

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
ROBERT J. GLADWIN, JUDGE

DIVISION III

CA06-1062

DECEMBER 12, 2007

DON HENDRICKSON

APPELLANT

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. CV-2001-69]

V.

ARKANSAS STATE HIGHWAY
COMMISSION

APPELLEE

HON. DAVID L. REYNOLDS,
JUDGE

AFFIRMED

Appellant Don Hendrickson appeals the Faulkner County Circuit Court's grant of the motion *in limine* filed by appellee Arkansas State Highway Commission regarding the limitation of testimony related to the permanent easement on his land and impairment of public access to his business interests. We affirm.

In 1983, appellant purchased two tracts of land, the north boundary of which abutted State Highway 286. At the time of purchase, the highway was a two-lane road without curbs. Appellant's tracts were separated by Duwayne Lane, a public dead-end street, with ingress and egress existing only by way of the highway. On the east tract stood a frame

dwelling, while on the west tract stood a brick residence and a combined self-service gas station and convenience store.

In 2001, appellee filed an eminent domain complaint condemning the north portion of each of appellant's tracts of land to widen the highway to two lanes running both east and west with a median separating the lanes. An eight to ten-inch curb was built on the edge of the new right of way along the entire north line of appellant's property, with a green-space area left between the new curb and the curb marking the outside line of the eastward-traveled portion. Appellant filed a timely answer seeking just compensation for the land taken and severance damage to his residual lands, particularly as related to the business property located on his land. Prior to appellee's action, appellant had three means of ingress and egress from his two tracts of land, all of which afforded unimpaired and direct access from the highway to his convenience-store business, gas station, and parking area, irrespective of whether motorists were traveling east bound or west bound.

Subsequent to the new construction, appellant's previous access was diminished except for the entrance to Duwayne Lane and the substituted cut in the median at the west end of the property. Appellant contends that this route requires vehicles traveling west bound to drive into the cut in the median, turn left across both east-bound lanes of traffic and enter the permanent construction easement on the property of appellant's neighbor and make a sharper-than-ninety-degrees turn to the left onto the easement imposed on appellant's property.

On the day of the jury trial, April 11, 2006, appellee filed a five-page motion *in limine* just prior to the beginning of the trial. The circuit court held three in camera hearings to discuss the motion, focusing primarily on appellee's attempt to prevent appellant and his expert witness from discussing or testifying concerning the use of the permanent easement imposed by appellee on the land and testimony relating to the impairment of public access to appellant's business and land. Appellant argued against any such limitation of evidence and explained that the construction of the median and the limited and dangerous access through the crossover was a gross inconvenience and seriously impaired the public access to his business.

The circuit court granted the motion *in limine* with respect to these two points, after which the trial proceeded with the jury granting a judgment in favor of appellant in the amount of \$50,000. The judgment was filed on May 30, 2006, and appellant filed a timely notice of appeal on June 22, 2006. He specifically challenged the circuit court's ruling granting the motion *in limine*, paragraph No. 7, whereby the circuit court denied his attempts to introduce evidence regarding the use of the permanent easement impressed upon his land. He also appealed the ruling related to paragraph No. 8, which denied his attempts to introduce evidence, the proffer of which was made, to prove compensation for the loss of access to his remaining property which resulted from the configuration and construction of Dave Ward Road in front of appellant's property.

A. Limitation of Evidence Regarding Permanent Easement Imposed by Appellee

Appellant asserts that by granting appellee's motion, which prevented him from introducing evidence in any form concerning the use of the permanent easement imposed on the property by appellee, the circuit court erroneously prohibited him from explaining to the jury the means of access to his land by his customers, his renters, and his family. He claims that the ruling, itself, constituted a taking of the limited access appellee had left him. Article 2, Section 22, of the Arkansas Constitution states that "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefore." Appellant cites *Arkansas State Highway Commission v. Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965), as an example of when the supreme court has acknowledged, even in the absence of an actual loss of land, "a basic right of an abutting property owner, for the right of access to a street or highway [as] one of the incidents of ownership or occupancy of land abutting thereon." *See also Ark. State Hwy. Comm'n v. Billingsley*, 247 Ark. 49, 444 S.W.2d 259 (1969) (finding that there was substantial evidence establishing considerable damage of ingress or egress despite a technical ability to access seventy-feet of usable frontage). Accordingly, appellant requested compensation not only for the actual taking, but also for the damage done to the property not taken but nonetheless substantially impaired or damaged.

Appellant acknowledges that in *Wright v. Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2001), the supreme court referred to language from *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S.W.2d 753 (1931), reiterating that in order for a property owner to challenge a governmental action that is not an actual taking of his property, he must

suffer damages that are distinct from those suffered by the general public. However, the supreme court went on to specifically explain that a property owner whose land abuts the land being taken by the government and who has a property right of egress and ingress through such land suffers a distinct injury not suffered by the general public. *See Wright, supra*. Accordingly, appellant maintains that the circuit court's ruling prohibited him from offering proper testimony regarding the damage to his tracts of land and wrongfully denied him the use of the supporting information that the state constitution and case law afford him.

Appellant points out that, because of the circuit court's ruling, he did not attempt to introduce testimony regarding the loss of and/or extreme limitation of his access to his property. He and his primary witness regarding the value of the property, Ms. Diana Thompson, were both aware of the circuit court's admonition and attempted to comply with those terms. He claims the circuit court erroneously denied his right to go forward with evidence needed to prove his damages, which prejudiced his case, and that such error is reversible error warranting a new trial.

Appellee counters that appellant did, in fact, testify regarding the permanent easement, and the record contains approximately twenty-seven pages of direct testimony and four additional pages of cross-examination and re-direct testimony. Appellant was able to provide details regarding the physical changes to the property and the resulting alterations to the entrances to his property, as well as specific testimony regarding monetary damages he claims to have suffered as a result. Appellee points out that appellant addressed the easement, his complaints against those individuals and government entities involved in the

process of planning the improvements, the effect the improvements had on traffic patterns related to his property, and his resulting damages. Appellee asserts, and we agree, that appellant was able to present a substantial amount of information on this issue to the jury.

Appellant himself acknowledges that appellee allowed him to testify to such an extent that, “upon proper objection by [a]ppellee, much of [appellant’s] testimony might have been denied.” He simply contends that there was much more that he would have said absent the circuit court’s ruling. Appellant has failed to show how he was prejudiced by the ruling, what the other testimony would have been, or how the result would have differed if the additional information had been allowed. Moreover, it appears that the real focus of the potential testimony that was excluded was hearsay testimony about appellant’s employees’ difficulties using the road in its new condition, and that limitation certainly was not error. We affirm on this point.

B. Limitation of Evidence Related to the Construction of the Median

Appellant asserts that the circuit court erroneously required proof of an absolute, complete denial of all access to appellant’s property before any testimony would be permitted regarding damages to the remainder of his property. He explains that, as opposed to the previously unfettered access he enjoyed, the one remaining point of access to his property requires a person desiring to use the access to pull up into a space in the median, watch for east-bound traffic in a fifty-mile-per-hour posted speed zone, and when clear, drive across the east-bound lanes and onto a permanent construction easement on the land of appellant’s neighbor to the west, then make an acute-angle turn and proceed eastward along

a narrow easement on appellant's land to the convenience store, *or* continue west on the highway some 800 or more feet to Salem Road and make a U-turn to come back to that easement.

Appellee argued at the hearing that the taking of access may be an impairment but does not constitute a denial of access, and that in a partial taking of land, the landowner is not entitled to compensation for the impairment of access if any access whatsoever remains for the landowner. Again, appellant cites *Campbell, supra*, for the proposition that any damage to such an easement, whether by destruction or impairment, is a damage to the property owner and independent of any damage sustained by the general public. Likewise, in *Kesner, supra*, the supreme court stated that a landowner must show that a property right has been invaded, and direct and substantial damage peculiar to him must be sustained, in order to establish special compensatory damages. The fact that the value of the lot has been diminished is not sufficient to sustain an award.

Appellant cites *Arkansas State Highway Commission v. Bowers*, 248 Ark. 388, 451 S.W.2d 728 (1970), in which the supreme court allowed witnesses to testify as to the loss of access as an element of damage. *See also Ark. State Hwy. Comm'n v. Cottrell*, 9 Ark. App. 359, 660 S.W.2d 179 (1983) (finding that the rule that circuitry of travel is not compensable when a land owner whose land is not being taken claims that he is entitled to damages); *Ark. State Hwy. Comm'n v. Coffman*, 251 Ark. 590, 473 S.W.2d 873 (1971) (allowing evidence of the inconvenience of a partial taking to be considered in assessing a landowner's damages).

Appellant asserts that his efforts to establish the severance damages to the remainder of his property, which consisted of a service station, meat market, convenience store, his dwelling, and rental property, was thwarted by the hearing and resulting ruling on the motion *in limine*. He claims that his severance damages materially exceeded the jury award, and that access of west-bound traffic is substantially hampered in the effort to patronize his businesses. Appellant argues that it was clear error for the circuit court to restrict, or essentially deny, testimony regarding the new limitations imposed on his ingress and egress to the property. While acknowledging that access to the property was not completely denied, appellant asserts that the only new way to reach his property is dangerous, restrictive, and inconvenient.

Appellee again alleges, and we agree, that appellant freely testified about this issue at trial. Alternatively, appellee contends that the circuit court's ruling excluding evidence that the median strip down the center of the new road was an element of damages that must be considered was not error. Appellee asserts that it is well settled that public authorities may erect a median strip down the center of a thoroughfare or may in some other manner prohibit left turns or two-way traffic without compensating the abutting landowner for his inconvenience or for the loss of business that results from the flow of traffic. *See Ark. State Hwy. Comm'n v. Bingham*, 231 Ark. 934, 333 S.W.2d 738 (1960); *City of Ft. Smith v. Van Zandt*, 197 Ark. 91, 122 S.W.2d 187 (1938). Although the rulings in these cases dealt with the factual considerations of those specific cases, which appellant claims differ "vastly" from the facts in the instant case, we find merit in appellee's argument on this point. Appellant

was ultimately allowed to present a significant amount of testimony on these issues, and we hold that he has failed to demonstrate prejudice in not being allowed to present more evidence, what that additional evidence would have entailed, or that it would have changed the outcome of the case. Accordingly, we affirm on this point as well.

Affirmed.

GRIFFEN, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case must be affirmed; however, I disagree that we should dispose of this case simply because Mr. Hendrickson was able to present evidence that appeared to circumvent the Highway Commission's motion in limine. The majority is correct when it states that Hendrickson was not prejudiced by the paucity of the evidence that he was allowed to present at trial. There was enough evidence presented to warrant an instruction on the loss of access, had the trial court not found in granting the motion in limine that it was not compensable.¹

Mr. Hendrickson was, however, prejudiced by what I believe was an improper use of a motion in limine to preclude him from asserting a theory of recovery based on the loss of access to his property. It is settled law that it is impermissible to use motions in limine as

¹ I believe that Mr. Hendrickson's second point would be unavailing under any circumstance. In *Arkansas Highway Commission v. Bingham*, 231 Ark. 934, 333 S.W.2d 728 (1960), the supreme court decided that as a matter of public policy that the diminution in access to a business by the creation of a divided highway would not be compensable in condemnation actions.

a sweeping means of testing issues of law. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003) (citing *Schichtl v. Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987)). Nonetheless, I must acknowledge that Mr. Hendrickson's argument on appeal did not assail the propriety of granting the motion in limine as a means of foreclosing one theory of recovery. Accordingly, this case must be affirmed.