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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000480-MR

R & J DEVELOPMENT COMPANY, LLC — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 01-CI-00068

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

AND: NO. 2006-CA-000508-MR

FAST LANE DISCOUNT
TOBACCO OUTLET, INC. — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 01-CI-00068

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

TAYLOR, JUDGE: R & J Development Company, LLC (R & J) brings Appeal No. 2006-CA-000480-MR and Fast Lane Discount Tobacco Outlet, Inc. (Fast Lane) brings Appeal No. 2006-CA-000508-MR from a January 20, 2006, judgment upon a jury trial adjudicating the fair market value and the fair market lease value of property taken by the Commonwealth through condemnation. We affirm in both appeals.

The Commonwealth instituted a condemnation proceeding by filing a petition in the Rowan Circuit Court for the purposes of acquiring a .837 acre tract of land in fee simple from R & J. The record reveals that a building was situated upon the land where a tobacco outlet store was being operated by Fast Lane. R & J had leased the property to Fast Lane for this purpose.

Commissioners were appointed and eventually fixed the fair market value of the property at $250,000.00. Being dissatisfied with the commissioners' valuation, R & J filed an answer to the condemnation complaint. Therein, R & J specifically "excepted" to the commissioners' valuation and requested a jury trial. R & J also filed a motion to join Fast Lane as an additional real party in interest alleging that Fast Lane held

[1] Senior Judge William L. Knopf 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.

a long-term lease upon the subject property. The court eventually granted the motion to join Fast Lane as a defendant. A trial by jury was held, and the jury returned a verdict finding the fair market value of the property without the lease to be $265,000.00 and the fair market value subject to the lease to be $245,000.00. In accordance with the jury verdict, R & J was awarded $245,000.00 representing the fair market value of its fee simple interest in the land and Fast Lane received $20,000.00 representing the fair market value of the lease. Being dissatisfied with the award, both R & J and Fast Lane have filed appeals, which have been consolidated for our review.

Standard of Review

The primary errors asserted in both appeals look to various evidentiary rulings made by the trial court. The proper standard of review of a trial court's evidentiary rulings is abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). This same standard applies under the Kentucky Rules of Evidence, including the testimony of expert witnesses under Ky. R. Evid. (KRE) 702. *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995)(overruled on other grounds).

In performing our review, the decision below must be affirmed unless the jury verdict rendered is "palpably or flagrantly against the weight of the evidence so as to indicate it was reached as a result of passion or prejudice." *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). This standard will be applied accordingly to both appeals.

Appeal No. 2006-CA-000480-MR

R & J contends that the circuit court committed reversible error by both admitting and excluding certain items of evidence at trial. R & J names three specific contentions of error: (1) the court erred by admitting evidence of the initial purchase price ($175,000.00) paid by R & J when it acquired the property in 1995; (2) the court erred in admitting evidence concerning the tax assessed value of the property; and (3) the court erred in excluding evidence by R & J concerning the cost of improvements upon the property after its purchase in 1995. We shall address these issues seriatim.

In *Commonwealth, Department of Highways v. Whitledge*, 406 S.W.2d 833 (Ky. 1966), the Court was faced with the question of whether evidence of the purchase price of property paid some five years and two months prior to its condemnation was admissible to measure the fair market value of the property at the time of condemnation. The Court ultimately concluded that the purchase price was admissible. In so concluding, the Court held:

> In Nichols' The Law of Eminent Domain (3rd Ed.), Vol. 5, sec. 21.2, pp. 411 through 414, it is pointed out that the price paid for property which is the subject of condemnation is admissible, if these conditions are satisfied: The sale was bona fide; the sale was voluntary, not forced; the sale occurred relatively in point of time; and the sale covered substantially the same property involved in the condemnation proceeding. In the case of *Taylor, etc. v. State Roads Commission of Maryland*, 224 Md. 92, 167 A.2d 127, the fact that a sale of similar property was made five years, one and one-half months prior to the commencement of the action to

> condemn did not render evidence of that sale inadmissible in such condemnation proceeding.

Commonwealth v. Whitledge, 406 S.W.2d at 836. Under the holding of *Whitledge*, the purchase price of condemned property is admissible if (1) the sale is bona fide; (2) the sale is voluntary; (3) the sale occurred relative in time to the condemnation; and (4) the sale involved substantially the same property. *Id.*

In the case at hand, R & J argues that the sale of the property was neither relative in time because it took place in 1995, some six years prior to condemnation, nor was substantially the same property because of extensive remodeling. We disagree.

In *Whitledge*, the Court admitted into evidence the purchase price of property some five years and two months before condemnation. Here, we do not believe that the passage of six years rendered the sale too remote in time to be admissible. Moreover, we cannot say that the mere remodeling of property affects whether it is "substantially" the same property under the factors set forth in *Whitledge*. Most importantly, we are guided by the following statement in *Whitledge:*

> We think it the better policy, where there are any reasonable elements of comparability, to admit testimony as to the sales, and leave the weight of the comparison for the consideration of the jury, along with such distinguishing features as may be brought out on cross-examination or otherwise.

Id. at 836 (citation omitted). Accordingly, we hold that the circuit court did not err by admitting into evidence the purchase price or sale price paid by R & J for the property in 1995.

R & J also contends that it was reversible error to admit into evidence the tax valuation of the property. The Commonwealth introduced into evidence the taxable value of the property as fixed by the Rowan County Property Valuation Administrator. The property's tax assessed value was $175,000.00.

As a general rule, the tax assessed value of property is generally inadmissible in a condemnation proceeding to prove the fair market value of the property. *Mengel Properties v. City of Louisville*, 400 S.W.2d 690 (Ky. 1966); *Milby v. Louisville Gas & Electric Company*, 375 S.W.2d 237 (Ky. 1964). However, an exception to this rule is recognized in *Commonwealth, Department of Highways v. Rankin*, 346 S.W.2d 714 (Ky. 1960). Therein, the Court held that the tax assessed value of land is admissible in a condemnation action where the owner fixed or assented to the valuation. The Court in *Rankin* stated:

> Evidence as to assessed valuation of land when fixed by the owner is competent in a condemnation action for the purpose of acquiring state highway right of way. *Commonwealth, by State Highway Comm. v. Combs*, 229 Ky. 627, 17 S.W.2d 748; *Davidson v. Commonwealth,* 249 Ky. 568, 61 S.W.2d 34; *Commonwealth v. Salyers*, 258 Ky. 837, 81 S.W.2d 859. In determining the value of land taken for highway purposes, such assessed value, though not conclusive, can be considered in connection with other evidence of value of the property. *Crittenden County v. Towery*, 264 Ky. 606, 95 S.W.2d 233. Such evidence is admissible on the theory that it is an admission against interest when the value shown is fixed by the landowner. *Commonwealth v. Gilbert*, Ky., 253 S.W.2d 264. When a landowner signs an assessment list of his property which contains an evaluation of such property, as the landowner did here, he will not be heard to say that he has not fixed the value of his property.

Id. at 716-717. As the landowner signed an assessment list that contained a valuation of his property, the *Rankin* Court held that such tax valuation was properly admissible.

In this case, the Commonwealth notes that R & J signed the consideration certificate contained in the 1995 deed of conveyance.[2] Pursuant to this certificate, R & J made a sworn statement that the property was worth $175,000.00 in 1995. The Rowan County PVA placed this value on the property for taxation purposes. Given these facts, we agree with the Commonwealth and believe that the tax assessed value of the property was properly admissible. *See Commonwealth, Department of Highways v. Rankin*, 346 S.W.2d 714.

R & J's final argument is that the circuit court committed reversible error by excluding evidence outlining the cost of improvements made upon the property after its purchase in 1995. In its reply brief, R & J comments:

> The [Commonwealth] states that by not putting the itemized cost into evidence by avowal amounts to a waiver. This confuses the point. The court ruled that the parties were not allowed to place this into evidence before the jury and it would have made no difference that it was not placed in by avowal, as that would not have any bearing on what the jury's verdict would have been.

R & J's Reply Brief at 3. We believe R & J has misinterpreted the law.

The proper procedure for preserving a claim of error relating to the exclusion of evidence is found in KRE 103(a)(2).[3] To preserve an allegation of error

[2] A consideration certificate in a deed is required by KRS 382.135. The certificate is a sworn, notarized statement by the grantor and grantee that the consideration reflected in the deed is the full consideration paid for the property.

[3] Ky. R. Evid. 103(a)(2) reads:

regarding the exclusion of evidence, it is incumbent upon the party to request the circuit court to enter the evidence excluded into the record by avowal or by counsel offering a proffer of the evidence. KRE 103(a)(2); *Hart v. Commonwealth*, 116 S.W.3d 481 (Ky. 2003). In *Hart*, the Kentucky Supreme Court noted that "[a]ppellate courts review records; they do not have crystal balls." *Id.* at 484 (quoting *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 (Ky. 2000)). Without having this evidence before us, we have no way to determine whether exclusion of the evidence was prejudicial to R & J. Moreover, R & J admits that it did not request the excluded evidence to be entered into the record by avowal or by proffer. Thus, the issue concerning the exclusion of such evidence was not properly preserved for our review. *See id.*, 116 S.W.3d 481.

In sum, we affirm in Appeal No. 2006-CA-000480-MR.

Appeal No. 2006-CA-000508-MR

Fast Lane contends the circuit court committed reversible error by admitting into evidence the testimony of two appraisal witnesses for the Commonwealth,

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> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> . . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.

William Berkley and Joe Robinson. Specifically, Fast Lane alleges that Berkley and Robinson failed to follow *Commonwealth, Department of Highways v. Sherrod*, 367 S.W.2d 844 (Ky. 1963) in rendering their opinions concerning the fair market value of Fast Lane's lease with R & J. Neither Robinson nor Berkley appraised any value for the lease because, in their opinion, the lease was not the result of an arm's-length transaction. Under *Sherrod*, Fast Lane argues that the fair market value of a lease should be based upon whether the rental price paid by the lessee is equal to or above the fair market rental value of the subject property. As Robinson and Berkley assigned no value to the lease due to the lack of an arm's-length transaction, Fast Lane maintains that their appraisal testimony should have been excluded by the circuit court. We disagree.

> In *Sherrod*, the Court held:
>
> > [T]he market value of the lease can easily be ascertained by determining what the whole property would sell for free of the lease, and what it would sell for subject to the lease-the difference is the value of the lease. (Of course, if the lease were disadvantageous to the lessee it would have no value, because the land would not sell for less subject to the lease, but for *more*.)

Id. at 849. According to *Sherrod*, the fair market value of a lease is determined by comparing the rental rate paid under the lease to the fair market rental rate in the community. If the lease is advantageous to the lessee and the lessee is paying less than the fair market rental rate, the lease would have value upon condemnation. On the other hand, if the lease is disadvantageous to the lessee and the lessee is paying a higher rental rate, the lease would have no value upon condemnation.

In this case, Robinson and Berkley testified that the lease was not the result of an arm's-length transaction between Fast Lane and R & J. In support thereof, they testified that Fast Lane was paying a rental rate far higher than the fair market rental rate in the area. Robinson specifically testified that Fast Lane was paying $1,600.00 per month according to the lease terms and that the fair market rental value was $900.00 per month in his opinion. Berkley also testified that the lease rate was higher than the fair market lease rate in the area and was favorable to R & J. Thus, Robinson and Berkley opined that the lease was disadvantageous to Fast Lane. The above testimony is sufficient to support Robinson and Berkley's opinion that the lease had no value under the principles announced in *Sherrod*. Based upon the testimony of Robinson and Berkley, we are of the opinion that the appraisal testimony was properly admitted.

Next, Fast Lane contends:

> The verdict of the trial court below should be reversed because of the blatant appeal by representatives of the State Highway Department to the passion and prejudice of the jury which so permeated the trial that it prevented this appellant from receiving a fair and impartial verdict.

Fast Lane's Brief at 8. Fast Lane argues that the Commonwealth repeatedly made derogatory remarks concerning Jim Booth, who held an ownership interest in both R & J and Fast Lane. Fast Lane contends that the Commonwealth referred to Booth as a wealthy man who resided in the second largest mansion in the county. We observe that some of those comments were made at a prehearing conference outside the hearing of the jury. Fast Lane also maintains that the Commonwealth's closing argument was improper

for stating that R & J and Fast Lane were trying to raid the coffers of the Commonwealth, that R & J and Fast Lane were really on the same side, and the lease between them was basically a sham created for tax purposes.

The Kentucky Supreme Court recently reemphasized the position that our Courts give broad latitude in allowing counsel to present a case to the jury. *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006). A trial will not be reversed based upon closing arguments unless the statements made render the entire trial fundamentally unfair. *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001). Given the totality of the evidence presented to the jury in this case, we do not believe that the admission of these statements constituted reversible error. *See also* KRE 103(a). Stated differently, we cannot say that absent their admission the jury's verdict would have been different. *See Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987). To the extent these statements were improper, we conclude the error to be harmless.[4] Accordingly, we hold that the circuit court did not commit reversible error regarding the alleged error below.

[4] We note that Fast Lane Discount Tobacco Outlet, Inc's counsel did not make a contemporaneous objection to the statements made by opposing counsel in closing argument. Rather, counsel waited until the jury had been dismissed to move for a mistrial, based upon the prejudicial statements made during closing argument. In this instance, the trial court was not given the opportunity to rule on any objectionable statements or admonish the jury, if deemed necessary. However, the Court does acknowledge that the Commonwealth did attempt to place the jury in the position of being the protector of the "state coffers," implying that the jury effectively controlled disbursements from the state treasury. We note that this is the function of the executive and legislative branches of state government, not juries, and such an argument may be analogous to the "golden rule" argument in criminal cases where prosecutors ask jurors to place themselves in the victim's position and rule accordingly. We strongly caution the Commonwealth against this practice in future cases.

Fast Lane further argues that the circuit court committed reversible error by admitting Robinson's testimony concerning a comparable sale involving Viking Food Mart, Inc. The Viking Food Mart sale was used by other appraisers at trial as a comparable sale in reaching the fair market value of the condemned property. It was Robinson's opinion that the Viking Food Mart sale should not be used as a comparable sale. He testified that the sale involved a tax free exchange among three properties. Fast Lane argues that Robinson had no "first-hand knowledge" as to whether the Viking Food Mart sale was a tax free exchange involving three separate properties. As such, Fast Lane contends that the circuit court committed reversible error by admitting this testimony.

It is well-established that a primary responsibility of a jury is to determine the weight of evidence and credibility of witnesses. *Tuttle v. Perry*, 82 S.W.3d 920 (Ky. 2002). The jury heard Robinson's testimony, and based upon Fast Lane's argument above, Robinson should have been easily impeached. The credibility of this witness was clearly placed before the jury, which we will not second guess on appeal. Even if we were to agree that this testimony was erroneously admitted, we are unable to conclude that absent its admission the jury's verdict would have been different. *See Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987). Thus, we hold that the circuit court did not commit reversible error in admitting Robinson's testimony. *See* KRE 103(a).

For the foregoing reasons, the judgment of the Rowan Circuit Court in Appeal Nos. 2006-CA-000480-MR and 2006-CA-000508-MR is affirmed.

ALL CONCUR.

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