IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

DOYLE SMITH and VIRGINIA SMITH,	)	
Plaintiffs-Appellants,	)	
vs.	)	
CITY OF SIOUX CITY, IOWA; FIRST NATIONAL BANK IN SIOUX CITY; MOBILE PIPE LINE CO.; BROTHERS PIPE LINE CO.; IOWA PUBLIC SERVICE COMPANY; WOODBURY COUNTY SOIL CONSERVATION DISTRICT; HALLIE SARGISSON, Woodbury County Treasurer; and WOODBURY COUNTY, IOWA,	)	210
Defendants-Appellees.	)	Filed September 30, 1987 7-270 86-1260

Appeal from the Iowa District Court for Woodbury County (No. 87394 Law) - Phillip S. Dandos, Judge.

The plaintiffs appeal from a condemnation jury's award for partial taking of their real estate and from the trial court's ruling denying their motion for a new trial. **AFFIRMED.**

Robert W. Green of Carter, Sar, Edmonds & Green, Sioux City, for plaintiffs-appellants.

C. Maurice Rawe and Ann K. Jensen, Assistant City Attorneys, for defendants-appellees.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J. 211

This is an appeal by landowners from a condemnation jury's appraisement of damages resulting from a partial taking of their real estate. We affirm.

Plaintiffs Doyle and Virginia Smith owned 583 acres of farmland in Woodbury County. The City of Sioux City (defendant) sought to condemn 88.99 acres of plaintiffs' land to establish a sanitary landfill.

The condemnation commission met and on March 24, 1981, filed a written report assessing plaintiffs' damages in the amount of $101,000. See Iowa Code §472.14. Plaintiffs appealed the condemnation commission's award of damages to the district court.

The case was tried to a jury. The jury awarded plaintiffs $101,000. Plaintiffs appeal and raise the following issues:

1. The court erred in admitting the testimony of defendant's expert.
2. The court erred in excluding evidence of an option to buy the condemned land for $185,000 given by plaintiffs to a third party after the time of the taking.
3. The court erred in admitting evidence with regard to the granting of an easement to plaintiffs by the City of Sioux City.
4. The court erred in overruling plaintiffs' motion for mistrial made when defendant's attorney told the jury in his opening statement that plaintiffs had been paid $101,000 by the City for the condemned property.
5. The court erred in overruling plaintiffs' motion for new trial based on alleged juror misconduct and inadequate damages unsupported by sufficient evidence in the record.

I.

Plaintiffs claim the trial court erred in admitting the testimony of defendant's expert appraiser, Ritch LeGrand. LeGrand testified that he physically inspected the subject property for the City of Sioux City and made an appraisal in January 1980 and again on January 31, 1981. The measure of damages for a partial taking is the difference in the fair market value of the subject property immediately before and immediately after condemnation. Yoder v. Iowa Power

& Light Co., 215 N.W.2d 328, 332 (Iowa 1974) (quoting Jones v. Iowa State Highway Comm'n, 255 Iowa 615, 632, 123 N.W.2d 424, 434 (1963)). Plaintiffs claim LeGrand's opinion as to the value of the land was irrelevant because his inspection was not made immediately before and immediately after the condemnation on March 24, 1981. The force of plaintiffs' argument on this issue is somewhat blunted by the fact that plaintiffs' own expert first inspected the property for the purpose of appraisal in May 1986, over five years after the condemnation.

The trial court has considerable discretion in the admission of expert appraisal testimony. Crist v. Iowa State Highway Comm'n, 255 Iowa 615, 629, 123 N.W.2d 424, 432 (1963). Plaintiffs make no claim there were any factors that changed during the month and one-half before the condemnation occurred. Also, plaintiffs cross-examined LeGrand regarding his knowledge and appraisal methods.

While the issue is the value of the condemned land at the time of the taking, anything that reasonably bears on that question is admissible in evidence. Crist, 255 Iowa at 630, 123 N.W.2d at 432 (year-old valuation admitted). See Martinson v. Iowa State Highway Comm'n, 257 Iowa 687, 693, 134 N.W.2d 340, 344 (1965) (six-month-old valuation admitted). The trial court properly overruled plaintiffs' objection to LeGrand's testimony.

II.

Plaintiffs next claim the trial court erred in refusing to admit evidence plaintiffs gave an option to purchase the condemned real estate for $185,000 to a third party after the time of the taking. The option agreement was executed on June 1, 1981. The prospective buyer testified had the City awarded him the landfill contract, he would have exercised the option, but he had no other reason to acquire the property.

In Hardaway v. City of Des Moines, 166 N.W.2d 578, 581 (Iowa 1969), plaintiffs-condemnees offered to prove what a prospective buyer had offered them for the condemned property two years prior to the condemnation. The court held that the trial court did not err in excluding that evidence. Id. at 582.

Although an unaccepted offer to purchase real estate is not identical to an unexercised option to purchase, we believe the reasoning used by the Hardaway court applies in this case:

> The burden is placed on the party seeking to introduce such evidence to lay a sufficient foundation to establish the offer was made prior to condemnation. . . . and it must be determined whether [the offer was] made with reference to the fair cash market value of the property or to supply a particular need or fancy.

Id. at 581 (emphasis added).

The condemnation occurred on the date upon which the commission made its appraisement, March 24, 1981. See Heldenbrand v. Executive Council, 218 N.W.2d 628, 632 (Iowa 1974). Thus, the June 1 option was not executed prior to the condemnation. The buyer's testimony in the offer of proof reflected his interest in the property was for a particular and highly specialized need.

We conclude the trial court did not err in excluding evidence of the option to purchase for $185,000. It was not relevant to the sole issue in the case: the fair market value of the property immediately before and immediately after the condemnation.

III.

Plaintiffs objected to evidence offered by defendant regarding an easement granted to plaintiffs by the City. The entire 583-acre tract had approximately one and a quarter miles of road frontage prior to the condemnation, but only a half mile afterward.

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Defendant presented testimony and an exhibit relating to a resolution, authorized and approved by the city council in February 1982, that granted plaintiffs an ingress and egress easement across the landfill site. Plaintiffs objected to admission of the exhibit, claiming it was irrelevant because defendant's witness did not know whether the resolution had been delivered to plaintiffs or whether the easement had been recorded.

The issue whether plaintiffs were deprived of convenient access to their property is material. Jury instructions Number 15 and 17 instruct the jury to consider impairment of plaintiffs' ingress and egress in assessing damages.

Defendant validly characterizes the city council's resolution as evidence of defendant's intention to limit its taking. A condemnor may limit its acquisition by announcing a lesser taking; such announcement may be made as late as the trial itself. Fanning v. Mapco, Inc., 181 N.W.2d 190, 194 (Iowa 1970) (condemnor limited taking to easement for one pipeline rather than an easement for an unlimited number of pipelines).

Although the resolution does not create an easement valid against subsequent purchasers, see Iowa Code §558.41 (no instrument affecting real estate is valid against subsequent purchasers unless recorded), it is evidence of the extent of the taking. Plaintiffs have the burden of proof to establish their case and to show such reasonable market value of their property as they claim it to be. Crist, 255 Iowa at 632, 123 N.W.2d at 434. Plaintiffs gave no evidence they have been deprived of convenient access to their property, other than the mere fact that the condemned property abutted three-quarters of a mile of their road frontage.

We conclude the court did not err in admitting evidence of the city council's resolution granting plaintiffs an easement across the landfill.

The trial court made a record that during his unreported opening statement, defendant's attorney "made a statement that the City had paid to the plaintiffs the sum of $101,000 for the property herein." Upon plaintiffs' objection, the court admonished the jury to disregard the statement. Plaintiffs subsequently moved for mistrial. The court overruled plaintiffs' motion for mistrial but granted a motion in limine forbidding defendant to refer to the amount of the condemnation commission's award.

The court, having been apprised of Iowa Code section 472.21, later amended its admonition to the jury and permitted the admission of evidence of the condemnation commission's award of $101,000. Section 472.21 provides that the "appraisement of damages by the condemnation commission is admissible" in appeals from condemnation proceedings.

Plaintiffs argue the attorney's statement constituted prejudicial misconduct so great the court's admonition could not erase it from the minds of the jurors. The trial court has considerable discretion in determining whether the alleged misconduct, if there was any, was prejudicial. Hamilton v. O'Donnell, 367 N.W.2d 293, 296 (Iowa App. 1985).

We agree with the trial court's amended admonition: while evidence that the commission "awarded" plaintiffs $101,000 is admissible, evidence that plaintiffs were actually paid $101,000 is not admissible. In finding that plaintiffs were not prejudiced by the remark and that a different result was improbable even if it had not been made, the court exercised its discretion. Kester v. Bruns, 326 N.W.2d 279, 281 (Iowa 1982).

Plaintiffs argue that prejudice is apparent because the jury's award of damages is identical to the amount defendant's attorney said plaintiffs were paid by the City. The record reveals, however, the $101,000 figure was repeatedly

and properly put before the jury as the amount awarded by the condemnation commission as their assessment of plaintiffs' damage. Jury instruction Number 22 informed the jury defendant "admitted that the value of such property is in the amount of $101,000."

The court admonished the jury immediately after the remark was made and also instructed the jury that remarks made in opening statement are not evidence. We are unable to say, under the whole record, that the trial court exceeded the bounds of fair discretion in its rulings. Kester, 326 N.W.2d. at 281.

V.

Plaintiffs' final argument on appeal concerns their motion for new trial based on several factors including the assignments of error already addressed in this opinion. See Iowa R. Civ. P. 244.

Additionally, plaintiffs assert the jury was guilty of misconduct. After trial, plaintiffs' attorney learned the jury foreperson's nephew had been killed in an automobile accident somewhere along the road running adjacent to the condemned property. The juror did not reveal this information during voir dire when asked if she had any knowledge of the subject property. We find no indication in the record this alleged misconduct was calculated to, or with reasonable probability did, influence the verdict. See Moore v. Vanderloo, 386 N.W.2d 108, 118 (Iowa 1986). Plaintiffs' allegation of juror misconduct is without merit.

Plaintiffs also moved for a new trial on the grounds that the jury's $101,000 damage award was inadequate and was not substantiated by sufficient evidence in the record. The essence of plaintiffs' argument is that the $101,000 damage figure returned by the jury does not equal any of the appraisals made by plaintiff Doyle Smith, plaintiffs' expert and defendant's expert: $190,000; $152,000; and $100,000 respectively. The jury was instructed to fix plaintiffs' damages by

determining the difference between the fair and reasonable market value of the plaintiffs' property as a whole immediately before the taking and the value of the part remaining immediately after the condemnation. The jury was not required to make a finding regarding the reasonable market value figures; they only had to agree upon the amount of the difference between the before and after values.

We find the jury's award is clearly within the range of trial testimony and thus is based on sufficient evidence. Where a verdict is within the evidence, we will not disturb the jury's award. Gail v. Clark, No. 86-493, slip op. at 36 (Iowa July 22, 1987).

In ruling upon a motion for new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). We find no abuse of discretion in the trial court's ruling denying plaintiffs' motion for new trial.

AFFIRMED.