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Commonwealth Of Kentucky

Court Of Appeals

NOS. 2000-CA-002314-MR, 2000-CA-002389-MR,
2000-CA-002390-MR, 2000-CA-002391-MR,
AND 2000-CA-002393-MR

R. J. CORMAN RAILROAD COMPANY/MEMPHIS LINE APPELLANT

CONSOLIDATED APPEALS FROM LOGAN CIRCUIT COURT
v. HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTIONS NOS. 96-CI-00048, 95-CI-00199,
95-CI-00560, 95-CI-00561 AND 95-CI-00565

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: R. J. Corman Railroad Company/Memphis Line has appealed from a summary judgment entered by the Logan Circuit Court on September 12, 2000, which ruled as a matter of law that Corman had suffered no compensable loss as a result of the Department of Highways' installation of six crossings over its railroad tracks. Having concluded that there is a genuine issue

as to a material fact concerning the railroad's claim for compensatory damages, we reverse the summary judgment and remand for further proceedings.

The right of way of Corman's Memphis Line begins at a point just south of Bowling Green, Kentucky, in Warren County, runs south through Logan County and terminates at a point on the Cumberland River, near Clarksville, Tennessee. During the last decade, the Department of Highways undertook a project to relocate U.S. Highway 68/Kentucky Highway 80 through Logan County and to widen the highway to four lanes with controlled access. Acting under the Eminent Domain Act of Kentucky (1976),[1] the Department brought five separate proceedings in Logan Circuit Court to condemn a total of six grade-level highway crossing easements across Corman's right of way as a part of this project. Two of these easements replaced the crossings for two two-lane roads which intersect Highway 68/80. These replacements became necessary when the intersections of these two roads with Highway 68/80 were relocated. The remaining four easements are for new crossings where the relocated and widened Highway 68/80 actually crosses the railroad.

As mandated by KRS 416.580, the circuit court appointed commissioners to make the initial awards of just compensation in each action. The commissioners arrived at their determination for each crossing by taking the difference between the fair market value before and after the taking coupled with the fair

[1]Kentucky Revised Statutes (KRS) 416.540 through 416.670.

market value of temporary construction easements when appropriate. Both parties filed exceptions to each of the commissioners' awards and the cases remained on the circuit court's docket for further proceedings.

In response to a motion by the Department of Highways, the circuit court ruled that the sole measure of damages applicable in any condemnation case in Kentucky is set out in KRS 416.660 (the difference between the fair market value before and after the taking). The circuit court went on to state that it anticipated "instructing the jury concerning this law and no other alternative measure of damages." On June 8, 1999, the circuit court entered an order consolidating the cases for trial before a single jury. The cases were brought on for jury trial on May 25, 2000, following several continuances.

After the jury was empaneled, counsel for Corman was permitted to interrogate Robert Knight, the Department of Highways's valuation witness, on voir dire, out of the presence of the jury. Testimony and discussion with counsel soon revealed that the opposing experts had appraised different portions of the railroad property. Due to the disagreement of the parties on the issue, the circuit court ruled that before the matter could be presented to a jury, it was necessary pursuant to KRS 416.660 to determine the precise boundaries of the "entire tract" as a matter of law. According to the circuit court, at least one of the parties, if not both, incorrectly defined the tract of property to be valued. The circuit court concluded that any

ruling it made during the trial defining the tract might result in the inadmissibility of the testimony of one or both experts due to lack of relevance. The Department of Highways moved for a continuance following Knight's testimony and the circuit court, over an objection by Corman, declared a mistrial, dismissed the jury and reassigned the cases for trial on September 21, 2000.

Shortly before the rescheduled trial was to begin, the Department of Highways moved for summary judgment. The Department argued that Corman had, as a matter of law, suffered no compensable damages by reason of the takings. Corman filed a motion in limine seeking a ruling which would permit it to prove the fair market value of its right of way immediately before and immediately after the takings utilizing a capitalization of net income approach. Corman also sought permission to have its valuation expert and other witnesses explain the reasons for the differences in the net income to be capitalized before and after the takings, including all relevant factors that a knowledgeable buyer would consider as having an impact on the income to be capitalized as a result of the takings such as the maintenance and liability costs created by the crossing easements. In support of its motion in limine, Corman submitted the affidavit of its valuation witness, Howard Capito, which contained a brief summary of the proposed method of valuation.

These motions were heard by the circuit court on September 11, 2000. The circuit court concluded that in the interest of judicial economy and due to its inability to predict

in advance what this Court's ruling would be, the best approach for it to follow was to seek what can most accurately be called an advisory opinion from this Court. Accordingly, the circuit court sustained the Department of Highway's motion for summary judgment and encouraged Corman to appeal its ruling. This appeal followed.

It is beyond dispute that a railroad's right of way is property entitled to constitutional protection and that the taking of an easement across a railroad's right of way must be accompanied by the payment of just compensation.[2] The continued vitality of this rule was recognized in Loretto v. Teleprompter Manhattan CATV Corp.[3] The United States Supreme Court made a narrow holding in the Loretto case, affirming the traditional rule that a permanent physical occupation is a taking and the property owner in such a case has an expectation of compensation, but noting that it did not question the substantial authority upholding a State's broad power to impose restrictions on an owner's use of his property.[4] Kentucky courts are in accord with this line of reasoning as evidenced by the decision in Louisville & Nashville R.R. Co. v. City of Louisville,[5] in which the Court stated that a railroad company is entitled to just compensation

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[2]Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540, 25 S.Ct. 133, 49 L.Ed. 342 (1904).

[3]458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[4]Id., 458 U.S. at 441, 73 L.Ed.2d at 886.

[5]131 Ky. 108, 114 S.W. 743, 748 (1908).

for the establishment of a highway or street over its line or right of way regardless of whether the company is the owner of the fee or merely holds an easement for right of way. It is worth noting that Kentucky's highest court in City of Louisville was specifically addressing the right of a railroad to just compensation for an easement taken for the construction of a grade-level roadway crossing. This line of precedents left no doubt that railroad property is entitled to the same constitutional protection as individual property. However, the analysis does not end there, since we must also determine the appropriate measure of compensation in such a case.

Section 242 of the Kentucky Constitution provides that in condemnation proceedings the amount of damages shall "in all cases, be determined by a jury, according to the course of the common law." This Court has consistently upheld the principle that, absent an effective waiver, Section 242 creates an absolute right to a jury trial on the question of damages in a condemnation proceeding in a line of cases beginning with Louisville & Nashville R.R. Co. v. Lang,[6] and extending through Equitable Life Assurance Society of the United States v. Taylor.[7] We therefore reiterate that if a railroad is entitled to payment for a crossing, it is entitled to have the compensation assessed by a jury.

However, not every acquisition of an easement for a

[6]160 Ky. 702, 170 S.W. 2, 3 (1914).

[7]Ky.App., 637 S.W.2d 663 (1982).

railroad crossing amounts to a compensable taking. There must be competent evidence of diminution in the value as a result of the acquisition in order for it to constitute a compensable taking. If no such competent evidence is presented, no compensable taking has occurred as a matter of law, and there is no issue for the jury to decide.

Kentucky's highest court has stated unequivocally that "[t]he only damage is the difference in market value before and after the taking, and that is the only issue to be submitted to the jury."[8] Similarly, the Court required that a jury in a condemnation case decide from the evidence and include in its verdict: (A) the fair market value of the property as a whole immediately prior to the taking; (B) the fair market value of the tract remaining immediately after the taking; and (C) the difference between A and B which sum should be the amount of compensation awarded for the taking.[9] This measure of damages has since been incorporated into the Eminent Domain Act of Kentucky which governs cases such as the one before us, and neither party attempts to discredit this method.[10] The dissension stems from its application. Conceivably, a jury could determine that the after value equals or exceeds the before value after applying this formula. As argued by the Department, in

[8]Commonwealth, Dept. of Highways v. Sherrod, Ky., 367 S.W.2d 844, 854 (1963).

[9]Commonwealth, Dept. of Highways v. Priest, Ky., 387 S.W.2d 302, 306 (1965).

[10]See KRS 416.660.

such a case, no compensable taking has occurred and the property owner is entitled to no payment. The Department further argues that if the only evidence produced by the property owner relating to diminution in value is based solely on improper factors considered by its only valuation witness with the result that the evidence of the valuation witness is legally incompetent and excluded, the necessary conclusion is that the value has not diminished, and as a matter of law, no compensable taking has occurred.

Returning to Sherrod, we observe that every physical taking is not, by definition, a compensable taking as confirmed by our highest court when it interpreted the reasoning of the United States Supreme Court supporting its decision to uphold a statute requiring that benefits be offset against both taking and resulting damages:

> The reasoning of the [U.S.] Supreme Court was, in substance, that the "property" of a landowner is a value unit, and when a portion of the land is taken, and perhaps the remainder damaged, the only question is: How much has the unit been reduced in value, without regard to what physical components may have been taken from the unit? In other words, "property" within the meaning of constitutional eminent domain provisions is value and not tangible substances. The owner's "property" is taken in condemnation only to the extent he has lost value. We think this view is sound [emphases original].[11]

In Commonwealth, Dept. of Highways v. Tyree,[12]

[11]Sherrod, supra at 856-57.

[12]Ky., 365 S.W.2d 472, 476 (1963).

Kentucky's highest court addressed the issue of relevancy as presented in connection with the testimony of a witness who in making his estimate of values relies upon an irrelevant measure of value or an element of value that is legally noncompensable, holding that if cross-examination of the valuation witness reveals the factors that were considered by the witness, and "one or more of those factors is invalid in that it involves an irrelevant measure of value or a legally noncompensable element of value, it would seem that his testimony should be subject to a motion to strike because it is based upon irrelevant factors."[13] The Court elaborated by providing examples, stating that an irrelevant measure of value might be the price paid by the state in condemning another piece of property or the sale price of a noncomparable piece of property and noncompensable elements might include loss of profits or diversion of traffic.[14] In Tyree, the Court concluded that if irrelevant factors are used by the witness, then his estimates are consequently invalid and are to be excluded completely from consideration by the jury except for instances where the witness has attributed a specific value to the irrelevant factor and then the irrelevant factor can be eliminated from his estimate, leaving the remaining estimate as acceptable evidence.[15]

Two years later, the high court was again presented

[13]Id. at 476.

[14]Id.

[15]Tyree, supra at 476.

with a case which demanded that it revisit the issue of how to deal with a valuation witness, who, after giving apparently competent testimony on direct examination, admits on cross-examination that he included an improper factor in his analysis. The tenets set forth in Tyree were upheld as indicated by the following excerpt:

> At the conclusion of his cross-examination a motion is made to strike his entire testimony, as was done in this instance. When the witness's valuation is "based solely or primarily on an improper factor his estimate becomes invalid and is subject to a motion to strike." But when the improper factor can be eliminated from his calculations and the estimate revised accordingly the appropriate remedy is an admonition to the jury not to consider the improper factor and a requirement of the witness that he revise his figures and give an opinion on the correct basis [citations omitted].[16]

In the present case, Corman produced only one valuation witness, Capito, who intends to testify at trial regarding the before and after values of the property in question. Accordingly, a review of his deposition in light of the foregoing legal background is appropriate at this time. Capito indicated that he gathered information from several sources in order to compute what he feels is a reduction in value of the Corman Memphis Line as a result of the crossings imposed on the railroad and the consequent taking of its property. The information he reviewed includes the following: operational expenses prepared

[16]Commonwealth, Dept. of Highways v. Shaw, Ky., 390 S.W.2d 161, 163 (1965).

by the railroad stemming directly from the maintenance of the crossings; estimates of liability and litigation costs based on a projected number of accidents on the crossings over 20 years prepared by another consultant; and an estimate of expenses directly related to cleanup of the projected accidents at the crossings. Capito also projected the expenses based on the number of accidents anticipated over 20 years and then reduced to present value annual added expense in order to arrive at the proposed reduction in value. His determination of the difference in market value was based solely upon that factor; and if the factor is determined to be a legally noncompensable element of value as defined in Tyree, the circuit court would have been compelled to strike his estimate of the diminution in value of the railroad property attributed to the crossings.

The decisive question then becomes whether the sole or primary factor employed by Capito in estimating the claimed diminution in value of Corman's property due to the installation of these railroad crossings was a legally noncompensable element of value. As previously stated, Capito clearly states that his valuation was based solely on the maintenance expenses associated with the crossings, the number of accidents predicted to occur at the crossings over a given period of time, the projected liability and litigation costs resulting from each accident, and the anticipated cleanup costs following each accident. The Department argues that the criteria cited by Capito as a basis for his valuation was declared to be a legally noncompensable

element of value by Kentucky's highest court in the City of Louisville case referred to earlier:

> So that it may safely be said, both upon principle and authority, that the appellant railroad company was not entitled to compensation for the expense it might necessarily incur in constructing, maintaining, or protecting these streets across its right of way. Nor was it entitled to compensation for the increased liability to damages that it might be required to pay on account of accidents at these crossings. This element is entirely too conjectural and speculative to be considered. Accidents and resulting litigation or damages may or may not occur. But in no view of the case that we can conceive of should this feature be allowed to enter into a case upon the issue of compensation.[17]

The Department claims City of Louisville speaks directly to the question at hand. It contends that railroads are not entitled to compensation for the maintenance of crossings and prospective accidents, along with the resulting litigation and cleanup costs. The Department claims that in arriving at his estimate of the diminution in value suffered by Corman as a result of the crossings, Capito relied solely on this impermissible factor and, as such, his testimony should be rendered unsalvageable as it does not lend itself to revision as is permissible under the test set forth in Tyree, and should be excluded from jury consideration.

The Department further argues that without the testimony of Capito, there is no competent evidence that the railroad crossings at issue reduced the market value of Corman's

[17]City of Louisville, supra at 749.

railroad property. It claims that once Capito's testimony is excluded, Corman is left with no evidence which would create an issue of fact for submission to a jury. Accordingly, the Department argues that Corman has failed to meet the burden imposed upon it by the motion for summary judgment — to place competent affirmative evidence in the record despite a more than adequate opportunity to do so. As the Supreme Court has said: "In any case submitted for summary judgment, there is an obligation to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. CR 56.03."[18] The Department contends that the only competent evidence was produced by it in the form of testimony by its valuation witness, Knight, who determined there was no decrease in the value of the property as a result of the crossings. Since a jury's award must be within the range of valuation testimony presented to it for consideration,[19] the Department argues the circuit court did not exceed its authority by granting summary judgment in its favor.

Furthermore, the Department notes that it has paid for all of the warning devices, gates and other equipment installed at each crossing and has compensated Corman for performing the construction work involved. It points out that it is a well-established doctrine that railroad companies cannot

[18]Unisign, Inc. v. Commonwealth, Transportation Cabinet, Ky., 19 S.W.3d 652, 657 (2000).

[19]See Commonwealth, Dept. of Highways v. Stephens Estate, Ky., 502 S.W.2d 71 (1973).

recover damages arising from the cost or expense of doing or maintaining crossings that the state may compel them to do. The state may, pursuant to its police power, require railroad companies to erect safety gates at some crossings, keep flagmen at others, erect sign boards, give reasonable warnings of approaching trains . . . and in all cases, railroads have been required to maintain crossings in suitable repair for public travel.[20]

For its argument, Corman points out that the capitalization of net income approach to determining the before and after fair market values of a parcel of commercial property in a condemnation proceeding has been approved in Kentucky.[21] Corman argues that the capitalization of net income method of valuation does not violate the prohibition of "price-tagging" of specific items of damages.[22] In its brief, Corman argued:

> The Department's arguments mischaracterize the nature of the capitalization of net income method of valuing property. Obviously, the necessary first step in valuing property by capitalizing its net income is to determine the net income to be capitalized, and that number is then divided by a capitalization rate appropriate to the investment to determine value. In the case at hand, as its appraisal witness will testify, the Railroad's right of way could be generally expected to produce the same gross income

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[20]Id.

[21]Commonwealth, Dept. of Highways v. Tanner, Ky., 424 S.W.2d 384 (1968).

[22]Commonwealth, Dept. of Highways v. Mann, Ky., 387 S.W.2d 848 (1965).

> with the crossing easements in place as it did immediately prior to the takings. Similarly, he will testify that the capitalization rate appropriate to the investment would remain the same immediately after the takings as immediately before. However, as stated previously, the income to be capitalized in determining value is net income. Thus, both before and after the taking of the crossing easements, willing and knowledgeable buyers and sellers undertaking to determine the value of the right of way by the capitalization of net income, would necessarily have to determine, as accurately as they could, the operating expenses to be subtracted from the gross income to yield the net income to be capitalized. It is undeniable that the right of way existing immediately after the taking of the crossing easements will be subject to operating expenses which were not present immediately prior to the taking, and it is equally undeniable that knowledgeable and willing buyers and sellers would account for those additional operating expenses, as accurately as they reasonably could, in determining the net income to be capitalized to establish the after taking value of the right of way [emphasis original].
>
> There is nothing in this process that amounts to "price-tagging". Although there will always be clearly identifiable factors affecting the net income to be capitalized, these factors do not amount to separate items of damage. Contrarily, the application of the capitalization of income formula produces one lump sum valuation of the whole property interest immediately prior to the taking and one lump sum valuation of the property interest remaining immediately after the taking. While it is inherent in applying the capitalization of net income formula that the factors reducing net income to be capitalized must be identified and quantified, these factors do not equate to, and are not presented as, separate items of damage.

We agree with Corman's argument and find support for its position in the often-cited case of Sherrod, supra. In

Sherrod, the Court noted that "the landowner himself is not entitled to loss of profits," "he is limited to loss of market value."[23] The Court went on to reject "the rule requiring separation of taking damages and resulting damages [as being] based upon 'artificial dichotomy'" [emphases original]; and to restate that "[t]he only damage is the difference in market value before and after the taking[.]"[24] Importantly, the Court stated:

> This conclusion does not mean that evidence may not be introduced as to various factors that will reduce the value of the remaining land. But these factors are merely to be considered as they may affect the difference in market value before and after the taking. See Greenup County v. Redmon, Ky., 335 S.W.2d 335. Evidence of factors bearing on diminution of value should be addressed to how they will affect market value and not how they will hurt the owner or make less advantageous the use of the property for his particular purposes, or create conditions that he would like to remedy. And no price should be put on the individual factors. Commonwealth Dept. of Highways v. Stamper, Ky., 345 S.W.2d 640; Commonwealth, Dept. of Highways v. Tyree, Ky., 365 S.W.2d 472 (decided March 1, 1963)[emphases original].[25]

The Court in Sherrod continued by addressing the question of "offsetting benefits", and concluded that "a proper construction of the Constitution, Sections 13 and 242, requires that benefits be taken into consideration in determining the total loss of value the owner has sustained" [emphasis

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[23]Sherrod, supra at 849.

[24]Id. at 853-54.

[25]Id. at 854.

original].[26] The Court then concluded by stating:

> Our ultimate conclusion on this phase of the case is that in cases where part of a tract of land is taken by condemnation the only fact for the jury to determine (as concerns damages) is the difference in market value of the tract before and after the taking.[27]

At 26 Am.Jur.2d. Eminent Domain §333 p. 745, it is stated:

> It has been held that lost profits and business damages are intangibles which do not constitute "property" in the constitutional sense, and that, consequently, the right to such damages is a matter of legislative grace, not a constitutional imperative. On the other hand, there are authorities allowing recovery for injury to business or loss of profits as an element of damages due in consequence of a taking, at least where the damages were suffered as a consequence of the taking and not by virtue of market forces or otherwise [footnotes omitted] [emphasis added].

In State v. Halverson,[28] the Supreme Court of Idaho stated:

> Appellant also contends that the court erred in overruling its objection to the expression of an opinion by Lee and Lenhart as to the value of the triangle tract, because their opinions were "based entirely upon the profits of defendants' business." Lenhart testified that in forming his opinion he took into consideration the location of the property, the buildings, the nature of the business and the revenue produced by that business. In addition to the elements considered by Lenhart, Lee also noted that the respondents had a water right of value.

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[26] Id. at 857.

[27] Id.

[28] 384 P.2d 480, 483-84 (1963).

> While loss of profits is not an element of damages in a condemnation proceeding, income derived from a business is a factor which may be considered in arriving at the fair market value of property. 18 Am.Jur. Eminent Domain, § 260, p. 902; State ex rel. State Highway Commission v. Flynn, Mo.App., 263 S.W.2d 854, (rental income); State Roads Commission v. Novosel, 203 Md. 619, 102 A.2d 563; State v. Peterson, 134 Mont. 52, 328 P.2d 617.
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> In Harvey Textile Co. v. Hill, 135 Conn. 686, 67 A.2d 851, the following statement appears:
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> > In determining market values in awarding damages for land taken, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair market price of the land . . . . Determination of damages to be paid for taking of land in eminent domain proceedings requires consideration of everything by which value is legitimately affected.
>
> In the case of State Roads Commission v. Novosel, supra, the issue raised by the State's assignment of error herein was considered. That court stated:
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> > As a practical matter, a prospective purchaser would hardly fail to consider whether or not the business conducted on the premises had proved profitable, for this would be a measure of the desirability of the location, if not to him then to other purchasers. The precise weight to be accorded to this factor is a matter of judgment on which experts may differ, and of this the jury is the final judge.

In the case sub judice, we conclude that the experts should be allowed to consider the various factors related to the railroad crossings both before and after the condemnation. While

there are now six crossings with their attendant risks and costs, it may be that the six well-marked crossings with lights and perhaps gates actually lowered the railroad's risks from the previous crossings. The changes to the property are relevant in determining before and after fair market values; and the capitalization of net income approach is an accepted valuation method.

Accordingly, the summary judgment of the Logan Circuit Court is reversed and this matter is remanded for a jury trial on the issue of damages in a manner consistent with this Opinion.

GUIDUGLI, JUDGE, CONCURS.

HUDDLESTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HUDDLESTON, JUDGE, DISSENTING: Supreme Court Rule (SCR) 1.030(8)(a) provides that this Court is "bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court [the former Court of Appeals]." Because I believe that the majority has failed to follow what I perceive to be binding precedents, I am compelled to dissent.

The majority correctly observes that in a case in which only a portion of a landowner's property is taken, the measure of damages is the difference in the fair market value of the property immediately before and immediately after the taking.[29] While there are several approaches to arriving at fair market

[29] Ky. Rev. Stat. (KRS) 416.660; Commonwealth, Dep't of Highways v. Sherrod, Ky., 367 S.W.2d 844, 854 (1963).

value — that is, the price a willing buyer would pay to a willing seller, both in possession of all relevant facts and neither under any compulsion to buy or sell, a price tag may not be put on individual factors.[30] If a valuation witness relies on an irrelevant measure of damages or an element of damages that is legally noncompensable, his testimony is subject to a motion to strike[31] and, as a result, may not be considered by the factfinder in assessing damages for the taking of the property being condemned.

The only valuation witness that R.J. Corman Railroad Company proposed to call upon the trial of these cases to assess the damages it allegedly sustained when the Department of Highways constructed highway crossings for U.S. Highway 68/Kentucky Highway 80 over its railroad track extending from Bowling Green, Kentucky, to Clarksville, Tennessee, is Charles Howard Capito. Capito is not an appraiser, but is instead a commercial banker who has had a business relationship with R. J. Corman for several years. If his testimony is admissible, the majority is correct that this case must be submitted to a jury to fix the value of Corman's property before and after taking by the Department of Highways for the construction of several highway crossings across Corman's railroad track. If, on the other hand,

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[30] Sherrod, supra, n. 1, at 854, 856-857. See also Commonwealth, Dep't of Highways v. Tyree, Ky., 365 S.W.2d 472, 476 (1963), and Commonwealth, Dep't of Highways v. Shaw, Ky., 390 S.W.2d 161, 163 (1965).

[31] Tyree, supra, n. 2, at 476.

Capito's testimony is not admissible, the trial court correctly decided that Corman is but entitled to nominal damages. Because of the importance of Capito's testimony to the issue at hand, we reproduce the pertinent parts of his sixteen-page deposition below:[32]

> A. I gathered information from several sources to compute what I feel is a reduction in value of the R. J. Corman Memphis Line as a result of these crossings imposed on the railroad, the taking of the property and the building of the crossings.
>
> I have reviewed some operational expenses prepared for me by the company that are expenses of direct maintenance of operation of these crossings.
>
> I have some estimates of litigation costs based on a projected number of accidents on these crossings over 20 years. That was prepared by another consultant.
>
> And I have an estimate of direct expenses of cleaning up after the projected accidents at these crossings. These would be expenses incurred by the railroad in cleaning things up.
>
> I projected those expenses based on the number of accidents projected over 20 years and then did a present value on that annual added expense and came up with what I feel is a reduction in value of the railroad for each crossing.
>
> Q. All right. Did you go to the railroad and the site of each of these crossings and examine the facilities?
>
> A. No, sir.
>
> * * *
> Q. And you reviewed operational

[32] Capito was interrogated by Phillip K. Wicker on behalf of the Department of Highways.

expenses?

A. Yes, sir.

Q. Who furnished you the information concerning the operational expenses?

A. The railroad — what I describe as direct operating costs were provided to me by the company's chief financial officer, Mr. Ken Adams. The cost of litigation was prepared by another consultant, Richards and Associates, Boyd Richards, and I used some of his data. He prepared a number of — he estimated the number of accidents on these crossings over 20 years based on railroad traffic, as well as highway traffic — I believe he got his information from the Kentucky Cabinet — and estimated cost of litigation based on a projected number of incidents at [$]223,000 per case, average settlement. That includes attorney's fees and settlement costs.

Q. Okay.

A. I also use a number of $25,000 per accident, which is an average cost to the railroad to clean up and repair damage, not only to the crossing, but railroad equipment, and the railroad time and resources required to repair damages.

* * *

A. We've reduced the projected number of accidents to eight.

* * *

A. Auburn is one; Emerson is one; Blanton is one; Kentucky Stone is one; Stephenson Mill Road is .8; Muddy River is .4; U.S. 79 is 1.8; and F. Lee Highway 431 is one. That should total eight.

* * *

Q. Okay. And, of course, the total cost per accident, $248,000, would remain the same.

A. Yes, sir.

* * *

A. But the total annual expenses should read across, and then that is — I present value that as if that was paid every year for 20 years and then discount it at the present value factor of the rate of 13.4, 13.9, as the case may be.

* * *

Q. Were you aware that that crossing is not involved in this lawsuit?

A. I'm aware there's six crossings that are the formal — there's six cases here, and I included eight just for the matter of being inclusive. I feel like it's up to the plaintiffs and the defendants to decide which of these crossings to debate, but I included all eight.

* * *

Q. I'm looking at the valuation impairment. I have seen there that you've got the beginning value of the railroad at $33,495,000?

A. Yes, sir.

Q. Ask then a reduction in value of $211,518?

A. Yes, sir.

Q. Now, I believe that you indicated to me that in fixing the $211,518, that you reviewed the operational expenses, estimates of litigation, and costs of the number of accidents projected over 20 years and the clean up after the accidents?

A. I estimated a clean up per accident; yes, sir.

Q. Okay. And for that particular Auburn Crossing, it amounted to $211,518?

A. Yes, sir.

Q. Okay. Let me — you have got — how did you get the beginning value of the railroad at the Auburn Crossing?

A. What I did on that, Mr. Wicker, is I computed the value of the R. J. Corman Railroad Company Memphis Line for 1994, for 1995, and for 1996, and I computed that based on a multiple of cash flow at seven times cash flow.

I will define cash flow as earnings before interest, taxes, depreciation, and amortization. And that's pretty much the standard by which short line railroads trade. In other words, in buyers and sellers of railroads, they do a multiple of cash flow.

I, in that instance — so, in 1995, I viewed the Memphis Line as sellable at $33,495,000, and then you add in the — you consider the reduction in value because of the added expenses. And that's the reduction in value of the railroad.

In the case of 1996, I computed the value of the railroad using the same multiple of cash flow of seven times cash flow.

Q. Okay. And you have $42,287,000 as a beginning value the rest of the way across the board?

A. Yes, sir. Because all of those, I was told, were 1996.

* * *

Q. All right, sir. So, looking at the Auburn Crossing again, you started with a beginning value of $33,495,000?

A. Yes, sir.

Q. And then you computed the damages, and that was $211,518?

A. Yes, sir.

Q. And then you deducted the $211,518 from your $33,495,000, and arrived at your after value of $33,283,482?

A. That's correct.

Q. Okay. And with respect to all of the other seven crossings across the board, is that the way you did it; you started based on the factors you have told me and arrived at a before value of $42,287,000?

A. That's correct.

Q. And then you added up the damages?

A. On the far right is the sum of all the crossings.

Q. Okay. And you added up the damages and deducted them from the beginning value and got the ending value of the railroad?

A. Yes, sir.

* * *

Q. Okay. Did you consider any sales of other railroad right-of-way in arriving at the estimates of the value?

A. No, sir, I don't. The sale of railroad right-of-way, my experience is that railroads sell based on their cash flow and not based on any value of right-of-way. The value of the right-of-way is merely a franchise on which the business operates. The value of the real estate underneath the track is, in my opinion, irrelevant to the value of the business.

Q. Okay. You value the business?

A. Yes, sir.

Q. Have you appraised any other types of properties, other than railroads?

A. I would say not, Mr. Wicker. My banking work as a lender to short line railroads requires that I be able to judge the value of a railroad and what it's worth and what it — of course, as a lender, I have to be able to make a pretty good guess as to how they can repay a loan. But I'm not a

real estate appraiser.

Q. Okay. Have you had any specialized or formal training in appraisal of property?

A. No real estate training. No, sir. I have had a great deal of training in business valuations, both in college and in graduate school, and what seems like limitless bank training in business valuations, which are usually based on a multiple or cash flow, depending on the industry.

Nearly one hundred years ago, Kentucky's highest court held that a railroad is not entitled to compensation for the increased likelihood that it might incur expenses resulting from accidents that might at some future time occur at the point where a highway crosses its tracks. In Louisville & Nashville R.R. Co. v. City of Louisville,[33] the Court said:

> So that it may safely be said, both upon principle and authority, that the appellant railroad company was not entitled to compensation for the expense it might necessarily incur in constructing, maintaining, or protecting these streets across its right of way. Nor was it entitled to compensation for the increased liability to damages that it might be required to pay on account of accidents at these crossings. This element is entirely too conjectural and speculative to be considered. Accidents and resulting litigation or damages may or may not occur. But in no view of the case that we can conceive of should this feature be allowed to enter into a case upon the issue of compensation.[34]

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[33] 131 Ky. 108, 114 S.W. 743 (1908). Although this case was decided long ago, it remains good law and has been cited in several cases, including Idol v. Knuckles, Ky., 383 S.W.2d 910, 911 (1964).

[34] Id. at 749. And see generally 26 Am. Jur. 2d Eminent Domain § 398 (1996), in which it is said that:

As can readily be seen from his testimony reproduced above, all that Corman's valuation witness, Capito, did was to estimate the expenses that Corman would incur each time an accident occurred at one of the points where Highways 68/80 crosses[35] its track and multiply those expenses by eight, the estimated number of accidents that could be expected over a period of twenty years. He reduced the resulting sum to present value and then subtracted that figure from the before value of the railroad line to arrive at the supposed fair market value of

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"It is generally held that the measure of damages is the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used and for which it was always likely to be used, and that value after the [condemning authority] acquires the privilege of participating in its use, by the opening of a street across it, leaving the railroad tracks undisturbed. The measure is the diminished value of the property for railway purposes; or, as sometimes said, the difference in the value between the exclusive and the joint use of the right of way.

* * *

"The railroad may not, however, recover for the interruption or inconvenience to its business, nor for the probability that it will be obliged to pay damages for accidents at the crossing, nor for the increased liability of accidents at the crossing, nor for the inconvenience caused by the observance of public regulations designed to prevent the block of crossings."

Id. at pp.805-806 (citing, inter alia, People v. Tulare Packing Co., 25 Cal. App. 2d 717, 78 P.2d 763 (1938); Grafton v. S. Paul, M. & M. Ry., 16 N.D. 313, 113 N.W. 598 (1907); Mauvaisterre Drainage & Levee Dist. v. Walbash R. Co., 299 Ill. 299, 132 N.E. 559, 22 ALR 944 (1921); New York, C. & S. L. R. Co. v. Rhodes, 171 Ind. 521 86 N.E. 840 (1909); and Southern K. R. Co. v. Oklahoma City, 12 Okla. 82, 69 P. 1050 (1902).

[35] Capito computed the costs per accident at $223,000.00 for litigation expenses (including settlement costs and attorney's fees) and $25,000.00 for cleanup expenses based on an estimate prepared by Boyd Richards of Richards and Associates.

the railroad line after the construction of the highway crossings. That simply is not a proper method of arriving at the fair market value of the railroad property after the takings by the Department.

The circuit court, in my opinion, correctly decided that Corman proposed to offer no admissible evidence of the after value of its railroad line. In view of the fact that the Commonwealth proposed to offer proof that Corman suffered no compensable loss as a result of the installation of crossings over its railroad track, the court properly determined that Corman is entitled to but nominal damages for the takings. In the absence of any competent evidence pointing to damage, a maximum recovery of nominal damages is sufficient to satisfy the just compensation requirement of the Constitution.[37] I would, therefore, affirm the summary judgment from which this appeal is prosecuted, but I would remand for an award of nominal damages.[38]

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[37] See Village of Arlington Heights v. Illinois Commerce Comm'n, 64 Ill. App. 3d 364, 380 N.E.2d 812 (1978).

[38] As to the amount of nominal damages that should be awarded, see Stoll Oil Refining Co. v. Pierce, Ky., 343 S.W.2d 810, 812 (1961) (fixing nominal damages at $1.00).

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