[Cite as *Ohio Dept. of Natural Resources v. Thomas*, 2016-Ohio-8406.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES,

PLAINTIFF-APPELLANT, **CASE NO. 10-16-05**

v.

NELDA G. THOMAS, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Mercer County Common Pleas Court
Trial Court No. 12-CV-208

Judgment Affirmed

Date of Decision: December 27, 2016

APPEARANCES:

Scott D. Phillips and Shanna J. Morris **for Appellant, ODNR**

Thomas H. Fusonie **for Appellees, Gale and Nelda Thomas**

Leah Curtis **for Amici Curiae, Ohio and Mercer County Farm Bureau**

SHAW, P.J.

{¶1} Plaintiff-appellant State of Ohio, Department of Natural Resources ("ODNR"), appeals the May 11, 2016, judgment of the Mercer County Common Pleas Court entering a jury's award of $515,970 to defendants-appellees, Nelda Thomas and Gale Thomas (collectively referred to as "appellees"), for ODNR's appropriation of a permanent flowage easement on the appellees' farm. For the reasons that follow, we affirm the judgment of the trial court.

I. Introduction

{¶2} Appellees are owners of 95.55 acres of farmland in Mercer County, Ohio.[1] Due to a spillway modification to Grand Lake Saint Marys ("GLSM") in 1997, flooding increased on the appellees' farm.[2]

{¶3} As a result of the intermittent, but inevitably recurring flooding caused by the GLSM spillway modification, appellees were among more than 80 landowners who filed an action for a writ of mandamus in the Supreme Court of Ohio on July 17, 2009, seeking to compel ODNR to initiate appropriation proceedings for the taking of their property.

[1] At trial it was indicated that the appellees also own other tracts of farmland; however, those farms were not flooded as a result of the spillway modification and have no bearing on this action.
[2] For a discussion of the spillway and events leading to its construction, *see State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117.

II. Relevant Litigation Prior to the Current Proceeding

a. The Doner *Mandamus Action*

{¶4} The Supreme Court of Ohio granted the requested writ of mandamus in *State ex rel. Doner v. Zody,* 130 Ohio St.3d 446, 2011-Ohio-6117. In *Doner*, the Supreme Court of Ohio began its decision by rejecting ODNR's argument that relators' claims were barred by the statute of limitations, holding that landowners needed "time to determine whether the flooding that followed [ODNR's] construction of the spillway in 1997 and [ODNR's] refusal to lower the lake level at GLSM was of sufficient frequency to constitute a taking." *Doner* at ¶ 50. In making this finding, the *Doner* Court relied on an expert's statement that such evidence called for " 'at least 10 and preferably 15 years or more of record in order to produce meaningful hydrologic statistics.' " *Id*. at ¶ 49. Thus the Supreme Court of Ohio found that where a trespass by flooding was continuous and ongoing, the statute of limitations period was tolled.

{¶5} The *Doner* Court then proceeded to address the mandamus action itself, analyzing the evidence presented by the parties. After thoroughly summarizing the evidence presented, the Court found that: (1) relators established by "clear and convincing evidence that flooding that occurred on their property was the direct, natural, or probable result of respondents' actions" in altering the spillway and

abandoning lake-level management, and that (2) the flooding, "while intermittent, is inevitably recurring." *Doner* at ¶¶ 79, 82.

{¶6} In reaching its conclusion, the *Doner* Court made a number of specific findings indicating that it was persuaded by ODNR's own expert's statement that as a result of the construction of the spillway and the lack of lake-level management, 100-year flooding events were occurring "every ten years. And according to the evidence submitted by some of the relators, flooding can now occur after even a minimal rain event." *Id*. at ¶ 82.

{¶7} The *Doner* Court also rejected ODNR's argument that even if there was a taking, it was not compensable because ODNR had acquired a prescriptive easement to flood relators' property. The Court found that a claim for a prescriptive easement was actually an affirmative defense that ODNR failed to raise and that ODNR had thus waived a claim to a prescriptive easement.

{¶8} In conclusion, the *Doner* Court granted the relators' requested writ of mandamus to "compel [ODNR] to commence appropriation proceedings to determine the amount of [ODNR's] taking of the property. * * * The determination of the extent of the taking will be made by the court presiding over the appropriation proceeding." *Id.* at ¶ 86.

b. Contempt Proceedings Related to Doner

{¶9} Following the mandamus order in *Doner*, ODNR initiated appropriation proceedings against only two of the property owners who had been involved in the mandamus action. The remaining relators then filed a motion for an order for ODNR to show cause why it should not be held in contempt of the *Doner* decision. The Supreme Court of Ohio granted that motion and held a show-cause hearing on December 4, 2012.

{¶10} On December 5, 2012, in *State ex rel. Doner v. Zehringer*, 134 Ohio St.3d 326, 2012-Ohio-5637 ("*Zehringer I*"), the Supreme Court of Ohio found that ODNR was in contempt of the Court's writ in *Doner*. In making its contempt finding, the Court stated that after settlement negotiations had failed, ODNR filed appropriation cases for only two of the property owners. The Court thus determined that relators established that ODNR was in contempt of its writ in *Doner*. The Court then stated,

> **We order respondents to complete all appraisals on relators' parcels for the 2003-flood-level cases within 90 days and to file all appropriation cases for these parcels within 120 days. For the remaining 20 parcels that respondents claim they have not yet surveyed because they involve flooding above the 2003 flood level, respondents are ordered to institute declaratory-judgment actions in the Mercer County Common Pleas Court within 30 days to determine the legal rights of the parties for those parcels.**

Zehringer I at ¶ 3.

{¶11} Subsequently, relators filed a second contempt motion in the Supreme Court of Ohio. The Court summarily denied the second contempt motion in *State ex rel. Doner v. Zehringer*, 139 Ohio St.3d 314, 2014-Ohio-2102 ("*Zehringer II*").

{¶12} However, Justice Pfeifer wrote a concurring opinion in *Zehringer II*, which was joined by Justice O'Neill, noting specifically that, "The 2003–flood–level cases were so denominated because the extent of the taking of those parcels had been established to be the level of the 2003 flood. We ordered appraisals for the 2003–flood–level cases because ODNR stated that surveys establishing the extent of the taking had already been completed." *Zehringer II* at ¶ 5. Justice Pfeifer indicated that ODNR was now attempting to abandon the 2003 flood level as the extent of the taking. *Id*. at ¶ 6. Justice Pfeifer stated that ODNR had represented to the Supreme Court of Ohio in the 2012 contempt proceeding that the 2003 flood level set the extent of the taking for the parcels that were affected by the flood.

c. ODNR's Doner*-related Appropriation Proceedings Previously Reaching Verdict*

{¶13} Consistent with the *Doner* decision (and the accompanying contempt proceedings), ODNR initiated appropriation proceedings in the Mercer County Common Pleas Court for the related properties. Three of those appropriation cases were fully litigated to verdict and ODNR appealed all three decisions to this Court, making similar arguments in all three cases.

{¶14} In *Ohio Dept. of Nat. Resources v. Chad Knapke*, 3d Dist. Mercer No. 10-14-03, 2015-Ohio-1691, *appeal not allowed*, 144 Ohio St.3d 1409, 2015-Ohio-4947, ODNR argued that the trial court erred by failing to grant ODNR's request for a jury view of the subject property, that the trial court erred by admitting some of the landowner's testimony and exhibits while excluding some of ODNR's, and that the jury received improper instructions. A 2-1 majority affirmed the trial court's judgment, finding that the denial of the jury view was error, but harmless, that certain photographs introduced by the landowners were erroneously admitted, but not prejudicial error, that the trial court did not err in excluding ODNR's evidence related to lake-level management, and that the jury instructions were not improper.

{¶15} In *Ohio Dept. of Nat. Resources v. Mark Knapke Trust, et al.*, 3d Dist. Mercer No. 10-13-25, 2015-Ohio-470, *appeal not allowed*, 143 Ohio St.3d 1464, 2015-Ohio-3733, a plurality opinion from this Court affirmed the trial court's judgment where similar assignments of error were raised as those in the *Chad Knapke* case.[3]

{¶16} However, in *Ohio Dept. of Nat. Resources v. Ebbing*, 3d Dist. Mercer No. 10-13-24, 2015-Ohio-471, *appeal not allowed*, 143 Ohio St.3d 1499, 2015-Ohio-4468, a plurality opinion from this Court reversed the trial court's judgment,

[3] The plurality opinion in *Mark Knapke* consisted of a lead opinion authored by Judge Shaw, a concurrence in judgment only by Judge Preston, and a dissent by Judge Rogers.

finding that it was error for the trial court to deny the jury view, that certain photographs introduced by the landowners were erroneous and prejudicial, and that it was error to exclude ODNR's testimony related to lake-level management.[4]

{¶17} All three of the appropriation cases that reached verdict and were addressed by this Court on appeal were then appealed to the Supreme Court of Ohio. The Supreme Court of Ohio declined to hear any of the cases.

d. Appropriation Deposit Mandamus Litigation

{¶18} This Court has also addressed two separate ODNR appeals related to *Doner* wherein ODNR challenged a writ of mandamus that had been granted by the Mercer County Common Pleas Court ordering ODNR to deposit money equal to its good-faith offers to the landowners for its appropriation cases.

{¶19} In *State ex rel. Karr Revocable Trust v. Zehringer*, 3d Dist. Mercer No. 10-13-18, 2014-Ohio-2241, *appeal not allowed*, 140 Ohio St.3d 1497, 2014-Ohio-4845 ("*Karr I*"), ODNR appealed the writ of mandamus granted by the Mercer County Common Pleas Court. On appeal, ODNR argued that it had no clear legal duty to deposit money at the time it filed its appropriation petitions, and that relators had other adequate forums to litigate the merits. A 2-1 majority of this Court rejected ODNR's claims, finding that ODNR had a clear legal duty to make the deposits on the appropriation cases and that landowners demonstrated by clear and

[4] The plurality opinion in *Ebbing* consisted of a lead opinion by Judge Rogers, a concurrence in judgment only by Judge Preston, and a dissent by Judge Shaw.

convincing evidence that they did not otherwise have a plain and adequate legal remedy.

{¶20} After this Court's affirmance in the *Karr I* mandamus action, ODNR filed a "motion to correct value of mandated deposits" in the Mercer County Common Pleas Court, contending that ODNR had new or updated appraisals because the original appraisals were based upon an incorrect "date of take," which was used for valuation purposes. ODNR contended that it should be able to deposit the lower amounts contained in the new or updated appraisals rather than the original good-faith offers. ODNR argued that the original appraisals and good-faith offers did not take into account new information that had been obtained, which materially impacted the valuations of the properties, and that R.C. 163.59(E) required updating appraisals older than two years. Ultimately the trial court rejected ODNR's arguments to update its appraisals for purposes of modifying its deposit amounts and ODNR appealed that decision to this Court in *State ex rel. Karr Revocable Trust v. Zehringer*, 3d Dist. Mercer No. 10-14-16, 2015-Ohio-1495 ("*Karr II*").

{¶21} In *Karr II*, this Court unanimously rejected ODNR's arguments. We determined that the date-of-take issue raised by ODNR was a separate and distinct issue from correcting or modifying a deposit based on its original appropriation petition, and thus it was not a valid reason for seeking to subvert the writ of

mandamus granted by this Court. This Court also determined that applying R.C. 163.59(E)'s provision on updating appraisals in the manner advocated by ODNR would lead to "absurd result[s]." *Karr II*, at ¶ 16.

III. The Current Action Related to the Appellees' Farm

{¶22} On December 3, 2012, ODNR filed a "Petition to Appropriate Flowage Easement and to Fix Compensation" for the property owned by the appellees. The petition stated ODNR was in full compliance with the Supreme Court of Ohio's mandamus order in *Doner*. The petition further stated that the parties had been unable to agree on terms for a conveyance of the flowage easement.

{¶23} The petition indicated that the purpose of the appropriation was to acquire a "permanent flowage easement free and clear of all liens, claims and encumbrances, that fully complies with * * * the order of the Ohio Supreme Court." (Doc. No. 3). ODNR asserted that the flowage easement had a fair market value of $363,100.00 and that the appellees were those who had been identified as owners or persons with an interest in the property. The petition requested that the trial court enter judgment ordering the conveyance of a permanent flowage easement to ODNR, and that if the appellees failed to answer, the trial court declare the value of the easement as $363,100.00.

{¶24} Incorporated in, and attached to, the petition was a description of the subject property, which consisted of a total of 95.55 acres. The flowage easement covered a total area of 85.349 acres.

{¶25} On December 18, 2012, appellees filed an answer. In the answer, appellees stated that ODNR had not fully complied with the Ohio Supreme Court's mandamus order because ODNR had not provided a "good faith offer of just compensation for the property [ODNR] has taken." (Doc. No. 10). However, appellees admitted that they had been unable to come to terms with ODNR.

{¶26} The matter was set for trial, wherein a jury would determine the value of the flowage easement. Prior to trial, there were numerous motions filed by both ODNR and the appellees on various issues. The trial court allowed extensive briefing by both parties on the issues, and the trial court held motion hearings where it deemed oral arguments were necessary.[5]

{¶27} Once all pre-trial issues were determined, the matter proceeded to trial, which was held April 20-22, 2016. Notably, there is no burden of proof in this type of appropriation proceeding pursuant to R.C. 163.09. The jury is simply required to evaluate the evidence and reach a consensus as to the value of the property with a flowage easement, and the value of the property without a flowage easement.[6] The

[5] A number of these pre-trial issues are the subject of the current appeal, and will be discussed *infra*.
[6] The "consensus" is that 6 of the 8 jurors must agree on the value. (Tr. at 688).

difference between those two values is the amount that would be awarded to the appellees.

{¶28} At trial, Gale Thomas testified on behalf of the appellees. Thomas testified that the farm at issue was purchased in 1988, that it consisted of 95.55 acres, and that approximately 90 acres of the farm were tillable. Thomas testified that he farmed the property with his son and his brother.

{¶29} Thomas testified that prior to purchasing the farm, flooding primarily occurred in the winter, and "it was not that bad" compared to the flooding after the new spillway was constructed. (Tr. at 221). Thomas testified that during his ownership, from 1988 until the spillway was constructed in 1997, he did not recall any flooding; however, he did testify that he had a partial crop loss in 1996.

{¶30} Thomas testified that since the construction of the spillway, he had flooding "almost every year. Some years worse than others, at different times of the year." (Tr. at 231). Thomas testified that the floods in 2003, 2011, and 2015 were all particularly bad, though he testified that it had also flooded in 1998, 2002, 2005, 2008, 2009, 2010, and 2013.

{¶31} Thomas testified that there were a number of issues with the flooding, which began with the flooding destroying crops, or potentially destroying them. Thomas testified that the flooding could make it difficult to plant and harvest. He specifically testified that he had a total crop loss in 2011. Thomas testified that up

to 90 percent of his farm floods, that it gets five to six feet deep and that the flooding can stay five to seven days.

{¶32} Thomas testified that the flooding also causes soil erosion, soil compaction, damages field tiles, prevents access to the farm because the roads are flooded, and creates what Thomas called "blowholes" where tile gets "blow[n] out, and then they suck back in." (Tr. at 249). Thomas indicated that this requires significant additional work for him to prepare and maintain the farm.

{¶33} Thomas also testified to extensive debris that gets left on his property due to the flooding. He testified in 2011 the debris was "probably 100 feet wide and six to eight inches thick" of cornstalks, bean straw, firewood, sticks, and bottles. (Tr. at 246). Thomas testified that he had to clean up the debris to be able to farm the property or the "dirt underneath will just stay like mush." (*Id*. at 246). Thomas testified that ODNR did not help with the cleanup and with the easement ODNR would not be helping him in the future.

{¶34} Thomas testified that he still farmed the subject property despite the flooding and the risk of flooding destroying his crops. However, he testified that he would not purchase the property today.

{¶35} On cross-examination Thomas testified that there were years he did not have flooding at all and that being close to a creek could actually make a farm more productive. Thomas also testified that he had no current plans to sell the farm.

{¶36} Appellees next called Richard Vannatta, their appraiser. Vannatta testified to his qualifications and was qualified as an expert in real estate appraisal evaluation. Vannatta testified as to how he conducted his appraisal of the subject property, indicating that he used a "sales comparison" method for valuing the property with and without the flowage easement.

{¶37} As to valuing the property with a flowage easement, Vannatta testified that ODNR was taking an "unrestricted occupancy right because there [are] no * * * reservations[.] * * * It's whenever they have the need to flood the property they can flood it. And it could happen at any time, 24/7, forever." (Tr. at 338-39). Vannatta testified that it was a "big thing." (*Id*. at 339).

{¶38} Vannatta testified that the value of the property without the flowage easement was $1,353,650 and the value of the property with the flowage easement was $135,365,[7] leaving a diminished value of $1,218,285, which he stated he believed the appellees were owed. A copy of Vannatta's report was entered into evidence.[8]

[7] He testified that he could not find any comparable sales in his approach for what the property would be worth after the flowage easement was attached to the property, so he reduced the value of the property by 90%.

[8] Vannatta's valuation was initially done valuing the property as of the original trial date of November 21, 2013. The trial was actually held in April of 2016. Vannatta testified that he had checked sales since he originally did his report and they still supported the conclusion that he made in 2013.

{¶39} On cross-examination Vannatta's opinion regarding the value of the subject property and his methodology were thoroughly challenged by ODNR. At the conclusion of Vannatta's testimony, appellees rested.

{¶40} ODNR then called Gary Obermiller, the Deputy Director and Chief of Ohio State Parks in the Division of Watercraft. Obermiller gave an overview of ODNR's statewide function.

{¶41} ODNR next called Bruce Dunzweiler, a real estate appraiser who had done the initial appraisal that the good-faith offer to the appellees was based upon. Dunzweiler testified as to his qualifications and was classified as an expert in appraisals and valuations. Like Vannatta, Dunzweiler testified that he also used a "sales comparison" approach when valuing the flowage easement.

{¶42} Dunzweiler testified that without the flowage easement, the highest and best use of the property was agriculture, and with the flowage easement the property's highest and best use was still agriculture because it could still be farmed and have a harvest. Dunzweiler testified that without the flowage easement he believed the appellees' farm was worth approximately $668,900, and that with the flowage easement it was worth approximately $305,800. Dunzweiler thus testified that he believed the flowage easement was worth $363,100. A copy of Dunzweiler's report was entered into evidence.[9]

[9] Dunzweiler's initial appraisal was based on a valuation date of July 30, 2012. Dunzweiler indicated that the value he placed on the flowage easement then was valid as of the trial date.

{¶43} Dunzweiler was thoroughly cross-examined as to the methodology he used to arrive at his numbers. At the conclusion of Dunzweiler's testimony, ODNR rested and the case was submitted to the jury.

{¶44} The jury returned a verdict indicating that the flowage easement was worth $515,970. A judgment entry entering the jury's verdict was filed on May 11, 2016. It is from this judgment that ODNR appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE TRIAL COURT ERRED BY DENYING ODNR'S MOTION FOR LEAVE TO FILE [AN] AMENDED PETITION AND DETERMINING THAT THE EXTENT OF THE TAKE WAS THE ENTIRETY OF ALL FLOODING THAT OCCURRED DURING THE 2003 FLOOD EVENT.

ASSIGNMENT OF ERROR 2

THE TRIAL COURT ERRED BY DENYING ODNR'S MOTION TO SET THE DATE OF TAKE AS THE DATE OF THE 1997 SPILLWAY MODIFICATION.

ASSIGNMENT OF ERROR 3

THE TRIAL COURT ERRED GRANTING LANDOWNERS' MOTIONS TO EXCLUDE ODNR'S NEW OR UPDATED HISTORICAL, HYDROLOGICAL, AND APPRAISAL EVIDENCE FOR PURPOSES OF VALUATION.

ASSIGNMENT OF ERROR 4

THE TRIAL COURT ERRED BY DENYING ODNR'S MOTION TO EXCLUDE TESTIMONY AND EVIDENCE FROM LANDOWNER'S REAL ESTATE APPRAISAL EXPERT WHILE AT THE SAME TIME GRANTING LANDOWNER'S MOTION TO EXCLUDE TESTIMONY AND EVIDENCE FROM ODNR'S REBUTTAL APPRAISAL EXPERT.

ASSIGNMENT OF ERROR 5
THE TRIAL COURT ERRED BY DENYING ODNR'S MOTION TO COMPEL DISCOVERY AND ADMITTING THE LANDOWNERS' UNFAIRLY PREJUDICIAL TESTIMONY AND EXHIBITS.

ASSIGNMENT OF ERROR 6
THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS CONSTITUTES REVERSIBLE ERROR.

First Assignment of Error

{¶45} In ODNR's first assignment of error, it argues that the trial court erred by denying its "Motion for Leave to File Amended Petition" and that the trial court erred by determining that the "extent of the take" was the 2003 flood level.[10]

{¶46} We review the denial of a request to amend a complaint, or in this case, an appropriation petition, under an abuse of discretion standard. *See Lundeen v. Graff*, 10th Dist. Franklin No. 15AP-32, 2015-Ohio-4462, ¶ 25. An abuse of discretion consists of a decision that is arbitrary, unreasonable, or unconscionable. *Rock v. Cabral*, 67 Ohio St.3d 108, 112 (1993), quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, we review the trial court's decision on the extent of the take *de novo*, without any deference to the trial court's determination, as it is an issue of law. *See Snapp v. Castlebrook Builders*, 3d Dist. Shelby No. 17-12-22, 2014-Ohio-163, ¶ 94.

[10] It is undisputed that the "extent of the take" was an issue for the trial court to determine prior to the jury deciding the value of the flowage easement at trial. *See Masheter v. Boehm*, 37 Ohio St.2d 68, 77 (1974).

{¶47} In this case, ODNR filed its original appropriation petition on December 3, 2012, alleging that the value of the flowage easement was $363,100. According to the record, trial was originally scheduled to commence November 20, 2013.[11]

{¶48} On October 11, 2013, ODNR filed a "Motion for Leave to File an Amended Petition to Appropriate Flowage Easement and to Fix Compensation *Instanter*." (Doc. No. 25). Thus, according to the record, ODNR filed its motion over ten months after it filed the original petition and just over a month before the scheduled trial date. In its motion, ODNR stated that it was seeking to incorporate a "clear and accurate description of the property to be taken, which appropriately accounts for the scientific effects of the redesigned spillway." (*Id*.) ODNR indicated that it had acquired new counsel since first filing the appropriation action in this case and the other *Doner*-related appropriations, and that new counsel had conducted "voluminous research and hired new experts." (*Id*.) ODNR stated that there were multiple errors with the original petition that needed to be corrected.

{¶49} More specifically, in its motion for leave, ODNR contended that it had previously measured the flowage easement by the "2003 flood," but that was "an extraordinary flood event." (Doc. No. 25). ODNR contended that such an

[11] A journal entry filed by the trial court on October 18, 2013, indicated trial was scheduled to commence November 20, 2013. (Doc. No. 27). This was corroborated by the fact that appellees' appraiser used November 21, 2013, as his original valuation date due to his understanding that it would be the date of trial.

extraordinary event, which would occur less than once in every 10 years, was not sufficient frequency to constitute a taking. ODNR argued that a new report showed a more accurate level of flooding, which would alter the "extent" of the take.

{¶50} ODNR also argued that the increase in flooding on the appellees' property as a result of the spillway modification was not determined or quantified. Rather, ODNR contended that the original petition was based "upon a metes and bounds description prepared by surveyors based on the estimated height of the 2003 flood marked by the Mercer County Engineer on bridge crossings." (*Id*.) ODNR argued that such a description was incorrect because the 2003 flood event was not the appropriate measure of the take, and that there was no information regarding the history of the area prior to 1997 to measure the flood event against.

{¶51} ODNR argued that the resulting appraisal value in its original petition that was based on the 2003 flood event as the extent of the take was inaccurate. As a result, ODNR requested that the trial court grant it leave to amend its petition, contending that Civ.R. 15 amendments should be freely granted when justice required. (*Id*.) citing *Columbus Bar Ass'n v. Dougherty*, 99 Ohio St.3d 147, 2003-Ohio-2672, ¶ 15.

{¶52} The Amended Petition, attached as "Exhibit A" to the "motion for leave," indicated that the flowage easement actually had a fair market value of $58,150, over $300,000 less than what ODNR had provided as its "good-faith" offer

in its original petition. ODNR's other exhibits attached to the motion contained a summary of its findings, which contended that the spillway modification only caused flooding to inundate an additional .1 acres of land for approximately 20 hours longer relative to what flooding had been prior to the GLSM spillway modification.

{¶53} Appellees opposed ODNR's motion to amend, arguing that ODNR was not seeking to cure a defect or informality in its original appropriation petition, but rather proposing an entirely new parameter for evaluating the extent of the take. In addition, appellees argued that ODNR had been ordered by the Supreme Court of Ohio in the *Zehringer I* contempt proceeding to complete all appraisals for the 2003 flood levels. *State ex rel. Doner v. Zehringer*, 134 Ohio St.3d 326, 2012-Ohio-5637, ¶ 3. Appellees argued that ODNR was required to comply with Supreme Court of Ohio's contempt order in *Zehringer I*, that ODNR had indicated to the Supreme Court of Ohio that it would comply with that order, that ODNR had complied with the order by getting the appraisals based on the 2003 flood levels, and now, after certifying compliance with the Supreme Court of Ohio's contempt order, ODNR sought to subvert the contempt order with an entirely new appraisal based on a different extent of the take.

{¶54} ODNR responded in its reply memorandum, contending that amendments to complaints/petitions should be liberally granted, that the Supreme

Court of Ohio never determined the extent of the take, and that the use of the phrase "2003-flood-level cases" in the *Zehringer I* contempt order was just a simplified way for the Supreme Court of Ohio to distinguish between two sets of relators.[12]

{¶55} On January 17, 2014, the trial court filed its "Judgment Entry on Motion for Leave to File an Amended Petition." (Doc. No. 48). In the entry, the trial court overruled ODNR's motion for leave to amend, first finding that granting ODNR's motion would conflict with the Supreme Court of Ohio's decisions in *Doner* and *Zehringer I*. The trial court stated that it understood the Supreme Court of Ohio's writ of mandamus in *Doner* to require the trial court to determine the amount of ODNR's taking of relators' property, which included the appellees' property, as a result of the creation of the 1997 spillway, and to convene a jury to assess the value of the easement taken.

{¶56} The trial court indicated that consistent with the Supreme Court of Ohio's mandamus order in *Doner*, the trial court required metes and bounds descriptions of the flowage easement, including the proposed flowage easement on the appellees' property. The trial court referenced the Supreme Court of Ohio's determination in *Doner* that the new GLSM spillway and lack of lake level management were causing 100-year flooding events every 10 years, an example of

[12] To reiterate the excerpt from our discussion of *Zehringer I*, the Supreme Court of Ohio stated, "We order respondents to complete all appraisals on relators' parcels for the 2003-flood-level cases within 90 days and to file all appropriation cases for these parcels within 120 days." *Zehringer I* at ¶ 3.

which was the 2003 flood. The trial court indicated that the boundaries of the 2003 flood levels were described in ODNR's original appropriation petition as the extent of the take.

{¶57} The trial court determined that the procedure adopted in this case and the other related *Doner* cases, had been consistent with, and in compliance with, the Supreme Court of Ohio's decision. The trial court stated that ODNR now sought to vacate a portion of the easement as determined by the 2003 flood level, which would recur as frequently as annually and not less than once every ten years.

{¶58} The trial court also determined that if it granted ODNR's motion it would be, effectively, subverting the *Zehringer I* contempt decision. The trial court stated that the Supreme Court of Ohio "appear[ed] to affirm" the trial court's position on the extent of the take in *Zehringer I*. (Doc. No. 48). The trial court concluded by stating,

> **In summary, the court concludes that ODNR is bound by the orders of the Supreme Court in *Doner,* including the contempt order; that ODNR is collaterally estopped from altering the description of the easement in an amended petition from that which it has represented to the Supreme Court it has used to comply with its contempt order in *Doner*; that it is bound by the determination by the Ohio Supreme Court that the flowage easement to be valued in this case is from flooding that is frequent, severe and persistent and is therefore sufficient to constitute a take under law as determined by the Supreme Court in *Doner*;**[13] **and finally, nothing in Chapter 163 of the Ohio Revised Code**

[13] It appears that the trial court's reference here was to the argument that ODNR's amended petition would reduce the "extent of the take" to such a minimal intrusion that it might not constitute a "taking" at all, which the court thought would be contrary to the determination already made in *Doner* that a taking had occurred.

> **authorizes an amendment of the description of the easement taken under these circumstances.**

(Doc. No. 48).

{¶59} ODNR challenges the trial court's decision on appeal, contending that the trial court erred in denying its motion to amend and that the trial court erred in setting the extent of the take at the 2003 flood level. More specifically, ODNR contends that the Supreme Court of Ohio never determined the extent of the take and any finding by the trial court to the contrary is erroneous; that the trial court's determination of the extent of the take did not consider flooding that occurred on the property prior to the creation of the spillway; that the 2003 flood was an "extraordinary event;" that R.C. 163.12(C) allows amendments with respect to appropriation petitions for any defect or informality in accordance with Ohio Civ.R. 15; and that other Ohio courts have allowed amendments to appropriation petitions.

{¶60} By contrast, appellees renew their arguments that they made to the trial court, steadfastly maintaining that ODNR should be prevented by collateral estoppel from raising these arguments where ODNR had either not challenged this issue at the trial court level in the separate *Doner* proceedings that had reached verdict—*Chad Knapke*, *Mark Knapke*, *Ebbing*, *State ex rel. Post v. Speck*, 3d Dist. Mercer No. 10–06–01, 2006-Ohio-6339—or had not appealed them. Appellees also argue that the Supreme Court of Ohio essentially ratified the extent of the take as the 2003 flood levels in the *Zehringer I* contempt decision.

{¶61} At the outset of our discussion, we note that the trial court specifically stated that *it* had determined the extent of the take and that the Supreme Court of Ohio "appear[ed] to affirm" the *trial court's* finding on the extent of the take in *Zehringer I*, not that the trial court was relying on any decision of the Supreme Court of Ohio as to the extent of the take. Thus any indication by ODNR that the trial court was merely relying on the Supreme Court's decision on this issue is inaccurate.

{¶62} Nevertheless, the *Zehringer I* contempt proceeding against ODNR in the Supreme Court of Ohio can be read as ratifying the trial court's extent of the take. It specifically states, "*We order* [ODNR] to complete all appraisals on relators' parcels for the 2003-flood-level cases within 90 days and to file all appropriation cases for these parcels within 120 days." (Emphasis added.) *Zehringer I* at ¶ 3. However, giving ODNR the benefit of its argument that the Supreme Court of Ohio was merely using the phrase "2003-flood-level cases" in *Zehringer I* as a designation for a group of landowners rather than as an order tacitly ratifying the trial court's determination on the extent of the take, we still cannot find that the trial court erred in setting the extent of the take at the 2003 flood level.

{¶63} The Supreme Court of Ohio found in *Doner* that 100-year flood events were happening as often as every 10 years. One example of that, though ODNR contends it was an "extraordinary event," was the 2003 flood. ODNR may classify

the 2003 flood as an "extraordinary event," but testimony at trial indicated that similar levels of flooding were present in 2011 and 2015, with intermittent flooding in a handful of other years as well.[14] Notably, the Supreme Court of Ohio also found in *Doner* that flooding can happen after even "minimal" rain events.[15] *Doner* at ¶ 82.

{¶64} The trial court elected to set the extent of the take as the 2003 flood level, which consisted of the extreme of what the flowage easement could encompass, and what ODNR was ultimately purchasing was the right to flood as frequently and as often as it desired. The record itself supports that significant flood events occurred, at least on this property, in other years since 2003. ODNR's indication that the 2003 "event" was "extraordinary" seems contrary to the evidence as it was reached perhaps 3 times over a 12-year span on the appellees' property. Thus, reviewing the issue of the "extent of the take" *de novo*, we cannot find that

[14] Gale Thomas testified that the 2011 and 2015 floods were similar in scope to the 2003 flood. (Tr. at 235-239). He also testified to flooding in 1998, 2002, 2005, 2008, 2009, 2010, and 2013.

[15] ODNR cites the case of *Baird v. United States*, 5 Cl. Ct. 324 (1984), for the proposition that an "extraordinary event" cannot be the measure of a flowage easement or constitute a taking. However, in *Baird*, which was decided by the United States Court of Claims, there was only *one* prolonged flooding event that killed trees, and the court found that flooding with an occurrence of once in every 120 to 130 years was compensable in *tort action* rather than as a taking. Clearly, given the Supreme Court of Ohio's findings in *Doner* and the actual flooding on the appellees' farm, *Baird* is substantially different from the case before us and has little relevance. ODNR also cites *Accurate Die Casting Co. v. City of Cleveland*, 2 Ohio App.3d 386 (8th Dist.1981), claiming that Ohio courts have held that events that occur less frequently than once than every ten years do not constitute a taking; however, *Accurate Die Casting* is also readily distinguishable as the flooding was far less frequent and severe. In addition, unlike *Accurate Die Casting*, the Supreme Court of Ohio already determined that a taking had occurred in this case.

the trial court's election to use the 2003 flood level as the extent of the take was error.[16]

{¶65} With the issue of the extent of the take determined, we turn to the trial court's denial of ODNR's motion to amend its appropriation petition. ODNR cites *Dorsey v. Donohoo*, 83 Ohio App.3d 415, 615 N.E.2d 239 (12th Dist.1992), and *Madison Cty. Bd. of Commrs. v. Bell*, 12th Dist. Madison No. CA2005-09-036, 2007-Ohio-1373, for the proposition that some courts have allowed amendments to appropriation petitions. However, both of those Twelfth District cases constitute entirely different factual situations and have little relevance to this case before us, particularly as the *discretion* of the trial court was upheld in both of those cases.[17]

{¶66} Moreover, the case *sub judice* presents a circumstance where ODNR was seeking to dramatically reduce its good-faith offer that this *entire action* was based upon. In fact, in its initial petition ODNR requested that the trial court enter judgment valuing the flowage easement at $363,100 if the appellees failed to

[16] ODNR states in its brief that the extent of the take in an inverse condemnation action is "not a question of law, but one of fact" and that the trial court should have held a hearing on this issue. (Appt.'s Br. at 7). However, as we have stated, the alteration of the GLSM spillway was creating 100-year flood events every ten years, so the 2003 flood that ODNR attempts to consistently stress as an outlier seems like an appropriate measure for the extent of the take both factually and legally, given that similar flooding events occurred in 2011 and 2015.

[17] *Donohoo* concerned the appropriation of land for an interchange. It was not an inverse condemnation proceeding like this case, where the government had already entered the land by way of flooding. The amended petition in *Donohoo* also merely added an easement for ingress and egress to the appropriation, it did not dramatically alter the scope of the appropriation, though again it is important to note that the government had not yet even entered the land. *Bell* presented a scenario wherein an appropriation action was modified from a fee simple to an easement, which is again unlike the situation before us. *Bell* was also not an inverse condemnation action as the government had not already entered the land but was planning to do so in the future, thus amending the petition seems entirely reasonable.

answer. Then, ten months after it filed its original petition, and only one month before the scheduled trial date, ODNR sought to reduce its "good-faith" offer that negotiations prior to filing the appropriation were based on, and that this entire litigation was based on, by over $300,000.

{¶67} As the trial court is given broad discretion on whether to grant or deny a motion to amend a complaint, we cannot find that the trial court erred in this circumstance. Nor can we find that the trial court erred in finding that ODNR was not merely seeking to correct a defect or informality in the proceedings by moving to amend its appropriation petition. Therefore, ODNR's argument is not well-taken and ODNR's first assignment of error is overruled.

Second Assignment of Error

{¶68} In ODNR's second assignment of error it argues that the trial court erred by denying its motion to set the "date of the take" for purposes of valuing the flowage easement as the date of the 1997 spillway modification. Specifically, ODNR contends that the "date of the take" for valuation purposes should be the earlier of the date of trial and the date of the physical appropriation. ODNR contends that the trial court should have adopted the date of the 1997 spillway modification as the date of the take because it was the earlier of the two dates. As the date of the take is an issue of law, we review the trial court's determination *de*

novo. *Snapp v. Castlebrook Builders*, 3d Dist. Shelby No. 17-12-22, 2014-Ohio-163, ¶ 94.

{¶69} In this case, on June 28, 2015, ODNR filed a motion to set the "date of the take" as April 30, 1997, for purposes of valuing the appellees' property, rather than the date of trial, which is what had been used in the previous ODNR cases that had reached verdict and were appealed to this Court—*Chad Knapke*, *Mark Knapke*, *Ebbing*, and *Speck*. ODNR further argued that the trial court had not conclusively established the date of trial as the date of the take even though ODNR had already valued the flowage easement in its appropriation petition, which contained its good-faith offer, using a date inconsistent with its newly proposed date of take.

{¶70} On July 13, 2015, appellees filed a memorandum contra to ODNR's motion to set the date of the take as April 30, 1997. Appellees argued that the date of the trial was the correct date, that even if it was not ODNR was collaterally estopped from arguing otherwise based on the prior litigation wherein the date of trial was used as the date of take, and that using 1997 as the date of the take was illogical based on the fact that the Supreme Court of Ohio stated that the taking could not be determined for at least 10 to 15 years because a flowage easement required intermittent but inevitably recurring flooding to constitute a taking.

{¶71} On April 7, 2016, the trial court filed an entry denying ODNR's motion to set the date of the take as the 1997 construction of the spillway. In the

entry, the trial court stated that there had been multiple appropriation trials and all had proceeded using the date of take as the date of trial and none had challenged the date of take as the date of trial. The trial court stated,

> **[c]onsistently throughout all related proceedings, the parties have prepared for and presented evidence at the trials at which the valuation of the take was the primary issue based upon the trial date as the date of the take for valuation purposes.**
>
> **The court cannot find good cause upon which to now establish a different date of take for this and all future trials for the valuation of the easements of other related property owners. To require the parties in this case to use the 1997 construction of the spillway date as the valuation will only further delay this and the related matters and cause additional expense to the parties. Furthermore, for the court to adopt a different date of take from the date of trial in each valuation trial would violate the law of the case concept.**

(Doc. No. 182).

{¶72} On April 11, 2016, the trial court held its final pretrial hearing on various pending motions, and the parties again addressed the "date of take" issue. The trial court again indicated that the date of trial had been used and uncontested for each trial that had been litigated related to ODNR's appropriation proceedings in Mercer County, including the case of *State ex rel. Post v. Speck*, 3d Dist. Mercer No. 10-06-01, 2006-Ohio-6339, which was prior to the mandamus action in the Supreme Court of Ohio and was presided over by a different trial court judge.

{¶73} The trial court stated that if it were to adopt the date of the 1997 spillway modification as the date of take, "we would then have to compute some

kind of remuneration for the property owners that would take into account their loss of use of any funds that they would have gotten at that point in time. * * * [W]e're stuck with this nebulous idea that we're going to value what you already took back then as of now; and I don't know how else we can be any more consistent, as much as I don't necessarily think that is the absolute best way to do it. I don't know of a better way, that's the problem; and that's the precedent that has been established in these proceedings and it shall remain." (Apr. 11, 2016, Tr. at 28-29).

{¶74} At trial, ODNR renewed its motion to set the date of take as April 30, 1997, and it was overruled. ODNR challenges the trial court's ruling on appeal, renewing its argument that the date should be the earlier of the date of trial and the date of the spillway modification. In support of its position, ODNR summarily cites two cases from the Supreme Court of Ohio, *Director of Highways v. Olrich*, 5 Ohio St.2d 70 (1966), and *Evans v. Hope*, 12 Ohio St.3d 119 (1984). In *Olrich*, the Supreme Court of Ohio stated that, "It is recognized in this state that property taken for public use shall be valued as of the date of trial, that being the date of take, unless the appropriator has taken possession prior thereto, in which event compensation is determined as of the time of the taking." 5 Ohio St.2d at 73. In *Evans*, the Supreme Court of Ohio stated, "Generally, the 'date of take' on which the value of property appropriated for public use is determined is the earlier of either the date of trial or

the date of actual physical appropriation." 12 Ohio St.3d at 120, citing *Olrich* (additional citations omitted).

{¶75} Notably, neither of the cases cited by ODNR deal with flowage easements and neither contains circumstances remotely similar to the case before us. Similarly, neither dealt with a taking that had to be determined *over a period of time*, as the Supreme Court of Ohio cited in *Doner*.

{¶76} In this case it is certainly inarguable based on the Supreme Court of Ohio's ruling in *Doner* that the creation of the spillway in 1997 *caused* the intermittent and inevitably recurring flooding to begin on the appellees' property. But, what is clear from the Supreme Court of Ohio's *Doner* opinion, is that for such flooding to constitute a taking, that flooding must inevitably *recur* with the *frequency* and *severity* to constitute a taking. The flooding created by the spillway needed to be monitored, as the Supreme Court of Ohio stated, for *at least* 10 to 15 years before meaningful hydrologic statistics could be found.[18] That fact alone supports the trial court's decision not to use the date of the creation of the spillway as the date of the take.

{¶77} Furthermore, the date of trial is the date that ODNR is officially acquiring the *right* to flood the appellees' property into perpetuity. So while the

[18] We are aware that the Supreme Court of Ohio discussed this fact in the context of overruling ODNR's argument that the relators' claims in *Doner* were barred by the statute of limitations. Nevertheless, we find that the point is persuasive here.

initial entrance onto the property by flooding may have occurred earlier than the date of trial, ODNR was taking the right to flood the property on the date of trial.

{¶78} We would note that in arguing for the date of the spillway modification as the date of the take, ODNR cites language from a footnote in this Court's plurality opinion in *Ohio Dept. of Nat. Resources v. Ebbing*, 3d Dist. Mercer No. 10-13-24, 2015-Ohio-471, as support for its position. In the footnote, the authoring judge questioned the use of the date of take as the date of trial. Importantly, the authoring judge also emphasized that neither party had questioned the use of the date of trial as the date of take in *Ebbing*. The date of the take similarly went unquestioned in the previous *Doner*-related appropriation proceedings in the trial court and in this Court. In the past, parties have stipulated to the date of take for valuation purposes. *See Proctor v. Wolber*, 3d Dist. Hancock No. 5-01-38, 2002-Ohio-2593, ¶ 5. While there was no stipulation here, the history between the parties suggests an understanding that at one time the date of trial was a logical date to use for valuing the flowage easement.

{¶79} ODNR also cites this Court's decision in *State ex rel. Karr Revocable Trust v. Zehringer*, 3d Dist. Mercer No. 10-13-18, 2014-Ohio-2241, contending that we determined that the date of take was the date of the spillway's creation. However, any such possible interpretation of this Court's decision in *Karr I* was *specifically disavowed* in *Karr II* where we made clear that we had not determined

any specific date of taking in the *Doner* litigation as it was unnecessary for our determination of the *Karr I* and *Karr II* appeals.

{¶80} Moreover, while ODNR argues for the use of the date of the spillway's creation as the date of take for purposes of valuation, perhaps a stronger argument than the argument for that date could be made for the use of the date of the Supreme Court of Ohio's decision in *Doner*. At that time, the taking had explicitly been determined and mandamus was granted ordering appropriation proceedings to commence.[19] While the date of the *Doner* decision would conflict with the trial court's ultimate determination in this case, it does provide yet another viable alternative to the date ODNR suggests that the trial court *had* to use, further undermining ODNR's position as ODNR is not arguing simply that the trial court was incorrect in setting the date; rather, it is arguing that only *one possible date was correct*, which is illogical given the nature of determining a taking by flooding.

{¶81} Furthermore, it is important to emphasize that although the "date of take" was set as the date of trial, ODNR's appraiser's initial valuation was done as of July 30, 2012, and the appellees' appraiser's initial valuation was done as of November 21, 2013. The values contained in both appraisals *did not change* and *were not increased* for the date of the 2016 trial, thus ODNR technically received valuation dates that were valid *years* prior to the trial date.[20]

[19] However, the extent of the taking was still yet to be determined by the trial court.
[20] Both appraisers did testify that their valuations were valid as of the date of trial.

{¶82} In sum, ODNR argues narrowly that the date of the take *had* to be set as the date of the spillway modification. Based on the foregoing reasoning, we cannot find that the trial court erred by denying ODNR's motion to specifically set the date of take as the date of the 1997 spillway modification, particularly where the Supreme Court of Ohio cited language stating that it took at least 10-15 years to ascertain meaningful hydrological statistics and the flooding was still ongoing. Therefore, ODNR's second assignment of error is overruled.

Third Assignment of Error

{¶83} In ODNR's third assignment of error, it argues that the trial court erred by excluding ODNR's "new or updated historical, hydrological, and appraisal evidence for purposes of valuation." (Appt.'s Br. at 16). Specifically, ODNR argues that since the inception of this case it had obtained a new appraisal of the flowage easement based on "new" historical and hydrological data related to the appellees' farm. ODNR wanted to introduce both the "new" data and the new appraisal at trial, and this evidence was precluded by the trial court. On appeal, ODNR claims that its evidence was relevant, probative, and permissible, and that R.C. 163.59(E) actually *mandated* ODNR to obtain a new or updated appraisal if more than two years had elapsed since the original appraisal.

{¶84} "An appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its

discretion." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271 (1991), citing *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989).

{¶85} In this case, when ODNR filed its petition to appropriate the flowage easement on the appellees' property, it specifically asserted a good-faith offer of $363,100. This offer was based on the appraisal of Bruce Dunzweiler, who originally assessed the value of the flowage easement for ODNR. Dunzweiler also testified to this valuation at trial.

{¶86} After ODNR had already filed its petition and extended its good-faith offer to the appellees, ODNR hired new outside counsel and underwent what ODNR called "a shift in strategy," which led to ODNR obtaining "new" historical and hydrological data and a new appraisal of the flowage easement. The new appraisal was done by an appraiser other than Dunzweiler. According to the new appraiser's affidavit, the amount due to appellees as a result of the flowage easement was a total of $238,900.[21]

{¶87} ODNR sought to introduce evidence of the new appraisal of the appellees' property and the "new" historical and hydrological data that the appraisal

[21] While not introduced into evidence at trial, the new appraisal is contained in the record. Notably, this new appraisal was not only different from Dunzweiler's original appraisal but it was also different than the $58,150 amount ODNR attempted to assert in its motion to amend its appropriation petition, which was previously discussed in the first assignment of error. Both appraisals were done by the same new appraiser, Lance Brown.

was based on at trial.[22] Appellees filed a motion to preclude ODNR from presenting that evidence.

{¶88} Ultimately the trial court precluded ODNR's testimony and its new appraisal. However, the trial court stated that it would *permit* ODNR to present testimony regarding any material change in the character or condition of the appellees' property that had occurred since ODNR commenced its appropriation proceedings in 2012, but ODNR would be prevented from presenting any "new" historical or hydrological evidence as it was not actually "new." The trial court determined that ODNR was effectively seeking a " 'do-over' of its initial determination of the value of the take as evidenced by the initial appraisal upon which this eminent domain proceeding was based[.]" (Doc. No. 154).

{¶89} In its entry on the matter, the trial court further stated that

> **Because the law recognizes that there may have been a material change in the character or condition of** [appellees'] **property that may have occurred since ODNR commenced this eminent domain proceeding against** [appellees]**, the law permits new or updated appraisal information to address any difference in value that has resulted from such material change. Because the Ohio Supreme Court determined that ODNR had waived any claim to a prescriptive easement to flood** [appellees'] **property (see *Doner* ¶84), historical data about any newly discovered historical or hydrological evidence that ODNR may have uncovered or developed is irrelevant and immaterial to the value of the easement that the Supreme Court of Ohio determined ODNR had taken. To permit such evidence would violate the principle of *res judicata* since the Supreme Court used historical and hydrological**

[22] This evidence was in the form of testimony from Dr. George McMahon, an expert hydrologist, Bryan Smith, a professional surveyor, and Lance Brown, an appraiser.

> **evidence on the issue of the frequency of the flooding submitted by the parties in *Doner* in determining that ODNR had taken a permanent and perpetual flowage easement on and over** [appellees'] **propert[y]. The factual evidence in *Doner* focused upon the flooding that naturally occurred from rainfall prior to the 1997 construction of the spillway as compared to the flooding that occurred after the 1997 spillway was constructed.**

(Doc. No. 154).

{¶90} Prior to commencing the trial, the trial court held a hearing on various pending motions, and there was further discussion held on the exclusion of ODNR's new appraisal and the accompanying historical and hydrological data. In that discussion, ODNR again argued for the inclusion of its evidence. ODNR represented to the trial court that it had acquired new data since its original appraisal, albeit not data specifically related to the period after the filing of its appropriation petition.

{¶91} The trial court questioned ODNR's use of such evidence, which would undermine ODNR's own good-faith offer upon which the entire proceedings were based. In responding to ODNR's arguments, the trial court stated,

> **But the property owners, seems to me, would have a right to rely on the good faith offer made by the government agency that is taking their property. For you now to take the position that you have substituted a different appraiser to get a new appraisal, whether you want to call it updated or a new appraisal, * * * that would be significantly less than what the original offer was is a** [sic] **totally unfair and inequitable to the property owner who relied on the good faith offer of the government agency that's taking, has taken their property.**

(Apr. 11, 2016, Tr. at 17).

{¶92} ODNR then argued that Dunzweiler's original appraisal from its appropriation petition would be part of the trial, but ODNR thought that it should also be able to present the new appraisal that it now felt was more accurate. (Tr. at 18). The trial court then asked,

> **Why is ODNR not bound by that judicial admission** [of its good-faith offer] **in front of the jury and permitted to have a multiple number of new appraisers come in and use different theories, all of which would undermine and be less than what the original good faith offer to the property owners was? How is that equitable?**

(*Id.*)

{¶93} The trial court continued to question ODNR on the use of its evidence, asking various questions and making statements, which included the following.

> **How are you able to put on a second witness that, in effect, attacks the credibility of the initial appraiser whose, on whose basis we are even going to trial? That's like cross-examining your own witness. That's just inequitable and unfair and confusing for the jury.**
>
> * * *
>
> **The foundation for the filing of this lawsuit was the property owners' rejection of the initial offer. For you to secure another appraiser who takes a different approach only for the purpose of that different approach reducing the good faith offer or the value of the take, according to ODNR's opinion at this point in time, to less than what the good faith offer was is totally unfair.**
>
> *** * ***

> **Now, just, just so that the Court is clear * * * [i]f the economy would have tanked and real estate valuations would have significantly decreased, I would think Mr. Dunzweiler** [the original appraiser] **could have said based upon that my updated appraisal with the same theory that I used before has now decreased and perhaps even below what the original * * * appraisal was; but there has to be some kind of change from the time that the basis for this case was established at not the property owners' appraisal but at ODNR's appraisal because ODNR is the government agency that took the property.**
>
> **This is a case to protect private citizens from the tyranny of government, and you can't manipulate the system to change the rules in the middle of the stream and punish a property owner who relied on what the government said they were going to pay them for taking their property. That's just inequitable, and the Court is not going to permit it.**

(Tr. at 19-23).

{¶94} During the same hearing the trial court also asked ODNR's counsel whether the "new theory" its appraisal was based on just "came into existence in the last two years" and ODNR's counsel stated that it had not. (Tr. at 20). The court also asked whether the theory used by Dunzweiler was the same as the new appraiser's theory and ODNR's counsel said that it was not. As a result, the trial court then stated that ODNR just had a different approach even though nothing had changed in this case since the original appraisal. (*Id.*) The trial court then reaffirmed its exclusion of ODNR's new appraisal and the accompanying new historical and hydrological data.

{¶95} On appeal, ODNR challenges the trial court's exclusion, claiming first that its new appraisal and the new historical and hydrological data were relevant to the valuation of appellees' farm and that R.C. 163.59(E) actually *mandated* ODNR to get a new appraisal as two years had passed since ODNR filed its appropriation petition. We will deal with the latter argument first.

{¶96} Revised Code 163.59(E), which ODNR argues mandates it to acquire a new or updated appraisal, reads as follows.

> **If information presented by the owner or a material change in the character or condition of the real property indicates the need for new appraisal information, *or if a period of more than two years has elapsed since the time of the appraisal of the property, the head of the acquiring agency concerned shall have the appraisal updated or obtain a new appraisal.* If updated appraisal information or a new appraisal indicates that a change in the acquisition offer is warranted, the head of the acquiring agency shall promptly reestablish the amount of the just compensation for the property and offer that amount to the owner in writing.**

(Emphasis added).

{¶97} ODNR argues that R.C. 163.59(E) says that the agency "*shall* have the appraisal updated or obtain a new appraisal," thus the statute not only permitted ODNR to present evidence of a new or updated appraisal at trial, the statute actually required it.

{¶98} ODNR made a similar argument to this Court in *Karr II*, albeit in the context of whether ODNR could amend its deposit amounts to lower amounts

contained in the new appraisal. We rejected ODNR's attempt to use the new deposit amounts, conducting the following reasoning.

> **ODNR argues that, since its initial appraisals, it has "thoroughly researched historical and hydrological information that documents flooding that occurred on the [Relators'] properties long before the spillway modification in 1997" and has "retained new hydrological experts that produced hydrology reports specifically quantifying the increase in flooding from the 1997 spillway modification on the [Relators'] parcels in terms of frequency, area, and duration." (Appellants' Brief at 8, 9). ODNR does not contend that this is "information presented by the owner." R.C. 163.59(E). And while this information might be "new information" to ODNR, it is not based on "a material change in the character or condition of the real property indicat[ing] the need for new appraisal information." * * * Indeed, it appears this "new information" now in ODNR's possession was available to ODNR when it performed its initial appraisals. Second, were we to conclude that R.C. 163.59(E)'s two-year provision requires ODNR to update its appraisal and modify its deposit amounts, it would give incentive to an appropriating agency, such as ODNR, if it became displeased with its original appraisal, to prolong an appropriation proceeding for two years simply to reach that threshold. We refuse to construe the statute to reach that absurd result.**

State ex rel. Karr Revocable Trust v. Zehringer, 3d Dist. Mercer No. 10-14-16, 2015-Ohio-1495, ¶ 16.

{¶99} We emphasize that *Karr II* dealt specifically with ODNR seeking to alter its deposit amounts and not the admission of any evidence at trial, thus *Karr II* does not prevent ODNR from attempting to introduce this same evidence at trial as the appellees suggest in their brief to this Court. However, the reasoning in *Karr II*

can still be persuasive in reviewing the trial court's decision to exclude ODNR's "new" evidence.

{¶100} As we stated in *Karr II*, the evidence ODNR claims is "new," is not actually new in the sense that it was essentially unknowable at the time ODNR would have been presenting historical and hydrological data to the Supreme Court of Ohio in *Doner* or in making its original appraisal and the accompanying good-faith offer. Moreover, as we stated in *Karr II*, interpreting R.C. 163.59(E) in the manner ODNR urges would lead to "absurd" results. ODNR produced a good-faith offer based on an appraisal it had done and presented it to the landowners. When the landowners rejected the offer, ODNR filed an appropriation action based on the amount of the original appraisal. Now, ODNR does not wish to update its original appraisal due to any change in the land or any staleness related to the original appraisal. Rather, it wishes to effectively replace its original appraisal, feeling that its good-faith offer was actually too high based on what they now claim to have been less than thorough data.

{¶101} Revised Code 163.59(E) seems to be designed to protect a landowner or the government in the event of a change in the value of the property or in the event proceedings were taking so long that value of the land had shifted. It would be "absurd," as we stated in *Karr II*, to allow an appropriating agency to just repeatedly attempt to introduce new, lower appraisals based on no "new"

information that had occurred since filing the appropriation petition in an attempt purely to undermine the "good-faith" offer that initiated the action. Thus we decline to apply R.C. 163.59(E) in the manner advocated by ODNR.

{¶102} Nevertheless, even if R.C. 163.59(E) did "mandate" ODNR to get a new or updated appraisal, in this case ODNR's original appraiser, Bruce Dunzweiler, specifically testified that the appraisal he conducted, which ODNR's appropriation petition was based on, *was still valid as of the trial date*, meaning that ODNR had effectively "updated" its appraisal at the time of trial as per any mandate in the statute. Thus ODNR's arguments related to R.C. 163.59(E) are not well-taken.

{¶103} Similarly, we cannot find that the trial court abused its discretion in preventing ODNR from introducing its new appraisals and the "new" evidence the appraisals were based on. As the trial court stated in its questioning, by presenting this evidence, ODNR would effectively be cross-examining Dunzweiler, its own appraisal expert. ODNR would also be undermining its own good-faith offer. Moreover, Dunzweiler's own appraisal report states that he takes into account flooding that occurred prior to 1997 in the "before" value and presumes the flowage easement is in place for the "after" value, indicating that he did consider the difference in flooding both before and after 1997 in coming to his valuation, which was what the parties proceeded to trial about.

{¶104} Notably, the trial court did state that it would permit ODNR to introduce evidence of any material change in the land or the land's value that had occurred since filing the appropriation action. However, ODNR did not attempt to go this route, rather it sought to introduce evidence not of a material change in the value of the land, but of a wholly different valuation altogether—a valuation that undercut the offer that began this case that had been pending for years.

{¶105} As a trial court is vested with broad discretion in determining what evidence to permit or exclude in a trial, we cannot find that the trial court abused its discretion in these circumstances by excluding ODNR's testimony and evidence. Accordingly, ODNR's third assignment of error is overruled.

Fourth Assignment of Error

{¶106} In ODNR's fourth assignment of error, it argues that the trial court erred by denying its motion to exclude the testimony of the appellees' appraiser, Richard Vannatta, and that the trial court erred by preventing ODNR from presenting evidence from its "rebuttal appraisal expert," Jefferson Sherman, who would have testified that he conducted a review of Vannatta's appraisal report and that he did not find that the appraisal report comported with appropriate professional standards.

{¶107} We review the trial court's decision to permit or exclude evidence under an abuse of discretion standard. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271 (1991), citing *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989).

{¶108} In this case, on December 30, 2015, ODNR filed a "Motion to Exclude [appellees'] Real Estate Appraisal Expert and Related Appraisal Report," arguing that the analysis of the appellees' appraiser was flawed, that it was unreliable, and that it did not comport with the appropriate appraisal expert evidentiary standards set forth in Evid.R. 702 or R.C. 4763.13.[23] (Doc. No. 156). Attached to the motion was an appraisal review that had been conducted by Jefferson Sherman, who ODNR hoped to call at trial to present evidence of the flaws in Vannatta's appraisal. According to the appraisal review, Sherman had not conducted his own appraisal of the appellees' property, he had not been to the appellees' property, and he had not personally viewed the comparable sales used in Vannatta's valuation other than online; rather, he merely conducted a review of Vannatta's appraisal report and Vannatta's findings.

{¶109} On January 15, 2016, the appellees filed a memorandum in opposition to ODNR's motion to exclude Vannatta's testimony and appraisal report. The appellees argued that ODNR's arguments went to the weight and credibility that should be given to Vannatta's appraisal, not the admissibility. In addition, the

[23] Revised Code 4763.13 generally requires appraisers to comply with applicable standards. It says nothing related to the admissibility of testimony.

appellees argued that Vannatta's appraisal was actually compliant with applicable rules, statutes and appraisal practices. Further, appellees argued that there had been no case that they could find where an appraisal reviewer had been permitted to testify in court. On January 28, 2016, ODNR filed a reply brief in support of its motion.

{¶110} On April 6, 2016, appellees filed a motion to specifically exclude the testimony of Jefferson Sherman at trial, and his accompanying appraisal review of Vannatta's appraisal report.

{¶111} On April 11, 2016, the trial court held a final pretrial hearing, wherein various pending motions were discussed including the admissibility of Jefferson Sherman's testimony and his appraisal review. The parties orally argued their positions to the trial court. At that time, appellees emphasized that opening the door to this type of testimony would then permit the appellees to present their own appraisal reviewer and then reviewers questioning the reviews. Appellees further argued that ODNR did not need to present the testimony of Jefferson Sherman or enter his appraisal review into evidence as they could simply cross-examine Vannatta with any alleged inaccuracies in his report. Appellees contended that ODNR was attempting to improperly collaterally attack Vannatta's credibility.

{¶112} Ultimately the trial court granted appellees' request to exclude the testimony of Jefferson Sherman and permitted Vannatta to testify at trial. The trial

court filed a journal entry granting appellees' motion to exclude the testimony of Jefferson Sherman. In that entry the trial court reasoned that "the purpose for which plaintiff ODNR has stated for calling Jeff Sherman as an expert is to testify as to the credibility of the opinions and conclusions contained in appraisal reports, and as such, such credibility testimony is expressly prohibited by Evid.R. 608 and invades the province of the jury to weight [sic] the credibility of the witnesses." (Doc. No. 200).

{¶113} ODNR now argues on appeal that the trial court erred by, (1) failing to exclude the testimony of Vannatta and (2) excluding the testimony of its appraisal reviewer, Jefferson Sherman.

{¶114} We will first address ODNR's argument that the trial court erred by failing to exclude Vannatta's testimony. ODNR claims that Vannatta's appraisal and his related testimony did not meet the expert evidentiary standards of Evidence Rule 702, which reads as follows.

> **A witness may testify as an expert if all of the following apply:**
>
> **(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;**
>
> **(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;**
>
> **(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the**

> **testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:**
>
> **(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;**
>
> **(2) The design of the procedure, test, or experiment reliably implements the theory;**
>
> **(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.**

{¶115} Specifically, ODNR contends that Vannatta's testimony would not satisfy Evid.R. 702(C)(3), claiming that appraisal experts are required to comply with Uniform Standards of Professional Appraisal Practice ("USPAP") guidelines and that Vannatta's appraisal of the subject property did not do that.

{¶116} Appellees counter by stating that Evid.R. 702(C)(3) is not applicable in this situation because a valuation opinion is not the result of a specific procedure, test or experiment. Appellees contend that appraisal is more art than science, a point that was made by ODNR to the jury during opening statements at trial.[24] In support of their argument, appellees cite *Cincinnati v. Banks*, 143 Ohio App.3d 272, 282-83, 757 N.E.2d 1205, 1212-13 (1st Dist.2001), wherein the First District Court of Appeals found that a trial court did not abuse its discretion by permitting an appraiser's expert testimony on the value of real estate under Evid.R. 702(C)(3).

[24] During opening statements, which are obviously not evidence, ODNR's counsel stated, "[D]oing an appraisal is much more a form of art than it is a science." (Tr. at 202).

{¶117} At the outset of our discussion, we would note that while ODNR renewed its objection to Vannatta's testimony as a whole before he testified, ODNR did not object at all when the appellees moved to classify Vannatta as an expert during the trial. We would similarly note that ODNR did not challenge the ability of Vannatta to testify in the *Chad Knapke*, *Mark Knapke*, or *Ebbing* cases that were reviewed by this Court; rather, ODNR merely challenged aspects of Vannatta's appraisal report, such as specific pictures contained in the report that this Court unanimously found more prejudicial than probative.[25]

{¶118} Nevertheless, to the extent that ODNR has preserved its ability to challenge Vannatta's testimony, or his testimony as an expert in this case, Evid.R. 702(C)(3) is geared primarily toward specific tests or procedures that would not seem to coincide precisely with an appraisal opinion, which both parties stressed was more "art than science." At the very least, assuming Evid.R. 702(C)(3) clearly governs here, we cannot find that the trial court abused its discretion.

{¶119} The actual testimony of Vannatta at trial revealed a substantial amount of testimony that would support Vannatta testifying as an expert. Vannatta testified that he owned his own appraisal business, and that he had been doing appraisals for 44 years. (Tr. at 319-320). Vannatta testified that he was certified by the State of Ohio as a real estate appraiser, that he held an "accredited senior

[25] Those pictures that we found prejudicial were not included in Vannatta's appraisal report in this trial.

appraiser" designation that allowed him to appraise essentially anything he and his client agreed he was competent to do. (*Id*. at 321). Vannatta testified that he taught appraisal courses, that he was familiar with USPAP standards and that he was certified to train appraisers relative to USPAP standards. (*Id*.) Vannatta testified that he was 1 of approximately 500 people qualified to teach USPAP standards in the entire United States. (*Id*. at 322). Vannatta testified that he regularly attended continuing education, including courses on appraisals for eminent domain. (*Id*.) Vannatta also testified that he had appraised hundreds of farm properties and that he had appraised properties for probate courts. Vannatta testified that he was a licensed real estate broker and an auctioneer as well.

{¶120} As to the specific property in this case, Vannatta testified as to how he formulated his opinions using the sales comparison approach, which was the same approach used by ODNR's expert. ODNR was then able to thoroughly cross-examine Vannatta relative to his appraisal methodology, his sales comparison used, and his valuation of the property both with and without the flowage easement. Vannatta also certified that his appraisal report comported with USPAP standards in the report itself.

{¶121} Based on Vannatta's qualifications and his testimony as to how he valued the property using the sales comparison approach, which was similar to ODNR's expert, albeit with different outcomes, we cannot find that the trial court

erred in denying ODNR's motion to exclude Vannatta as a witness. This is particularly true given that ODNR was able to fully cross-examine Vannatta on any issues it found related to Vannatta's appraisal of the property.[26] As the appellees contend, ODNR's arguments really go to the weight and credibility that should be given to Vannatta's appraisal, not the admissibility of his expert opinion. Thus ODNR's argument that the trial court erred by permitting Vannatta's testimony is not well-taken.

{¶122} Similarly, we cannot find that the trial court abused its discretion in granting the appellees' motion to exclude the testimony of Jefferson Sherman and his appraisal review. Preventing ODNR from opening the door to a parade of witnesses who would challenge various appraisal reports without actually appraising the property is within the sound discretion of the trial court. Furthermore, it appears evident that at least some of ODNR's cross-examination was guided by the information provided by Jefferson Sherman in his appraisal review. ODNR filed Sherman's affidavit and his appraisal review in the record, and among other things, Sherman questioned Vannatta's uniform 90 percent reduction in the value of the properties Vannatta appraised based on the flowage easement. ODNR specifically cross-examined Vannatta on this and other issues that were actually raised in Sherman's appraisal review. Thus it would be nearly impossible to find any

[26] Arguably ODNR's cross-examination of Vannatta was extremely impactful given that the jury valued the flowage easement far closer to ODNR's expert's valuation than Vannatta's.

reversible error in this case even if we did find that the trial court somehow erred by excluding Sherman's testimony. Therefore, ODNR's arguments that the trial court erred for excluding Jefferson Sherman's testimony are not well-taken.

{¶123} For all of these reasons we cannot find that the trial court abused its discretion in this case in denying ODNR's motion to exclude Vannatta's testimony and his appraisal report or that the trial court abused its discretion by granting appellees' motion to exclude the testimony of Jefferson Sherman. Therefore, ODNR's fourth assignment of error is overruled.

Fifth Assignment of Error

{¶124} In ODNR's fifth assignment of error, it argues that the trial court erred by denying ODNR's motion to compel discovery related to crop yields on the appellees' farm both before and after 1997. ODNR also argues that appellees' counsel made improper statements during rebuttal closing argument.

{¶125} Discovery matters are generally reviewed under an abuse of discretion standard. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265. Similarly, determination of whether a closing argument was improper is a discretionary matter with the trial court and will not be reversed absent an abuse of discretion. *Pang v. Minch*, 53 Ohio St.3d 186, 194 (1990). However, where there was no objection to a purported error, we review the matter under a plain error standard. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-23, 1997-Ohio-401 ("[T]he

plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness * * * of the judicial process[.]").

{¶126} In this case, ODNR sought to compel discovery of crop yields on the appellees' farm both before and after the creation of the 1997 spillway. ODNR argued that the information was relevant to the case to determine whether the appellees' claims that they suffered crop losses after the 1997 spillway was valid.

{¶127} The trial court denied ODNR's motion to compel. In its entry, the trial court stated as follows.

> **Consistent with decisions in this and related cases regarding the valuation of the easement and other information relevant to the valuation thereof submitted to the court in related motions in this cause, the court finds that the information sought by plaintiffs by said motion is irrelevant and immaterial to that valuation and any other issues in this cause. Based thereon, the court hereby determines said motion is not well-taken and the same is hereby denied.**

(Doc. No. 184).

{¶128} On appeal, ODNR argues that the trial court should have granted its motion to compel and that the court's error was compounded by the fact that appellees were able to present some testimony related to diminished crop yields at trial during Gale Thomas's testimony, albeit minimal and non-specific testimony.

{¶129} Appellees counter ODNR's arguments on appeal by contending that Thomas's testimony at trial related to diminished crop yields was not in an attempt to prove any lost income, which was not the valuation approach used by either appraiser in this case, but rather the testimony was simply used to demonstrate the impact of ODNR's flooding on the property. In addition, appellees argue that ODNR did not object to Thomas's testimony at trial. Appellees also contend that Thomas did not testify to pre-1997 crop yields, that ODNR actually had any post-1997 yield documents to cross-examine Thomas with, and that ODNR used the lack of specific crop yield evidence at trial against the appellees in the trial, preventing any prejudicial error.[27]

{¶130} We would note that the record to this Court is unclear as to what information definitively existed that ODNR sought to compel that it did not already have.[28] Nevertheless, for the purposes of reviewing this assignment of error, we will assume that there is specific crop yield information still retained by the appellees for the requisite years that was not provided in discovery.

[27] To support this point, appellees cite ODNR's closing argument, wherein ODNR stated, "I would posture that the reason [the appellees] didn't bring that evidence is the same reason they didn't bring the crop yield evidence in, it doesn't fit with their legend that this farm is ruined." (Tr. at 643). As we have stated, closing arguments are not evidence.

[28] In the deposition of Gale Thomas, he testified that he kept records of how much he had planted and harvested on his farm, which is what ODNR seems to be requesting; however, Thomas testified that he thought he only had the records as far back as 2000 and that he doubted he could go back past 1997. (Jan. 21, 2015, Depo. Tr. 136-37). In that same deposition, Thomas was actually examined by ODNR with some insurance claims that Thomas had made relative to crop losses after 1997, indicating that ODNR had access to the economic impact of his crop losses after 1997.

{¶131} Even accepting this basic assumption, ODNR's appraiser did not conduct his valuation using the "income approach," indicating that there is little possible relevance to ODNR's request.[29] In fact, neither appraiser in this case utilized the "income approach" in valuing the property, rather, both used the sales comparison approach, which is likely why there was no specific discussion in either appraisal report of lost income amounts related to diminished crop yields.[30] Thus it is unclear in this case how evidence of any crop yields would have aided ODNR's sales comparison[31] valuation or aided ODNR in challenging the appellees' sales comparison appraisal, which contained no specific dollar figures related to diminished crop yields resulting from the flooding.[32] For these reasons alone we could find that the trial court did not abuse its discretion.

{¶132} Notwithstanding the approach used by the appraisers in this case, the trial court still could have properly restricted the testimony presented at trial to a

[29] The income based approach to valuing property is one potential method for valuing a property, which both appraisers noted in their appraisal reports. In Dunzweiler's appraisal report, he states that, "The key to the Income Approach is * * * (1) to estimate the anticipated future benefits the subject property will receive, and (2) to find a proper technique and rate with which to convert the benefits into an indication of value for the property." (Pl.'s Ex. 4, p. 38, 60). Dunzweiler's report continued by stating that most farms are purchased with the sales comparison approach and that the income approach was thus not developed for valuation and was omitted from the appraisal both in the "before" and "after" valuations. Similarly, after defining the income approach to valuation, Vannatta's appraisal report stated, "I did not develop the income approach because sufficient market data was not available and more importantly because typical like-kind market participants in Mercer County rarely, if ever, consider the income approach." (Def.'s Ex. O, p. 6).

[30] Vannatta indicated that he considered that there would be some years with diminished crop yields in conducting his "after" valuation, but he never cited any specific yield amounts or any specific numbers.

[31] The sales comparison approach was defined in Dunzweiler's appraisal report as "Comparing the subject property with other similar properties which have either been recently bought or sold, or with similar properties which are currently for sale in the same market area[.]"[31] (Pl.'s Ex. 4, p. 45).

[32] Dunzweiler, ODNR's appraiser, actually testified specifically that his report does not talk about crop loss. (Tr. at 588).

broad demonstration of the impact of the flooding on the farm without getting into specifics on crop yields.

{¶133} As to what evidence of crop yields was actually presented at trial, both parties seemed to be in agreement that 2011 was a total crop loss for the appellees. However, there was no testimony as to the value of any lost crops from the 2011 missed harvest. On the opposite end of the spectrum, both parties seemed to agree that there were multiple years since 1997 that no flooding had occurred on the land at all, which would have left a regular planting and harvest season. That fact was stressed by ODNR during the trial.

{¶134} Only in one place during Gale Thomas's testimony does he provide any information as to specifically diminished crop yields. Thomas testified that in 2015—the year immediately prior to the trial—he remembered he collected 928 bushels of soybeans off of the subject property, which was approximately 15 bushels per acre, far less than the sixty he expected to harvest. (Tr. at 242). However, again, Thomas provided no amount of lost income related to the diminished crop yield for 2015.

{¶135} All other testimony that Thomas provided was in generalities. For example, Thomas testified that he had some years with diminished yields due to flooding, but he did not give any specifics as to what economic impact it had. Moreover, Thomas actually testified that he could not remember specifically what

his yield was each year since 1997 and no evidence was presented by the appellees as to those yields. (Tr. at 243).

{¶136} Importantly, ODNR actually failed to object to what little crop-yield testimony that the appellees did present at trial. Thus any suggestion that the trial court erroneously admitted this bit of testimony would be reviewed under a plain error standard.

{¶137} In sum, as neither of the appraisers in this case used an income-based approach when valuing the property, we cannot find that the trial court's denial of the motion to compel was an abuse of discretion. It is not clear how specifics related to yields would be relevant given that neither appraiser valued the property using this method and the jury was required, per instruction, to assume that ODNR "will make the * * * fullest and most damaging use reasonably foreseeable for the permanent and perpetual flowage easement, regardless of any future intentions, future promises, or statements regarding future intentions or promises by ODNR." (Tr. at 682-683.) Moreover, specifics related to crop yields and the economic impact were not entered into the record through Gale Thomas's testimony and thus there was no "compounding" of any error as ODNR suggests. Finally, ODNR also failed to object to what crop yield testimony was presented, which could have been presented merely to show the impact of the flooding on the land. Thus ODNR's

arguments that the trial court erred by denying its motion to compel and by admitting testimony related to crop yields are not well-taken.

{¶138} Turning to ODNR's claims related to statements appellees' counsel made during closing arguments, ODNR first contends that appellees' counsel made an improper reference to something a juror said during *voir dire* in the appellees' rebuttal closing argument.

{¶139} During *voir dire*, ODNR's counsel asked the panel of potential jurors whether anyone had heard of flooding issues with GLSM and whether anyone had any preconceived notions about the spillway and its modification. (Tr. at 106-107). ODNR's counsel questioned one juror who had his hand up specifically. That juror, identified as Mr. Lefeld, stated,

> **Yeah. You know, as far as – as far as what was there, I've lived in Mercer County my whole life. I've known the spillway when it was existing, and what it is today, or the old one, I should say, you know, what it was, and what it is. It's two different worlds, so yeah, they did. In her terms, it did screw it up, so it does let out, you know, a lot more water than what it used to. The lake level used to come up more than what it does today, and there is verification of that, so …**

(Tr. at 108).

{¶140} When further questioned, that same juror stated that he had worked for a company that had contracts for ODNR but he was not an agent of ODNR. Upon further questioning, he stated,

> **We were – at – during certain times of flooding, the County would hire us to go out and take elevations at different bridges. And you know, while being out there, you'd see all the flooding, so you know, pictures don't say a whole lot of words,** [sic] **when it comes to that. You can read it in the paper and see it, but when you're actually out there and – and actually see it firsthand it makes a world of difference.**

(Tr. at 109-110). Mr. Lefeld, the prospective juror, was not seated on the jury.

{¶141} However, Mr. Lefeld's comments were referenced by appellees' counsel at the beginning of his rebuttal closing argument in the following segment.

> **Thank you, Your Honor. Mr. Lefeld got it right. Mr. Lefeld, on Wednesday afternoon, when we all first got together, sat up in that chair over there, he was the surveyor who did a ton of work for ODNR.**

(Tr. at 648).

{¶142} At this time, before appellees' counsel continued his rebuttal closing argument, ODNR requested a sidebar and objected to any reference to what a prospective juror stated during *voir dire*. The trial court overruled the objection, stating that it was "argument." (Tr. at 649). Appellees' counsel then continued his rebuttal closing argument stating,

> **You remember Mr. Lefeld sat in that seat right there, despite all the work he did for ODNR, he said, they screwed it up. Others said they screwed it up as well. Mr. Lefeld has seen the flooding. And you remember what he said? Despite Exhibit C, that you'll have in the jury room, despite Exhibit E of the Thomas property that you'll have in the jury room, I remember what Mr. Lefeld said, he said pictures don't do it justice, and then his voice trailed off, as he described when he saw the actual flooding. And I know why, because I have seen it. It's chilling. It's awful.**

> **ODNR made this screw-up, and they're the government, so they can buy their way out of it, but they can't call it a minor fender bender, and they can't get out of this screw-up at the expense of Gale and Nelda Thomas.**

(Tr. at 649-650).

{¶143} On appeal, ODNR argues that any reference during closing arguments to what a juror said during *voir dire* was improper as the juror's statement was not evidence.

{¶144} At the outset of our analysis of this issue, we must emphasize that the jury was explicitly instructed that closing arguments were not evidence and thus we could not find that any error here was prejudicial as we presume the jury followed the court's instructions. (Tr. at 676); *Pang v. Minch*, 53 Ohio St.3d 186, 195, 559 N.E.2d 1313, 1322 (1990) ("A presumption always exists that the jury has followed the instructions given to it by the trial court.").

{¶145} Nevertheless, we would find that appellees' counsel should not have made any argument related to something a juror said during *voir dire*, or mentioned the potential juror by name.

{¶146} However, while the method in which counsel made his arguments was improper, the *substance* of what appellees' counsel stated was permissible by way of rebuttal closing argument. The jury instructions themselves stated that ODNR's construction of the spillway caused the flooding on the appellees' farm,

and any reference to the severity of the flooding was testified to by Gale Thomas and exhibited in the photographs entered into evidence. Thus the substance of the statements made by appellees' counsel was supported by what was presented at trial, even if appellees' counsel should have avoided making statements through the context of what a prospective juror said during *voir dire*. Therefore, we cannot find that any error here was prejudicial.

{¶147} Next, ODNR argues that the appellees' counsel improperly stated in rebuttal closing argument that, "another landowner within the 100-year floodplain receive[d] $13,000 an acre in the before value, reflective of the market that it was in." (Tr. at 666). Appellees stated this in the context of arguing that their land appraisal amount was not too high after this issue was challenged by ODNR in its closing argument.

{¶148} Given the context in which the statement regarding the $13,000 amount was made we cannot find any prejudicial error. The amount was consistent with the valuations of other landowners used in Vannatta's appraisal report, which was entered into the record. In fact, Vannatta's appraisal report showed properties that ranged from $13,973 per acre for croplands to $16,145 per acre of croplands in the "before" value.[33] (Def.'s Ex. O, p. 30). Thus the $13,000 figure was consistent with some of the evidence at trial and we cannot find that it was prejudicial error.

[33] These amounts are taken from the "unit price allocation of croplands" in the "before" allocation of Vannatta's report. ODNR seems to suggest that the $13,000 amount stated by appellees' counsel during

{¶149} To any extent that appellees' counsel's closing argument somehow referenced materials outside the record, such a statement would be error. However, we cannot find such error to be prejudicial in this case, given the trial court's instruction that closing arguments are not evidence, and given that the comparison properties contained in Vannatta's appraisal report that comport with, or are above, the $13,000 per acre amount referenced by the appellees during its rebuttal closing argument.[34] For all of these reasons we overrule ODNR's fifth assignment of error.

Sixth Assignment of Error

{¶150} In ODNR's sixth assignment of error, it argues that even if no single error was prejudicial on its own in this case, the cumulative errors in this trial were prejudicial and deprived ODNR of a fair trial.

{¶151} As this Court discussed in *Chad Knapke*, *Mark Knapke*, and the *Ebbing* cases, whether the cumulative error doctrine is applicable to civil cases *at all* in Ohio is still an open question, including in this District where this Court has yet to issue a binding majority opinion actually applying the cumulative error doctrine.[35] The plurality opinion in *Ebbing* specifically stated that it would apply

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closing argument was not taken from those properties in Vannatta's report, but rather from outside the record entirely. Appellees even appear to concede this in their brief, despite the fact that Vannatta specifically testified that one of his comparable sales in the "before" value was within the "AE flood zone" and his report specifically indicated "before" valuations higher than $13,000 per acre. (Tr. at 351). For the purposes of our review, it is too unclear, at best, to say definitively, as ODNR suggests, that the $13,000 statement refers to a valuation outside of the record when it could easily refer to a valuation inside the record.

[34] ODNR argues that the appellees' counsel actually put this amount on a projector and that it was error to do so; however, we have no indication of that in the record so it is not even reviewable as an argument.

[35] Appellees point out that since this Court's decisions in *Chad Knapke*, *Mark Knapke*, and *Ebbing*, two more Ohio Appellate Districts have been reluctant to apply the cumulative error doctrine in civil cases. *See J.P. v.*

the cumulative error doctrine. The majority opinion in *Chad Knapke* indicated that even if it would have applied the cumulative error doctrine to the errors found in *Chad Knapke*, the cumulative impact did not deprive ODNR of a fair trial, and the *Mark Knapke* decision did not find multiple errors that would necessitate a discussion of the cumulative error doctrine.

{¶152} Similar to the *Mark Knapke* decision, we have not found multiple errors that would necessitate invoking any so-called "cumulative error doctrine." Nevertheless, as we did in both *Knapke* decisions, we would emphasize that the jury award here appears inherently fair given that it was well within the range of the two appraiser's valuations and it was actually far closer to the valuation of ODNR's appraiser.

{¶153} As the only error here has already been found to be entirely harmless we find no need to address ODNR's cumulative error argument further. Therefore, ODNR's sixth assignment of error is overruled.

{¶154} For the foregoing reasons, ODNR's assignments of error are overruled and the judgment of the Mercer County Common Pleas Court is affirmed.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr

T.H., 9th Dist. Lorain No. 14CA010715, 2016-Ohio-243, ¶ 35; *Wolf v. Rothstein*, 2d Dist. Montgomery No. 26859, 2016-Ohio-5441, ¶¶ 96-97.