# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| Carrolls Water Association,<br>a Washington State Non-Profit Corporation,<br><br>Respondents,<br><br>v.<br><br>Mark Horn, an unmarried individual,<br><br>Appellant,<br>and<br><br>and Riverview Community Bank, a Washington State Corporation,<br><br>Defendant. | No. 39093-1-II<br><br>UNPUBLISHED OPINION |

HUNT, J. — Mark Horn appeals his jury award of $2,500 in damages as just compensation for Carrolls Water Association's condemnation of an easement along a strip of his property to operate an existing underground waterline for public necessity and use. Horn argues that the trial court erred in (1) excluding evidence of "the history of the case and the issues relating to the taking and illegal placement of the waterline on his property," (2) failing to record each sidebar conference at trial, (3) ignoring the Washington State Supreme Court's "mandate" establishing the property's "actual" boundary lines, (4) issuing jury instruction no. 14 on fair

market value, and (5) refusing to award him attorney and expert witness fees below.[1] Horn also requests attorney fees and costs on appeal. We deny this request and affirm the jury's verdict.

FACTS

In 1997, real-estate developer Wesco Properties, Inc. installed a waterline to connect the Carrollton Crest Subdivision to an external water source. In locating the waterline, Wesco relied on a survey. Questions later arose about whether Wesco had mistakenly built a portion of the waterline along a .20-acre area of Mark Horn's vacant, two-and-a-half acre property (Lot 18) adjacent to, but not part of, the subdivision. In 1998, the non-profit Carrolls Water Association assumed control of the waterline and "put [it] into use" to provide water to the subdivision's 157 members and 39 homes. Clerk's Papers (CP) at 5. And in 2002, Wesco transferred legal title in the waterline to Carrolls Water.

I. First Lawsuit—Timber Trespass

In 1998, believing Wesco had unlawfully removed timber and installed the waterline on his property without his permission, Horn sued the company for trespass damages (Cowlitz County Superior Court Cause No. 98-2-00980-3). At trial, the parties disputed the boundary lines of Horn's affected land based on several different surveys of the area. *See* CP at 212-213. In its findings of fact and conclusions of law, the trial court found that "the Dunn-Oleson survey established the boundary line for all purposes," and it awarded Horn $1,800 in damages for Wesco's unlawful removal of timber from his property, plus $125 in attorney fees and $130 in costs.[2] CP at 213.

[1] Br. of Appellant at 1.

Carrolls Water then offered to buy from Horn the strip of property along which the waterline ran. Horn agreed, but the parties never settled on a purchase price. As a result, title to the strip did not pass from Horn to Carrolls Water.

## II. Condemnation

In 2007, Carrolls Water petitioned to condemn—as an easement for "public use and necessity" (waterline easement)—the .20-acre strip of Horn's property on which the waterline was buried. CP at 7. The trial court granted the condemnation petition and entered findings of fact, conclusions of law,[3] and a certificate of necessity for "the public use proposed." CP at 83. Carrolls Water also requested a jury trial "to determine the compensation and damages, if any" to compensate Horn for the condemned waterline easement. CP at 7.

Before the trial on damages began, the trial court granted Carrolls Water's motion in limine to exclude "[r]eferences to any of the [previously] disputed issues" or proceedings and references to the waterline as "illegal." CP at 113. In its order limiting evidence at trial, the trial court barred Horn from "referring to or mentioning" the following matters: (1) "References to any of the disputed issues and proceedings of Horn vs. Wesco Properties, Inc., Cowlitz County Cause No. 98-2-00980-3, and Cowlitz County Cause No. 07-2-00438-7, and any subsequent appellate proceedings between the parties"; and (2) "References to the case of Eisenbarth vs.

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[2] *Horn v. Wesco Properties, Inc.*, noted at 127 Wn. App. 1041, 2005 WL 1300789.

[3] In its findings of fact and conclusions of law, the trial court found that (1) "the use of the condemned property is a public use as required" under Chapter 8.20 RCWA, finding of fact III, CP at 82; (2) "the public use proposed, and the property to be condemned," are "both reasonable and necessary to further the public use of the property," finding of fact IV, CP at 83; and (3) Carrolls Water's petition for condemnation was neither fraudulent nor arbitrary or capricious.

Mark Horn, Cowlitz County Cause No. 05-2-01969-8." CP at 113.

In response to Carrolls Water's motion in limine to exclude lay opinion testimony about the waterline easement's value, the trial court agreed to limit such evidence, concluding that lay witnesses could not testify about the property's value without "some particular expertise," Verbatim Report of Proceedings (VRP) (Dec. 1, 2008) at 50, and that Horn could testify about "reasonably-accepted [ ] methods" for determining just compensation damages when "supported by competent evidence." VRP (Dec. 1, 2008) at 50. The parties later stipulated that October 27, 2007—the date on which Carrolls Water filed its condemnation petition—would be the "taking" date for purposes of determining just compensation for the waterline easement. VRP (Jan. 7, 2009) at 205.

The trial court also ruled that (1) Carrolls Water received title to the waterline from Wesco on January 15, 2004; (2) Horn would receive trespass damages from Carrolls Water from the time it acquired the waterline on January 15, 2004,[4] until it filed the condemnation action on October 27, 2007; (3) the parties would not submit the question of trespass damages to the jury; and (4) after the jury verdict on just compensation, the parties would calculate the trespass damages at a rate of "one percent a month" of the jury's just compensation damages award to Horn. VRP (Jan. 7, 2009) at 205.

A. Waterline Easement's Value

Turning first to the amount necessary to compensate Horn for the waterline easement,

[4] The trial court advised the parties that any allegation of trespass damages occurring before January 15, 2004, was irrelevant because it involved a separate lawsuit pending between Horn and Wesco.

Carrolls Water's expert appraiser Kenneth L. Davis, Sr. testified, "[T]here's no loss in value [to Horn's land] due to the easement," VRP (Jan. 8, 2009) at 29; because (1) the waterline easement does not affect Horn's ability to use "that side area of the yard," VRP (Jan. 8, 2009) at 28; (2) Horn could not build within the first five feet of the waterline because local zoning rules designated that five-foot area for setbacks; and (3) despite the waiting list for new users to access the waterline, if Horn or a subsequent owner of Lot 18 were to connect to the waterline in the future, "It would save them thousands of dollars . . . as opposed to going with a private water source." VRP (Jan. 8, 2009) at 19. Davis testified that $2,500 is the standard amount of compensation that property owners receive for a utility easement.

Horn called no expert witnesses to rebut this testimony or to testify on his behalf. Instead, he testified about the waterline easement's value, based on its size and the area's property values. He testified that (1) the waterline easement is two-tenths of an acre in size[5]; (2) it lies entirely on his property, Lot 18—a vacant tract of land with no over-ground structures; (3) he does not plan to build on it; but (4) he should receive $31,000 to compensate for the waterline easement, based on the area's highest property values, and "a bunch of different factors," including his enjoyment of the property's views, privacy, and paved roads.[6]

B. Waterline Easement's Location

When Horn asked why the property's legal description, on which the survey relied, failed to include Lot 18 or the waterline easement, Carrolls Water's expert surveyor responded that the

[5] It is undisputed "that the total area of the [waterline] easement is two-tenths of an acre." VRP (Jan. 8, 2009) at 136.

[6] VRP (Jan. 8, 2009) at 140.

waterline easement "[wa]s not a part of the original Lot 18." VRP (Jan. 7, 2009) at 78. Carrolls

Water then requested a sidebar conference outside the jury's presence, during which it objected that Horn was "essentially eliciting" testimony about the history of the property, contrary to the trial court's in limine order limiting evidence at trial. VRP (Jan. 7, 2009) at 78. The trial court stated, "[O]nce the piece of property is identified," information about "[h]ow we got to that point is not relevant" because the property's value is the only relevant issue. VRP (Jan. 7, 2009) at 81-82.

Horn's counsel advised the trial court that Horn would testify about the easement's location on his property but objected that Lot 18's legal description was "not properly-drafted" because the survey on which it relied had failed to reference "Lot 18," designating it only as "Lot 4." VRP (Jan. 7, 2009) at 84, 85. The trial court overruled this objection, reasoning that because Lot 18's legal description includes its "meets[sic] and bounds" measurements, the question of "[w]hether it's [actually part of] Lot 4 or Lot 18 doesn't make any difference." VRP (Jan. 7, 2009) at 86. The trial court further noted, "We can redraft the [legal] description, if necessary." VRP (Jan. 7, 2009) at 87.

Carrolls Water's expert surveyor then testified that the waterline easement lies along the westerly boundary line of Horn's property. Carrolls Water asked, "[I]s this easement that you've drafted here, that's contained in Exhibit 1, actually on Mr. Horn's property?" VRP (Jan. 7, 2009) at 89. The expert surveyor replied, "[Y]es." VRP (Jan. 7, 2009) at 89.

Horn next called a lay witness, sewer construction equipment operator Raymond Gawthorne, who testified about his "first-hand knowledge of the water quality [in the area of the water line easement]." VRP (Jan. 8, 2009) at 156. Horn called another lay witness, Everett

Timmreck, Carrolls Water's Board of Directors President. Counsel for Carrolls Water noted, "So long as the testimony is limited to the moratorium, I have no objection."

The jury awarded Horn $2,500 in damages as just compensation for the condemned waterline easement. Horn appeals.[7]

ANALYSIS

I. Excluded Evidence

Horn argues that the trial court abused its discretion in excluding evidence "of other directly relevant cases, parties and wrongdoings,"[8] as irrelevant to the only issue at bar—the value of his property as encumbered by the waterline easement. Br. of Appellant at 7. We disagree.

At the outset, we note that Horn's argument, as outlined in his brief of appellant and raised in the jury trial below, attempts to relitigate previously and/or finally adjudicated issues involving other parties, claims, and properties that are not before us on appeal and were neither raised below nor relevant to the jury's decision on just compensation damages. These issues include: (1) "the illegality of the installation" of the waterline on Horn's property and related claims for damages in trespass; and (2) the legality of the condemnation action, which Horn characterizes as an "unconstitutional taking" of his property, despite his having failed to raise the

[7] Horn seeks a new trial for "determination of the value of property taken." Br. of Appellant at 21. At oral argument, he clarified that he seeks a new trial because he believes the jury's determination of just compensation was too low.

[8] Horn argues that the trial court erred in excluding testimony of (1) his property's actual boundary lines, (2) "attorney fees and costs associated with the many legal proceedings he has had to institute in order to obtain justice in this case," (3) "the history of this case," (4) "how much land [he] owned," and (5) "references to the illegality of the installation" of the waterline. Br. of Appellant at 1, 5-6. But, as the trial court concluded below, none of these items of evidence were relevant to the jury's determination of the easement's value and just compensation for Horn.

issue or to challenge the condemnation's legality below.[9] Br. of Appellant at 6. Horn seeks a new trial, apparently challenging only the amount of the jury's just compensation verdict; thus, our review is limited to this issue.

A. Irrelevant Evidence

We review for abuse of discretion a trial court's discretionary decision to exclude evidence as irrelevant; we will not reverse such a decision unless it is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *Lee v. Sauvage*, 38 Wn. App. 699, 709, 689 P.2d 404 (1984). Contrary to Horn's argument, the trial court did not abuse its discretion in excluding evidence of other "cases, parties and wrongdoings." Br. of Appellant at 7. The record demonstrates that those topics pertained to trespass and timber removal—issues previously adjudicated between Horn and Wesco and for which Horn was awarded separate damages for trespass. *See* CP at 213; *Horn v. Wesco Properties, Inc.*, noted at 127 Wn. App. 1041, 2005 WL 1300789, at *4.

In the instant case, the trial court repeatedly reminded the parties that the only relevant

[9] Horn does not, however, challenge the underlying condemnation action. Therefore, the legality of the condemnation is not before us. RAP 10.3(a)(4).

Similarly, Horn fails to assign error to what he characterizes as the disallowance of interest on his just compensation damages, running from the time the waterline was installed. Although, therefore, we need not address this issue either, RAP 10.3(a)(4), we note that the trial court's judgment does include interest on the damages the jury awarded Horn as just compensation for the waterline easement.

Furthermore, as we note in the facts section of this opinion, the parties agreed below that Horn would receive trespass damages from Carrolls Water from the time it acquired the waterline on January 15, 2004, until it filed the condemnation action on October 27, 2007; and the trial court advised the parties that any claim for trespass damages occurring before January 15, 2004, was irrelevant to the instant case because it involved a separate lawsuit between Horn and Wesco.

inquiry was the waterline easement's value and the amount of damages necessary to compensate Horn for its condemnation. ER 402 provides: "Evidence which is not relevant is not admissible." ER 401 defines "relevant evidence" as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Horn fails to argue in his appellant's brief that the evidence of which he complains would fall within ER 401's definition of relevant evidence. Nor does he argue that the evidence was "of consequence to the determination of the action" or otherwise relevant to the easement's value or to the jury's determination of just compensation. ER 401. Accordingly, the trial court did not abuse its discretion in excluding evidence of the previous proceedings.

B. Just Compensation

Although Horn agreed below with Carrolls Water's expert surveyor that the waterline easement is .20 acres in size, he argues that "the [trial] court specifically disallowed certain damages" and improperly excluded evidence in calculating its value. Br. of Appellant at 6-7. But other than broadly asserting that "he believed [that $31,000 was] the value of the property where the easement actually was," Br. of Appellant at 14, Horn does not attempt to explain why the jury's determination of compensation for the condemned easement was not just.[10] And he did not

[10] Both parties cite our decision in *Paul Bunyan Rifle and Sportsman's Club*, in which we articulated the modern method for measuring just compensation for condemnation of real property as follows:

> [W]here only part of a single tract of land is taken, the measure of damages is the fair market value of the land taken together with damages to the land not taken. In other words, just compensation is the difference between the fair market value of the entire tract before the acquisition and the fair market value of the remainder after the acquisition.

present evidence below about how the waterline damaged his property, even though his attorneys had mentioned this possibility. Therefore, even assuming, without deciding, that the trial court erred in excluding the evidence, we do not reverse. *State v. Jones*, 33 Wn. App. 372, 374, 656 P.2d 510 (1982), *aff'd*, 101 Wn.2d 113, 677 P.2d 131 (1984) ("Trial error is not a ground for reversal unless the error is prejudicial").

We also hold that the evidence supports the jury's award of $2,500 to Horn as just compensation for the waterline easement. Carrolls Water's expert appraiser testified that although the waterline's underground location did not lessen the value of Horn's Lot 18 property, a standard offer of compensation for this type of easement ranges from $500 to $5,000 for negotiation purposes; and $2,500 is a common amount of compensation for this type of utility easement. Although Horn disputed this amount in his trial testimony, he provided no expert witnesses to rebut it; nor did he present any evidence to counter Davis's assertion that $2,500 is a standard, common amount of compensation for this type of case. As the foregoing facts demonstrate, the evidence presented at trial supports the jury's award of $2,500 as just compensation for Horn.

Horn also contends that "the trial court abused its discretion in refusing to follow the [Washington State Supreme Court's] mandate[11] as to where the actual boundary line lay, causing

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132 Wn. App. 85, 92, 130 P.3d 414 (2006). *Paul Bunyan*, however, involved the condemnation of an entire strip of property, with title passing to the State, such that the property owners no longer had use of this valuable commercial frontage along a state highway. 132 Wn. App. at 87-88. Here, in contrast, Carrolls Water condemned an easement for use of a waterline buried in the ground, which did not similarly deprive Horn of his use of the ownership and use of the surface of the ground.

[11] Horn fails to support this contention: He fails to identify either the substance of this "mandate" or citation to any court decision proclaiming such "mandate." Br. of Appellant at 12. As we

jury confusion."[12] Br. of Appellant at 12. But Horn does not argue that the easement's exact location would affect its value. Nor does he argue that the exclusion of this boundary line evidence prejudiced his case. *See Jones*, 33 Wn. App. at 374, 377. For these reasons, we could reject his argument outright.

Nevertheless, as the trial court explained, we note that Horn's property's legal description includes undisputed "[metes] and bounds measurements" such that the question of "[w]hether it's on Lot 4 or Lot 18 doesn't make any difference." VRP (Jan. 7, 2008) at 86. Thus, the exact location and boundary lines of the property over which the waterline easement runs were unnecessary and irrelevant to the jury's assessment of the waterline easement's value. More specifically, as Carrolls Water aptly notes, "Horn's speculation that the jury may have been misled is not relevant to the jury's determination of 'just compensation,'" and "Horn's objection to [L]ot 4 being referenced in the description is irrelevant to a proper description for valuation."[13] Br. of Resp't. at 9-10.

In sum, Horn fails to show that he did not receive just compensation for the condemnation of the waterline easement, which is the only issue before us on appeal. As we note in the facts

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earlier noted, we do not address arguments unsupported by citation to authority and insufficiently developed such that we must guess at its meaning.

[12] It is apparent from the parties' briefs and from oral argument that previous litigation resolved confusion about the location of the waterline with respect to Horn's property and that various boundary line adjustments were made. Thus, the only remaining trial issue that Horn now appeals is the amount of damages or just compensation for that portion of the waterline that was buried on part of Horn's property.

[13] The trial court also noted that the parties could "redraft the [property's legal] description, if necessary" to correct any asserted errors. VRP (Jan. 8, 2008) at 87.

section of this opinion, (1) Horn previously litigated the property's boundary line and trespass damages issues in his separate lawsuit against Wesco, a case on which we ruled in two previous appeals and which is not before us now; and (2) the trial court ruled pre-trial that the parties could not introduce evidence of the trespass issue at the condemnation jury trial. Because the foregoing facts demonstrate that Horn's previous litigation with Wesco was irrelevant to the issue of just compensation, Horn fails to demonstrate how excluding these topics caused prejudice to his case. We find no abuse of discretion in the trial court's ruling on the evidence.

C. Unrecorded Sidebars

In a related argument, Horn contends that the trial court abused its discretion in failing to record "some of the side bar[sic] conference[s] in which the discussion was clearly about the property line and the previous decision by the court of appeals." Br. of Appellant at 10. He also contends that because "there is nothing in the record to indicate what the unrecorded proceedings . . . were about . . . this area of the trial [is] open to speculation." Br. of Appellant at 11-12. Again, we disagree.

Horn provides no supporting argument about how this unrecorded sidebar prejudiced his case or otherwise affected the jury's determination of his damages award.[14] Br. of Appellant at 11-

[14] The argument that Horn does present on this point is internally inconsistent: He argues both that that "there is nothing in the record to indicate what the unrecorded proceedings . . . were about," Br. of Appellant at 11, and that "some of the sidebar conference . . . was clearly about the property line and the previous decision by the court of appeals." Br. of Appellant at 10. Furthermore, Horn could easily have remedied this deficiency at trial. As Carrolls Water correctly points out, (1) "It was within Mr. Horn's power to obtain an affidavit reciting what occurred during any sidebar conference," which he did not do; (2) "[w]e are left to speculate as to what [Horn] contends would have been added to the record had the sidebar conferences been recorded"; and (3) "[the unrecorded sidebars] were irrelevant whether they were recorded or not." Br. of Resp't at 7-8.

12. Under RAP 10.3(a)(6) we need not address such undeveloped arguments. As we previously noted, "Trial error is not a ground for reversal unless the error is prejudicial." *Jones*, 33 Wn. App. at 374. Therefore, we do not further consider this argument.

II. Jury Instructions

Horn next argues that the trial court abused its discretion in issuing jury instruction no. 14 on fair market value.[15] But as Carrolls Water asserts in its brief, "Neither of Mr. Horn's two attorneys object[ed] to any jury instruction nor proposed any alternative instructions." Br. of Resp't at 10. The record supports this assertion. Horn, therefore, has waived his ability to raise this issue on appeal.

The law is well-settled that before Horn can claim error based on a jury instruction, he must first show that he objected to the instruction in the trial court. *Stewart v. State*, 92 Wn.2d 285, 298-99, 597 P.2d 101 (1979). As Division One of our court articulated in *Goodman v. Boeing Co.*, "If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure." 75 Wn. App. 60, 75, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Because Horn failed to preserve this issue for appeal, and it does not involve a manifest constitutional error, we do not further address it. *Goodman*, 75 Wn. App. at 75.

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[15] Jury instruction no. 14 provided, "Fair market value cannot be measured by the value of the property to Carrolls Water Association, the value of the Carrolls Water Association project, or Carrolls Water Association's need for the particular property." CP at 342.

III. Attorney and Expert Witness Fees

Lastly, Horn argues that the trial court abused its discretion in "not awarding [him] attorney fees and expert witness fees." Br. of Appellant at 16. But again, as Carrolls Water asserts, (1) Horn fails to cite controlling legal authority in support of this request, contrary to RAP 10.3(a)(6); and (2) he "was not entitled to expert witness fees because he never called an expert witness to testify in this case." Br. of Resp't at 12. The record supports these assertions. Thus, Horn establishes no legal basis for an award of expert witness fees or reasonable attorney fees below.[16]

Horn also requests an award on appeal under RAP 18.1 for the "filing fee, costs for copies and service of documents on the other party and the court, and the attorney fees relating to this appeal." Br. of Appellant at 20. Because he does not prevail on appeal, we deny his request for attorney fees and costs on appeal.

[16] To the extent that Horn requests "all attorney fees and expert witness fees incurred, extending back to 1998 and continuing to date," Br. of Appellant at 19, his argument lacks merit because (1) his January 7, 2009 jury trial on damages for the waterline easement condemnation is the only matter before us; (2) the proceedings that occurred before his 2009 jury trial are irrelevant; and (3) although Horn recognizes that the abuse-of-discretion-standard controls our review of a trial court's decision to deny a party's attorney fee request, he fails to show how the trial court's decision denial of his attorney fee request was an abuse of discretion under the facts here. Br. of Appellant at 16-18 (citing *Kennedy v. Martin*, 115 Wn. App. 866, 872, 63 P.3d 866 (2003)).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Van Deren, CJ.

Penoyar, J.