STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

DAVID WAGLEY, BARBARA WAGLEY, BANK OF LENAWEE, and PAVILLION MORTGAGE,

Defendants-Appellees.

FOR PUBLICATION
May 21, 2013

No. 311255
Lenawee Circuit Court
LC No. 05-001960-CC

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

K. F. KELLY, J. (*concurring in part and dissenting in part*)

Aside from the issue of statutory interest, I fully agree with the majority's well-written and thorough analysis of this difficult and complex case. However, I believe defendants remained in possession of the property and therefore waived any statutory interest. I would, therefore, reverse that portion of the trial court's order awarding statutory interest pursuant to MCL 213.65.

"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. To that end, the first criterion in determining legislative intent is the language of the statute. If the statutory language is unambiguous, then the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Barclae v Zarb*, ___ Mich App ___; ___ NW2d ___ (Docket No. 299986, issued April 16, 2013), slip op, p 5 (citations omitted).

MCL 213.65 provides, in relevant part, that a "court shall award interest on the judgment amount or part of the amount from the date of the filing of the complaint to the date that payment of the amount or part of the amount is tendered. . . . However, an owner remaining in possession after the date that the complaint is filed waives the interest for the period of the possession." MCL 213.65(1) and (2). A plain reading of the statute and the particular facts of this case reveal that the trial court erred in awarding statutory interest where defendants clearly remained in possession of the property.

It is true that, pursuant to MCL 213.57, title to defendants' property vested in plaintiff as of the date of the filing of the complaint for condemnation. However, although *title* automatically vested in plaintiff at the time the complaint was filed, a trial court must take action

in order for *possession* of the property to pass to plaintiff. MCL 213.59 provides that "the court shall fix the time and terms for surrender of possession of the property to the agency."

The difference between title and possession is buttressed by our Court's decision in *Dep't of Transportation v Jorissen*, 146 Mich App 207, 213-214; 379 NW2d 424 (1985)[1]:

> MCL § 213.59(1) . . . provides that after the agency has fulfilled certain requirements the trial court shall fix the time and terms for the surrender of possession of the property to the agency. MCL § 213.59, subds. (2), and (3); . . .govern the procedures regarding the granting of interim possession to the agency. The Legislature contemplated that the owner of the property would remain in possession until the trial court ordered surrender of possession or interim possession. Until that time, the owner of the property retains possession of the property. An agency may not obtain possession absent an order of surrender of possession or interim possession.
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> In this case, [although title vested in plaintiff on January 9 when it filed the complaint] the trial court ordered defendants to surrender possession of the property to plaintiff on or before May 15, 1981. There was no order of interim possession. Plaintiff did not obtain possession of the property until May 15. Since defendants remained in possession of the property until May 15, defendants waived their right to interest on the judgment for that period. MCL § 213.65. If defendants were not "in possession", id., until May 15, then the surrender of possession ordered by the court was without meaning and had no effect.

Here, like in *Jorissen*, there was no interim order awarding possession. And although there is no record evidence that defendants actually continued to occupy or use the property, such an inquiry is not dispositive of whether a party remains in possession of the property:

> We reject defendants' argument that they did not remain in possession of the land because they were in Florida and received no income or use of the land after the complaint was filed. This argument confuses the right of possession with the notion of actual presence of the land. Defendants could not, by their temporary absence, deprive themselves of possession of the land. Defendants had the right to occupy and use the premises. They were in possession. That the land produced no income during the relevant period resulted from its vacant state and the change of seasons. More importantly, there is no connection between defendants' failure to obtain such income and the fact whether they were in possession or not. Surely a person may possess land which is not income-producing. One may also be in possession of land the income from which is for some reason being received by another. In the instant case, the dispositive fact is that defendants asked for and were granted the right of possession until May 15,

[1] The *Jorissen* Court interpreted an earlier version of MCL 213.65, but the earlier version was substantially similar.

> 1981. Since the statute allows interest to run from the date of possession, that is the date from which interest runs.
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> The term "property" includes, in addition to title and possession, "the rights of acquisition and control, the right to make any legitimate use or disposal of the thing owned, such as to pledge it for a debt, or to sell or transfer it". Until May 15, 1981, defendants were free to enter the premises and use the property. [*Id.* at 214-215 (citations omitted).]

It is undisputed that plaintiff has had possession of the rights acquired through the avigation easement since the date of the trial court's order, November 21, 2007. While evidence existed that imposition of the easement interfered with defendants' use and enjoyment of the property, it did not "permanently deprive[] [defendants] of any possession or use of their residence." See *Charles Murphy MD PC, v City of Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). Although the final judgment indicated that the jury determined "that the practical value or utility of the remainder of the Subject Property has been destroyed by the taking [of the easement],"[2] this is not the equivalent of a deprivation of possession and use during the pendency of these proceedings, thus rendering unavailing defendants' assertion of entitlement to interest pursuant to MCL 213.65. Such an outcome is consistent with the intent and purpose underlying the concept of just compensation. "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999) quoting *K & K Construction, Inc. v Dep't of Natural Resources*, 217 Mich App 56, 72-73; 551 N.W.2d 413 (1996).

I would reverse the trial court's award of statutory interest.

/s/ Kirsten Frank Kelly

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[2] MCL 213.54(1) provides: "If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict." "[T]he 'acquisition of a portion of' any given property would relate to the county's acquisition of an avigation easement interest from the property owner." *Co of Lenawee v Wagley (Wagley II)*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 302533, 302534, 302535, 302537, 302538), upub op, at n 2.