

SUPREME COURT OF LOUISIANA

No. 95-C-1261

**State of Louisiana, Department of
Transportation & Development**

vs.

Schwegmann Westside Expressway, Inc.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS,
STATE OF LOUISIANA

KIMBALL, J., dissenting.

I do not believe the jury committed manifest error in awarding \$4,500,000 in severance damages; therefore, I respectfully dissent.

In an expropriation proceeding, a factfinder's factual determinations as to value of property and entitlement to any other types of damages will not be disturbed on review in the absence of manifest error. *West Jefferson Levee District v. Coast Quality*, 640 So.2d 1258, 1277 (La. 1994). In *Stobart v. State Through Department of Transportation and Development*, 617 So.2d 880, 882-83 (La. 1993), this court stated:

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." this court has announced a two-part test for the reversal of a factfinder's determinations:

- 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
- 2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).

This test dictates that a reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's finding. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.

Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review

where conflict exists in the testimony.

In an expropriation case, a landowner is entitled to be compensated to the fullest extent of his loss. La. Const. Art. I, Sec. 4. This amount includes not only the value of the land actually taken but also damages to the remaining land which result from the expropriation, an amount known as "severance damages". The burden of proving severance damages is on the landowner, and they "must be shown to a reasonable certainty and must not be too remote or speculative." *West Jefferson Levee District v. Coast Quality Construction Corp.*, 640 So.2d 1258, 1297 (La. 1994). The measure of severance damages is the "diminution in the value of the remaining property caused by the taking" which is determined by looking at the fair market value of the property both before and immediately after the expropriation. *West Jefferson*, Id. "Fair market value" is the "price for property which would be agreed upon between a willing and informed buyer and a willing and informed seller under usual and ordinary circumstances; it shall be the highest price estimated in terms of money which property will bring if exposed for sale on the open market with reasonable time allowed to find a purchaser who is buying with knowledge of all the uses and purposes to which the property is best adapted and for which it can be legally used." Id. at 1271 (quoting La. R.S. 47:2321). Thus, the fair market value is the price a buyer is willing to pay after he has considered all of the uses to which the property may be put, where such uses are not speculative, remote or contrary to the law. Id. In the context of the instant case, our review is confined to a determination of whether there is a reasonable factual basis in the record from which a jury could have determined the fair market value of defendant's non-expropriated property decreased in the amount of \$4,500,000.00 because of the effects of the project for which the defendant's other property had been expropriated.

The doctrine of "highest and best use" is inapposite to this case. It applies where a landowner, whose property is expropriated, argues that his property would have had a *more profitable* use in the future but for the expropriation and therefore, he should be compensated at a value based on the future use and not the use to which the property was being put at the time of the expropriation. Thus, "a landowner is entitled to compensation based on a potential use of the property, even though the property is not being so utilized at the time of the taking, provided he can show it is reasonably probable the property could be put to this use in the not too distant future." If a landowner can prove it was reasonably probable his property could have been put to this *more profitable* use in the not too distant future, the factfinder should determine a fair market value of the property based on this higher

and better use and utilize it as the before taking value of the property, and then determine the effect the taking had on the value of the property in order to arrive at an amount of severance damages. The doctrine of highest and best use simply does not apply in this case because Schwegmann Westside is not arguing that but for the expropriation, its property would have had a use which was *more profitable* than the use it had at the time of the expropriation, and therefore it was entitled to compensation based on a the fair market value the property would have if it could be used in a fashion more lucrative than a supermarket. Rather, Schwegmann Westside has set forth an argument that the fair market value of its property has been reduced because a property owner can only hope to profitably rent it as a discount outlet/warehouse, which it asserts is *less lucrative* than the use of the property as a supermarket. For these reasons, the highest and best use doctrine is irrelevant.

Although highest and best use analysis does not apply in this situation, Schwegmann Westside is nevertheless constitutionally entitled to be compensated to the fullest extent of its loss. As explained earlier, Schwegmann Westside is entitled to severance damages if it can prove the fair market value of its remaining property immediately after the expropriation and the completion of the project for which the property was expropriated is lower than the fair market value the property had immediately prior to the expropriation.

Schwegmann Westside asserts the jury did not manifestly err in awarding severance damages in the amount of \$4,500,000.00 because this represents the approximate difference between the value the remaining property had prior to the taking (when a buyer could hope to rent the property as a viable supermarket), and the value the remaining property had after the taking (when a buyer could only hope to rent the property as a warehouse/discount outlet). Schwegmann Westside argues the fair market value has been reduced by the expropriation because prior to the expropriation, an informed buyer would be willing to pay approximately \$8,000,000 for the property because he could hope to rent it to a supermarket, but after the expropriation -- as a result of the reduction in accessibility and visibility -- an informed buyer would only be willing to pay a few million dollars for the property because he could only hope to rent it as a warehouse or discount outlet. In support thereof, Schwegmann Westside, the owner of the property, points to record evidence that its lessee, the Schwegmann supermarket, experienced a growth in yearly gross sales up until the year the property was expropriated, and thereafter experienced a yearly decrease in gross sales such that six years later, gross sales were approximately half of what they were the year of the expropriation.

More importantly, Schwegmann Westside refers to the trial testimony of three witnesses who were qualified as experts in the development of shopping centers and retail centers. These experts testified there was a direct relationship between the value of the property on the market and the volume of business a tenant can expect to do in that location, and that if a property loses half its business, it has lost at least half its value. These experts unequivocally testified that if the property were presently vacant and on the open market, no retailer or supermarket would lease the property for those purposes as a result of the highly restricted accessibility and visibility which resulted from the expropriation. They additionally testified that the most profitable use of the property after the taking was for industrial or warehouse use which was not dependent on customer ingress and egress and that warehouse space rents for half as much or less than retail locations like supermarkets. Thus, their testimony supports a finding that a buyer of the property after the expropriation could not expect to rent it at high supermarket rates, and could only expect the lower rent resulting from leasing the property as a warehouse or discount store; therefore, the buyer of the property would only be willing to pay a price for the property based on the assumption the property was only leasable as a warehouse or discount store.

It is irrelevant that Schwegmann Westside continues to lease the space as a supermarket to Schwegmann's. The determining factor in severance damages is the fair market value the remaining property had before and after the taking. "Fair market value" is the price a willing and informed buyer under usual and ordinary circumstances would be willing to pay if the property was exposed for sale on the open market when taking into consideration the purposes to which the property is best adapted and for which it can be legally used. Defendant's experts in shopping center development testified it would be "absolutely impossible" to lease the store to any other supermarket or similar establishment should Schwegmann's close its supermarket, and that the property was now leasable only as a warehouse or discount retail type establishment, which would give the property itself a much lower value. John Schwegmann, the CEO of Schwegmann Westside and the Schwegmann supermarkets, testified that if he did not already have a store in that location, he would not open a supermarket there today, and that the store remains open, despite the huge decrease in profits, because the store is able to absorb a portion of company overhead. Thus, although Schwegmann Westside may continue to receive supermarket rate rents from the supermarket for internal accounting reasons, if the property were to be put up for sale on the open market, the evidence shows

the market would only be willing to pay a price for the property based on the expectation the property could only be leased as a warehouse/discount outlet.

In other words, a normal buyer under ordinary circumstances would not now be willing to pay a price for this property which is based on the expectation of being able to lease the property at the high rental rates retail/supermarket space is normally leased at. Rather, an ordinary buyer in the open market would now only be willing to pay a much lower price which reflects the fact that the property is only rentable, under ordinary circumstances, as a warehouse or discount outlet. The fact that the store continues to be leased to Schwegmann's supermarket is not an ordinary circumstance and is rather a unique function of the fact that the store and Schwegmann Westside ultimately share common ownership, and the store is being used for accounting purposes to absorb company overhead. Fair market value is instead determined by looking to what the property would sell for if it were offered on the open market after the expropriation, and there is evidence in the record upon which a jury could find that if this property were put on the open market now, a buyer would only be willing to pay a price based on the assumption the property could only be leased for warehouse or discount outlet purposes. The jury had before it expert testimony that prior to the expropriation, a buyer in the open market was willing to pay anywhere from \$8,148,786.00 to \$8,984,000.00 for the property because he could hope to rent it to a supermarket at higher rental rates. The jury also had before it expert testimony that after the expropriation, a buyer on the open market would only be willing to pay anywhere from \$2,765,000.00 to \$3,200,000.00 for the property because he could only hope to rent it as a warehouse or discount outlet at much lower rental rates. Because there was evidence in the record upon which the jury could determine the property no longer had a fair market value after the expropriation of a property capable of being rented to a supermarket, the jury could not have manifestly erred in relying on the pre-expropriation appraisals of the state and the post-expropriation appraisals of the defendant. There is nothing inherently improper or manifestly erroneous in choosing a pre-expropriation appraisal of the property based on its use in one capacity and a post-expropriation appraisal of the property based on its use in a less lucrative capacity where there is otherwise evidence in the record to support a conclusion that the property indeed now has the less lucrative use. Indeed, the law mandates that a landowner in such a situation be compensated for the decrease in fair market value of his property caused by the expropriation. In light of the above, there was clearly a reasonable factual basis in the record from which the jury could have

concluded that although the property was worth several million dollars prior to the expropriation because it could at that time be leased as a profitable supermarket, the property was after the expropriation and the resultant diminishment of traffic access worth much less than that because it no longer had a fair market value based on its use as a supermarket. Therefore, it was within the jury's discretion to award \$4,500,000.00.