

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1380

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

PITT & GREENE ELECTRIC
MEMBERSHIP CORPORATION,
Petitioner

v.

Greene County
No. 00 SP 16

MARY BRYAN CUMMINGS RASBERRY,
KATHERINE RASBERRY PITTS, and
EDWIN A. RASBERRY, III, as
co-executor of the estate of
EDWIN A. RASBERRY, JR., MARY B.
RASBERRY, Individually; MARY
FRANCES R. NEWELL and husband,
RAYMOND NEWELL,
Respondents

Appeal by petitioner from judgment entered 1 May 2001 by Judge Franklin R. Brown in Greene County Superior Court. Heard in the Court of Appeals 21 August 2002.

Vandeventer Black LLP, by Norman W. Shearin, Jr., for petitioner.

Kirk, Kirk, Howell, Cutler & Thomas, LLP, by Joseph T. Howell, for respondents.

BRYANT, Judge.

On 9 March 2000, petitioner Pitt & Greene Electric Membership Corporation commenced this condemnation proceeding pursuant to Chapter 40A of the North Carolina General Statutes to acquire a power line easement across a portion of a 495 acre farm owned by respondents Edwin A. Rasberry, Jr., et ux et al. On 15 June 2000,

three commissioners appointed by the Greene County Clerk of Superior Court filed a report assessing just compensation for the taking of the power line easement at \$43,353. On 18 June 2000, the clerk entered an order confirming the report of the commissioners. Respondents excepted to the order, appealed, and requested a jury trial as to the issue of just compensation.

A jury trial was conducted on 2-3 April 2001 at Greene County Superior Court with the Honorable Franklin R. Brown presiding. The jury returned an award of \$85,000 as just compensation. Judgment in accordance with the award was entered 1 May 2001. Petitioner gave notice of appeal on 25 May 2001.

I.

First, petitioner argues that the trial court erred by failing to exclude evidence of the interest and area taken by the petitioner. Specifically, petitioner argues that the trial court erred by failing to exclude, *sua sponte*, portions of Shankel's (respondents' witness) testimony concerning the nature and extent of the rights acquired by petitioner.

N.C. R. App. P. 10 (b) (1) provides that to preserve an issue for appellate review, a party must have presented a timely objection or motion to the trial court, and must have received a ruling on that objection or motion.

In the instant case, through the entirety of Shankel's direct and redirect examination, petitioner failed to make one single objection to any of Shankel's testimony. Petitioner presents to

this Court a hybrid plain error argument by contending that the trial court should have excluded this evidence on its own motion. However, plain error review applies only to evidentiary rulings and jury instructions in criminal cases. *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). To preserve this issue for appellate review, petitioner was under an obligation to make the appropriate objections at trial. Therefore, this assignment of error is overruled.

II.

Second, petitioner argues that the trial court erred in granting respondents' motion in limine to exclude evidence of special and general benefits. We disagree.

N.C.G.S. § 8C-1, Rule 103(a)(2) (2001) provides, "*Effect of erroneous ruling.* - Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

The record reflects that the trial court granted respondents' motion in limine to exclude petitioner witness Suggs' proposed testimony as to how the transmission line, as planned, would improve the reliability of electric service. Contemporaneous with granting the motion, the trial court stated it would not go into the proffered testimony of petitioner witness Booth, and would

consider objections as they arose at trial. Petitioner intended to introduce Booth's testimony to establish that the transmission line would bring a measurable benefit to the Raspberry tract, based on evidence of benefits brought to a similar tract of land near Tarboro, North Carolina. At trial, respondents' objection was sustained as to petitioner's question to Booth, "Do you believe that -- believe that the potential exists for this transmission line to enhance the development potential of this property?"

Our review of the record reveals that petitioner failed to make an offer of proof either when Suggs or Booth's testimony was excluded from evidence. In order for this Court to make a fair, complete, and just assessment of the alleged error concerning the exclusion of evidence, it is incumbent upon the complaining party to make an offer of proof as to what the excluded evidence would have revealed. The petitioner has failed to properly preserve this issue for appellate review, therefore, this assignment of error is overruled.

III.

Third, petitioner argues that the trial court erred in instructing the jury that "Compensation is to be assessed on the basis of the rights acquired by Pitt & Greene. It is not what Pitt & Greene actually does, but what it acquires the right to do." Specifically, petitioner argues that this instruction is in discord with the mandate of N.C.G.S. § 40A-66. We disagree.

When a party on appeal contests the correctness of a jury instruction, the appellate court must review the instructions in

their entirety. *In re Hendrickson*, ___ N.C. App. ___, ___, 565 S.E.2d 254, 262 (2002). Moreover a party appealing the instruction has the burden of showing that the error occurred and that the error, in light of the entire charge, was likely to mislead the jury. *Id.* at ___, 565 S.E.2d at 262.

N.C.G.S. § 40A-66 (2001) provides:

§ 40A-66. Compensation to reflect project as planned

(a) If there is a taking of less than the entire tract, the value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.

(b) The value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized.

The trial court provided the following jury instructions, in pertinent part:

The measure of just compensation to which the owners are entitled where an easement is taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking, that is, immediately after it was made subject to the easement.

Compensation is to be assessed on the basis of the rights acquired by Pitt & Greene. It is not what Pitt & Greene actually does, but what it acquires the right to do.

. . .

You must find the fair market value

of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking on March 9, 2000, and not as of the present day or any other time.

In arriving at the fair market value of the property immediately before the taking, you should in light of all the evidence consider not only the use of the property at that time, but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Likewise, in arriving at the value of the remainder immediately after the taking, you should in light of all the evidence consider not only the use of the property at that time, but all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

In arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it will be at the conclusion of the project.

(Emphasis added.).

In reviewing the sum of the above stated excerpt, it appears the instructions were in compliance with the statutory requirements of N.C.G.S. §§ 40A-1 to 40A-70 (Eminent Domain), including the statutory mandate of N.C.G.S. § 40A-66. Moreover, petitioner has not met his burden of showing the contested language was likely to mislead the jury – especially in light of the above italicized excerpt. Therefore, this assignment of error is overruled.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).