

RENDERED: APRIL 21, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000508-MR

RICHARD WOLFORD AND
JACKIE WOLFORD

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 02-CI-005253

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Richard and Jackie Wolford bring this appeal from a February 8, 2005, judgment of the Jefferson Circuit Court awarding damages in the amount of \$15,936.00 for the condemnation of property by the Louisville and Jefferson County Metropolitan Sewer District (the Sewer District). We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

This controversy began when the Sewer District initiated an eminent domain action pursuant to the Eminent Domain Act, Kentucky Revised Statutes (KRS) 416.540-680. The Sewer District sought to install a forced main sewer to connect a large station pump in eastern Jefferson County to the Floyd's Fork Regional Wastewater Treatment Plant. To do so, the Sewer District needed to locate an easement along the boundary between the Wolfords' twenty-five acre tract of property and Interstate 64.

After the action was filed, the Sewer District took possession of the easement, and the line was built. The record reveals that the Wolfords utilized the property as a nursery and had planted several types of plants and trees. The projected path of the easement over the Wolfords' land would necessarily destroy several types of bamboo. During the construction of the easement, it is undisputed that bamboo was destroyed.

The parties' primary argument concerned the fair market value of the property condemned. The Wolfords sought to introduce the expert opinion of Lin Bell. Bell opined that the fair market value of the property taken was \$43,447.00. The circuit court excluded Bell's testimony by order entered January 25, 2005. After exclusion of Bell's testimony, the only evidence upon the fair market value of the property taken was offered by the Sewer District. In accordance therewith, the

circuit court entered an order concluding that the fair market value of the land taken was \$15,936.00. This appeal follows.

The Wolfords' sole contention of error is that the circuit court erroneously excluded the testimony of Bell. The Wolfords contend that Bell's appraisal represented the "highest and best use" of their property as a wholesale nursery and landscape operation. The Wolfords point out that property may be valued at its highest and best use as recognized in Big Rivers Electric Corporation v. Barnes, 147 S.W.3d 753 (Ky.App. 2004). The Wolfords contend the circuit court erred by concluding that Bell valued the property by using a method called "price tagging"; rather, the Wolfords claim that Bell's valuation simply used the method known as the highest and best use. See Id.

Conversely, the Sewer District argues that Bell's appraisal of the property is not based upon the highest and best use but rather amounted to price tagging, which was condemned by Big Rivers Electric Corporation. We believe resolution of this appeal looks to the proper interpretation of Big Rivers Electric Corporation.

In Big Rivers Electric Corporation, the Court initially noted that where a part of land is taken, the proper measure of damages is the difference between the fair market value of the tract before and the fair market value of the tract

after the taking. In so concluding, the Court painstakingly pointed out that "[w]here the land contains minerals, 'the quality and quantity of the minerals may be properly considered as affecting the market value of the land but they cannot be valued separately.'" Id. at 756 (citation omitted). More specifically, the Court held "the testimony of the difference in market value should be stricken where a witness arrives at an 'after' value by itemizing various damage factors and subtracting the total from the 'before' figure." Id. The Court referred to this practice as "price tagging" and stated its disapproval of the price tagging of "trees, springs, barns, etc." Id. at 757. The Court also observed that the fair market value of the land may be determined by its use and this approach is known as the highest and best use concept. Under this concept, minerals and other items may be considered in determining the fair market value of the land, but may not be "*items of damage* to be priced and totaled." Id. at 757 (citations omitted).

In Bell's appraisal report, he opined:

| | |
|--------------------|-----------|
| Vacant Land | \$360,000 |
| Nursery Stock | \$422,432 |
| Total Before Value | \$782,432 |

. . . .

After Value

| | |
|---------------------|------------------|
| Land | \$354,295 |
| Remaining Inventory | <u>\$386,313</u> |

| | |
|-------------------|-----------|
| Total after value | \$740,608 |
|-------------------|-----------|

| | |
|---|----------|
| Difference of Before and After Value | \$41,824 |
|---|----------|

**Compensation for
Temporary Easement**

| | |
|------------------------|----------|
| 1.1595 acre x \$14,000 | |
| x 10% for 1 year | \$1,623 |
| Total Compensation Due | \$43,447 |

From the above, it is clear that Bell considered the nursery stock as a separate element of damage to be added to the fair market value of the land. This is clearly impermissible and amounts to price tagging. If Bell wished to give an opinion concerning the highest and best use of the land as a nursery, Bell should have simply rendered an opinion as to the fair market value of the land as a nursery.

The difference between the two approaches is evident. Under the price tagging approach, the land and the nursery stock are valued separately. Under this approach, the nursery stock and the land are given separate values based upon their respective fair market values; then the two values are added together. Under the highest and best use approach, the nursery stock is not separately valued. Rather, the fair market value of the land as a nursery is considered.

In this case, Bell separately valued the nursery and land to arrive at a fair market value; this approach is plainly

price tagging. Accordingly, we are of the opinion that the circuit court did not err by excluding the testimony of Bell.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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