

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002474-MR

CARRIE D. FRANK

APPELLANT

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
v. HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 01-CI-00052

BIG RIVERS ELECTRIC CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Carrie D. Frank has appealed from the findings of fact, conclusions of law, and interlocutory judgment entered by the Breckinridge Circuit Court on November 13, 2001, which ruled that Big Rivers Electric Corporation was authorized to condemn a permanent easement across a portion of Frank's property, which consists of approximately 233 acres,¹ for the

¹ Frank's entire tract of land is located in Breckinridge County near the city limits of Hardinsburg. The eastern most tip of Frank's property runs parallel to Kentucky State Highway 261. The northern most tip of her property abuts U.S. Highway 60.

purpose of constructing an electric transmission line. The trial court also ruled that Big Rivers was entitled to the right of ingress and egress, where reasonably necessary, across Frank's remaining property for the purpose of maintaining and operating its easement. Having concluded that the trial court did not err in its disposition of this matter, we affirm.

Big Rivers is a non-profit rural electric cooperative corporation organized pursuant to Kentucky Revised Statutes (KRS) 279.010, et seq. On March 9, 2001, Big Rivers filed a petition to condemn a permanent easement across Frank's land pursuant to the Eminent Domain Act² and KRS 279.110(4). The petition alleged that a permanent easement across Frank's land was necessary "for the construction and operation of an electric transmission line which will provide electric power to a newly constructed Meade County RECC substation [] located in Grayson County, Kentucky[.]" The petition further alleged that the transmission line was necessary due to an increase in the demand for electricity in the Rough River area. In particular, Big Rivers stated that it intended to install four wooden electric poles on Frank's property. Big Rivers also sought to acquire the right of ingress and egress across Frank's remaining property for the purpose of operating and maintaining the easement it sought to condemn. On March 23, 2001, the trial

² KRS 416.540, et seq.

court entered an order appointing three commissioners, who assessed the reduction in the fair market value of Frank's property by reason of the taking at \$16,236.00.

On April 27, 2001, Frank filed a motion to dismiss the condemnation petition filed by Big Rivers on the ground that Big Rivers had failed to provide a particular description of the property sought to be condemned as mandated by KRS 416.570(2).³ Frank also filed an answer to the condemnation petition in which she averred, among other defenses, that Big Rivers had failed to prove that a "general easement to enter upon and across [her property] at all locations" was necessary.⁴ On May 11, 2001, Big Rivers filed a motion for interlocutory judgment. Big Rivers insisted that it had in fact complied with the particularity requirements of KRS 416.570(2), and that Frank's motion was

³ KRS 416.570 provides in relevant part as follows:

Except as otherwise provided in KRS 416.560, a condemnor seeking to condemn property or the use and occupation thereof, shall file a verified petition in the circuit court of the county in which all or the greater portion of the property sought to be condemned is located, which petition shall state that it is filed under the provisions of KRS 416.550 to 416.670 and shall contain, in substance:

. . . .

(2) A particular description of the property and the use and occupation thereof sought to be condemned[.]

⁴ In other words, Frank denied that Big Rivers had a right to ingress and egress upon her property "at all locations" for the purpose of maintaining and operating the easement it sought to condemn. The general right to ingress and egress upon a servient estate for the purpose of operating and maintaining a permanent easement is sometimes referred to as a "secondary easement." See e.g., 25 Am.Jur.2d, Easements and Licenses, § 95 (1996).

merely an attempt to delay the proceedings. In its motion for interlocutory judgment, Big Rivers described the easement it sought to obtain as follows:

The easement is 100 feet in width, being 50 feet on either side of the aforementioned centerline. The easement crosses the Frank property for a distance of 3,216.3 feet.

Big Rivers further alleged that it was not required to establish necessity for the right of ingress and egress across Frank's remaining property; Big Rivers claimed that it was only required to establish necessity for the easement itself and not for the limited right of ingress and egress.

On June 6, 2001, a hearing was held for the purpose of resolving these issues. At that time Frank requested additional time to file a memorandum in support of her motion to dismiss. The trial court granted Frank's request and on June 15, 2001, she tendered a memorandum in support of her motion to dismiss. On June 27, 2001, the trial court entered an order denying Frank's motion to dismiss and an order denying Big Rivers' motion for interlocutory judgment. As for Frank's motion to dismiss, the trial court reasoned that dismissal was unwarranted as the errors alleged by Frank were curable through the amendment process. As for Big Rivers' motion for interlocutory judgment, the trial court reasoned that Big Rivers had failed to describe the easement it sought to obtain with the requisite

degree of particularity. More specifically, the trial court pointed out that Big Rivers had failed to describe a "point of origination and point of termination" for the easement it had requested. In respect to the right of ingress and egress sought by Big Rivers, the trial court ruled as follows:

If the condemnor desires the right to ingress and egress by means other than over the [dominant] estate, then it must describe that easement in its complaint in particularity and be responsible for the diminution in value to the whole resulting from that easement. In the event that the petitioner wishes to impose the right of ingress and egress upon the entire tract of land (230 acres, plus or minus), it may do so but should not then complain of the compensation awarded to the condemnee. The case of Tennessee Gas Transmission v. Teater, Ky., 252 S.W.2d 674 (1952), clearly stands for the proposition that the right of ingress and egress is a right subject to condemnation and is compensable to the landlord.

The trial court granted Big Rivers leave to file amended pleadings.

On July 12, 2001, Big Rivers filed an amended petition and a motion for interlocutory judgment. In its amended petition, Big Rivers attempted to further describe the easement it sought to obtain as follows:

Easement Tract No.1

The easement acquired shall be 100 feet in width and shall be 50 feet on either side of the following described centerline:

Beginning at a corner marked by a dead tree and a corner fence post, as shown on the attached plat, thence in a northwest direction a distance of 337.5 feet to a point in the property line, marked by a fence, of Carrie Frank, which marks the beginning point of the easement; thence along the following centerline and 50 feet on either side thereof south 10 degrees 43 minutes 35 seconds west 372.1 feet to the property line marked by a fence, of Carrie Frank.

Easement Tract No.2

The easement acquired shall be 100 feet in width and shall be 50 feet on either side of the following described centerline:

Beginning at the intersection of two fences at a corner of the Carrie Frank property, thence in a southeast direction 712 feet to a point in the fence line of the Carrie Frank property, which marks the beginning point of the easement; thence along the following centerline and 50 feet on either side thereof south 10 degree[s] 43 minutes 35 seconds west a total of 1784.9 feet; thence south 20 degrees 43 minutes 23 seconds west 1059.3 feet to a point in the property line of Carrie Frank, marked by a fence, which point is 910.8 feet from a corner fence post on the southwest corner of the Frank property.

In total, Easement Tract No.1 and Easement Tract No.2 contain 7.38 acres, more or less.

On July 18, 2001, a second hearing was held for the purpose of addressing Big Rivers' amended petition and motion for interlocutory judgment. The trial court heard extensive arguments from both parties, after which it concluded that Big

Rivers had failed to describe the right of ingress and egress it had requested with any degree of particularity. The trial court acknowledged that Big Rivers had a right to ingress and egress upon Frank's remaining property for the purpose of maintaining and operating its easement, however, the trial court determined that Big Rivers had failed to describe, with any specificity, the area it sought to condemn for this purpose. The trial court also took issue with an allegation in the amended petition which claimed that Big Rivers had the right to access the easement at any location for the purpose of removing any obstructions located within or without the easement "in such proximity to the installed electric facilities so as to endanger those facilities or create the threat of a service interruption."⁵ The trial court was of the opinion that this particular provision was overly broad in the sense that it failed to delineate precisely how far outside of the easement Big Rivers was permitted to go. Consequently, the trial court denied Big Rivers' motion for interlocutory judgment. Once again, however, the trial court granted Big Rivers leave to file amended pleadings.

On August 1, 2001, Big Rivers filed a motion requesting the trial court's permission to file an amended petition, which purported to restrict its right to access the easement under the aforementioned "danger tree provision" to a

⁵ Counsel for Big Rivers labeled this provision the "danger tree provision."

"maximum distance of seventy-five (75) feet from the centerline of the easement." On August 8, 2001, the trial court granted Big Rivers' motion and entered an order requiring the previously appointed commissioners to file a supplemental report assessing the fair market value of Frank's property in light of the amended petition. Big Rivers filed its amended petition on August 9, 2001. On August 14, 2001, the commissioners filed a report which assessed the total reduction in the fair market value of Frank's property at \$19,501.00.

On August 18, 2001, Frank filed an answer to the amended petition, in which she averred, among other defenses, that Big Rivers had failed to prove that it needed an "access easement across and upon all of [her land.]"⁶ Frank further averred that Big Rivers had failed to "describe[] a particular route by metes and bounds of the exact location of where [Big Rivers], its agents, employees, and all other persons in behalf of [Big Rivers] will travel in crossing [her] property in getting to and from the primary easement." On August 27, 2001, Frank filed a motion for an evidentiary hearing on the issue of necessity in respect to the general right of ingress and egress sought by Big Rivers. Frank also requested the trial court to issue an order requiring Big Rivers to provide a "metes and

⁶ In other words, Frank once again denied that Big Rivers had a right to ingress and egress upon her property "at all locations" for the purpose of maintaining and operating the easement it sought to condemn.

bounds" description of the right of ingress and egress it sought to obtain.

On August 29, 2001, Big Rivers filed a motion for interlocutory judgment. Big Rivers insisted that it was "entitled to the limited right of ingress and egress[.]" Big Rivers described the right of ingress and egress it sought to obtain as follows:

The right of reasonable ingress and egress across [Frank's remaining lands] to facilitate performance of the rights sought in this amended verified petition, except that ingress and egress shall be along existing public roads and farm roads, where practicable.

Big Rivers also insisted that the trial court had already decided the issue of ingress and egress in its favor. Big Rivers claimed that the only issue then before the trial court concerned the so-called "danger tree provision." Big Rivers further alleged that it had amended its petition to address the concerns expressed by the trial court in this respect.

On September 5, 2001, yet another hearing was held for the purpose of addressing Big Rivers' amended petition and motion for interlocutory judgment. Once again, the trial court heard arguments from both parties, after which it suggested that Big Rivers omit the words "where practicable" from its description of the right of ingress and egress it sought to obtain. The trial court opined that the phrase "where

reasonably possible" provided a more precise description. The trial court did not rule on Frank's motion for an evidentiary hearing at that time.

On September 10, 2001, Frank filed a memorandum in support of her motion for an evidentiary hearing on the issue of necessity. Frank insisted that she was entitled to an evidentiary hearing on this issue pursuant to KRS 416.610(4), which provides in relevant part as follows:

If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has such right.

Frank further insisted that it was not within the trial court's discretion to decide whether to hold a hearing on the issue of necessity; she claimed that such a hearing was mandatory under the statute.

On October 15, 2001, the trial court entered an opinion and order denying Frank's motion for an evidentiary hearing. The trial court reasoned that Frank had failed to allege any "factual basis which would put at issue the right of [Big Rivers] to condemn the secondary easements." The trial court stated that "[Frank's] objections with respect to whether the secondary easements are condemnable are questions of law,

not fact." The trial court went on to note that Frank "has been afforded every opportunity to present her side of the case through numerous briefs and several oral arguments[,] thereby satisfying the hearing requirements of KRS 416.610(4). In respect to Frank's contention that a right of ingress and egress across her entire property was unnecessary, the trial court ruled as follows:

[I]t may be that during the life of the primary easement it will never be necessary for [Petitioner] to encroach upon any other portion of Respondent's lands. This would seem likely given that there are currently two country roads which provide access to the primary easement.

However, it may also be that some now unforeseeable need to encroach upon another portion of the land may arise in the future. For this reason, it would be impossible for this Court to determine this issue prospectively. The better option is to include the concept of "necessity" in the description of the secondary easement, and to allow a fact-finder to determine the necessity if a dispute arises in the future. Therefore, the Court recommends that the right of ingress and egress be described as follows:

"the right of ingress and egress across the remaining lands of respondent where reasonably necessary to facilitate performance of the rights sought in this Petition, except that ingress and egress shall be along then existing public roads, and if none, then existing farm roads, and if none, then where reasonably possible subject to any actual

damage caused by petitioner, its successors or assigns" [emphases original].

Petitioner would thus have a standard by which to conform its actions.

On November 13, 2001, the trial court entered findings of fact, conclusions of law and an interlocutory judgment in conformity with its opinion and order entered on October 15, 2001. Specifically, the trial court concluded that Big Rivers had the authority to condemn the easement described in its amended petition and that Big Rivers was entitled to the right of ingress and egress across Frank's remaining property for the purpose of operating and maintaining its easement, "but [that] such right of ingress and egress [was] a factor to be considered in determining the after value of [Frank's] property in the event of a trial with respect to the issue of just compensation."⁷ This appeal followed.⁸

Frank claims that she was entitled to an evidentiary hearing on the issue of necessity in respect to the right of ingress and egress requested by Big Rivers. Frank claims the burden was on Big Rivers to establish that it needed the right

⁷ "Such a burden is an encroachment on the dominion, reduces the marketable value of the property, and is a damage for which compensation must be paid." Tennessee Gas Transmission Co. v. Million, 314 Ky. 137, 143, 234 S.W.2d 152, 156 (1950)(citing Tennessee Gas Transmission Co. v. Jackman, 311 Ky. 507, 509, 224 S.W.2d 660 (1949)).

⁸ Frank and Big Rivers filed exceptions to the Commissioner's report pursuant to KRS 416.620 along with a request for a jury trial on the issue of damages. Ratliff v. Fiscal Court of Caldwell County, Ky., 617 S.W.2d 36, 39 (1981), recognized the right of an interlocutory appeal.

of ingress and egress across and upon her remaining property for the purpose of maintaining and operating its easement. Frank insists that Big Rivers failed to satisfy its burden in this respect. We disagree.

First and foremost, it has long been the law of this Commonwealth that the right of ingress and egress is a right subject to acquisition by condemnation.⁹ The following annotation adequately summarizes the issue:

In order that the owner of an easement may perform the duty of keeping it in repair, he has the right to enter the servient estate at all reasonable times to effect the necessary repairs and maintenance, or even to make original constructions necessary for enjoyment of the easement. Such right is an incident of the easement, and is sometimes called a "secondary easement." Such secondary easements can be exercised only when necessary, and in such a reasonable manner as not to increase needlessly the burden on, or go beyond the boundaries of, the servient estate [footnotes omitted].¹⁰

⁹ See e.g., Rogers v. Tennessee Gas & Transmission Co., 304 Ky. 863, 202 S.W.2d 737 (1947).

¹⁰ 25 Am.Jur.2d, Easements and Licenses, § 95 (1996). See also SMB Investments v. Iowa-Illinois Gas and Electric Co., Iowa., 329 N.W.2d 635, 638 (1983)(quoting Thompson, Real Property, § 428 (1961)):

"The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a "secondary easement," a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. The owner of the dominant estate may enter on the servient tenement, and there do any act necessary for the proper use of the easement. This secondary easement can be exercised only when necessary, and in such a

Since the right to reasonable ingress and egress upon a servient estate for the purpose of maintaining and operating a permanent easement is a right that flows with the easement by implication, it necessarily follows that an entity seeking to condemn an easement for any authorized purpose need only establish necessity for the easement itself, and not for the limited right of ingress and egress. In other words, because Big Rivers was entitled to a permanent easement across Frank's land for the purpose of constructing and operating an electric transmission line, it was also entitled to such use of Frank's land as reasonably necessary to enjoy that easement.¹¹ Thus, Frank was not entitled to a hearing on the issue of necessity in respect to the right of ingress and egress requested by Big Rivers in its condemnation petition.¹² Nevertheless, we agree with the trial court that Frank had "every opportunity to

reasonable manner as not to needlessly increase the burden upon the servient tenement. The grant of the easement carries with it by implication whatever incidental right is necessary to its beneficial enjoyment, provided the grantor has power to bestow it."

¹¹ See Farmer v. Kentucky Utilities Co., Ky., 642 S.W.2d 579 (1982). "It is evident, however, that the Kentucky Utilities Company is limited in the manner and extent of its usage of the servient estate in that only so much thereof may be encroached upon as is necessary to the natural and reasonable use of its primary easement." Id. at 581.

¹² Furthermore, the party challenging a condemnation petition bears the burden of establishing the lack of necessity. See e.g., Decker v. City of Somerset, Ky.App., 838 S.W.2d 417, 423 (1992); Embry v. City of Caneyville, Ky., 397 S.W.2d 141, 143 (1965); and McGee v. City of Williamstown, Ky., 308 S.W.2d 795, 797 (1957).

present her side of the case through numerous briefs and several oral arguments[.]” In addition, we hasten to point out that the limited right of ingress and egress possessed by Big Rivers may only be exercised in the event that Big Rivers is unable to access its easement via “then existing public roads and, if none, then existing farm roads[.]” Moreover, Frank is entitled to any “actual damage” caused by Big Rivers in the exercise of this right. That is to say, Big Rivers is not permitted to roam at will over Frank’s property. Quite the contrary, Big Rivers must exercise its limited right of ingress and egress “only when necessary, and in such a reasonable manner as not to increase needlessly the burden on . . . the servient estate” [footnote omitted].¹³

As for Frank’s contention that Big Rivers failed to establish that the limited right of ingress and egress across her property is necessary, the following observation provided by the Supreme Court of Virginia is particularly on point:

Whenever an electric transmission line is erected, many citizens of the areas served become dependent upon that facility for light, heat and power. Once installed, its maintenance is necessary for their health, comfort and welfare.

It is common knowledge that hurricanes and tornadoes of unusual violence cause widespread destruction. It is also known that transmission lines are among the chief

¹³ 25 Am.Jur.2d, Easements and Licenses, § 95 (1996).

victims of that character of elemental disturbance. When extensively damaged, prompt repair of electric transmission lines and resumption of service becomes urgent public necessities.¹⁴

Based upon the foregoing reasons, the findings of fact, conclusions of law, and interlocutory judgment entered by the Breckinridge Circuit Court on November 13, 2001, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert M. O'Reilly
Hardinsburg, Kentucky

BRIEF FOR APPELLEE:

Frank Stainback
James M. Miller
Owensboro, Kentucky

¹⁴ Virginia Electric & Power Co. v. Webb, 196 Va. 555, 84 S.E.2d 735, 740 (1954).