

[Cite as *Clark Cty. Bd. of Commrs. v. Stewart*, 2010-Ohio-5290.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

BOARD OF COUNTY COMMISSIONERS :	:	Appellate Case No. 09-CA-104
OF CLARK COUNTY, OHIO	:	
	:	
Plaintiff-Appellee	:	Trial Court Case No. 09-CV-0714
	:	
v.	:	(Civil Appeal from
	:	Common Pleas Court)
DALE E. STEWART, et al.	:	
	:	
Defendants-Appellants	:	

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OPINION

Rendered on the 29th day of October, 2010.

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FAIN, J.

{¶ 1} Defendants-appellants Dale E. Stewart and Clara Desantis Stewart appeal from a summary judgment rendered in favor of plaintiff-appellee the Board of County Commissioners of Clark County, Ohio, in an appropriation action. The Stewarts contend that the trial court erred in refusing to grant their motion to amend

or withdraw deemed admissions resulting from their failure to respond to the Board's requests for admissions. The Stewarts also contend that the trial court erred in failing to find the value of a temporary easement on the taken property, when the property was being actively used in agribusiness with a planted crop prior to the filing of the Board's action. Finally, the Stewarts contend that the trial court erred by failing to find the value of damage done to the residue of their land.

{¶ 2} We conclude that the trial court did not abuse its discretion in overruling the Stewarts' motion to amend or withdraw their deemed admission resulting from their failure to respond to requests for admissions, pursuant to Civ. R. 36(B). The Stewarts failed to provide the trial court with any explanation for their failure to timely answer the request for admissions. The trial court did err in rendering summary judgment on damages for a temporary taking, and on the issue of whether damages to the residue of the land occurred. Under *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, the Board, as the moving party, bore the initial burden of demonstrating that there were no genuine issues of material fact concerning an essential element of the opponent's case.

The Board failed to submit evidence, and failed to meet its initial burden under *Dresher*. Consequently, the trial court should have denied summary judgment on the issues of damages for a temporary taking and damage to the residue of the land. Accordingly, to the extent that the summary judgment rendered by the trial court establishes \$3,067 as compensation for the property taken, it is Affirmed; to the extent that the trial court rendered summary judgment to the Board with respect to the issues of compensation for the temporary taking of the Stewarts' property and damages to the residue of the property, its judgment is Reversed; and this cause is Remanded for

further proceedings consistent with this opinion.

I

{¶ 3} The Board filed an appropriation action in early June 2009, seeking to appropriate a small parcel of land belonging to the Stewarts. The Board alleged in the petition that the appropriation was for public purposes and for the improvement of Old Columbus Road at Vernon-Asbury Road in Clark County, Ohio. Copies of the pertinent Board Resolution and a description of the parcel were attached as Exhibits A and B.

{¶ 4} In early July 2009, the Stewarts filed an answer, disputing that the taking was for a public purpose. The Stewarts asked the trial court to issue a restraining order enjoining the Board from interfering with their legitimate business operations. They also requested fair and just compensation in the event that the taking was found to be for a public use, and compensation for damages to the residue.

{¶ 5} On July 22, 2009, the Board filed a notice of service of first interrogatories, request for production of documents, and requests for admissions, sent by regular mail and electronically to the Stewarts on July 21, 2009. Subsequently, the Board filed a motion for summary judgment in late August 2009. The Board contended in the motion that the Stewarts had failed to respond to its requests for admissions. The request for admissions states as follows:

{¶ 6} “E. Requests for Admission

{¶ 7} “1. Admit that the appropriation of the subject property prayed for in the Petition, is for the purpose of making or repairing roads which will be open to the public

without charge.

{¶ 8} “2. Admit that the fair value of the portion of the subject property being appropriated is \$3,067.00.

{¶ 9} “3. Admit that the only planned use for the subject property is for agriculture.” Board Motion for Summary Judgment, Exhibit A.

{¶ 10} The Stewarts failed to reply to the Board’s motion for summary judgment until the end of September 2009. In the meantime, the Stewarts filed notice of their responses to the Board’s discovery requests, including the requests for admissions, on September 16, 2009, which was not within the time required for a response. The Stewarts then filed a motion to withdraw and/or to amend answers to the requests for admissions in late September 2009. In the motion, the Stewarts contended that their failure to timely submit answers to the requests for admissions should not result in the answers being deemed admitted. The Stewarts contended, both in this motion and in their response to the motion for summary judgment, that fairness dictated that they should be permitted to answer the requests for admission. They also claimed that the Board would not be prejudiced by having the admissions set aside. The Stewarts did not offer any reason why they failed to timely file the answers.

{¶ 11} In October 2009, the trial court rendered summary judgment in favor of the Board. The court granted judgment for the Board on its appropriation request, and held that the value of the property was \$3,067. The court subsequently ordered the clerk to disburse \$3,067 to the Stewarts.

{¶ 12} The Stewarts appeal from the summary judgment rendered in favor of the Board.

{¶ 13} The Stewarts' First Assignment of Error is as follows:

{¶ 14} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS REFUSAL TO GRANT RELIEF TO THE APPELLANTS FOR THE DEEMED ADMISSION TO VALUE OF LAND WHERE THE APPELLANTS WERE 14 DAYS LATE IN PROVIDING RESPONSES TO ADMISSIONS THAT HAD BEEN PENDING FOR 3 ½ MONTHS AT THE TIME OF THE ADVERSE DECISION."

{¶ 15} Under this assignment of error, the Stewarts contend that the trial court erred in refusing to grant relief from the deemed admissions resulting from their failure to have timely responded to the Board's request for admissions. These answers, in turn, were the basis for the summary judgment rendered against the Stewarts. The Stewarts contend that this is too harsh a sanction for their failure to respond.

{¶ 16} The trial court did not rule on the Stewarts' motion for relief, but simply granted summary judgment in the Board's favor, based on the information in the admissions. Where the trial court fails to rule on a motion, we presume that the trial court overruled the motion. *Maguire v. Natl. City Bank*, Montgomery App. No. 23140, 2009-Ohio-4405, ¶ 16.

{¶ 17} The Stewarts' motion was brought under Civ. R. 36, which contains procedures governing requests for admissions. Civ. R. 36(A) allows parties to serve written requests for admission "of the truth of any matters within the scope of Civ. R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." These matters are deemed admitted pursuant to Civ. R. 36(A)(1), "unless, within a period designated in the request, not less than twenty-eight days after service

of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.”

{¶ 18} The Stewarts admit that they failed to comply with the time requirements in Civ. R. 36(A)(1). Their answers to the requests for admissions were filed almost two months after service of the requests, and only after the Board had filed its motion for summary judgment on the merits of the action.

{¶ 19} After the Stewarts filed their responses to the requests for admission, they filed a motion pursuant to Civ. R. 36(B), requesting that the admissions be withdrawn or amended. In this regard, Civ. R. 36(B) provides that:

{¶ 20} “Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Civ. R. 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.”

{¶ 21} In *Balson v. Dodds* (1980), 62 Ohio St.2d 287, the Supreme Court of Ohio interpreted Civ. R. 36(B) in a similar situation. In that case, the defendant’s responses to the plaintiff’s requests for admissions were filed 14 days late, and the defendant

neither requested nor obtained leave to file the responses late. *Id.* at 288. As in the case before us, the plaintiff moved for summary judgment before the responses were filed, arguing that the requested admissions were deemed admitted, due to the failure to respond. The plaintiff also contended that summary judgment was warranted, based on the lack of factual issues. *Id.* The trial court denied the motion for summary judgment, however, stating that:

{¶ 22} “(1) appellee's untimely filing was a mistake, and not ‘either willful and/or done in bad faith’; (2) appellant suffered no pecuniary loss or undue hardship as a result of the untimely filing; and (3) justice would be completely defeated unless ‘the cause * * * (were) heard fully upon its merits and then adjudicated upon the evidence adduced in open court.’ ” *Id.* at 294 (quoting from the trial court decision).

{¶ 23} The matter was ultimately tried to a jury, and a directed verdict was granted in favor of the defendant. *Id.* When the plaintiff appealed, the court of appeals affirmed the judgment, and refused to consider the issue of whether the trial court had erred in denying the plaintiff's motion for summary judgment. *Id.* The Supreme Court of Ohio then affirmed the decision of the court of appeals. The Supreme Court held that the court of appeals had erred in refusing to consider the denial of summary judgment. Nonetheless, the Supreme Court of Ohio concluded that the judgment should be affirmed, because the trial court had correctly applied Civ. R. 36(B). In this regard, the Supreme Court of Ohio stressed that under Civ. R. 36(B):

{¶ 24} “[T]he trial court, upon appellee's motion, * * * could permit the withdrawal or amendment of the Civ.R. 36(A) admissions, i.e., permit appellee to avoid the conclusive effect of her failure to file timely answers, if presentation of the merits would

be enhanced, and if appellant failed to satisfy the trial court that the withdrawal or amendment of the admissions would prejudice appellant in maintaining her action on the merits. * * * It is uncontested that presentation of the merits herein would be enhanced by permitting appellee to file untimely answers; and appellant has not demonstrated that these untimely answers would prejudice appellant in maintaining her action on the merits. Thus, we sustain the trial court's interpretation and application of Civ.R. 36." *Id.* at 290-91 (footnote and citations omitted).

{¶ 25} In the case before us, the Board agrees that under *Balson*, the trial court "could" have permitted the withdrawal of the admissions deemed by default. The Board argues, however, that the matter is within the trial court's discretion, and that under *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, the Stewarts have failed to establish "compelling circumstances" justifying their dilatory response to the admissions.

{¶ 26} *Willis* was issued after the decision in *Balson*. In *Willis*, the defendant failed to respond to a request for admissions for forty-two days after service, which also happened to be the first day of trial. *Id.* at 67. The trial court deemed the matters admitted, and entered judgment for the opposing party. *Id.* On appeal, the Supreme Court of Ohio first noted that under "compelling circumstances," a trial court may allow untimely replies to avoid admissions. *Id.* The court further observed that:

{¶ 27} "A request for admission can be used to establish a fact, even if it goes to the heart of the case. This is in accord with the purpose of the request to admit - to resolve potentially disputed issues and thus to expedite the trial. * * *

{¶ 28} "Any matter admitted under Civ.R. 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Civ.R. 36(B).

The court may permit the withdrawal if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action. *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293 [16 O.O.3d 329], paragraph two of the syllabus. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

{¶ 29} “In this case Charles [the defendant] failed to justify his dilatory response to the requests. On appeal Charles suggests that illness prevented his timely response. However, Charles did not move for a protective order or otherwise request relief from the duty of responding to these requests for admissions. Extensions of time may always be asked for and are usually granted on a showing of good cause if timely made under the Civil Rules. In such circumstances we do not see how Charles’ illness presented a substantial reason for not responding earlier.” *Id.* at 67-68 (bracketed material added; citations omitted).

{¶ 30} A factor that may have influenced the Supreme Court of Ohio in *Willis* was that the defendant had failed to cooperate with discovery requests and had defied court orders directing him to give a deposition. *Id.* at 68. The court noted that allowing the defendant to file his response would not only have prejudiced the plaintiff’s “pursuit of its remedy and entailed further delay, but it would have put a premium upon lack of diligence.” *Id.*

{¶ 31} Some dispute currently exists among Ohio district courts of appeals regarding whether a party must demonstrate a compelling reason for the trial court to

accept late responses to requests for admissions. Compare *Kutscherousky v. Integrated Communications Solutions, LLC*, Stark App. No.2004 CA 00338, 2005-Ohio-4275, ¶ 17-29, with *RKT Properties, LLC v. Northwood*, 162 Ohio App.3d 590, 2005-Ohio-4178, ¶ 12.

{¶ 32} In *Kutscherousky*, the Fifth District Court of Appeals applied federal precedent, and concluded that the “ ‘two-prong test of Rule 36(b) directs the court to consider the “effect upon the litigation and prejudice to the resisting party [,]” * * * rather than focusing on the moving party's excuses for an erroneous admission.’ ” 2005-Ohio-4275, ¶ 17 (citations omitted).

{¶ 33} In contrast, in *RKT Properties*, the Sixth District Court of Appeals relied on *Willis*. The Sixth District Court of Appeals held that withdrawal of admissions should be allowed only after considering prejudice to the opposing party, and that the compelling circumstances leading to the failure to reply to a request for admissions must be weighed against prejudice to the other party. 2005-Ohio-4178, ¶ 12.¹

{¶ 34} Our own district has required a compelling or substantial reason for the failure to file timely answers to requests for admissions. See, e.g., *Gwinn v. Dave Dennis Volkswagen* (Feb. 8, 1988), Greene App. No. 87-CA-56; *Sciranka v. Hobart*

¹Two panels of the Sixth District Court of Appeals have subsequently taken conflicting approaches. For example, *B & T Distribs. v. CSK Constr., Inc.*, Lucas App. No. L-07-1362, 2008-Ohio-1855, ¶ 18, follows the approach in *RKT Properties*, by holding that “[m]any Ohio courts, including this court, do require a showing of compelling circumstances, in addition to considering prejudice.” However, a later case, *Stevens v. Cox*, Wood App. No. WD-08-020, 2009-Ohio-391, ¶ 51, follows the approach of *Kutscherousky*, by holding that in assessing whether relief should be afforded under Civ. R. 36(B), “the trial court is directed to focus on the ‘ “effect upon the litigation and prejudice to the resisting party” * * * rather than focusing on the moving party's excuses for an erroneous admission.’ ”

Intern., Inc. (Sept. 4, 1992), Miami App. No. 91 CA 61; and *Family Songs Ministries v. Morris*, Miami App. No. 09-CA-16, 2010-Ohio-280, ¶ 16. In practice, though, our jurisprudence on this issue is not all that different from that of other districts.

{¶ 35} In *Family Songs Ministries*, supra, for example, counsel stated that the requests for admission were not responded to “for reasons not completely known * * * .” In *Sciranka*, supra, the failure to respond was allegedly due to a “change of personnel in the law office,” and in *Gwinn*, supra, the defaulting party cited “office personnel problems.” In none of these cases did counsel request, before the response date, additional time to respond.

{¶ 36} In the case before us, the Stewarts failed to provide the trial court with any explanation for their failure to timely respond to the Board’s request for admissions. They also failed to submit any affidavits or other evidentiary materials when they replied to the Board’s motion for summary judgment. In similar situations, we have held that the trial court did not abuse its discretion in refusing to allow a party to submit belated responses to requests for admissions. *Gwinn*, Greene App. No. 87-CA-56; *Family Songs Ministries*, 2010-Ohio-280, ¶ 19. In these cases, we focused on the lack of evidentiary materials submitted in connection with the response to summary judgment, and the lack of any real excuse for failing to file timely responses to the request for admissions. *Id.* This is not so high a hurdle to overcome.

{¶ 37} In view of our prior authority interpreting *Willis*, we conclude that the trial court did not abuse its discretion in overruling the Stewarts’ motion to withdraw or amend their deemed admissions resulting from their failure to have timely responded to the requests for admissions, despite the lack of any apparent prejudice to the Board.

{¶ 38} The Stewarts' First Assignment of Error is overruled.

III

{¶ 39} The Stewarts' Second Assignment of Error is as follows:

{¶ 40} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO FIND THE VALUE OF THE TEMPORARY EASEMENT OF THE TAKEN PROPERTY THAT WAS ACTIVELY USED IN AGRIBUSINESS WITH A PLANTED CROP FOR THE 2009 SEASON PRIOR TO THIS ACTION BEING FILED BY THE APPELLEE."

{¶ 41} Under this assignment of error, the Stewarts contend that the trial court erred by failing to consider the value of crops that were being grown on their land at the time it was taken. The Board responds by noting that the facts in question are not part of the record. The Board also states that it did not seek, and did not obtain, a temporary easement for any period of time on the property.

{¶ 42} R.C. 163.14(B) provides that "[t]he jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners." Because the trial court rendered summary judgment, the court decided the issue of the compensation to be awarded for the property appropriated. Taking the admissions into account, the trial court held that the value of the appropriated property was \$3,067, which is the sum the Board deposited with the clerk of courts.

{¶ 43} When property is taken, an owner's remedy consists of two discrete elements – " 'compensation' for the property actually taken and 'damages' for injury to

the property which remains after the taking, i.e., the residue.” *City of Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 415. “Compensation” is the fair market value of the land that is taken, irrespective of any benefits resulting to the remaining land because of the proposed improvement. In contrast, “damages” include any injury to the remaining land as a result of constructing the proposed improvement, after allowance for special benefits. *Id.*

{¶ 44} In addition, “The Constitution protects against temporary takings just as it does against permanent takings.” *State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 124, 1998-Ohio-313. Accordingly, in a proper case, damages may be awarded for the temporary taking of property for a public use, where the land is encroached upon, and the owner’s dominion and control are restricted, for a period of time. *City of Norwood v. Sheen* (1933), 126 Ohio St. 482, 487-88. Accord, *Lake Pointe Constr. Co., Inc. v. Avon*, 182 Ohio App.3d 554, 2009-Ohio-2613, ¶ 9. The measure of damages in these situations is the diminution in the value of the use of the property during the period of the temporary taking. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 69, 2002-Ohio-1627.

{¶ 45} The Stewarts contend that a temporary taking occurred, because the construction interfered with crops being grown on their property. In contrast, the Board contends that it did not request a temporary taking. Neither of these matters is part of the record. We do note that the Stewarts’ answer asked for an injunction to prevent the Board from interfering with crops that were growing. The requests for admissions also did not address the issue of a temporary taking. However, the resolution attached to the Board’s petition for appropriation describes the property necessary to be acquired

as follows:

{¶ 46} “1) a standard highway easement for the purposes of improving Old Columbus Road at Vernon-Asbury Road in the following described property: See Exhibit A.

{¶ 47} “2) A temporary construction easement for the purpose of improving Old Columbus Road at Vernon Asbury Road in the following described property: See Exhibit B.

{¶ 48} “The duration of the temporary easement requested from the Grantor (Stewart) to the Grantee (County) is 12 months immediately following said date on which the work described is first commenced [sic] by the County or it’s [sic] duly authorized employees, agents, and contractors.” Exhibit A attached to the Petition for Appropriation filed on June 6, 2009.

{¶ 49} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, the Supreme Court of Ohio stated with regard to summary judgment, that:

{¶ 50} “[E]ven *Celotex* makes clear that the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. Accord *Mitseff*, *supra*, 38 Ohio St.3d at 114-115, 526 N.E.2d at 801. That is, the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials

listed in Civ.R. 56(C) include ‘the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.’ These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. While the movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed. In this regard, *Celotex* makes clear, especially in light of Justice White's concurring opinion in that case, that a moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. The assertion must be backed by some evidence of the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.” 75 Ohio St.3d at 292-293.

{¶ 51} The Board's own resolution, which was submitted to the court, suggests that a temporary easement was desired. In moving for summary judgment, the Board failed to address this point, and failed to submit any evidence on the matter. Accordingly, the Board failed to satisfy its initial burden under *Dresher*, and the trial court should have denied summary judgment on this point. The Board may be correct in stating that no temporary taking occurred, but this is not a fact that can be determined on the current state of the record.

{¶ 52} The Stewarts' Second Assignment of Error is sustained.

IV

{¶ 53} The Stewarts' Third Assignment of Error is as follows:

{¶ 54} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO FIND THE VALUE OF THE DAMAGE DONE TO THE RESIDUE OF APPELLANTS' LAND IN THIS EMINENT DOMAIN ACTION."

{¶ 55} Under this assignment of error, the Stewarts contend that the trial court erred by failing to award an amount for damage allegedly done to the residue of their land on Old Columbus Road. The Stewarts contend that the property is zoned for permissible uses other than agriculture, which is the cheapest of the permissible uses of the land, and that they should have been able to claim compensation for the "highest and best use" of the land.

{¶ 56} "Compensation for land taken for public use is determined by the fair market value of the property on the date of taking unless for some unusual circumstance a different earlier date of valuation is ascertained. * * *

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

{¶ 58} "Damage to the residue is measured by the difference between the

pre- and postappropriation fair market value of the property that remains after the taking.” *Hilliard v. First Indus., L.P.*, 158 Ohio App.3d 792, 2004-Ohio-5836, ¶ 5.

{¶ 59} The Stewarts failed to submit facts to the trial court, by way of affidavits or other evidence, that would indicate a value for the land other than the \$3,067 amount listed in the requests for admissions as the “fair value of the subject property being appropriated.” Request for Admission No. 2. As noted, however, damage to the residue is measured by the difference between the pre- and post-appropriation fair market value of the property. The evidence submitted by the Board fails to address this issue. Accordingly, under *Dresher*, the Board failed to satisfy its initial burden, and the trial court should have denied summary judgment on this issue.

{¶ 60} The Stewarts’ Third Assignment of Error is sustained.

V

{¶ 61} The First Assignment of Error having been overruled, and the Second and Third assignments of error having been sustained, to the extent that the summary judgment rendered by the trial court establishes \$3,067 as compensation for the property taken, it is Affirmed; to the extent that the trial court rendered summary judgment to the Board with respect to the issues of compensation for the temporary taking of the Stewarts’ property and damages to the residue of the property, its judgment is Reversed; and this cause is Remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J., and FROELICH, J. concur.

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