Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANTS:

Attorney for Eugene M. Gray Trust:
DANIEL F. ZIELINSKI
Steuerwald Zielinski & Witham
Danville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KATHY BRADLEY
Deputy Attorney General
Indianapolis, Indiana

FILED
Oct 14 2011, 10:05 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

EUGENE M. GRAY TRUST, A-1 VACUUM, NORTHWEST OPTICAL, and MARION COUNTY, INDIANA,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-1011-PL-1329
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0509-PL-36687

October 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Eugene M. Gray Trust (the Trust)[1] appeals the trial court's decision regarding the interest due the Trust as part of an eminent domain action. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 19, 2005, the State filed a complaint against the Trust, A-1 Vacuum (A-1), Northwest Optical, and Marion County, Indiana, (collectively, "the Defendants") for appropriation of real estate by way of eminent domain in order to improve State Road 136. In the complaint, the State indicated it had offered the defendants $213,040.00, collectively, for the property, but the defendants had declined. The trial court ordered an appraisal.

On May 4, 2006, the appraisers filed a report. On May 10, the State filed an exception to the report. On July 5, the trial court issued an order stating:

> The court-appointed appraisers report that the Defendants in this action are entitled to total just compensation of Two Hundred Forty Thousand Dollars ($240,000) in this case.
>
> The Court, having reviewed the record of this case, and being duly advised, ORDERS [the State] to pay the Clerk of the court the total appraisers' fees in the amount of One Thousand Eight Hundred Dollars ($1,800.00).
>
> The Court further ORDERS the Clerk of the Court, on receipt of said amount, to pay each of the appraises [sic] his or her share of the fee recited above, and to deposit all other amounts received from [the State] in an interest-bearing account pending further Order of this Court.

(App. at 45) (emphasis in original).

On July 31, A-1 objected to any distribution of funds to the Trust and brought a cross claim against the Trust. A-1 claimed the Trust had refused to pay damages A-1 was due by virtue of its leasehold interest in the condemned property.

[1] The other defendants do not participate in this appeal.

On October 6, the Trust filed a motion to dismiss A-1's cross-claim, or "in the Alternative, Answer to Cross-Claim." (*Id*. at 47.) On October 16, A-1 answered and, in the same document, claimed exceptions to the appraiser's report of May 4, 2006. After a hearing on January 3, 2007, the trial court dismissed A-1's cross-claim.

On January 17, A-1 filed a motion to correct error and for reconsideration of the dismissal of its cross-claim. On January 30, the Trust responded and moved for permission to withdraw funds from the account in which the State had deposited $240,000 pursuant to the July 5, 2006, order. On March 20, after a hearing, the trial court granted A-1's motion to correct error and denied the Trust's request to withdraw funds.

On September 5, 2008, the trial court ordered a new appraisal to determine the value of A-1's leasehold interest. The appraisal indicated A-1 did not have a positive leasehold interest. A-1 filed exceptions to the appraiser's report on November 7. A jury trial to determine the value of A-1's leasehold interest in the property commenced August 3, 2009, and the jury awarded the defendants $265,100 in damages - $242,000 to the Trust, and $23,100 to A-1 Vacuum.

On October 19, the Trust removed the funds it had been awarded. On February 2, 2010, the Trust filed a motion for payment of interest due, and the trial court set a hearing for April 12. The Trust requested interest of $58,079,[2] but was awarded $6,950.40.[3] On August 26, the Trust filed a motion for extension of time to file a motion to correct error and a

[2] This amount is equal to 8% interest per year for three years on $242,000.

[3] This amount is equal to 8% interest per year for three years on $28,960, which is the difference between the original amount the State offered the Trust and the amount of the final settlement.

memorandum of law in support of the motion to correct error, and asserted the trial court miscalculated the interest due the Trust. The trial court denied the Trust's motion to correct error on November 1.

DISCUSSION AND DECISION

The Trust appeals the denial of its motion to correct error. We generally review such orders for an abuse of discretion. *D.W. v. L.W.*, 917 N.E.2d 725, 727 (Ind. Ct. App. 2009). An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law. *Id*. We review matters of law *de novo*. *City of Indianapolis v. Hicks*, 932 N.E.2d 227, 230 (Ind. Ct. App. 2010), *reh'g denied*.

The Trust's motion to correct error challenged the award of only $6,950.40 in interest. The trial court entered findings of fact and conclusions of law *sua sponte*, and therefore, we must determine whether the evidence supports the findings and whether the findings support the judgment. *Speaker v. Speaker*, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001). The judgment will be reversed only when clearly erroneous. *Id.* To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.*

The court's order indicates it relied on Ind. Code § 32-24-1-11(d)(6)(B), which states in relevant part:

> (6) *In a trial of exceptions*, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant's damages from the date plaintiff takes possession of the property. Interest may not be allowed on any money paid by the plaintiff to the circuit court clerk:

. . .

> (B) that is equal to the amount of damages previously offered by the plaintiff to any defendant and which amount can be withdrawn by the defendant without filing a written undertaking or surety with the court for the withdrawal of that amount.

(Emphasis added.) Regarding the "amount of damages previously offered by the plaintiff," the statute provides: "A surety or written undertaking may not be required for a defendant to withdraw those amounts previously offered by the plaintiff to the defendant if the plaintiff has previously notified the court in writing of the amounts so offered." Ind. Code § 32-24-1-11(d)(4).

The trial court found "the amount which [sic] could have been withdrawn by Gray Trust without filing a written undertaking or surety was $213,040.00," (App. at 18), and:

> The court computes interest, pursuant to I.C. 32-24-1-11(d)(6), as follows:
> (a) Defendant's damages = $242,000.00
> (b) Interest may not be allowed on the amount of damages previously offered and which [sic] can be withdrawn without filing a written undertaking or surety = $213,040.00
> (c) $242,000.00 - $213,040.00 = $28,960.00
> (d) $28,960.00 at an annual rate of eight percent (8%) = $2,316.80
> (e) date of possession(8/8/06) until date of judgment (8/6/09) = 3 years. $2,316.80 times 3 years = $6,950.40

(*Id*. at 18-19.)

The Trust argues the trial court should have awarded interest on the entire amount awarded by the jury, $242,000, because it was unable to withdraw any funds during the pendency of A-1's cross-claims pursuant to Ind. Code § 32-24-1-11(d)(4), and thus Ind. Code § 32-24-1-11(d)(6) does not apply. The State claims it made a valid exception to the first appraisal, and thus the action was a "trial of exceptions" pursuant to the same statute, and the

Trust is not entitled to additional interest because it could have withdrawn the amount of the State's original offer, $213,040.

To succeed on appeal, the Trust must demonstrate it was unable to withdraw the amount of the State's original offer, $213,040, contrary to the provisions of Ind. Code § 32-24-1-11(d)(4), or, in the alternative, demonstrate a valid exception to the appraisal report was not made. *See* Ind. Code § 32-24-1-11 (requirements for filing exception to appraiser's report). The Trust asserts one or both of these requirements might have been met, but has not supported its allegations with evidence in the record. Therefore, based on the record before us, we are unable to find an abuse of discretion by the trial court in denying the Trust's motion to correct error in the trial court's decision regarding pre-judgment interest, nor can we say there is no evidence to support the trial court's findings. Accordingly, we affirm.

Affirmed.

BRADFORD, J., concurs.

BAKER, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

EUGENE M. GRAY TRUST, A-1 VACUUM, NORTHWEST OPTICAL, and MARION COUNTY, INDIANA	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-1011-PL-1329
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

BAKER, Judge, dissenting

I respectfully dissent and part ways with the majority's view in disallowing interest to the Gray Trust (Trust) with respect to the $242,000 judgment that was awarded.

First, there is no dispute that the State deposited $240,000 in the clerk's office. Appellant's App. p. 95-96. However, the Trust was precluded from withdrawing those funds and had to proceed to trial. In the end, the jury awarded the Trust $242,000 or $2,000 above the State's settlement offer. Id. at 109.

In my view, the trial court erroneously limited the amount of interest to the amount above what would have allegedly been withdrawn without filing a written undertaking or

surety, in accordance with Indiana Code section 32-24-1-11(d)(4)(6). The statute provides that "a surety or written undertaking may not be required for a defendant to withdraw those amounts previously offered by the plaintiff to the defendant if the plaintiff previously has notified the court in writing of the amounts so offered."

Granted, I embrace the notion that interest amounts are not permitted on the amount of damages previously offered by the plaintiff to any defendant that could be withdrawn without undertaking of surety. However, Indiana Code section 32-24-1-11(d)(6) that disallows interest on the amount of damages previously offered if no money is withdrawn contemplates the condemnee's ability to withdraw the funds without restriction. Indeed, the previous version of this statute has been construed to assure that the "state will not pay interest upon funds which are in the hands of, or freely available to, the defendant." State v. Turner, 386 N.E.2d 208, 209 (Ind. Ct. App. 1979).

In this case, the evidence establishes that the funds were not "freely available" to the Trust. More specifically, the Trust could not have withdrawn the amounts that were deposited with the trial court because A-1 Vacuum contested the proposed withdrawals and it claimed an interest in the funds. And the trial court specifically denied the Trust's motion to withdraw the funds. Appellant's App. p. 95, 98. As a result, because the Trust could not freely withdraw the funds, I believe that it was entitled to interest on the entire award of damages rather than interest only on the difference between the actual award and the amount of the State's offer. In short, I believe that the Trust is entitled to interest on the jury award from the date of the taking, which was August 8, 2006.

I would reverse the trial court's judgment and remand the cause to the trial court with instructions to recalculate the amount of interest on the jury award from August 8, 2006, plus interest at 8% per annum on the unpaid interest that is due.