NO. COA01-1045

NORTH CAROLINA COURT OF APPEALS

Filed: 06 August 2002

CARDINAL EXTENSION COMPANY, LLC,
Petitioner

v.

Wake County
No. 99 SP 438

WILLARD C. PLEASANT
and HAZEL J. PLEASANT,
Respondents

Appeal by petitioner from judgment entered 21 February 2001 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 15 May 2002.

Womble Carlyle Sandridge & Rice, PLLC, by John C. Cooke and Christine Carlisle Odom, attorneys for petitioner-appellant.

Kirk, Kirk, Gwynn & Howell, L.L.P., by Joseph T. Howell, attorney for respondents-appellees.

THOMAS, Judge.

Petitioner, Cardinal Extension Company, LLC, appeals the trial court's judgment ordering it to pay $199,500.00 for the taking of respondents' property for a natural gas pipeline easement.

Cardinal contends the trial court erred in five ways: (1) in permitting Charles Bass to give an opinion regarding the value of respondents' property after the acquisition (after value) because the trial court earlier granted Cardinal's motion *in limine* to exclude his opinion; (2) by denying Cardinal's motion to strike

Bass's and Clemm Shankle's opinions as to the property's after value; (3) by denying Cardinal's motion for a new trial; (4) in denying Cardinal's motions to amend the judgment and to conform an exhibit to the evidence; and (5) in granting respondents' motion for costs. For the reasons herein, we find no error.

Cardinal is a North Carolina natural gas public utility. On 10 March 1999, it filed a special proceeding pursuant to Article II, Chapter 40A of the North Carolina General Statutes to acquire a sixty-foot wide permanent utility easement and a 1.98-acre temporary work space easement across land owned by respondents, Willard and Hazel Pleasant. Under Article II, all issues of law and fact raised by the parties are first determined by the Clerk of Superior Court. N.C. Gen. Stat. § 40A-25 (2001). In the proceeding, the Clerk of Superior Court of Wake County found that Cardinal had the right to acquire the property and appointed three freeholders to appraise it and determine the proper amount of compensation. Both parties filed exceptions to the freeholders' estimate that the amount of compensation should be $37,500.00. The Clerk nonetheless entered a judgment finding that the compensation due respondents was $37,500.00. The parties appealed to the trial court.

Prior to jury selection, the parties submitted multiple motions *in limine*. Cardinal only opposed respondents' motion that the trial court exclude evidence of "[a]ny policies and procedures of [Cardinal] that are inconsistent with the rights taken." Respondents maintained that the motion was based on the inclusive

language in Cardinal's "very broadly termed" permanent easement. They insist they never contended the easement represented a total taking, but rather requested that Cardinal not be allowed to offer evidence that its intended use of the easement was less than the scope of the rights actually acquired. The trial court concluded:

> [T]here are some rights retained by the Respondents in this case, and so I don't know that the motion in limine is well taken, except as it might in any way verify the terms of the easement. And in terms of talking about policies in advance of the easement, to that extent, I don't think petitioner can do that, but otherwise I wouldn't restrict them to talking about what rights may have been retained by the Petitioner in this case.

Thereafter the trial court heard Cardinal's motions *in limine*. In one pleading, Cardinal asserted six motions requesting exclusion of: (1) hypothetical subdivision drawings prepared by Bass and Shankle; (2) page 34 of Bass's appraisal report (the "Bass Appraisal"), which details the calculation of the tract's value before acquisition (before value); (3) pages 35-36 of the Bass Appraisal, which details the calculation of the tract's after value; (4) page 36 of the Bass Appraisal, which sets forth an alternative analysis for valuing the property; (5) page 36 of the Bass Appraisal, which states Bass's final conclusions as to the property's value; (6) page 33 and Exhibit I of the Bass Appraisal, which state the asking price for lots in the Kirk Wood Subdivision; and (7) the selling prices of hypothetically developed lots. The arguments concerning these motions advanced by both parties focused primarily on whether reference to a hypothetical subdivision of the property, or the use of a hypothetical subdivision map to

illustrate respondents' appraisers' testimony, should be permissible.

In ruling on the motions, the trial court acknowledged that respondents' appraisers believed the highest and best use of the property was residential and that they used comparable sales in valuing it. The trial court then noted, however, that the use of maps of a hypothetical subdivision was speculative, "and so I have problems with allowing that, and think that [Cardinal's] motion in limine is well taken, and would allow it at this point."

Cardinal maintains that the trial court's ruling excluded all of Bass's opinions concerning after value because they were based solely on the assumption of the hypothetical lots.

Bass was respondents' first witness. He said he had done twelve or thirteen appraisals on this same project for Cardinal. He further stated that he had obtained information regarding thirty or forty sales surrounding the property as part of his appraisal process. Bass testified without objection to a before taking value of $1,800,000.00, and that the highest and best use of the property after the taking was for residential subdivision development. He then gave the opinion, over Cardinal's objection, that the property's value immediately after the taking was $1,632,000.00. Thus, Bass estimated there was $168,000.00 in damages.

Shankle, meanwhile, said he examined between fourteen and sixteen surrounding property sales and that the fair market value of the property immediately before the taking was $1,500,000.00. The highest and best use of the property after the taking,

according to Shankle, was as a residential subdivision. He valued the property at $1,290,000.00 immediately after the taking, which amounted to a $210,000.00 reduction.

After respondents' rested their case, Cardinal moved to strike that portion of Bass's and Shankle's testimony concerning the after value. The motion was denied.

Diana Conn testified for Cardinal as an expert appraiser and also used a comparable sales approach. She adjusted downward the sales for the area within the permanent and temporary easements, but found no loss in value to the land lying outside the easement area. She valued the property at $1,400,000.00 before the acquisition, and determined the difference between the before value and the after value to be $32,000.00.

The jury rendered a verdict of $199,500.00. Cardinal appeals.

By its first assignment of error, Cardinal contends the trial court erred in allowing Bass to give an opinion regarding the value of respondents' property after the acquisition because this opinion had been excluded by the trial court when it granted Cardinal's motion *in limine*. We disagree.

"[T]he court's ruling [on a motion *in limine*] is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, [it] is subject to modification during the course of the trial." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998). Moreover, "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence

if the [movant] fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), *reh'g denied*, 349 N.C. 242, 515 S.E.2d 706 (1998).

Here, Cardinal did object when Bass was asked his opinion regarding the after value, thereby preserving the issue for appeal. The trial court overruled the objection and Bass responded: "$1,632,000." Cardinal contends the trial court "reversed" its previous *in limine* ruling.

We note first that Cardinal did not request in its motion *in limine* that Bass's opinion as to after value be deemed inadmissible, and the trial court never ruled it inadmissible. Rather, Cardinal prayed that the trial court preclude the introduction of specific pages of Bass's written appraisal report and the selling prices of hypothetically developed lots.

Second, as noted above, a motion *in limine* is subject to modification at trial. *Heatherly*, 130 N.C. App. at 619, 504 S.E.2d at 105. The trial court's ruling that it was granting Cardinal's motion "at this point" indicates it "properly viewed its *in limine* ruling as preliminary, tentative and subject to modification as presentation of the evidence progressed." *Id.* at 623, 504 S.E.2d at 107. Moreover, the record reflects that both parties focused their arguments, and the trial court its ruling, on the use of hypothetical maps or reference to a hypothetical subdivision. Accordingly, the trial court did not err in allowing Bass to give

his opinions as to the after value simply because it had allowed Cardinal's motion *in limine*. We reject Cardinal's argument.

By its second assignment of error, Cardinal contends the trial court erred in denying its motion to strike Bass's and Shankle's opinions regarding the property's after value. We disagree.

Cardinal argues that the testimony of respondents' appraisers is inadmissible because of deficiencies in both their methodology and supporting data. It contends Bass and Shankle failed to follow the methodology of the comparison sales approach, gave opinions without providing underlying data or supporting facts, and that the market data and facts in their written appraisals contradict their opinions.

Rule 705 of the North Carolina Rules of Evidence provides that an "expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise . . . ." N.C.R. Evid. 705. Here, both experts extensively testified regarding their research for the appraisals. Both reviewed comparable sales and determined that the highest use was as a residential subdivision. They answered questions on cross-examination regarding the reasons for their opinions and inferences. Bass offered several times to provide further explanations of his methodology for appraising the property. We note finally that any evidence questioning the sufficiency of the factual basis of the expert opinion affects the credibility of the testimony but not its competence as evidence. *Horne v. Roadway*

Package Systems, Inc., 129 N.C. App. 242, 244, 497 S.E.2d 436, 438 (1998). Accordingly, the trial court did not err in denying Cardinal's motion to strike the experts' opinions as to the property's after value.

Cardinal next assigns as error the trial court's denial of its motion for a new trial. Cardinal asserts eleven grounds for a new trial. We now proceed only to those arguments not previously addressed here.

An appellate court's review of a trial court's ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates an abuse of discretion by the trial court. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

One ground for a new trial argued by Cardinal is a statement by Bass while testifying, where he referred to Cardinal's appraiser as a "little girl." However inappropriate, we hold that the reference does not rise to the level of being prejudicial error requiring a new trial.

Another ground addresses allegedly improper conduct during summation, which was not recorded. Specifically, Cardinal maintains that through summation and improperly admitted evidence, respondents in effect asked the jury to determine the scope of the easement. The record reflects no request for an instruction or any objection by Cardinal. The trial court used pattern jury instructions on easements and also instructed the jury that:

"Where an easement is taken for a natural gas line, the owner does not give up all title to his land." Accordingly, we find no merit to this contention.

Two additional grounds are based on a claim that the jury disregarded the trial court's instructions and awarded excessive damages. Cardinal contends the jury's verdict of $199,500.00 establishes that the jury ignored the instructions and treated the easement as a fee simple taking. The verdict, however, is consistent with respondents' evidence. We held that the testimony of respondents' appraisers was admissible expert testimony. Therefore, the evidence does not establish "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C.R. Civ. P. 59(a)(6).

The final two grounds allege errors of law committed during trial. The first incorporates grounds one through nine in support of the contention that there was "[e]rror in law occurring at the trial and objected to by the party making the motion." N.C.R. Civ. P. 59(a)(8). Since we find no error based on the first nine grounds, we reject this contention. The second asserts that respondents are precluded from referencing terms in the easement because the only issue for trial was just compensation. Since the rights acquired by the condemnor determine the amount of damages, *see Gas Co. v. Hyder*, 241 N.C. 639, 642, 86 S.E.2d 458, 460 (1955), reference to the easement's terms was permissible. Cardinal's argument is without merit.

By its fourth assignment of error, Cardinal contends the trial

court erred in denying its motions to amend the judgment and to conform an exhibit to the evidence, namely that it now receives a fee simple interest in the area of the easement. Cardinal cites no legal authority in support of its argument and we therefore deem it abandoned. N.C.R. App. P. 28(b)(5).

Lastly, Cardinal contends the trial court abused its discretion in granting respondents' motion for court costs. "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Section 40A-8 of the North Carolina General Statutes provides that:

> In any action under the provisions of Article 2 or Article 3 of this Chapter, the court in its discretion may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided such appraisers or engineers testify as witnesses, and such plats are received into evidence as exhibits by order of the court.

N.C. Gen. Stat. § 40A-8(a) (2001). Pursuant to section 40A-8, the trial court reimbursed respondents for costs incurred for the services of appraisers. Section 40A-13 of our General Statutes further provides: "In addition to any reimbursement provided for in G.S. 40A-8 the condemnor shall pay all court costs taxed by the court." N.C. Gen. Stat. § 40A-13 (2001). Therefore, the trial court's order taxing court costs to Cardinal was not arbitrary, and

we find no error.

NO ERROR.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).