IN THE COURT OF APPEALS OF TENNESSEE

CITY OF JOHNSON CITY, TENNESSEE,	)	C/A NO. 03A01-9606-CV-00181
	)	WASHINGTON COUNTY LAW COURT
Plaintiff-Appellant,	)	
v.	)	
OUTDOOR WEST, INC. OF TENNESSEE,	)	
Defendant-Appellee.	)	HONORABLE THOMAS J. SEELEY, JR. JUDGE

OPINION ON PETITION TO REHEAR

The appellee has filed a petition for rehearing. In the petition, the appellee contends that our opinion "failed to properly consider the evidence and the specifics of the trial judge's ruling" concerning the testimony of William Miller, one of the experts who testified on market value. While conceding in its petition that Miller testified that "if canceled the lease would be worth $4,600", the appellee points out, and we agree, that Miller did not adopt $4,600 as his opinion of value; however, we disagree with appellee's opinion regarding the significance of this latter fact. The appellee concludes, as did the trial judge, that the jury was properly instructed that it could not return a verdict for less than $59,500, the value that *was* adopted by Miller as his opinion of value, and the lowest opinion of value adopted by either of the expert witnesses.

Appellee contends that we were wrong when we held that the trial judge committed reversible error when he placed a lower limit of $59,500 on the jury's verdict. We respectfully disagree.

The appellee's position incorrectly assumes that a jury is limited to the range of values *expressly adopted* by the witnesses as their opinions of value. This is too restrictive. More correctly stated, *a jury is limited to the range of market values established by the competent proof*, including the impact of all relevant factors -- those tending to have a downward effect on value as well as those tending to enhance value, as of the date of taking. In this case, the downward factors included the owner's right to cancel. The evidence is clear that the value of the leasehold, assuming an exercise of the right to cancel, was $4,600 as of the date of taking. The evidence established this as a possible value, regardless of whether an expert actually adopted it as his opinion of value.

A jury is entitled to consider all relevant evidence, i.e., any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Tenn.R.Evid. Among other things, the jury in this case could consider the following value-impacting facts and inferences: (1) that the owner of the fee had the right to cancel the lease on six months' notice; (2) that the owner had not previously shown an inclination to do so, as evidenced by the fact that the lease had been renewed twice; (3) that it was reasonable to assume that the owner would not exercise his right of cancellation since the arrangement was apparently profitable to him, and the property's potential uses were limited by its

size; and (4) that the lease had been renewed twice, a fact supporting the expert David Rikard's higher opinion of value, which was based on the remaining term plus a projected ten-year renewal. All of the testimony with respect to these facts was relevant on the question of fair market value. The jury could consider the effect, if any, that each of these factors "[had] already had upon the fair market value of the property on the date of taking." ***Nashville Housing Auth. v. Cohen***, 541 S.W.2d 947, 952 (Tenn. 1976).

If a jury can *consider* evidence, it must be permitted to *act* on that evidence, if it so desires. In this case, the jury was permitted by the trial court's charge to fully *consider* and *act upon* all of the relevant evidence *except* the owner's right to cancel the lease. When the trial judge placed a "floor" of $59,500 on the value the jury could consider, he in effect told the jury that it could not consider, on the low side, any factor that was contrary to or inconsistent with the factual basis of Miller's opinion of $59,500. That opinion was the monetary result of Miller's mathematical calculation of present value, i.e., the "stream" of net advertising revenues due for *the remaining term of the lease at the time of taking,* reduced to present value by applying an appropriate discount rate. Needless to say, a cancellation of the lease is inconsistent with an income "stream" for the remaining term. Hence, while the jury was told by the trial judge that it could *consider* the owner's right to cancel, it is clear that *it could not act upon that instruction* because the trial judge told the jury, in effect, that it could not factor the right to cancel into its calculation of value if to do so would reduce its award below $59,500. This

was error and one that was clearly prejudicial in nature. Again, we would emphasize, if a jury can legitimately consider evidence, it must be permitted to factor that evidence into its verdict, if that is what it chooses to do.

The error in this case was in the trial court's suggestion to the jury of specific amounts as a range. The suggestion on the low side was clearly prejudicial, because there was proof of a lower value--$4,600--in the event of cancellation. It was for the jury to decide whether and to what extent the right to cancel affected the lease's value at the time of taking. The pattern instruction, with no mention of specific values, is the appropriate instruction on the subject at hand. *See* T.P.I. Civil 11.30.

We have considered the cases[1] cited in the petition for rehearing. We find nothing in those authorities at odds with our holding in this case.

The petition for rehearing is DENIED at the appellee's costs.

IT IS SO ORDERED.

ENTER:

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr.J.

[1] ***Nashville Housing Auth. v. Cohen***, 541 S.W.2d 947 (Tenn. 1976); ***State of Tennessee v. Parkes***, 557 S.W.2d 504 (Tenn. App. 1977).