IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01211 COA

MISSISSIPPI TRANSPORTATION

COMMISSION APPELLANT

v.

NORWOOD VILLAGE, INC., A MISSISSIPPI

CORPORATION, OWNER; LOIS

BENEFIELD D/B/A VILLAGE FLORIST,

LESSEE; AND MAURICE JONES D/B/A

MAURICE JONES, INC., LESSEE APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DANIEL DICKS GUICE

COURT FROM WHICH APPEALED: HARRISON COUNTY SPECIAL COURT OF EMINENT DOMAIN

ATTORNEY FOR APPELLANT: JACK H. PITTMAN

ATTORNEYS FOR APPELLEES: ALBERT NECAISE

W. ROSS CAPPS

NATURE OF THE CASE: EMINENT DOMAIN

TRIAL COURT DISPOSITION: NEW TRIAL GRANTED

MANDATE ISSUED: 8/5/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

The Mississippi Department of Transportation, dissatisfied with the trial court's decision to grant an additur in an eminent domain proceeding, has appealed, claiming that the additur was improper.

The case involved the acquisition of .06 acre from a .74 acre parcel in Harrison County containing several commercial buildings rented by the owner to two separate tenants. No part of the permanent improvements was acquired in the proceeding. The appellees are the property owner, Norwood Village, Inc. (hereafter "Norwood"); the tenant of one of the buildings, Lois Benefield, a sole proprietor operating a floral business under the trade name "Village Florist" (hereafter "Village"); and another tenant, Maurice Jones, who operates a realty under the name "Maurice Jones, Inc." (hereafter Jones). The jury returned a verdict of $16,670.00 as the total compensation for the acquisition. As instructed, the jury apportioned the damages between the owner and the two tenants, awarding $16, 570.00 to Norwood as owner and $50.00 each to the tenants. On post-trial motion, the trial court suggested an additur of $10,000.00 for Norwood and an equal amount for Village. The court did not suggest the need to adjust the award to Jones. Jones made no formal entry of appearance in this appeal.

I.

General Considerations

The authority of the trial court to interfere with the verdict of the jury in an eminent domain case is very limited. The general statute dealing with additurs and remittiturs applies to eminent domain proceedings. Miss. Code Ann. § 11-1-55 (1972). This code section requires, in order to propose a change in the verdict, a finding "that the jury . . . was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." Miss. Code

Ann. § 11-1-55 (1972); *Accord, Dorrill v. State Highway Comm'n of Mississippi,* 525 So. 2d 1333, 1335 (Miss. 1988).

The trial court, in ordering the additur in this case, made the following comment:

"I couldn't personally understand how the appraiser, Mrs. Duncan, [the Commission's expert on value] could testify as she did, with this sidewalk going right up against the building there. You know, it just didn't look right to me. And they were taking away some parking. Now, there was some question about how much the Village Florist would be entitled to because of the fact that there hasn't yet been a new lease signed. But I'm going to go ahead and grant an additur of ten thousand dollars in each instance. Ten thousand dollars for the land owner and ten thousand dollars for the young lady [presumably Village]."

This Court has concluded that the trial court was manifestly in error in both aspects of this modification to the jury's award. The jury's determination in an eminent domain case is more than merely advisory. *State Highway Comm'n of Mississippi v. Warren,* 530 So. 2d 704, 707 (Miss. 1988) . It is entitled to great deference, especially in those cases, as in the case now under consideration, where the jury is permitted a view of the property and hears competent, relevant evidence on the factual issues to be resolved. *Id.* The trial court is not authorized to substitute its judgment for the collective judgment of the jury simply on a conclusion that, in the court's opinion, the compensation is inadequate.

II.

The Additur to Norwood as Owner

The Commission's appraiser testified under the long-established "before and after" rule that governs in cases involving a partial taking. *See State Highway Comm'n of Mississippi v. Smith,* 511 So. 2d 881, 883 (Miss. 1987). She testified that, before the acquisition, the property had a value of $324, 095, and, after the acquisition, the remaining property would have a value of $307,425. In calculating her "after" value of the property, the Commission's appraiser allowed for certain reasonable costs that would necessarily be incurred by the property owner to maintain the economic viability of the property under the new street layout. These items included costs to relocate a sidewalk, to pave alternate parking areas in order to replace parking areas adversely affected by the acquisition, and to relocate one building entrance rendered unsuitable by the right-of-way expansion. The entrance relocation allowance was for the building occupied by Jones. The just compensation for the taking, according to this witness, was the difference between these before and after value figures, or $16, 670.

The property owner presented expert testimony indicating a "before" value of $303,000 and an "after" value of $266,000, for a proper damage figure of $37,000. The president of Norwood also testified that, in her opinion, damages were $50,000; however, that opinion was not supported by any meaningful analysis. The jury appears to have substantially discounted that testimony, and in our assessment of the evidence, we conclude that it has little significance. The primary difference between

the two expert appraisals appeared to have been a different assessment of the impact of the greater proximity of the road and the loss of certain parking areas on the "after" value of the remaining property.

This Court has reviewed the testimony presented at trial, including specifically the testimony of the Commission's appraiser. She restricted her testimony to those areas of opinion that directly bore on the issues to be resolved by the jury. Her opinions were properly supported by relevant market data and were not inherently incredible. She was not substantially impeached in cross-examination, neither were her opinions so contradicted by other competent proof as to render them unworthy of belief. The fact that the jury apparently chose to accept her testimony rather than that of the expert appraiser offered by Norwood does nothing to demonstrate bias, passion or prejudice on the part of the jury. Norwood's appraiser's testimony concerning the diminished value of the improvements occasioned by the right-of-way alterations was given in only the most general terms and was supported by no rational explanation or analysis. This Court finds it unremarkable that the jury apparently elected to give little weight to that testimony. The trial court's analysis in support of the $10,000 additur to Norwood speaks of the court's belief that the Commission's appraiser did not properly account for diminished value of the building occupied by Village caused by the road moving nearer. The court also commented on the loss of parking spaces. The jury heard evidence from Norwood's appraiser that would have permitted them to increase the amount of compensation based on these factors. The verdict indicates they either rejected that evidence or substantially discounted it in arriving at a verdict. There is no rational basis to conclude that this resolution of conflicting evidence was the result of anything other than proper jury deliberation. We are convinced that the trial court manifestly erred in concluding that the verdict in favor of Norwood was so low as to evidence bias, passion or prejudice on the part of the jury, or that it was against the overwhelming weight of the evidence.

III.

The Additur to Village as Tenant

As to the appealing tenant, the proof showed that Village occupied one of the buildings on a month-to-month basis. There had previously been a longer-term written lease with renewal provisions; however, the term of that lease, including renewals, had expired prior to the commencement of the eminent domain proceeding. The sole evidence presented by Village as damages incurred by the Commission's acquisition was an estimate to redesign the entrance to the leased building in the amount of $25,950.00.

There appears from the proof and argument of counsel to have been some measure of confusion and misunderstanding at trial on the proper measure of compensation to a tenant whose tenancy is affected in some manner by an acquisition under the laws of eminent domain. There is no particular separate claim for damages or compensation that is available to a tenant over and above the compensation computed as being due under the "before and after" rule. The ultimate proper award of just compensation is the same whether the property is occupied by the owner or is owned by one entity and occupied by another under some tenancy arrangement. The sole additional issue to be resolved by the jury in cases involving an owner and a tenant, after computing the just compensation award, is to arrive at a proper division of the compensation amount between the owner and the

tenant. *Seago Enterprises, Inc. v. Mississippi State Highway Comm'n,* 330 So. 2d 588, 590 (Miss. 1976). In doing this, Mississippi follows the minority rule in computing a tenant's damages in a partial condemnation of the leasehold. *Lee v. Indian Creek Drainage District,* 246 Miss. 254, 148 So. 2d 663, 667 (1963).

Thus, the award of total damages to the property is apportioned between the landlord and the tenant so as to give the landlord the value of his reversion, and rents under the contract, less an abatement for present payment. *The damage to the leasehold is determined by awarding the tenant the value of his contract (which includes a reduction in his future rents because of loss of the use of a portion of the leased premises), less the rents due under the terms of his contract, plus the abatement earned for the present payment of rent to the landlord.*

Id at 667-68 (emphasis supplied).

Under that rule, the tenant in this case, having only a month-to-month tenancy, would be entitled, at most, to the decreased value of its right of occupancy for one month caused by the partial taking. The question for the jury in a tenancy situation is how to arrive at a proper division of the total damage award between the owner of the fee and the tenant. Thus, a tenant whose long-term lease is adversely affected by a condemnation proceeding may be entitled to substantially more damages than a month-to-month tenant, but that increased compensation properly comes at the expense of the landowner, not as an added element of damage assessed to the condemning authority. This is true since the landowner's reversionary right at the end of the lease diminishes in value as the interval of time before that reversion may be realized increases. By the same token, the tenant's injury increases in relation to the length of the remaining term of its tenancy.

Thus, even had the Commission in this case been acquiring the entire property, the compensation to a month-to-month tenant would be negligible since such a tenant has no legal interest in the property enforceable against the owner beyond the right to occupy for the next succeeding term. That being the only interest the tenant has in the property itself, that is the only stake the tenant has in the compensation paid by the sovereign for the taking. It should be noted that even this interest must be diminished by the savings to the tenant for any unpaid rent that would have been due for the period had the right of occupancy not been interrupted by the acquisition. *Lee,* 148 So. 2d at 667-68.

The only evidence of damage presented by Village was an estimate of the cost of relocating an entrance to the building, based upon testimony that the present entrance would, after the contemplated modifications, be an unsatisfactory means of gaining access to the store. While it was within the province of the jury to consider evidence of such alterations made necessary by the acquisition, nevertheless, it was for the jury to decide whether, based upon the facts, such an alteration was necessary to continue the reasonable economic utility of the improvement. In that respect, this claim that a new entrance was necessary as to this building is no different from evidence concerning the necessity for an altered entrance on the other building which the Commission conceded was necessary. However, even if the jury made that determination, it was a factor properly

includable in the damage award figured as a part of the diminished "after" value of the property remaining after the partial taking, not as a separate item of damage awarded to the tenant.

Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512, 515 (Miss. 1971). The jury could have then, in making the proper division of the calculated damages, taken into consideration whether the tenant or the landlord bore responsibility under the terms of their agreement for the cost of such alteration.

In this case, Village, holding over by mutual agreement under an expired lease, had no obligation to absorb the cost of such an alteration. Even had the jury determined the cost of relocating the entrance to be a proper consideration in computing the "after" value of the property, it would have been manifest error to award that element of the damages to a month-to-month tenant.

There is no basis to conclude that this tenant, whose entire legal interest in the premises consisted of the right, subject to the payment of rent, to occupy the premises for one month, was entitled to compensation of $10,050.00 for the adverse effect of this partial taking on that limited right of occupancy. The trial court articulated no basis for such a conclusion and pointed to no evidence in the record supporting such an award that was ignored by the jury. The reason is simple. There was no such evidence, and on the facts of this case, there is no rational basis to conclude that such an amount of compensation was due to this tenant. The trial court was manifestly in error in ordering this additur. The jury's minimal award to Village, though perhaps offending uninformed sensibilities, is not contrary to the law on the subject and is not against the weight of the evidence. In fact, it indicates that the jury had a clear understanding of its duty and carried out that duty unswayed by passion, prejudice, or sympathy. On the undisputed facts of this case there has been only a slight interference with a property right of minimal value. A nominal award to this tenant was the only appropriate verdict. The verdict of the jury on the issue of just compensation to this tenant should be affirmed.

THE ORDER OF THE HARRISON COUNTY SPECIAL COURT OF EMINENT DOMAIN AWARDING AN ADDITUR TO NORWOOD VILLAGE, INC. AND LOIS BENEFIELD D/B/A VILLAGE FLORIST IS SET ASIDE, AND THE JUDGMENT OF THE HARRISON COUNTY SPECIAL COURT OF EMINENT DOMAIN ENTERED PURSUANT TO THE VERDICT OF THE JURY IS REINSTATED. COSTS ARE ASSESSED AGAINST THE APPELLEES, NORWOOD VILLAGE, INC. AND VILLAGE FLORIST.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.