

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

CARL E. FAGERMAN and BERTHA L.
FAGERMAN,

Defendants-Appellants.

UNPUBLISHED

July 26, 2002

No. 223147

Wexford Circuit Court

LC No. 96-012551-CC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendants appeal by right from a judgment entered after a jury trial in this condemnation case.

In 1995, plaintiff determined that it was necessary to acquire through eminent domain a portion of defendants' 232.1-acre working farm in order to relocate Highway US-131 around the city of Cadillac. Plaintiff intended to acquire a 38.53-acre parcel that would dissect defendants' farm into two remainders separated by a four-lane highway. Plaintiff also intended to acquire a temporary easement or right-of-way over 1.87 acres of defendants' remainder for use during highway construction. Following a jury trial, the trial court entered an amended judgment on the jury's verdict that awarded just compensation of \$237,000, plus interest and attorney fees, to defendants. We affirm.

Defendants first argue that the circuit court lacked subject matter jurisdiction in this proceeding because plaintiff failed to make a good-faith purchase offer, as required by MCL 213.55(1). After defendants filed their appellate brief challenging the subject matter jurisdiction of the circuit court, plaintiff moved in this Court for partial dismissal, contending that *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11; 441 NW2d 27 (1989), a case relied on by defendants, was wrongly decided. This Court then issued an order denying the motion for partial dismissal but directing the parties to file supplemental briefs essentially addressing whether the holding of *In re Acquisition, supra*, should stand in light of MCL 213.56(6).

In *Acquisition*, the governmental entity had initiated eminent domain proceedings against the defendants' property after having made an offer to purchase the property, but the offer did

not include an amount for the moveable fixtures. *Acquisition, supra* at 13, 17. This Court concluded that the circuit court lacked subject matter jurisdiction over the governmental entity's complaint because the offer, by not including an amount for the movable fixtures, did not constitute a good-faith offer and because a good-faith offer was necessary to establish subject matter jurisdiction. *Id.* at 17-18. Defendants in the instant case contend that plaintiff's offer to them also excluded, *inter alia*, amounts for fixtures and therefore did not constitute a good-faith offer. Relying on *Acquisition*, they thus contend that the circuit court lacked subject-matter jurisdiction.

However, MCL 213.56(6) states, in part:

an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

In *Detroit v Lucas*, 180 Mich App 47, 50; 446 NW2d 596 (1989), this Court deemed the above language "clear and unambiguous" in holding that the defendants had failed to file timely for leave to appeal and thus had waived their challenge to a finding of necessity with regard to condemnation. See also *Calloway-Gaines v Crime Victim Services Comm*, 463 Mich 341, 346; 616 NW2d 674 (2000) (the plain language of subsection 6(6), requiring the timely filing of an appeal from an order upholding the determination of public necessity or upholding the validity of the condemnation proceeding, constitutes a limitation on the jurisdiction of the Court of Appeals).

We conclude that in light of MCL 213.56(6), the *Acquisition* panel erred in failing to recognize that it lacked jurisdiction to consider the issue whether a good-faith purchase offer had been made; indeed, such jurisdiction was lacking because the issue was not timely raised but was instead raised after just compensation had been determined and appealed.¹ In the instant case, defendants similarly did not timely raise the issue of a defective good-faith offer. Accordingly, defendants have waived appellate review of the issue, and we lack jurisdiction to consider it.²

¹ We acknowledge that in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001), the Court made a general statement that subject matter jurisdiction is not subject to waiver. We do not find *Travelers* dispositive here, however, in light of the *specific statute enacted by the Legislature*, MCL 213.56(6), that limits the Court of Appeals' jurisdiction to consider challenges such as that raised in *Acquisition* and that raised in the instant case.

² We note that pursuant to 1996 PA 474, the condemnation statute at issue in this case was amended effective December 26, 1996. Because the instant complaint was filed in October 1996, the amendments are inapplicable. However, all future cases will be governed by these amendments, which essentially bolster the meaning of MCL 213.56(6) by indicating that landowners contending that an offer does not constitute a good-faith offer because of excluded amounts for certain property must challenge the exclusions within a set time period, and if they do not do so, the challenge will be "barred." See current MCL 213.55(3). In light of these amendments that will govern future cases, we find it unnecessary to resolve in a published
(continued...)

Defendants additionally contend that the trial court abused its discretion in denying their motion for a new trial or additur. In their post-trial motion below, defendants argued that the jury's verdict was grossly inadequate because it did not include \$44,535 necessary to install new driveways. A trial court's decision regarding the grant or denial of additur is accorded deference and will not be reversed on appeal absent an abuse of discretion. *Settington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). In addition, a trial court has discretion in granting a new trial, and this Court "will not interfere absent a palpable abuse of discretion." *Id.*

After carefully reviewing the record below, we discern no error with respect to the denial of additur. Indeed, the trial court noted the parties' stipulation that defendants would accept the jury's verdict as to just compensation and not look to plaintiff to pay for or install new driveways.³ Moreover, given that the jury's verdict was within the range of evidence and that defendants had ample opportunity to challenge plaintiff's appraisal figures at trial, we cannot conclude that the trial court abused its discretion in denying additur. *Settington, supra* at 609.

With regard to defendants' remaining issues, we conclude that appellate review has been waived by defendants' failure to object timely during trial. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). In *Napier*, the Michigan Supreme Court explained the rationale for timely preservation of issues for appellate review:

A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal. See *Spencer v Black*, 232 Mich 675; 206 NW 493 (1925) (issue raised for the first time on appeal not properly before the Court); *Molitor v Burns*, 318 Mich 261, 263-265; 28 NW2d 106 (1947) (failure to renew motion for directed verdict at close of defendant's case waived any error). Generally, to preserve an issue for appellate review, it must be properly raised at trial. *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891) ("[p]arties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases"); *Moden v Superintendents of the Poor*, 183 Mich 120, 125-126; 149 NW 1064 (1914) (statute of limitations defense waived by failure to raise it at trial); *Miller v Cook*, 292 Mich 683, 688-689; 291 NW 54 (1940) (absent proper motion for a directed verdict of negligence as a matter of law, the question cannot be raised on appeal); *Taylor v Lowe*, 372 Mich 282, 284; 126 NW2d 104 (1964) ("counsel may not stand by, electing as we must assume to 'take his chances on the verdict of the jury' [citations omitted] and then raise questions which could and should have been raised in time for corrective judicial action"). The rule is based upon the nature of the adversary process and the need for judicial efficiency. 3 LaFave & Israel, *Criminal Procedure*, § 26.5(c), pp 251-252, summarizes the basis for this rule:

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opinion the specific questions we asked the parties to brief on appeal, as they are unlikely to reappear in the future.

³ We note that at oral argument counsel for plaintiff informed this Court that plaintiff subsequently agreed to install the new driveways and has in fact done so.

“There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.” [Quoting *State v Applegate*, 39 Or App 17, 21; 591 P 2d 371 (1979).]

[*Napier, supra* at 227-229.]

While it is true that this Court may review an unpreserved issue to prevent a miscarriage of justice, as noted in *Napier, supra* at 233-234, such review in a civil case is to be exercised “quite sparingly”:

Defendant raises no injustice other than the loss of a favorable jury verdict. While defendant asserts that manifest injustice and a miscarriage of justice would occur if appellate review of the sufficiency of the evidence were denied in the instant case, defendant fails to describe the nature of that injustice. More than the fact of the loss of the money judgment . . . in this civil case is needed to show a miscarriage of justice or manifest injustice. A contrary ruling in the instant case would, in effect, impose a duty in every civil case on the trial judge to review sua sponte the sufficiency of the evidence and to grant unrequested verdicts. Such a rule would be in patent conflict with our adversary system of civil justice. [Footnote omitted.]

We are convinced that no miscarriage of justice will result from our failure to review the unpreserved issues raised on appeal in the instant case. Defendants had ample opportunity to set forth their case and their damages estimate at trial, and the jury’s verdict was within the range of evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens