

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POWER COMPANY, A
NEVADA CORPORATION,
Appellant/Cross-Respondent,
vs.
ERNEST A. BECKER, JR. AND
KATHLEEN C. BECKER, HUSBAND
AND WIFE AS JOINT TENANTS,
Respondents/Cross-Appellants.

No. 55180

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal and cross-appeal from a district court order in an eminent domain action. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

To ensure continued power service and to avoid projected equipment overloads in southwest Las Vegas, appellant Nevada Power Company (NPC) sought to acquire a 24-foot permanent easement in order to construct, operate, and maintain a transmission line on property owned by respondents Ernest A. Becker, Jr. and Kathleen C. Becker. The Beckers own a 1.26 acre tract of land located at the northwest corner of Blue Diamond Road and South Rainbow Boulevard. The subject real property is improved with a convenience store and gasoline station.

In anticipation of filing an eminent domain action in order to construct the transmission line, NPC filed a petition with the district court to permit it to enter the Beckers' property for the purpose of performing survey work and inspecting the land pursuant to NRS 37.050. According to NPC, the Beckers had refused it access to the subject property in order to conduct the necessary tests. The district court granted NPC's petition

on September 14, 2007. Thereafter, NPC filed an eminent domain action and a motion for immediate occupancy against the Beckers in October 2007. Finding that there was a need for speedy occupation and that the subject property was being taken for a public use, on November 19, 2007, the district court granted NPC the right to take immediate occupancy upon making a deposit with the district court, which NPC carried out on November 21, 2007.

Prior to trial, NPC filed a motion in limine concerning the exclusion of evidence, including photographs of distribution lines on the subject property, a Clark County ordinance, and information associated with the Nevada Department of Transportation's (NDOT) road project. The district court granted the motion finding that the evidence would be a needless consumption of time, confusing to the jury, and irrelevant.

In August 2009, NPC served an offer of judgment, pursuant to NRCP 68 and NRS 17.115, on the Beckers in the amount of \$345,000. This monetary figure represents the funds deposited by NPC with the clerk of the district court and "any recoverable attorney fees, costs, and interest." Subsequently, the Beckers rejected NPC's offer of judgment as they sought \$900,000 in compensation—\$300,000 for value of the easement and \$600,000 for alleged severance damages. After a five-day jury trial, the jury returned a verdict of \$239,000—the jury did not award severance damages.

Following the trial, the Beckers filed a memorandum of costs and disbursements. Thereafter, NPC filed a motion to re-tax costs, arguing that the Beckers were not entitled to recover any costs because NPC was the prevailing party. See NRCP 68(f)(1); NRS 17.115(4)(a). In response, the Beckers argued that, under NRS 37.120(3), the Legislature

mandated that landowners must be awarded their reasonable costs and interest as a component of just compensation in condemnation cases. The district court agreed with the Beckers and concluded that the statutory purposes of achieving just compensation would be circumvented by an award of costs to NPC, thereby rejecting the offer of judgment rule in eminent domain cases.

The Beckers also filed a motion for prejudgment interest pursuant to NRS 37.175. The parties disagreed over the date of accrual—the Beckers argued that the date of accrual should be September 14, 2007, the date that NPC was granted entry onto the property for the limited purposes of surveying and inspecting the land, and NPC argued that the date of accrual should be November 21, 2007, the date NPC made its deposit with the district court. Additionally, NPC contested the manner in which the interest was calculated. The district court concluded that interest must be compounded annually beginning on September 14, 2007, the date the court permitted NPC to enter the subject property to survey and inspect the land. The district court entered a final judgment of condemnation in December 2009. The total recovery by the Beckers was \$286,255.74, which was made up of \$239,000 from the jury verdict and \$47,255.74 in costs and prejudgment interest.¹

Both parties timely appealed. On appeal, NPC maintains that it is entitled to costs under NRCP 68 and NRS 17.115 because the amount of its offer of judgment was greater than the judgment the Beckers obtained at trial, and also argues that the district court erred in

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

calculating prejudgment interest.² On cross-appeal, the Beckers argue that the district court abused its discretion in excluding testimony about distribution lines, as well as photographs of NPC's power project and the subject property.³

Offer of judgment

In August 2009, NPC served an offer of judgment on the Beckers in the amount of \$345,000 including "any recoverable attorney fees, costs, and interest." According to NRS 37.185, neither a condemning authority nor a landowner is liable for the attorney fees of the other party. See generally McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 673, 137 P.3d 1110, 1128 (2006) (landowners in condemnation actions have no constitutional right to attorney fees as part of the just compensation for

²NPC further argues that the district court committed error in precluding all evidence of an appraisal performed for the Beckers in connection with a refinance application. However, NPC failed to raise this issue in its opening brief, and instead raised this issue for the first time in its combined reply and answering brief. See State of Nevada v. Glusman, 98 Nev. 412, 428, 651 P.2d 639, 649 (1982) (we refuse to consider issues that the appellant failed to raise in the opening brief). Because NPC did not raise this issue in its opening brief, we need not address it.

³We conclude that the district court did not abuse its discretion in excluding this evidence. See Hansen v. Universal Health Servs., 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (recognizing that a district court's ruling on the admissibility of evidence is reviewed for an abuse of discretion). The pre-existing distribution poles and the proposed NDOT road-widening project are neither related nor relevant to the transmission line project. Additionally, the Clark County ordinance concerning the burial of distribution lines is also irrelevant because it involves distribution lines, not transmission lines. Furthermore, the distribution lines are not at issue and do not relate to the issue of just compensation for a transmission line easement.

taken property). Based on this prohibition, a condemning authority cannot make an offer of judgment that contemplates attorney fees. Accordingly, we conclude that NPC's offer of judgment comprised of attorney fees is invalid as a matter of law.⁴

Prejudgment interest

We next consider the date on which the computation of prejudgment interest will commence under NRS 37.175(4). See Clark County v. Sun State Properties, 119 Nev. 329, 342, 72 P.3d 954, 962 (2003) (holding that a "condemnee is entitled to prejudgment interest from the date of the taking"). NPC contends that the September 14, 2007, order granting it right of entry, pursuant to NRS 37.050, is not a compensable taking that triggers the accrual of prejudgment interest. NPC argues that the taking occurred on November 21, 2007, when it first made a money deposit to the court obtaining the right to permanently occupy the easement area and commence building the transmission facilities. We agree.

"Whether a taking has occurred is a question of law that we review de novo." Moldon v. County of Clark, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008).

A taking occurs when a "governmental action . . . cause[s] a permanent physical occupation of . . . land." Argier v. Nevada Power Co.,

⁴Because NPC's offer of judgment is invalid, we need not address whether a landowner's constitutional right to just compensation precludes a condemnor from recovering costs under NRCP 68 and NRS 17.115. Nonetheless, we note that as of November 2008, "[a] property owner shall not be liable to the government for attorney fees or costs in any eminent domain action." Nev. Const. art. 1, § 22(7).

114 Nev. 137, 141, 952 P.2d 1390, 1392 (1998); see Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987). Likewise, a brief interference with one's property rights does not amount to a compensable taking. ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 650, 173 P.3d 734, 741 (2007). With these principles in mind, we conclude that the district court erred in determining that a taking occurred on September 14, 2007, because a temporary impairment of access is insufficient to constitute a taking. In doing so, we also conclude that precondemnation activities made in accordance with NRS 37.050 are not compensable takings. See Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980) (providing that a good faith precondemnation planning activity should not be considered a taking), abrogated on other grounds by Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 531-32 (2005).⁵


In determining the action that triggers the accrual of prejudgment interest, we conclude that prejudgment interest accrued when NPC obtained the right to permanently occupy the easement area. See Argier, 114 Nev. at 141, 952 P.2d at 1392. Further, in paying prejudgment interest, NPC is liable to the Beckers for "the difference between the amount deposited . . . and the sum of the amount awarded for the taking." NRS 37.175(1). As such, prejudgment interest must be calculated from November 19, 2007, the date when the district court entered a written order granting NPC the right to immediate occupancy of the subject property, rather than the date that NPC was granted entry

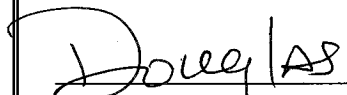
⁵Pursuant to NRS 37.050(3), a landowner may only receive actual damages sustained to the land and injuries resulting from governmental negligence, wantonness, or malice.


onto the property for the limited purposes of surveying and inspecting the land under NRS 37.050.


Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁶

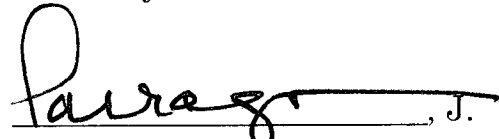

Saitta, C.J.


Douglas, J.


Cherry, J.


Gibbons, J.


Hardesty, J.


Parraguirre, J.

cc: Hon. Valorie J. Vega, District Judge
Janet Trost, Settlement Judge
Law Offices of Michael G. Chapman/Reno
Nitz Walton & Heaton, Ltd.
Law Offices of John M. Netzorg
Eighth District Court Clerk

⁶The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.