, the Ogles concede that, in order to find that there was no necessity for the power line, the trial court would have had to determine that Ohio Power abused its discretion. In reviewing the trial court’s conclusion that there was no such abuse of discretion, we are limited to determining whether the decision was supported by competent and credible evidence. *City of Toledo*

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<sup>1</sup> {¶ a} R.C. 169(B) has been amended since the filing of the case sub judice. Under current R.C. 169(B), regarding the burden of proof, the statute now reads, in pertinent part:

{¶ b} “(1) \* \* \* Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence except as follows:

{¶ c} “(a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.”

*v. Kim's Auto & Truck Service, Inc.*, 6th Dist. No. L-02-1318, 2003-Ohio-5604, at ¶10; *Erie-Ottawa-Sandusky Regional Airport Authority v. Orris* (Sept. 13, 1991), 6th Dist. No. 90-OT-039, at \*4.

{¶11} Neither party disputes the following: Ohio Power sought to obtain an easement directly from the Ogles, but the parties were unable to come to terms which were mutually satisfactory; Ohio Power is a public utility entitled to appropriate land pursuant to Ohio Law; because Ohio Power adopted a resolution of necessity, the Ogles bear the burden of proof of showing the appropriation was not necessary; the trial court's relevant inquiry was whether Ohio Power abused its discretion in appropriating the Ogles' property. As such, the only point of contention between the parties is whether the taking was a public necessity.

{¶12} The parties fundamentally disagree about the meaning of the term "public necessity." Ohio Power argues the only relevant question is whether the project furthers a public purpose. In contrast, while not denying that Ohio Power's project may serve a public purpose, Appellant argues that a determination of public necessity also requires an examination into the manner in which the project is to be implemented. Essentially, the Ogles argue that it is not necessary for Ohio Power to put the power line aboveground when a less intrusive method, burying the line, is available.

However, because the Ogles failed to meet their burden of proof, we overrule this assignment of error.

{¶13} As previously stated, Ohio Power adopted a resolution that the easement was necessary. Under R.C. 163.09(B), after adopting such a resolution, the burden of proof shifts. As such, Appellant was presumed to have acted regularly and in a lawful manner until the contrary was shown. Thus, the Ogles needed to offer proof that Ohio Power abused its discretion in determining the taking was necessary. However, at the necessity hearing, the Ogles put forth no evidence suggesting Ohio Power did not make a reasoned decision. In their brief, the Ogles state that Ohio Power did not introduce any evidence showing that a number factors, such as anticipated load increases, aesthetics, and environmental impact, were taken into consideration before it passed the resolution of necessity. However, this argument mistakes the burden of proof. Ohio Power had no duty to rebut the claim unless the Ogles presented evidence that Ohio Power failed to consider such factors. The Ogles simply failed to do so.

{¶14} The Ogles also seem to argue that the existence of a prior plan conceived by Ohio Power, to install the line below ground, shows it abused its discretion in deciding, ultimately, to install the line aboveground. However, the existence of an alternate plan may also be construed as

demonstrating that Ohio Power made a reasoned and good faith effort to exercise its discretion by considering various methods of implementation. Further, the Ogles failed to present evidence demonstrating Ohio Power's reasoning, or lack thereof, in ultimately deciding to install the line aboveground. It's possible that Ohio Power determined aboveground installation was prohibitively expensive, or that underground installation was untenable because of complications specific to the property in question. Because no evidence was presented on the matter, we simply do not know the factors Ohio Power considered, or did not consider, in deciding to install the line aboveground instead of below.

{¶15} Finally, the existence of alternate routes or methods of implementation is not proof that a taking is unnecessary. “Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court.” *Cincinnati Gas and Electric Company v. Davies* (June 30, 1975), 1st Dist. Nos. CA 74-10-0086, CA 74-10-0087, at \*4, citing *Ohio Edison Co. v. Gantz* (1958), 109 Ohio App. 127, 159 N.E.2d 478. “Appellants essentially argue that an alternative route could have been chosen. However, the existence of alternative routes to the one selected

does not show that a necessity, i.e., reasonable public use, did not exist for that selection. In such instances, choice of routes is discretionary.” *Ferencz v. City of Toledo* (Dec. 30, 1988), 6th Dist. No. L-87-379, at \*3.

{¶16} Accordingly, because Ohio Power passed a resolution of necessity, and because the Ogles failed to meet their burden of proof that the taking was unnecessary, the trial court had competent and credible evidence to find in favor of Ohio Power. As such, the Ogles assignment of error is overruled.

#### V. First Cross-Assignment of Error

{¶17} Ohio Power, in its first assignment of error on cross-appeal, asserts the trial court erred in denying its motion for a directed verdict on the issue of damage to the residue of the Ogles’ property. Initially, we state the appropriate standard of review.

{¶18} “A motion for a directed verdict \* \* \* does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.” *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, at ¶96, quoting *O’Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. Accordingly, we apply a de novo standard of review. *Wright* at ¶96; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶4.

{¶19} Further, when a trial court rules on a motion for a directed verdict, it must consider neither the weight of the evidence nor witness credibility. *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, at ¶31, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284, 423 N.E.2d 467. A trial court should not grant a directed verdict unless, after construing the evidence most strongly in favor of the party against whom the motion is directed, “reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.” *Groob v. Keybank*, 108 Ohio St.3d 348, 843 N.E.2d 1120, 2006-Ohio-1189, at ¶14; quoting Civ.R. 50(A)(4).

{¶20} In the case sub judice, after the trial court concluded the taking of Appellants’ property was a public necessity, a jury trial was conducted to determine compensation. Ohio Power called one witness, Dan Singer, a real estate appraiser. Singer testified that he was hired to determine the value of the proposed easement; determining the diminution in value of the residue was not part of his appraisal. Singer concluded that, according to his evaluation, the fair market value of the land encompassing the easement was approximately \$3,600. He further testified that, in his opinion, the power poles and power lines which would run along the

easement would not diminish the value of the real property. Thus, he testified that there would be no damage to the residue.

{¶21} Charles and Melanie Ogle also testified regarding the value of their property. Each testified that, over the years, they had made significant improvements to the property including: their residence, a log home; a solar power system which met all of their electricity needs; an underground telephone line; a greenhouse; a large garage; a barn and various outbuildings; a water well and septic system; a natural gas system; and fencing and pastureland. Charles Ogle stated that, in his opinion, the property was worth approximately \$15,000 an acre. He testified that he arrived at that figure based upon his relatively recent purchase of two lots in close proximity to the property in question:

{¶22} “Well, the basis for that opinion if you look at the lots that we purchased and the tax cards, they are public record. Lot 6 that we purchased we paid \$10,025 per acre for that lot. Okay. And lot 5 that we purchased right here, we paid \$17,064.84 per acre.” \* \* \* “I would put a value of \$15,000 an acre on my property because that property to the south is worth \$15,000 an acre. In fact, some property sold for more than \$15,000 an acre.”

{¶23} Melanie Ogle testified that, based upon what she knew about property values in the area, Singer's estimate was “absolutely not” an

accurate valuation of the property. She noted that another property along Donaldson Road had sold for \$215,000, and that was for approximately 43 acres of unimproved land. In her view, her property, consisting of 88 acres with the improvements noted above, was worth at least \$750,000. “I guarantee you I wouldn’t have any problem selling it for that.”

{¶24} The Ogles also testified that the installation of an aboveground power line, running the length of Donaldson Road, would decrease the value of the residue of their property. Currently, Donaldson Road, which bisects the Ogles’ property, is tree-lined and free of power and telephone lines and poles. Ohio Power did not contest that installing the aboveground power line would require the removal of certain trees along the easement. The Ogles placed into evidence numerous photos, including the trees which would be removed along Donaldson Road and views from various vantage points on the property which would be degraded by the installation of power poles and lines. The Ogles testified that the proposed aboveground installation would seriously affect the aesthetics of the property and, thus, significantly affect the value of the residue. Melanie Ogle stated that, in her opinion, it would decrease the value of the property by, at least, ten percent.

{¶25} When there is a partial taking of real property, the landowner is entitled to receive compensation both for the appropriated property and for any damage to the remaining property. Such damage to the residue is the difference between the fair market value of the residue before and after the taking. *Wray v. Goeglein* (Dec. 2, 1998), 4th Dist. No. 97 CA 9, at \*7, citing *Englewood v. Wagoner* (1987), 41 Ohio App.3d 324, 326, 535 N.E.2d 736, 739. Further, under the “owner-opinion rule,” because property owners are assumed to be so closely acquainted with their property as to be aware of its market value, they are deemed competent to testify as to that value. Such testimony does not require a specific foundation as would that of an expert witness. *Smith v. Padgett*, 32 Ohio St.3d 344, 513 N.E.2d 737; *Conkle v. Southern Ohio Med. Ctr.*, 4th Dist. No. 04CA2973, 2005-Ohio-3965, at ¶16. “In the context of establishing the market value differential, the ‘owner-opinion rule’ permits appellee to offer his opinion of the value of the property after the injury.” *Fox v. Williams* (May 28, 1996), 4th Dist. No. 95 CA 38, at \*2.

{¶26} In the case sub judice, Ohio Power argues the Ogles’ testimony regarding the property’s value, and the diminution of value to the residue after the taking, was unsubstantiated and merely speculative, and

that the only basis for determining valuation was provided by Ohio Power's expert, Dan Singer. We disagree.

{¶27} In an appeal based upon a motion for a directed verdict, we consider neither the weight of the evidence nor witness credibility. Here, Ohio Power and the Ogles presented conflicting evidence as to both the value of the property as a whole and the damage, or lack thereof, to the residue. As the finder of fact, the jury was free to believe or disbelieve, in whole or in part, the testimony of Singer and the Ogles related above. The jury may have believed, for instance, because Ohio Power did not ask Singer to prepare an appraisal of the diminution of value of the residue, and because Singer admittedly did not consider the Ogles' improvements to the property, his opinion that there was no diminution was not convincing. The jury may also have chosen to give weight to the Ogles contention that the culling of trees and the installation of power poles would significantly impact the aesthetics of the property and, thus, diminish the value of the residue.

{¶28} After construing the evidence most strongly in favor of the Ogles, we find that reasonable minds could have come to the conclusion that the removal of trees and the installation of aboveground power lines and poles on the Ogles' property could result in a diminution of value to the

residue in the amount of \$50,000. Accordingly, Ohio Power's first cross-assignment of error is overruled.

#### VI. Second Cross-Assignment of Error

{¶29} Ohio Power's second cross-assignment of error states that the trial court erred in failing to instruct the jury that it could not award damages for damages to the residue of the property. In this assignment of error, Ohio Power simply states that for the reasons cited in its first assignment of error, the trial court should have instructed the jury that it could not award such damages. Accordingly, following our rationale in Ohio Power's first assignment of error, we also overrule its second assignment of error.

#### VII. Conclusion

{¶30} For the foregoing reasons, we overrule the assignment of error of Charles and Melanie Ogle and the cross-assignments of error of Ohio Power. The Ogles' argument fails because they did not meet the required burden of proof. That is, they failed to show that Ohio Power abused its discretion in determining the taking of the easement was necessary for a public use. Ohio Power's cross-assignments of error fail because, when the evidence is considered in a light most favorable to the Ogles, reasonable minds could conclude the property suffered a diminution in value to the residue. Accordingly, we affirm the judgment of the court below.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee/Cross-Appellant recover of Appellants/Cross-Appellees 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 Hocking County Common Pleas Court to carry this judgment into execution.

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

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

Kline, P.J., Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Presiding Judge Roger L. Kline

BY: \_\_\_\_\_  
Judge Peter B. Abele

BY: \_\_\_\_\_  
Judge Matthew W. McFarland

**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.**