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COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY

NO. 2007-SC-008-D

Stephen B. Early, et. al.	Appellants
v. **APPELLANTS' BRIEF**	
Oldham County Board of Education	Appellee

Appeal from Court of Appeals
No. 2006-CA-001062
Oldham Circuit Court
Nos. 2005-CI-0404, 2005-CI-0405, 2005-CI-0407

Stephen B. Early
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Certificate of Service

The undersigned does hereby certify that a true copy of this Brief has been served by first class mail, postage prepaid, upon: (a) Hon. Karen Conrad, Oldham County Circuit Judge, 100 West Jefferson St.,LaGrange, KY 40031 and (b) Mr. Alan N. Linker, Seiller Waterman, LLC, Meidinger Tower, 22nd Floor, 462 South Fourth St., Louisville, KY 40202, on the 23 day of July, 2007. It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court.

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INTRODUCTION

This is a Condemnation Case in which the Appellants (Stephen Kaelin, Rebecca Kaelin, John Szatlocski, Annmarie Szatloczki, Stephen Early and Susan Early, hereinafter referred to as "Landowners") appeal from the Order Denying Reconsideration and the Order Dismissing Appeal of the Court of Appeals. The basis of this appeal is that the Court of Appeals erroneously held that a Notice of Appeal must be filed with 30 days of the Interlocutory Judgment instead of within 30 days of the "final determination of the exceptions" (as Landowners did) and Landowners have been denied their Constitutional Right of Appeal set forth in Section 115 of the Kentucky Constitution.

INTRODUCTION

This is a Condemnation Case in which the Appellants (Stephen Kaelin, Rebecca Kaelin, John Szatlocski, Annmarie Szatloczki, Stephen Early and Susan Early, hereinafter referred to as "Landowners") appeal from the Order Denying Reconsideration and the Order Dismissing Appeal of the Court of Appeals. The basis of this appeal is that the Court of Appeals erroneously held that a Notice of Appeal must be filed with 30 days of the Interlocutory Judgment instead of within 30 days of the "final determination of the exceptions" (as Landowners did) and Landowners have been denied their Constitutional Right of Appeal set forth in Section 115 of the Kentucky Constitution.

STATEMENT CONCERNING ORAL ARGUMENT

The Landowners strongly desire oral argument and believe that oral argument would be helpful and beneficial to the Court in deciding the issues presented. Specifically, the Landowners believe that oral argument would be of benefit to the Court for the following reasons:

1. The Constitutional Right of Appeal is so cherished that its denial must be based only on a clear and unequivocal showing of obvious neglect, dereliction or prejudice to the opposing party and the Landowners" actions negate these.

2. The Court of Appeals erroneously interpreted this Court's ruling in Ratliff v. The Fiscal Court of Caldwell County, Kentucky, 617 S.W.2d 36 (Ky.1981) and explanation is needed to show the error.

3. It would allow the Court to ask about puzzling aspects of the issues presented.

4. It would allow the Court to seek any factual clarifications deemed necessary.

5. The Court could raise issues that the parties may have neglected.

6. It would assure the Court that holding one way would not require a wrong answer in some future case.

7. It would assure the Court that the resolution of the case does not have some hidden legal or practical problem.

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STATEMENT OF THE CASE

The Court of Appeals' "Order" dated December 12, 2006 (Appendix 1) denied the Landowners' Motion for Reconsideration. The Court of Appeals' "Order Dismissing Appeal" dated October 24, 2006 (Appendix 2) dismissed the appeal of the Landowners and set forth the bases for its decision to do so.

The Circuit Court had rendered a Final Judgment on May 19, 2006 (Appendix 3). The Circuit Court had also rendered an Interlocutory Judgment on March 8, 2006 (Appendix 4). The Interlocutory Judgment incorporated by reference the Circuit Court's Order of February 14, 2006 (Appendix 5) and set forth the bases for its holding that the Oldham County Board of Education (hereinafter referred to as "OCBE") had "the right and authority to condemn the property sought to be condemned herein." It was a lengthy explanation of the Circuit Court's ruling against the Landowners on the "right to take."

A. EVENTS PRIOR TO THE INTERLOCUTORY JUDGMENT

A Hearing on OCBE's "right to take" was held on February 13, 2006. The Circuit Court entered its Order of February 14, 2006 (Appendix 5) which held for OCBE on the "right to take" and served essentially as

On April 28, 2006, a Hearing on the Joint Stipulation (Appendix 6) was held. At the Hearing, the Circuit Court made handwritten notations at: (a) the top stating "ORDER UPON" Joint Stipulation and (b) the bottom stating "ORDERED. The above joint stip'n (*sic*) is incorporated as an Order of Court. Karen Conrad 4-28-06."

The Order Upon Joint Stipulation is significant for the following reasons:

(i) It was signed by the both counsel for OCBE and counsel for the Landowners.

(ii) It states that Landowners are withdrawing their exceptions and waiving a Jury Trial and "all rights of appeal on the issue of damages"...*NOT ON THE ISSUE OF "RIGHT TO TAKE."*

(iii) It states that no monies are to be paid the Landowners "*until such time as the appeal...on the sole issue of the right of the right of OCBE to condemn...properties has been exhausted....*" (Emphasis added.)

(iv) It references the Court's Order of February 14, 2006.

(v) It acts upon Landowners' Motion for Consolidation (filed concurrently with the Joint Stipulation) and states that "*the purpose and intent of the Motion for Consolidation is to allow for one (1) Final Judgment to be entered which will be a single appealable judgment solely with regard*

to OCBE's right to condemn...properties." (Emphasis added.) The clear intent of the Consolidation being judicial economy...consolidating the three separate cases into one for the purpose of appeal.

Thus, there were two (2) references to *appeal* solely on the issue of OCBE's right to condemn the Landowners' properties. A fair reading of the Joint Stipulation (and the Order incorporating it) shows that:

(a) the Landowners were relinquishing their right of trial by jury on the issue of damages *in exchange for* an expedited appeal that would end the litigation;

and

(b) the Circuit Court, by the handwritten notations at the top and bottom of the Joint Stipulation was making it an "Order" and thus continuing to exercise its jurisdiction over the parties.

21 days later (May 19, 2006) the Final Judgment (Appendix 3) was entered. The Final Judgment incorporated by reference the Order of February 14, 2006 and essentially the Findings of Fact and Conclusions of Law set forth in that Order. Most significantly, the Final Judgment specifically stated (Appendix 3, Paragraph 5): "*Pursuant to the Joint Stipulation and Court's Order thereon dated April 28, 2006 such amounts shall not be paid to (the Landowners) until such time as the appeal by (the*

Landowners) on the sole issue of the right of (OCBE) to condemn (Landowners') properties has been exhausted and there has been rendered a Final Judgment by a court of competent jurisdiction and last resort." (Emphasis added, "Landowners" substituted for "Respondents" and "OCBE" substituted for "Petitioner").

The Final Judgment ends with the statement (Paragraph 9) that "*This is a final, appealable Judgment which finally disposes of all parties and all claims.*"

What the Final Judgment shows is equally significant:

(a) A clear and unequivocal statement that the Circuit Court (and OCBE, as shown by the Joint Stipulation) knew and understood that the Landowners would be filing an appeal on the issue of the "right to take."(Paragraph 5).

(b) The declaration by the Circuit Court that it was continuing to exercise its jurisdiction and it was only with the Final Judgment that there was a disposition of "all parties and all claims." (Paragraph 9).

(c) The statement by the Circuit Court that the consolidation of the three (3) separate cases had been "consolidated and merged for purposes of entering a Final Judgment by this Court's Order of April 28, 2006." (the Order Upon Joint Stipulation) (Pages 1 and 2.)

Four days later, May 23, 2006, the Notice of Appeal was filed by Landowners...25 days after the Order Upon Joint Stipulation.

The chronology of the events in this case are graphically portrayed in the "Time Line" attached as Appendix 9.

What this chronology shows is that:

(1) Counsel for OCBE *knew* that the Landowners were seeking an expedited appeal of the Circuit Court's ruling on the "right to take"...as shown by the Order Upon Joint Stipulation of April 28, 2006 and the Final Judgment of May 19, 2006. OCBE *cannot* claim that it was prejudiced or surprised by the Notice of Appeal. The intent of the Landowners to appeal the Circuit Court's ruling on the "right to take" has been known since at least the Order Upon Joint Stipulation dated April 28, 2006.

(2) The Circuit Court continued to exercise its jurisdiction *after* the Interlocutory Judgment by:

(a) Making the Joint Stipulation an Order of the Court on its own motion and personal handwriting *and finally disposing of the Landowners' Exceptions.*

(b) Granting the Motion for Consolidation to allow for "a single appealable Judgment solely with regard to OCBE's right to condemn Respondents' properties."

(c) Declaring, only in the Final Judgment, that there had been a final disposition "of all parties and all claims."

C. THE APPEAL TO THE COURT OF APPEALS

The Landowners expeditiously pursued their appeal to the Court of Appeals:

(i) In July of 2006, a Pre-Hearing Conference was conducted by a Staff Attorney for the Court of Appeals. This Conference was attended by both counsel for the Landowners and counsel for OCBE.

(ii) OCBE filed a Motion to Dismiss Appeal and the Landowners' "Response to Motion to Dismiss" was filed on August 17, 2006.

(iii) The Landowners' "Brief of Appellants" was submitted on October 7, 2006.

(iv) After receipt of a "Notice of Deficient Pleading" dated October 11, 2006, the Landowners corrected the deficiency and submitted their Brief on October 17, 2006.

(v) Landowners' Brief was received on October 17, 2006 and *filed* on October 17, 2006.

(vi) A "Corrected Receipt Notice" was dated October 17, 2006.

(vii) The Court of Appeals issued the Order Dismissing Appeal on October 24, 2006 (7 days after the Landowners' "Corrected" Brief had been submitted and 17 days after the "Original" Brief had been submitted.)

From this chronology, the conclusion is inescapable that the Landowners proceeded expeditiously to perfect their appeal to the Court of Appeals. There was no delay, neglect, dereliction, or arrogance in their actions. The Landowners were doing everything possible, in cooperation with the Circuit Court and counsel for OCBE, to perfect their appeal.

ARGUMENT

The sole issue before this Court is whether a Notice of Appeal in a Condemnation Case *must* be filed: (a) within 30 days of the Interlocutory Judgment (the holding of the Court of Appeals and OCBE's position) **OR** (b) within 30 days of the "final disposition of the exceptions" (Landowners' position).

Here, the "Order Upon Joint Stipulation" (Appendix 8) was the "final determination of the exceptions" and the Notice of Appeal of Landowners was filed 25 days after that Order.

The "Order Dismissing Appeal" and "Order" (denying reconsideration) of the Court of Appeals has denied Landowners their Constitutional Right of Appeal on two issues:

(1) Does a patent error in the description of the land condemned in a resolution of condemnation adopted by a board of education render that resolution void?

(2) Does (a) a "take-it-or-leave-it" offer, without an invitation for a counteroffer, plus (b) a letter by the condemnor's general counsel constitute "bad faith" so as to vitiate a condemnation by a board of education?

LANDOWNERS MUST NOT BE DENIED THEIR CONSTITUTIONAL RIGHT OF APPEAL

The Constitutional Right of Appeal is a highly cherished and jealously guarded right afforded to citizens of our Commonwealth by Section 115 of our Constitution. It should be so protected that a denial of the right of appeal should occur only upon a clear and unequivocal showing of obvious neglect, dereliction, or prejudice to the opposing party. The record is forceful in showing that the Landowners were aggressively and expeditiously pursuing this appeal. In its Order Dismissing Appeal (Appendix 2), the Court of Appeals cited three (3) cases:

1. Ratliff v. The Fiscal Court of Caldwell County, Kentucky, 617 S.W.2d 36 (Ky. 1981) (on Page 2 of the Order);

2. Hagg v. Kentucky Utilities Co., 660 S.W.2d 680 (Ky. App.1983) (on Page 2 of the Order);

3. Kipling v. City of White Plains, 80 S.W.3d 776,783-84 (Ky. App. 2001) (Footnote, Page 3 of the Order).

There are *two*(2) *significant differences between the cases cited by the Court of Appeals and the case before this Court:*

1. No Exceptions to the Interlocutory Judgment were filed in Ratliff or Hagg.

2. There was no Order or other exercise of jurisdiction by the Circuit Court after the Interlocutory Judgment.

A. EXCEPTIONS TO THE INTERLOCUTORY JUDGMENT WERE FILED IN THIS CASE

27 days after the Interlocutory Judgment of March 7, 2006, Landowners filed their Statement of Exceptions to Interlocutory Judgment on April 4, 2006 (Appendix 7). Exceptions are important, as shown by the fact that the Condemnation Statute [KRS 416.620(2)] specifically provides that *"exceptions may be filed by either party* or both parties by filing with the clerk of the Circuit Court and serving upon the other party or parties *a*

statement of exceptions, which statement shall contain any exceptions the party has to the award made by the commissioners . The statement of exceptions shall be tried, but shall be limited to the questions which are raised in the original statements of exceptions, or as amended, but the owner shall not be permitted to raise any question so raised, concerning the right of the petitioner to condemn the property." (Emphasis added.)

In their Statement of Exceptions to Interlocutory Judgment filed April 4, 2006 (Appendix 7), the Landowners lodged Exceptions to:

(a) the inadequacy of "the amount of damages awarded by the Commissioners...." (Exception #4);

(b) failure of the Commissioners "to use the proper measure of damages in arriving at their award..." (Exception #5).

Thus, the requirements of KRS 416.620 (1) were met.

Exceptions give the trial court an opportunity to reconsider a prior ruling. In Black's Law Dictionary (Sixth Edition, 1990), at Page 559 "exceptions" are defined as:

> Objection to order or ruling of trial court. A formal objection to the action of the court, during the trial of a cause, in refusing a request or overruling an objection; *implying that the party excepting does not acquiesce in the decision of the court, but will seek to procure its reversal,* and that he means to save the benefit of his request or objection in some future proceeding. (Emphasis added.)

It is the mandate of KRS 416.620 (1) that "*The statement of exceptions shall be tried....*" Thus, the Condemnation Action *may not proceed* until the Exceptions are tried or there has been some other disposition made. The Court of Appeals completely ignored the Exceptions filed by the Landowners.

What the Court of Appeals failed to recognize is the role of Exceptions as addressed by this Court in Ratliff, *on the same page as that quoted by it in the Order Dismissing Appeal.* Three paragraphs earlier, this Court in Ratliff stated:

> The statute provides, however, that upon 30 days from the entry of the interlocutory judgment *(if no exceptions were filed) or upon final determination of the exceptions,* the circuit court "shall enter such final judgment as may be appropriate." KRS 416. 620(6). (Ratliff, at 39, emphasis added.)

Ratliff thus creates a "bifurcation" relating to the duty to file the Notice of Appeal:

(a) if no exceptions were filed, within 30 days of the Interlocutory Judgment

OR

(b) if exceptions were filed, then within 30 days of the "final determination of the exceptions."

Thus, if Exceptions have been filed by a losing condemnee, there must be "a final determination of the exceptions" before the circuit court can enter a final judgment or before the duty to file the Notice of Appeal arises. Here, the following events occurred:

(1) 27 days after the Interlocutory Judgment, Exceptions were filed [April 4, 2006, Appendix 7...well with the 30 days "from the entry of an interlocutory judgment" required by KRS 416.620(1)];

(2) 23 days after the Exceptions were filed, the Order Upon Joint Stipulation was entered (April 28, 2006, Appendix 8);

(3) 21 days after the Order Upon Joint Stipulation, the Final Judgment was entered (May 19, 2006, Appendix 3);

(4) 4 days after the Final Judgment, the Notice of Appeal was filed (May 23, 2006, Appendix 10).

Under any interpretation of these Time Line Events (Appendix 9), Landowners' Notice of Appeal *was timely filed*, being within 30 days after the "final determination of the exceptions" :

(a) four days after the Final Judgment;

(b) 25 days after the Order Upon Joint Stipulation.

In Ready v. Jamison, 205 S.W.2d 479 (Ky. 1986), this Court examined the change in CR 73.02(2) that became effective on January 1,

1985 and adopted "a new policy of substantial compliance as set out in CR 73.02(2)." This was *after* both Ratliff and Hagg. It did so in these words:

> The change in CR 73.02(2) is critical to the decision in the cases before us...Before this change in 73.02(2), this court interpreted the portion of CR 73.02(2) which specifies the contents of a Notice of Appeal as requiring dismissal where the judgment appealed from was inappropriately designated. This was an automatic dismissal regardless of whether any harm or prejudice resulted to the opponent from the defect in the notice. Continued adherence to this policy of automatic dismissal regardless of prejudice is in conflict with the policy of substantial compliance which is now followed in the federal courts and the vast majority of our sister states who have considered the matter... The time has come to recognize the change from the "policy of strict compliance with rules of procedure regarding appeals" (Foremost, *supra* at 469) to a new policy of substantial compliance as set out in CR 73.02(2)....*Dismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent.* While our Court continues to have a compelling interest in maintaining an orderly appellate process, *the penalty for breach of a rule should bear some reasonable relationship to the seriousness of the defect.* While dismissal still may be appropriate where the breach of the rule is sufficiently serious and the *harm to the opponent is sufficiently serious,* under CR 73.02(2) the appellate court is charged with the burden of deciding the appropriate sanction on a case by case basis....*With this new policy we seek to recognize, to reconcile and to further three significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right of appeal.* (Ready, at 481-482, emphasis added.) *See,* Crossley v. Anheuser-Busch, Inc.,747 S.W. 2d 600, 601 (Ky. 1988); City of Devondale v. S.J. Stallings, 795 S.W. 2d 954, 957 (Ky. 1990).

Likewise, in another case in which this Court found the dismissal by

the Court of Appeals to be an abuse of discretion, Crossley v. Anheuser-Busch,Inc., 747 S.W.2d 600 (Ky. 1988), this Court stated:

> In *Ready v.Jamison, supra,* this Court adopted a policy in which *dismissal is a disfavored remedy for violation of the civil rules relating to appellate procedure.* Noting that our former policy of "automatic dismissal" was in conflict with the rule applied in the majority of state courts and the Federal courts, we imposed upon the appellate court in which the case is pending the duty to decide the appropriate sanction on a case-by-case basis and exercise its discretion only after considering the seriousness of the defect. We identified three objectives which we sought to further:
>
>> ...(A)chieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal. *Ready, supra,* at 482.
>
> ...Appellants' act of misfiling their prehearing statement resulted in a disruption of the appellate process. *For three and a half months no progress was made toward resolving the case on the merits and dismissal of the appeal and denial of reconsideration required unnecessary judicial action. Nevertheless, we can ascertain no harm to appellee as a result of appellants' error. ...If we allow the decision of the Court of Appeals to stand, the objective of promoting an orderly appellate process may be served, but the other objectives of appellate practice will be totally defeated: The case will not be decided on the merits, and appellants will lose their constitutional right of appeal. We conclude, therefore, that the Court of Appeals abused its discretion in dismissing the appeal.* (Crossley, at 601, emphasis added.)

Dismissal of the Landowners' appeal was not an appropriate remedy because:

(1) The Notice of Appeal of May 23, 2006 was within 30 days of:

(a) Order Upon Joint Stipulation of April 28, 2006 (25 days) which was the "final determination of the exceptions" as required by Ratliff (at 39)

(b) Final Judgment of May 19, 2006 (four days) which incorporated the Order Upon Joint Stipulation and reiterated the "final determination of the exceptions" as required by Ratliff (at 39).

(2) There was "no substantial harm or prejudice" to OCBE and no "harm...sufficiently serious". (Ready, at 481).

(a) The Order Upon Joint Stipulation of April 28, 2006 *signed by Counsel for OCBE* made two (2) specific references to the Landowners' intent to appeal the Circuit Court's ruling on the "right to take."

(b) Construction has not commenced on any of the properties condemned by OCBE.

The Court of Appeals was also incorrect in its statement that

> Furthermore, Hagg expressly determines that an appeal from the right to take must be taken within thirty days of entry of the interlocutory order and that the only exception to this is the filing of a motion pursuant to CR 59, which is required to be made while the trial court retains jurisdiction, i.e., ten days. In the instant case the appellants neither filed an appeal within thirty days nor filed a post-judgment motion. We conclude that their notice of appeal did not timely invoke this Court's jurisdiction. (Order Dismissing Appeal, Appendix 2, Pages 3 and 4).

The Court of Appeals again failed to recognize the role of exceptions.

No exceptions were filed in Hagg. The interlocutory judgment was entered on August 3,1983. No exceptions to the interlocutory judgment were filed. On September 7, 1983 (35 days after the interlocutory judgment) the condemnee moved the trial court to grant an extension until September 16, 1983 "to file exceptions". (Hagg, at 681). Eight days later, September 15, 1983, the condemnee filed a motion to set aside the interlocutory judgment...no exceptions were filed and the motion was denied on October 5,1983. *Thus, in Hagg, no exceptions were filed within 30 days of the interlocutory judgment and there was no pleading or court order for 35 days after the interlocutory judgment.* A total of 43 days had elapsed between the interlocutory judgment and the motion to set aside.

The Hagg court stated:

> Plainly this motion did not constitute "exceptions" as permitted by KRS 416.620 but was in reality what it was denominated, a "motion to set aside" or vacate a judgment under CR 59.5. Unfortunately, the time for making such a motion had long since expired when the motion was made and the trial court was powerless to enlarge that time. Hagg, at 682.

Here, Landowners filed their "Statement of Exceptions to Interlocutory Judgment" 27 days after the Interlocutory Judgment (Appendix 7), well within the 30 days mandated by KRS 416.620(1). Landowners' Statement of Exceptions to Interlocutory Judgment made specific reference

to KRS 416.620(1) so such Exceptions cannot be deemed to have been in reliance on CR 59.

The Court of Appeals, in a footnote to the Order Dismissing Appeal, also cited Kipling v. City of White Plains, 80 S.W.3d 776, 783-84 (Ky. App. 2001) with the signal "See also". In ALWD & Daily Dickinson, ALWD Citation Manual (2d ed., Aspen Publishers 2003), Sec. 44.3 "See also" is defined as:

> Used to cite additional material that support the proposition. *Support under this signal is not as strong or direct as when no signal or "see" is used.* "See also" may be used when the cited authority supports the point made, but is in some respect distinguishable from previously cited cases. (Emphasis added.)

Perhaps most instructive from Kipling is the Court of Appeals' reference in that opinion to "exceptions" (which it ignored in the case now before this Court):

> In response to the trial court's order, the Kiplings *filed exceptions* to the interlocutory judgment on September 8, 1999. From the record, it appears that the Kiplings *did not wait for the trial court to rule on their exceptions* as they filed a notice of appeal on September 10, 1999. (Kipling, at 782).

A fair reading of this statement bespeaks a tone of surprise or unfilled expectation that the Kiplings could have waited for the trial court to rule on their exceptions. It is almost an admission by the Court of Appeals that the duty to file the notice of appeal did not arise until the trial court did "rule on

their exceptions." Why the Court of Appeals chose to ignore the Landowners' Exceptions in this case is a mystery. The Landowners here did wait for the trial court to "rule on their exceptions" (by the Order Upon Joint Stipulation of April 28, 2006) and their Notice of Appeal was filed 25 days after that (May 23,2006).

A review of Kipling, at 783-84 (as cited in the Order Dismissing Appeal) discloses that the Court of Appeals was merely repeating the quotation from Ratliff (at 39) that was set forth on Page 3 of the Order Dismissing Appeal.

The reference by the Court of Appeals to Ratliff (at 39) appears to demonstrate a concern that any notice of appeal filed beyond 30 days of the interlocutory judgment works a prejudice upon the condemnor, one that it believes this Court was addressing in Ratliff. A close reading of Ratliff, at 39, shows that this Court was concerned with prejudice to both (a) the condemnee and (b) the condemnor.

As to the condemnee:

> We believe that *if the right of immediate possession* (and all that such implies) *is exercised*, in many instances, even if an appellate court later reverses the trial court's determination of the condemnor's right to take, that *the condemnee cannot be returned to his same position.* (Ratliff, at 39, emphasis added.)

As to the condemnor:

> Moreover, if the mandated appeal is made after the taking, the condemnor could easily suffer by a condemnee's action in "laying under the log" and allowing excessive damages to accrue, prior to appeal. (Ratliff, at 39).

In the case now before this Court:

(1) No "immediate possession" has been "exercised" and no construction has started upon any of the Landowners' properties which has been condemned by OCBE.

(2) Counsel for OCBE has known since the Order Upon Joint Stipulation of the Landowners' desire to appeal the Circuit Court's ruling on the "right to take."

(3) There was no "final determination of the exceptions" until either (a) the Order Upon Joint Stipulation or (b) the Final Judgment...and the Notice of Appeal was within 30 days of either of these Circuit Court Actions.

Therefore, there can be no claim of "prejudice" to OCBE...which has not started construction on the condemned properties or suffered any delays beyond those normally associated with litigation (unless it could be argued that the delay is of its own making since it filed a Motion to Dismiss *after* (a) being fully aware of the Landowners' intent to appeal the "right to take" ruling, (b) receiving the Notice of Appeal and (c) the Prehearing Conference.

B. THE CIRCUIT COURT ENTERED AN ORDER UPON JOINT STIPULATION

The Order Upon Joint Stipulation of April 28, 2006 was 23 days after the Exceptions (Appendix 8). That Order was the "final determination of the exceptions" mandated by Ratliff (at 39). Under Ratliff, this Court stated that a final judgment may be entered only: (a) "upon 30 days from the entry of the interlocutory judgment (if no exceptions were filed)"

or

(b) "upon final determination of the exceptions".

Thus, the Exceptions serve to suspend the duty to file a Notice of Appeal until a "final determination of the exceptions" has been made. That "final determination of the exceptions" did not occur until the Order Upon Joint Stipulation *at the earliest, not the Interlocutory Judgment* of March 8, 2006.

The Order Upon Joint Stipulation is significant in the following respects:

(1) It was the subject of a Hearing.

(2) It was signed by Counsel for OCBE.

(3) It made at least two (2) references to the intent of Landowners on the appeal of the "right to take" ruling.

(4) It disposed of (became the "final determination") of the Exceptions.

(5) It consolidated three cases into one "to allow for one (1) Final Judgment to be entered which will be a single appealable Judgment solely with regard to OCBE's right to condemn (Landowners') properties."

(6) The Circuit Court made handwritten notes describing it as "Order Upon" Joint Stipulation and "ORDERED. The above joint stip'n *(sic)* is incorporated as an Order of Court. Karen Conrad 4-28-06" thus exercising jurisdiction over the matter.

The fact that all parties (condemnor, condemnees, and court) *agreed* to the actions cited in the Order Upon Joint Stipulation shows a consensus that all believed the case ready to proceed to the next stage. *It was the "final determination of the exceptions" at the earliest point in time.* The Interlocutory Judgment was not the "final determination". Likewise, the Interlocutory Judgment was *not* a situation involving "a matter is finally litigated by the judgment, or if it operates to divest some right in such manner as to put it out of the power of the court to place the parties in their original condition." (Ratliff, at 39).

The Order Upon Joint Stipulation was referenced in the Final Judgment of May 19, 2006 (Appendix 3, Page 2 and Paragraph 5). The Final Judgment went beyond the Order Upon Joint Stipulation, however, in that it approved the delivery of the Deed to the real property (Paragraph 7). So, the approval of the Deed by the Master Commissioner was yet another issue resolved, finally, by the Final Judgment.

The Notice of Appeal was filed:

(a) 25 days *after* the Order Upon Joint Stipulation...well within the 30 days required by CR 73.02 (1) (a). The Order Upon Joint Stipulation was the *earliest point* at which there was a "final determination of the exceptions."

(b) four days after the Final Judgment...well within the 30 days required by CR 73.02(1)(a). The Final Judgment incorporated the Order Upon Joint Stipulation and approved delivery of the Deed by the Master Commissioner. It was not until the Final Judgment that the Circuit Court declared that there had been a final disposition of "all parties and all claims."

CONCLUSION

The Landowners must not be denied their Constitutional Right of Appeal. As stated by this Court in Crossley, *supra,* at 601:

> If we allow the decision of the Court of Appeals to stand, the objective of promoting an orderly appellate process may be served, but the other objectives of appellate practice will be totally defeated: The case will not be decided on the merits, and appellants will lose their constitutional right of appeal.

Rather than condoning a procedural conundrum created by the Eminent Domain Statute (which this Court has labeled "inartfully drawn", Ratliff at 39), **Ratliff was an effort by this Court to uphold the highly cherished and jealously guarded right of appeal set forth in Section 115 of the Kentucky Constitution.**

The expanded text (beyond that quoted by the Court of Appeals in the Order Dismissing Appeal) should be considered instructive since it shows the high regard this Court held for the Constitutional Right of Appeal:

> This specific, constitutional mandate, **effectively extending the rights of litigants, must be interpreted in accordance with its plain meaning...We have no difficulty in concluding that the statute does provide an appeal when a condemnee is dissatisfied with the trial court's ruling on the right to take property....**The statute says nothing expressly of a losing condemnee's right to appeal. (It) provides, however, that upon 30 days from the entry of the interlocutory judgment (if no exceptions were filed) **or upon final determination of the exceptions,** the circuit court "shall enter such final judgment as may be appropriate." The balancing of the equities of condemnor and the private citizen whose property can be taken is not an easy one. Certainly the new eminent domain statute is, putting it kindly, **inartfully drawn. However, prominent in the foreground, and tipping the scales, is the mandated appeal set out in Ky. Const., Sec. 115, supra.** We believe that the provisions of KRS 416.610(4) referring to an interlocutory judgment,

> because of the above reason, allows an immediate, expedited appeal, by the condemnee of the question of the condemnor's right to take. (Ratliff, at 38-39, emphasis added.)

This Court, in Ratliff, was doing everything in its power to protect the Constitutional Right of Appeal. There, "nearly 20 months later" (*after* the interlocutory judgment *and the start of construction;* Ratliff, at 37) a final judgment was entered by the trial judge. The condemnee in Ratliff would have lost her Constitutional Right of Appeal had this Court not intervened...since 20 months had elapsed since the interlocutory judgment. Yet, this Court so cherished the Constitutional Right of Appeal that it declared (perhaps because the statute was deemed "inartfully drawn") that the Right survived the technical conundrum of an "inartfully drawn" statute. *The facts of Ratliff were certainly more egregious than in this case, and yet in Ratliff this Court allowed the appeal to proceed.*

The reliance by the Court of Appeals upon Hagg, *supra,* is misplaced because *there were no Exceptions filed in Hagg and no Order or other exercise of jurisdiction by the Circuit Court after the Interlocutory Judgment.* Its reliance upon Kipling, *supra,* was equally misplaced because even though exceptions were filed in Kipling, the Court of Appeals' opinion implies that the condemnees there could have waited for the trial court "to rule on their exceptions..."(at 782).

All of the issues in this case revolving around OCBE's "right to take" were not adjudicated until either: (a) the Order Upon Joint Stipulation (which was signed by OCBE's counsel and showed the intention of the Landowners to appeal) **or** (b) the Final Judgment. The Circuit Court continued to exercise jurisdiction over the case and the parties *after* the Interlocutory Judgment. The Notice of Appeal was within 30 days of either the Order Upon Joint Stipulation or the Final Judgment. There has been no "substantial harm or prejudice" (Ready, at 481) to OCBE. It has not taken possession of the properties and construction has not begun.

The Landowners must not be denied their Constitutional Right of Appeal. They have done everything possible to preserve that Right and to perfect an expedited appeal. It would be a terrible injustice to require condemnees to search our Kentucky Jurisprudence dealing with our Eminent Domain Statute and then be forced to "guess" as to when the Notice of Appeal must be filed. The consequences of an error in the "guess" are too great. If wrong, the condemnees are denied the Constitutional Right of Appeal...even though they had done everything possible to protect that Right and no "substantial harm or prejudice" resulted to the condemnor.

A study of the cases and our Eminent Domain Statute reveals an effort by this Court and our General Assembly to address the "Twin Evils" that

lurk within any Condemnation Action. Those Twin Evils are (1) Time and (2) Prejudice to either the condemnor or the condemnee. Time must be addressed through adherence to deadlines set forth in the Rules of Civil Procedure. Prejudice must be addressed (a) to make certain that no rulings are issued which would prevent the condemnee from being "returned to his same position" and (b) preventing an unscrupulous condemnee from damaging the condemnor by waiting in darkness ("laying under the log") and "allowing excessive damages to accrue prior to appeal."

Neither of these Twin Evils have been allowed to contaminate this case.

Time was addressed.

The Notice of Appeal was filed (a) 25 days *after* the Order Upon Joint Stipulation...that Order being the "final determination of the exceptions" and (b) four days after the Final Judgment. By both measurements, Landowners were within the 30 days required by CR 73.02(1)(a).

The blame for any delay in having this matter quickly resolved by the Court of Appeal must rest with OCBE...which has known since the Order Upon Joint Stipulation of the Landowners' desire to appeal the "right to take" ruling. Yet, even after the Circuit Court Action and the Prehearing

Conference, OCBE filed the Motion to Dismiss. Construction has not begun.

Prejudice was addressed.

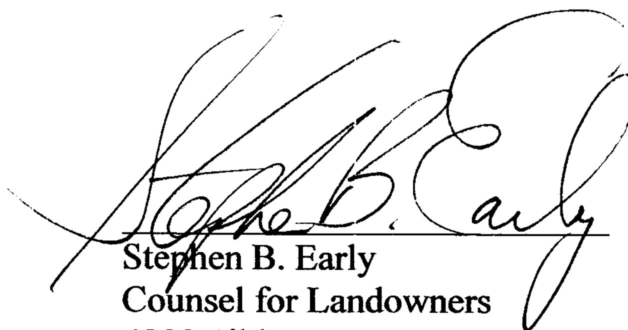
(a) Landowners have pursued this appeal vigorously. They have sought only the appellate review of the "right to take" ruling. They waived their right to a Jury Trial on the issue of damages in exchange for a consolidated, expedited appeal. They have proceeded expeditiously so that actions would not be taken which would prevent them from being returned to their original position. The Landowners believe that the condemnation of their property and the "right to take" ruling by the Circuit Court are wrong. They seek only to have the opportunity to demonstrate that wrongness to the Appellate Courts of Kentucky.

(b) Landowners cannot be accused of unscrupulous conduct, of waiting in darkness ("laying under the log") and "allowing excessive damages to accrue prior to appeal." The Order Upon Joint Stipulation shows their willingness to exchange the valuable right of a Jury Trial for a consolidated, expedited appeal solely on the "right to take" issue. That Order Upon Joint Stipulation declared in at least two (2) sections the intent of the Landowners to appeal. Counsel for OCBE signed the Joint

Stipulation and the Circuit Court, on its own volition, made it an Order. Thus, all parties- condemnor, condemnees, and the Circuit Court- were fully aware of the intent to appeal. OCBE cannot reasonably claim that it has been surprised or prejudiced in any way by the actions of Landowners. The record is clear that the Landowners are not guilty of any obvious neglect, dereliction, or conduct prejudicial to OCBE that would offend the judicious piety of this Court.

WHEREFORE, PREMISES CONSIDERED, the Landowners pray that this Court reverse the Court of Appeals' Order Dismissing Appeal and remand this case to the Court of Appeals with directions to adjudicate the appeal.

Respectfully submitted,



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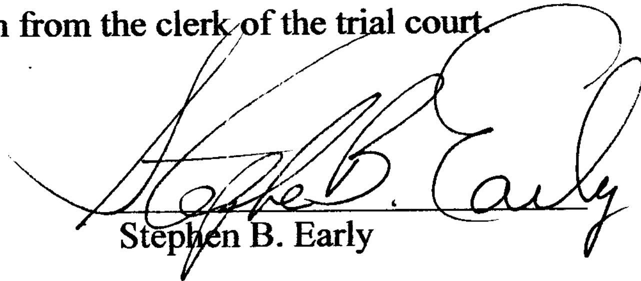
Certificate of Service

The undersigned does hereby certify that a true copy of this Appellants' Brief has been served by first class mail, postage prepaid, upon: (a) Hon. Karen Conrad, Oldham County Circuit Judge, 100 West Jefferson St., LaGrange, KY 40031 and (b) Mr. Alan Linker, Seiller Waterman, LLC, Meidinger Tower, 22nd Floor, 462 South Fourth St., Louisville, KY 40202, on the 23 day of July, 2007. It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court.



Stephen B. Early