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Summary of Nevada Power Co. v. 3 Kids LLC, 129 Nev. Adv. Op. 47

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JURY INSTRUCTIONS & EVIDENCE

Summary

The Court reviewed a jury instruction regarding the determination of fair market value of condemned property, a portion of which is located within a government setback, for the purpose of ascertaining just compensation. Additionally, the Court considered whether the district court abused its discretion by allowing testimony provided by respondent's expert and excluding appellant's rebuttal evidence.

Disposition/Outcome

The district court erred in giving an overbroad jury instruction, but the error did not warrant reversal as appellant was not prejudiced because a separate jury instruction remedied the error. Additionally, the district court did not abuse its discretion by allowing respondent's expert's testimony and by excluding appellant's rebuttal evidence.

Factual and Procedural History

Respondent, 3 Kids, purchased a 3-acre parcel west of the Las Vegas strip. The property was zoned for industrial use, but 3 Kids believed it could be re-zoned for more intensive development. A portion of the property is in a county setback. The only developments a landowner may perform in the setback relate to landscaping and parking. In 2008, appellant Nevada Power Co. informed 3 Kids that it was going to exercise two easements on the property for installation of high-voltage transmission lines. After 3 Kids rejected Nevada Power's offer for the easements, the issue of just compensation went to trial.

At trial, 3 Kids argued that Nevada Power owed \$2,106,000 in just compensation based on a theory that holding the property for a speculative rise in market value was its highest and best use. Disagreement ensued over the value of one of the easements, which was within a setback. 3 Kids' expert did not consider the easement's location within the setback and concluded that Nevada Power was taking 90% of the rights to the land within the easement. Nevada Power's experts disagreed and concluded that the amount of just compensation due was only \$556,000, based on an industrial development highest and best use. Nevada Power's expert determined that Nevada Power was taking only 10% of the rights to the land within the easement because it was within a setback.

Nevada Power objected to Jury Instruction No. 35, which instructed the jury to disregard the setback in its valuation of the property on the grounds that 3 Kids' use of the area within the setback was limited to parking and landscaping. 3 Kids responded that this court's holding in *Robinson* was broad enough to encompass the proposed instruction. The district court agreed with 3 Kids and included the instruction. After deliberation, the jury awarded 3 Kids \$1.7 million in just compensation.

¹ By Oscar Peralta.

Discussion

Justice Gibbons wrote the unanimous opinion of the Court sitting en banc.²

The jury instruction under consideration, Jury Instruction 35, read: “In determining the fair market value of the land in which the easement is sought, you are required to value the property as a whole, and not put a lesser value on the portion of the property to be condemned based upon any governmental restrictions that apply solely to that portion.” The Court agreed with Nevada Power that this instruction runs afoul of the holding in *City of North Las Vegas v. Robinson*.⁶

In *Robinson*, the City of North Las Vegas sought to condemn a portion of a larger parcel.⁷ While the parties agreed that the highest and best use was commercial, the City’s expert valued the property based on uses that would not trigger a dedication requirement—which would have rendered the property valueless.⁸ There, the district court gave an instruction that directed the jury to “determine the value of the condemned parcel in the before condition based upon only those uses to which the property can be put without obtaining government approvals that would trigger the dedication.”⁹ The Court held that the instruction was inconsistent with just compensation requirements in Nevada because it “caused the jury to ignore the highest and best use of the entire parcel and to improperly sever the condemned portion from the whole parcel.”¹⁰

Here, the portion which instructed the jury not to “put a lesser value on the portion of the property to be condemned based upon any governmental restrictions that apply solely to that portion,” is inconsistent with the language in *Robinson*. In *Robinson*, the Court stated that the trier of fact is permitted to consider “evidence of land-use restrictions that would influence a prudent purchaser when purchasing the condemned property.”¹¹ In certain situations, evidence of land-use restrictions may not be considered, such as where it causes the jury to disregard the highest and best use of the whole parcel.¹² As a restriction on land use, an existing setback is generally a proper matter for the jury to consider.¹³ Although Jury Instruction 35 did not direct the jury to disregard the highest and best use of the parcel, as in *Robinson*, the instruction was erroneous, nevertheless, by directing the trier of fact to disregard the setback in a situation that did not cause them to disregard the highest and best use of the whole parcel.

A separate jury instruction, Jury Instruction 19, stated, in pertinent part: “If the land subject to the easement will still have some market value after the taking of the easement and the construction and improvement in the manner proposed, Nevada Power is required to pay on the

² Chief Justice Pickering voluntarily recused herself from participation in the decision of this matter.

⁶ 122 Nev. 527, 134 P.3d 705 (2006).

⁷ *Id.* at 529, 134 P.3d at 706.

⁸ *Id.* at 530, 134 P.3d at 707.

⁹ *Id.* at 529, 134 P.3d at 706.

¹⁰ *Id.* at 531, 134 P.3d at 707.

¹¹ *Id.* at 532, 134 P.3d at 708.

¹² *Id.* at 532-33, 134 P.3d at 708-09 (citing *Cnty. of Clark v. Alper*, 100 Nev. at 389-90, 685 P.2d at 947-49).

¹³ *See Alper*, 100 Nev. at 387, 685 P.2d at 946 (“As a restriction on land use, an existing zoning ordinance is generally regarded as a proper matter for the jury’s consideration.”).

decrease in market value that results from the easement. Thus, in determining the compensation to be awarded for taking the easement, you must first determine the fair market value of the land in which the easement is sought and then determine the value of the same land as it will be subject to the easement and the construction of the proposed improvement. The difference between these amounts will be the value of the easement.” Because Jury Instruction 19 correctly applies the Court’s reasoning in *Robinson*, the instruction alleviated any prejudice to Nevada Power caused by the erroneous language in Jury Instruction 35.

The Court suggests the following pattern instruction in cases where a jury is tasked with determining just compensation for a piece of property burdened by a land-use restriction where the jury does not need to disregard the highest and best use of the land: “In determining the fair market value of the land in which the easement is sought, you are required to value the land as a whole based on its highest and best use and look to the most probable price which the property would bring in an open market under the conditions of a fair sale. To determine the most probable price, you must not focus solely on the condemned portion, but you may consider evidence of land-use restrictions that would influence a prudent purchaser when purchasing the condemned property.”

The Court disagreed with Nevada Power’s arguments that the district court abused its discretion by allowing 3 Kids' expert to present testimony for which she did not disclose certain supporting data, and that the district court should have allowed it to present maps and reports to rebut 3 Kids' expert’s testimony.

NRCP 16.1(a)(2)(B) requires an expert's report to "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data and other information considered by the witness in forming the opinions."¹⁸ While the testimony in question was not adequately thorough, such weaknesses went to the weight of the evidence and not its admissibility.¹⁹ These weaknesses were appropriate topics for cross-examination. Nevada Power had a wide range of unused tools available to address any issues with the report before trial, including motions to compel production of documents, motions in limine, development of a competing paired sales analysis, and vigorous cross examination.²⁰

At trial, Nevada Power attempted to provide rebuttal information not previously disclosed after realizing that some of its assumptions, made as a result of 3 Kids’ experts imprecise identification of parcels of land were incorrect. The district court acted within its discretion by refusing to allow Nevada Power to introduce information in rebuttal that was not disclosed prior to trial.²² Nevada Power also argued that 3 Kids’ expert’s testimony violated NRS 50.285

¹⁸ NRCP 16.1(a)(2)(B)

¹⁹ See *Williams v. Eighth Judicial Dist. Court*, 127 Nev. __, __, 262 P.3d 360, 368 (2011) (noting that concerns about the reliability of expert testimony went to weight, not admissibility).

²⁰ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

²² NRCP 16.1(a)(3); *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (stating that this court “review [s] a district court's decision to admit or exclude evidence for abuse of discretion, and. . . will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse”).

because her paired sales analysis lacked verifiable and reliable data relating to the five property sales. NRS 50.285 does not define the type of documentation or data on which experts may rely, however, and does not support Nevada Power's argument.²³ Further, the district court properly denied Nevada Power's request to play a portion of 3 Kids' expert's video deposition at trial, as Nevada Power's counsel agreed that he could examine the witness live instead.²⁴

Conclusion

The district court erred in giving a jury instruction that misstated the law; however, the error did not warrant reversal because it did not cause prejudice that substantially affected appellant's rights. The district court did not abuse its discretion in permitting 3 Kids' expert's testimony, as Nevada Power had ample opportunities to address any deficiencies therein, or in refusing to allow Nevada Power to introduce information in rebuttal that was not disclosed prior to trial.

²³ NEV. REV. STAT. § 50.285 (2011).

²⁴ See *Clark Cnty. v. State*, 65 Nev. 490, 506, 199 P.2d 137, 144 (1948) ("[A] party on appeal cannot assume an attitude. . . inconsistent with. . . that taken at the hearing below.").