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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000188-MR

COUNTY OF KENTON, KENTUCKY, ex rel.
KENTON COUNTY AIRPORT BOARD
and KENTON COUNTY AIRPORT BOARD — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS , JUDGE
ACTION NO. 02-CI-00856

CLINTON BASTON and CORDELLA BASTON — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

DIXON, JUDGE: Appellants, Kenton County, Kentucky, and the Kenton County Airport Board, appeal from a judgment of the Boone Circuit Court awarding Appellees, Clinton Baston and Cordella Baston, $670,000 in this condemnation action. For the reasons discussed herein, we reverse the decision of the trial court and remand the case for further proceedings.

This matter stems from a project which began in the early 1990's for the construction of a new runway at the Cincinnati/Northern Kentucky Airport. As part of the process, the airport filed a number of eminent domain actions to acquire the necessary parcels of land. The parcel at issue herein belonged to Clinton[1] and Cordella Baston, and consisted of 7.883 acres of residentially-zoned property located along Hill Road in Boone County, Kentucky. Hill Road is a narrow gravel road with a 30-foot right-of-way, along which are located several residences, including the Baston property; its only access to a public road system is a one-lane bridge that intersects Hill Road at a hairpin turn.

The trial in this action was held in October 2005. As part of Appellants' proof, engineer Dan Reigler testified that the access problem at Hill Road prohibited any tractor-trailer traffic, and the extensive road and site excavation that would be required rendered the property unsuitable for a warehouse site. Next, Lance Brown, Appellants' appraiser and valuation expert, testified that it was unlikely the Baston property could be rezoned for industrial development because of the access problems, and thus the property's highest and best use was for residential development. Brown valued the property at $350,000 or $45,000 an acre.

Baston, on the other hand, presented testimony from engineer Ray Erpenbeck that Hill Road could be fixed within the existing 30-foot right-of-way to accommodate tractor-trailer traffic. Based upon Erpenbeck's opinion, Baston's valuation

[1] While the style of the case lists Clinton Baston as the Appellee, Cordella Baston is the individual who participated in these proceedings. Presumably, the property was deeded in both names, although Clinton is evidently deceased.

expert, Jack Nickerson, testified that that the property's highest and best use was development as a warehouse facility and valued the property at $788,000 or $100,000 an acre.

At the close of evidence, the jury returned a verdict finding that the fair market value of Baston's property was $670,000 or $85,000 an acre. The trial court subsequently denied Appellants' motion for a new trial. This appeal ensued.

Appellants argue that the trial court erred in permitting testimony that violated KRS 416.660(2), as well as failing to admonish the jury or grant a mistrial once the improper information was placed before the jury. Further, Appellants charge that Baston's repeated improper questions prejudiced and inflamed the jury, resulting in an excessive verdict. We agree.

KRS 416.660(2) provides:

> Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation or the construction of the project shall be disregarded in determining fair market value. The taking date of for valuation purposes shall be either the date the condemnor takes the land, or the date of the trial of the issue of just compensation, whichever occurs first.

Proof is very limited in condemnation proceedings by its very nature. The issue to be decided by the jury is extremely narrow - determine the fair market value of a tract of land, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder immediately after the taking. KRS 416.660.

Prior to trial, the trial court entered an order prohibiting any reference to the wealth and assets of the airport, as well as any reference to the issue of assemblage, or whether the Baston property would have been more valuable if combined with other parcels for industrial development. Nevertheless, throughout the trial Baston's counsel repeatedly questioned airport personnel about the millions of dollars in property that was acquired by the airport in conjunction with the runway project; read letters from airport counsel to other landowners regarding the imminent condemnation of their parcels for the project; repeatedly asked if the other parcels that the airport had acquired had been developed industrially; and told the jury that the runway project "kill[ed] the whole area for development."[2] Appellants point out that although many of their objections were sustained, the trial court refused to admonish the jury or grant their repeated motions for a mistrial.

In *Big Rivers Electrical Corp. v. Barnes*, 147 S.W.3d 753, 757-758 (Ky.App. 2004), this Court held that repeated references by plaintiff's counsel to an offer from the coal company to purchase the property at issue was reversible error. Although the trial court therein sustained Big Rivers' objection to the references and admonished the jury to disregard such, we stated that "[o]nce the jury heard about the offer, it would have been hard to disregard." *Id.* at 762. Similarly, in *Rockwell International Corp. v.*

[2] We would note that the order *in limine* also prohibited any reference to the amount of money the airport had spent controlling pollution; whether or not Au Chocolat company was going to locate next to the Baston property; and the number of appraisers under contract with the airport. Nonetheless, Baston's counsel attempted to question airport personnel on those issues as well.

Wilhite, 143 S.W.3d 604, 631 (Ky.App. 2003), we reversed the lower court based, in part, upon plaintiff's counsel's attempts to bias the jury against the large corporate defendant.

> [W]e are of the opinion that "the statements of counsel were outside the record, and otherwise improper, [were] calculated to inflame the passions and excite the prejudices of the [jurors], and thereby induce them to disregard the evidence . . . ." [*Louisville & N.R. Co. v. Smith,* 27 Ky. L. Rptr. 257, 84 S.W. 755, 759 (1905)]. Because counsel should not introduce extraneous matters before a jury, or by questions or comments, endeavor to discuss unrelated subjects, where there is a a reasonable probability that the verdict of the jury has been influenced by such conduct, it must be set aside.

Rockwell, supra, at 631.

The record reveals that Baston's counsel began his opening arguments by improperly telling jurors that it was their job to determine whether the airport was dealing with property owners in "good faith." Counsel concluded the case by criticizing the airport's valuation evidence and stating, "I'm sorry, I don't think that's right. I don't think that's enough. That's not what she deserves for hanging in there. That's not her measure of justice on this day." Between opening and closing statements, counsel made repeated comments, in violation of the order *in limine,* about the millions of dollars spent by the airport on land acquisition and how such acquisition had killed development in the area.

Without a doubt, counsel's intent was to appeal to the passion and prejudice of the jury by painting the airport as a large wealthy entity running roughshod over a poor widowed woman. Unfortunately, while the trial court frequently sustained Appellants'

objections, it erroneously ruled that neither an admonition nor mistrial was necessary since the objectionable questions had not been answered. However, we believe that it is irrelevant whether the questions were answered as the prejudice resulted from the questions themselves.

Baston contends that even if the trial court erred, Appellants have failed to demonstrate that any prejudice resulted. Baston argues that the fact that the jury's verdict was within the range of values testified to by its own experts dispels any notion that it was excessive. We disagree. As noted by our Supreme Court in *Commonwealth v. Gearhart*, 383 S.W.2d 922, 925 (Ky. 1964),

> [t]his alone is not sufficient to foreclose inquiry whether the verdict is palpably excessive; neither does it preclude testing whether the verdict is adequately supported by evidence of probative value. We have recognized the rule that a verdict will not be disturbed as excessive, generally, unless it shows bias or prejudice, or is based on estimates unsupported by the facts or so extravagant as to create a probability that the estimates are incorrect.

The jury herein fixed a per acre value of $85,000, which was at the high end of values for industrial property. However, and as will be discussed further, other than Erpenbeck's bald assertion otherwise, the clear weight of the evidence indicated that the Baston property was unsuited for industrial development.

Furthermore, we agree with the rationale espoused in *Risen v. Pierce*, 807 S.W.2d 945, 949 (Ky. 1991), that "[w]hile we cannot say with certainty that the improper argument affected the result, we cannot say that it did not. A party aggrieved by

egregious argument should not be required to demonstrate prejudice, ordinarily an impossible task, for to do so would in most cases render reviewing courts powerless to correct the error." *See also Big Rivers Electric Corp., supra,* at 762-763. While an isolated instance of improper conduct, or in this case improper questioning, may not be prejudicial, "when it is repeated in colorful variety by an accomplished orator its deadly effect cannot be ignored." *Louisville & N.R. Co. v. Smith,* 27 Ky. L. Rptr. 257, 84 S.W. 755, 759 (1905).

Appellants next argue that there was insufficient evidence to support the jury's finding that the property's highest and best use was for industrial development. Appellants point out that Erpenbeck's opinion that Hill Road could be modified to accommodate industrial traffic was wholly unsupported. Erpenbeck provided no affirmative evidence that the road could be improved within the existing right-of-way, nor did he present evidence that additional land could be acquired from the neighboring properties to accomplish such a modification.

In *Big Rivers Electrical Corp. v. Barnes*, *supra*, this Court discussed the concept of "highest and best use" in property valuation.

> The market value of land is determined by its use, or "the adaptability . . . for particular uses, even though the property is not then being so used." *Gearhart*, 383 S.W.2d at 926. The adaptability concept has become known as the "highest and best use". *Galbraith v. Winn*, Ky., 459 S.W.2d 153 (1970).
>
> The "highest and best use" has qualifications. "[T]here must be an expectation or probability in the *near future* that it can

> or will be so used." *Gearhart*, 383 S.W.2d at 926 (emphasis added). The property must not only be *available* for a future use but there must be a *reasonable expectation* that it will be so used. *Commonwealth, Dept. of Highways v. Riley*, Ky., 388 S.W.2d 128, 129 (1965). . . . In condemnation cases, the value of the land taken is based on "its use at the time of the taking *unless* it can be shown that an expectation or probability of ... uses in the *near* future can be shown." *Creason*, 402 S.W.2d at 427 (emphasis added). In determining the market value of land, we look to "the highest and best use of the property at the time of the taking. . . ." *Paintsville-Prestonsburg Airport Board v. Galbraith*, Ky., 433 S.W.2d 868, 870 (1968). "[W]e recognize[ ] that evidence can be adduced that the highest and best use might be something other than the present use but in order for this to be true there must be an expectation or probability in the *near future* it will be so used." *Id.* at 871. *See also Commonwealth, Dept. of Highways v. Carraco*, Ky., 476 S.W.2d 175 (1972); *Commonwealth, Dept. of Highways v. Melwood Development, Inc.*, Ky., 487 S.W.2d 684 (1972).

Big Rivers Electrical Corp., supra, at 757-758.

We are of the opinion that Baston failed to present evidence that there was a reasonable expectation or probability that the property could or would be industrially developed "in the near future." The lack of access and the failure to develop proof as to the mere possibility, let alone the cost, of creating the necessary access, should have prohibited any testimony as to industrial values. The jury simply cannot speculate as to the highest and best use of the property. As was noted in *Paintsville-Prestonsburg Airport Board v. Galbraith*, 433 S.W.2d at 870, "Even though there is a possibility that [the property] may someday be developed for [industrial] purposes, . . . if the possibility . . . is remote and speculative, this will render any evidence of such use inadmissible." We

conclude that the jury verdict assessing Baston's property at the high end of the industrial values, despite its residential zoning and use, only supports the conclusion that the jury was influenced by the improper tactics of Baston's counsel.

The judgment of the Boone Circuit Court is reversed and the matter is remanded for further proceedings in accordance with this opinion.

ACREE, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS, AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent. The primary issue raised by the County is that the trial court permitted counsel for Baston to introduce into evidence matters that were not properly admissible. Specifically, the County complains that Baston's counsel asked questions and/or made comments indicating that the County's notice to Baston and others that it was considering taking their land devalued that land. The standard of review on evidentiary issues is abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). Having reviewed the record, I do not discern any abuse of discretion by the trial court. While counsel for Baston may have made inappropriate comments and/or asked inappropriate questions, the trial court adequately dealt with those comments and questions. Furthermore, the jury instructions specifically stated that the jurors "shall disregard and exclude from consideration any change or fluctuation in such value as you believe from the evidence took place prior to the date of taking solely by reason of advance knowledge of the project." That instruction cured any error that may

have occurred during the trial. *See American Eagle Fire Ins. Co. v. Meredith*, 232 Ky. 142, 22 S.W.2d 571, 572 (1929); *Tribble v. Giles*, 279 Ky. 358, 130 S.W.2d 777 (1939). Finally, I note that, as stated by counsel for the County in his closing, "Nothing that I say, nothing that I say as a question, nothing that I argue or close with, is evidence. Nothing that Mr. Taliaferro may have asked that wasn't answered is evidence."

Additionally, I note that determining the correctness of the varying estimates of the value of property is within the purview of the jury "unless it appears that the evidence in support of it lacks sufficient probative value for that purpose." *Com. Dept. of Highways v. Quality Oil Co.,* 452 S.W.2d 397, 398-99 (Ky. 1970). While the County did present evidence that contradicted the evidence presented by Baston, the evidence by Baston was not "so lacking in probative quality as to leave the verdict without evidentiary support." *Id.* at 399. *See also, Com. Dept. of Highways v. Tyree,* 365 S.W.2d 472 (Ky. 1963). Finally, I note that the jury's verdict of $670,000 was clearly within the range of values supported by the evidence.

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