IN THE COURT OF APPEALS OF IOWA

No. 9-157 / 08-1009
Filed May 29, 2009

EDWARD A. GREEN, MELVIN J. GREEN, and BARBARA GREEN,
Plaintiffs-Appellants,

vs.

WILDERNESS RIDGE, L.L.C., LORAS J. FABER, SANDRA FABER, JOHN H. KIVLAHAN, DORIS E. KIVLAHAN, and DUBUQUE COUNTY, IOWA,
Defendants-Appellees,

vs.

WILLIAM KIVLAHAN and THERESA KIVLAHAN,
Third-Party Defendants.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Plaintiffs appeal from the district court's order with regard to defendants' application for condemnation. **AFFIRMED.**

Stephen W. Scott of Kintzinger Law Firm, P.L.C., Dubuque, for appellants.

Brian J. Kane of Kane, Norby & Reddick, P.C., Dubuque, and Nicolas Strittmatter, Monticello, for appellees.

John and Doris Kivlahan, Dubuque, pro se.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Plaintiffs Edward Green, Melvin Green, and Barbara Green (Greens) appeal from the district court's order with regard to defendant Wilderness Ridge, L.L.C.'s application for condemnation, in which the district court found the route proposed by Wilderness Ridge was the nearest feasible route for Wilderness Ridge to gain access to its landlocked property. The Greens argue the district court erred in (1) ignoring the costs of acquisition of the land to be condemned in determining the nearest feasible route; (2) concluding Dudley Lane was not an existing public road, and relying on hearsay evidence to reach that conclusion; and (3) determining Route No. 6 was the appropriate route to be condemned. We affirm.

I. Background Facts and Proceedings.

In July 2006 Wilderness Ridge purchased a seventy-five-acre tract of land in rural Dubuque County. The land was mostly timber, and Wilderness Ridge planned to use it for recreational purposes and occasional logging. Wilderness Ridge purchased the land knowing it was landlocked and thereafter instituted condemnation proceedings pursuant to Iowa Code section 6A.4(2) (2007) to gain access to the land by condemning a public way across real estate owned by the Greens and real estate owned by third-party defendants, William and Theresa Kivlahan. Wilderness Ridge sought to condemn a twenty-four-foot-wide dirt road route of access.

On June 18, 2007, the Greens filed a petition in equity, arguing the route proposed by Wilderness Ridge was not the nearest feasible route to an existing public road, as required under section 6A.4(2). On May 15, 2008, after a trial,

the court entered an order finding the appropriate route to be condemned was the route selected by Wilderness Ridge. The Greens now appeal.

II. Standard of Review.

When an action is tried in equity, our review is de novo. Iowa R. App. P. 6.4; *see Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*); *Owens*, 610 N.W.2d at 865.

III. Issues on Appeal.

A. Cost of Acquisition.

The Greens argue the district court erred in ignoring the costs of acquisition of the land to be condemned in determining the nearest feasible route. The Greens contend the cost of acquisition should have been a factor in the court's determination of the nearest feasible route.

Eminent domain is the inherent power of a government to take private property for public use conditioned upon the payment of just compensation. *Owens*, 610 N.W.2d at 865. This power is also conferred upon those who own or lease land that has no public or private access. Iowa Code § 6A.4(2). Therefore, pursuant to section 6A.4(2), "an owner of 'land locked' property is permitted to institute condemnation proceedings to secure a public way over other land to permanently solve the inability to access the property." *Owens*, 610 N.W.2d at 865.

The procedure for condemnation is set forth in chapter 6B. Our supreme court has explained the procedure as follows:

> An eminent domain action is recognized as a special proceeding. It is a unique blend of administrative and legal procedures which are prescribed by statute. . . . The only judicial action which occurs before the condemnation commission is assembled to assess the compensation for the taking is a determination by the chief judge of the judicial district in which the land is located that the application is legally sufficient and the applicant is empowered to condemn the land. Following this threshold determination, a condemnation commission is selected to appraise the damages as a result of the taking.

Id. In this case, the district court determined Wilderness Ridge's application for condemnation was legally sufficient. The court further found it lacked authority to determine the Greens' damages. With regard to this issue, the court stated:

> Plaintiffs [Greens] are of the position that the Court should also take into consideration the value of the property to be condemned before and after the creation of the public way. This evidence was allowed at trial. In this regard, Plaintiffs cite *Owens*, 610 N.W.2d at 868, wherein the Iowa Supreme Court stated as follows: "In other cases it may be appropriate to also consider the value of the land sought to be condemned."
>
> The *Owens* case, however, sheds no light on what these "other cases" might be and there is no Iowa case law directly on point. After having considered all of the testimony and arguments of counsel, this Court concludes that Wilderness Ridge is correct in its argument that it is not in the Court's authority in these proceedings to determine the condemnee's damages. Pursuant to Iowa Code Chapter 6B, the compensation commission is to be appointed to assess the condemnee's damages.

We agree. The court's authority in this case was limited to the determination of whether Wilderness Ridge had the right to condemn a public way, and if so, which way would be the nearest feasible route. On appeal, the Greens continue to acknowledge that the supreme court in *Owens* noted it may be appropriate in other condemnation cases to consider the value of the land. The Greens ask this court to adopt a standard in private condemnation cases

such as this that the selection of the nearest feasible route include a consideration of the cost of acquiring the land sought to be condemned.

Upon our review of *Owens* and the cases from other jurisdictions that the supreme court cites in its analysis in *Owens*, we find these cases involve wholly different factual situations than this case. Those cases addressed whether a landowner had a right to condemnation through a third party's property to reach a portion of his property that was landlocked due to a natural obstruction in the land (i.e., stream, gulch, deep ravine, etc.), when the rest of the landowner's property was not landlocked, and when landowner could reasonably access the landlocked portion through the rest of his own property (i.e., by building a bridge, bulldozing and filling in the creek, etc.). As the supreme court in *Owens* stated:

> If one has a way *through his own land*, he cannot impose a "way of necessity" through his neighbor's land, unless his own way is not reasonably adequate or its cost is prohibitive. Mere inconvenience or mere cost, as the basis for using another's land to get access to one's own property, falls short of meeting this test. . . . [Therefore, it may] be appropriate in some cases to consider the value of the land sought to be condemned against the value of the land benefited by the condemnation.

Id. at 868 (citations omitted) (emphasis added).

We interpret *Owens* to suggest it may be appropriate in some cases in which a landowner "has a way *through his own land*" to consider the cost or value of the land sought to be condemned. *Id*. (emphasis added). The facts of this case, however, are dissimilar to the type of situation the court analyzed in *Owens*. Here, Wilderness Ridge's entire property is landlocked. It is not possible for Wilderness Ridge to gain access to a particular portion of its land

that is landlocked due to a natural obstruction by a route through its own property.

What we have here is the classic scenario addressed by chapters 6A and 6B. Pursuant to those chapters, the district court was correct in declining to determine the Green's damages. Upon the district court's determination that Wilderness Ridge's application for condemnation was legally sufficient, a compensation commission is selected to appraise the damages. Iowa Code § 6B.4. At that point, if the Greens disagree with the award made by the compensation commission, they may appeal the assessment to the district court. *Owens*, 610 N.W.2d at 865. We decline to adopt a standard in all private condemnation cases that the selection of the nearest feasible route include a consideration of the cost of acquiring the land sought to be condemned. Finding no error, we affirm as to this issue.

B. Existing Public Road.

The Greens argue the district court erred in concluding Dudley Lane was not an existing public road, and in relying on hearsay evidence to reach that conclusion.

1. Dudley Lane.

Of the eight proposed routes for condemnation, the most appropriate routes were determined to be Route No. 6 and Route No. 8. Wilderness Ridge favored Route No. 6, and the Greens favored Route No. 8. As the district court noted, "A major issue in the consideration of Route No. 8 is the status of Dudley Lane." Although Dudley Lane is listed as a Dubuque County class B road and was platted and filed for record in 1919, there is no evidence that Dudley Lane

has ever existed. The Greens argue that the exact location of Dudley Lane is known and that Dubuque County is required to maintain it to class B status.[1] The platted Dudley Lane comprises a portion (1925 feet) of the total length of Route No. 8 (4555 feet). Therefore, if Dudley Lane is found to be a class B road that Dubuque County is required to maintain, then the portion of Route No. 8 that goes through private property is only 2630 feet. If Dudley Lane is not found to be a class B road that Dubuque County is required to maintain, however, then Route No. 8 travels through 4555 feet of private property, 420 more feet than Route No. 6.[2]

The district court determined Dudley Lane is not a class B road that Dubuque County is required to maintain:

> The problem with Plaintiffs' position as to Dudley Lane is that Dudley Lane as shown on Joint Exhibit No. 1 does not exist. If a road existed there at one time, there is no evidence of it today. There are not even remnants of a road. Further, Iowa Code section 309.57 and the Dubuque County Class B Road Ordinance presuppose the physical existence of a road of some sort. Iowa Code section 309.57 addresses the "maintaining" of a road and the Dubuque County Class B Road Ordinance addresses the minimum effort, expense and attention needed to keep a Class B road open to traffic (emphasis added). Here there is no road to maintain or keep open for traffic because there is no road and its exact location is unknown.

---

[1] Pursuant to section 309.57(1): "Area service 'B' classification roads may have a lesser level of maintenance as specified by the county board of supervisors, after consultation with the county engineer." Section 309.57(2) further states:

> Roads within area service 'B' and 'C' classifications shall have appropriate signs, conforming to the Iowa State sign manual, installed and maintained by the county at all access points to roads on this system from other public roads, to adequately warn the public they are entering a section of road which has a lesser level of maintenance effort than other public roads.

With regard to that issue, the Dubuque County Class B Road Ordinance states: "Only the minimum effort, expense and attention will be provided to keep Area Service System B Roads open to traffic."

[2] Route No. 6 is 4,135 feet in length and travels completely through private property.

Upon our review of the record, we agree with the district court's finding that the portion of Dudley Lane platted on Route No. 8 does not exist. There is substantial evidence and testimony in the record supporting the court's conclusion.

We find the testimony of Dubuque County Engineer Michael Felderman particularly informative with regard to this issue. At the time of trial, Felderman had been the engineer for Dubuque County for three and a half years, and prior to that, Felderman had been an assistant engineer for the city of Dubuque for twelve years. Felderman testified that to his knowledge, the portion of Dudley Lane at issue had never been a travelable, drivable roadway, and there was no record of Dubuque County maintaining it. Felderman researched the issue at the request of the Dubuque County Board of Supervisors, and in August 2007 Felderman wrote a memo noting his findings.

Registered engineer and land surveyor Kenneth Buesing walked the area comprising the portion of Dudley Lane in question and testified, "There's no evidence of a physical road ever being there." According to Buesing, the portion of Dudley Lane at issue in this case does not meet the definition of a public road. Furthermore, Loras Faber, the owner of property on which the Greens argue the portion of Dudley Lane exists, testified that to his knowledge, Dudley Lane has never been mapped, surveyed, or staked out.[3] He further testified that he has never heard anything about Dubuque County intending to improve or make a road at Dudley Lane. According to Faber, the terrain of the land in the area of

[3] Faber had owned the property for approximately twelve years, and his father had owned it for fifty years before he sold it to Faber.

the platted Dudley Lane is "very wooded, full of gulleys and hills" and it would be "[v]ery difficult to even try to walk it."

We find no error in the district court's determination that Dudley Lane was not an existing public road. We affirm as to this issue.

2. Hearsay.

The Greens further contend the district court erred in relying on hearsay evidence to reach the conclusion that Dudley Lane was not an existing public road. The Greens contend the court relied on hearsay when it quoted from Dubuque County's answer and relied on a video recording of a board of supervisors' meeting (Exhibit G) to confirm Dudley Lane's nonexistence.[4]

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801; *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006). Hearsay evidence is not admissible unless some exception allows its admission. Iowa R. Evid. 5.802. In this case, Dubuque County's answer and the board of supervisors' video were out-of-court statements. The statements were not, however, offered to prove the truth of the matter asserted.

Rather, the court analyzed the statements with regard to the issue of whether the condemnation proceeding would "permanently solve" Wilderness Ridge's inability to access its property. *Owens*, 610 N.W.2d at 865 (noting that, pursuant to section 6A.4(2), "an owner of 'land locked' property is permitted to institute condemnation proceedings to secure a public way over other land to permanently solve the inability to access the property."). As the court stated:

[4] We note that Wilderness Ridge argues the Greens failed to preserve error with regard to the admission of the answer filed by Dubuque County. We will address this issue assuming, *arguendo*, the Greens properly preserved error.

> If Route No. 8 would be selected as the route of access, this would not be a permanent resolution of the issue. As stated by Wilderness Ridge, this would put Wilderness Ridge in a position of challenging Dubuque County with respect to Dudley Lane and the condemnation of land leading to a dispute cannot be what was intended by Iowa Code section 6A.4(2).

The court acknowledged Dubuque County's denial of Dudley Lane's existence and its adamant refusal of any responsibility or obligation to build or maintain a road that does not exist. The court therefore reasoned that a route chosen for condemnation including Dudley Lane would not permanently solve Wilderness Ridge's inability to access its property. Upon our review, we find these statements were not inadmissible hearsay. Finding no error, we affirm.

C. The Nearest Feasible Route.

The Greens argue the district court erred in determining Route No. 6 was the appropriate route to be condemned. The Greens contend the court should have determined Route No. 8 was the nearest feasible route for Wilderness Ridge to gain access to its property.

Courts are to apply Iowa Code section 6A.4(2) in determining the appropriate route to be condemned. According to that section:

> The condemned public way shall be located on a division, subdivision or "forty" line, or immediately adjacent thereto, and along the line which is the *nearest feasible route* to an existing public road, or along a route established for a period of ten years or more by an easement of record or by use and travel to and from the property by the owner and the general public.

Iowa Code § 6A.4(2) (emphasis added). In this case, the district court critically evaluated two proposed routes for condemnation: Route No. 6 and Route No. 8. After hearing in-depth expert and nonexpert testimony and receiving numerous

exhibits, the court determined Route No. 6 was the nearest feasible route. As the district court stated:

> [T]he preponderance of the evidence establishes that Route No. 6 would be more feasible to build. Wilderness Ridge's expert, Kenneth Buesing, took into account the cost of creating a public way, the terrain and interference with crops and buildings when he concluded that Route No. 6 was more feasible than Route No. 8 . . . .
>
> The undersigned relies heavily on the testimony of Kenneth Buesing. He has for many years been a registered engineer and land surveyor. He testified that from a topographical point of view, Route No. 8 is much steeper than Route No. 6. This can easily be seen by viewing Defendant's Exhibit B. Defendant's Exhibit B clearly shows the disparity in the contour lines between Route 6 and Route 8. Steeper land equates to more drainage and erosion problems. Mr. Buesing testified that the soil at Route No. 6 is very suitable for roadway fill and that drainage should not be a problem. Route No. 8 also has a great deal of thick timber which would need to be removed.

We have considered many factors upon our de novo review of the record, including, but not limited to the length, terrain challenges, maintenance challenges, and cost of road development in determining the appropriate route for Wilderness Ridge to access its property. There is significant evidence in the record showing Route No. 8 would be much more difficult and costly to build and maintain than Route No. 6, due to Route No. 8's terrain, grade, and drainage. We find no error in the district court's determination that Route No. 6 is the nearest feasible route, pursuant to section 6A.4. We affirm as to this issue.

IV. Conclusion.

Having considered all issues raised on appeal, we affirm.

AFFIRMED.

Eisenhauer, J., concurs; Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent, because I believe the majority and the district court incorrectly applied the law in this case. In determining what is the "nearest feasible route," *see* Iowa Code § 6A.4(2), the district court should consider the impact of the proposed roadway on the servient estate. Common sense dictates that this should be part of the "feasibility" inquiry. Because the district court essentially declined to consider such evidence, and focused only on which roadway would be cheaper to build and presents fewer engineering issues, I would reverse and remand.

The choice in this case was between Route 6, which cuts through the middle of the Green Brothers' 292-acre dairy farm, and Route 8, which straddles the edge of that farm and otherwise goes through undeveloped land. The Green Brothers have owned and operated their dairy farm for twenty-seven years. They maintain approximately seventy-five dairy cows. The cows use the entire property, although the farm buildings and the only water source are located at the southern end. Additionally, the Green Brothers grow corn and hay on the property.

There was substantial evidence that if Route 6 were chosen, the Green Brothers would have to fence the condemned roadway. There would be a dramatic impact on the value of their land. One of their experts estimated a $190,000 reduction in value; the other estimated a $180,000 reduction in value. The divided land would, among other things, be much less convenient to use. In addition, the Green Brothers would incur additional costs to install electricity and a well in the northern half of the property.

Wilderness Ridge acquired its seventy-five acres of landlocked wilderness land in 2006 for $130,000. It wants to have the ability to drive four-wheel drive vehicles and logging trucks across the Green Brothers' farm. It intends to use its seventy-five acres for recreational hunting, and potentially other purposes in the future.

In short, there was substantial evidence that Route 6 would do more *harm* to the Green Brothers' farm than the landlocked parcel that it seeks to *benefit* is presently worth.

In picking Route 6 over Route 8, the district court disregarded all this evidence. Instead, it basically relied on the testimony of Wilderness Ridge's expert that Route 8 would be cheaper to build and is somewhat "flatter" and thus preferable from an engineering standpoint.

Iowa Code section 6A.4(2) is an extraordinary law. It allows one private property owner to take another private property owner's land. While such laws exist in a number of jurisdictions, they are understandably not favored. *Kelly v. Panther Creek Plantation, L.L.C.*, 934 So.2d 1049, 1055-56 (Ala. 2006) (quoting earlier case to the effect that the statute giving a landlocked owner the right to condemn a way of necessity over the lands of a stranger "is not a favored statute, . . . [w]e are taking the property of one man and giving it to another"); *Brown v. McAnally*, 644 P.2d 1153, 1160 (Wash. 1982) ("We have held, and continue to hold, that the statute which gives a landlocked owner a way of necessity over lands of a stranger is not favored in law and thus must be construed strictly."); *see also Curtman v. Piezuch*, 494 S.W.2d 668, 671 (Mo. Ct.

App. 1973) (same); *McGinnis v. McCarter*, 940 A.2d 581, 584 (Pa. Cmwlth. Ct. 2008) (same); *Barge v. Sadler*, 70 S.W.3d 683, 688 (Tenn. 2002) (same).

When applying section 6A.4(2), courts are supposed to select the "nearest feasible route" that meets certain other criteria. I believe the word "feasible" incorporates consideration of the impact of the route on the servient estate. I reach this conclusion for several reasons.

First, I take the word "feasible" to mean "practical." But how can you decide whether a roadway is practical if you disregard its effects on the property it is crossing?

Second, statutory construction should reach a just and reasonable result. Iowa Code § 4.4(3). I believe it is neither just nor reasonable to hold that someone who acquires undeveloped property, knowing it is landlocked, should be entitled to the access route across another's property that is most convenient for them from an engineering and construction cost perspective, regardless of its impact on the other property owner.

Third, I believe the supreme court's decision in *Owens v. Brownlie,* 610 N.W.2d 860 (Iowa 2000), supports this construction. I agree *Owens* technically involves a slightly different issue. The question presented there was when a necessity exists to condemn an access road at all. In determining this question, the court indicates (twice) that it "may be appropriate to also consider the value of the land sought to be condemned [for the access road]." *Id*. at 868. Yet if one can consider the value of the land that would be condemned in determining the *right* to an access road, logic dictates that you can consider the value of the land that would be condemned in determining the specific *route* of that road.

Fourth, other jurisdictions have followed this approach. *See, e.g., Brothers v. Holloway*, 692 So.2d 845, 848 (Ala. Civ. App. 1997) ("we agree with the condemnees' position that their convenience was a material consideration for the trial court"); *West v. Hinksmon*, 857 P.2d 483, 487 (Colo. Ct. App. 1992) ("the condemnee should be permitted, upon proper proof, to show that an acceptable alternative route across condemnee's property exists which would be less damaging than that proposed by condemnor"). In *Wagle v. Williamson*, 810 P.2d 1372, 1376-77 (Wash. Ct. App. 1991), the court interpreted Washington's admittedly different statute and held that the trial court erred in granting an access easement that—like Route 6 here—bisected the adjacent property owner's land. The court added, "[T]he opinion of the burdened landowner, as to whether a specific way of necessity imposes a greater burden than would an alternative route, must be given considerable weight." *Id*. at 1376.

The only counterargument raised by Wilderness Ridge is that the actual condemnation damages will be determined in a separate proceeding pursuant to chapter 6B. But this argument, in my view, misses the point. The fact that damages are fixed in another proceeding in no way diminishes the importance of selecting the most "feasible" route from everyone's perspective (not just that of the landlocked property owner) in the first place. Once the parties arrive at the damages proceeding, it is too late to do anything about route selection. There is nothing inconsistent in allowing the district court to take into account the burden of a route on the servient estate at the section 6A.4(2) phase; indeed, *Owens* already dictates such an approach to some extent, while reserving the final damages award to the chapter 6B phase.

I would be prepared to accept the district court's finding that Dudley Lane is not an actual road at this point, regardless of the fact that it may appear in the ordinance books. However, resolving that issue in favor of Wilderness Ridge means only that Route 8 is 420 feet longer than Route 6. It does not establish which path is the "nearest feasible route" to an existing public road, because there is substantial evidence that Route 6 would have a serious adverse impact on the Green Brothers' dairy farm. Accordingly, I would reverse and remand for the district court to make further factual findings, using the legal standard set forth above.