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COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY

NO. 2007-SC-008-D

Stephen B. Early, et. al. Appellants

v. **APPELLANTS' REPLY 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

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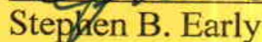
Certificate of Service

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, Meidinger Tower, 22nd Floor, 462 South Fourth St., Louisville, KY 40202 on the 1st day of October, 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 It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court.



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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

THE "INTERLOCUTORY JUDGMENT" TRIGGERS A PERMISSIVE APPEAL, NOT A MANDATORY APPEAL

Ratliff v.The Fiscal Court of Caldwell County, Kentucky, 617 S.W.2d 36 (Ky. 1981)............................1,3,7,8, 9

Hagg v. Kentucky Utilities Co., 660 S.W.2d 680 (Ky. App. 1983)..1,2,3,7

Webster's Ninth New Collegiate Dictionary......................3

CONCLUSION..9

ARGUMENT

THE "INTERLOCUTORY JUDGMENT" TRIGGERS A PERMISSIVE APPEAL, NOT A MANDATORY APPEAL

Appellee, Oldham County Board of Education (hereinafter referred to as "OCBE") laid great importance on this issue in its Brief:

> While the Court's opinion (in Ratliff) answered the question of whether an interlocutory appeal may be taken from a constitutional standpoint, it left unanswered whether such appeal **must** be taken. (Appellee's Brief, at 20.)

The "Order Dismissing Appeal" of the Court of Appeals dated October 24, 2006 (Appendix 2 to Appellants' Brief) recognized that Ratliff does not expressly create a mandatory appeal. It did so in these words:

> The Court notes that *Ratliff* provides that the Eminent Domain Statute allows an immediate, expedited appeal from the interlocutory judgment adjudicating the right to take. Although the appellants are correct that the case does not expressly address whether a party is compelled to file an immediate appeal from such a decision, it includes the following language that may be construed as such:
>
> (Quoting Ratliff, at 39.)
>
> Furthermore, *Hagg* expressly determines that an appeal from the right to take must be taken within thirty days of entry of the interlocutory order.... (at pages 3-4, emphasis on "compelled" by the Court of Appeals.)

Note the use of the word "allows" by the Court of Appeals in the first sentence. "Allows" is a word meaning "permit" and yet the Court of Appeals goes on to state that Hagg "expressly determines that an appeal

from the right to take *must* be taken with thirty days.... " This is incongruous...inconsistent within itself...since something that is allowed or permitted cannot be held to be mandatory. The Court of Appeals' holding was that an appeal was mandatory, since it used the word "must".

The Interlocutory Judgment entered March 8, 2006 did **not** state:

(a) that it was final and appealable;

(b) that all claims relating to the right to take had been addressed;

(c) that there was no just reason for delay.

All of the foregoing would have been "signals" to a litigant that the proponent of the Interlocutory Judgment (OCBE, the Appellee). None of those signals appear in the Interlocutory Judgment. It was entered pursuant to OCBE's "Motion to Conform the Court's February 14, 2006 Order to the Requirements of KRS 416.610" dated February 24, 2006.

The Court of Appeals' reliance on Hagg appears to rest on these words:

> The Supreme Court has recently held that such a judgment, although denominated by the statute as "interlocutory", is appealable. (Citing Ratliff.) In fact, the Court held that a condemnee's right to immediately appeal such a judgment "is demanded by Ky.Const., Sec. 115." *Id*,at39....Simply put, the judgment referred to in KRS 416.610 as an "interlocutory judgment," was final and appealable as to the issue of the right to condemn and the right to immediate entry." (Hagg,at 681.)

Conspicuous by its absence, in Hagg, is a direct statement that such an appeal is *mandatory*. The Hagg Court's quotation from Ratliff was incomplete. The *full* sentence reads:

> It certainly is not, however, as protective to the right of a condemnee as an immediate appeal, which preserves the status quo, and which, we believe is demanded by Ky.Const. Sec. 115, the provisions of which were known by the 1976 General Assembly. (Ratliff, at 39.)

The Landowners believe that the critical, determinative holding of Ratliff is set forth just a few sentences later:

> 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 39, emphasis added.)

Note the use of the word **"ALLOWS."** This is the same word as used by the Court of Appeals in the "Order Dismissing Appeal." It is the operative word. The word "allow" means "permit." (Webster's Ninth New Collegiate Dictionary, p.72). Had the Ratliff Court intended to make the appeal mandatory, it would have said so...plainly and clearly. It did not use a word that means "mandatory." Important to this interpretation is the factual background of Ratliff:

(1) after the interlocutory judgment in its favor, the condemnor "took possession of the land and began construction of the transmission line" (at 37);

(2) no Exceptions were filed;

(3) "nearly 20 months later" a jury trial was held "addressing solely the issue of damages" (at 37);

(4) "In that final judgment, the issue of the right to take was not addressed." (at 37);

(5) "In the instant case, the condemnee...apparently made no effort to have the final judgment of the trial court address the right of the condemnor to take her property."(at 39).

Even in light of these egregious facts, the Ratliff Court reversed the Court of Appeals' Order of Dismissal on the "right to appeal the right to take...." (at 39.)

In the case now before this Court, the record is clear that the Landowners' were doing everything possible to perfect an appeal on the Circuit Court's right to take ruling:

(1) No possession of the land has been taken by OCBE and no construction has begun.

(2) 27 days after the Interlocutory Judgment, Exceptions were filed which were intended to preserve points of error for appeal on both (a) the right to take and (b) damages. Those Exceptions challenged the Circuit Court's holdings: (a) that the error in the description of land being condemned ("30 feet instead of 20 feet") was "harmless"; (b) that the Landowners' claim of a denial of good faith negotiations was "unsupported

by the record"; (c) that there was no abuse of discretion by OCBE; (d)that the amount of damages awarded by the commissioners was adequate; (e) that the proper measure of damages was employed; and (f) that the delivery of Deeds to the condemned properties was authorized.

Note: In Appellee's Brief, on page 23, OCBE states that Landowners "impermissibly attempted to use their Exceptions as a springboard for relitigating the right to condemn issue." Nothing could be further from the truth. The Landowners were using the Exceptions to preserve the various points of error, described above, for appeal. This points up what shall be termed the "Landowners' Dilemma, " created by the uncertainty of whether an appeal of the interlocutory judgment is mandatory or permissive. The Dilemma is this: If the Landowners file Exceptions *only* to the amount of the Commissioners' Award, they may be held to have waived their right to object to the right to take ruling and if they do not file Exceptions to the Award, they may be held to have waived their right to object to the Award. The *only way* a Landowner can advise the trial court, and thus preserve the points of error

for appeal on *both*: (a) the right to take ruling and (b) the Award, is to file Exceptions to both.

(3) 23 days after the Exceptions, the Circuit Court entered its "Order Upon Joint Stipulation" which clearly stated the intent of the Landowners to appeal "the sole issue of the right of OCBE to condemn Respondents' properties has been exhausted and there has been rendered a Final Judgment by a court of competent jurisdiction and last resort." It set forth the willingness of the Landowners to waive their right to a Jury Trial on the question of damages in exchange for an Appeal.

(4) 21 days after the Order Upon Joint Stipulation, a Final Judgment was entered (61 days after the Interlocutory Judgment) and the Final Judgment *specifically* made reference to: (a) "the Court's February 14, 2006 Order" (which contained the ruling on the right to take) and (b) "the appeal by Respondents on the sole issue of the right of Petitioner to condemn Respondents' properties has been exhausted...."

(5) Landowners were making every effort to have the Final

Judgment address the right of the condemnor to take their property.

A comparison between the lack of diligence on the part of the landowners in Hagg and the Landowners in this case is even more striking. In Hagg:

(1) 35 days elapsed between the interlocutory judgment and *any action* by the landowners.

(2) landowners filed Motions: (a) to Extend Time for Exceptions and (b) Set Aside Interlocutory Judgment---neither of which appear to have challenged the right to take.

(3) No Exceptions were filed.

(4) No Final Judgment was entered, only an Order Denying Motion To Set Aside Interlocutory Judgment.

Thus, in Hagg, the landowners did *almost nothing* to convey their desire to appeal the right to take ruling.

Landowners in Condemnation Cases should not be required to search the Jurisprudence of Kentucky and then speculate as to whether the appeal of a right to take ruling is mandatory or permissive. The consequences of being wrong are too great. It is unfortunate that litigants and our courts must deal with an "inartfully drawn" statute (Ratliff, at 39.) The Condemnation

Statute should clearly and plainly state that the interlocutory judgment is final and appealable on the issue of the right to take. It does not. Such clarity would provide litigants with the advance warning that they had a duty to file the Notice of Appeal within 30 days of the interlocutory judgment.

As it stands now, since it rests with the General Assembly to clarify the statute, a litigant is forced to search the case law to determine at what point an appeal on the issue of the right to take becomes mandatory. That is a terrible burden to place on litigants, especially since Ratliff "does not expressly address whether a party is compelled to file an immediate appeal from such a decision…." (Court of Appeals' Order Dismissing Appeal, Appendix 2 of Appellants' Brief, Page 3.) The Court of Appeals has, because of this uncertainty, chosen to construe Ratliff as requiring a mandatory appeal within 30 days of the interlocutory judgment. (Order Dismissing Appeal, at 3.)

Yet, the Court of Appeals has relied upon its own holding in Hagg as authority that the appeal is mandatory. The Landowners submit that the Court of Appeals has erroneously interpreted Ratliff. Ratliff uses the word **"allows"**, which means "permit":

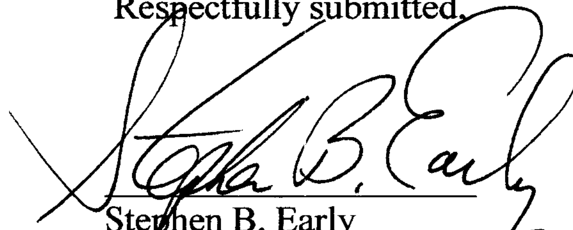
> We believe that the provisions of KRS 416.610(4) referring to to an interlocutory judgment because of the above reason, **allows** an immediate, expedited appeal, by the condemnee of the question of the condemnor's right to take. (at 39, emphasis added.)

CONCLUSION

In situations where there is a question as to whether appeal of the interlocutory judgment is: (a) mandatory (as articulated by the Court of Appeals) or (b) permissive, (as articulated by the Ratliff Court), the doubt should be resolved in favor of the landowners. This is what the Ratliff Court did, in upholding a right of appeal even after 20 months had elapsed since the interlocutory judgment and the landowner there had done *nothing* to preserve the right of appeal:

> 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.* (Ratliff, at 39, emphasis added.)

Respectfully submitted,



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