COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2007-SC-000008-D

STEPHEN EARLY, et. al. — APPELLANTS

vs.

APPELLEE BRIEF

OLDHAM COUNTY BOARD OF EDUCATION — APPELLEE

* * * * * * * * * * *

ALAN N. LINKER
SEILLER WATERMAN, LLC
2200 Meidinger Tower
462 S. Fourth Street
Louisville, Kentucky 40202
(502) 584-7400

Counsel for Appellee,
Oldham County Board of Education

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was mailed this 18th day of September, 2007 to:

Stephen Early
4902 Fible Lane
Crestwood, KY 40014

Hon. Karen Conrad
Oldham Circuit Court
100 West Main Street
LaGrange, KY 40031

Samuel Givens, Jr.
Clerk, Ky. Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

ALAN N. LINKER

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Oldham County Board of Education, respectfully requests that an oral argument be scheduled in this appeal because it believes an oral argument will be of benefit to the Court in understanding the parties' positions as well as the applicable legal principles.

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INTRODUCTION

This is a condemnation case in which the Appellants, Stephen Early, Susan Early, Stephen Kaelin, Rebecca Kaelin, John Szatloczki and Ann Marie Szatloczki (collectively "the Appellants"), have taken this appeal from the October 24, 2006 Order of the Kentucky Court of Appeals. Such Order dismissed the Appellants' earlier appeal to that Court based upon their failure to timely file a Notice of Appeal within thirty (30) days of the Trial Court's Interlocutory Judgment entered pursuant to KRS 416.610. This Interlocutory Judgment determined that the Appellee, Oldham County Board of Education ("OCBE"), had the right to condemn permanent rights-of-way upon the Appellants' respective properties for the public purposes of making highway improvements attendant to the construction of a new school campus.

At issue before this Court is whether a condemnee must appeal an adverse right to condemn ruling within thirty (30) days of the entry of the Interlocutory Judgment when the condemnee files Exceptions which again challenge the condemnor's right to take in direct contravention of KRS 416.620(1).[1] In Ratliff v. Caldwell County, 617 S.W.2d 36 (Ky. 1981), this Court held that a condemnee may appeal from an

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[1] KRS 416.620(1) provides in pertinent part that:

> "Within thirty (30) days from the date of entry of an interlocutory judgment authorizing the petitioner to take possession of the property, 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 the exceptions, or as amended, but the owner shall not be permitted to raise any question, nor shall the court reconsider any question so raised, concerning the right of the petitioner to condemn the property."

Interlocutory Judgment on the right to take issue. In Hagg v. Kentucky Utilities, 660 S.W.2d 680 (Ky. App. 1983), the Court of Appeals, relying upon Ratliff, held such appeal from an Interlocutory Judgment on the right to take issue was mandatory. Both Ratliff and Hagg, however, involved facts where the condemnee either failed to file Exceptions, or did not further challenge the right to take in such Exceptions. OCBE submits that this factual distinction does not change the results reached by this Court in Ratliff and by the Court of Appeals in Hagg.

In this appeal, the Appellants are asking the Court to ignore the statutory eminent domain mechanisms and procedures adopted by the General Assembly and, instead, implement an unwieldy procedure which will blur the separate and distinct roles of the trial court and the jury in the condemnation process. The mechanics of the Eminent Domain Act, the existing precedent established by both this Court and the Court of Appeals, and important public policy considerations all dictate against any change in existing procedures.

COUNTERSTATEMENT OF THE CASE

OCBE rejects the Statement of the Case contained in the Brief filed by the Appellants. Since the Appellants' Statement of the Case fails to articulate the underlying factual and procedural history in the manner contemplated by CR 76.12(4)(c)(iv) and (v), OCBE will do so herein.[2]

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[2] CR 76.12(4)(c)(iv) and (v) require that the "Statement of the Case" section of an appellant's brief support factual assertions by references to the record, and the "Argument" section of such brief to identify, with references to the record, where each issue asserted was preserved for appeal, as well as the manner of preservation. Because the Appellants' Brief fails to comply with either of these requirements, the Court would be justified in striking their brief. *See* Robbins v. Robbins, 849 S.W.2d 571, 572 (Ky. App. 1993) and CR 76.12(8)(a).

This matter comes before the Court on Discretionary Review the Court of Appeals October 24, 2006 Order which dismissed the Appellants' appeal. Such appeal arose from the Trial Court's May 19, 2006 Final Judgment. However, the issues upon which Appellants base their appeal relate to the Trial Court's March 7, 2006 Interlocutory Judgment which determined that OCBE had the right to condemn, for public purposes, permanent rights-of-way of varying widths across the front of Appellants' respective properties. [RA 330-332]. Ostensibly, the Appellants assert that an appeal from the Final Judgment is proper with respect to the right to condemn issue because such Judgment incorporates the Trial Court's findings recited in its earlier Interlocutory Judgment.

The procedural events which give rise to this appeal began on June 7, 2005, when OCBE filed four separate actions in the Oldham Circuit Court for the purpose of condemning a right-of-way across the front of the Appellants' respective properties.[3] [RA 001-010]. Condemnation proceedings were necessary because OCBE had been unable to acquire the subject rights-of-way by a voluntary purchase from the Appellants. The Trial Court appointed three Commissioners as required by KRS

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[3] OCBE initiated the condemnation actions separately against Stephen Early and Susan Early (05-CI-00404); Stephen Kaelin and Rebecca Kaelin (05-CI-00405); and John Szatloczki and Ann Marie Szatloczki (05-CI-00407). The fourth action was filed against Larry McIntosh and Lynn McIntosh (05-CI-00406), who did not appeal the March 7, 2006 Interlocutory Judgment. The McIntoshes' separate appeal from a summary judgment granted to OCBE upon their challenge to the Commissioners' Award has been fully briefed and is presently submitted to the Court of Appeals in Case No. 2007-CA-000118.

In designating the Record on Appeal, the Appellants only included those pre-consolidation and post-consolidation items contained in the senior action - - Oldham County Board of Education vs. Early (05-CI-00404). However, the pleadings and Trial Court rulings in 05-CI-00405 and 05-CI-00407 are substantially identical in all material respects.

416.580, and on June 21, 2005, those Commissioners filed their written valuation reports with the Trial Court concerning the Appellants' respective properties. [RA 011-013 and 016-018].

On July 15, 2005, the Appellants' filed their respective Answers which challenged OCBE's right to condemn. [RA 021-024]. The Appellants based their challenge upon the assertions that: (1) OCBE's proposed use of their properties was not in furtherance of a public purpose; (2) OCBE failed to negotiate in good faith prior to initiating the subject condemnation actions; and (3) OCBE acted arbitrarily in selecting their respective properties for acquisition of rights-of-way.

The Trial Court consolidated the four cases solely for purposes of discovery and the determination of OCBE's right to condemn. [RA 040]. On February 13, 2006, the parties tried the issue of OCBE's right to condemn before the bench. At the close of Appellants' proof, the Trial Court, in a bench ruling, granted OCBE's Motion for a Directed Verdict.[4]

On February 14, 2006, the Trial Court entered an Order memorializing its bench ruling which granted OCBE a directed verdict. [RA 321-324]. Accordingly, the Order held that OCBE had the right to condemn the subject rights-of-way across the Appellants' properties. This Order, however, failed to recite all of the findings mandated by KRS 416.610(2)(a)-(d) for inclusion in an Interlocutory Judgment. On February 24, 2006, OCBE timely moved the Trial Court to conform its February 14,

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[4] Decker v. City of Somerset, 838 S.W.2d 417 (Ky. App. 1992) dictates that the Appellants had the burden of proof at the trial on their challenge to OCBE's right to condemn.

2006 Order to satisfy these statutory requirements. [RA 325-327]. On March 7, 2006, the Trial Court entered an Interlocutory Judgment which incorporated the findings articulated in its February 14, 2006 Order, and also recited the factual findings required by KRS 416.610(2). [RA 330-332].

On April 4, 2006, Appellants filed Exceptions to the Interlocutory Judgment as permitted by KRS 416.620(1). [RA 337-339]. While the Appellants' Exceptions properly challenged the amounts awarded by the Commissioners, their Exceptions also improperly challenged OCBE's right to condemn by asserting in pertinent part that:

> "1. Respondents take Exception to the Court's finding in the Court's Order of February 14, 2006 (incorporated by reference in [sic] to the Interlocutory Judgment) that the Resolution's statement of the "incorrect amount of acreage, 30 feet instead of 20 feet" . . . was harmless error.
>
> 2. Respondents take Exception to the Court's finding in the Court's Order of February 14, 2006 that the claim of Respondents that Petitioner failed to negotiate with them in good faith was "unsupported by the record and fails as a matter of law.
>
> 3. Respondents take Exception to the Court's finding in the Court's Order of February 14, 2006 that there was "no factual or legal support . . . that the Board has committed an abuse of discretion."
>
> * * *
>
> 6. Respondents take Exception to the Interlocutory Judgment regarding the directive for preparation and delivery to the Master Commissioner of a Deed "transferring title to said real property" in that such Deed should not be delivered by the Master Commissioner until a Final Judgment has been entered which is not subject to appeal."

RA 337-338. As KRS 416.610(3) does not permit a condemnee's Exceptions to re-litigate a previously decided right to take determination, OCBE moved the Trial Court to strike the improper portions of the Appellants' Exceptions. [RA 340-342].

On April 28, 2006, the date scheduled for the hearing of OCBE's Motion to Strike, the parties instead tendered a Joint Stipulation to the Trial Court. Upon presentation, the Trial Court entered the Joint Stipulation, which it re-worded as "Order upon Joint Stipulation". [RA 344-345]. Pursuant to this Joint Stipulation, the Appellants withdrew their Exceptions and accepted the respective Commissioners' awards. The Joint Stipulation further provided that the Appellants would not receive payment:

> "until such time as the appeal by [Appellants] on the sole issue of the right of OCBE to condemn [Appellant's] properties has been exhausted and there has been rendered a Final Judgment by a court of competent jurisdiction and last resort."

RA 337-338. The parties' Joint Stipulation further provided that its purpose and intention was 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".

RA 338. To the extent the Interlocutory Judgment was final and appealable with respect to OCBE's right to condemn, the thirty (30) day appeal time expired on April 6, 2006 per CR 73.02(1).

The Joint Stipulation, however, was both negotiated by the parties, and entered by the Trial Court, more than three weeks **after** such appeal time from the Interlocutory Judgment had expired. The procedural timeline attached as Appendix 9 to the Appellants' Brief shows that the Trial Court entered the Joint Stipulation fifty (50) days after the entry of its Interlocutory Judgment. Had the Appellants not included in their Exceptions an improper attempt to relitigate the right to take issues in contravention of

KRS 416.610(3), OCBE would not have needed to make its Motion to Strike, and the Joint Stipulation would not have occurred.

On May 19, 2006, the Trial Court entered the Final Judgment tendered by Appellants. [RA 348-349]. This Final Judgment conformed with the requirements of KRS 416.620(6), memorialized the Appellants' withdrawal of their Exceptions, and incorporated the other operative terms of the Joint Stipulation. This Final Judgment also incorporated the Trial Court's right to condemn determination set forth in the Interlocutory Judgment.

The Appellants filed their Notice of Appeal from the Final Judgment in the Trial Court on May 23, 2006. [RA 356]. The Appellants' timeline shows that they filed the Notice of Appeal seventy-five (75) days after the Trial Court's entry of the Interlocutory Judgment. *See* Appendix 9 to Appellants' Brief.

On August 9, 2006, OCBE moved the Court of Appeals to dismiss the Appellants' appeal pursuant to CR 76.02(1). OCBE premised its grounds for dismissal upon the analysis of the procedural mechanics of the Eminent Domain Act discussed in Ratliff, *supra*. and Hagg, *supra*. On October 24, 2006, the Court of Appeals entered an Order dismissing the Appellants' appeal. The Appellants thereafter moved the Court of Appeals to reconsider its October 24, 2006 Order. The Court of Appeals denied the Appellants' Motion by an Order entered on December 12, 2006.

The Appellants timely moved this Court for Discretionary Review on January 2, 2007. This Court granted Discretionary Review on June 13, 2007.

COUNTERSTATEMENT OF FACTS

The continued growth and development of Oldham County, and the expectation of future growth, has necessitated that OCBE expand its educational facilities in the eastern part of the County. Prior to mid 1998, OCBE began considering several locations for the construction of a comprehensive school campus comprising an elementary, middle and high school (the "Campus").

THE EAST OLDHAM SCHOOL CAMPUS

In or about the summer of 1998, OCBE selected a 144 acre site for the Campus. *See* James Ewalt Affidavit, ¶3; RA 137. This site is located along the north side of Kentucky Highway 22 near the intersection of Fible Lane, approximately two (2) miles west of Ballardsville. OCBE acquired this site for the Campus through a negotiated sale in December, 1998. Id. Among the factors which OCBE considered in selecting this prospective site were acquisition costs, amount of acreage, location, and the proximity to major roadways. Id., at ¶4.

Upon selecting the Campus site, OCBE engaged the professional engineering firm Kiesel/Meyer Engineers, Planners & Surveyors, Inc. ("Kiesel/Meyer") to prepare the necessary site plans and renderings for submission to the Kentucky Department of Education as required by KRS 162.060.[5] *See* Ewalt Affidavit, ¶5; RA 138.

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[5] KRS 162.060 provides:

"The chief state school officer shall be furnished a copy of all plans and specifications for new public school buildings contemplated by boards of education and for all additions to or alterations of old buildings. He shall examine or cause to be examined all such plans and specifications and shall approve or disapprove them in accordance with the rules and regulations of

In this instance, it was also necessary for OCBE to obtain approval of its proposed site plan from the Kentucky Highway Department. [RA 119]. This additional approval was required because of the fact that Kentucky Highway 22 would serve as the principal means of ingress and egress into the Campus. *See* KRS 177.057[6] and 603 KAR 5:120(3)[7]. As a condition of granting its approval, the Kentucky Highway Department required that OCBE construct certain roadway improvements along Kentucky Highway 22. *See* Ewalt Affidavit, ¶6; RA 138.

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the Kentucky Board of Education. Plan reviews for conformance with the Uniform State Building Code shall be conducted only by the Office of Housing, Buildings and Construction. No board of education may award a contract for the erection of a new building or contract for an addition to or alteration of an old building until the plan has been approved by the chief state school officer."

[6] KRS 177.057 provides:

"A local school district shall not purchase property for the construction of any school facility until the district consults with the Kentucky Transportation Cabinet, Department of Highways, Frankfort Office, to determine if the property to be purchased currently has adequate highway access or if highway access is planned for a future date by the Transportation Cabinet. If the property to be purchased does not currently have adequate highway access or if the Transportation Cabinet does not plan future highway access to the property, the cabinet shall so notify the local school district in writing."

[7] 603 KAR 5:120(3) provides in pertinent part:

"On all highways where access is "partially controlled," the department may permit relocation or shifting of existing access points, addition of new access points, elimination of existing access points, or modification of access points under the following circumstances:

* * *

(b) Additional access points may be permitted provided the criteria established by KRS 177.315 are followed and a permit request is processed as set forth in Section 4 of this administrative regulation in accordance with the procedures set forth in Section 5 of this administrative regulation. The offset distance between access points located on opposite sides of the highway shall not be less than the minimum spacing distance established in KRS 177.315."

These roadway improvements were necessary for safe ingress and egress to the Campus, and included the construction of turn lanes near the Highway 22 entrance to the Campus and a redesign of the intersection of Fible Lane and Highway 22. Id. In turn, the construction of the turn lanes necessitated that OCBE obtain rights-of-way of varying widths on both sides of Highway 22 from ten (10) abutting property owners, including the Appellants. All of these road improvements will be dedicated to public use upon completion. Id., at ¶7.

OCBE'S NEGOTIATIONS WITH RESPONDENTS

In April, 2004, Gayle Johnson ("Johnson"), OCBE's Assistant Superintendent, initiated communications with the owners of the affected properties[8]. Gayle Johnson Affidavit, ¶3; RA 141. The purpose of these communications was to inform the property owners about the proposed school construction project, and the need to acquire a portion of their properties for the roadway improvements to Kentucky Highway 22.[9] Id.

Johnson was able to meet personally with each of the Appellants, save the Szatloczkis. *See* Johnson Affidavit, ¶4; RA 141-142. Johnson made numerous unsuccessful attempts to contact the Szatloczkis in person, and left several telephone messages on their answering machine during April, 2004. Id. Mr. Szatloczki, however, erased Johnson's messages without ever listening to them.[10] On April 21, 2004,

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[8] *See* Stephen Early Deposition, p. 9; Stephen Kaelin Deposition, p. 15; and Larry McIntosh Deposition, p. 17.

[9] OCBE reached agreements with six of the property owners for the acquisition of rights-of-way across their respective properties.

[10] *See* John Szatloczki Deposition, p. 16.

Johnson wrote the Szatlockis to explain matters relating to the proposed school construction project and OCBE's need to acquire a right-of-way across a portion of their property.[11] Mr. Szatloczki, however, apparently discarded this letter, as well as any other pre-condemnation correspondence from OCBE, without ever reading them.[12]

After Johnson's initial communications (or attempted communications) with each of the Appellants, OCBE commissioned David Miller, MAI, SRA ("Miller") to appraise the fair market value of the respective rights-of-way which it sought to acquire. *See* Johnson Affidavit, ¶6; RA 142. Miller determined the fair market values of the respective rights-of-way were:

- Early $5,450.00
- Kaelin $3,200.00
- Szatloczki $2,700.00
- McIntosh $1,700.00

Such sums represented Miller's professional opinion of the difference in fair market value of the Appellants' respective properties before OCBE's acquisition of a right-of-way, and the value after such acquisition.[13]

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[11] *See* Exhibit 9 to John Szatlocki Deposition and Johnson Affidavit, ¶5; RA 142.

[12] *See* John Szatloczki Deposition, p. 22.

[13] *See* Exhibit 3 to Larry McIntosh Deposition; Exhibit 10 to John Szatloczki Deposition; Exhibit 16 to Stephen Kaelin Deposition and Exhibit 25 to Stephen Early Deposition.

In early August 2004, Johnson personally delivered a copy of Miller's appraisal reports to each of the Appellants.[14] In meeting with the Appellants, Johnson discussed the Miller appraisals, the proposed plan for the Campus, as well as the property owners' questions and concerns. *See* Johnson Affidavit, ¶7; RA 142. However, during these meetings, none of the Appellants stated either an opinion as to the value of the respective rights-of-way being acquired, or a proposed alternative value.[15]

After meeting with the McIntoshes concerning the Miller appraisal, Johnson met again with Mr. McIntosh to discuss the idea of exchanging the needed right-of-way from the front of his property for 20 feet in the rear of the property owned by a neighbor, Al Klingenfus.[16] Larry McIntosh Deposition, pp. 35-36 and Johnson Affidavit, ¶¶9-10; RA 142-143. The McIntoshes acknowledge this was an idea developed by Johnson.[17] Further, this proposed property exchange was **in addition** to the OCBE's monetary offer to the McIntoshes.

On August 23, 2004, Mr. Kaelin corresponded with OCBE to complain about Miller's appraisal.[18] Mr. Kaelin's letter, however, failed to either state a counter-offer,

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[14] *See* Johnson Affidavit, ¶7 [RA 142]; Stephen Early Deposition, pp. 22-23; Stephen Kaelin Deposition, pp. 28-29; Anne Marie Szatloczki Deposition, p. 15; and Larry McIntosh Deposition, pp. 32-33.

[15] *See* Johnson Affidavit, ¶8 [RA 142]; Stephen Early Deposition, pp. 24-25; Stephen Kaelin Deposition, p. 36; Larry McIntosh Deposition, p. 35; and Anne Marie Szatloczki Deposition, pp. 15-16.

[16] Mr. Klingenfus was the individual who transferred the Campus site to OCBE, and was agreeable to this proposal. *See* Johnson Affidavit, ¶9; RA 142-143.

[17] *See* Larry McIntosh Deposition, pp. 36-37.

[18] *See* Exhibit 17 to Stephen Kaelin's Deposition.

or his opinion of the fair market value of the subject right-of-way. This fact is ironic because Mr. Kaelin believed at the time that $10,000 was the fair market value of the right-of-way.[19]

On September 13, 2004, Dr. Blake Haselton ("Haselton"), OCBE's then Superintendent, corresponded with each of the Appellants as a follow-up to the prior meetings with Johnson and their receipt of the Miller appraisal reports.[20] Haselton's letter informed the Appellants that OCBE would pursue condemnation if an agreement for the conveyance of the respective rights-of-way was not reached by September 24, 2004.

On September 20, 2004, Jim Ewalt ("Ewalt"), OCBE's Facilities Director, corresponded with each of the Appellants concerning the East Oldham School project.[21] In his letter, Ewalt solicited the Appellants to contact Johnson concerning any questions they might have. None of the Appellants, however, communicated with either Ewalt or Johnson in response to this letter[22]. *See* Ewalt Affidavit, ¶10; RA 138.

On October 8, 2004, Haselton responded to Mr. Kaelin's August 23, 2004 letter.[23] Haselton explained Miller's appraisal methodology, and solicited Mr. Kaelin to

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[19] *See* Stephen Kaelin Deposition, p. 38.

[20] *See* Exhibit 5 to Larry McIntosh Deposition; Exhibit 11 to John Szatloczki Deposition; Exhibit 18 to Stephen Kaelin Deposition; and Exhibit 26 to Stephen Early Deposition.

[21] *See* Ewalt Affidavit, ¶9; RA 142-143, Exhibit 6 to Larry McIntosh Deposition and Exhibit 12 to John Szatloczki Deposition.

[22] *See* Larry McIntosh Deposition, p. 42; and Anne Marie Szatloczki Deposition, p. 26.

[23] *See* Exhibit 19 to Stephen Kaelin's Deposition.

contact Johnson with any further questions. Mr. Kaelin, however, never communicated further with either Haselton, Johnson, or anyone else at OCBE.[24]

Having heard nothing from the Appellants, OCBE's General Counsel, Anne Coorssen ("Coorssen"), corresponded on October 28, 2004 with each of them to reiterate OCBE's intention to proceed with condemnation. *See* Coorssen Affidavit, ¶3; RA 161.[25] Coorssen's letter again stressed the importance of OCBE proceeding quickly with acquiring the subject rights-of-way, and advised them that OCBE's prior monetary offer would remain in effect during condemnation proceedings. None of the Appellants, however, communicated with Coorssen or anyone else at OCBE after receiving this letter. Id., at ¶7; RA 162.

On January 31, 2005, again, having heard nothing from the Appellants, OCBE's Board adopted a resolution authorizing the condemnation of the subject rights-of-way. *See* Coorssen Affidavit, ¶8; RA 162. This Resolution noted that OCBE had previously reached agreements with six other neighboring property owners.

On April 27, 2005, Alan Linker ("Linker"), OCBE's litigation counsel, met with Mr. Early, to discuss his proposal for an alternative location of the subject road improvements. Early's proposal sought a re-design of the road improvements which would obviate the need for acquiring the subject rights-of-way.[26] At this meeting, Early acted on his own behalf and as counsel for each of the other Appellants. However,

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[24] *See* Stephen Kaelin Deposition, pp. 54-55.

[25] *See also* Exhibit 7 to Larry McIntosh Deposition; Exhibit 20 to Stephen Kaelin Deposition; and Exhibit 27 to Stephen Early Deposition.

[26] *See* Stephen Early Deposition, pp. 6-7.

Early simply focused on the location of the road improvements, and never communicated a monetary counter-offer or a proposed alternative valuation.

On or about May 17, 2005, Coorssen conferred with Jeffrey Meyer of Keisel/Meyer to discuss Early's alternative route proposal. *See* Coorssen Affidavit, ¶10; RA 162-163 and Jeffrey Meyer Affidavit, ¶3; RA 172. Upon receipt from Coorssen of a drawing which depicted Early's proposed alternative route, Mr. Meyer conferred with his partner, Jere Kiesel, to consider such proposal. *See* Jeffrey Meyer Affidavit, ¶9; RA 173. However, based upon their review of the Early proposal, Messrs, Meyer and Kiesel advised Coorssen that such proposal could not be accommodated. *See* Coorssen Affidavit, ¶10; RA 162-163 and Jeffrey Meyer Affidavit, ¶10; RA 173. The basis for the rejection of the proposal was that Early's alternative route would not be safe, would not meet Kentucky highway regulations, could jeopardize the funding award from the Kentucky Highway Department, and would cause increased engineering fees and project delays. *See* Jeffrey Meyer Affidavit, ¶10; RA 173. On June 2, 2005, Linker wrote to Early to inform him that OCBE's engineers had rejected his alternative route proposal.[27] Linker's letter further advised Early of OCBE's plans to proceed with condemnation.

OCBE'S INITIATION OF CONDEMNATION

OCBE filed the subject condemnation actions against each of the Appellants on June 7, 2005. On June 8, 2005, the Trial Court appointed three Commissioners as required by KRS 416.580, and on June 21, 2005, the Commissioners tendered their

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[27] See Exhibit 23 to Stephen Early's Deposition.

written valuation reports. The Commissioners opined the value of the subject rights-of-way as follows:

- Early $4,716.00
- Kaelin $3,684.00
- Szatloczki $3,109.00
- McIntosh $1,931.00

Like the Miller appraisals, such sums represented the Commissioners' collective opinions of the difference in value of Appellants' respective properties before OCBE's acquisition of a right-of-way, and after such acquisition.

Appellants' respective Answers challenged OCBE's right to condemn. [RA 021-024]. While the Appellants' primarily contend that OCBE's monetary offers were inadequate, their deposition testimony reveals that the real complaint was not about the money, rather they wanted the Highway 22 road improvements located elsewhere.[28]

The parties tried the right-to-take issue before the Trial Court on February 13, 2006. As per Decker v. City of Somerset, 838 S.W.2d 417 (Ky. App. 1992), the Appellants' had the burden of proof at such trial. At the close of the Appellants' proof, OCBE moved the Trial Court for a directed verdict on the basis that the Appellants had failed to carry their burden of proof in attempting to negate OCBE's right-to-take. The Trial Court's February 14, 2006 Order memorialized such ruling and determined that OCBE had a right to condemn. [RA 321-324]. Because the Trial Court's February 14, 2006 Order did not articulate all the findings required by KRS 416.610(2)(a)-(d), OCBE

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[28] *See* Larry McIntosh Deposition, pp. 45, 56-58; Lynn McIntosh Deposition, pp. 21-22; Anne Marie Szatloczki Deposition, pp. 43-44 and 45-47.

timely moved the Trial Court pursuant to CR 59 to conform its February 14, 2006 Order to make these required statutory findings. [RA 325-327]. On March 7, 2006, the Trial Court entered separate Interlocutory Judgments against each of the Appellants which conformed to KRS 416.610(2). [RA 330-332].

On April 4, 2006, the Appellants filed Exceptions to the Interlocutory Judgments as permitted by KRS 416.620(1). [RA 337-339]. However, on April 28, 2006, the Appellants withdrew their Exceptions and accepted the respective Commissioners' awards by way of a Joint Stipulation. [RA 334-335]. Again, this Stipulation was negotiated and entered more than three (3) weeks after the appeal time resulting from the Interlocutory Judgment had expired per CR 73.02(1).

On May 19, 2006, the Trial Court entered a Final Judgment which conformed with the requirements of KRS 416.620(6), and memorialized the Appellants' withdrawal of their previously filed Exceptions. [RA 348-355]. Appellants filed their Notice of Appeal in the Oldham Circuit Court on May 23, 2006. [RA 356]. Appellants' Notice of Appeal indicates that their appeal arises from both the Interlocutory Judgment and the Final Judgment.

ARGUMENT

The sole question presented in this appeal is whether a condemnee, who is dissatisfied with the trial court's determination that the condemnor has the right to condemn, is compelled to appeal from the interlocutory judgment entered pursuant to KRS 416.610. In light of Ratliff v. Caldwell County, 617 S.W.2d 36 (Ky. 1981) and Hagg v. Kentucky Utilities, 660 S.W.2d 680 (Ky. App. 1983), the Court of Appeals properly dismissed the Appellants' appeal because they failed to file their Notice of

Appeal within thirty (30) days of the entry of the Interlocutory Judgment which adjudicated with finality, as per KRS 416.610(3) and 416.620(1), their challenge to OCBE's right to condemn.

I. THE EMINENT DOMAIN ACT AND THE CIVIL RULES REQUIRE A CONDEMNEE TO APPEAL FROM THE INTERLOCUTORY JUDGMENT WHEN CHALLENGING A CONDEMNOR'S RIGHT TO CONDEMN.

In adopting the Kentucky Eminent Domain Act, the General Assembly established specific procedures for the litigation of eminent domain actions. As noted in Ratliff v. Fiscal Court of Caldwell County, Kentucky, 617 S.W.2d 36, 38 (Ky. 1981), "[t]he purpose of the act was to set up a new and uniform condemnation procedure."

While the Act may be "inartfully drawn," as observed by the late Chief Justice Stephens in Ratliff,[29] the mechanics of these uniform procedures are nevertheless straightforward and not difficult to comprehend. These procedures are distinct from nearly every other civil action in the manner they are commenced, tried and appealed. However, the one thing which condemnation actions have in common with all other civil actions is the applicability of the Rules of Civil Procedure. *See* KRS 416.650. As will be discussed below, such fact is important in this appeal.

Upon filing a condemnation action, the trial court appoints three (3) "impartial housekeepers of the county who are owners of land." KRS 416.580. These Commissioners are sworn, view the condemnee's property, and award a condemnee:

> "such a sum as will fairly represent the reduction in market value of the entire property . . . said sum being the difference between the market value of the entire property

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[29] *See* 617 S.W.2d at 39.

> immediately before taking and the market value of the remainder of the property immediately after the taking... ."

KRS 416.580. After valuing the property, the Commissioners report their award to the Trial Court.

Within twenty (20) days of the service of the condemnation petition, KRS 416.600 allows the condemnee the right to file an answer which:

> "shall be **solely confined** to the question of the right of the petitioner to condemn the property sought to be condemned... ." (Emphasis added).

If no answer challenges the right to take, then the trial court enters an Interlocutory Judgment confirming such right. KRS 416.610(2). If an answer challenges the condemnor's right to take, the issue is tried by the trial court without a jury. KRS 416.610(4). If the right to take is confirmed, the trial court enters an Interlocutory Judgment confirming such right. Id. Procedurally and statutorily, that ends the issue of the right to take.

Within thirty (30) days from the entry of an Interlocutory Judgment, either party is entitled to file exceptions to the commissioners' award. KRS 416.620(2). However, KRS 416.610(3) provides that any exception from an Interlocutory Judgment "shall be confined solely to exceptions to the amount of compensation awarded by the commissioners." KRS 416.620(1) reiterates such restriction in providing that a condemnee "shall not be permitted to raise any questions, nor shall the court reconsider any question so raised, concerning the right of the petitioner to condemn the property." This makes perfect sense since the right to take issue has already been finally determined.

In the event either party files exceptions to the commissioners' award, KRS 416.620(1) provides that "questions of fact pertaining to the amount of compensation" shall be tried before a jury. Upon the final determination of the exceptions, KRS 416.620(6) provides for the entry of a Final Judgment. KRS 416.620(2) provides that any appeal from such Final Judgment is taken to the Court of Appeals.

The above procedures designed by the General Assembly are straightforward and easily comprehendible. However, these procedures fail to specifically address a condemnee's ability to appeal from an Interlocutory Judgment if dissatisfied with an adverse right to condemn ruling. This question remained unanswered until this Court's 1981 opinion in Ratliff. While the Court's opinion answered the question of whether an interlocutory appeal may be taken from a constitutional standpoint, it left unanswered whether such appeal **must** be taken.

In Ratliff, this Court reversed a Court of Appeals' determination that the Eminent Domain Act did not provide condemnees a right of appeal from an adverse right to condemn ruling. This Court noted that Section 115 of the Kentucky Constitution guarantees the right to one appeal, and that:

> "the general assembly was cognizant of the constitutional article [Ky. Const. §115] when it enacted the new eminent domain act."

617 S.W.2d at 38. Importantly for purposes of this case, this Court also concluded that a right of appeal "becomes evident once the condemnation procedure is carefully examined." 617 S.W.2d at 38.

In authoring Ratliff, the late Chief Justice Stephens detailed the specific procedural mechanics of the Eminent Domain Act - - much in the same manner as

OCBE does above. Critical to the analysis in this case, this Court noted in Ratliff that, based upon KRS 416.620(1), a condemnee cannot use Exceptions to "challenge the provision of the judgment which authorizes the taking." 617 S.W.2d at 39. Also critical is this Court's observation that:

> "[w]hile the word "interlocutory" normally implies a non-appealable order, such an order (no matter what it is called) can be appealed if 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."

617 S.W.2d at 39, citing Commonwealth et al. ex rel. Reeves v. Unknown Heirs of Brown, Ky., 249 S.W.2d 52 (1952) and CR 54.02. Given that KRS 416.610(3) and 426.620(1) bring finality to a right to condemn determination, this Court logically concluded that such determination was subject to CR 54.02 for appeal purposes - - a natural conclusion since condemnation actions are subject to the Rules of Civil Procedure. *See* KRS 416.650.

While Ratliff held that an appeal from a right to condemn determination was permissive, it did not address the important question of whether such an appeal was mandatory. The Court of Appeals, however, answered that question two years later in Hagg v. Kentucky Utilities, 660 S.W.2d 680 (Ky.App. 1983). In Hagg, the trial court determined a condemnor had the right to condemn over the condemnee's challenge. The trial court entered its Interlocutory Judgment on August 3, 1983. Thereafter, the condemnee neither filed a notice of appeal within thirty (30) days or Exceptions to the amounts awarded by the Commissioners. The condemnee, however, belatedly filed a CR 59.05 motion to set aside the Interlocutory Judgment, and appealed from the denial of such relief.

The Court of Appeals first noted the impropriety of appealing from the denial of a CR 59.05 motion.[30] Next, the Court of Appeals, citing Ratliff, held "that such a judgment, although denominated by the statute as "interlocutory," is appealable." 660 S.W.2d at 681. The Court of Appeals further noted that Ratliff declared that "a condemnee's right to immediately appeal such a judgment is demanded by Ky. Const., Sec. 115." Id. The Court of Appeals concluded its opinion by holding that 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... ." 660 S.W.2d at 681.

The procedural mechanics of both KRS 416.610 and 416.620 have not changed in the interim since Ratliff and Hagg were decided, and the result in this case should be no different. In light of both Ratliff and Hagg, there can be no dispute that, for appeal purposes, the Interlocutory Judgment fully and finally adjudicated the question of OCBE's right to condemn a right-of-way across the Appellants' respective properties.

II. THE COURT OF APPEALS DID NOT ERR IN DISMISSING THE APPELLANTS' APPEAL AS BEING UNTIMELY FILED.

The record clearly shows that the Appellants did not file their Notice of Appeal within thirty (30) days of the Trial Court's entry of the Interlocutory Judgment. Based upon Ratliff and Hagg, the Court of Appeals did not err in dismissing the Appellants' appeal as being untimely filed.

In arguing their appeal was timely, the Appellants suggest at page 20 of their Brief that filing Exceptions to the Interlocutory Judgment somehow tolled the time for appealing the right to take determination until the ultimate entry of a Final Judgment.

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[30] *See* Marshall v. City of Paducah, 618 S.W.2d 433 (Ky. App. 1981).

In this instance, the Appellants' Exceptions challenged not only the amount of the Commissioners' Award, but also challenged the right to condemn determination. While OCBE does not dispute the Appellants' right to challenge the Commissioners' Award, it firmly asserts that the Appellants impermissibly attempted to use their Exceptions as a springboard for relitigating the right to condemn issue. KRS 416.610(3) and 416.620(1) are clear and unambiguous that Exceptions may not be used for such purpose.

The error of the Appellants' argument is evidenced by their statement that "Ratliff creates a "bifurcation" relating to the duty to file the Notice of Appeal." Appellants' Brief, p. 19. Appellants interpret Ratliff as creating a duality involving the right to condemn issue - - where the timing of an appeal is determined by whether or not a condemnee files Exceptions. However, this is a gross misinterpretation of both the Eminent Domain Act and Ratliff. The only duality resulting from the Eminent Domain Act is the fact that the right to condemn and just compensation issues are entirely distinct and independent of each other. These two issues are akin to two trains running in opposite directions on parallel tracks, where to paraphrase Rudyard Kipling, "East is East, and West is West, and never the twain shall meet."[31]

Appellants further err in arguing that Exceptions "give the trial court an opportunity to reconsider a prior ruling." Appellants' Brief, p. 18. Appellants base this argument upon the definition of "exceptions" found in Black's Law Dictionary (6th Ed. 1990). However, the manner in which Black's Law Dictionary addresses the term

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[31] Rudyard Kipling, The Ballad of East and West (1895).

"exceptions" does not, and cannot, apply here. KRS 416.610(3) and 416.620(1) are clear in their mandate that a condemnee is not permitted to use Exceptions as a means for giving a trial court "an opportunity to reconsider" the right to take issue - - once that issue is decided, there is no second look.

The procedural mechanics of the Eminent Domain Act and CR 54, as addressed in both Ratliff and Hagg, dictate that a trial court's determination of a condemnor's right to condemn brings finality to that inquiry. In other words, once a right to condemn determination is made, that issue is "off the table" with respect to any further trial court proceedings. Even if a condemnee could ostensibly utilize CR 59.05 as a means of seeking the reconsideration of a right to condemn determination, that rule has no application in this case since the Appellants did not invoke it. However, even if some hint of a CR 59.05 motion could be strained from the Appellants' Exceptions, the record shows that they failed to file their Exceptions within the ten (10) day period specified in CR 59.05.[32]

Since the Interlocutory Judgment brought finality to the issue of OCBE's right to condemn, Ratliff, Hagg and CR 54.02 clearly show that such determination was final for appeal purposes. This meant the Appellants were required to file their Notice of Appeal on or before April 6, 2006. The Appellants, however, did not file their Notice of Appeal until May 23, 2006. This was untimely per CR 76.02(1), and the dismissal of their appeal by the Court of Appeals was proper. *See* CR 73.02(2) and Burchell v. Burchell, 684 S.W.2d 296 (Ky. App. 1984).

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[32] The record shows that the Appellants filed their Exceptions twenty-three (23) days after entry of the Interlocutory Judgment.

III. APPELLANTS HAVE NOT BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF APPEAL.

OCBE does not take issue with the Appellants' assertions that Section 115 of the Kentucky Constitution guarantees litigants the right to one appeal, or that such right is sacred. However, that right, though sacred, is not without boundaries.

Just as the United States Constitution grants citizens the right to freely travel,[33] the existence of that right does not mean that its exercise is limitless. For instance, the law restricts the right to freely travel, in some small measure, by requiring that drivers abide by the posted speed limit. The same holds true when considering the myriad of restrictions which affect the ability of airline passengers to freely travel. So too, when Section 115 of the Kentucky Constitution guarantees a right to appeal, the exercise of that right is not without limits. One such limit is the requirement that appeals be practiced within the established rules governing appellate practice. *See* Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2000). CR 73.02 is one such rule.

These appellate rules clearly set forth the proper procedure for initiating an appeal, which requires the filing of a Notice of Appeal within thirty (30) days of the entry of a "judgment." CR 73.02(1). In turn, CR 54.01 defines a judgment as "a written order of a court adjudicating a claim or claims in an action or proceeding." The cases interpreting the Civil Rules provide that a Notice of Appeal is the procedural mechanism

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[33] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

by which an appellant invokes the jurisdiction of the Court of Appeals. *See* AK Steel Corporation v. Carico, 122 S.W.3d 585 (Ky. 2003). Thus, an appeal must be dismissed on jurisdictional grounds when an appellant's Notice of Appeal is not filed within thirty (30) days after entry of a final judgment. *See* CR 73.02(2); Burchell v. Burchell, 684 S.W.2d 296 (Ky. App. 1984); and United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708 (Ky. App. 1987). Here, the Interlocutory Judgment was final with respect to the issue of the right to take.

IV. DILIGENCE, GOOD FAITH AND LACK OF PREJUDICE ARE NOT RELEVANT IN THIS CASE.

Appellants urge the Court to consider their diligence and good faith in pursuing an appeal, as well as the lack of prejudice to OBCE. Plain and simple, either an appeal is filed timely, or it is not. There is no gray area. Thus, the extent of an appellant's diligence and good faith, or the fact that the appellee may not suffer prejudice from a belated appeal, are not mentioned anywhere in CR 73.02(2).

The Appellants further err in suggesting that their appeal should be saved by the "substantial compliance" rule adopted by this Court in Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986)[34] and followed in cases like Crossley v. Anheuser-Busch, Inc., 747 S.W.2d 600 (Ky. 1988).[35] Jamison and its progeny have no application in this case because the "substantial compliance" rule only applies when a notice of appeal is defective, but otherwise timely filed. On this point, Kentucky courts have consistently

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[34] In Jamison, this Court held that a timely filed, but defective, notice of appeal does not automatically warrant dismissal.

[35] Crossley holds that the failure to timely file a Court of Appeals prehearing statement does not require automatic dismissal.

held that an untimely appeal is not saved by the substantial compliance rule. *See* Workers' Compensation Bd. v. Siler, 840 S.W.2d 812, 813 (Ky. 1992) in which this Court addressed the scope of Jamison in holding that:

> "filing of the Notice of Appeal within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action."

Thus, once the time for filing an appeal has passed, the Court of Appeals is without jurisdiction to entertain a belatedly-filed appeal. An appellant therefore cannot invoke the "substantial compliance" rule as a basis for a court to extend an appeal time which has already expired.

Next, the Appellants attempt to save their untimely appeal by relying upon the terms of the parties' Joint Stipulation. Appellants place great emphasis on the fact that the Joint Stipulation tied the payment of the respective Commissioners' awards to the exhaustion of their appeal on the right to condemn issue, and contemplated there being a single Final Judgment for purposes of their appeal from the right to condemn determination. The Appellants conclude the:

> "fact that all parties . . . agreed to the actions cited in the Order upon Joint Stipulation shows a consensus that all believed the case was ready to proceed to the next stage."

Appellants' Brief, p. 29. The Appellants' argument, however, has one very important flaw - - the Joint Stipulation was negotiated and entered into more than thirty (30) days after the entry of the Interlocutory Judgment.

Kentucky law is clear that parties cannot mutually extend the time for filing an appeal, or mutually confer jurisdiction upon the Court of Appeals after the time for an appeal has expired. As this Court recently observed in Wilson v. Russell, 162 S.W.3d

911, 913 (Ky. 2005):

> "[j]urisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined."

Therefore, "jurisdiction may not be waived, and it cannot be conferred by consent of the parties." Id.; see also Little v. Mann, 195 S.W.2d 321 (Ky. 1946). In fact, this principle even means that parties can fully litigate an action pursuant to a stipulation of jurisdiction, only for one party to renege and successfully challenge jurisdiction upon failing to prevail in the litigation. Eastern Coal Corp. v. Morris, 287 S.W.2d 603 (Ky. 1956).

From the wording of the Joint Stipulation, there is no doubt that the parties believed in good faith that they were implementing a plan which would efficiently allow the case "to proceed to the next stage." Appellants' Brief, p. 29. While this may have been the parties' intention, Kentucky law simply does not allow them to mutually breath new life into an appeal that is dead.

Based upon the reasons set forth above, the Court of Appeals' dismissal of the Appellants' appeal should be affirmed.

V. PUBLIC POLICY SUPPORTS AFFIRMING THE DISMISSAL OF THE APPELLANTS' APPEAL.

As stated above, Ratliff observed that "[t]he purpose of the act was to set up a new and uniform condemnation procedure." 617 S.W.2d at 38. Undoubtedly, the General Assembly intended this uniform procedure would apply to both trial and appellate practice in condemnation cases. The policy basis for this intention is neither complicated nor difficult to comprehend - - the General Assembly sought to bring certainty, consistency and stability to the condemnation process.

The right to own private property, and the assurance that the government may not take such property except for a public purpose and upon the payment of just compensation, is one of the most fundamental and sacred principles of American jurisprudence. *See* Gouled v. United States, 255 U.S. 298, 303-304, 41 S.Ct. 261, 263, 65 L.Ed. 647 (1921). In this instance, the Court of Appeals' dismissal of the Appellants' appeal does not compromise this fundamental principle by forcing condemnees "to 'guess' when the Notice of Appeal must be filed," as Appellants argue. Appellants' Brief, p. 33.

To the contrary, the procedural mechanics of the Eminent Domain Act, as highlighted in both Ratliff and Hagg, are very straightforward and easily comprehended. These procedural mechanics provide an orderly, certain and consistent process which does not require that condemnees engage in a guessing game. After Hagg, there is no question, ambiguity or doubt that a condemnee must file an appeal from an adverse right to condemn determination within thirty (30) days of the entry of the Interlocutory Judgment.

If anything, the condemnation procedure proposed by the Appellants would actually lead to more confusion, uncertainty and inconsistency. As Ratliff and Hagg demonstrate, this is not the first case which calls into question the timing of a party's appeal from an adverse right to condemn ruling. Since Hagg was decided nearly 25 years ago, and there have been no contrary rulings in the interim, the requirement that a condemnee must appeal from the Interlocutory Judgment is settled law. It should stay that way.

The Appellants' proposed procedure would also potentially blur the separate and distinct roles of the trial court and the jury in the condemnation process. The Eminent Domain Act contemplates that the trial court's role is to determine a condemnor's threshold right to condemn, and the jury's role is to ensure that a condemnee receives just compensation. Yet, permitting a condemnee to inject issues related to the right to condemn into their Exceptions, as the Appellants have attempted to do here, potentially opens the door to the jury being asked to consider matters not related to valuation in fixing an award of just compensation. The requirements of KRS 416.620(1) insure this does not happen. All the Appellants needed to do was read the statute.

Finally, the Appellants' proposed procedure would lead to a situation in which the time for appealing an adverse right to condemn ruling would vary depending upon whether or not each of the parties took certain actions, and would also require a weighing of the parties' prejudice based upon those actions. For example,

- one time for appeal would exist if a condemnee failed to file Exceptions;
- a later time for appeal would exist if the condemnee filed Exceptions and the condemnor took possession of the property following the Interlocutory Judgment; and
- yet another time for appeal would exist if the condemnee filed Exceptions and the condemnor refrained from taking possession following the Interlocutory Judgment.

As the Court can see, requiring condemnors and condemnees to follow such a procedure would be the equivalent of a mouse in a maze. While the Appellants express a concern at page 33 of their Brief about a party having to guess when a notice of appeal is due, the procedure they propose would, for lack of a better description,

lead to mass chaos in condemnation cases. On the other hand, simply requiring that an appeal be taken from of an adverse right to condemn ruling would result in condemnation actions proceeding in a more orderly and certain fashion.

Public policy dictates that the condemnation process should be utilized in an optimally expeditious, certain and consistent manner in order to balance the equities of both condemnors and condemnees. The procedural process employed in Kentucky since Hagg accomplishes this goal. The Eminent Domain Act allows a condemnor to take possession of property upon the determination of its right to condemn and payment of the Commissioners' Award. Yet, the procedure proposed by the Appellants would allow condemnees to dictate when an appeal of the right to condemn determination occurs. This would allow a condemnee to choose to immediately appeal from the Interlocutory Judgment, or file Exceptions and forestall such appeal on the right to take issue until after what may turn out to be an unnecessary jury trial on damages if the right to take decision is reversed. The certainty and uniformity presently found in condemnation cases decided under the Eminent Domain Act would cease to exist if the law were as the Appellants propose.

Quite often, the unintended consequences of an action prove to be the most damaging. The ultimate effect of the Appellants' proposed process would have just such an unintended consequence. Since condemnors could never be certain about the timing of a condemnee's appeal of an adverse right to condemn ruling, they would either have to delay important public projects for what could be several years, or

proceed at their own peril.[36] Since nearly every public project has budgeting and funding requirements, the unintended consequence of the Appellants' proposed procedure would potentially wreak havoc on the budgeting and appropriations processes of numerous government agencies throughout Kentucky. In some instances, condemnees could literally hold hostage critical infrastructure or economic development projects for a substantial period of time due to the uncertainty of when the jury trial on compensation would be ready to be tried and scheduled by the trial court.[37] This is a classic example of the tail wagging the dog, and it is incomprehensible the General Assembly would have ever intended such a result.

Certainty, consistency and definitiveness are all goals which the law seeks to achieve. *See* Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C., 120 S.W.3d 682 (Ky. App. 2003); Burchett v. Commonwealth, 98 S.W.3d 492 (Ky. 2003); and Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980). The process approved in both Ratliff and Hagg, and advanced here by OCBE, ensures the very certainty, consistency and definitiveness which the law demands. Both condemnors and condemnees deserve no less. However, adopting the process proposed by the Appellants' would promote the very type of uncertainty and inconsistency which the law seeks to avoid.

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[36] In this instance, OCBE has refrained from commencing the subject road improvements until its right to condemn is finally affirmed. These road improvements are important - - sufficiently important that the Department of Highways conditioned its approval of OCBE's plan for the Campus upon their construction. Yet, every day the Appellants are permitted to hamstring the construction of the Highway 22 road improvements compromises the safety of those using the Campus.

[37] The United States Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) recognized the importance of infrastructure and economic development projects, and held that eminent domain power could be used in furthering such purpose when a future public benefit would be derived.

The Eminent Domain Act and its procedural mechanics have now been in effect for more than thirty (30) years. In interpreting the scope of such procedural mechanics, both Ratliff and Hagg have brought both certainty and consistency to the law. This certainty and consistency creates a perfect and equal balancing which protects both the public needs advanced by condemnors and the preservation of individual property rights sought by condemnees. The fact that Ratliff and Hagg have stood the test of time is a testament to this perfect and equal balance. The Appellants have failed to articulate a sound or compelling reason for disturbing this balance. Accordingly, the Court of Appeals' dismissal of the Appellants' appeal as untimely should be affirmed.

VI. IN DETERMINING THE PROPRIETY OF THE DISMISSAL OF THE APPEAL, THIS COURT MAY CONSIDER WHETHER THE APPELLANTS COULD PREVAIL ON THE MERITS.

At page 16 of their Brief, the Appellants highlight the two issues upon which they premise their appeal. Appellants assert that the description of the land to be condemned stated in the OCBE Board resolution was erroneous or insufficient, and that OCBE's submission of a "take-it-or-leave-it" offer without inviting a counteroffer negates its right to condemn.

The substantial evidentiary record, however, reveals that the Appellants have suffered no prejudice by the dismissal of their appeal since they could not have prevailed on the merits had such appeal been heard. Kentucky courts have previously considered the ability of a party to prevail on the merits in dismissing that party's appeal. *See* Seay v. Commonwealth, 487 S.W.2d 890 (Ky. 1972) in which the former High Court held that "[t]hough we are dismissing the appeal we have viewed the

claimed errors and it is our conclusion that the appellant could not prevail on the merits."[38]

The Appellants first argument on appeal is that OCBE's Board resolution was defective[39] because it both allegedly failed to sufficiently describe the properties to be condemned and authorized the condemnation of more property than OCBE actually condemned. RA 189-195. The OCBE Board resolution authorized:

> "the condemnation of a 30' right-of-way across the front of the properties located at 1101 E. Hwy. 22, 1002 E. Hwy. 22, 1001 E. Hwy. 22, and the portion of the 4902 Fible Lane that abuts Hwy. 22."

RA 170. The Kentucky Eminent Domain Act does not specify the requirements of the resolution adopted by a condemning authority. Instead, Kentucky law looks to the content of the condemnor's petition, and asks the seminal question whether the condemnation petition informs the condemnee precisely what is to be taken from him. *See* Weiss v. Commissioners of Sewerage of Louisville, 153 S.W. 967 (Ky. 1913).

The record demonstrates that OCBE sufficiently informed the Appellants of both the property interest and the amount of property to be condemned from them. First, the OCBE Resolution identifies the physical address of each of the Appellants' respective properties. [RA 197]. Prior to condemnation, OCBE presented the Appellants with a

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[38] In Seay, the Court addressed the inability of an appellant to prevail on the underlying merits of an appeal which, like this appeal, was procedurally deficient.

[39] The Appellants' respective Answers and depositions failed to articulate any factual basis which addressed the sufficiency of the OCBE resolution, or the fact that OCBE was actually condemning less property from them than authorized in such resolution. [RA 021-024].

copy of the portion of Kiesel/Meyer right-of-way plats pertaining to their properties.[40] These plats each graphically depicted that portion of the properties sought to be acquired, and stated the total square footage. The square footage measurements shown on the Miller appraisal reports for the Appellants' respective properties correspond to the total square footage measurements depicted on the Kiesel/Meyer plats of each such properties.[41] Compare RA 200-203 to RA 198-199. Next, OCBE attached the copies of the Kiesel/Meyer plats as exhibits to the respective Petitions, and each Petition also stated both the specific square footage enumerated in the Kiesel/Meyer plats, and the specific metes-and-bounds descriptions shown on the Kiesel/Meyer plats. *See* Petition, ¶¶5 and 7; RA 002-003. Finally, the Commissioners utilized the Kiesel/Meyer plats in valuing the rights-of-way being taken from the Appellants. In light of these facts, OCBE is at a total loss to comprehend how the Appellants could have prevailed on appeal in challenging the sufficiency of the property descriptions.

The Appellants second argument on appeal is that OCBE cannot condemn a **lesser** amount of property than authorized by its Resolution. Below, the Appellants failed to point to any law (from Kentucky or otherwise) which holds that a condemnor's taking of less property than initially authorized in a resolution negates its right to take.

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[40] *See* Exhibit 1 to Larry McIntosh Deposition, Exhibit 9 to John Szatloczki Deposition, Exhibit 15 to Stephen Kaelin Deposition, and Exhibit 24 to Stephen Early Deposition.

[41] *See* Exhibit 3 to Larry McIntosh Deposition, Exhibit 10 to John Szatloczki Deposition, Exhibit 16 to Stephen Kaelin Deposition, and Exhibit 25 to Stephen Early Deposition.

Kentucky law holds that a condemnor "cannot authorize the taking of property by eminent domain in excess of the particular public need involved." McGee v. City of Williamstown, 308 S.W.2d 795, 796 (Ky. 1957). While the Appellants would have a legitimate complaint if OCBE were attempting to condemn more property than authorized by its Resolution, they fail to advance a legitimate complaint since OCBE actually condemned less property from them than its Board authorized by such Resolution.

However, even if OCBE's Board resolution does not sufficiently or accurately specify the amount of property being condemned from each of the Appellants, such fact alone should not be fatal to OCBE's right to take. Even if OCBE's resolution is somehow deemed deficient, OCBE could easily cure any deficiency by adopting an amended resolution.

The Appellants' final argument on appeal is that OCBE's right to take was negated by its failure to negotiate in good faith for a voluntary purchase prior to initiating condemnation proceedings. The record, however, demonstrates a total lack of substance to such assertions.[42]

In negotiating for the voluntary acquisition of private property prior to initiating a condemnation action, all that Kentucky law requires is that the condemnor make a reasonable **monetary** offer to the landowner. *See* Usher & Gardner, Inc., 461 S.W.2d 560 (Ky. 1970). In this case, the record clearly shows that OCBE's negotiation efforts

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[42] Aside from the Appellants' bad faith claim lacking factual support, they failed to plead the exact nature of OCBE's alleged bad faith conduct with particularity in their Answer.

with the Appellants satisfied this requirement, and included:

- communicating directly with the Appellants on numerous occasions concerning the construction of the Campus and acquisition of the subject rights-of-way;
- providing the Appellants with information relating to the project and the attendant roadway improvements;
- soliciting questions and comments from the Appellants throughout the entire pre-condemnation process; and
- providing the Appellants a monetary offer based upon an objective appraisal.

If anything, the record demonstrates that OCBE's negotiation efforts exceeded its legal obligations. More importantly, the record demonstrates that **none** of the Appellants **ever** articulated to OCBE their opinion of the value of the rights-of-way to be taken, or proposed a counter-offer to Miller's appraised values.

As OCBE asserted before the Trial Court in response to the Appellants' bad faith argument, negotiation, like a tennis match, is a two-way process - - one party acts and the opposing party has the opportunity to either accept or respond to such action. In this instance, the Appellants failed and refused to respond to OCBE's monetary offers with their own counter-offers. In other words, the Appellants simply refused to participate in the negotiation process - - much akin to a tennis player refusing to return an opponent's serve.

Kentucky law is clear that a condemnor is not required to haggle with a condemnee in order to satisfy its obligation to negotiate in good faith. *See* Coke v. Commonwealth, 502 S.W.2d 57 (Ky. 1974) and God's Center Foundation, Inc. v. Lexington Fayette Urban County Government, 125 S.W.3d 295 (Ky.App. 2002). Yet,

even haggling requires participation from both sides. Before the Trial Court, the Appellants attempted to justify their lack of participation on the fact that OCBE did not solicit a counteroffer from them. OCBE knows of no law, and the Appellants have certainly never cited to any law, which requires the solicitation of a counteroffer. Essentially the Appellants are arguing that OCBE did not negotiate in good faith because it failed to bid against itself. If the law does not require a condemnor to haggle in negotiating with a condemnee, the law most certainly does not require it to bid against itself.

From the evidentiary record, the Appellants' refusal to respond to, accept, or counter OCBE's monetary offers is easily explained. The Appellants' depositions clearly reveal their real complaint is not about the money offered by OCBE - - they simply want the Highway 22 road improvements located elsewhere.[43] The essence of this fact is best demonstrated by the following statement which Mr. McIntosh made in a February 2005 Courier-Journal article (Exhibit 8 to Mr. McIntoshes' deposition) concerning OCBE's condemnation efforts:

> "The larger reason he [Mr. McIntosh] said is that he doesn't understand why the board can't take land from the other side of Kentucky 22, rather than his."

However, Kentucky law is clear that the location of where OCBE constructs the Highway 22 roadway improvements is not a matter that it was obligated to negotiate with the Appellants. Davidson v. Commonwealth, 61 S.W.2d 34, 37 (Ky. 1933). Irrespective of any obligation on OCBE's part to negotiate matters relating to the

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[43] *See* Larry McIntosh Deposition, pp. 45, 56-58 and Exhibit 8 thereto; Lynn McIntosh Deposition, pp. 21-22; Anne Marie Szatloczki Deposition, pp. 43-44 and 45-47.

location of the Highway 22 road improvements, the evidentiary record overwhelming demonstrated that OCBE did not act in bad faith or in an arbitrary manner in its deliberative process.

The substantial evidentiary record highlighted above is the exact same record which the Court of Appeals would have considered in deciding the merits of the Appellants' appeal. Considering that such record overwhelming refutes any claim that OCBE lacked the right to condemn, the Appellants would have been unable to prevail on the merits even if the Court of Appeals had not dismissed their appeal as untimely.

The Appellants will undoubtedly argue that any consideration of the underlying merits of their appeal in the present forum deprives them of the right of appeal guaranteed by Section 115 of the Kentucky Constitution. OCBE does not dispute the Appellants' constitutional right to appeal the Trial Court's Interlocutory Judgment. The Appellants, however, do not have a constitutional right to pursue a meritless appeal. *See* Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

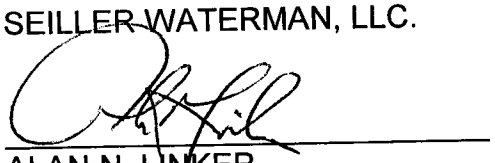
The Court of Appeals' dismissal of the Appellants' appeal should be affirmed because of the fact that any error in dismissing such appeal was harmless.

CONCLUSION

Based upon the grounds set forth above, the Court of Appeals' October 24, 2006 Order dismissing the Appellants' appeal should be AFFIRMED in all respects.

Respectfully submitted,

SEILLER WATERMAN, LLC.

By: 

ALAN N. LINKER
2200 Meidinger Tower
462 South Fourth Street
Louisville, Kentucky 40202
(502) 584-7400
Counsel for Appellee
Oldham County Board of Education