IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-716

Filed: 31 December 2020

Cumberland County, No. 18 CVS 4548

DEPARTMENT OF TRANSPORTATION, Plaintiff,

v.

JOHN L. CANADY and wife, JANICE B. CANADY, Defendants.

Appeal by defendants from orders entered 23 May and 7 June 2019 by Judge Gale M. Adams in Superior Court, Cumberland County. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorneys General Alvin W. Keller, Jr. and Nicholas W. Yates, and Special Deputy Attorney General Douglas W. Corkhill, for plaintiff-appellee.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for defendants-appellants.

STROUD, Judge.

Defendants own property in Fayetteville where the North Carolina Department of Transportation acquired by eminent domain a portion of the property for easements related to the widening of Raeford Road. Defendants and Plaintiff disagree on the scope of the easements as described in the complaint and declaration

of taking. Defendants filed a motion for a determination of issues other than damages under North Carolina General Statute § 136-108 to obtain a ruling on this issue before a trial on just compensation. Defendants appeal from orders denying their motion for a determination of issues other than damages and denying their motion to strike Plaintiff's Amended Complaint. Because, as noted by the trial court's order, the language of the complaint and declaration is broad and does not give Defendants sufficient notice of the specific devices being placed in the utility easements, the trial court's order failed to resolve the issue raised by Defendants' motion. We therefore reverse the order and remand for entry of a new order including findings of fact addressing the evidence and conclusions of law based upon those findings.

I. Background

On 27 June 2018, Plaintiff filed a complaint, declaration of taking, and notice of deposit of $111,525.00 as its estimate of just compensation, exercising its authority under North Carolina General Statute Chapter 136, condemning "that land described in a Quitclaim Deed executed October 29, 1981 to John L. Canady, and recorded October 30, 1981 in Book 2844, Page 695, Cumberland County Registry[,]" for purposes of a "permanent utility easement" ("PUE") and a "permanent drainage/utility easement" ("DUE") over a portion of John and Janice Canady's ("Defendants") property. An office building is located on Defendant's property, adjoining Raeford Road in Fayetteville.

On Exhibit B, the complaint describes the "area taken" as follows:

> That area sufficient to acquire for Department of Transportation project 39049.2.1 the right of way shown over and upon Parcel 238 on Plan Sheet 21 of the above-mentioned project, plus such additional areas as indicated as permanent utility easement and as permanent drainage/utility easement (or DUE) on said plan sheet. The aforesaid plan sheet is attached hereto for the purpose of identification of the areas taken and for no other purpose. Said areas taken will be more specifically described on the plat provided for in G.S 136-106.

The "interest or estate taken" is defined as:

> Fee simple title to right of way for all purposes for which the plaintiff is authorized by law to subject the same.
>
> A permanent utility easement for all purposes for which the plaintiff is authorized by law to subject the same. Said utility easement in perpetuity is for the installation and maintenance of utilities, and for all purposes for which the Department of Transportation is authorized by law to subject same. The Department of Transportation and its agents or assigns shall have the right to construct and maintain in a proper manner in, upon and through said premises a utility line or lines with all necessary pipes, poles and appurtenances, together with the right at all times to enter said premises for the purpose of inspecting said utility lines and making all necessary repairs and alterations thereon; together with the right to cut away and keep clear of said utility lines, all trees and other obstructions that may in any way endanger or interfere with the proper maintenance and operation of the same with the right at all times of ingress, egress and regress. The Department of Transportation shall have the right to construct and maintain the cut and/or fill slopes in the above-described permanent utility easement area(s). The Permanent Utility Easement shall be used by the Department of Transportation for additional working area

during the above described project.

A permanent drainage/utility easement (or DUE) for all purposes for which the plaintiff is authorized by law to subject the same. Said drainage/utility easement in perpetuity is for the installation and maintenance of drainage facilities and/or utilities, and for all purposes for which the Department of Transportation is authorized by law to subject same. The Department of Transportation and its agents or assigns shall have the right to construct and maintain in a proper manner in, upon and through said premises a drainage facility and/or utility line or lines with all necessary pipes, poles and appurtenances, together with the right at all times to enter said premises for the purpose of inspecting said drainage facility and/or utility lines and making all necessary repairs and alterations thereon; together with the right to cut away and keep clear of said drainage facility and/or utility lines, all trees and other obstructions that may in any way endanger or interfere with the proper maintenance and operation of the same with the right at all times of ingress, egress and regress. The Department of Transportation shall have the right to construct and maintain the cut and/or fill slopes in the above-described permanent drainage/utility easement area(s). The Permanent Drainage/Utility Easement shall be used by the Department of Transportation for additional working area during the above described project.

In September 2018, Defendants filed an answer admitting the allegations regarding Plaintiff's authority to take the property under Chapter 136 and their ownership of the property but denying that the funds deposited were "'just compensation' for the interests taken" and asserting their claim for just compensation to be determined by jury trial. In March 2019, Defendants deposed Bo Hemphill, the Eastern Utilities Manager for Plaintiff. Defendants' notice of deposition listed 23

matters on which examination was requested, including information regarding permanent drainage easements, PUEs, DUEs, the types of entities DOT may assign these easements to, and the temporal duration, nature and purposes of these different types of easements.

On 9 April 2019, Defendants filed a motion under North Carolina General Statute § 136-108 ("Section 108 motion"), requesting a hearing for "a determination of issues other than damages." To support the motion, Defendants also filed an affidavit by Defendant Mr. Canady. On 22 April 2019, the trial court began the hearing on Defendants' North Carolina General Statute § 36-108 motion. At the hearing, both sides made arguments and Defendants submitted the affidavit of Defendant Mr. Canady. Defendants' counsel also noted that Mr. Canady was present and available to testify if needed. Plaintiff did not present any evidence or witnesses and asked that the trial court rule on the Section 108 motion "as a matter of law without the Court receiving any evidence." Plaintiff's counsel also noted that if the trial court was not prepared to rule as a matter of law,

> we do have Mr. Richard Birkholz here, and perhaps some other evidence that we would present on such matters as the fact that the DOT project plans here did not contemplate any impediment being constructed on the servient portion of the property, and also with examples of other properties subject to similar easements which are used freely -- the servient portion is used freely with no impediment to property, and perhaps some other things.

But Plaintiff ultimately did not present *any* evidence regarding what the DOT project plans contemplated for the property or any "other things." Plaintiff *argued* the deposition of Mr. Hemphill addressed the questions raised by Defendants regarding how the PUE and DUE would actually be used and how the easements would limit the use of the property:

> So I understand where the Court is going with this, *but when you read that transcript, the Department spent the entire time trying to explain it. This is the specific -- going in this specific property. This is your parcel. This is going on. Here's the drainage pipe. This is how big it is.*
>
> *It was apparent and I'll let the Court review that deposition, the interest was not what's going on that particular piece of property, because there are answers.* You can go by and it's [sic] utilities by others that will go by, and you can look and see exactly what's going where. We had the actual utilities manager here at Mr. Yarborough's pleasure with a 30(b)(6) motion to go by and get all those answers.
>
> So there is no surprise, like, what's going in these easements. Everyone knows what's going inside the easements.

(Emphasis added.)

But the trial court never read "that transcript," and it is well established that arguments of counsel are not evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) ("[I]t is axiomatic that the arguments of counsel are not evidence." (citing *State v. Hinson*, 341 N.C. 66, 76, 459 S.E.2d 261, 267 (1995))). Mr. Hemphill's deposition, which Plaintiff argued includes "the answers," was not presented to the trial court as an exhibit in advance of the hearing or during the

hearing. When settling the record on appeal, Plaintiff requested to add the Hemphill deposition to the record; Defendants objected because the deposition was not presented, filed, or proffered as evidence. The trial court entered an order settling the record on appeal and found that "[t]he deposition transcript of Bo Hempfill was not introduced into evidence or submitted to the Court for its consideration prior to the Court's ruling on the subject matter of the appeal." Thus, the trial court ordered that the deposition "is not allowed in the Record on Appeal."

At the Section 108 hearing, Defendants argued they simply wanted

> to know up-front what DOT plans to do. And if DOT plans -- says, we're going to do any and everything -- if we're going to do any and everything that we say we're going to do in our Complaint, which is what they are asking for in their Complaint.
>
> They are asking for all these things in [Exhibit] B in their Complaint; then that's fine. If they say that they are asking for less than that, and they're prepared to amend their pleadings to reflect that they are only taking what they think they're going to take, that's fine

Defendant presented Mr. Canady's affidavit, which included several attachments, as evidence. Mr. Canady's affidavit described his background and experience as a licensed North Carolina General Contractor from 1975 to 1990; a licensed North Carolina real estate broker since 1975; and a licensed North Carolina insurance agent, since approximately 1968. He and Mrs. Canady had owned the property subject to the taking since 1981. His office is on the property, as well as about 3,000 feet of additional office space leased to other businesses. He noted that

he had reviewed the complaint, NC DOT's Court map illustrating the takings, the transcript of NC DOT's designated 30(b)(6) witness, and NC DOT's appraisal of the property. Mr. Canady averred that

> NCDOT is taking three types of interests across the front of our office complex:
>
> a. Highway right of way; a relatively narrow strip varying in width ranging from 4.49 feet to 4.62 feet
>
> b. Permanent Utility Easement; basically a 29.5-foot-wide strip, with a DUE inset as shown below.
>
> c. Permanent Drainage/Utility Easement; inset in the Permanent Utility Easement Area with the following dimensions: 15 feet by 10.39 feet by 15 feet by 10.49 feet.

After noting the various types of uses noted in the description of the DUE and PUE in the complaint, Mr. Canady described the impact on the property and questions as to the nature and extent of the taking as follows:

> 21. According to NCDOT's Notice of Taking in its Complaint for Project U-4405, our remaining property became subject to NCDO's PUE and DUE rights, including its temporary construction easement rights "during the above described project" on June 27, 2018.
>
> 22. There is no start date or finish date for the project in Exhibit B by which to judge (or appraise) how long our property will be subject for use by NCDOT, "for additional working area during the above described project."
>
> 23. As to the duration of the project, DOT's witness testified, "There are start dates and finish dates. They aren't calendar dates."; in other words, NCDOT does not

know when the project will start or when the project will finish at this time or, certainly, did not know on the date of take.

24. When NCDOT first let Project U-4405 for bids, no one bid on the project.

25. I do not know if there are still any construction contracts let [sic] for Project U-4405 even now.

26. However, on information and belief, no Notice To Proceed (NTP) has been given to any construction contractor on Project U-4405; in other words, there is no "start date" established even now, much less a "finish date".

27. The PUE or the DUE will cause the loss of our sign and certain other improvements.

28. The PUE and the DUE, as stated by NCDOT, are permanent in "perpetuity".

29. According to Merriam Webster Dictionary, these permanent easements are in "perpetuity" meaning "eternity"; other synonyms for perpetuity are "everlasting", "foreverness" and "infinity".

30. During perpetuity, NCDOT has the right to place any appurtenances or facilities on the property authorized by law for a PUE or a DUE.

31. As shown in Paragraph 16(b), NCDOT can place on our property: A permanent utility easement for all purposes for which the plaintiff is authorized by law to subject the same.

32. As shown in Paragraph 16(f), NCDOT can place on our property: A permanent drainage/utility easement for all purposes for which the plaintiff is authorized by law to subject the same.

33. Attached to the 30(b)(6) Deposition and this Affidavit as Exhibit 8, is a list of the types of appurtenances or facilities which could historically go on PUEs or DUEs.[1]

34. Just recently, the legislature "authorized by law" a new type of utility, which is shown and illustrated as attached to the 30(b)(6) Deposition and this Affidavit as Exhibits 5 and 5A, which could be added to a permanent utility easement or the permanent drainage/utility easement.[2]

35. As is clear from NCDOT's language in its Exhibit B, its permanent PUE and DUE easement rights are written in the broadest possible language.

36. I do not know and, more importantly, "the market" does not know what types of utility technologies or drainage technologies may arise in the future which would allow the possibility of NCDOT placing even additional "appurtenances" and "facilities" on the PUE and the DUE.

37. Exhibits 12, 14, 15 and 16 are examples of current types of permanent utility appurtenances.

38. Exhibit 18 is an example of a current type of permanent drainage appurtenance.

39. Exhibit 19 is an example of a current type of a permanent drainage facility (the complete retention pond facility) with its various appurtenances are shown; an example of an appurtenance for that facility (the metal and

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[1] This Exhibit lists symbols for utility plan sheets, including several types of utility poles, manholes, power transformers, telephone pedestal, CATV pedestal, gas valves, gas meters, concrete pier, steel pier, underground lines of various types (power, telephone, fiber optic, gas, water, and sewer), fire hydrants, and sanitary sewer cleanouts.

[2] Exhibit 5 includes North Carolina General Statute § 136-18.3A regarding "Wireless Communications Infrastructure" and a diagram illustrating small cell deployment towers.

> concrete cage area) is also shown on Exhibit 19.
>
> 40. If NCDOT utilizes all the rights it has condemned over our property, it will, among other things, cause us to: a
>
> a. Lose 14 parking spaces nearest the road.
> b. Relocate our sign across the driveway, losing 2 additional parking spaces directly in front of the building.
> c. Reconfigure those parking spaces directly in front of the building, losing 2 additional parking spaces.
>
> 41. These reductions will cause there to be less parking spaces on the subject property than the number of people who work in the building and will eliminate all customer parking for a customer-intensive group of businesses.
>
> 42. The temporary takings contained within the easements can significantly disrupt the operation of the entire office complex for at least the seven (7) years announced by NCDOT.

From the transcript of the hearing, it appears the hearing was concluded on 22 April 2019, and the trial court took the matter under advisement, to "read through everything" before ruling. But after the hearing, on 26 April 2019, Plaintiff's counsel sent a "post hearing submission" email to the trial court and to Defendants' counsel stating that Plaintiff *intended* to file an Amended Complaint. The email included proposed language to be added to the end of the two paragraphs on Exhibit B of the complaint describing the "interest or estate taken." On 29 April 2019, Defendants filed an "objection to Plaintiff's post-hearing submission." That same day, Plaintiff

filed—but did not serve on Defendants—an Amended Complaint. The descriptions of the "interest or estate taken" for both the DUE and PUE in the Amended Complaint and Declaration of Taking were the same as the original complaint with some added language. For the DUE, the following language was added to the description in the original complaint:

> The underlying fee owners retain the right to continue to use the permanent utility easement area(s) in any manner and for any purpose, including, but not limited to, access and parking, which is not inconsistent with the reasonable use and enjoyment of the easements by the Department of Transportation, its successors and assigns. In addition, said utility easement will be more specifically described on the utility construction and/or utility by others plans contained in the Department of Transportation Project 39049.2.1 Plans.

For the PUE, the following language was added to the original description of the "interest or estate taken":

> The underlying fee owners retain the right to continue to use the permanent drainage/utility easement (or DUE) area(s) in any manner and for any purpose, including, but not limited to, access and parking, which is not inconsistent with the reasonable use and enjoyment of the easements by the Department of Transportation, its successors and assigns. In addition, said utility easement will be more specifically described on the utility construction and/or utility by others plans contained in the Department of Transportation Project 39049.2.1 Plans.

The next day, 30 April 2019, Plaintiff filed "ADDITIONAL AUTHORITY PURSUANT TO NCGS 136-103" which was essentially a brief in support of Plaintiff's argument

that the amendment to the complaint was proper under North Carolina General Statute § 136.103.

On 13 May 2019, the trial court held a second day of the hearing. At the beginning of the hearing, the trial court noted that no ruling had yet been made on the Section 108 motion because it had received notice that Plaintiff planned to amend the complaint:

> THE COURT: [T]he reason that we find ourselves here today is because I felt like after the hearing you were -- which is why I ruled after I received notice that you were going to amend the Complaint. I felt like because there were additions that were being made, this amendment was being made, there were changes being made that weren't addressed at the initial hearing, --
>
> MR. KELLER: Right.
>
> THE COURT: -- that it was only fair that Mr. Yarborough have an opportunity to address the changes in the information that was coming to the Court after this hearing took place.

Defendants' counsel then advised the trial court that although he had received the Plaintiff's email regarding a proposed amendment, the complaint had not been amended, and if Plaintiff were to amend the complaint, Defendants would need to "resubmit[] our argument to address the specifics of that language." Plaintiff's counsel then stated that the Amended Complaint had been filed; Defendants' counsel noted he had not been served with an Amended Complaint. Plaintiff's counsel provided a copy of the Amended Complaint to Defendants' counsel during the

hearing, and he accepted service "as of today's date." Defendants asked for time to submit a proposed order and an objection to the amendment to the complaint, while Plaintiff noted it did not intend to respond and would rely on the arguments and authority it had already submitted to the trial court.

On 14 May 2019, Defendants filed a motion to strike the Amended Complaint under North Carolina General Statute § 1A-1, Rule 12(f). On 20 May 2019, Plaintiff filed a motion opposing Defendants' motion to strike. Plaintiff noted the purpose of the amendment:

> Based on comments made by the Court and Defendants during the Defendants' N.C. Gen. Stat. § 136-108 hearing, the Department determined that amending the complaint by providing a restatement of utility easement law and the location of utility information would promote the ends of justice and ensure that this case is litigated on its merits and will not prejudice the Defendants.[3]

On 23 May 2019, the trial court entered an "ORDER DENYING DEFENDANTS' MOTION PURSUANT TO NCGS § 136-108" ("Section 108 Order"). On 7 June 2019, the trial court entered an order denying Defendants' Motion to Strike Plaintiff's Amended Complaint. Defendants timely filed notice of appeal from both orders.

II. Interlocutory Appeal

[3] It appears that the "comments made by the Court" were questions raised at the first day of the Section 108 hearing regarding the non-binding and broad description of the easements in the complaint.

> Generally, this Court reviews a final judgment of the Superior Court, pursuant to N.C. Gen. Stat. § 7A–27(b)(1). An interlocutory order is one that "does not determine the issues[,] but directs some further proceeding preliminary to final decree." An order entered pursuant to N.C. Gen. Stat. § 136-108 is an interlocutory order because "[t]he trial court d[oes] not completely resolve the entire case," but instead "determine[s] all relevant issues other than damages in anticipation of a jury trial on the issue of just compensation." Here, the trial court's order is an interlocutory order. The order is not a final judgment in the proceeding because the jury still must determine the amount of compensation defendant is entitled to for DOT's taking of its property.
>
> "Generally, there is no right of immediate appeal from interlocutory orders and judgments." However an interlocutory order is reviewable by this Court when it "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." The North Carolina Supreme Court has held that condemnation hearing orders "concerning title and area taken are vital preliminary issues" that affect a party's substantial right and thus must be immediately appealed pursuant to N.C. Gen. Stat. § 1-277.

Dep't of Transp. v. BB & R, LLC, 242 N.C. App. 11, 14, 775 S.E.2d 8, 11-12 (2015) (alterations in original) (citations omitted).

Defendants argue,

> [t]he determination of the nature and extent of the interests taken is a substantial right and a necessary predicate to determining the ultimate issue, just compensation. In condemnation cases, "the compensation to be paid is the value of the interest taken." *United States v. General Motors Corp.,* 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945). "[A] Section 108 judgment becomes a final judgment on the issues it addresses if it is not immediately

> appealed . . ." *Town of Apex v. Rubin*, ___ N.C. App. ___, 821 S.E.2d 613 (2018).

(Alterations in original.) We conclude Defendants have established that a substantial right has been affected, and their immediate appeal of the Section 108 Order is proper.

III. Amendment to Complaint and Declaration of Taking

Before addressing the merits of the primary issue raised by Defendants regarding the denial of their motion under Section 136-108, we note several procedural issues which complicate our analysis. Defendants argue on appeal that the trial court erred by allowing Plaintiff to amend the complaint without compliance with North Carolina General Statute § 1A-1, Rule 15(a). N.C. Gen. Stat. § 1A-1, Rule 15(a) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party[.]").

In brief summary, Defendants argue Plaintiff have a *right* to amend the complaint and declaration of taking under North Carolina General Statute § 136-103(d). N.C. Gen. Stat. § 136-103(d) (2019) ("The Department of Transportation may amend the complaint and declaration of taking and may increase the amount of its

deposit with the court at any time while the proceeding is pending[.]"). However, the *procedure* for amending the complaint is dictated by the North Carolina Rules of Civil Procedure. *Bd. of Transp. v. Royster*, 40 N.C. App. 1, 4, 251 S.E.2d 921, 924 (1979) ("A condemnation proceeding under Article 9, Chapter 136, is a civil action and is subject, as are other civil actions, to the Rules of Civil Procedure, G.S. 1A-1, Rule 1."). Since Defendants had already answered the complaint, Plaintiff would be required to seek leave of court under Rule 15(a) to amend the complaint, but Plaintiff did not file a motion to amend. Instead, Plaintiff simply filed the Amended Complaint and did not serve it on Defendants until the second day of hearing on Defendants' Section 108 motion. Plaintiff argues Rule 15(a) does not apply because North Carolina General Statute § 136-103(d) is "a differing *procedure* . . . prescribed by statute." North Carolina General Statute § 1A-1, Rule 1 (emphasis added) ("These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.").

The trial court issued its order denying Defendants' Section 108 motion *before* the order allowing the amendment to the complaint. The Section 108 Order addresses the language of the *original* complaint, not the Amended Complaint. Although the Section 108 Order does not state explicitly that it is based upon the original complaint, the Section 108 Order includes in the findings a quote of the description

of the "interest or estate taken" from the original complaint, without the additional language added by the Amended Complaint.

The order denying the Defendants' motion to strike the Amended Complaint also does not specifically state whether the trial court ruled based upon the original complaint or the Amended Complaint, but in that order, the trial court denied Defendants' motion to strike the amendment and concluded that Defendants were not prejudiced by the Amended Complaint because it "includes a mere restatement of established law and *does not change the substance of the original complaint*." (Emphasis added.) The trial court also concluded that its "Order of 23 May 2019 denying Defendant's N.C. Gen. Stat. § 136-108 [motion] will not be changed." Thus, although the trial court's order denying the Section 108 motion was based upon the original complaint, the trial court also determined its ruling would be the same under the amended complaint because it did "not change the substance of the original complaint." In other words, the trial court determined Plaintiff's amended complaint did not change the interest or nature of the taking in any way and made no difference in the trial court's ruling on the Section 108 motion.

Further complicating matters, Defendants contend that the filing of the complaint for eminent domain and declaration of taking establishes the date of taking and the date of valuation, and if the Amended Complaint did change the extent of the taking, either by increasing or decreasing the "interest or estate taken," this basic

issue would need to be resolved prior to a jury trial. *See City of Charlotte v. Univ. Fin. Properties, LLC*, 260 N.C. App. 135, 153, 818 S.E.2d 116, 128 (2018) ("N.C. Gen. Stat. § 136-103(d) allows the condemnor to do two things: (1) 'amend the complaint and declaration of taking;' and (2) 'increase the amount of its deposit with the court at any time while the proceeding is pending. . . .'" (alteration in original)), *aff'd*, 373 N.C. 325, 837 S.E.2d 870 (2020). The date of taking, valuation, and calculation of prejudgment interest on any award in excess of the deposit would depend upon the date (or dates) of the taking, and the trial court's orders do not address the controlling date. And if the Amended Complaint made no substantive change to the taking, there would seem to have been no reason to allow the amendment, since it simply raises more questions than it answers.

We agree with the trial court that the amendment to the complaint did not change the substance of the complaint. Thus, the date of the taking remains 27 June 2018, based upon the original complaint, and the scope of the taking did not change based upon the amended complaint. But we caution this opinion should not be read as approving the irregular procedures used in this case to amend the complaint, including but not limited Plaintiff's failure to file a motion to amend the complaint and to serve the amended complaint in accord with North Carolina General Statute § 1A-1, Rule 5 upon Defendants' counsel and the trial court's issuance of an order ruling on Section 108 motion before ruling on the amendment to the complaint and

declaration of taking. Because the amendment made no substantive change to the Plaintiff's claim and no change to the "interest or estate taken," these procedural issues do not change our analysis of the Section 108 issue raised on appeal, and we will not address them further.

IV. Failure to Determine Issue Regarding "Interest or Estate Taken" Raised by Section 108 Motion

Defendants argue that the trial court erred in its Section 108 Order by failing to determine "any and all issues raised by the pleadings other than the issue of damages" as required by North Carolina General Statute § 36-108.

A. Standard of Review

> The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment . . . . [U]nchallenged findings of fact are presumed correct and are binding on appeal. The trial court's conclusions of law are subject to de novo review.

Dep't of Transp. v. BB & R, LLC, 242 N.C. App. 11, 15, 775 S.E.2d 8, 12 (2015) (alterations in original).

B. Analysis

There is no dispute regarding the area affected by the taking or the ownership of the property. Here, the issue raised by the Section 108 motion is "the nature and extent of the interest NCDOT has acquired in the PUE and DUE." Plaintiff responds that "the DOT has not acquired full, free, and unlimited rights over defendants'

property. The effect of the taking was not to grant to DOT complete dominion over the encumbered property to the virtual exclusion of defendants. The DOT has not attempted to acquire such extensive rights, and in fact has not acquired such rights."

"In hearings pursuant to N.C. Gen. Stat. § 136-108, the trial court, after resolving any motions and preliminary matters, conducts a bench trial on the disputed issues except for damages. Accordingly, the trial judge must make adequate findings of fact which support the conclusions of law." *Dep't of Transp. v. Byerly*, 154 N.C. App. 454, 457, 573 S.E.2d 522, 524 (2002) (citations omitted).

The trial court made a few findings of fact reciting the procedural history of the case, the undisputed description of the physical area affected by the DUE and PUE, the amount of the deposit, and two findings describing the PUE and DUE acquired by Plaintiff. These two findings recited verbatim the language from the Plaintiff's Original Complaint, as quoted above. Based only upon these findings of fact, the trial court made the following Conclusions of Law and Decree:

> BASED on the FINDINGS OF FACT, this Court makes the following CONCLUSIONS OF LAW:
>
> 1.) NCDOT did not acquire the right to occupy the surface of the PUE and DUE to the total exclusion of Defendants. It condemned only an easement—the right to use Defendants' property for a particular purpose; Defendants retained the fee in the land. Subject to the prohibitions specifically enumerated in the Complaint, Defendants may make any use of the surface of the strip encumbered by the easement which will not interfere with NCDOT's transmission of utilities and drainage of water. *Light Co. v. Bowman*, 229 N.C. 682, 51 S.E. 2d 191 (1949).

Certainly, the use will be limited; but it cannot be said that the right to use it and to traverse it freely has no value to Defendants.

The general law regarding easements provides, it is well-settled that an easement "extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired, and to no others; and the owner retains the title to the land in fee and the right to make any use of it that does not interfere with the full and free exercise of the public easement." 26 Am. Jur. 2d Eminent Domain, § 133, p. 794. *See City of Statesville v. Bowles*, 6 N.C. App. 124, 130, 169 S.E.2d 467, 471 (1969) (which also held with respect to an easement taken by eminent domain that an easement "extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired, and to no others; and the owner retains the title to the land in fee and the right to make any use of it that does not interfere with the full and free exercise of the public easement.")

2.) The Complaint did not give NCDOT free, full, and unlimited right of ingress and egress over the encumbered property, not only when it needed to carry out its purposes, but at any time. The effect was not to grant to NCDOT complete dominion over the encumbered property to the virtual exclusion of Defendant. In the instant case, the NCDOT has not attempted to acquire such extensive rights, and in fact has not acquired such rights. *See Shingleton v. State*, 260 N.C. 451, 457 133 S.E.2d 183, 187 (1963) (quoting 12A Am. Jur., Easements, s. 113, pp. 720, 721). "[A]n easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." *Id.* Whether a specific use of an easement constitutes a reasonable use is a question of fact and is not a matter of law. *Id.* The possessor of an easement has only the rights that are necessary to the reasonable and proper enjoyment of that easement.

3.) The broad language of a PUE or DUE does not eliminate the bundle of rights retained by Defendant and the market value analysis should not treat these utility

easements as leaving the underlying fee with no value.

4.) Since utility easements are vital to providing homes and businesses with power, telecommunications, internet, water, sewer, etc., the correct standard "in fixing values on property in condemnation proceedings for any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied, but has never been applied, its availability for future uses must be such as enters into and affects its market value, and regard must be had to the existing business or wants of the community, or such as may be reasonably expected in the immediate future to affect present market value. The test is what is the fair value of the property in the market. The uses to be considered must be so reasonably probable as to have an effect on the present market value. Purely imaginative or speculative value should not be considered." *Carolina Power and Light Company v. Clark*, 243 N.C. 577 (1956)

5.) Basing the valuation of the PUE and DUE on Defendants' expectation that the completion of the entire widening of Raeford Road Project may take about seven years, and that an alleged takings will affect the remainder of the Defendants property for seven years, rather than an actual assessment of the actual time that the Defendants' property outside of the PUE and DUE may be affected, lacks sufficient reliability. *See, Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (holding the trial court abused its discretion in failing to exclude expert testimony regarding valuation of an easement "based on hunches and speculation"); *City of Charlotte v. Combs*, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011) ("[T]he measure of damages for a temporary taking is the rental value of the land actually occupied" [sic] by the condemnor."); and *DOT v. Jay Butmataji*, LLC, 8 I 8 S.E.2d 171, 178 (2018) (finding an appraiser's valuation regarding access to a motel was not based upon the actual conditions on the property). Defendants' may follow procedure established by N. C. Gen. Stat § 136-110 and make a motion to continue the cause until the highway project under which the appropriation occurred is open to traffic, or until such

> earlier time as, in the opinion of the judge, the effect of condemnation upon said property may be determined.
>
> Based on the FINDINGS OF FACT and CONCLUSION OF LAW:
>
> Although this Court has concerns that the language describing the utility easements in Exhibit "B" of NCDOT's Complaint and Declaration of Taking and Notice of Deposit can be construed as broad and does not give sufficient notice to the property owner of the specific devices being placed in the utility easements, our Courts have consistently ruled that an order granting Defendants' N. C. Gen. Stat § 136-108 motion would amount to prejudicial error.
>
> The rights retained by the Defendants in the encumbered property were substantial, and contrary to Defendants' contention, it would be error to instruct an appraiser to not consider the fact that only easements encumbered the portions of land in question.
>
> Therefore, based on established North Carolina law, the Defendants retained the right on the PUE and DUE to traverse it freely, to park on it, to landscape it, and to use it for any lawful purpose at such time and for so long as such uses do not conflict with the rights of the NCDOT. *See City of Statesville v. Bowles*, 6 N.C. App. at 130, 169 S.E.2d at 471 (owner has the right to traverse, park on, landscape, grade over, and use for any lawful purpose, not in conflict with the easement).
>
> THEREFORE, IT IS HERBY ORDERED, ADJUDGED, AND DECREEED THAT, the Defendants' Motion pursuant to N.C. Gen. Stat. § 136-108 is DENIED.

(Alterations in original.)

Defendants argue that the trial court failed to make findings of fact addressing the only evidence before it, Mr. Canady's affidavit. As noted above, Plaintiff presented no evidence, and the deposition of Mr. Hemphill, about which Plaintiff argued "when you read that transcript, the Department spend the entire time trying

to explain it[,]" was not in evidence. Under Rule 52, the trial court must make findings of fact addressing the relevant facts needed to support its conclusions of law. N.C. Gen. Stat. § 1A-1, Rule 52. Plaintiff argues "the trial court made sufficient findings of fact to supports its conclusions of law," and "[i]n essence, this was a motion in limine seeking the trial court's ruling on an evidentiary issue regarding appraisal methodology. There has not been a trial and thus no proffer of this evidence has been made and ruled on during a trial proceeding. N.C.R. App. P. 10 (a) (1)."

It is apparent from the Section 108 Order that the trial court did not make any substantive findings of fact addressing the evidence presented by Defendant. Most of the trial court's order is recitations of principles of law from various cases. These general principles of law are not necessarily wrong, but without findings of fact about Defendants' property and how the PUE and DUE as planned by Plaintiff will affect the property, we cannot review the trial court's ruling.

The primary practical and legal question presented by Defendants was whether the planned easements would eliminate most of the parking area on the property. Taking the broad description of the easements at face value, Plaintiff would have the right to install utility structures which would eliminate Defendants' use of the area taken as a parking lot. For example, as noted by Mr. Canady's affidavit, the broad language of the DUE would include the right to install a retention pond, which would effectively eliminate any use of the area as parking. The DUE would also allow

an underground drainage pipe, which most likely would allow Defendants to continue to use the parking area since the pipe would be installed underground, but the language of the DUE does not require an underground drainage pipe.

The DUE also gives Plaintiff an unlimited right to cut and fill the property, which could result in the installation of a retaining wall such as the one described in *North Carolina Department of Transportation v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C. App. 610, 817 S.E.2d 62 (2018). In *Laxmi*, the DOT took a portion of a hotel's property to widen and improve a road and for a permanent utility easement. *Id.* at 612, 817 S.E.2d at 65. The initial appraisal showed a retaining wall but did not indicate the wall's height and did not indicate that any parking spots would be lost. *Id.* After accepting a counteroffer for just compensation, DOT made changes to the project's plans. *Id.* "The modified appraisal indicated that the right of way would be enlarged, and added a temporary construction easement and a slope easement." *Id.* The hotel accepted the modified appraisal, but the hotel owner maintained it was never informed of the changes to the project's plans. *Id.* at 613, 817 S.E.2d at 66. "The DOT project eliminated several of Laxmi's parking spaces, which caused the Hotel's parking lot to be in violation of local codes. In addition, when the Department completed construction of the retaining wall, the wall was roughly fifteen feet tall, completely blocking the Hotel's visibility from the street." *Id.* As a result, the trial court set aside a consent judgment and ordered the case proceed to trial "to determine

the appropriate amount of compensation for the taking." *Id.* DOT appealed to this Court, which affirmed the trial court's order and concluded "that the evidence supports the trial court's determination that Laxmi was not adequately informed of the extent of DOT's taking of the Hotel property, and that the Consent Judgment did not provide just compensation for DOT's taking." *Id.* at 625, 817 S.E.2d at 73. Here, Plaintiff argued it has no plans to cut and fill the property in a way that would interfere with Defendants' use of the parking area or building, but again, Plaintiff did not present evidence to support this argument other than the preliminary plan sheets of the project attached to the complaint and to the Amended Complaint, and the trial court's findings do not address this issue.

The trial court's order fails to resolve the essence of Defendant's Section 108 motion. The trial court ruled as follows:

> [T]he Defendants retained the right on the PUE and DUE to traverse it freely, to park on it, to landscape it, and to use it for any lawful *purpose at such time and for so long as such uses do not conflict with the rights of the NCDOT. See City of Statesville v. Bowles*, 6 N.C. App. at 130, 169 S.E.2d at 471 (owner has the right to traverse, park on, landscape, grade over, and use for any lawful purpose, not in conflict with the easement).

(Emphasis added.)

Defendants did not disagree with the above statement by the trial court, but since the description of the PUE and DUE in the complaint and Amended Complaint are so broad as to allow any and all potential uses, even in a manner which would

completely eliminate Defendants' use of the easement areas, Defendants' motion requested a ruling defining the extent of their retained rights to traverse, park upon, and use the PUE and DUE after completion of Project No. 39049.2.1. Defendants' Section 108 motion asked the trial court to rule on the extent of the planned construction to determine what purposes would not "conflict with the rights of the NCDOT." Because the language of the complaint and declaration was "broad and does not give sufficient notice to the property owner of the specific devices being placed in the utility easements," which the trial court noted as a "concern," the trial court's order simply "denying" Defendants' Section 108 motion failed to resolve the issue raised by Defendants' motion. We must therefore reverse the order and remand for entry of a new order.

V. Conclusion

The trial court erred by denying Defendants' Section 108 motion without resolving the issue raised by the motion. We must therefore reverse the order and remand for entry of a new order including findings of fact addressing the evidence and conclusions of law based upon those findings. This order shall be based upon the existing record, since the courts do not normally give parties a "second bite at the apple" following a full hearing. *See City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 439, 740 S.E.2d 487, 491 (2013) ("We do not believe N.C.G.S. § 136-108 contemplates affording a party multiple hearings, at least not when the party had

every opportunity to argue all relevant issues in a single N.C.G.S. § 136-108 hearing.").

REVERSED AND REMANDED.

Judges INMAN and BROOK concur.

Report per Rule 30(e).