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

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**CORDELLA BASTON**

**APPELLANT**

**v.**

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

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

**APPELLEES**

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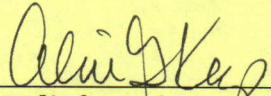
**REPLY BRIEF OF APPELLANT CORDELLA BASTON**

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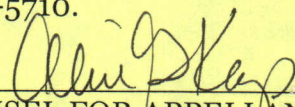
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SUPREME COURT

  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Reply Brief of Appellant Cordella Baston has been sent by U.S. Mail, postage prepaid, this 22<sup>nd</sup> day of October, 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.

  
COUNSEL FOR APPELLANT

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## ARGUMENT

A. **The Brief of Appellees (Airport) Incorrectly Asserts that Engineer Ray Erpenbeck's Opinions Regarding Access on Hill Road Were Not Supported.**

The Airport states: 1) that the Airport's evidence regarding the alleged inability of tractor trailer trucks to use Hill Road was "unrefuted" (Brief of Appellee at 10); 2) that such evidence was "unrebutted" (*Id.* at 14); 3) that Engineer Ray Erpenbeck offered no refutation whatsoever to the testimonies of Mr. Pisakowy or Mr. Riegler (*Id.* at 15); and 4) that "Mr. Erpenbeck did not challenge either Mr. Piaskowy or Mr. Riegler nor that Exhibit 8 and Exhibit 30 inaccurately depict the true state of affairs." (*Id.* at 15.)

The Hill Road issue must be considered in the context of the entire trial. To refute Appellant's ("Baston's") position that the site was feasible for industrial development, the Airport produced testimony that the site was not accessible and was too costly to develop. Hill Road was only one point in the Airport's many points regarding access and development costs. The Airport's theory and testimony regarding the Hill Road issue was that the right-of-way is 30 feet wide; that there is a sharp turn in the road; and that in order for a tractor trailer truck to make the turn a 50-foot-wide right-of-way is required.

To support this theory (and its prohibitive development cost theory), the Airport offered Planner Laura Robertson who testified that a 50-foot right-of-way was required; architect Andrew Piaskowy who used software-generated drawings to demonstrate turning radiuses (and also used software-generated drawings to demonstrate that after site grading, the proposed buildings would hang out unsupported 18 feet in space, that a prohibitively costly retaining wall would be

required to correct the problem, and that a prohibitively costly surface water retention system would also be required) TAPE 1, 10/25/05 at 3:07 to 3:29, 3:26, Exhibit 13 and 14; and Engineer Dan Riegler who used illustrations (including Exhibit 30) demonstrating turning radiuses (and also testified regarding exorbitant expenses required to prepare the site for industrial buildings, thereby rendering the site impractical for industrial development).

Appellant's expert witness Ray Erpenbeck, a civil engineer with over 40 years of experience and a developer himself, rebutted each of the three underpinnings to the Airport's theory.

Mr. Erpenbeck testified that Laura Robertson's opinion that a 50-foot-wide right-of-way was required was based upon her incorrect interpretation of which section of the Boone County Zoning Code applied. Mr. Erpenbeck testified that a 50-foot right-of-way is required only in the subdivision regulations, and that since there would be no subdivision of the Baston property only a 30-foot wide right of way would be required. He gave specific examples proving his point.

Regarding Architect Andrew Piaskowy's testimony and the computer-generated drawings he used to support his opinions, Mr. Erpenbeck first demonstrated that the dramatic computer-generated drawings showing buildings hanging 18 feet out into space were nothing more significant than a computer producing what the computer operator instructed. Mr. Erpenbeck testified to his knowledge of such "CAD" material, and gave his opinion that the entire issue regarding site preparation would require nothing more than an additional two or three feet of extra grading to make the site preparation issue go away. Mr.

Erpenbeck testified that the grading would cost \$2.95 per cubic yard and that only approximately 9,000 cubic feet would need to be moved. TAPE 4, 10/27/05, 3:20 – 3:26. Mr. Erpenbeck testified that the retaining walls suggested by Mr. Piaskowy (at a cost of \$125,550.00 per Mr. Riegler, (TAPE 3, 10/26/05 at 3:51)) were not needed and that the total excavation cost would be approximately \$26,000.00. Mr. Erpenbeck told the jury that he was involved in a personal project going on at the time of trial wherein he was moving 65,000 cubic yards at a cost of \$2.05 to \$2.10 per cubic yard. This is just a small sampling of the compelling testimony offered by Mr. Erpenbeck to disprove the many points raised by the Airport in their attempt to prove the Baston property unsuitable for industrial development. Similarly, Mr. Erpenbeck disproved the Airport's testimony regarding expensive surface water retention costs.

Regarding Engineer Riegler's testimony supporting the Airport's prohibitive development cost theory and Hill Road access theory, Mr. Erpenbeck first proved to the jury that the cost estimates produced by Mr. Riegler were inappropriate for comparison to the Baston property. Mr. Erpenbeck's extensive testimony disproving Mr. Riegler's cost estimates begins at TAPE 3, 10/26/06 at 3:37 and runs through TAPE 4, 10/27/05 at 8:51. It is respectfully submitted that by the time Mr. Erpenbeck had finished his analysis of Mr. Piaskowy's and Mr. Riegler's opinions, the jury was certainly entitled to consider which opinions to accept, and there was no doubt that Mr. Erpenbeck's testimony was far more factual, accurate, and compelling.

Regarding the testimony of Mr. Riegler and Mr. Piaskowy pertaining to Hill Road and the alleged necessity to widen the 30-foot right-of-way to 50-foot,

Mr. Erpenbeck first informed the jury of specific industrial sites in Boone County serviced by 30-foot right-of-ways. Mr. Erpenbeck informed the jury that he had performed site plans for Eaton Asphalt for an industrial plant on East Frogtown Road serviced by Mt. Zion Road East, which has a 30-foot right-of-way. Mr. Erpenbeck testified that that project was approved with no requirement to widen either the 20 to 22-foot wide pavement or the 30-foot right-of-way. He testified that he was currently developing a site for a Budweiser distribution facility off East Frogtown Road and it was not being required to widen that 30-foot right-of-way either. He also testified to a similar situation on East Mt. Zion from Route 25 to the east to the Enterprise 6 industrial park where FedEx is currently building a large distribution center that will employ over 1,000 people. Mr. Erpenbeck stated there are 15 or 16 industrial buildings on that site and there was no requirement to widen Mt. Zion Road. He also testified as to construction of the International West Industrial Park containing buildings of 500,000 to 600,000 square feet off Graves Road in Hebron, Boone County, Kentucky, which is serviced by a 30-foot right of way and 20-foot pavement wherein there was likewise no requirement for widening. Mr. Erpenbeck testified that tractor-trailer trucks use all of these roads every day. TAPE 4, 10/27/05 at 8:51.

Regarding the Hill Road turn and the Riegler Exhibit 30, Mr. Erpenbeck reviewed Exhibit 30 before the jury and testified to the jury that an aerial photograph of that section of Hill Road and the 30-foot right-of-way thereon were sufficient to soften the curve to allow tractor-trailer trucks to use the road. TAPE 4, 10/27/05 at 8:51-8:55.



Mr. Erpenbeck's Hill Road opinion (given at the end of testimony produced over two days, wherein he categorically addressed and disproved the multitude of opinions offered by Mr. Piaskowy and Mr. Riegler) was subjected to cross-examination. The cross examination regarding Hill Road began at TAPE 4, 10/27/05 at 9:08 with the Airport attorney asking:

Let's go back to this softening of the curve. As I look at this [Riegler Exhibit 30] it looks like in order to take care of some of these curves here you are going into other property. Do you agree with that?

Mr. Erpenbeck responded, "No. Actually, I believe you can do it within the existing right of way." The Airport's next cross-examination question was "I understand. But when you look at Mr. Riegler's drawing, does it look like the turning ratio puts those trucks in different property?" Mr. Erpenbeck responded:

Well, if we were coming in and building a total new road, if we laid this out to meet all the ultimate standards that would be required under new design, [an objection was made and the Court allowed Mr. Erpenbeck to continue] but when you are using an existing road that applies to every road in the county, there probably wouldn't be an existing road that would meet that standard. So, what you do with an existing road is that you meet the standard as best you can, and that's what we would do in this case and it would adequately function.

The Airport then asked, "You're saying, alright, you understand the turning ratios and size of a tractor trailer?" Mr. Erpenbeck responded "yes," and the Airport counsel finished the question by asking, "And you are still saying physically you can do this and not have to go over into any other property?" Mr. Erpenbeck responded "yes" and the Airport's counsel (apparently satisfied) replied, "OK."

Airport counsel satisfied themselves in cross examination and made no motion to strike Mr. Erpenbeck's Hill Road opinion. After the completion of evidence, the Airport made no motion for a partial directed verdict whereby the

jury would be instructed that their award must be based upon a highest and best use of Residential. Further, the Airport's proposed jury instructions did not preclude the jury from determining that the highest and best use would be Industrial. Based upon the foregoing, the issue of an Industrial use was properly submitted to the jury.

**B. The Airport Failed to Show That the Verdict Was Based Upon Passion and Prejudice Rather Than Upon the Evidence.**

The Airport has characterized Baston's questions regarding the effect of the project on industrial development around the Airport as "intentional" misconduct designed to create prejudice against the Airport. Brief of Appellees at 31. The Airport's argument is based upon its repeated assertion that KRS §416.660(2) precludes the admission of any evidence regarding the affect of the proposed condemnation. Baston took issue with this assertion at trial, as she now does on appeal. As discussed in the Brief of Appellant and Section C, *infra*, the statute does not prohibit the introduction of such evidence.

Further, the record reflects that any question posed regarding the effect of the project was based upon Baston counsel's good faith belief that such evidence is admissible but that the jury must be instructed to disregard it when determining the fair market value, pursuant to statute. Counsel's good faith is illustrated by the exchange quoted at pages 25-26 of the Brief of Appellees, wherein Mr. Taliaferro stated at a bench conference, "The effect of the project does come into the case if it kills the development potential."

Asserting that the trial court erred when it denied the Airport's motions for mistrial based upon the this alleged misconduct, the Airport relies upon *Risen*



*v. Pierce*, 807 S.W.2d 945 (Ky. 1991) and *Big Rivers Elec. Corp. v. Barnes*, 147 S.W.3d 753 (Ky.App. 2004). Yet the Airport fails to show that these two cases are controlling, given the fact that the Airport made no objection during Baston's closing argument. *Risen* and *Big Rivers* both relate to comments made during closing argument that were the subject of proper objections.

The Airport also cites *Rockwell International Corp. v. Wilhite*, 143 S.W. 3d 604 (Ky. App. 2003), review denied, for the proposition that the trial court should have set aside the verdict because of Baston's counsel's alleged misconduct. As discussed herein, the evidence that is alleged to be "highly prejudicial" was properly admitted pursuant to KRS 416.660(2), and therefore Baston's counsel did not engage in misconduct, let alone intentional misconduct. However, assuming *arguendo* such misconduct, the Airport has failed to show, as it is required to do on appeal, that "there is a reasonable probability that the verdict of the jury has been influenced by such conduct." *Rockwell, supra* at 631.

The only grounds asserted for such "reasonable probability" is the dollar amount of the verdict, which the Airport characterizes as "excessive" and in disregard of the evidence. The Airport writes at page 30 of its brief, "The jury valued the property at a huge value even for industrial property, even though the proof showed that semi trailer trucks could not access the subject property." Yet, the evidence introduced by the Airport upon cross-examination of Ray Erpenbeck included his expert testimony that he understood the turning ratios of a tractor-trailer and still asserted that the road could accommodate such traffic without encroaching upon any other property.

The Airport's argument that the verdict is not based upon evidence is therefore dependent upon its assertion that the testimony of Ray Erpenbeck regarding access to tractor-trailers is nevertheless "bald" and that the court should have precluded any value testimony based upon an Industrial use. Such argument must fail, as discussed in Section A, *supra*. The verdict was supported by properly admitted evidence, including expert testimony regarding the necessary right-of-way, the softening of the curve, the cost of an industrial site, the likelihood of a change in zoning from Residential to Industrial, and an Industrial value of \$100,000 per acre. As such the verdict should be reinstated by this Honorable Court.

C. **The Airport Failed to Establish that KRS §416.660(2) Precludes Evidence Regarding the Effect of the Proposed Condemnation.**

In its brief, the Airport offers no analysis of, or reference to, the common law that preceded KRS §614.660(2) or of KRS §416.620(1), which provides that, "[a]ll questions of fact pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury . . ." as discussed in the Brief of Appellant. Baston's assertions on these issues therefore remain undisputed.

Rather, the Airport repeatedly asserts that KRS §416.660(2) "bans" evidence regarding the effect of proposed development on the market for industrial development around the Airport and that Baston's counsel acted in "bad faith." At page 39, the Airport states, "The legislature has prohibited this type of testimony in enacting KRS §416.660(2)." Yet, the clear language of the statute does not create a "ban" or "prohibition" on such evidence. Rather, it states that this evidence shall be "disregarded in determining fair market value."

Under the statute, each party is free to introduce evidence that current market conditions have been affected by the announcement of the project. Read in conjunction with KRS §416.620(1), *supra*, KRS §416.660(2) mandated that the Baston jury be instructed to disregard "any change in the fair market value prior to the date of condemnation which [the Airport or Baston] establishes was substantially due to the general knowledge of the imminence of condemnation or the construction of the project."

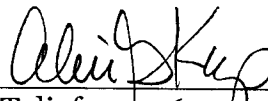
The jury instructions in this case complied with this mandate, and therefore the Court of Appeals erred when it reversed the verdict on the basis of KRS §416.660(2).

#### CONCLUSION

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

Respectfully Submitted,

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