[Cite as *Lorain v. McKiel*, 2017-Ohio-7919.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

CITY OF LORAIN Appellee v. ELINOR R. MCKIEL, et al. Appellants	C.A. No. 16CA011016 16CA011017 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE Nos. 2013PC00031 2014PC00026

DECISION AND JOURNAL ENTRY

Dated: September 29, 2017

TEODOSIO, Judge.

{¶1} Elinor R. McKiel and John McKiel appeal the judgment of the Lorain County Court of Common Pleas, Probate Division, entered on August 22, 2016, denying their motion for assessment of attorney fees, expert expenses, and litigation costs. We affirm.

I.

{¶2} In 2013, the City of Lorain developed a plan for road improvements that included the widening of Jaeger Road. In July 2013 and May 2014, respectively, the City of Lorain filed petitions for appropriation for fee simple takings from the McKiels' properties located at 3005 Jaeger Road and 3015 Jaeger Road. The City filed amended petitions in April 2015, reserving for the McKiels the right of ingress and egress to a residual property. In July 2016, the matter went to trial before a jury, who returned verdicts in favor of the McKiels consisting of both compensation for the property taken and damages to the residual property, as well as compensation for temporary easements. Following the trial, the McKiels filed a motion for

assessment of attorney fees, expert expenses, and litigation costs, which was denied by the trial court in August 2016. The McKiels now appeal, raising two assignments of error.

II.

{¶3} We note at the outset that each of the McKiels' two assignments of error go well beyond presenting a statement of the alleged error for our review, and are comprised of a mix of fact, law, and argument, constituting 45 lines of text in total. While we have considered all arguments set forth by the McKiels, we will utilize abbreviated versions of the assignments of error for the sake of clarity.

ASSIGNMENT OF ERROR ONE

> THE TRIAL COURT ERRED IN ITS DETERMINATION THAT THE McKIELS WERE NOT ENTITLED TO FEES AND COSTS PURSUANT TO THE TRIAL COURT'S ORDERS OF AUGUST 22, 2016.

{¶4} In their first assignment of error, the McKiels argue the trial court erred in not finding that the City of Lorain abandoned its original legislative taking and that the McKiels were not entitled to fees and costs under R.C. 163.21(A)(2). The McKiels contend that the City of Lorain abandoned appropriation proceedings when it amended its pleadings to provide easements for the McKiels' driveways as an express right of ingress and egress. We disagree.

{¶5} "With respect to whether or not the trial court was correct in deciding [if an] appellant abandoned the proceedings, we review the decision based upon an abuse of discretion standard." *City of Willoughby v. Slyman*, 11th Dist. Lake No. 94-L-142, 1996 WL 535287, *3 (Sept. 13, 1996). An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, a

reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶6} R.C. 163.21(A) provides:

> (A)(1) If it has not taken possession of property that is appropriated, an agency may abandon appropriation proceedings under sections 163.01 to 163.22 of the Revised Code at any time after the proceedings are commenced but not later than ninety days after the final determination of the cause.
>
> (2) In all cases of abandonment as described in division (A)(1) of this section, the court shall enter a judgment against the agency for costs, including jury fees, and shall enter a judgment in favor of each affected owner, in amounts that the court considers to be just, for each of the following that the owner incurred:
>
> (a) Witness fees, including expert witness fees;
>
> (b) Attorney's fees;
>
> (c) Other actual expenses.

{¶7} "In the context of appropriation proceedings, the term 'abandon' means 'to give up, discontinue, withdraw from * * *, cast away, leave or desert * * *. Stated another way, "abandon" means to give up or discontinue any further interests in something * * *.'" *Dorsey v. Donohoo*, 83 Ohio App.3d 415, 422 (12th Dist.1992), citing *Moraine v. Baker*, 34 Ohio Misc. 77, 78-79 (C.P.1971).

{¶8} In *Dorsey*, the Twelfth District Court of Appeals considered the question of the abandonment of appropriation proceedings where, as in the present case, the petition had been amended, stating that "[t]he parcel of land to be appropriated was identical in the two petitions" except for "the addition of the easement for ingress and egress * * *." *Id.* In determining that the appellant did not abandon its original application, the court held: "We cannot conclude that such amendment was so substantial as to constitute a relinquishment of the original appropriation petition." *Id.* The court further stated that "given the fact that the county took steps to conform

its pleading to the construction plans well in advance of the trial date, we can perceive no prejudice to appellees in their preparation for trial." *Id*.

{¶9} In support of their argument, the McKiels direct us to *Montgomery Cty. v. McQuary*, where the trial court considered an original petition for appropriation setting forth construction easements for sewer extensions through the subject property. *Montgomery Cty. v. McQuary*, 26 Ohio Misc. 239, 240 (C.P. 1971). The petition was amended to designate a different course of the easement through the landowner's property. *Id*. The trial court found "the action of the appropriating agency in procuring a new and different course through defendant's land is tantamount to an abandonment of the original proceedings to take a particular portion of defendant's land for sewer purposes." *Id*. at 241.

{¶10} We decline to apply the analysis of the common pleas court in *McQuary* to the present matter. *McQuary* is distinguishable in that the location of the appropriation, in the form of a construction easement, was changed in the amended petition. The location of the appropriation in the present case was not changed; rather, the amended petition added an easement for egress and ingress for the benefit of the McKiels. While this constitutes a change in the scope of the property interest for the affected area of land, it is not an abandonment of the proceedings under R.C. 163.21(A). We conclude that the amendment to the pleadings did not constitute an abandonment of the proceedings and the trial court did not err in refusing to award fees and costs under R.C. 163.21(A)(2).

{¶11} The McKiels' first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

> THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR WHEN IT STATED, DECLARED, AND DETERMINED IN ITS AUGUST 22, 2016[,] RULINGS THAT THE CITY OF LORAIN HAD MADE A GOOD FAITH OFFER TO COMPENSATE THE

> McKIELS AS REQUIRED BY LAW; THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR WHEN IT STATED, DECLARED, AND DETERMINED IN ITS AUGUST 22, 2016[,] RULINGS THAT THE PROJECT IMPROVEMENTS WERE COMPLETED AS TO THE McKIEL PROPERTY IN CONFORMITY TO THE PROJECT DRAWINGS WHEN IN FACT THE PROJECT WAS NEVER COMPLETED IN CONFORMITY TO THE DRAWINGS AS TO THE McKIEL PROPERTY, BUT WAS IN FACT UNFINISHED AND INCOMPLETE.

{¶12} In their second assignment of error, the McKiels essentially make two arguments, which we will address separately. The McKiels first argue the trial court abused its discretion when it stated the City of Lorain had made a good faith offer to compensate the McKiels as required by law. We disagree.

{¶13} We note at the outset that "an appellant's assignment of error provides this Court with a roadmap to guide our review." *Taylor v. Hamlin-Scanlon*, 9th Dist. Summit No. 23873, 2008-Ohio-1912, ¶ 12. This Court declines to chart its own course when an appellant fails to provide guidance. *Young v. Slusser*, 9th Dist. Wayne No. 08CA0019, 2008-Ohio-4650, ¶ 7. "It is not this Court's duty to create an appellant's argument for him." *Thomas v. Bauschlinger*, 9th Dist. Summit No. 27240, 2015-Ohio-281, ¶ 8.

{¶14} The McKiels contend that the trial court's determination that the City of Lorain made a good faith offer is without factual basis. In support of this argument, the McKiels argue:

> **The gross verdicts total $101,635.00:** In 2013 PC 00031 a [j]ury verdict of $55,900.00 was issued; and in 2014 PC 00026 a [j]ury verdict of $45,735 was issued. The City of Lorain, Ohio's offer of $20,000.00 suggests a finding of "bad faith" rather than "good faith". [sic] A less than 1/5th offer (20%) on the gross verdict totals, as a matter of public policy, should have been found by the trial court to be "bad faith" as a matter of law; [sic] Beating their offer by 25% statutorily is calculated as a trigger for fees (establishes public policy); further, "bad faith" should have been determined by the trial court and served as a basis to award the McKiels all of their fees and costs under R.C. 163.21(A)(2). The trial court abused its discretion to find otherwise.

{¶15} In its order entered on August 22, 2016, the trial court noted the language of R.C. 163.21(C)(1) as providing:

> Except as otherwise provided in division (C)(2) or (3) of this section and subject to division (C)(5) of this section, when an agency appropriates property and the final award of compensation is greater than one hundred twenty-five per cent of the agency's good faith offer for the property or, if before commencing the appropriation proceeding the agency made a revised offer based on conditions indigenous to the property that could not reasonably have been discovered at the time of the good faith offer, one hundred twenty-five per cent of the revised offer, the court shall enter judgment in favor of the owner, in amounts the court considers just, for all costs and expenses, including attorney's and appraisal fees, that the owner actually incurred.

The trial court found that "the jury awards[] exceeded the last good faith offer(s) by more than 125%." The trial court went on to note the limiting language of R.C. 163.21(C)(2), which provides:

> The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure, for the purpose of making or repairing roads that shall be open to the public without charge * * *.

The trial court further found that under the circumstances, "there [could] be no recovery for the costs and expenses in this case under R.C. 163.21(C)(1)."

{¶16} The McKiels' argument, as quoted above, appears to contend that because the City of Lorain made an offer of $20,000, which was less than 20% of the total verdict, the offer should have been construed as being in bad faith and have "served as a basis to award the McKiels all of their fees and costs under R.C. 163.21(A)(2)." R.C. 163.21(A)(2), as noted above, provides for costs and fees only in the case of abandonment of the proceedings, and is not applicable to the argument regarding the City of Lorain's offer not meeting a particular percentage of the actual award. Therefore, the contention that R.C. 163.21(A)(2) could serve such a purpose is misplaced. To the extent that this argument is an attempted articulation of the

scenario presented under R.C. 163.21(C)(1), whereby the final award of compensation is greater than one hundred twenty-five per cent of the agency's good faith offer for the property, the McKiels do not make any argument in opposition to the trial court's finding that under the limiting language of 163.21(C)(2) there can be no recovery for fees and costs under R.C. 163.21(C)(1). As noted above, it is not our duty to make appellants' argument for them, and we decline to do so here. We conclude the McKiels have failed to show any error or abuse of discretion in the trial court's referencing "the last good faith offer(s)."

{¶17} The McKiels also contend the trial court erred in stating that the project improvements were completed in conformity with the project drawings and argue that the trial testimony does not support such a finding, but that rather, the project was left incomplete. They argue that as a consequence, it should have been determined that the City of Lorain abandoned the project. The McKiels state:

> As a matter of law, it should be found that such work was in fact unfinished and incomplete and for the trial court to characterize it as otherwise is error but is a further demonstration of Lorain's bad faith toward the McKiels in this matter. Actually, it reflects a further abandonment of project objectives and an aggravation to the scope of the city's take.

{¶18} The McKiels' second assignment of error is based upon an assertion that "[t]he trial court abused its discretion and committed prejudicial error when it stated, declared, and determined in its August 22, 2016[,] rulings that the project improvements were completed as to the McKiel property in conformity to the project drawings * * *." This Court has been unable to locate any such statement by the trial court in its order entered on August 22, 2016. The only statement made by the trial court as to the issue of "project completion" is the following: "The project as completed, provided for the ingress and egress to the two properties, including sidewalks, and reconstruction of the driveway approaches." Even if we were to assume the trial

court's statement was inaccurate, the McKiels have failed to show any prejudicial error and have not provided any case law in support of the theory that a failure to complete the project in conformity with the project drawings is an abandonment of the proceedings.

{¶19} The McKiels' second assignment of error is overruled.

III.

{¶20} The McKiels' assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

THOMAS A. TEODOSIO
FOR THE COURT

SCHAFER, P. J.
CARR, J.
CONCUR.

APPEARANCES:

ROBERT J. GARGASZ, Attorney at Law, for Appellant.

PATRICK D. RILEY, Law Director, and DONALD M. ZALESKI, Assistant Law Director, for Appellee.

RICHARD J. MAKOWSKI, Attorney at Law, for Appellee.