

# Commonwealth Of Kentucky

## Court Of Appeals

No. 96-CA-3332-MR

LYMAN P. BARNES  
and JOYCE M. BARNES

APPELLANTS

V. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 96-CI-0161

BIG RIVERS ELECTRIC  
CORPORATION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GARDNER, HUDDLESTON and KNOX, JUDGES.

GARDNER, JUDGE. Lyman P. Barnes and Joyce M. Barnes (the Barneses) appeal from findings of fact, conclusions of law, and interlocutory judgment of the Ohio Circuit Court in an eminent domain proceeding filed by Big Rivers Electric Corporation (Big Rivers). We affirm.

Big Rivers is a non-profit rural electric cooperative corporation. On June 25, 1996, it filed a petition in Ohio Circuit Court seeking to obtain a permanent easement across a parcel of

real property owned by the Barneses for the purpose of constructing and maintaining a power line. The filing of the petition was preceded by a period of negotiation, during which Big Rivers initially offered \$2,300 for the easement and later raised the offer to \$3,000. The negotiations were unsuccessful.

After the action was commenced, the court appointed three commissioners on July 2, 1996, as required by KRS 416.580, and the commissioners subsequently filed their report. Big Rivers then sought an interlocutory judgment, and the Barneses moved for dismissal. After hearing the parties' arguments in two hearings, the court granted the motion for interlocutory judgment and denied the motion to dismiss. On November 6, 1996, the court entered the interlocutory judgment in accordance with its findings of fact and conclusions of law. Big Rivers was authorized to take possession of the Barneses property for the purpose of constructing the power line, and the Barneses were awarded \$15,000 in compensation. This appeal followed.

The Barneses first argue that the lower court committed reversible error in failing to rule that Big Rivers has the burden of establishing that the easement is necessary and for the public use. They also maintain that Big Rivers failed to meet this burden. We have closely examined the facts, the law, and the arguments of counsel, and find no error on this issue.

In its order of October 1, 1996, the lower court stated as follows:

This Court is in agreement with the Petitioner's statement that the public use in this action is the furnishing of electrical energy to rural areas of this state by a public utility created for that purpose. In Ratliff -v- Fiscal Court [of Caldwell County, Kentucky], Ky. 617 SW2d 36 (1981), the Kentucky Supreme Court held that a utility's mere expansion of its transmission system constitutes a public purpose for the easements required. This is a situation that is encompassed within the facts of this case as the evidence was presented in the two hearings conducted by this Court regarding this matter. Therefore, this Court finds that the Petitioner's condemnation of the Respondents' property is for a public use and necessity.

We find no basis upon which we may conclude that the lower court erred in finding the condemnation to be for a public use and necessity. The trial court is presumptively correct in its rulings, City of Louisville v. Allen, Ky. App., 385 S.W.2d 179 (1964), and we will not disturb a court's findings absent a showing that they are clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01. The record supports the lower court's conclusion on this issue, and the Barneses' argument distinguishing between "public use" and "public purpose" is not compelling. Accordingly, we find no error on this issue. We are also not persuaded by the Barneses' argument that the lower court erred in failing to hold that Big Rivers had the burden of proof on this issue. The court found that the burden was met, and we believe nothing more was required.

The Barneses also argue that the lower court erred in concluding that Big Rivers had negotiated with the Barneses in good faith prior to filing its petition for condemnation. Specifically,

they maintain that Big Rivers failed to make a reasonable effort to acquire the easement at a fair price, and that Big Rivers' offer amounted to little more than a "take it or leave it" proposition.

Condemners are required to make a good faith attempt to purchase the subject property at a reasonable price. Coke v. Commonwealth, Ky., 502 S.W.2d 57 (1974). The record indicates that the parties corresponded by mail regarding Big Rivers' proposed purchase of the easement, and that negotiations ensued wherein Big Rivers first offered \$2,300, then raised the offer to \$3,000. Also contained in the record is a letter from Big Rivers to the Barneses wherein Big Rivers stated that it remained open to any reasonable offer. While it is true that the commissioners later recommended compensation to the Barneses in an amount which exceeded Big Rivers' last offer by \$12,000, we cannot conclude that this fact, taken alone, evidences bad faith on the part of Big Rivers. When the record is examined in its entirety, we cannot find that the lower court erred in concluding that Big Rivers had negotiated in good faith. The Barneses have not overcome the presumption that the trial court ruled correctly on this issue. City of Louisville v. Allen, supra.

The Barneses also argue that the lower court erred in failing to require Big Rivers to strictly comply with the statutory prerequisites to filing the petition for condemnation. They maintain that Big Rivers failed to: 1) describe the parcel at issue with sufficient specificity, 2) establish why public right-of-ways were not utilized before seeking to condemn public

property, and 3) post a bond. We have examined the statutes which the Barneses cite in support of these arguments, namely Kentucky Revised Statute (KRS) 416.570, KRS 416.140(1), and KRS 416.130(1), and find no error. Our review of the record indicates that the condemned property was described in the petition and its attachments with specificity sufficient to satisfy the "particular description of the property" requirement as set forth in KRS 416.570(2). Contrary to the Barneses assertion, KRS 416.140(1) simply does not require Big Rivers to establish why public right-of-ways were not utilized. Rather, it serves to allow public utilities to use public right-of-ways where needed. Finally, the Barneses have not shown that the lower court erred in concluding that Big Rivers was not required to post a bond prior to entering the Barneses' property. Even if such a bond was required, any error on this issue is harmless. KRS 416.130(1) requires a bond to be posted before land is entered for the purpose of making "surveys or examinations. . . ." It appears that the period for surveying or examining the parcel has long since passed, and that construction of the power line has commenced.

The Barneses' final argument is that the lower court erred in denying their motion brought pursuant to CR 65.08 to enjoin Big Rivers from beginning work on the power line during the pendency of this appeal. The motion, which was filed some six months after entry of the interlocutory judgment, was denied by the lower court in part because CR 65.08 was inapplicable. We must agree with the court's conclusion on this issue. CR 65.08(1)

states in relevant part that, "[a]fter an appeal is taken from a final judgment granting or denying an injunction any party may move the circuit court to grant, suspend or modify injunctive relief during the pendency of the appeal." (emphasis added). The November 8, 1996, interlocutory judgment was neither final nor did it grant or deny injunctive relief. Even if CR 65.08 were applicable, it further provides that a party adversely affected by a ruling of the circuit court under paragraph (1) of this rule may file a motion with the Court of Appeals seeking relief. No such motion has been filed. In any event, the Barneses were not appealing from a "final judgment granting or denying an injunction," and accordingly we can find no error in the lower court's conclusion that CR 65.08 was not applicable and that the Barneses were not entitled to injunctive relief under this rule.

For the foregoing reasons, the findings of fact, conclusions of law, and interlocutory judgment of the Ohio Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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