ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-1363

September 19, 2007

ARKANSAS STATE HIGHWAY COMMISSION
APPELLANT

V.

LEONARD V. HUGHES, JR., and DENISE PHILLIPS HUGHES
APPELLEES

AN APPEAL FROM CRITTENDEN COUNTY CIRCUIT COURT
[CIV2004-89]

HON. PAMELA HONEYCUTT, JUDGE

AFFIRMED

Appellant Arkansas State Highway Commission (Commission) condemned certain property owned by appellees Leonard and Denise Hughes. The Hugheses challenged the compensation offered by the Commission, and, after a jury trial, were awarded $210,000 for the taking. The Commission appeals from the denial of a motion for a new trial, arguing that the jury's valuation of the property was not supported by substantial evidence. We hold that there was no error, and, thus, affirm the jury's verdict.

I. Factual Background

At issue in this case are two tracts of property near the new interchange for Interstate 555, between Gilmore, Arkansas, and Turrell, Arkansas: Tract 2, containing 95.99 acres and Tract 8, the adjoining property, containing 94.47 acres. Each tract fronted Highway 63, which ran from Turrell to Jonesboro, Arkansas.

The Commission condemned a total of 5.59 acres: .86 acres of the Hugheses' property in Tract 2 and 4.73 acres of the Hugheses' property in Tract 8. Based on its determination

that the highest and best use of both properties is for agricultural use, the Commission offered total just compensation for the property of $10,050: $1550 for the .86 acres taken from Tract 2 ($1802 per acre) and $8500 for the 4.73 acres taken from Tract 8 ($1797 per acre).

The Hugheses contested the amount of compensation offered by the Commission and requested a jury trial to determine the value of the land. The matter was tried on June 28 and 29, 2006. Both the Commission and the Hugheses presented expert testimony regarding just compensation. Mr. Hughes also testified regarding his opinion of the value of his land. The jury valued both parcels of land at $210,000, without specifying the value of each parcel of land.

The Commission filed a motion for new trial. It asserted that the verdict was clearly contrary to the preponderance of the evidence, citing the fact that it presented evidence that the property was worth $10,050, and that the Hugheses' own appraiser testified that the property was worth only $39,517. It further asserted that Mr. Hughes's opinion that his property was worth $375,000 was not supported by substantial evidence. After the Commission's motion was deemed denied, this appeal followed.

II. Standard of Review and Applicable Law

The Commission's motion for a new trial was filed pursuant to Arkansas Rule of Civil Procedure 59(a) on the basis that the jury's verdict or property valuation was clearly contrary to the preponderance of the evidence. When a motion for a new trial is based on that ground, we will affirm the denial of the motion if the jury's verdict is supported by substantial evidence. *See Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty and it must force the mind to pass beyond mere suspicion or conjecture. *See State Auto Prop. Cas. Ins. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999).

The burden to prove the value of land in a condemnation case is on the landowner, who must establish the property's value by a preponderance of the evidence. *See Property Owners Imp. Dist. No. 247 of Pulaski County v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992); Ark. Code Ann. § 16-64-110(3)(A)(Repl. 2005). A landowner may testify as to the value of his property because of his status as owner; however, the weight of his testimony is affected by his knowledge of value. *See Southwestern Bell Telephone Co. v. Fulmer*, 269 Ark. 727, 600 S.W.2d 450 (Ark. App. 1980).

A landowner need not be shown to be an expert on values or even to be acquainted with the market value of such property; instead, his qualification to give estimates of his property's value is based on his relationship to the property as owner. *Arkansas State Hwy. Comm'n v. Pakis*, 25 Ark. App. 330, 758 S.W.2d 21 (1988). The principal qualification of a landowner to opine regarding the value of his property is familiarity with his property; when he qualifies in this respect, the adverse party must show there was no reasonable or logical basis for the landowner's opinion. *Id.* If the landowner's values are shown on cross-examination to be founded on a questionable basis, that fact bears on the weight to be given to his testimony. *Id.*

An owner of property is competent to testify as to value of his property if he has an intimate acquaintance with his property, but not every landowner's testimony constitutes substantial evidence. *See Arkansas State Hwy Comm'n v. Watson*, 248 Ark. 422, 451 S.W.2d 741 (1970). A landowner's opinion as to the value of his property must be grounded in evidence of market value. *See Arkansas State Hwy. Comm'n v. Frisby*, 329 Ark. 506, 951 S.W.2d 305 (1997). Whether evidence is substantial is an issue of law for the trial court to determine, weighing every inference in favor of the verdict. *See Butler v. Arkansas State Hwy. Comm'n*, 6 Ark. App. 267, 640 S.W.2d 467 (1982).

The measure of damages in partial-taking eminent domain cases is the difference between the market value of the whole tract before the taking and the market value of that part which remains after the taking, less any enhancement peculiar to lands. *See Young v. Arkansas State Hwy. Comm'n*, 242 Ark. 812, 415 S.W.2d 575 (1967). In arriving at market value of property in a condemnation case, consideration should be given as to what has been taken from the owner, that is, as to what the owner has lost. *Arkansas State Hwy. Comm'n v. Southern*, 250 Ark. 1016, 469 S.W.2d 102 (1971). That is, in considering what is just compensation, the value of the tract before and after the taking must be considered, not merely the value of the land taken. *See Young, supra.*

Proof of a market value for the parcel for that use must be made. *See Southern, supra.* Mere proof of adaptability to a certain usage, without more, does not establish such market value; there must be such demand for the property for that use as will give it a value in the market for that use. *See Southern, supra.* If there is no demand for that use at that location, the property does not have value for that use in the market. *See Southern, supra.* An opinion on value that is without a fair and reasonable basis fails as substantial evidence. *See Southern, supra.*

III. Property Description

The property at issue belonged to Mrs. Hughes's family for many years and came into her exclusive possession in 2000, via conveyances from relatives. Mr. Hughes became co-owner of the property in 2001. Mr. Hughes personally managed the property from 1992 until February 2002, when he hired Harold Fitts of National Farmers to manage the land. The property was taken by the Commission on February 12, 2004.

The property is located between Gilmore and Turrell, on the north side of Highway 63, northwest of the old interchange that connected Highway 63 with Interstate 55 (which

runs to Memphis). This old interchange has been improved as a new interchange for incoming Interstate 555 (which connects with I-55 at the Memphis exit near Turrell and will run to Jonesboro).

The subject property fronts Highway 63 and is nearly level. At the time of the taking, both tracts had been leased for agricultural purposes. Prior to the changes made to accommodate Interstate 555, the Hugheses had direct access to their property from Highway 63. Now they have no direct access to their property but must access their property via a service road. This requires them to travel approximately one mile down the service road and cross the Gilmore interchange to enter the property.

IV. Evidence

The evidence is uncontroverted that Mr. Hughes negotiated the sale of 1.43 acres of adjacent land for $225,000 in 1997, and that a Flash Market was built on that site. This same site formerly housed an Exxon station, which had operated since the 1960s. This adjacent property, located within the Gilmore city limits, lies immediately east of the subject property (constituting the southeast corner of the Hugheses' property at that time). As part of the sale to Flash Market, the city of Gilmore installed a water line to the frontage property and also laid a sewer line. The adjacent property also contains an Entergy substation.

Mr. Hughes testified that after the Flash Market opened, he received several inquiries from people concerning the property, half of whom wanted the property for commercial use. At that point, he began trying to market the property as commercial property. However, Mr. Hughes said that after the I-555 project was announced, commercial interest in the property was "dead." He admitted that from 1992 to 2003, he only made one commercial sale of any of his property that fronted Highway 63 (the 1997 Flash Market sale).

Both Mr. Hughes and Edward McCarley, the Hugheses' appraiser, testified that Deerfield Inns inquired about a tract the same size as the tract sold to the Flash Market for the

proposed purpose of installing a motel. That company offered the Hugheses $25,000 for 1.43 acres, which the Hugheses refused. They counter-offered to sell the property for $100,000, which Deerfield refused. Mr. Hughes admitted that his subsequent research into other sales in the area convinced him that the property was worth $50,000. Both Mr. Hughes and McCarley said that since then, Deerfield bought a piece of property adjacent to the Hugheses' property to build a motel. However, as of the date of the hearing, the hotel had not been built.

Further, Mr. Hughes testified that after the Flash Market property was condemned, the company purchased other property approximately one mile away across I-55, and built a new Flash Market store there.[1] He also said that the new Flash Market is the only property within one mile of the old site that has convenient access to Interstate 55.

Based on the foregoing, Mr. Hughes believed the value of the property before the taking was $480,000 and after the taking was between $105,000-$110,000. He agreed that the highest and best use of the *remaining* property was agricultural. However, he believed the highest and best value of the *frontage property taken* (which he erroneously determined totaled 7.5 acres) was as commercial property. He valued the property taken at $50,000 per acre.

Jerome Alford, a consulting engineer who works for the city of Gilmore, testified that there was no commercial development that took place in the area except for the (old) Flash Market. However, he also testified that when the proposed hotel was being planned and that site was being cleared, the city considered which improvements would be required to extend the water line from the Flash Market to the hotel.

Harold Fitts, of National Farmers, has managed the farmland leased by the Hugheses (including the frontage property taken) since February 2002. He said that since then Mr.

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[1]The trial court instructed the jury to disregard any evidence regarding the valuation of the property sold in that sale.

Hughes actively worked to market as commercial property five lots of frontage property along Highway 63 adjacent to the Flash Market. He reiterated that the property being used as agricultural land is more difficult to access since the changes have been made because a party must go to Gilmore and turn around to come up the access road, instead of simply turning off of Highway 63.

Three expert appraisers also testified in this case: the Hugheses' appraiser, McCarley, and the Commission's appraisers, Errol Lemmons and Randal Cobb. Each based his estimate of the value of the land, in part, on comparable land sales that were memorialized in a brochure created by the Commission. Cobb used comparable sales 9, 10, and 11. McCarley and Lemmons used comparable sales 10, 11, and 22.

Sale number 9 involved seventy acres of fairly level farmland. This property had electricity and telephone service available, but no water and sewer. This property is located one-fourth of a mile from I-55; thus, the new interchange is located between the subject property and the sale number 9 property. There was no evidence of the value of the this land per acre.

Sale number 10 involved a seventy-acre agricultural tract of frontage property located near junction of Arkansas 42 and 77, which lies southeast of the subject property and southeast of the interchange. The unit price for this property was $1800 per acre.

Sale number 11 involved a 346-acre agricultural tract, which sold for $859 per acre. This property was located along both sides of Highway 63, up the road from the subject property. Neither sale number 10 or 11 had utilities although telephone and electricity services were available nearby.

Sale number 22 involved the Hugheses' 1030-acre agricultural tract situated directly across Highway 63 from the subject property. This lot sold as agricultural property for $837 per acre. This sale was pending when Lemmons made his appraisal in the instant case.

McCarley, the Hugheses' appraiser, used comparable sales 10, 11, and 22. He testified regarding the value of Tract 8, the 94.47-acre tract from which the Commission took 4.73 acres. McCarley determined that the highest and best use of the property in Tract 8 both before and after the taking was agricultural except for approximately five acres fronting Highway 63 that was more appropriate for commercial use. McCarley further testified that having no easy access to I-555 eliminates any commercial potential the property has and also makes farming the remaining land less profitable. Thus, he assigned a lower value after the taking for the remaining agricultural property. McCarley opined that the total value of the land before the taking was $147,205 and after the taking was $107,688 for a difference in value of $39,517.

Both Cobb and Lemmons determined that all of the land was best suited for agricultural purposes. Lemmons used comparable sales 10, 11, and 22; he believed that sale number 10 was the most applicable. (Coincidentally, Lemmons conducted the appraisal for the 1997 Flash Market sale.) He testified that Tract 8 was worth $170,050 before the taking and $161,550 after the taking, and thus, concluded that just compensation for that taking was $8,500. Lemmons did not assign a reduced value for the agricultural property remaining after the taking because property was still accessible. Lemmons testified that he considered the commercial possibilities of the approximate five acres fronting Highway 63 but did not see any evidence of commercial demand at the time of the taking; therefore, he assigned no separate commercial value to that property, as McCarley had done.

Cobb based his opinion on comparable sales 9, 10, and 11. He testified regarding the value of Tract 2, the 95.99 acre tract of which the Commission took .86 acres. Like Lemmons, Cobb believed the property had no commercial value and thus, assigned only agricultural values. Also like Lemmons, Cobb estimated the value of the subject property before the taking at $1800 per acre. However, unlike Lemmons, Cobb reduced the

property's value to account for the agricultural loss. He estimated that Tract 2 was worth $172,800 before the taking and $171,250 after the taking, for a just compensation value of $1550 per acre.

V. Discussion

The total acreage taken was 5.59 acres. The jury valued the property at $210,000 but did not specify how it determined that figure – i.e., whether it found the highest and best use of the property to be for agricultural purposes, commercial purposes, or a mixture of the two. Given that the evidence that highest value of the land for agricultural purposes was approximately $1800 per acre, it is obvious that the jury must have awarded the Hugheses some commercial value. Thus, the jury's verdict is affirmable if substantial evidence supports that the highest and best use of at least some of the property is as commercial property.

Simply put, there was substantial evidence presented upon which the jury could have inferred that the Hugheses' property had some commercial value at the time of the taking. Further, the jury's award was within the range of values established by the evidence of market value in this case. *See Arkansas State Hwy. Comm'n v. Lusby,* 251 Ark. 940, 475 S.W.2d 707 (1972) (affirming an award in an eminent domain case where the jury's verdict was based on the highest valuation of the property, notwithstanding the disparity in the landowner's and the Commission's appraisals); *Arkansas State Hwy. Comm'n v. Sargent*, 241 Ark. 783, 410 S.W.2d 381 (1967) (holding that the award in an eminent domain case was not excessive where it was within the range of values testified to by landowners' witnesses); *D.B. & J. Holden Farms Ltd. P'ship v. Arkansas State Hwy. Comm'n*, 93 Ark. App. 202, 218 S.W.3d 355 (2005)(holding that since the Highway Commission's expert testified that the difference in the before and after values of the two tracts of condemned land was $138,661, the jury could have reasonably relied on this testimony in arriving determining the property's value). Accordingly, we affirm the jury's verdict.

The Commission argues that the jury's verdict was not supported by substantial evidence primarily because Mr. Hughes's opinion regarding valuation: 1) is based on his view of the value of the property taken in isolation, rather than the value of what the entire property was worth before and after the taking; and 2) was contrary to the valuation determined by the appraisers.[2]

Mr. Hughes agreed that the highest and best use of the nonfrontage property was agricultural but believed that the highest and best value of the frontage property was as commercial property. Contrary to the Commission's argument, Mr. Hughes's opinion regarding his property's value is not based purely on a commercial valuation; that is, he did not value all of his property as commercial, only the frontage property. Mr. Hughes opined that the total value of both tracts, including the frontage and nonfrontage property, was $480,000 before the taking; of this $480,000, he assigned a $375,000 value to the frontage property. He opined that the total value of the tracts after the taking was between $105,000-$110,000. Based on Mr. Hughes's knowledge of the land and his research of recent sales in the area, he determined that the part of his property that was best suited for commercial purposes was worth $50,000 per acre. Thus, the approximate $375,000 difference in Mr. Hughes's before-and-after estimate is apparently based on his mistaken belief that 7.5 acres were taken, to which he assigned a $50,000 per acre commercial value. The $105,000-$110,000 after-taking value apparently means that Mr. Hughes assigned no loss in value to his agricultural land (if he had, his "after" estimate would have been even lower). Mr. Hughes's testimony was substantial in light of *Ark. Hwy. Comm'n v. Duff*, 246 Ark. 922, 440 S.W.2d

[2]The Commission below moved to strike Mr. Hughes's testimony on the basis that it was not substantial. While the Commission does remind the court of that fact, it does not develop the argument on appeal that his testimony should have been stricken. We do not address arguments on appeal that are not adequately developed. *See Spears v. Spears*, 339 Ark. 162, 3 S.W.3d 691 (1999).

563 (1969)(holding the landowner's opinion of the value of his land constituted substantial evidence, where it was based on his knowledge of the property and his knowledge of comparable land sales).[3]

Moreover, other evidence, exclusive of Mr. Hughes's testimony, also supports that the property had commercial value. The Commission overlooks the fact there was on ongoing commercial entity, the Flash Market, on the adjacent property at the time of the taking. Further, the City of Gilmore's commitment to using the adjacent Flash Market property as commercial property resulted in sewer and water access over the *subject* property, thus making it suitable for commercial purposes.[4]

In addition, one-half of the inquiries Mr. Hughes fielded after the 1997 Flash Market sale were for commercial purposes; these inquiries stopped "dead" when the I-555 project was announced.

Further, after the Flash Market sale in 1997, Deerfield Inns sought to purchase a similar tract of frontage property from the Hugheses. Deerfield Inns offered the Hugheses $25,000 for a 1.43 acre lot (based on the size of the previous Flash Market sale). When the Hugheses demanded too steep a selling price, Deerfield Inns subsequently purchased property adjacent to the Hugheses' property, for the purpose of building a motel. Mr. Hughes testified that his subsequent research of similar sales in the area convinced him that he should have asked only $50,000 per acre.

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[3]The Commission also argues that Mr. Hughes's opinion is based on a commercial sale of property that was not part of the subject property, namely, the new Flash Market sale. However, Mr. Hughes testified that he looked at other "sales" and it was for the jury to determine how much weight to give to this testimony where no other evidence of specific sales was offered.

[4]We recognize that the fact that property is readily adaptable for commercial purposes, alone, does not prove that there was a commercial demand of the property at the time of the taking. *See Southern*, *supra*. However, in this case, there was additional evidence of commercial demand.

At this same time, the City of Gilmore considered the improvements that would be necessary to operate the proposed motel. The fact that the motel was not thereafter built does not negate the fact that the property was sold for commercial purposes. Weighing every inference based on the foregoing in evidence favor of the verdict, as we must, *see Butler*, *supra*, we believe the jury was entitled to interpret all of the foregoing facts as evidence that the Hugheses' frontage property had commercial value.

Additionally, the jury was entitled to give more weight to the testimony of McCarley, the Hugheses' expert witness, than to the testimony of the Commission's appraisers. McCarley concluded that five acres of the Hugheses' frontage property was suitable for commercial purposes; he also assigned a reduced value to the remaining agricultural property. Notably, the Commission does not argue that McCarley's testimony was faulty, and in fact, concedes that its own expert, Lemmons, recognized the commercial potential of the Hugheses' property.

McCarley's opinion was based, in part, on the fact that there had been a commercial presence at the subject interchange for the past forty years in the form of the Exxon station and the Flash Market store. McCarley also relied on the fact that within a twenty-mile interval along I-55 (including the subject interchange), there was at least one service station/convenience store at most of the interchanges. He further relied on the Deerfield Inn offer and the fact that the Deerfield company, in fact, purchased adjacent property for commercial purposes.

In failing to award any commercial value to the property, Lemmons and Cobb apparently ignored the requirement that a determination of market value must comprehend the land's availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used. *See Sargent*, *supra*. Additionally, none of the comparable sales relied on by the Lemmons and Cobb involved property that was deemed fit for

commercial purposes. Unlike the subject property, none of those sales involved property was adjacent to property that was being used commercially, and none had existing water and sewer lines. Rather, those sales concerned property that was only immediately fit for agricultural purposes. Moreover, only one of those sales involved property located on the same side of the interchange as the subject property; for example, sale number 10 involved property nearly two miles from the interstate, whose nearest access was Highway 77, not Highway 63.

Further, Lemmons failed to assign any loss to the remaining agricultural land due to the change in access to the property. *See Lusby, supra* (holding that where there is a partial taking of land and the landowner is inconvenienced by the taking of his ingress and egress to the remainder, that inconvenience is compensable and should be considered in assessing the landowner's damages). In short, the jury could have determined that the Commission's appraisers relied on sales that were *not* comparable to the subject property, and that those appraisers did not fairly assess the loss to the Hugheses' remaining land; thus, the jury could have given less weight to the Commission's appraisers' conclusions regarding the value of the Hugheses' land.

Finally, the evidence established that the property taken in this case was worth between $10,517 and $375,000. The jury did not award the Hugheses the full value of the land that they requested. Obviously, the jury believed the land had some commercial value but believed that the appraiser's estimates were too low and that Mr. Hughes's estimate was too high. The jury was entitled to rely on the evidence presented regarding the market value of the land in reaching its verdict. *See Lusby*, *supra*; *Sargent*, *supra*. A verdict in a condemnation proceeding will not be set aside as excessive unless it is so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case, even though the award may appear liberal. *See Sargent, supra*. Here, the jury's award, though liberal, was not

excessive. Thus, we affirm the jury's verdict.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.