

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001002-MR

CITY OF BOWLING GREEN, KENTUCKY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 97-CI-00695

SPECIALTY CONCRETE COMPANY, INC.;  
TRANS FINANCIAL BANK, N.A.;  
JAMES HARMON and CAROLYN HARMON

APPELLEES

OPINION  
VACATING AND REMANDING  
\*\* \*\*

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE: This is an appeal from a judgment in a condemnation case determining just compensation for property taken. The City of Bowling Green (the "City") argues that the judgment must be vacated because inadmissible testimony pervaded the valuation proceedings and because the jury's verdict was not supported by the evidence. Having considered the record, the arguments of counsel, and the applicable law, we vacate and remanded for further proceedings.

On June 20, 1997, the City initiated an action to acquire by eminent domain property owned by the appellee,

Specialty Concrete Company, Inc., ("Specialty Concrete"). The property was sought by the City for the purpose of widening Dishman Lane in anticipation of further growth in this largely industrial part of town. The commissioners' report, filed September 22, 1997, valued the property interests being taken at \$25,751.22. The parties rejected this figure and, on October 14, 1997, Specialty Concrete filed its response to the City's petition to condemn.

On November 10, 1997, appellee James Harmon, a shareholder of Specialty Concrete, and his wife, appellee Carolyn Harmon, intervened in the action. Prior to 1996, the Harmons had occupied a single-family residence located on the property of Specialty Concrete. They alleged that agents and employees of the City had advised them that the Dishman Lane project was going to begin in the spring of 1996 and that their home would be demolished at that time. They claimed that City officials instructed them to vacate the residence. As a result of the City's representations, they had been forced to incur moving expenses and to pay a mortgage long before condemnation proceedings actually began. More significantly, since they had moved out of the house nearly two years before it was taken by the City, their home's value had deteriorated significantly. The City argued that the Harmons' claims should be summarily dismissed since the damages alleged by them were not recoverable in a condemnation action.

On December 10, 1997, an interlocutory judgment granting the City the right to condemn the property was entered.

At that time, the appellees were ordered to vacate and deliver possession of the premises to the City.

On March 9 and 10, 1999, a jury trial was held to determine the amount of compensation owed to the appellees. The City made a pre-trial motion to exclude testimony of the Harmons and of Jim Pinkerton (the other shareholder of Specialty Concrete) on the basis that it was unfairly prejudicial and immaterial to valuation of the condemned property. The motion was denied, and the trial proceeded with the court noting the City's standing objection to any testimony related to the Harmons' concerns about being forced to move to another residence, the expenses they incurred as a result, and the deterioration of the residence caused by its untimely abandonment.

In addition to each party's appraisal witnesses, the jury heard from Pinkerton and the Harmons. Jim Harmon testified that he had kept abreast of the City's plans with respect to the Dishman Lane project since 1995. He indicated that a City official had advised him that his home would be razed in March 1996 and that he should not make any improvements to the property. Recanting his previous claim, however, Harmon admitted that no one had advised him to vacate the property before December 1997. Carolyn Harmon corroborated her husband's testimony and also stated that their little girl had been devastated by the move. In closing, the Harmons argued that the City was trying to take advantage of the fact that their house had been allowed to deteriorate since early-1996 and emphasized that they had been traumatized by the forced move.

Despite having allowed the Harmons' contested testimony, the court declined to permit the jury to make an award to them individually. Accepting the opinion of the landowners' appraiser in toto, the jury determined that Specialty Concrete was entitled to recover \$62,000.00, for the property taken. The City's subsequent motion for a new trial was denied, and this appeal followed.

On appeal, the City argues that the trial court erred by permitting the Harmons' testimony. It maintains that the testimony was immaterial to establishing the property's value at the time of its taking and that it was otherwise unfairly prejudicial. We agree.

The provisions of KRS 416.660 set forth the standards to be used for determining just compensation. The statute provides that the landowners shall be awarded as compensation such a sum as will fairly represent the difference between the fair market value of the tract immediately before the taking and its fair market value immediately after the taking. Moreover, the statute directs that any change in the fair market value of the property prior to the date of condemnation (which the condemnor or condemnee establishes to have occurred as a result of the general knowledge of the imminence of condemnation or of a construction project) shall be disregarded in determining fair market value. The "taking date" for valuation purposes is designated as either the date on which the condemnor takes the property or the date of the trial of the issue of just compensation -- whichever occurs first.

The Harmons contend that their testimony was relevant to a determination of the fair market value of the property before the taking. They maintain that they made the decision to vacate their house in early 1996 based upon a time-line provided by City officials and that the City should not now be permitted to benefit from the home's subsequent deterioration. Although we are terrifically sympathetic to the compelling logic and equity of their argument, the law unfortunately dictates otherwise in the clearest of terms.

In Ford v. City of Bowling Green, Ky., 780 S.W.2d 613 (1989), the court addressed a similar issue where it was asked to determine whether the landowner or the condemnor would bear the loss of property vandalized prior to the entry of the interlocutory judgment authorizing the city to take possession. The court determined that the diminution in value of the property was not caused by the nature of the municipal project to be constructed and thus could not be taken into account in establishing a "before taking" value pursuant to statute. Although the diminution in value was simply a result of damage to a building upon the condemned property, the condemnor had no right to take the landowner's property before the entry of the interlocutory judgment. The court concluded that the landowner had to absorb and bear the loss caused by the vandals.

In this case, the Harmons have presented conflicting evidence that the City had taken or had attempted to take their property prior to the entry of the interlocutory judgment in December 1997. Jim Harmon testified and admitted that no one had asked him to relinquish the property before that date. The

City's announcement of its prospective development plan and its discussion of a projected time-line did not equate to a physical taking. Moreover, nothing in the record indicates that the public officials acted fraudulently or in bad faith in dealing with the Harmons or that they unreasonably delayed the proceedings.

The Harmons were entitled to possess the property and remained responsible for its condition until such a time as an interlocutory judgment had been entered. As a result, KRS 416.660 compels a finding that the Harmons' testimony as it related to the deterioration of the house following their move in 1996 was not relevant to establishing the fair market value of the property before the taking in December 1997. Consequently, their testimony as it related to moving expenses and the stress of relocation is also irrelevant to the proceedings. Thus, the Harmons' testimony was inadmissible into evidence. There can be little doubt that the sympathetic nature and the significant volume of their testimony were so prejudicial as to sway the jury to render a verdict in favor of the landowner. We must vacate the judgment in favor of the appellant as to the evidence, and therefore we need not consider the appellant's remaining argument on appeal.

For the foregoing reasons, the judgment of the Warren Circuit Court is vacated and this matter is remanded for additional proceedings.

TACKETT, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOFF, JUDGE, CONCURRING IN PART AND DISSENTING IN

PART: I agree with the majority opinion to the extent which the majority opinion holds that the Harmons' testimony as it related to moving expenses and the stress of relocation was irrelevant and improperly admitted into evidence. However, because we are remanding this case for a new trial, I believe that several of the reasons why this evidence should have been excluded should be clarified. I entirely agree with the majority that a considerable amount of the Harmons' testimony was irrelevant to the condemnation proceeding, and was unfairly prejudicial to the City. Both Jim and Carolyn Harmon testified regarding the stress caused by being required to move. They complained about the uncertainty caused by their dealings with the City, and the disruption which that uncertainty brought into their lives. The Harmons further expressed their feelings that they had been mistreated by the City officials. Both of the Harmons testified at length concerning how happy their family was in their home on Dishman Lane. Most egregiously, Carolyn Harmon testified that she did not feel as safe in her new neighborhood, and that she was "afraid to let my little girl get out on the street with her bicycle, because you never know who's going to grab her and take off with her".

None of this evidence was remotely relevant to a determination of the fair market value of the condemned property immediately prior to the taking. This testimony did not bolster the credibility of the expert testimony regarding the value of

the property, nor did it relate to the condition of the property at the time of the taking. Rather the Harmons' testimony on these matters was clearly calculated to prejudice the jury against the City. Consequently, I agree with the majority opinion that the trial court erred in allowing this testimony, and in denying the City's motion for a new trial. During any new trial, this testimony should be excluded in its entirety.

However, I disagree with the majority opinion that the Harmons' testimony regarding the deterioration of the house prior to the entry of the interlocutory judgment is irrelevant as a matter of law. Although this testimony may be inadmissible depending upon the totality of the evidence, I do not believe that this Court can decide the issue at this point in the proceedings. As pointed out in the majority opinion, KRS 416.660(2) requires that any increase or decrease in the fair market value of the property which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of the condemnation or the construction of the project shall be disregarded in determining fair market value. Ford v. City of Bowling Green, Ky., 780 S.W.2d 613 (1989) clarifies that this rule applies only to changes in the fair market value of the property prior to the taking which is caused by the anticipation of the nature of the project. Since the condemnor has no right to take the condemnee's property prior to the entry of the interlocutory judgment, the condemnee has the responsibility for maintaining the property until the entry of the interlocutory



judgment. Consequently, any damage to the property prior to entry of the interlocutory judgment is the sole responsibility of the condemnee.

Nonetheless, the decision in Ford is predicated on the lack of evidence in that case that the condemnor attempted to take the property prior to the entry of the interlocutory judgment. Id. at 615. In this case, the majority points out that there was conflicting evidence that the City had taken or attempted to take the property prior to the entry of the interlocutory judgment in December 1997. If there actually was conflicting evidence, then the Harmons' reasons for failing to maintain the property is admissible. Jim Harmon's testimony concerning the representations made by the City officials would be relevant to rebut the evidence presented by the City regarding the dilapidated condition of the house. On the other hand, Jim Harmon also admitted that no one from the City asked him to relinquish the property prior to the entry of the interlocutory judgment. Furthermore, the majority states that there was no evidence that the City officials acted fraudulently or in bad faith in dealing with the Harmons.

I would hold that the relevancy of this evidence is a matter for the trial court to determine prior to the presentation of this evidence to the jury. If there was evidence that the City officials discouraged the Harmons from maintaining the property, then the testimony should be admitted to rebut the City's evidence regarding the deterioration of the house. The

City should not be permitted to benefit from such misrepresentations by its agents. However, this evidence may be irrelevant if there was no evidence that the Harmons' failure to maintain the house was due to any conduct by the City. In the latter circumstance, the rule set out in Ford v. City of Bowling Green, requires Specialty Concrete to bear the loss of value caused by the house's deterioration prior to the entry of the interlocutory judgment.

Finally, since we are remanding this case for a new trial, I feel the need to raise one additional issue which the majority opinion does not address. I entirely agree with the majority that the central focus of any condemnation action must always be a determination of the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking. KRS 416.660 This determination is a matter which is within the province of the finder of fact. KRS 416.620(1). Furthermore, where exceptions are filed by both parties to the report of the commissioners in a condemnation proceeding, the burden of proof is on the condemnor. Commonwealth, Department of Highways ex rel. v. Snyder, Ky., 309 S.W.2d 351, 352 (1958).

The City objects that Specialty Concrete's expert improperly excluded from his valuation of the property the deterioration of the house during the two years it stood vacant. As a result, the City also complains that this expert was not qualified to give an opinion as to the value of the property.

Likewise, Specialty Concrete complains that the City's expert used inappropriate comparable sales in reaching his valuation of the property. Nonetheless, the matter of evaluating the probative effect of comparable sales is properly left to the jury. Commonwealth, Department of Highways v. Garrett, Ky., 447 S.W.2d 596, 597 (1969). So long as the conclusions and opinions of qualified expert witnesses are based upon facts and factors generally acceptable in the industry, they are sufficient to form the basis of a jury verdict. Caney Creek Coal Co. v. Ellis, Ky., 437 S.W.2d 745, 749 (1968). On remand, it is the trial court's duty to determine the competency of the expert testimony. If the testimony of either expert is not competent, then a directed verdict may be appropriate. However, if the deficiencies in the expert testimony relate only to the weight to be given to the particular expert's valuation, then the question of the fair market value of the property to be condemned must be submitted to the jury.

BRIEFS FOR APPELLANT:

H. Eugene Harmon  
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BRIEF FOR APPELLEE SPECIALTY  
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