

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY BARTSAS,
Appellant,
vs.
COUNTY OF CLARK, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,
Respondent.

No. 40705

FILED

FEB 02 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment, based upon a jury verdict, in an eminent domain proceeding. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Clark County sued Mary Bartsas to acquire a portion of her real property for the Las Vegas Beltway project. The County appraised the land to be taken at \$2,894,900; this amount included severance damages. After the County posted this amount as a deposit, the parties stipulated to the County's occupancy of the land and Bartsas' withdrawal of the deposit before judgment. Shortly before trial, the County, after hiring a new appraiser, lowered its land appraisal to \$987,000, excluding severance damages. At trial, the County argued that the lower appraisal was the appropriate compensation, and the jury returned a verdict of \$987,000. Based upon the jury's verdict, the district court ordered Bartsas to repay the County approximately two million dollars.

On appeal, Bartsas argues that the judgment should be reversed because the County's counsel made several prejudicial statements at trial, evidence was improperly admitted, and because the

lower appraisal resulted in an unjust and inequitable outcome at trial. Bartsas points out that since “just compensation” was the only issue at trial, the district court erred when it admitted irrelevant and/or prejudicial evidence. We are persuaded by Bartsas’ arguments that cumulative evidentiary error warrants reversal of the district court’s judgment, and we remand this matter for further proceedings. As the parties are familiar with the facts, we include only those facts needed for an understanding of the issues addressed in this order.

Cumulative error

The record must be considered as a whole to determine whether an erroneous ruling resulted in prejudice.¹ In determining whether an error was prejudicial or harmless, it is this court’s duty to search the record and exercise judicial discretion.² Error in civil cases is not presumed prejudicial³. However, even when error exists, a verdict will not be set aside unless the error affects the parties’ substantial rights.⁴

Here, the following evidence was improperly allowed at trial: evidence of the “need” for Bartsas’ property; evidence of benefits from a “completed beltway” to Bartsas’ property; evidence of access impairment; and evidence of benefits to Bartsas’ property derived from the “Town Center” project. Although some of these errors may be viewed as harmless, their cumulative effect resulted in prejudice to Bartsas and

¹NRCP 61; Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 448 P.2d 46 (1968).

²Boyd v. Pernicano, 79 Nev. 356, 385 P.2d 342 (1963).

³Id.

⁴NRCP 61; City of Elko v. Zillich, 100 Nev. 366, 683 P.2d 5 (1984).

affected her substantial rights. Each of these evidentiary issues is examined separately below.

Evidence of the “need” for Bartsas’ property

It is well established that both the United States and the Nevada Constitutions guarantee the right to just compensation for private property taken for the public use.⁵ Any evidence of “need” or implication of “greater public good” because of the property’s convenient location is prejudicial when deciding the amount of compensation to award to the individual landowner in an eminent domain case.⁶ Such evidence improperly allows the jury to weigh the “need” for the taken property against the property’s value, since the issue of “need” is not directly related to the determination of just compensation in eminent domain proceedings. Therefore, the district court erred when it allowed the County to present evidence of its “need” for Bartsas’ property.

Evidence of “completed beltway” benefits to Bartsas’ property

Bartsas contends that the district court erred when it allowed expert testimony regarding benefits to Bartsas’ remaining property resulting from a “completed beltway,” while Bartsas’ land was taken for a different project, a “temporary beltway.” Bartsas argues that evidence of completed beltway benefits was improperly allowed, as the completed beltway project benefited the property generally, and did not create

⁵U.S. Const. amend. V; Nev. Const. art. 1, § 8; Alper v. Clark County, 93 Nev. 569, 572, 571 P.2d 810, 811 (1977).

⁶The trial’s only issue was the amount of appropriate compensation to Bartsas; the issues of public use or need for Bartsas’ property were not the issues at trial.

benefits specific to Bartsas' property. Bartsas further asserts that the benefits evidence was speculative, as it was uncertain when, if at all, the funds for the completed beltway would be approved; the "completed" beltway was a project separate from that for which the land was taken; and the County provided no specific value for the alleged benefits.

While Nevada statutes do not distinguish between general and special benefits, we previously explained, in Department of Highways v. Haapanen,⁷ that general benefits enhance the entire area after construction, thus suggesting that special benefits must enhance the landowner's property in some unique way. Additionally, we noted in Haapanen that if special benefits result to the property owner after the construction following a condemnation is completed, then the condemnor may have a right to setoff. If, however, the benefits are merely general to the entire area, then setoff is not allowed.⁸ The Haapanen court interpreted NRS 37.110(4) as follows:

A determination must be made by the trier of fact whether site prominence, increased traffic and possible change in use of the property after the taking, all or singularly, have increased the value of the land after the taking. The trier of fact must then determine whether the benefits, if any, are general or special. If special, they must be setoff against the damages occasioned by the taking.⁹

Although the County maintains that it only wanted to prove that any damages to Bartsas' property were offset by the benefits from the

⁷84 Nev. 722, 724, 448 P.2d 703, 705 (1968).

⁸Id.

⁹Id.

completed beltway project, under Haapanen, the benefits had to be of a “special” nature to offset damages. Here, the jury was not instructed to determine whether benefits accrued from the relevant project and whether any benefits were of a general or special kind to offset the damages. Consequently, the court erred when it allowed the jury to consider the benefits evidence as an offset to Bartsas’ damages.

With respect to Bartsas’ contention that evidence of a “completed” beltway project was improperly admitted because Bartsas’ land was taken for the temporary beltway (“as proposed”), Bartsas points out that the “completed” beltway was a separate project, contingent, among other conditions, on federal funding and design revisions.

The statutory scheme of NRS 37.110 provides that the condemnor must pay for damages to the remaining land caused by the condemnor’s improvement. As discussed above, the condemnor may also offset any special benefits that result from the condemnor’s improvements.¹⁰ However, the statute does not permit the condemnor to offset the landowner’s damages by third-party special benefits that may accrue to the property through a separate project.¹¹

In considering a provision similar to NRS 37.110, California Code of Civil Procedure section 1248, this court has previously noted that

“Code of Civil Procedure section 1248 authorizes severance damages (subd. 2) and benefits (subd. 3) to be assessed for ‘the construction of the improvement’ in the manner proposed by the

¹⁰NRS 37.110; State, Dep’t of Transp. v. Las Vegas Bldg., 104 Nev. 479, 484, 761 P.2d 843, 846 (1988).

¹¹Las Vegas Bldg., 104 Nev. at 484, 761 P.2d at 846.

condemnor. That section does not authorize the offsetting of damages and benefits between distinct and separate projects of improvement simply because the condemning agency has, for its own convenience, joined such separate projects in one action.”¹²

Likewise, here, as the “completed” beltway was a project separate from the temporary beltway for which Bartsas’ property was taken, the district court improperly allowed the County to introduce evidence of any “completed” beltway benefits to Bartsas’ property.

Evidence of access impairment

Bartsas argues that the district court improperly departed from this court’s decision in State ex rel. Department of Highways v. Linnecke¹³ when it failed to make a legal determination regarding access impairment, instead allowing the jury to decide this issue. In Linnecke, we addressed the issue of whether an abutting property owner’s right of direct access to a public highway entitles him to compensation for severance damages when that access is restricted, impaired or otherwise injured.¹⁴ We held that “[t]he determination of whether such substantial impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact.”¹⁵ Thus, the district court is required to make a threshold legal determination of whether direct access has been or will be substantially impaired, entitling

¹²Id. (quoting People ex rel. Dept. of Public Works v. Simon Newman Co., 37 Cal. App. 3rd 398, 408 (1974)).

¹³86 Nev. 257, 468 P.2d 8 (1970).

¹⁴Id. at 259, 468 P.2d at 9.

¹⁵Id. at 260, 468 P.2d at 10.

the property owner to compensation. Then, if the court concludes that direct access is or will be impaired as a matter of law, the parties may submit any questions regarding the extent of impairment and damages therefore to the jury.

Bartsas contends that the district court erred when it did not make a specific determination of law regarding access impairment, but instead allowed the parties to introduce evidence concerning the legal question to the jury. As a result, she argues, the issue of access impairment was left to the jury, while under Linnecke it should have been decided by the district court as a matter of law.

The County responds that the district court was not required to make an express access impairment determination because the Linnecke decision does not apply to this matter, given the facts of this case. The County argues that since Bartsas' property did not directly adjoin the freeway, the district court was not required to follow Linnecke, and thus it did not err when it allowed the jury to consider evidence concerning impaired access.

Despite the County's arguments, however, the law remains the same: the district court was required to determine whether, as a threshold matter of law, substantial impairment was established. Only once the district court expressly concludes that direct access has been or will be impaired, may issues about the measure of harm be submitted to the jury. Here, the district court erred in not making an express determination regarding substantial impairment, instead allowing the jury to consider whether impairment had been shown.

Evidence of benefits to Bartsas' property from the "Town Center" project

Finally, Bartsas argues that the court erred when it allowed the County to imply that the “Town Center”¹⁶ project was part of the project for which Bartsas’ property was taken, since the County’s complaint stated that the property was taken for the Las Vegas Beltway project. Although the district court properly granted Bartsas’ motion in limine and excluded evidence of the “Town Center” location, the County, by its own admission, referred to the “Town Center” project to rebut Bartsas’ testimony that access to her property had been diminished. Although the County did not solicit direct testimony regarding “Town Center” project benefits, any mention of “Town Center” in the context of the damages determination may have led the jury to view this project as benefiting Bartsas’ remaining land, which was inappropriate under NRS 37.11, as well as under our reasoning in State, Department of Transportation v. Las Vegas Building.¹⁷

CONCLUSION

The district court erred when it allowed multiple instances of irrelevant and/or prejudicial evidence to be admitted at trial. Although, when considered individually, some of these errors may be considered harmless, when considered in the aggregate, the cumulative error resulted in substantial injustice to Bartsas, warranting reversal of the judgment.¹⁸ Accordingly, we

¹⁶“Town Center” was a separate project from the Las Vegas Beltway project. Apparently, the location of “Town Center” was dependent upon the location of the project for which Bartsas’ property was taken.

¹⁷104 Nev. 479, 761 P.2d 843 (1988).

¹⁸In light of this conclusion, we do not reach Bartsas’ other arguments raised on appeal.

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for further proceedings.¹⁹

Becker, J.
Becker

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Mark R. Denton, District Judge
Law Offices of John M. Netzorg
Law Offices of Kermitt L. Waters
Michael K. Mansfield
Clark County Clerk

¹⁹The Honorable Robert E. Rose, Chief Justice, being disqualified, the Honorable Miriam Shearing, Senior Justice, participated in the determination of this appeal in his place, pursuant to this court's order entered on October 10, 2005.

SHEARING, Sr. J., dissenting:

I would affirm the judgment of the district court. I do not agree that cumulative errors in the district court affected the parties' substantial rights.

I do not agree that all the errors cited by the majority were indeed errors, and those that I would agree were errors, I find to be harmless. I conclude the parties had a fair hearing under appropriate instructions and that the judgment should be affirmed.

 Sr. J.
Shearing