

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

VILLAGE OF SILVERTON, HAMILTON COUNTY, OHIO,	:	APPEAL NOS. C-180158 C-180188
Plaintiff-Appellant/Cross- Appellee,	:	TRIAL NO. A-1606979
vs.	:	<i>JUDGMENT ENTRY.</i>
LLK PROPERTIES, INC,	:	
Defendant-Appellee/Cross- Appellant.	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Village of Silverton (“Silverton”) appeals from the judgment entry on a jury verdict awarding LLK Properties, Inc., (“LLK”) \$661,000 for the city’s appropriation of its property. LLK appeals from the judgment of the trial court concluding that Silverton’s appropriation was for the purpose of a road improvement project. We overrule the assignments of error, and we affirm the judgment of the trial court.

In its first assignment of error, Silverton contends that the trial court abused its discretion by allowing the owner operator, Lisa Ebbert, to testify about profits and losses because the business-loss rule prohibits recovery of lost profits as a result of the taking.

“The business-losses rule is a judicial construct that holds that the owner of

appropriated property may not be compensated for the loss of future profits from any commercial enterprise on the property.” *Cincinnati v. Banks*, 143 Ohio App.3d 272, 285, 757 N.E.2d 1205 (1st Dist.2001). However, the rule does not “compel the exclusion of any and all evidence of profits or income generated by a business operated on appropriated property.” *Id.* When a property’s value may be attributable to the location of the property, testimony concerning income is admissible. *See id.* at 287; *Wray v. Hart*, 4th Dist. Lawrence No. 91AC20, 1992 WL 208900, *7, (Aug. 13, 1992).

After a thorough review of the record, we find Ebbert did not testify about the loss of future profits or the income potential of the business or seek any compensation for the loss of future profits. Rather, Ebbert testified that the location of the property enabled her business to grow rapidly. The testimony was admissible because the location of the property was relevant to the fair market value of the property. *See id.* We overrule the first assignment of error.

In the second assignment of error, Silverton argues that the jury verdict was against the manifest weight of the evidence because the total compensation awarded was not within the range of the evidence. When assessing whether the jury’s verdict is against the manifest weight of the evidence, this court examines the entire record, “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [verdict] must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). “It is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier-of fact.” *Betz v. Timken Mercy Med. Ctr.*, 96 Ohio App.3d 211, 218, 644 N.E.2d 1058 (1994). If the total compensation and damages awarded are within the

range of testimony on those subjects, the jury verdict is adequate. *Preston v. Rappold*, 172 Ohio St. 524, 528, 178 N.E.2d 787 (1961).

After thoroughly reviewing the record, we hold that the total compensation awarded, including the damage to the residue, was well within the range of testimony. The expert appraisers testified that the value of the property before the appropriation ranged from a low of \$261,000 to a high of \$680,000, and the total compensation due to LLK ranged from a low of \$118,000 to a high of \$680,000. Both parties agreed that if the property were sold, a new business would require variances or waivers in order to comply with the current zoning codes, and that the appropriation would result in the loss of one of the two curb cuts. Thus, the jury award of \$661,000 was within the range of the testimony presented at trial. *See Preston* at 528. Accordingly, we overrule the second assignment of error.

In the third assignment of error, Silverton contends that the trial court erred by allowing LLK to present testimony that the partial appropriation was actually a total take because a trial court's jurisdiction is limited to the property described in the complaint. However, LLK did not dispute that Silverton proposed to appropriate .148 acres of the total .692 acres as stated in the complaint. LLK's expert relied on the appropriation of .148 acres in his expert report, and testified that, after the appropriation, the residue had no fair market value. Thus LLK did not assert a complete appropriation of the property. Rather, the testimony was relevant to the fair market value of the residue. Because LLK did not assert that Silverton appropriated more than the .148 acres contained in its complaint, we find no merit to Silverton's third assignment of error.

In the fourth assignment of error, Silverton argues that the trial court abused its discretion by refusing to submit all of its requested jury interrogatories with no

explanation. However, Silverton does not cite to the record where the trial court rejected the interrogatories as required by App.R. 16(A)(3) and (D). Consequently, we must disregard the assignment of error. *See* App.R. 12(A)(2).

Next, Silverton argues that the trial court’s cumulative errors deprived it of a full and fair trial. The cumulative-error doctrine holds that “a judgment may be reversed if the cumulative effect of multiple errors deprives a defendant of his constitutional rights even though, individually, the errors may not rise to the level of prejudicial error or cause for reversal.” *Dept. of Natural Resources v. Ebbing*, 2015-Ohio-471, 28 N.E.3d 682, ¶ 110 (3rd Dist.). Because we have found no errors, we overrule the fifth assignment of error.

In its cross-appeal, LLK argues that the trial court erred in concluding that the appropriation was for public purposes. Determining the purpose of the appropriation presents a mixed question of law and fact. *Wray v. Speedway LLC*, 2017-Ohio-7998, 98 N.E.3d 1038, ¶ 28 (6th Dist.). An appellate court reviews the court’s findings of fact under a manifest-weight-of-the-evidence standard. *Id.*

Based on the evidence in the record, we conclude that Silverton intended to improve the safety and remedy inefficiencies at the intersection of Montgomery and Stewart Roads on the property it appropriated from LLK. We have no doubt that the road improvement project was for a public purpose, and that the appropriation of LLK’s property was necessary to improve safety at the intersection. Silverton acted in good faith and complied with R.C. 163.04 and 163.59. Accordingly, we overrule LLK’s sole assignment of error.

Having overruled all of the assignments of error, we affirm the judgment of the trial court.

OHIO FIRST DISTRICT COURT OF APPEALS

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS and CROUSE, JJ.

MOCK, P.J., concurs in judgment only.

To the clerk:

Enter upon the journal of the court on September 25, 2019
per order of the court _____.

Presiding Judge