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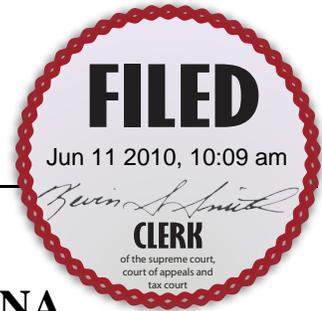
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**IN THE
COURT OF APPEALS OF INDIANA**

GREGOR W. KING and DELORES P. KING,)

Appellants-Defendants,)

vs.)

No. 29A05-0909-CV-527)

HAMILTON SOUTHEASTERN UTILITIES, INC.)

Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0708-MI-858

June 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Gregor and Delores King appeal the amount of damages entered after a jury trial for the valuation of their land affected by the acquisition of a temporary and permanent easement by Hamilton Southeastern Utilities, Inc. (“HSU”) by eminent domain. We affirm.

Issues

The Kings raise several issues on appeal, which we consolidate and restate as:

- I. Whether the trial court erred in refusing to admit into evidence the Complaint for taking by eminent domain for the purpose of providing a description of the permanent and temporary easements;
- II. Whether the trial court erred in permitting the HSU witness to testify as to the benefits of the sewer installation to the property; and
- III. Whether the trial court erred in refusing to give three proffered jury instructions regarding determination of damages.

Facts and Procedural History

On August 6, 2007, HSU filed a Complaint for Condemnation of Real Property against the Kings. HSU sought a permanent and temporary easement across a ninety-nine acre piece of real estate owned by the Kings (“the Property”), located in Hamilton County, to construct sewer mains. On October 16, 2007, the trial court issued an order (“Appropriation Order”) that stated in part that the Kings had withdrawn their objection to the taking of the easements, and the easements were appropriated as described in the order subject to the payment of damages by HSU. A jury trial was held to determine the amount of damages owed by HSU to the Kings for the taking of the permanent and temporary sewer easements. After a two-day trial in August of 2009, the jury returned a damages amount of \$78,840.

With interest added from the date the easements were appropriated, the trial court entered a judgment amount of \$89,104.32 in favor of the Kings. This appeal ensued. Additional facts will be provided as needed.

Discussion and Decision

I. Complaint as Evidence

First, the Kings contend that the trial court erred by refusing to admit the Complaint to describe the scope of the easements. The decision of a trial court to admit or exclude evidence is left to the court's discretion and is afforded great deference on appeal. Irmscher Suppliers, Inc. v. Schuler, 909 N.E.2d 1040, 1046 (Ind. Ct. App. 2009). We will reverse such decisions only where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

The Kings complain that the trial court should have admitted the Complaint because one averment detailed the scope of the easements HSU requested. They claim that the breadth of the easements was described in the Complaint whereas such description was not included in the Appropriation Order. The averment read as follows:

The Plaintiff needs a portion of the Defendants' Property for a permanent and temporary sanitary sewer easement for the Mud Creek Interceptor Project Phase IV (hereinafter "Project") to place, construct, operate, control, maintain, reconstruct, relocate, change the size of, repair and remove sewer mains, pipes and conduits, all necessary or incidental auxiliary or feeder service mains, pipes or conduits, lift stations, man-holes and other facilities, appliances, apparatus and structures convenient or proper for the purpose of rendering sewage disposal services.

Appellants' Appendix at 12. However, it is the Appropriation Order that creates the easement, not the Complaint. Thus, the legal constraints of the easements are controlled by

the Appropriation Order. Cf. Adkins Invs., Inc. v. Jackson County REMC, 731 N.E.2d 1024, 1033 (Ind. Ct. App. 2000) (“The nature of an easement created by an express agreement or grant must be determined by the provisions of the instrument creating the easement.”), trans. denied. Therefore, the trial court did not abuse its discretion in refusing to admit the Complaint as evidence of the scope of the sewer easements.

II. Benefits of Sewer Installation

Second, the Kings raise another evidentiary issue of whether the trial court erred when it permitted a witness of HSU to testify as to the benefit the Kings would derive from having a sewer line on their property. We review this admissibility of evidence decision for an abuse of discretion.

Indiana Code Section 32-24-1-9 provides in relevant part:

(c) The appraisers shall determine and report all of the following:

- (1) The fair market value of each parcel of property sought to be acquired and the value of each separate estate or interest in the property.
- (2) The fair market value of all improvements pertaining to the property, if any, on the portion of the property to be acquired.
- (3) The damages, if any, to the residue of the property of the owner or owners caused by taking out the part sought to be acquired.
- (4) The other damages, if any, that will result to any persons from the construction of the improvements in the manner proposed by the plaintiff.

(d) If the property is sought to be acquired by the state or by a county for a public highway or a municipal corporation for a public use that confers benefits on any property of the owner, the report must also state the benefits that will accrue to each parcel of property, set opposite the description of each parcel of property whether described in the complaint or not.

(e) Except as provided in subsection (f), in estimating the damages specified in subsection (c), the appraisers may not deduct for any benefits that may result

from the improvement.

(f) In the case of a condemnation by the state or by a county for a public highway or a municipal corporation for public use, the appraisers shall deduct any benefits assessed from the amount of damage allowed, if any, under subsection (c)(3) and (c)(4) and the difference, if any, plus the damages allowed under subsection (c)(1) and (c)(2) shall be the amount of the award. However, the damages awarded may not be less than the damages allowed under subsection (c)(1) and (c)(2). Upon the trial of exceptions to the award by either party, a like measure of damages must be followed.

(emphasis added). The Kings' first contention is that HSU is not a municipal corporation, which would prohibit evidence of benefits from a taking pursuant to eminent domain. However, the Kings do not dispute that HSU is authorized by Hamilton County, a municipal corporation, to supply sewer services to the public in the county. Thus, for eminent domain purposes, HSU stands in the shoes of the County in its provision of a public sewer system, which permits consideration of benefits.

Second, King asserts that Traynor, HSU's witness on assessment of damages, should not have been permitted to testify that the value of land is generally higher when it has sewer connections than without it because Traynor did not conclude that the taking resulted in damage to the residue of the property. A public improvement usually conveys both benefits and damages when it is created under the right of eminent domain. Gaslight & Coke Co. v. City of New Albany, 158 Ind. 268, 273, 63 N.E. 458, 460 (1902). Under these circumstances, the compensation of the owner for what is taken "is determined, in absence of a statute forbidding it, by taking into account both the benefits and damages." Id. The current eminent domain statute permits evidence of benefits from the taking if there is damage to the residue of property taken by a municipal corporation for public use. I.C. § 32-

24-1-9(f). At trial, Gregor King testified that the taking would result in damage to the residue of the property in his belief that the permanent easement prevented access to property east of the easement. As the jury was the ultimate assessor of the value of the taking, the trial court did not abuse its discretion in permitting HSU to present evidence of benefits of the sewer installation once the Kings presented evidence that the taking would result in damage to the residue of the property.

III. Refusal of Proffered Jury Instructions

Finally, the Kings allege that the trial court committed reversible error by refusing their proposed jury instructions 3, 7 and 11. When reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction: (1) correctly states the law; (2) is supported by the evidence; and (3) is covered in substance by other instructions. Phoenix Nat. Res., Inc. v. Messmer, 804 N.E.2d 842, 846 (Ind. Ct. App. 2004). When an instruction is challenged as an incorrect statement of the law, we review the ruling de novo. Id. We review challenges under the second or third prong for an abuse of discretion as the trial court has discretion to instruct the jury. Id.

First, the Kings allege the trial court abused its discretion by refusing its proposed jury instruction 3 in favor of HSU's proposed instruction on the definition of "fair market value." The Kings do not clearly articulate on what basis they challenge the "fair market value" instruction given to the jury. They do not allege that the definition provided to the jury is an incorrect statement of law or that the provision of the definition of "fair market value" was not supported by the evidence. As they were proposing a definition, the Kings

concede the necessity of defining “fair market value.” The definition as provided in the final jury instructions was:

“Fair market value” means the price [] the property would bring after fair and reasonable negotiations between a seller willing but not compelled to sell and a buyer willing and able but not compelled to buy.

Appellants’ App. at 314. This is a correct statement of law. See State v. Bishop, 800 N.E.2d 918, 923 (Ind. 2003) (“Fair market value is the price at which property would change hands between a willing buyer and seller, neither being under any compulsion to consummate the sale.”). Thus, the Kings have not demonstrated that the trial court abused its discretion in using the final jury instruction defining “fair market value.”

Second, the Kings contend that the trial court abused its discretion in refusing its proposed instruction 7, which provided:

The Landowners are entitled to recover all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made or work to be constructed not including such as may arise from negligence, or unskillfulness, or from wrongful act of those engaged in the work, must be assessed. Damages are assessed once for all, and the future necessities as well as the present needs of the condemnor are to be taken into consideration.

Appellants’ App. 289. Specifically, they allege that the jury was not instructed that this was the only opportunity for the Kings, the landowners, to recover damages for any present or future use of the easement by HSU. We disagree.

Final Instruction 11 provided: “In Indiana, an easement is a right given in perpetuity to do an act upon land owned by another.” Appellants’ App. at 311. The jury was also instructed that:

You may consider, as proper elements of damages, the uses to which the land

may be put and the interference with the ingress or egress, the interruption of the communication from one portion of the land to the other, resulting from the construction of the facilities and structures in and/or upon the land appropriated, the annoyance and inconvenience, if any, occasioned by such construction in and/or upon the lands appropriated in crossing from one portion of the land to another, including the going and entering upon said land and leaving therefrom.

Appellants' App. at 320 (emphasis added). Combined, these instructions inform the jury that the damages to be assessed include any interference by the uses to which the land may be put by HSU, which has the ability to use the permanent easements in perpetuity. The trial court did not abuse its discretion in refusing the Kings' proffered jury instruction 7 as the jury was adequately instructed.

As to the Kings' proposed jury instruction 11, they acknowledge that the proposed instruction is based on Arkansas caselaw but assert that it should be adopted as law in Indiana. It reads: "Where a utility company in a condemnation proceeding acquires an easement across the land of another, depriving the owner of the use of the property, the compensation for the taking must equal the full value of the land, as if a fee were being acquired." Appellants' Appendix at 290; see Cramer v. Ark. Okla. Gas Corp., 316 Ark. 465, 467, 872 S.W.2d 390, 392 (1994). This is not the law in Indiana nor would it comport with the statutory provisions as to how land taken under eminent domain is required to be assessed: by the fair market value of each separate estate or interest in the property. See I.C. § 32-24-1-9(c)(1). The trial court did not abuse its discretion in refusing this proffered jury instruction.

Conclusion

In sum, the trial court did not abuse its discretion in its evidentiary rulings and did not abuse its discretion in refusing three of the Kings' proffered jury instructions.

Affirmed.

MAY, J., and BARNES, J., concur.