IN THE COURT OF APPEALS OF IOWA

No. 0-379 / 89-1326

NORMAN E. KELLER and PATRICIA A. KELLER,

Appellants,

vs.

CITY OF LEON, IOWA, and DECATUR COUNTY STATE BANK (LIENHOLDER),

Appellees.

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Decatur County, Jerrold W. Jordan, Judge.

Kellers appeal a jury verdict awarding them damages in a condemnation proceeding. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Scot M. Halverson, Leon, for appellants.

Sherman W. Phipps of Phipps & Rolfe, Lamoni, for appellee City of Leon.

Charles L. Elson of Elson & Fulton, Leon, for appellee Decatur County State Bank.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

In 1979 the Kellers purchased a parcel of real estate in the City of Leon (City). At the time of the purchase, the Kellers were unaware that a city sewer line existed on their land. In 1988 the City condemned a portion of the Kellers' land for the purpose of repairing and relocating the preexisting sewer line on their land. The condemnation commission awarded the Kellers $500. The Kellers appealed the award pursuant to Iowa Code section 472.21. The jury awarded the Kellers $500. The Kellers appeal.

The Kellers contend that they are entitled to more than $500 in damages. They claim that the district court erred in excluding evidence concerning the illegality of the preexisting line as it affected the value of the property. The Kellers also contend that the court improperly excluded their evidence regarding the diminution of value of their land by the removal of trees and other side effects of the acquisition of the easement.

Our standard of review is on assigned errors of law. Hammer v. County of Ida, 231 N.W.2d 896, 900 (Iowa 1975). We are bound by the trial court's finding of facts if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Evidence on Damages

The doctrine of eminent domain is subject to Iowa's constitutional mandate: "Private property shall not be taken for public use with out just compensation first being made, ..." Iowa Const., Art. I, sec. 18.

We deal first with the trial court's exclusion of evidence concerning the diminution of value in their land due to construction procedures, especially the removal of their trees. We begin our inquiry by reviewing the pertinent section of the Iowa Code.

> The commissioners shall, at the time fixed in the aforesaid notices, view the land sought to be condemned and assess the damages which the owner will sustain by reason of the appropriation; . . .

Iowa Code § 472.14 (1989).

The standard used in condemnation procedures is that of fair market value, the potential market price negotiated between an able buyer and a willing seller. See 29A C.J.S. Eminent Domain § 159 (1965). "Both parties to a condemnation appeal are entitled to offer evidence of facts that would impress a willing buyer in purchasing the land." Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1239, 150 N.W.2d 642, 650 (1967).

"'[C]ondemnee's recovery * * * is not restricted to the value of the land taken, but he is entitled to have assessed all damages as the taking occasioned to the land as an entirety.' (emphasis added [and extended]). Hammer v. County of Ida, 231 N.W.2d 896, 901 (Iowa 1975) (quoting Wilkes v. Iowa State Highway Commission, 172 N.W.2d 790, 794 (Iowa 1969)). "The value of trees growing on the land has been considered a proper element to take into consideration is such a case." Kukkuk v. City of Des Moines, 193 Iowa 444, 456, 187 N.W. 209, 214 (1922).

> [D]amages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken.
>
> The value of the tract "after the taking" is to be determined by the condition in which the property will be, assuming that the condemned property is properly used for the purpose for which it is taken . . . .
>
> In a general way, it may be said that all matters, either present or future, that necessarily and proximately affect the market value of the tract by the appropriation and proper use of the condemned portion for which it is taken, may be considered in assessing damages.
>
> Applying the general rules to the instant case, it is obvious that the appellee was entitled to show to the jury the condition in which his property would be after the condemned strip had been appropriated and used for the purpose for which it was taken.

Kukkuk, 193 Iowa at 448-49, 187 N.W. at 211 (quoted in part by Hammer, 231 N.W.2d at 900).

The City contended, and the trial court apparently agreed, the condemnation only included those items specifically listed. We find this standard unacceptable in light of the pertinent authority. To allow the taking to be so limited, would allow any condemning government agency to define the amount it will pay by simply putting in its report only the minimum necessary. The land owner would then have to resort to a separate action against the contractor or other third party. Such a result is inequitable and contravenes the very spirit of the Just Compensation Clause.

We determine Kukkuk v. City of Des Moines is controlling in the present case. We determine the district court erred by not allowing evidence of the diminution in

value to the Kellers' land caused by the removal of trees and other consequences flowing from the construction of the new sewer line.

We reverse the district court on this issue and remand the case to the district court for a new trial, to include evidence of diminution in value due to the removal of trees and other consequential damages. We determine the City of Leon may not raise affirmative defenses of negligence of the contractor or other affirmative defenses unless they were properly pleaded in its answer or similar motion. Iowa R. Civ. P. 72, 101, 104; See Colonial Baking Co. v. Dowie, 330 N.W.2d 279,283-84 (Iowa 1983); Foods, Inc. v. Leffler, 240 N.W.2d 914, 920 (Iowa 1976).

II. Prior Servitude

The other issue raised is whether a preexisting sewer line is a mere permissive item under a license or an already established easement, and the effect of this in determining damages. The Kellers assert they could revoke the license or permission at any time. This they could not do with an easement. The easement would take precedence over their legal title and over their actual dominion of the land. They contend the the correct valuation should be the difference of the land value with a sewer line subject to a revocable license, versus the land after the easement had been imposed. The Kellers did in fact revoke the license for the sewer.

The parties stipulated to the fact of a preexisting sewer line on the Kellers' property. However, the Kellers asserted they were not on notice of this at the time of purchase. The Kellers further asserted there was insufficient physical evidence to put them on notice as to the existence of the sewer.

The general rule is well stated in the Iowa Code.

> **Adverse Possession - "use" as evidence.**
> In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Iowa Code § 564.1 (emphasis added).

> Our statute for many years has said that use alone is not evidence and there shall be express notice of claim of right. The mere use, therefore, never ripens into an easement. It must be shown that the person asserting an easement claimed a hostile right to use the way, and with the landowner's knowledge.

Paul v. Mead, 234 Iowa 1, 11, 11 N.W.2d 706, 711 (1943).

However, an exception has been carved out.

> An easement by prescription is created "by adverse possession, ..." We have also said under some circumstances "there may be an easement by prescription where the original use was with consent of the servient owner and use as of right has continued for more than ten years."
> * * *
> We conclude that it has been applied only in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use. Almost

> all are drainage cases and are determined either on the theory of a valid executed oral agreement or on the principle of estoppel.
>
> * * *
>
> It therefore appears we have modified the requirements to establish an easement by prescription in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreements. In such circumstances we do not apply the strict rules [of adverse possession].

Simonsen v. Todd, 261 Iowa 485, 489-95, 154 N.W.2d 730, 732-36 (1967) (citations omitted); cited with approval in Maisel v. Gelhaus, 416 N.W.2d 81, 87 (Iowa App. 1987).

Simonsen is controlling in this case. The trial court was correct in finding an easement by prescription in the preexisting sewer line. Considerable labor and money had been expended in laying that line. It was laid with the permission of a previous land owner.

> The license in this case was fully executed and plaintiff is in no position to revoke it. Where executed it becomes irrevocable, for the reason that to permit the licensor to revoke it at pleasure would constitute a fraud upon the licensee.

Simonsen, 261 Iowa at 492, 159 N.W.2d at 734.

We affirm the trial court on this issue.

We remand this case for a new trial on damages, considering the diminution in value of the land after the taking for the easement. The evidence may include those items which can be shown to have been lost or damaged as an immediate result of the easement and construction of the sewer line.

In closing, we point out neither attorney cited the controlling case authority and were apparently unaware of its existence. The briefs of both parties were scant and barely helpful to this court.

Cost on appeal are taxed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Donielson, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm in all respects.