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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-00319-D
(2006-CA-0188)

CORDELLA BASTON **APPELLANT**

v. **APPEAL FROM BOONE CIRCUIT COURT**
ACTION NO. 02-CI-0856

COUNTY OF KENTON, KENTUCKY, ex rel. **APPELLEES**
KENTON COUNTY AIRPORT BOARD
And
KENTON COUNTY AIRPORT BOARD, et al.

BRIEF OF APPELLANT CORDELLA BASTON

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief of Appellant has been sent by U.S. Mail, postage prepaid, this 6th day of August, 2009, to the following: Hon. Robert W. McGinnis, Harrison County Justice Center, 115 Court Street, Ste. 5, Cynthiana, KY 41031; and Joseph L. Baker, Esq., Debra S. Pleatman, Esq., and Steven C. Martin, Esq., Ziegler & Schneider, P.S.C., 541 Buttermilk Pike, Ste. 500, P.O. Box 175710, Covington, KY 41017-5710.

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INTRODUCTION

This is an appeal of the Opinion of the Court of Appeals which reversed and remanded a jury verdict and judgment entered in a condemnation case brought by the Kenton County Airport Board to acquire real property for a new runway.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral argument would assist the Court in its consideration of this appeal.

STATEMENT OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

The trial of this condemnation case occurred October 24 through 27, 2005. Pursuant to the agreement of the parties, the date of "taking" was the first day of trial. R[1]. at 26. The subject property was 7.883 acres located on Hill Road off of Hossman Road, in Boone County, Kentucky. The property was taken by the Kenton County Airport Board ["Airport"] pursuant to plans to construct a new runway at the Greater Cincinnati/Northern Kentucky International Airport. R. at 1. The parties did not agree on the highest and best use for the subject property, and pursuant to KRS §416.620(1), the fair market value of the property was tried to a jury.

A. Airport's Theory

The Airport's theory was that the residentially zoned property could not legally be used industrially. The Airport introduced testimony of land-use planner Laura Robertson, who opined that to obtain a zoning change to Industrial One, the Hill Road right-of-way must first be widened from 30 feet to 50 feet. She also opined that the pavement must be widened to 24-28 feet wide. TAPE 1, 10/25/05 at 5:06:20 and 5:11:14; TAPE 2, 10/26/05 at 9:06:45. She based her conclusions on the Boone County regulations for subdivisions. *Id.* at 5:12:44. Engineer Dan Riegler testified that a 50-foot right-of-way on Hill Road would encroach upon adjacent property or Elijah Creek. TAPE 2, 10/25/05 at 11:52:25. Mr. Riegler also testified that tractor-trailer traffic could not negotiate the existing hairpin curve on Hill Road. *Id.* at 11:57:20. Appraiser Lance Brown was then called to testify that such an encroachment upon adjacent property

[1] The Record on Appeal will be referred to herein as "R."

precluded a legal industrial use because an industrial user would have no private right of condemnation. TAPE 2, 10/25/05 at 2:55:20. Mr. Brown opined that the highest and best use would therefore be as a single-family residential development with 31 lots. *Id.* at 2:58:54. He further opined that based upon a residential use the fair market value of the property was $45,000 per acre. *Id.* at 3:39:05.

B. Baston's Theory

The theory of property owner Cordella Baston ("Baston") was that an industrial use would be legal, physically possible, economically feasible and would be the highest and best use for the property. With regard to the right-of-way, which Mr. Brown opined could not be legally widened to 50 feet, Baston presented testimony of Ray Erpenbeck, P.E., wherein he explained that the Boone County regulations for subdivisions would not apply to a property that was not being subdivided and was being used for a single industrial use, and that the applicable regulations require only a 30-foot right-of-way. TAPE 3, 10/26/05 at 2:51:46. He further opined that the Boone County regulations for access to property used for only a single industrial use require only a 24-foot-wide pavement. TAPE 4, 10/27/05 at 8:41:00. Based upon his 40 years of experience as a civil engineer in Northern Kentucky, Mr. Erpenbeck testified that in Boone County there are several examples of 30-foot right-of-ways that accommodate tractor-trailer traffic. Those examples include East Frogtown Road, East Mt. Zion Road and Graves Road. *Id.* at 8:51:30. He also testified about the Jang/Hossman industrial project on property that is adjacent to the Baston property, pointing out that the Jang/Hossman access from Hossman Road

requires tractor-trailer traffic to negotiate a 90-degree curve and that no remediation of the curve was required as a condition of the zoning change to industrial. TAPE 3, 10/26/05 at 3:18:10.

On direct examination, Mr. Erpenbeck also addressed the issue of whether the hairpin curve on Hill Road could be softened without encroaching upon the adjacent property. Having testified that: 1) the right-of-way required by the Boone County regulations would be 30 feet, rather than 50 feet; 2) the necessary pavement required by the Boone County regulations would be 24 feet wide; and 3) he had knowledge of other industrial developments in Northern Kentucky, Mr. Erpenbeck testified that it was his opinion that the curve on Hill Road could be softened within the existing 30-ft. right-of-way, allowing ingress and egress for tractor-trailer traffic. TAPE 4, 10/27/05 at 8:55:38.

Baston also introduced testimony of zoning expert Ralph Hopper that in his opinion a zone change would "clearly" be granted. TAPE 4, 10/27/05 at 10:45:20. Baston's appraiser, Jack Nickerson, testified that an industrial use would be legally possible, economically feasible, result in the highest return, and would therefore be the highest and best use. TAPE 4, 10/27/05 at 11:49:10.

With regard to the fair market value as an industrial parcel, Mr. Nickerson testified that the value was $100,000 per acre based upon comparable sales and other relevant factors. TAPE 4, 10/27/05 at 12:00:42.

On cross-examination, Airport appraiser Brown admitted that it would be physically possible to develop the Baston property industrially. TAPE 2, 10/25/05 at 4:11:06. He also admitted that he did an analysis of the financial feasibility of using the property for an industrial use and that he looked at prices

for industrial property throughout the area. Based upon his evaluation of the industrial market in the area, he determined that the fair market value of the Baston property as industrial would be in the range of $60,000 to $90,000 per acre. *Id.* at 4:43:28. However, Mr. Brown acknowledged that out of the nine industrial "comps" he used, only three were within four miles of the Baston property. *Id.* at 4:45:09.

Baston's theory was that Mr. Brown's top figure of $90,000 per acre was based in part on the depression of the industrial market that is due to the "chilling effect" of the public knowledge of the proposed runway, which had been announced approximately seven years prior to the taking. Mr. Brown, on cross-examination, testified regarding the "chilling effect" that can result from an anticipated Airport expansion, as follows:

> Q. You have heard of the term "chilling effect" on property before haven't you?
>
> A. Yes.
>
> Q. And would you say that the "chilling effect" on property value would relate to property value not increasing due to the anticipation of the uncertainty related to a future event, like airport expansion?
>
> A. Sure.
>
> Q. And are there prospective buyers who don't want to buy a piece of industrial property for fear of some uncertainty in the future?
>
> A. Yes.
>
> Q. And so that means generally property owners won't make improvements or build buildings on properties, isn't that right?
>
> A. No, property owners make improvements and build buildings all the time.

Q. Yeah, but if they're nervous about whether those buildings will still be there after they build them, they're not going to go buying property to put them on are they.

A. They may and they may not.

Q. Well, were you aware that the people around Baston, including Mrs. Baston, in 1997 got letters from the airport that there was an official intent to acquire their property?

A. I was not aware of that, no.

Q. So the Airport people did not advise you about exhibit number 131, did they?

A. I did not see this exhibit specifically, but since there were two appraisals done for the airport in 1997, with on site inspections, I would certainly assume that someone knew that the airport was thinking about buying it.

Q. Doesn't that kind of notice from the airport have the effect of essentially killing development around Baston?

Counsel for Airport: Objection.

Judge: Overruled, you may answer, if you can.

A. It certainly has an effect of the willingness of buyers to make decisions about the future.

Q. And that's really what you talk about in terms of the "chilling effect" on the property, isn't that right?

A. I assume, that's what you, I mean, when you say "chilling effect;" I assume that's what you mean.

TAPE 3, 10/25/05 at 4:50:24.

Baston also elicited testimony from Dale Huber, the Airport's Director of Aviation, that there had been no new development in the area of the subject property since the Airport sent out letters to landowners in 1997 (approximately seven years before the taking) advising of the Airport's intention to obtain

additional property for the construction of a new runway. Mr. Huber's testimony was as follows:

Q. And was Mr. Wayne Jones a property owner one thousand feet or so away from the Baston property a person that received one of those letters?

A. I don't recall that he did or didn't.

Q. Well, please assume that he did. Are you the one that authorized the letter that was sent to Mr. Jones from the airport lawyer, Mr. Baker on exhibit number 4, December or November the seventeenth 1999 advising Mr. Jones that any infrastructure or development which occurs on his property after 1999 may not be compensable in any condemnation action. Did you authorize that letter?

Counsel for Airport: Note my objection.

Judge: **Overruled.**

A. I don't know that I authorized the letter or not, I didn't write it.

TAPE 3, 10/26/05 at 9:52:10.

* * * *

Q. And Mr. Huber, after the letter of 1997, in the area around Baston, the area around Victory Park, no more industrial development occurred, even up to the present, is that correct?

Counsel for Airport: Objection.

Judge: **Overruled.**

A. I don't know the answer to that question.

Q. Well, take, take a look at the map here and tell us other than Victory Park that was developed in 1996, tell us whether or not any development in this area, other than the Victory Park that was developed in 1997 in the Baston area.

A. I'm not the planning commission, I don't, and I can't tell you what happened out there. I can tell you there was a lot of development that took place in the way of hotels and parking lot expansions, but you know I'm . . .

Q. In the area around Baston where the new runway is going to be put . . .

A. Yes

Q. Tell the jury if you can think of one industrial development that occurred there.

Counsel for Airport: Objection, your Honor, renew my motion.

Judge: **Overruled.**

A. I can't think of anything, I don't know.

Id. at 9:57:15.

* * * *

Q. Now, as of the date on [exhibit] 132 when the Airport wrote . . . Mrs. Baston, isn't it a fact that as of February the 21st of 2001 that the Board proposed plans had still not been approved?

A. That's true, they were not.

Q. And isn't it a fact also that on January the 15th of 2002 that a project finally got approved.

A. It did, that second letter you just talked to me about is a way of keeping the public informed about what's going on.

Id. at 10:00:31.

The Airport moved for a mistrial on October 26, 2005 at 9:56:12 based upon admission of "chilling effect" testimony. The motion followed the following question, which was posed to Mr. Huber by Baston's counsel on direct examination:

A. Did Mr. Jones go forward with any development after that letter?

Counsel for Airport: Objection.

Id. at 9:56:12.

The trial court denied the motion, as set forth in the following excerpt from the trial:

> Judge: We won't miss-try the case, I don't think any harm has been done at this point as far as the questions that have been asked. Could we steer away from this?
>
> Counsel for Baston: Okay.
>
> Counsel for Airport: Could we have an admonition?
>
> Judge: About what?
>
> Counsel for Airport: That they shouldn't
>
> Judge: The question has been asked, there has been no answer.
>
> Counsel for Airport: Okay.
>
> Judge: Your objection has been **sustained**.
>
> Counsel for Airport: Thank you.

Id. at 9:56:10.

The Airport again moved for a mistrial after Mr. Huber was asked, "Tell the jury if you can think of one industrial development that occurred [in the area around Baston]." The motion was overruled. *Id.* at 9:58:26. The Airport's third motion for a mistrial occurred after the court sustained the Airport's objection to the following question to Mr. Huber: "And does the Airport own over seven thousand acres around the Airport." *Id.* at 10:01:40.

Baston introduced the following evidence regarding the expectation or probability that there would be an industrial development of the Baston property:

1. Testimony of the Airport witness Ms. Robertson establishing that the Boone County Land Use Map from 1990 shows the Baston property as part of a "business park." TAPE 2, 10/25/05 at 10:13:55;

2. Testimony of Airport appraiser Lance Brown establishing that the 1990 Comprehensive Plan for the area designated the Baston property as "business/professional." TAPE 2, 10/25/05 at 2:54:00;

3. Testimony of Ms. Robertson establishing that a zone change to industrial would probably be granted to the Baston property upon satisfaction of seven conditions. *Id.* at 10:00:59;

4. The 1992 "Hossman Road Study" staff report that concluded that the area around the Baston property was no longer suitable for residential development and was a "major future center of business." *Id.* at 10:11:42;

5. Testimony of Ms. Robertson upon cross-examination, establishing that the 1990 Comprehensive Plan stated that additional residential growth in the area of the Baston property was unlikely, in part because of noise from the Airport. *Id.* at 10:24:30;

6. The Airport's noise contour map that shows that the Baston property was just outside the 65 DNL contour. *Id.* at 10:50:22;

7. Testimony of Ms. Robertson and Mr. Brown that two properties adjacent to the Baston property had been rezoned as industrial. *Id.* at 10:157:08; TAPE 2, 10/25/05 at 2:53:31;

8. Testimony of Ray Erpenbeck, P.E., that the applicable regulations regarding access require that the pavement of the access road be only 24 feet wide. TAPE 3, 10/26/05 at 3:03:58; TAPE 4, 10/27/05 at 8:51:30, 8:59:58;

9. Testimony of Mr. Erpenbeck regarding the feasibility of constructing a warehouse on the property. TAPE 3, 10/26/05 at 3:29:40;

10. Testimony of Mr. Erpenbeck regarding the feasibility of softening the curve on Hossman Road within the existing right of way. TAPE 4, 10/27/05 at 8:54:30, 8:55:47, 8:59:58, 9:08:01;

11. Expert opinion of appraiser Jack Nickerson that a zone change to Industrial One would be "very likely." TAPE 4, 10/27/05 at 11:49:10; and

12. Expert opinion of zoning expert Ralph Hopper that a zone changes to Industrial One would "clearly" be granted. TAPE 4, 10/27/05 at 10:45:20.

A review of the record reveals that the Airport did not move for a directed verdict at trial.

At the close of evidence the jury was instructed, in part, as follows:

1. You will determine from the evidence and state in your verdict the fair market value of the subject property immediately before the taking by the Kenton County Airport Board on October 23, 2005. **You will not take into account any effect the third North/South Runway Project may have on the fair market value of the subject property.** Fair market value of the subject property is its use at the time of the taking unless there is a showing that there is a reasonable expectation or probability of a different use in the near future and the different use is sufficiently imminent to affect its present market value.

* * * * * *

3. "Highest and Best Use" as used in this Instruction means the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability.

4. **In determining the fair market value of the property taken, you shall disregard and exclude from consideration any change or fluctuation in such value as you believe from the evidence took place prior to the date of taking solely by reason of advance knowledge of the project. (Emphasis added.)**

Exhibit C at 1-2.

The jury returned a verdict that the fair market value of the property was $670,000.00, or $85,000.00 per acre. *Id.* at 3. The Airport moved for a new trial, arguing that the court had allowed inadmissible testimony in violation of KRS §416.660(2); that the verdict was based upon passion and prejudice; and that the evidence established that tractor trailers could not access the property. The Airport's Motion for New Trial was denied on November 18, 2005. R. at 165-166. The judgment of $670,000.00 was entered on November 29, 2005. R. at

161-164; Exhibit D. The Airport filed a Notice of Appeal on November 30, 2005. R. at 172-173.

On appeal, the Airport argued that the trial court erred in overruling its objections to questions regarding the "chilling effect" of the general knowledge of the proposed Airport expansion. Court of Appeals Brief of Appellant at 5-17. The Airport also argued to the Court of Appeals that there was insufficient evidence that Hill Road could accommodate tractor-trailer traffic in view of a hairpin curve and narrow bridge, and that Baston therefore failed to meet the burden of showing that an industrial use would be physically and legally possible. *Id.* at 17.

In its Opinion issued on December 28, 2007 (Exhibit A), the Court of Appeals reversed the judgment of the Circuit Court on the following grounds:

A. The Court of Appeals opined that the Circuit Court's rulings on questions regarding the Airport's history of acquiring land surrounding the Airport and the resulting "chilling effect" on development in the area constituted reversible error. Exhibit A at 3;

B. The Court of Appeals found that Baston's counsel created improper prejudice and further held that the trial court erred in failing to admonish the jury or grant a mistrial. *Id.* at 5;

C. The Court of Appeals found that Baston failed to present evidence that there was a reasonable expectation or probability that the property could or would be industrially developed in the near future; that the Circuit Court should have therefore precluded testimony as to industrial use; and that therefore the jury verdict was not supported by evidence. *Id.* at 8.

The Court of Appeals remanded the case for retrial. *Id.* at 9.

Judge Keller issued a separate dissenting opinion in which she wrote that the proper standard of review on appeal of evidentiary issues is abuse of discretion and that she did not discern any such abuse of discretion; that the jury instructions cured any error that may have occurred during the trial; and that the jury verdict of $670,000 was clearly within the range of values supported by the evidence. *Id.* at 9-10. Upon Baston's petition, the Court of Appeals denied rehearing, with Judge Keller again dissenting. Exhibit B.

This Honorable Court granted Baston's Motion for Discretionary Review on June 17, 2009.

II. ARGUMENT

A. The Court of Appeals Erred When it Held that the Circuit Court's Rulings on Questions Regarding the Airport's History of Acquiring Land Surrounding the Airport Constituted Reversible Error.

1. The Court of Appeals erred in its interpretation of KRS §416.660(2).

Statutory interpretation is a matter of law that is subject to *de novo* review on appeal. This Honorable Court's main objective in statutory interpretation is to construe the statute in accordance with its plain language and meaning. In expounding on a statute, this Court must not be guided by any single sentence, but must look at the provisions of the whole law, and to its object and policy. *Cabinet for Families v. Cummins,* 163 S.W.3d 425 (Ky. 2005).

The Court of Appeals held that, "the trial court erred in permitting testimony that violated KRS §416.660(2)," which states in pertinent part:

> Any change in the fair market value prior to the date of condemnation **which the condemnor or condemnee establishes** was substantially due to the general knowledge of the imminence of condemnation or the construction of the project **shall be disregarded** in determining the fair market value. (Emphasis added.)

Exhibit A at 3.

The Court of Appeals held that counsel for Baston violated KRS §416.660(2) by asking questions about: 1) the Airport's lengthy past history of acquiring, through voluntary sales, undeveloped land surrounding the Airport; and 2) the fact that those acquisitions "killed development in the area," (i.e. were responsible for a depression of industrial development around the Baston property).

The following are the only three questions to which the Airport objected and which were deemed proper, and which therefore form the basis for the Court of Appeals' ruling that the trial court violated KRS §416.660(2):

> 1. Did you or are you the one that authorized the letter that was sent to Mr. Jones from the airport lawyer, Mr. Baker on Ex. number 4, December or November the seventeenth 1999 advising Mr. Jones that any infrastructure or development which occurs on his property after 1999 may not be compensable in any condemnation action. Did you authorize that letter? TAPE 3, 10/26/05 at 9:52:23;
>
> 2. And Mr. Huber, after the letter of 1997, in the area around Baston, the area around Victory Park, no more industrial development occurred, even up to the present, is that correct? *Id.* at 9:57:22;
>
> 3. In the area around Baston where the new runway is going to be put tell the jury if you can think of one industrial development that occurred there? *Id.* at 9:58:26.

In accordance with Baston's theory, these questions were posed in an effort to show that the depression in the industrial market around the Airport and the resultant lack of comparable industrial sales around the Airport was due

to the "chilling effect" of the Airport's announcements. These questions were clearly relevant to whether the Airport's public announcement affected the industrial market around the Airport in the years prior to the taking. Upon objection, Baston's counsel argued that pursuant to KRS §416.660(2), they had the right to prove that the industrial market in the area surrounding the Airport's proposed new runway (and therefore the value of the Baston property) was artificially depressed for years because of the public announcements and actions of the Airport regarding a planned runway, known as the "chilling effect." The Airport, however, argued that the statute precluded the admission of any evidence regarding depressed development and values of property surrounding the Airport as a result of the announcement of the proposed runway.

Upon considering argument from both parties and the effect of KRS §416.660(2), the Circuit Court properly exercised its discretion and made rulings at trial as objections were made. As discussed herein, the three questions at issue were properly allowed because they were relevant to any depression of the industrial market in the area. To rule otherwise would permit a condemnor to control to its advantage comparable sales for years prior to the taking date.

In condemnation actions, KRS §416.620(1) provides that, "**[a]ll questions of fact** pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury . . ." Yet the Airport and the Court of Appeals view KRS §416.660(2) as a rule of exclusion that would prohibit the introduction of any evidence regarding the effect on the market value of property caused by public announcement which occurred seven years before construction began on a massive project. Such an interpretation of the statute, however, is

nonsensical. If a trial judge were required to prohibit evidence that is relevant to the existence or non-existence of comparable sales resulting from announcement of the project years before the taking, the parties would be deprived of the right to a trial by jury on "all questions of fact" pursuant to KRS §416.620(1). Only a jury may determine whether a party has shown that an effect on the market, either positive or negative, is "due to the general knowledge of the **imminence** of condemnation or the construction of the project," per KRS §416.660(2). (Emphasis added.)

KRS §416.660(2), on its face, applies to each party to a condemnation action. In effect, the statute provides that Baston should not reap the benefit of an increase in the value of the subject property that is substantially due to the general knowledge of the project. Likewise, the statute prohibits the Airport from benefiting from a depressed industrial market if it can be shown by the landowner that the depression of the market is substantially due to the general knowledge of the project.

Contrary to the Airport's interpretation, KRS §416.660 (2) is not a rule of evidence. The statute does not render any evidence irrelevant or inadmissible. Rather, it is a rule of law that is to be incorporated into the jury instructions. This statutory rule of law requires the Court to instruct the jury that it shall not consider any change of value in the property to be taken that has been shown to be substantially due to public knowledge of the project. This instruction was given in this case. The statute also places the burden of proof on the party asserting that a change in market value of the property to be taken is substantially due to the general knowledge of the project. KRS §416.660(2)

provides a legal basis for the jury to determine the fair market value; it does not declare any proof inadmissible or improper.

The passage of KRS §416.660 in 1976 codified Kentucky's common law. *United Fuel Gas Company v. Mauk*, 272 S.W.2d 810 (Ky. App. 1954), held that any evidence regarding market value at the time of taking is competent, as follows:

> It is fundamental that a person whose property is taken is only entitled to compensation and resultant damage based upon its fair market value in its condition and situation at the time of the taking. **Evidence of that which tends to lower or raise the market value is a factor of much materiality and it is competent for either party to introduce such evidence.** See Nichols on Eminent Domain, 3rd Ed., Vol. 5, Section 18.11(1); also 98 A.L.R. 640. (Emphasis added.)

In a later case, *Cincinnati, New Orleans & Texas Pacific Railway Company v. Comm.*, 376 S.W.2d 307 (Ky. App. 1964), the Court specifically held that: 1) testimony as to enhancement in value of property between the date of the public announcement of the improvement and the date of taking that is attributable to the expected improvement **is admissible** in a condemnation proceeding; and 2) enhancement in value of property between that date of the public announcement of the improvement and the date of taking that is attributable to the expected improvement **is not compensable**. *Id.* at 309.

The common law rule was fair and just. For example, if a condemnee's appraiser used comparable sales occurring after announcement of a major highway project that would provide access to lands previously inaccessible, and a condemnor could show that the comparable sales were high because of anticipation of the highway project, the condemnor could argue that the court's instruction required that the jury disregard the comparable sales' high price to

the extent it was based upon general knowledge of the highway project. Likewise, if a condemnor announced many years before construction that a project was contemplated involving uses known to inhibit surrounding development, and development can be shown to have been inhibited, a condemnee can argue that lower comparable sales (or a lack of comparable sales in the immediate area) must be disregarded by the jury.

In the present case, the parties agreed that the date of taking would be the date of trial and thereby rendered competent any evidence of change in value of the subject property up to the date of trial. *United Fuel Gas Company, supra*; KRS §416.660(1). On direct examination, Mr. Brown testified that one factor an appraiser considers in determining a property's highest and best use is the use of other properties in the area. TAPE 2, 10/25/05 at 2:38:48. Through this testimony, the Airport submitted evidence that the use of surrounding properties was a factor to be considered by the jury in determining the subject property's highest and best use. Value necessarily follows, and is largely dependent on, the highest and best use. Baston's counsel, by eliciting testimony regarding the "chilling effect" of the announced runway project and the resultant lack of recent industrial development, was doing so in accordance with KRS §416.660(2).

The Court of Appeals Opinion, if it were to become final, would leave a condemnor free to stifle development around a future project and then argue for a lower fair market value based upon the lack on ongoing development. The meaning of the statute is plain. The meaning and intent of the statute is to protect both parties from the artificial impact of the announced project on the

property to be taken, either up or down, by allowing both parties to present evidence that an increase or decrease is causally the result of such artificial impact. The statute must also form the basis for instructing the jury that it shall disregard any such change in value. In this case, the jury was so instructed.

2. The Court of Appeals failed to apply the proper standard of review to the Circuit Court's rulings on admissibility of evidence.

As pointed out in Judge Keller's dissenting opinion, the proper standard on appeal of evidentiary rulings by the trial court is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). Upon appeal of Judge McGinnis' rulings on evidentiary issues, the Airport has not argued, let alone shown, that the Circuit Court abused its discretion in its rulings on objections to evidence or by its decision to not admonish the jury or grant a mistrial.

Without addressing whether the Circuit Court abused its discretion, the Court of Appeals concluded that the Circuit Court committed reversible error by various evidentiary rulings (including questions argued to be in violation of the Order *in Limine)* and by allowing testimony that the subject property was suitable for industrial development. By failing to review the trial court's evidentiary rulings pursuant to the abuse of discretion standard, the majority of the Court of Appeals panel failed to apply the correct standard of review, and in effect substituted its discretion for that of the trial court.

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton*

v. Sexton, 125 S.W. 3d 258, 272 (Ky. 2004) (citations omitted.) Review of the record establishes that none of Judge McGinnis' rulings meets the test for an abuse of discretion. His rulings were made in conformity with the plain meaning and intent of the statutes discussed *supra.* Because the Airport failed to sustain its burden of showing an abuse of discretion, the Court of Appeals erred when it opined that Judge McGinnis' evidentiary rulings constitute reversible error. Therefore, this Honorable Court should reverse the Opinion of the Court of Appeals.

B. The Court of Appeals Erred in its Conclusion that Baston's Counsel Created Improper Passion and Prejudice of the Jury.

With no analysis of KRS §416.660(2), and with no basis in the record for such a finding, the Court of Appeals announced its conclusion that, "Without a doubt, [Baston's] counsel's intent was to appeal to the passion and prejudice of the jury by painting the Airport as a large wealthy entity running roughshod over a poor widowed woman." Exhibit A at 5. A subjective evaluation of counsel's intent should not be an authorized exercise of appellate review, and will inevitably lead to the appellate court usurping the discretion of the Circuit Court. Rather, this Honorable Court has established a clear test to be applied in reviewing a jury verdict to determine whether it is the result of passion or prejudice. A reviewing court may reverse the verdict of the jury only when it is so flagrantly against the weight of the evidence as to indicate passion or prejudice. *Denzik v. Denzik,* 197 S.W. 3d 108 (Ky. 2006), rehearing denied.

The record herein contains more than sufficient evidence to support the verdict on both highest and best use and fair market value. As noted by Judge

Keller, the jury's verdict as to value was clearly within the range of values supported by the evidence. In fact, the jury's verdict was $15,000.00 per acre less than the amount requested by Baston's counsel in closing argument, a clear indication that the jury acted and decided dispassionately.

1. Questions regarding "chilling effect"

The Court of Appeals opined that Baston's repeated "improper" comments prejudiced and inflamed the jury, resulting in an excessive verdict. Exhibit A at 5-6. The Court of Appeals did not list the "improper" comments, but did state, "Between opening and closing statements, counsel made repeated comments, in violation of the order *in limine*, about the millions of dollars spent by the Airport on land acquisition and how such acquisition had killed development in the area." *Id.* at 5. As stated above, Baston's counsel interpreted KRS §416.660(2) to allow both Baston and the Airport to show that the public knowledge of the runway project caused an artificial increase or decrease in the value of the subject property, which the jury would be instructed to disregard. Additionally, Baston asserts that a condemnor may not publicly announce a project that will not occur for years into the future, and that will materially and negatively impact development of both the condemned property and property surrounding the condemned property, and then utilize KRS §416.660(2) to keep the jury from hearing evidence explaining the lack of development during the years that passed between the announcement and the trial. In its exercise of discretion, the trial court allowed testimony regarding the "chilling effect."

2. "Good faith" remark in opening statement

On appeal, the Airport also took issue with a remark made in Baston's Opening Statement to the effect that the jury should determine "whether the Airport is operating in good faith in the way they're treating folks." The objection to this remark was overruled. The Court of Appeals addressed this issue, stating:

> The record reveals that Baston's counsel began his opening arguments by improperly telling jurors that it was their job to determine whether the airport was dealing with property owners in 'good faith.'

Exhibit A at 5.

The Court of Appeals failed to discuss, or even note, the fact that any error that may have occurred in Opening Statement was cured by the Court's subsequent admonition to the jury that comments in Opening Statement are not evidence. TAPE 1, 10/24/05 at 11:46:44. Nor did the Court of Appeals address the long-standing law in Kentucky that, to the extent that the jury instructions cure error, such error is not prejudicial as a matter of law. *Tribble v. Giles*, 130 S.W.2d 777 (Ky. 1939).

3. Airport's motion for mistrial

The Airport also argued that the trial court should have granted a mistrial based upon the questions regarding other property acquisitions of the Airport and the assets of the Airport. Court of Appeals Brief for Appellant at 11. The Airport relied on *Big Rivers Electric Corp. v. Barnes*, 147 S.W.3d 753 (Ky. App. 2004), and this case was also cited by the Court of Appeals. Exhibit A at 4.

The Circuit Court's rulings in this case are clearly distinguishable from those in the *Big Rivers* case, in which counsel for the condemnee made repeated

references to the condemnor's offer to purchase the property for $500,000.00. Despite the ruling by the trial court in *Big Rivers* that the offered price was not admissible, the expert for the condemnee nevertheless testified regarding the offer. During closing argument in *Big Rivers*, the condemnee's attorney again mentioned the half-million-dollar offer. The trial court in *Big Rivers* sustained the objection made during the closing argument. On appeal, the Court of Appeals determined that the trial court should have granted a mistrial because the improper testimony and closing argument could not be cured by an admonition. The facts of *Big Rivers* are light years removed from the case *sub judice*. In the present case, in formulating questions, counsel for Baston was acting in good faith based upon KRS §416.660(2), as stated above. Clearly, the Court's reliance on *Big Rivers* is misplaced.

4. "Hanging in there" remark during closing argument

The Court of Appeals also found improper Baston's counsel's comment on the Airport appraiser's evaluation, made in closing argument: "That's not what she deserves for hanging in there. That's not her measure of justice on this day." Exhibit A at 5. Unlike the comment at the *Big Rivers* trial, there was no objection to this remark, or any comment made during closing argument, and therefore this issue was waived and should not have been considered upon appeal. *Department of Highways v. Spillman,* 489 S.W. 2d 814 (Ky. App. 1973). Yet, the Court of Appeals determined that this remark was evidence of "counsel's intent to appeal to the passion and prejudice of the jury." Exhibit A at 5.

Had the Court of Appeals considered this comment in its proper context, it would have understood that Baston's counsel was making an argument regarding

the testimony of Mr. Brown, the Airport's appraiser, that the industrial fair market value of the property was only $90,000.00 per acre. TAPE 4, 10/27/05 at 2:27:10. Baston's appraiser, Jack Nickerson, had placed the industrial value at $100,000 per acre. Baston's counsel was merely arguing that the Airport appraiser's $90,000 figure was not the fair market value. Ironically, the jury disagreed with Baston's counsel's argument and awarded less than $90,000 per acre – yet the Airport still complains. Even if the Airport had shown that this issue had been preserved and was properly before the Court of Appeals, the Airport made no showing that the comment in its correct context was improper or prejudicial. Clearly, an award that is less per acre than the industrial value conceded by the Airport's appraiser is not flagrantly against the weight of the evidence and is not indicative of passion or prejudice.

The Court's reliance on *Risen v. Pierce,* 807 S.W.2d 945 (Ky. 1991) (Exhibit A at 6) is also misplaced due to Airport counsel's failure to object to this comment. *Risen* involved a negligence action wherein a new trial was requested after opposing counsel made a prejudicial statement of fact unsupported by the evidence and there was a timely objection made. In *Risen*, the Circuit Court denied the request for a new trial and the Supreme Court ultimately reversed, stating that, "where an attorney makes a prejudicial statement of fact unsupported by the evidence, **and the improper argument is brought to the Court's attention,** the Court should promptly reprimand him and instruct the jury to disregard the statement, and if it be so prejudicial that it may improperly influence the jury, should set aside the verdict obtained by such attorney . . ." *Id.* at 949-950. (Emphasis added.) Simply put, the *Risen* opinion is

but one of a long history of cases requiring that alleged error in closing argument be preserved by objection. **Again, the Airport made no objection during Baston's closing argument.** It should be noted that *Risen* stands for another long-held rule that a "party to civil litigation is entitled to have his theory of the case submitted to a jury for its acceptance or rejection **if there is any evidence** to sustain it." *Id.* at 947. (Emphasis added.)

C. The Court of Appeals Erred When it Found that Other than Erpenbeck's "Bald Assertion" Otherwise, the Clear Weight of the Evidence Indicated that the Baston Property was Unsuited for Industrial Development.

In Kentucky, a jury verdict is not to be disturbed unless the appellate court finds that it is "palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice." *Bierman v. Klapheke*, 967 S.W. 2d 16, 18 (Ky. 1998). Upon review, all evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence. The functions are reserved for the trier of fact. Additionally, the prevailing party, in this case Baston, is entitled to all reasonable inferences which may be drawn from the evidence." *Id.*

In this case, the Court of Appeals found that Baston failed to present evidence that there was a reasonable expectation or probability that the property could or would be industrially developed "in the near future" and the Circuit Court should have therefore precluded testimony as to industrial values. Exhibit A at 8. The Court of Appeals went on to opine that therefore the jury verdict was not supported by evidence and remanded the case for retrial. *Id.* at 8-9.

As briefed by Baston in the Court of Appeals, the issue of whether the evidence regarding probability of industrial development was sufficient to permit the introduction of testimony of industrial value was not preserved for review by the Court of Appeals. The Airport failed to move for a directed verdict and failed to object to Baston's expert's value opinion. Baston pointed out to the Court of Appeals that in Kentucky a challenge to the sufficiency of evidence is not timely when it is raised for the first time in a motion for a new trial, as the Airport did in this case. *Bartley v. Loyall*, 648 S.W.2d 873 (Ky. App.1982).

Even if the issue of the sufficiency of the evidence of an industrial use had been properly preserved, the record establishes that sufficient evidence was indeed introduced. The record establishes that Mr. Erpenbeck testified upon direct examination as follows:

Q. Now, is part of the plan you submitted and the costs that you have calculated a softening of that curve?

A. Uh, yes it is.

Q. Okay, and is there sufficient right-of-way in there to soften that curve so that tractor trailer trucks can use it?

A. Yes there is.

Q. Now, as part of [Airport engineer] Mr. Riegler's exhibits, he has prepared exhibit 30 and he has drawings of this exact turn and showed depictions on how trucks would have a terrible time making the turn as it exists, as it existed, this is on exhibit 30, exactly the curve that you're going to soften out?

A. Yes.

Q. And can that be done in your engineering opinion, so that everything depicted, all the problems that are depicted in Riegler exhibit 30 just aren't there.

A. That is correct.

TAPE 4, 10/27/05 at 8:54:40.

Review of Mr. Erpenbeck's testimony regarding a "softening" of the curve reveals that it is not "bald." Rather, it is supported by the following factual basis contained in his testimony:

1) The necessary right-of-way would not be required to be 50 feet wide; it would need to be only 30 feet wide, as required by the Boone County regulations. TAPE 3, 10/26/05 at 2:51:46;

2) The necessary pavement would need to be only 24 feet wide, as required by the Boone County regulations. TAPE 4, 10/27/05 at 8:41:00

3) His extensive experience with other industrial developments in Northern Kentucky, many of which accommodate tractor-trailer traffic on a 30-foot right of way. *Id.* at 8:51:30; and

4) His knowledge of an industrial project adjacent to the Baston property that also involved a 90-degree hairpin curve and that did not require remedial work on the curve as a condition to the zone change to industrial. TAPE 3, 10/26/05 at 3:10:10.

Mr. Erpenbeck's testimony was subjected to cross-examination, during which Airport counsel had a full and fair opportunity to inquire into the factual basis for Mr. Erpenbeck's opinions and test the accuracy of his knowledge and sources of information.

Kentucky law provides that where expert testimony is conflicting, the issue becomes a question of fact for the finder of fact. *Kentucky Power Co. v. Kilbourn*, 307 S.W.2d 9, 11 (Ky. 1957). In this case, the finder of fact was the jury,

not the trial judge and not the Court of Appeals. In light of Mr. Erpenbeck's opinion that an industrial use would be legally and physically possible in spite of Plaintiff's Exhibit 30 and Mr. Riegler's and Mr. Brown's testimony to the contrary, this issue was properly submitted to the jury for its determination. Likewise, this testimony was sufficient to permit the introduction of testimony regarding the value of industrial property. The jury verdict of $85,000 per acre indicates that the jury accepted the theory that the highest and best use of the property is industrial. On the other hand, the jury rejected the testimony of Baston's appraiser that the fair market value was $100,000 per acre. The record contains sufficient evidence to support the verdict, and even if the Airport had properly preserved the issue of the admissibility of value testimony, the verdict must be reinstated.

By characterizing Mr. Erpenbeck's assertions as "bald," the Court of Appeals failed to acknowledge the factual basis for his opinions and improperly usurped the role of the jury. Evaluating the strength or "baldness" of Mr. Erpenbeck's testimony is the province of the jury, not the appellate court. Upon review, all evidence that favors Baston must be taken as true, and deciding the credibility or weight to be given to the evidence are functions reserved to the trier of fact. *Gorman v. Hunt*, 19 S.W.3d 662 (Ky. 2000). In light of Mr. Erpenbeck's testimony that an industrial use would be physically and economically feasible, and the factual basis for his expert opinions, Baston was entitled to have her theory regarding an industrial use and industrial value submitted to the jury for its acceptance or rejection. *Risen, supra*; *Farrington Motors v. Fidelity & Casualty Co.*, 303 S.W.2d 319 (Ky. 1957).

D. The Court of Appeals Erred when It Found that Baston Failed to Present Evidence that there Was a Reasonable Expectation or Probability that the Baston Property Could or Would be Industrially Developed in the Near Future.

The Court of Appeals also disregarded substantial affirmative evidence in the record when it determined that, "Baston failed to present evidence that there was a reasonable expectation or probability that the property could or would be industrially developed 'in the near future,'" citing *Big Rivers, supra,* at 757-758. Exhibit A at 8. The substantial evidence that was disregarded included the following:

1. Testimony of the Airport witness Ms. Robertson establishing that the Boone County Land Use Map from 1990 shows the Baston property as part of a "business park." TAPE 2, 10/25/05 at 10:13:55;

2. Testimony of Airport appraiser Lance Brown establishing that the 1990 Comprehensive Plan for the area designated the Baston property as "business/professional." TAPE 2, 10/25/05 at 2:54:00;

3 Testimony of Ms. Robertson establishing that a zone change to industrial would probably be granted to the Baston property upon satisfaction of seven conditions. *Id.* at 10:00:59;

4. The 1992 "Hossman Road Study" staff report that concluded that the area around the Baston property was no longer suitable for residential development and was a "major future center of business." *Id.* at 10:11:42;

5. Testimony of Ms. Robertson upon cross-examination, establishing that the 1990 Comprehensive Plan stated that additional residential growth in the area of the Baston property was unlikely, in part because of noise from the Airport. *Id.* at 10:24:30;

6. The Airport's noise contour map that shows that the Baston property was just outside the 65 DNL contour. *Id.* at 10:50:22;

7. Testimony of Ms. Robertson and Mr. Brown that two properties adjacent to the Baston property had been rezoned as industrial. *Id.* at 10:157:08; TAPE 2, 10/25/05 at 2:53:31;

8. Testimony of Ray Erpenbeck, P.E., that the applicable regulations regarding access require that the pavement of the access road be only 24 feet wide. TAPE 3, 10/26/05 at 3:03:58; TAPE 4, 10/27/05 at 8:51:30, 8:59:58;

9. Testimony of Mr. Erpenbeck regarding the feasibility of constructing a warehouse on the property. TAPE 3, 10/26/05 at 3:29:40;

10. Testimony of Mr. Erpenbeck regarding the feasibility of softening the curve on Hossman Road within the existing right of way. TAPE 4, 10/27/05 at 8:54:30, 8:55:47, 8:59:58, 9:08:01;

11. Expert opinion of appraiser Jack Nickerson that a zone change to Industrial One would be "very likely." TAPE 4, 10/27/05 at 11:49:10; and

12. Expert opinion of zoning expert Ralph Hopper that a zone change to Industrial One would "clearly" be granted. TAPE 4, 10/27/05 at 10:45:20.

It is abundantly clear that when the Court of Appeals concluded that there was no evidence of a "reasonable expectation or probability that the property could or would be industrially developed 'in the near future,'" it inexplicably disregarded material evidence in the record that required submission of the issue to the jury. The Court also adopted a statement in the Airport's Brief that was not properly supported by a citation to the Record.[2]

E. <u>The Jury Instructions Cured Any Error that May Have Occurred.</u>

In the present case, as noted in Judge Keller's dissenting opinion, the jury instructions cured any error that may have occurred during the trial. Exhibit A at 9. The Court of Appeals majority opinion contains no discussion of the jury instructions and provides no analysis to overcome Kentucky's longstanding law

[2] The Opinion of the Court of Appeals states that the only access to the property is a "one-lane narrow bridge." Exhibit A at 2. This statement appears in the Airport's Brief as well. The support given for the statement is the Airport's Trial Exhibit 30, Exhibit C to the Airport's Brief to the Court of Appeals. That exhibit, however, contains no indication of a one-lane bridge.

that, to the extent that the jury instructions cure error, such error is not prejudicial as a matter of law. *Tribble, supra.*

F. The Trial Court Did Not Err When It Denied the Airport's Motion for New Trial.

The Airport moved for a new trial, arguing that: 1) the trial court allowed testimony in violation of KRS §416.660(2); 2) Baston's counsel created prejudicial effect resulting in a verdict based upon passion and prejudice; and 3) the evidence established that tractor trailers could not access the Baston property. R. at 149. Upon appeal, a trial court's denial of a motion for new trial is to be treated with great deference, and therefore it should be overturned only if it is "clearly erroneous." *Bayless v. Boyer*, 180 S.W. 3d 439, 444 (Ky. 2005).

The Court of Appeals erred when it held that the trial court should have granted a new trial. The Circuit Court's rulings on the Airport's objections and motions were not shown to be clearly erroneous. The rulings were in conformity with the plain meaning of the controlling statutes. Any error that may have occurred was cured by the jury instructions. Review of the record reveals the verdict is not so flagrantly against the weight of the evidence as to indicate passion or prejudice pursuant to *Denzik, supra.* Rather, the jury's finding as to the fair market value is supported by proper and sufficient affirmative evidence, which has been set out herein. By failing to move for a directed verdict, the Airport failed to preserve its argument that there was insufficient evidence to allow the jury to consider an industrial value. However, even if that issue had been properly preserved, as set forth herein there was significant affirmative evidence that the Baston property could have been developed industrially and that tractor trailers could have accessed the property. Based upon the conflicting expert testimony of Mr.

Erpenbeck and Mr. Riegler, both of which had a reasonable factual basis, the trial court was correct in allowing the jury to determine whether tractor trailers could access the property.

Therefore, the determination of the Court of Appeals that the verdict was based upon bias or prejudice, rather than admissible evidence, is an unsupported opinion and must be overturned.

CONCLUSION

For the reasons stated herein, this Honorable Court should overturn the Opinion of the Court of Appeals and reinstate the judgment of the Boone Circuit Court.

Respectfully Submitted,

TALIAFERRO, SHIROONI,
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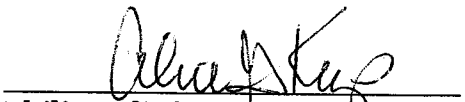
& KEYS PLLC



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