NO. COA05-1505

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

LEVEL 3 COMMUNICATIONS, LLC,
Petitioner-Appellant,

v.

Mecklenburg County
No. 00 SP 815

CHARLES G. COUCH, JR., JOE C. YOUNG, TRUSTEE, U/A/ DATED DECEMBER 24, 1992 WITH WAYNE T. UPCHURCH AND ELIZABETH C. UPCHURCH, KNOWN AS THE BARRY UPCHURCH TRUST, JOE C. YOUNG, TRUSTEE, U/A/ DATED DECEMBER 24, 1992 WITH WAYNE T. UPCHURCH AND ELIZABETH C. UPCHURCH, KNOWN AS THE GRAVES UPCHURCH TRUST,
Respondent-Appellees.

Appeal by plaintiff from judgment of Judge Timothy L. Patti entered 30 March 2005; Judge Timothy L. Patti's 16 March 2005 denial from the bench of Petitioner's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict Pursuant to Rule 50; and an order entered 26 May 2005 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 May 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Mark P. Henriques, for petitioner appellant.

James, McElroy & Diehl, P.A., by Bruce M. Simpson, for respondent appellee.

MCCULLOUGH, Judge.

Plaintiff appeals from judgment entered after a jury verdict awarding defendants just compensation in the amount of $150,000 for condemnation of an easement and an order denying plaintiff's motion for new trial. We affirm.

FACTS

On 21 March 2000, plaintiff, Level 3 Communications ("Level 3") filed a petition in Mecklenburg County Superior Court to condemn a 10-foot easement through property owned by Charles G. Couch, Jr., the Barry Upchurch Trust, and the Graves Upchurch Trust ("defendants"). The Clerk of Superior Court entered judgment for defendants determining that Level 3 had been granted interim construction authority for long line telecommunications in the State of North Carolina, Certificate of Public Convenience and Necessity to provide intrastate, interexchange, facilities-based long distance telecommunications services in North Carolina and local telecommunications services in North Carolina, and that in order to carry out such public business for the public use and benefit required certain rights of defendants' property. The judgment further stated that defendants were entitled to just compensation in the amount of $1,300.00. On 16 October 2003 defendants gave notice of appeal from the entry of this judgment and made a demand for a jury trial in Mecklenburg County Superior Court.

The following pertinent background information was adduced at trial: The property which is the subject of the dispute consists of two parcels owned by defendants. In 1961 George P. Wadsworth, as

receiver for a third-party company, deeded a parcel of land to Charles G. Couch and Beach Hall for the price of $43,200.00. In 1969, a second parcel was deeded to Charles G. Couch and Beach Hall for the price of $49,000.00. The two deeds together make up the 319 to 320 acres of property which contain the easement subject to dispute. On 30 July 1982, Beach Hall and his wife Sue G. Hall deeded their one-half interest in the property acquired in the two previous deeds to Labouisse & Couch, Inc., a company owned by Charles G. Couch for the price of $140,000.00. At the time of Charles G. Couch's death in 1986, the property was split into a one-half interest owned by Charles G. Couch and one-half interest owned by Labouisse & Couch, Inc. Upon his death, Charles G. Couch left everything he owned to his son and daughter, Charles G. Couch, Jr. and Elizabeth Upchurch.

In October 1987, a deed was executed transferring a one-half interest in the property from Labouisse & Couch, Inc. to Charles G. Couch, Jr. and Elizabeth Upchurch. At the time of transfer, the property was valued for tax purposes at $725,000.00. In 1992, Elizabeth Upchurch and her husband transferred a one-half interest into the Graves-Upchurch Trust and Barry Upchurch Trust making Joe C. Young (Mr. Young) the trustee of both trusts.

Sometime around 1941, the tracts of land owned by defendants became subject to a 30-foot easement in favor of Plantation Pipeline Company ("Plantation Pipeline"). The easement gave Plantation Pipeline a right-of-way and easement for the purposes of installing pipes and transporting petroleum based products. In June

1974, an agreement was executed granting an additional 20-foot easement, creating a 50-foot easement, in favor of Plantation Pipeline for the price of $25,000.00. At some point after the granting of the easements, Plantation Pipeline installed certain pipes underground within their 50-foot easement.

Level 3 attempted to negotiate with defendants to acquire an easement over defendant's property for the purpose of placing fiber optic telecommunication cables through the 10-inch pipe located within the Pipeline Plantation easement as a licensed utility company. The parties were unable to reach an agreement and therefore Level 3 instituted action for condemnation proceedings.

At the jury proceeding to determine just compensation, Mr. Young, as trustee for the trusts holding an interest in the property, testified to the background and history regarding the two tracts of land, the granting of the easements, and the fair market value of the easement and the land without objection. A summary of the history of ownership transfers and value of property was introduced at trial as Exhibit 8A over the objection of Level 3.

Mr. Young further testified that in his opinion he believed the easement, the rights that Level 3 was obtaining, had a value of $190,000.00. Mr. Young gave further testimony in regard to the value of the land now, as compared to the value of the land at the time that the original easement was acquired. A written summary of this testimony was introduced at trial as Exhibit 8B over the objections of Level 3. Mr. Young also produced evidence showing the value of the land as $9,000,000.00 after the taking by Level 3 and

opined that the difference between the fair market value before the taking and after the taking was $190,000.00.

At the close of defendant's evidence and again at the close of all evidence, Level 3 made a motion for directed verdict which was denied by the trial judge. At the charge conference, Level 3 requested a jury instruction regarding an easement within an easement. The language of the proposed jury instruction was as follows:

> Petitioner Level 3 contends that the Level 3 easement is located entirely within an existing easement owned by Plantation Pipeline Company. You are instructed that if you find that the Level 3 easement is within land already burdened by an existing easement, you are to award damages only for the additional burden caused by the Level 3 easement. In other words, you are to consider the Respondents' land not in its pristine and [u]nencumbered state, but encumbered by any easements exist[ing] prior to the Level 3 easement. You are to award the difference in the fair market value of Respondents' land subject to the existing easement, immediately before and immediately after subjecting it to the additional easement imposed by Level 3.

The judge denied the request to have the jury instructed based on the proposed language and instead instructed based on the Pattern Jury Instructions.

The jury verdict form indicated two preliminary questions for the jury to answer:

> 1. What was the fair market value of the portion of Respondents' property taken by Level 3 Communications, LLC at the time of the taking?
>
> 2. What was the difference between the fair market value of Respondents' entire

> property immediately before the taking and the fair market value of the remainder immediately after the taking?

The jury answered both preliminary questions with the amount of $150,000.00 and therefore determined the amount of just compensation for the taking to be $150,000.00. Judgment was entered on 30 March 2005 in accordance with the jury verdict and on 31 March 2005, Level 3 made a motion for a new trial which was denied by the trial judge.

Plaintiff now appeals.

ANALYSIS

I

Level 3 contends on appeal that the trial court erred in denying their request for a jury instruction containing instructional language as to how the jury should treat the issue of an easement within an easement. We disagree.

On appeal, this Court considers a jury charge contextually and in its entirety. *Jones v. Satterfield Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439, *cert. denied,* 282 N.C. 304, 192 S.E.2d 194 (1972). The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]" *Id.* at 86-87, 191 S.E.2d at 440. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *disc. review denied,* 321 N.C. 474, 364 S.E.2d 924 (1988). "Under such a

standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.*

The trial judge instructed the jury that there were two different methods for determining the amount of just compensation that defendants were entitled to receive and that the jury should award the greater of those two amounts. The trial judge instructed the jury that the two valuations to compare were (1) the fair market value of the easement across defendants' property taken by Level 3 at the time of the taking, and (2) the difference between the fair market value of the entire property immediately before the taking, and the fair market value of the remainder immediately after the taking. In instructing the jury on both of these valuations, the judge clearly instructed in both instances that in arriving at the fair market value of the property, the jury was to "consider not only the use of the property, at the time of the taking[,] but also, all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use[.]" Taken in context with the evidence adduced at trial, the instruction given by the trial court instructed the jury as to the **substance** of the special instruction requested by Level 3, however in different language than that requested. *See Calhoun v. Highway Com.*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935) (Our Supreme Court has held that, when a party requests a special instruction

that is "correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the [request], is nevertheless required to give the instruction, in substance at least[.]").

The evidence adduced at trial clearly showed that the property in dispute was subject to a previous easement held by Plantation Pipeline. In denying the request for a jury instruction on an easement within an easement, the judge merely stated that, in his discretion, he was opting to instruct using the pattern jury instruction, instead of that proposed by Level 3. The trial judge made no admonishment against Level 3 presenting their argument before the jury that defendants were entitled compensation reflecting only the additional burden caused by their taking. The jury instruction clearly directed the jury to consider the use of the property at the time of the taking, the fact that the property was already encumbered, and therefore, it cannot be said that given the jury instructions, taken as a whole, the jury was misled as to the law. Therefore, this assignment of error is overruled.

II

Next, Level 3 argues on appeal that the trial court erred in admitting certain evidence based on the contention that this evidence was inadmissible. We find no merit to this contention.

Level 3 cites numerous instances of testimony and exhibits which it contends were inadmissible and error, therefore warranting a new trial. However, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a

timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1) (2006).

Further, even assuming *arguendo* that the error was properly preserved for appeal, where a litigant contends that the trial court erroneously admitted inadmissible evidence, they must come forth, at the appellate level, and make a showing as to the prejudicial effect the admission of such evidence had on the outcome of the trial. *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002) ("The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred."), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). The erroneous admission of testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. review denied,* 314 N.C. 336, 33 S.E.2d 496 (1985).

A.

Level 3 contends that it was error for the trial court to admit Exhibits 8A and 8B where they contained inadmissible testimony. However, it is clear from a review of the transcript and the exhibits that 8A and 8B were mere compilations of testimony given at trial by Mr. Young.

Exhibit 8A presented a summary of history of ownership, transfers, and the value of property, all of which Mr. Young

testified to before the exhibit was tendered to the court, without objection by Level 3. Exhibit 8B is a written summary of the method used by Mr. Young to compute the value of the 10-foot easement based on relative property values. Again, the values and computations contained in Exhibit 8B were mere transcriptions of the testimony given by Mr. Young without objection by Level 3. *Id.*

Even assuming *arguendo* that the evidence was inadmissible and that the error was properly preserved for appellate review, it cannot be said that the introduction of the exhibits as evidence had any effect on the outcome of the trial where Mr. Young had previously testified, without objection, to the contents contained in both exhibits.

B.

Level 3 further contends that the trial court erred in allowing Mr. Young to testify as to the value of the easement to Level 3.

The law is clear that where there is a partial taking, "the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken." N.C. Gen. Stat. § 40A-64(b) (2005). Moreover, an owner is competent to testify as to the value of his own property as he is deemed to have sufficient knowledge of the property and its possibilities "'to have a reasonably good idea of what it is worth.'" *Responsible Citizens v. City of Asheville*, 308 N.C. 255,

270, 302 S.E.2d 204, 213-14 (1983) (citation omitted). The following exchange took place during the testimony of Mr. Young:

> Q: Do you have an opinion as to fair market value of the property taken by the petition, which is the subject of this case?
>
> A: Yes
>
> . . . .
>
> A: I think that the value, the fair value of this -- of the rights that Level 3 Communications got, is getting, under these proceedings is $190,000.

After a cursory review of the transcript it is apparent that Mr. Young was not testifying to the value of the property acquired by Level 3, rather, on the contrary, Mr. Young was merely meeting the burden of defendants in this case by making a showing as to the fair market value of the property taken.

We find no error in the admission of Mr. Young's testimony, as an owner of the land, to the fair market value of the property taken.

C.

Level 3 next contends that it was error for the trial court to allow admission of Mr. Young's testimony as to the price paid by Plantation Pipeline for the easement in 1974. However, Level 3 failed to make any objection to the admission of the testimony at trial and therefore has failed to properly preserve this error for appellate review. *See* N.C.R. App. P. 10(b)(1).

Therefore, this assignment of error is overruled.

III

Level 3 further contends that the trial court erred in refusing to grant its motion for directed verdict at the close of the evidence where defendants failed to show the fair market value of the land at the time of the taking. We disagree.

A trial court must view all of the evidence supporting the nonmovant's claim as true, and must consider the evidence in the light most favorable to the nonmovant, giving the nonmovant the benefit of every reasonable inference that may be drawn therefrom. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985). On appeal, our Court applies a *de novo* standard of review. *Monin v. Peerless Ins. Co.*, 159 N.C. App. 334, 340, 583 S.E.2d 393, 397 (2003). It is clear from the testimony of Mr. Young that he testified to his opinion of the fair market value of the property at the time of the taking, $190,000. Mr. Young further opined that the fair market value of the entire tract of the property before the taking was $9,900,000.00 and that the difference in the value of the entire tract of property before and after the taking was $190,000.00. Where our review of the record clearly shows direct evidence of the fair market value, we can determine that the motion for a directed verdict was properly denied and, therefore, this assignment of error is overruled.

IV.

Finally, Level 3 contends on appeal that the trial court erred in denying its motion for a new trial where the verdict was excessive and contrary to law. We disagree.

Rule 59 (a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> . . . .
>
> (8) Error in law occurring at the trial and objected to by the party making the motion[.]

N.C. Gen. Stat. § 1A-1, Rule 59(a) (2005). A motion under section (a) of Rule 59 is addressed to the sound discretion of the trial judge. *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E.2d 558 (1980). A ruling in the discretion of the trial judge raises no question of law. *See Bryant*, 313 N.C. 362, 329 S.E.2d 333. "The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention." *Pearce v. Fletcher*, 74 N.C. App. 543, 544, 328 S.E.2d 889, 890 (1985). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

Our review of the record does not give any indicia of an abuse of discretion on the part of the trial judge. The jury was presented with evidence from both sides as to opinions regarding the fair market value of the property. Further, the trial judge informed the jury in its charge of the law in regard to the amount of compensation which defendants were entitled. Level 3's contention on appeal amounts to nothing more than yet another attempt to assert its arguments made at trial as to compensation which, as evidenced by the verdict, the jury rejected.

Therefore, this assignment of error is overruled.

Accordingly, for the reasons stated above, we find no error in the trial court's decisions and the jury's determination as to just compensation for the taking of an easement by Level 3 over the property of defendant, and we therefore

Affirm.

Judges HUDSON AND TYSON concur.

Report per Rule 30(e).