RENDERED: February 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003053-MR

DENNIE BREEDING CONSTRUCTION, INC. APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 94-CI-000347

EAST KENTUCKY POWER COOPERATIVE, INC. APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND KNOX, JUDGES.

JOHNSON, JUDGE: Dennie Breeding Construction, Inc. (Breeding) appeals from a judgment entered on May 7, 1997, pursuant to a jury verdict that awarded it $22,500 as just compensation for the condemnation of land for an easement through its property in Nelson County, Kentucky. We affirm.

East Kentucky Power Cooperative, Inc. (EKPC) is a rural electric cooperative corporation organized and existing under the laws of the Commonwealth of Kentucky. It is a public utility authorized to engage in the generation, production, transmission

and distribution of electricity in Kentucky, with the authority to have and exercise the right of eminent domain. It commenced this action pursuant to Kentucky Revised Statutes (KRS) Chapter 416 for the purpose of constructing a high voltage transmission line. It sought to condemn an easement 100 feet wide and approximately 2,000 feet long, totaling approximately six acres, across a 66.88-acre tract of land owned by Breeding.

The Commissioners that were appointed by the Nelson Circuit Court awarded Breeding $12,000 for the taking. Breeding challenged the EKPC's right to condemn the property and the Commissioners' award. Following an evidentiary hearing on these issues, findings of fact, conclusions of law, and an order were entered upholding the condemnation and the Commissioners' award. Both Breeding and the EKPC excepted to the Commissioners' award and a jury trial on the issue of just compensation was held on April 28-29, 1997. Each party introduced evidence from two expert witnesses. A summary of the expert testimony at trial and the jury verdict is as follows:

Witness	"Before" Value	"After" Value	Difference	% Reduction
		For Breeding		
Leggett	$234,000	$114,000	$120,000	52%
Luckett	$234,080	$113,696	$120,384	52%

For the EKPC

Hagan	$100,000	$ 88,000	$ 12,000	12%
Hays	$140,700	$127,100	$ 13,600	10%

Jury's Verdict

"Before" Value: $149,500
"After" Value: $127,000
Difference: $22,500 or 15% reduction

The first issue raised by Breeding on appeal is whether the trial court committed prejudicial error by admitting into evidence the testimony and report of a court-appointed commissioner, Patrick Hagan (Hagan). Breeding argues that the admission of this evidence was improper (1) because Hagan had served as a commissioner in this case, (2) because Hagan's findings were not based upon any "before" or "after" values, or any comparable sales, and (3) because one of the EKPC's agents had accompanied Hagan on his viewing of the property in question.

Breeding cites West Fork Clarks River Watershed Conservancy Dist. v. Ransbottom, Ky., 420 S.W.2d 569 (1967); Commonwealth, Department of Highways v. Johnson, Ky., 403 S.W.2d 691 (1966); Commonwealth, Department of Highways v. McQuown, Ky., 395 S.W.2d 586 (1965); Commonwealth, Department of Highways v. C.S. Brent Seed Co., Ky., 376 S.W.2d 310 (1964); Commonwealth, Department of Highways v. Swift, 375 S.W.2d 691 (1964); and Commonwealth, Department of Highways v. Brubaker, Ky., 375 S.W.2d 404 (1964), for the proposition that a commissioner's testimony is improper, incompetent, and prejudicial. We find Breeding's arguments to be unpersuasive. We are of the opinion that these

cases stand generally for the proposition that a commissioner may properly testify on direct examination that he acted as a commissioner; as to the character of the inspection that he made of the premises; and as to the damages that would result from the taking. However, it is not proper for a commissioner to testify as to the amount of damages awarded by the commissioners or to undertake to explain the basis for the commissioners' award. Commonwealth, Department of Highways v. Swift, supra, at 693; Commonwealth, Department of Highways v. Evans, Ky., 361 S.W.2d 766, 770 (1962); and Webb v. Ky & W. Va. Power Co., 216 Ky. 64, 68, 287 S.W. 232 (1926).

Breeding's reliance on Swift is misplaced. In Swift, counsel, in his opening statement, told the jury the specific amount of the award that had been made by the court-appointed commissioners. In the case sub judice, Hagan was qualified as an expert, and gave his opinion of the property's "before" and "after" values. Accordingly, the identification of Hagan as a commissioner, and his testimony, were within the parameters set forth in Swift, Evans, and Webb.

Breeding properly notes that "[t]he correct measure of damages for a partial taking in a land condemnation case is the difference between the fair market value of the whole property immediately before the taking and the fair market value of the remaining property immediately after the taking." Commonwealth, Department of Highways v. Claypool, Ky., 405 S.W.2d 674, 678 (1966). Breeding contends Hagan admitted in his testimony that

he "valued the taking" instead of arriving at "before" and "after" values for the whole property as required by Claypool, supra. We disagree with Breeding's claim that the record is clear that Hagan admitted that he "valued the taking." The record shows that Hagan testified that he had in fact arrived at "before" and "after" values for the whole property as required by Claypool. While Hagan may have equivocated in his testimony, any inconsistencies in his testimony go to the credibility and weight to be placed on the evidence by the jury and not to its admissibility. Shepperson v. Kentucky Farm Bureau Mutual Ins. Co., Ky., 310 S.W.2d 262, 264 (1957); and Durbin v. Banks, 314 Ky. 192, 194-195, 234 S.W.2d 681, 682 (1950).

Breeding further argues, under the authority of Hamilton v. Commonwealth, Transportation Cabinet, Dept. of Highways, Ky., 799 S.W.2d 39 (1990), that Hagan's testimony should have been stricken. Breeding relies upon claimed "irregularities" such as Hagan's admission (1) that his report included, in addition to the 66.88-acre tract at issue, a second tract of approximately 60 acres that was not involved in the condemnation proceeding; and (2) that he viewed the property in question in the company of an employee of the EKPC. Hamilton, supra, involved an incorrect description of exactly how much acreage was being condemned. However, in the case at bar, Hagan's report included an additional tract of land that was not to be condemned, but there was no dispute over the amount of acreage in the specific tract of property that was being

condemned. Furthermore, our review of the record does not support Breeding's claim that Hagan "couldn't say for sure which property he appraised." If that fact was in question, then, again, it was for the jury to consider in weighing his testimony.

We will not disturb an evidentiary ruling of the trial court absent a clear showing of an abuse of discretion. Estep v. Commonwealth, Ky., 957 S.W.2d 191, 194 (1997). We find no such abuse on the issue of admitting Hagan's testimony. Even if it could be convincingly argued that the admission of Hagan's testimony was error, we believe any such error was harmless and "carried no particular weight with the jury." Commonwealth, Department of Highways v. Hunt, Ky., 414 S.W.2d 897, 898 (1967). Breeding is mistakened when it claims: "It is more than mere coincidence that the jury verdict was identical to the commissioner's [sic] findings in this case." Hagan's damage evaluation was $12,000 and the award by the jury was $22,500.

Breeding also claims that the jury's award was the result of improper passion and prejudice. Breeding points to the fact that the jury in this case initially returned a verdict based on a "before" value that was within the range of evidence presented, but an "after" value that was outside the range of the evidence presented. At that point, the trial court instructed the jury to deliberate further in order to come to a verdict with an "after" value that was within the range of the evidence presented. The jury then changed both the "before" and "after" figures so that they both were within the range of the evidence

presented. In the cases relied upon by Breeding, Commonwealth, Department of Highways v. Stephens Estate, Ky., 502 S.W.2d 71 (1973), and Commonwealth, Department of Highways v. Milby-Farmer Inc., Ky., 494 S.W.2d 88 (1973), the jury's final verdict had "after" values outside the range of evidence. Breeding's argument that the verdict was a "thin-air" verdict, not based upon the evidence, has no merit since the "before" and "after" values decided upon by the jury were within the range of the evidence presented. Miller v. Commonwealth, Department of Highways, Ky., 487 S.W.2d 931, 934 (1972).

The next issue concerns whether the trial court improperly admitted into evidence testimony relating to the comparison sales of properties with power transmission line easements running through them, when the sales were made after the transmission lines had been erected. Breeding argues that these comparison sales were "damage surveys" and as such were prejudicial and improperly admitted into evidence. Breeding relies upon Duerson v. East Ky Power Cooperative, Inc., Ky.App., 843 S.W.2d 340 (1992), for the position that consideration of factors other than those which bear upon the "before" and "after" values of the property being condemned is improper. In Duerson, the landowners contended that the commissioners' report on its face was improper because the condemner's petition "failed to provide sufficient information relating to the proposed easements" concerning "the risk and potential danger to health and safety" so "the commissioners can include these factors as an

element of damage for the taking." Id. at 343-344. This Court referred to this argument as "a novel contention for which we find no authority, nor are we furnished any by the appellants." Id. at 344. This Court continued by stating: "If factors other than those bearing upon the 'before and after' value of the property condemned are to be taken into consideration, it seems to us they must be authorized either by the supreme court or the legislature." Id. In our opinion the comparison sales relied upon in the case sub judice are not the type of factors referred to by this Court in Duerson. Rather, comparison sales are regularly relied upon in appraising real estate. As such, they are permissible evidence for consideration in determining "before" and "after" values. Breeding's description of the comparable sales as "damage surveys" is inaccurate. There was no error in admitting this evidence.

The next issue is whether the trial court erred when it refused to allow Breeding to introduce the testimony of James Parsons (Parsons). Parsons was an employee of the EKPC who had made an appraisal of the property to be condemned. Parsons' testimony was excluded by the trial court because Breeding had not listed Parson as an expert witness as required by local rule F.(b). The trial court also excluded Parsons' testimony pursuant to Kentucky Rules of Evidence (KRE) 408 as an offer of compromise extended in negotiations toward settlement, since Parsons had negotiated with Breeding before trial. Breeding attempted to use Parsons' testimony to rebut evidence of other appraisals that had

been introduced into evidence as a part of the EKPC's case. Breeding argued that he had complied with all discovery rules by listing on his pre-trial statement "all witnesses necessary for purposes of rebuttal". In Houser v. Coursey, 310 Ky. 625, 221 S.W.2d 432, 434 (1949), the Court quoted 31 C.J.S., Evidence, § 2, and stated that as follows:

> "Rebutting evidence is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is that evidence which has become relevant or important only as an effect of some evidence introduced by the other side. Rebutting evidence means not merely evidence which contradicts the witnesses on the opposite side, but also evidence in denial of some affirmative fact which the answering party has endeavored to prove. It embraces all testimony which tends to counteract or overcome the legal effect of the evidence for the adverse party."

We agree with Breeding that the testimony from Parsons that he sought to admit was rebuttal evidence and should have been admitted. The EKPC introduced testimony from two experts who offered "before" values of $100,000 and $140,700 and "after" values of $88,000 and $127,100, respectively. However, Parsons, an EKPC employee, made an appraisal with a "before" value of $240,000 and an "after" value of $229,000. This appraisal was much higher than the two appraisals by the EKPC's two experts who had testified at trial. Thus, Parsons' appraisal served to rebut that earlier evidence. However, if the "after" value assigned by Parsons of $229,000 were subtracted from the "before" value of $240,000, the award would be $11,000. While Breeding wishes to

argue that it suffered prejudice by not being allowed to introduce the amount of Parsons' "before" value of $240,000, we are of the opinion that any harm that may have occurred is offset by the fact that Parsons' "after" value of $229,000 would also have been admitted into evidence. Any error that may have occurred here was harmless since the jury awarded $22,500 which is more than the EKPC's other experts' awards of $12,000 and $13,600, and more than Parsons' figure of $11,000.

Breeding also argues that the trial court erred by failing to award 12% post-judgment interest pursuant to KRS 360.040 instead of 6% pursuant to KRS 416.620(5). Breeding argues that KRS 416.620(5) violates §§ 242 and 59 of the Kentucky Constitution. In Foster v. Sanders, Ky.App., 557 S.W.2d 205 (1977), this Court upheld the constitutionality of the entire Eminent Domain Act of Kentucky, including KRS 416.620, against claims that its procedures violated §§ 13 and 242 of the Kentucky Constitution. Breeding's § 59 argument is based on its claim that it is unconstitutional to limit interest to 6% rather than 12% since litigants in actions other than condemnation cases are entitled to 12% interest. Breeding argues that the 6% interest is special legislation prohibited by § 59, Paragraph 21 of the Kentucky Constitution.

In Union Trust, Inc. v. Brown, Ky.App., 757 S.W.2d 218, 219 (1988), this Court stated that "[a] statute must meet two requirements to avoid unconstitutionality under Section 59. The statute in question must apply equally to all in a class, and

there must be distinctive and natural reasons inducing and supporting the classification." Citing Schoo v. Rose, Ky., 270 S.W.2d 940 (1954). Both of these requirements are met herein because the statute applies equally to every person whose property is condemned in Kentucky under the Eminent Domain Act, and because there are sound public policy reasons behind the need for condemnation proceedings for the greater good of the people of this Commonwealth.

This Court in Bush v. Commonwealth, Department of Highways, Transportation Cabinet, Ky.App., 777 S.W.2d 608 (1989), addressed the issue of pre-judgment and post-judgment interest and KRS 416.620(5) by stating:

> The statute does not provide that such award of interest shall run only to the date of the entry of the final judgment. The statute does not provide that the judgment is enforceable against the Commonwealth as other judgments would be enforceable against a private party. The legislature could have made such provisions, but it did not.

Id. at 610 (emphases in original). Breeding argues that this Court's holding in Bush, supra, applies only to the Commonwealth whereas the EKPC is a private cooperative. However, since the power of the EKPC to condemn is authorized by the Commonwealth for the common good of the people, we do not believe there is any basis in the law to treat a private corporation acting in this capacity any differently.

The final issue raised by Breeding is that it was improper to require a unanimous verdict on damages in a

condemnation case. We disagree. The Court in Harlan County v. Cole, 218 Ky. 819, 824, 292 S.W. 501, 504 (1927), stated: "Section 242 of the Constitution plainly says that the damages for property taken for public use must be assessed by a jury according to the course of the common law. This necessarily must be a unanimous verdict of a jury of twelve members. The common law requires the concurrence of all the members of a jury of twelve to return a verdict." See also, Commonwealth Department of Highways v. Gilles, Ky. 516 S.W.2d 338, 339 (1974); and Franklin Co. V. Bailey, 250 Ky. 528, 63 S.W.2d 622 (1933). In requiring a unanimous verdict, the trial court followed the established law of this commonwealth.

For the foregoing reasons, the judgment of the Nelson Circuit Court is affirmed.

KNOX, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING. I concur with the majority except as to its reasoning concerning the testimony of James Parsons. The majority states that Parsons' testimony was admissible as rebuttal testimony but that any error in excluding it was harmless. In my opinion, the trial court properly excluded Parsons' testimony due to Breeding's failure to comply with local discovery rules concerning expert witnesses. Breeding's attempt to have the testimony admitted as rebuttal evidence was merely an attempt to get in "through the back door" expert testimony that was admissible only in its case in chief.

BRIEFS FOR APPELLANT:

Hon. John Douglas Hubbard
Hon. Jason P. Floyd
Bardstown, KY

ORAL ARGUMENT FOR APPELLANT:

Hon. Jason P. Floyd
Bardstown, KY

BRIEF FOR APPELLEE:

Hon. Foster J. Collis
Hon. Dale W. Henley
Winchester, KY

ORAL ARGUMENT FOR APPELLEE:

Hon. Dale W. Henley
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