IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 20, 2014 Session

STATE OF TENNESSEE EX REL. TENNESSEE DEPARTMENT OF TRANSPORTATION v. WILLIAM ERNEST JONES, SR., ET AL.

Appeal from the Circuit Court for Lawrence County
No. CC157004 Robert L. Jones, Judge

No. M2014-00151-COA-R3-CV – Filed June 25, 2015

This appeal concerns the measure of incidental damages in a condemnation proceeding. The State appeals the trial court's denial of its motions for directed verdict and remittitur of incidental damages. Taking the strongest legitimate view of the evidence offered by the landowners, we find that the award of incidental damages was properly supported, and therefore, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Robert E. Cooper, Attorney General and Reporter; Joseph F. Whalen, Acting Solicitor General; and Mary S. Foust, Senior Counsel; Nashville, Tennessee, for the appellant, Tennessee Department of Transportation.

R. Slade Sevier, Jr., and Nicholas A. DuPuis, Nashville, Tennessee, for the appellees, William Ernest Jones and Alice P. Jones.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

William and Alice Jones own a farm in Lawrence County, Tennessee. The farm is made up of two separate tracts of land, one located north of existing Highway 64 and one south of the highway. The Joneses purchased the two tracts of land in 1993 to operate a dairy farm. The northern section consists of 100 acres used for grazing cattle and is largely unimproved. The southern section contains 139 acres and is the site of the dairy farm operation and its supporting improvements.

On April 2, 2004, the Tennessee Department of Transportation (the "State") filed a petition for condemnation seeking to acquire a 16.483 acre portion of the northern section of the farm by eminent domain. The State alleged the land was necessary for the construction of a new, four-lane segment of Highway 64. The Circuit Court for Lawrence County granted the State's petition on April 27, 2004.

The new segment of Highway 64 was constructed in late 2010. Rather than widening the existing highway, which remains in place between the northern and southern tracts of the Joneses' farm, the State used the new segment to realign the highway. The new highway segment bisects the northern tract; it does not physically encroach on the southern tract or any of the farm improvements.[1]

The State initially tendered $43,000 as consideration for the purchase of the land. The trial court disbursed the funds to the Joneses by consent order entered June 7, 2004. In their answer, filed February 2, 2005, the Joneses argued that the tender was inadequate compensation for the taking. On July 28, 2011, the State tendered an additional $10,341 to the Joneses, which was disbursed shortly thereafter.

On July 29-31, 2013, a jury trial was held to determine the amount of damages due the Joneses because of the taking. William Jones, Jr., the Joneses' son and primary operator of the dairy farm, testified about operations before the construction of new Highway 64. The dairy farm used a wet/dry system to manage cow manure. Under the wet/dry system, the manure collected from the confinement barn[2] was removed and placed in either a dry stack facility or a lagoon. When the lagoon or dry stack facility was full, Mr. Jones, Jr. then distributed the manure around the farm. He transported a large percentage of the manure to the northern tract of the property. According to Mr. Jones, Jr., the northern tract, which was set up for grazing, had a soil type that would "take about three times the manure as the south side."

Prior to the condemnation, Mr. Jones, Jr. used a tractor to transport manure from the southern tract to the northern tract. Mr. Jones, Jr. testified that, although there were risks associated with crossing the two-lane highway, such as oncoming traffic and spillage, the risks associated with crossing the new, four-lane segment of Highway 64 were much greater. To avoid the risks associated with crossing the anticipated new highway, Mr. Jones, Jr. testified that he began building a new confinement barn in 2005 and started the process of implementing a new manure management plan in 2008 or 2009.

[1] With the exception of a few lengths of fence.

[2] The confinement barn houses the cattle. Built up manure is cleaned out twice daily.

After heavy flooding occurred in 2010, the dairy farm stopped using the wet/dry system. The flooding caused the existing lagoon to "bust" or overflow and leak into a nearby creek. The Joneses then constructed a new lagoon and began moving the manure to a neighbor's farm located "right up the street."

Under this new "all wet" system, all of the liquid that accumulates in the confinement barn, including spillover milk and water, drains into the lagoon. Mr. Jones, Jr. then puts an agitator into the lagoon in order to convert the waste into liquid. After the manure liquefies, a "traveling gun" is attached to an irrigation pipe, and the manure is applied to the neighbor's farm.

Because the neighbor's farm and the Joneses' confinement barn and lagoon are both located south of the new highway segment, the Joneses did not have to transport manure north of the new highway. However, but for the neighbor's generosity, the Joneses would need to install an irrigation pipe running underneath the new highway in order to safely transport manure to the northern tract of their property. In addition to a new manure management system, Mr. Jones, Jr. testified that he also had to run new fencing along both sides of the new highway and install a new waterline in order to pump water to the northern section.

Mr. John Donaldson,[3] a manure transportation expert, testified that at least thirty percent of the manure generated from the Joneses' dairy farm needed to go to the northern section of the property. In his opinion, following construction of the new highway, the Joneses could not continue to haul manure across the road to the northern tract of the property because the environmental and safety risks were too great. After construction was complete, the new route from the southern tract to the northern tract was one mile longer than the previous route. Mr. Donaldson further testified that it would be unsafe, both from a personal safety and an environmental standpoint, as well as economically unfeasible, to travel that distance on the highway with liquid manure in the tank. For a slow moving tractor pulling liquid manure, oncoming traffic on the four-lane highway posed a significant safety risk. Also, any amount of liquid manure spilled onto the highway presented an environmental hazard. Simply put, the new highway presented the Joneses with a longer travel time and greater probability of spilling the liquid manure. Therefore, Mr. Donaldson opined that the Joneses had to move to an all wet system—requiring a larger lagoon—in order for the manure to travel through the pipe.

Mr. James Lamb, a certified real estate appraiser, testified to the value of the property before and after the taking. According to Mr. Lamb, the value before the taking was $746,000, and the value after the taking was $423,500.[4] When asked about the basis

[3] The trial transcript incorrectly refers to the witness as "John Donelson."

[4] Mr. Lamb utilized the "cost approach" in appraising the Joneses' farm. Of the three basic approaches to valuation, this was, in his opinion, the most viable.

for the lower valuation, he explained, "because of unique issues to this particular property in regard to manure management in particular, it's the big item." In valuing the property, Mr. Lamb considered the northern and southern tracts of the farm as a single tract. When asked why he considered the tracts as one, Mr. Lamb responded, "[w]ell, the property is owned by the same people. It's the same home, the same property, the same title. They are adjacent to each other and are contiguous to each other. And it is utilized and used for one primary purpose, in this case, a dairy farm."

Mr. Lamb further testified that the diminution in value equaled the value of the land actually taken, which he appraised at $43,661, plus the "cost to cure" the remaining property. Mr. Lamb felt that the cost to cure was an appropriate estimation of the diminution in value of the property. He stated that the most likely use for the property was as a dairy farm, and the cost of adapting the manure management system must be considered. He further testified that there were no comparable sales for dairy farms in the area. In calculating the cost to cure the property, Mr. Lamb included the cost to install fencing along the new highway at $18,240; the price of a new water well on the northernmost 61 acres at $5,468; and the price of the new manure management system at $225,321, which included the cost of irrigation piping, a new lagoon, and a confinement barn.

The State's principal argument at trial was that the northern and southern tracts represented two different parcels. Therefore, consideration of any incidental damages to the unaffected southern tract in calculating the compensation due the Joneses was inappropriate. Mr. James E. Wade, an appraiser, testified on behalf of the State. In conducting his appraisal, Mr. Wade considered only the northern tract. He testified that, even though the two tracts were used for the same dairy farm, they were used for separate purposes—the northern section for grazing and the southern section for dairy operations. As such, his opinion was that the southern tract was unaffected by the taking.

Mr. Wade determined that the value of the land actually taken was $2,000 per acre, or $32,966. Fencing along the new highway added another $16,813, and the cost to install a new pond or well on the northern section of the property was $3,000. In total, Mr. Wade testified that the "amount due owner" was $53,340.22, which included: the acquired land, acquired fencing, replacement fencing, and the cost of installing a pond or well.

At the close of the trial, but before the jury rendered its verdict, the State moved for a directed verdict on the issue of incidental damages under Tennessee Rule of Civil Procedure 50.01. The State argued that the Joneses had failed to carry their burden on whether there was a diminution in value of the property or a causal connection between any incidental damages and the condemnation. The court denied the motion.

After hearing all the evidence, the jury determined that the value of the property taken was $43,661. The jury found the amount of incidental damages to be $148,249. In reaching this figure, the jury determined that the remaining property subject to incidental damages should include both the northern and southern tracts of the Joneses' farm. The award of $148,249 in incidental damages represented the following sums requested by the Joneses: (1) $18,240 for new fencing; (2) $5,468 for a new well; (3) $30,000 for irrigation piping running beneath the new highway from the southern tract to the northern; and (4) half of the $189,083 requested for the construction of a new lagoon and confinement system, rounded to the nearest dollar—$94,541.

The trial court entered a judgment and final decree confirming the jury verdict on August 30, 2013. Taking into account the jury's award, less the amount already tendered to the Joneses, plus statutory interest of six percent per annum, the trial court ordered the State to tender an additional $221,018.22 to the Joneses. The State tendered the remaining balance on September 6, 2013.

The State renewed its motion for directed verdict under Tennessee Rule of Civil Procedure 50.02 on August 21, 2013, and filed a motion for new trial or remittitur of compensation for incidental damages on September 30, 2013. The court denied each of these motions, finding that the evidence supported the jury's award of incidental damages. On appeal, the State asserts the trial court erred in denying its motions for a directed verdict. The State also contends, alternatively, that the trial court erred in denying its motion for remittitur.

II. STANDARD OF REVIEW

Tennessee Rule of Civil Procedure 50.01 provides that "[a] motion for a directed verdict may be made at the close of the evidence offered by an opposing party or at the close of the case." Tenn. R. Civ. P. 50.01. Under Tennessee Rule of Civil Procedure 50.02:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 30 days after the entry of judgment a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict.

Tenn. R. Civ. P. 50.02.

We review the denial of a motion for a directed verdict de novo, applying the same standards as the trial court. *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47, 67 (Tenn. 2013); *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). However, we are not permitted to reweigh the evidence or reconsider issues of witness credibility. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). Rather, we "must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence." *Johnson*, 205 S.W.3d at 370; *Gaston*, 120 S.W.3d at 819. A motion for directed verdict may be granted only if reasonable minds can reach but one conclusion from the evidence. *Gaston*, 120 S.W.3d at 819. If "material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence," the trial court's denial of the motion for a directed verdict must be upheld. *Johnson*, 205 S.W.3d at 370.

To avoid a motion for directed verdict, the non-moving party must present enough evidence to establish a prima facie case. In other words, the party must present some evidence on every element of its case. *Richardson v. Miller*, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000); *see also Harrogate Corp. v. Sys. Sales Corps.*, 915 S.W.3d 812, 818 (Tenn. Ct. App. 1995). Whether the trial court should have directed a verdict presents a legal question of whether material evidence was introduced on every element sufficient to create a jury issue. *See Lazy Seven Coal Sales v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 403 (Tenn. 1991).

Likewise, where the trial court has denied a motion for remittitur our review of its denial is "limited to a review of the record to determine whether the verdict is supported by material evidence." *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 422 (Tenn. 2013).

III. ANALYSIS

On appeal, the State contends that the trial court erred in denying its motions for directed verdict and motion for remittitur on the issue of incidental damages for two reasons: (1) the Joneses failed to offer any evidence regarding the diminution in value of their remaining land; and (2) the Joneses failed to offer any evidence proving that the need to revamp their manure management system was related to the condemnation.

The proper measure of incidental damages in an eminent domain proceeding is the diminution in value of the land by virtue of the taking, measured by the difference between the value of the property and improvements prior to the acquisition and the value of the remaining property thereafter. *Shelby Cnty. v. Barden*, 527 S.W.2d 124, 127-28 (Tenn. 1975); *Shelby Cnty. v. Kingsway Greens of Am., Inc.*, 706 S.W.2d 634, 638 (Tenn. Ct. App. 1985); *City of Lebanon v. Merryman*, No. 01-A-01-9005-CV00157, 1990 WL 177348, at *3 (Tenn. Ct. App. Nov. 16, 1990). However, if the damages can be cured,

the proper measure of damages is either the diminished value of the property or the cost of repairing the damage, whichever is less. *Betty v. Metro. Gov't of Nashville & Davidson Cnty.*, 835 S.W.2d 1, 7 (Tenn. Ct. App. 1992) *overruled on other grounds by Edwards v. Hallsdale-Powell Util. Dist. Knox Cnty., Tenn.*, 115 S.W.3d 461, 466-67 (Tenn. 2003). As we stated in *City of Lebanon v. Merryman*, No. 01-A-01-9005-CV00157, 1990 WL 177348 (Tenn. Ct. App. Nov. 16, 1990):

> In a case of partial taking, the cost of curing anything on the remaining land that has been adversely affected by reason of the taking is an element to be considered in determining diminution of value. The cost itself, however, is not a proper measure of damages. *Shelby* [*Cnty*.] *v. Kingsway Greens of* [*Am*.], *Inc.*, [706 S.W.2d] at 638. Such evidence can be the building of a new road for access to the remaining land, digging a new well for water supply, or buying hay and feed that is no longer available because the land from which it once came has been taken. This evidence is admissible because it may tend to prove the diminished value of the remaining land, but the "cost to cure" cannot be included in fixing the amount of incidental damages. *Tate v.* [*Cnty.*] *of Monroe*, 578 S.W.2d 642, 645 (Tenn. Ct. App. 1978).

Id. at *3. Therefore, absent proof that the property's fair market value was diminshed by the taking, the "cost to cure is irrelevant." *State v. Scribner*, No. 01A01-9307-CV-00322, 1994 WL 44949, at *3 (Tenn. Ct. App. Feb. 16, 1994).

Furthermore, there must be a causal connection between the taking and incidental damages. *See Strasser v. City of Nashville*, 336 SW.2d 16, 30-31 (Tenn. 1960) (Damages are "to be ascertained by taking into consideration all the factors then existing with reference to the [property] which enter into the question of the damage, actual and incidental, resulting from the taking in fee simple by the State . . . .") Incidental damages are fixed and measured at the time of the condemnation. *See id*.; *Chicago, St. L. & N.O.R. Co. v. Mogridge*, 92 S.W. 1114, 1115 (Tenn. 1906). Whether an increase or diminution in value to the remaining land has occurred following a taking is a question for the jury. *State ex rel. Dep't of Transp., Bureau of Highways v. Brevard*, 545 S.W.2d 431, 436 (Tenn. Ct. App. 1976).

The jury instructions in this case stated:

> When determining incidental damages to remaining property, the "cost to cure" anything on the remaining land that has been adversely affected by reason of the taking is an element to be considered in determining diminution in value of the remaining property. "Cost to cure" refers to the reasonable cost of the improvements necessary to repair the

injury or damages caused by the taking that diminish the remaining property's value.

Generally, you must not include in your verdict any sum for loss of business or inconvenience to business. However, when the property has a particular or special value to the business of the owner, you may consider a decrease in the value of an ongoing business in your determination of incidental damages to the remaining property. If the land possesses a special value to the owner which can be measured in money, he has the right to have that value considered in determining the incidental damages to the remaining property, but any incidental damages fixed by you must be caused by the taking of a portion of the property and the building of the new public improvement, and not caused or brought about by something other than the taking or new improvement.

The incidental damages to remaining property is the lesser of the following amounts: the reasonable cost of curing or repairing the damage to the remaining property; or the difference between the fair market value of the remaining property immediately before and immediately after the taking.

A person who claims his property has been damaged is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for damages that could have been prevented by reasonable efforts or by expenditures that might reasonably have been made.

The jury was properly instructed on this issue.

Considering the standard of review applicable to this case, we cannot say that under "the strongest legitimate view of the evidence in favor of the non-moving party," that the Joneses have failed to carry their burden in proving incidental damages. *See Johnson*, 205 S.W.3d at 370. The Joneses successfully introduced evidence which could establish their entitlement to incidental damages. *See Richardson*, 44 S.W.3d at 30.

Evidence supports the conclusion that there was a diminution in value of the property following the taking. The Joneses' appraiser, Mr. Lamb, testified that the partial taking diminished the value of the remaining property. Although he did consider the "cost to cure" as a component of the diminution, he did so in the context of the diminished fair market value of the property. Based on his expertise, Mr. Lamb testified that the most likely buyer of the Joneses' property would be another dairy farmer and that any such buyer would take into account the "cost to cure" in the purchase price because the new fencing, water well, and manure management system would all be necessary to continue to operate the dairy farm as a going concern.

The State contends that Mr. Lamb unequivocally stated that neither the remaining land nor the remaining improvements suffered any loss in value. While it is possible that the jury may have drawn this conclusion based on the cross-examination of Mr. Lamb, they did not. It is not for us to reconsider the credibility of witness testimony or reweigh the evidence upon consideration of the denial of a motion for directed verdict. *See Johnson*, 205 S.W.3d at 370.

Sufficient evidence also supports a causal connection between the incidental damages and the taking. Both Mr. Jones, Jr. and Mr. Donaldson testified that the construction of the new highway segment would necessitate the use of a new manure management system. Both witnesses indicated that the new road would present serious safety and environmental concerns if the old wet/dry system were continued.

On appeal, the State's argument seems to center on the contention that the new lagoon and confinement barn were not made a necessity because of the new highway. Rather, they argue the necessity arose in the wake of the flooding in 2010. The State also points out that the confinement barn and new lagoon were not constructed until 2005 and 2010 respectively, after the taking occurred. However, neither of these contentions are relevant to the resolution of this appeal. Incidental damages are to be measured at the time of the taking. *See Strasser*, 336 S.W.2d at 30-31; *Chicago, St. L. & N.D.R. Co.*, 92 S.W. at 1115. Therefore, the actual timing of the construction of the new confinement barn and lagoon is not determinative. They may have been constructed after the condemnation, but construction of the new highway did not begin until late 2010. The necessity still arose due to the condemnation. Although there may have been some merit to the State's position on the issue of causality at trial,[5] the Joneses did offer some evidence, and taking the strongest legitimate view of it, the trial court's denial of the State's motion for directed verdict is supported.

Tennessee Code Annotated § 20-10-102 (2009) grants the trial court the discretion to reduce a jury award where appropriate. However, the trial court refused to do so in this case. Because material evidence supported the jury's verdict, the trial court's denial of the State's motion for remittitur was likewise proper. *See Meals*, 417 S.W.3d at 422.

[5] In its order denying the State's motion for remittitur, the trial court found the Joneses' evidence on the causality issue to be weak in relation to the necessity for the new confinement barn and lagoon. However, the court also determined that, despite crediting this evidence, the jury only granted the Joneses fifty percent of the requested amount for the barn and lagoon.

IV. CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

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W. NEAL McBRAYER, JUDGE