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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001260-MR

DINAH YOUNG — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE RODERICK MESSER, SPECIAL JUDGE
ACTION NO. 07-CI-00173

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS;
JOHN LEBLANC; DEE ROBINSON;
DARRELL BAKER (DECEASED);
LARRY MARCUM AND PATRICIA
MARCUM, HUSBAND AND WIFE;
CITIZENS NATIONAL BANK
(SOMERSET, KENTUCKY);
COMMUNITY TRUST BANK, INC.;
STACEY SQUIRES; AND UNKNOWN DEFENDANTS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,[1] SENIOR JUDGE.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: Dinah Young[2] appeals from a judgment entered by the Pulaski Circuit Court on May 28, 2010. Following a jury trial in an action for eminent domain, and consistent with the jury's verdict, the court ordered Young to pay the Commonwealth of Kentucky, Transportation Cabinet Department of Highways, $56,800.00, plus pre-judgment interest in the amount of $9,474.24. Upon review of the briefs, the record and the law, we affirm.

FACTS

The Commonwealth needed to acquire about 4.7 acres of land for construction of a four-lane limited access highway now known as the Somerset Northern Bypass (Section 1). The desired land had been purchased by Young in the mid-1990's and was being developed as a subdivision for low to moderate income housing. The needed land was part of a larger tract spanning 29.34 acres that Young had subdivided into 58 lots, most of which were unimproved. There was conflicting evidence as to whether the road project impacted sixteen or twenty-two lots.

Three commissioners appointed by the Pulaski Circuit Court valued the property before the taking at $925,000.00 and after the taking at $475,000.00 for a difference of $450,000.00. In conformity with the commissioner's award, the

[2] Other parties were named as defendants when suit was initiated. Some of these entities were occupants of property leased or under contract of sale from Young; others were lenders who had provided funds upon which the realty that is the subject matter of this action was held as security. Two of the lenders, Citizens National Bank and Community Trust Bank remain parties to this action, but Young is the only party actively pursuing the matter.

Commonwealth deposited $450,000.00 with the Pulaski Circuit Court Clerk. The property was taken on July 6, 2007, and three days later, the court ordered the commissioner's award to be distributed to Young and the banks holding notes on the acreage. Young took exception to the commissioner's award as being inadequate and the Commonwealth filed an exception characterizing the award as "excessive."

Thereafter, a condemnation action was commenced with a jury trial being scheduled for April 19 and 20, 2010, with the prime issue of contention being the value of the property. To that end, the Commonwealth stated in pre-trial pleadings and its witness list that it would offer testimony from two appraisers, Robert Knight who valued the property before the taking at $991,400.00 and after the taking at $652,105.00 for a difference of $339,295.00, and John Lyons who valued the property pre-taking at $930,000.00 and post-taking at $536,800.00 for a difference of $393,200.00.

Young was expected to call her own appraiser, J.W. Grabeel, as a witness. He assessed the property at $1,025,000.00 before the taking and $288,000.00 after the taking for a difference of $737,000.00.

All three appraisers used a comparable sales approach in valuing the real estate. The Commonwealth anticipated Grabeel would disagree with the comparable sales used by Knight and Lyons and offer his own. It was expected the case would boil down to a dispute among the three appraisers.

In answering Young's interrogatories, the Commonwealth listed nine comparable sales relied upon by Lyons and nine sales relied upon by Knight. According to Young's brief in this Court, two of the comparable sales used by Knight were for "unimproved lot valuation." In her supplemental answers to interrogatories, Young identified three comparable sales relied upon by Grabeel and reserved the right for Grabeel to "review and consider any additional comparable sales disclosed by any witness at trial[.]" The comparable sales listed for Grabeel were for two vacant lots in two separate developments about two miles from the Young property and thirteen lots in a third development about three miles from the Young property.

As the proof developed, only four witnesses testified at trial. David Wade, a licensed engineer and surveyor, testified first for the Commonwealth. He focused mainly on the topography of Young's subdivision and the property that was taken for construction of the project.

Lyons followed Wade to the stand for the Commonwealth. He discussed his credentials as a certified general real property appraiser with thirty years experience. He testified he had viewed the subject property several times and then described his method of appraising land which is to begin by looking at the property's characteristics and topography and then considering several factors that affect value such as zoning and land usage. Next he looks at area property sales, which he compares, and finally reaches a decision.

Regarding Young's property, he testified there were originally sixty-two lots, and four of them had been sold before he began the appraisal process leaving fifty-eight lots for his consideration. He then detailed nine pieces of property around Pulaski County that he deemed comparable to Young's lots. Each of the parcels he identified contained either a single-wide mobile home, a double-wide modular home, or a one-story stick built family residence. He selected these particular sales because of their location, age, amenities and similarity to Young's lots. In selecting the comparable sales, he looked for property that had the "look" and "feel" of Young's property. He did not mention considering any unimproved property.

Lyons testified that all roads in the subdivision, except Canyon Point which was unfinished, were "chip and seal." He deemed compensation appropriate for several lots that were rendered inaccessible by the road project and/or "wasted." Although available, Knight was not called as a witness.

The Commonwealth announced closed at the conclusion of Lyons' testimony, whereupon Young moved for a directed verdict on the sole grounds that payment had not been offered for the taking of three landlocked lots. The Commonwealth responded that Young retained title to those lots and could use them as she saw fit, plus Lyons included compensation for those lots in his post-taking opinion. Thereafter, the trial court overruled the motion and the defense began its case.

Young and Grabeel testified on behalf of the defense. Young recounted her purchase of the property in 1995 and her desire to develop a residential area for modestly priced homes. Working with a surveyor, she platted 62 lots; installed roads, septic and electric lines; and sold four lots. She testified that since the taking by the Commonwealth in July of 2007, the property is no longer contiguous and the roads have been destroyed.

Grabeel testified next. He stated he has been an appraiser since 1962, a certified real property appraiser since 1992, and served as Pulaski County's Property Valuation Administrator for two decades. In reaching his opinion of the subject property's value he visited the property and applied three methods of valuation—cost, sales comparison and income. He admitted sales comparison is the method commonly used in a condemnation proceeding.

In selecting comparable sales, Grabeel looked at location, eye appeal, age, site size, whether the property was maintained, and available amenities such as garages, pools, sheds, and fences. He testified that just looking at a potential comparable is not good enough, it is helpful to speak with the buyer or seller and to enter the home. He then described the nine best sales he could find in the market for direct comparison to Young's eight improved lots. He testified that even though he and Lyons used some of the same comparable sales, they could easily reach different conclusions because they are rendering an opinion.

Grabeel was then asked about appraising a subdivision. He explained that he looks at the demand for lots, the location and whether the property would

appeal to people looking for that type of property. He testified he used three separate sales to evaluate the undeveloped lots in the Young subdivision because in his opinion an appraiser needs to consider both developed and undeveloped land. When asked whether it was sufficient to base an appraisal of a partially developed subdivision on five comparables with dwellings, Grabeel responded, "I'm not good enough to do it that way."

In describing the subdivision that remained after the taking, Grabeel testified it was damaged, its access had changed and its marketability had been adversely affected. He stated that three lots were now completely landlocked, and while other lots were no longer landlocked, the access to those lots was inferior. Furthermore, the bypass now divides the once quiet subdivision in half.

Young closed her case at the end of Grabeel's testimony, renewed her directed verdict motion, and for the first time, moved to strike Lyons' testimony because he failed to use as a comparable any subdivision or undeveloped property. The Commonwealth responded that Lyons' opinion was based on comparable sales and the jury should be allowed to decide his credibility. Young's motions were denied.

The Commonwealth then moved for a directed verdict and to strike Grabeel's testimony because on cross-examination Grabeel stated he used a cost approach in reaching his opinion. Young stated that while Grabeel had testified he considered the cost approach, as is his custom, he also testified that he did not use

it as his ultimate method of valuation. The court denied both of the Commonwealth's motions.

Jurors were then taken to the subject property to view it for themselves. They then returned to the courtroom where they received instructions from the court and heard closing arguments. Young argued Grabeel was the only appraiser who performed a proper appraisal since he considered both improved and unimproved land. The Commonwealth argued the comparables used by Grabeel for the subdivision were dissimilar from Young's property.

After deliberating, and in conformity with Lyons' figures, the jury found the fair market value of the Young property to be $930,000.00 before the taking and $536,800.00 after the taking for a difference of $393,200.00. The jury's award being less than the commissioner's award, which had already been distributed, Young was ordered to refund to the Commonwealth $56,800.00, plus pre-judgment interest in the amount of $9,474.24. This appeal followed.

LEGAL ANALYSIS

The two issues posed on appeal by Young are whether the jury's award was supported by substantial evidence and whether the jury's award was sufficient. We answer both questions in the affirmative and affirm the trial court's judgment.

We address first whether the jury's verdict is supported by substantial evidence. If it is, the trial court properly denied Young's directed verdict motions.

The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. *Bierman v. Klapheke*, Ky., 967 S.W.2d 16, 18 (1998). Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. *Id*. at 19. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Kentucky Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944). Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Nugent v. Nugent's Ex'r*., 281 Ky. 263, 135 S.W.2d 877 (1940).

It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. *Harris v. Cozatt, Inc.*, Ky., 427 S.W.2d 574, 575 (1968). While it is the jury's province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture. *Wiser Oil Co. v. Conley*, Ky., 380 S.W.2d 217, 219 (1964) citing *Kentucky Transport*

Corp. v. Spurlock, Ky., 354 S.W.2d 509 (1961); *Myers v. Walker*, Ky., 322 S.W.2d 109 (1959).

Gibbs v. Wickersham, 133 S.W.3d 494, 496 (Ky. App. 2004). Thus, the question before us is whether the jury's verdict was supported by the evidence.

In the context of this case, this is a question of witness *competency* rather than witness *credibility*. Young argues Lyons' testimony, the only testimony as to value offered by the Commonwealth, should have been stricken because it was based solely on comparables for *improved* property and most of the subject land was *unimproved*. As a result, Young argues Grabeel's opinion was the only valid one because he had used a combination of improved and unimproved property in forming his opinion.

"The proper measure of damages, where part of a tract of land is taken by condemnation, is the difference in the fair market value of the tract before and after the taking." *Commonwealth, Dept. of Highways v. Tyree,* 365 S.W.2d 472, 477 (Ky. 1963) (citing *Commonwealth, Dept. of Highways v. Stamper,* 345 S.W.2d 640 (Ky. 1961)). Importantly, Young has not cited us to any authority specifically requiring an appraiser to select specific types of land as comparables in developing an opinion as to a subdivision's value. We believe no such requirement exists because Kentucky courts have been "rather liberal" in allowing an expert witness to select comparables. *Commonwealth, Dept. of Highways v. Cole,* 437 S.W.2d 736, 737 (Ky. 1968). For example, in *Cole* it was not error for a witness to use "small commercial lots" as comparables for an appraisal for the taking of "a

relatively large rural tract with a potential for residential use." *Id.* at 738. Furthermore, had the appraiser "made no reference to other sales," his testimony would still have been competent. *Id.* at 737; see also *Commonwealth, Dept. of Highways v. Ward,* 461 S.W.2d 380, 381-82 (Ky. 1970) (citing *Tyree,* 365 S.W.2d at 476) ("A properly qualified witness may testify as to before and after values, without stating any factors that he took into consideration, and his testimony will have some probative value.").

This makes sense because no two pieces of land are the same and "[p]roperty values ordinarily are not susceptible of exact measurement[.]" It is for this very reason that we resort to opinions to establish the value of a piece of property. *Tyree,* 365 S.W.2d at 475. Hence, the relevancy of the comparables chosen "goes to the probative value of the expert's opinion, not its competency." *Id.* While an appraiser need not reveal the supporting facts for his opinion, any facts revealed will "give the estimate of value more weight, more credibility, more probative value (greater quality of conviction)." *Id.* at 477.

We find further support for our conclusion from the following passage:

> [i]f the land being used for comparison is ill-suited for that purpose due to its location, topography, size, or any other characteristic, its inadequacy should be exposed before the jury during cross-examination just as any other expert witness' testimony is challenged. This approach is consistent with our prior decisions which have allowed expert witnesses who use comparable sales to exercise their own skilled judgment in deciding what constitutes comparable property.

Hatfield v. Commonwealth, Dept. of Transportation, Bureau of Highways, 626 S.W.2d 213, 214 (Ky. 1982). In *Hatfield,* it was argued an expert's opinion should be stricken because it was based upon comparables located in a different county with some being as far as twenty miles away from the subject property. The Supreme Court concluded, "distance more appropriately addresses itself in this case to the credibility of the experts' opinions rather than to the competency of the evidence." *Id.* Based upon the foregoing, we discern no error in the trial court's denial of Young's motion to strike Lyons' testimony and no error in its denial of her motion for a directed verdict.

The second question posed by Young is whether the jury's award was sufficient.

> The legal criteria for determining whether an award in a condemnation proceeding is inadequate or excessive are similar to those that govern in common law actions. Where the amount is within the range of conflicting testimony, and thus has tangible evidentiary support, it will be sustained unless it is palpably inadequate or excessive. Nichols on Eminent Domain, Vol. 5, § 17.3. In such cases it is said that the jury's assessment of damages will not be set aside if it is 'supported by substantial evidence.' *Bailey v. Harlan County*, 1939, 280 Ky. 247, 133 S.W.2d 58, 60; *Lexington & E. Ry. Co. v. Sumner*, 1922, 196 Ky. 788, 245 S.W. 849, 850. But if it is not within the extreme limits of the valuation testimony and there is no other evidence from which it could reasonably be deduced it simply has no support at all, and, under the fundamental rules applicable to verdicts in any case, is generally set aside. Nichols, § 17.1.

Pierson v. Commonwealth, 350 S.W.2d 487, 489 (Ky. 1961). Here, the jury's verdict was consistent with Lyons' testimony. Furthermore, jurors viewed the property for themselves which provided "more than persuasive influence." *City of Middlesboro v. Chasteen,* 285 Ky. 427, 148 S.W.2d 295, 298 (1941) (citing *Bailey v. Harlan County,* 280 Ky. 247, 133 S.W.2d 58 (1939)). Therefore, we deem the jury's award to be supported by the evidence and sufficient.

For the foregoing reasons, we affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS:

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