IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 68,593

FLORIDA POWER & LIGHT COMPANY,	)
	)
Appellant,	)
	)
v.	)
	)
S. B. JENNINGS a/k/a S. BRYAN JENNINGS, JR., et al.,	)
	)
Appellees.	)

PETITIONER'S BRIEF ON THE MERITS

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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PREFACE

Petitioner, Florida Power & Light Company ("FPL"), was the petitioner in the eminent domain proceedings below. Respondents S. B. Jennings, Gordon R. Sandridge, Jr. and Southside Properties were the defendant/landowners.

All references to pages in the transcript of the trial will be designated by the symbol "T." followed by the page number of the transcript.

STATEMENT OF THE CASE AND OF THE FACTS

The opinion of the First District Court of Appeal herein, Florida Power & Light Company v. Jennings, 485 So.2d 1374 (Fla. 1st DCA 1986), contains a substantially accurate statement of the case and facts and is hereinafter repeated and briefly supplemented.

> On April 22, 1983, FPL filed a petition in eminent domain and a declaration of taking against certain named property owners in Clay County, Florida, for the construction of electric transmission and distribution lines. The interest to be acquired was a perpetual easement. On May 25, 1983, an order of taking was entered by the Circuit Court vesting interest in the subject property in FPL.
>
> Prior to trial FPL filed a motion in limine and memorandum of law regarding the admissibility of expert witness testimony on purported adverse effects of transmission lines. FPL sought to have the testimony of expert witnesses Dr. John Dennis Norgard and Dr. Nancy Wertheimer excluded from the trial, hypothesizing that these experts would testify to adverse effects caused by transmission lines which would have reduced the value of the subject property on the date of taking and should therefore by considered in the valuation of the property. According to FPL, evidence relating to the effect of public apprehension on market value has been rejected by Florida courts as too uncertain and speculative to be considered in the valuation of the property. FPL relied on Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963), as representing the law in Florida on this issue, and urged that under Casey an appraiser must be able to testify that his opinion as to value is based on some facts that people who buy real estate in Clay County are knowledgeable concerning any adverse effects of high transmission lines and that these potential buyers would

> depreciate land adjacent to a power line before they would buy it. Otherwise, it was asserted, the evidence would have nothing to do with a valuation question in the trial.

FPL here interjects and emphasizes that its reliance on Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963), both in the motion in limine referenced and at trial, was based primarily on the holding of Casey which provides:

> opinion evidence as to value in a condemnation case, based upon fear of a steel tower and high voltage transmission lines, is too speculative and conjectural to be considered as an element of damage to adjacent land.

Id. at 170.

The First District continued:

> Counsel for the property owners responded that he intended to introduce comparable sale studies from Hernando County, which has a 500,000 volt line, as does the Clay County line at issue here. In addition, counsel noted that within the eighteen months prior to the hearing, articles had been published in newspapers, magazines, and technical journals about the high transmission phenomenon. Consequently, they argued, the buying public is knowledgeable and aware of the issue, and the market place reflects this fact. Counsel urged the expert testimony was needed to show the causes of the depreciation in value which comparable sale studies would demonstrate.
>
> The trial court rejected the arguments advanced by FPL, and ruled that the property owners would be permitted to introduce evidence of comparable sales from Nassau County, Duval County, Putnam County, and Hernando County, as well as testimony of the expert witnesses regarding the electromagnetic

fields generated by 500,000 volt electrical transmission lines and their effect on human life. In addition, the court ruled this testimony would be relevant to the issue of severance damages, if severance damages were found to apply.

Trial was held on valuation of three parcels. Parcel C-3.3 is 280 feet wide and contains 41.5 acres; parcel C-12 is 220 to 280 feet wide and contains 53 acres; and parcel C-14 is 300 feet wide and contains 18.73 acres. The transmission lines erected by FPL on this property are supported by structures approximately 115 to 125 feet in height with 99 foot cross arms, and are designed to carry a maximum voltage of 550,000 volts. There are twelve such structures on parcel C-3.3, twelve on parcel C-12, and four on parcel C-14. The lines were constructed to transport power from coal fired generators in Georgia.

FPL's real estate appraiser testified that in his opinion there were no severance damages as to any of the parcels. In addition, he applied an easement factor to his valuation of the subject properties which reduced the amount of compensation due the affected property owners, based on his (the appraiser's) perception that the property owners retained some rights in the land moved against.

Testifying on behalf of the property owners were a professional planning consultant, a professor of electrical engineering, an epidemiologist, and three real estate brokers and appraisers. The planning consultant explained a number of exhibits relating to the topography of the subject lands, its adaptability to residential development, and its growth in relation to growth in surrounding counties. Based on his studies, which included information from the Clay County Comprehensive Plan, the Florida Statistical Abstract, and some documentation prepared by the Chamber of Commerce, the consultant concluded that Clay County is, percentage wise, the fastest growing county in this particular area.

Dr. Norgard, professor of electrical engineering at the University of Colorado, testified that his work over the years had involved him with and included knowledge of 500,000 volt transmission lines, particularly during his fifteen years of teaching at Georgia Tech where his assignment was to teach students how to design transmission lines for all voltages. Dr. Norgard and a colleague had been engaged by Brooks Air Force Base to conduct studies in the field of biological tissues. He testified at length concerning the massive electrical field from the power lines and the tone or hum emanating from these high voltage lines. Dr. Norgard then described a coupling effect of the electrical energy into the human body and stated that the result is a long-term chronic effect and that even small amounts of energy deposits over a long period of time can produce these results.

Dr. Wertheimer, epidemiologist, stated that her first study regarding the effect of electric transmission lines happened accidentally during the course of her study of leukemia in children. She went into the field to determine whether the affected children lived near each other, whether they lived near a factory that might be polluting the environment in some way, or whether there was a localized infection involved. These field studies led Dr. Wertheimer to conclude that the common denominator was the many power transformers in the backyards of her various subjects. After three years of study, she published findings that demonstrated that children with cancer lived near power lines that put out unusually high magnetic fields. She found that 64% of the children with cancer lived near high current configuration wires, as opposed to the 31% of childhood cancer cases where no high current lines were involved. A second study concerning incidents of cancer in adults yielded the same result. Dr. Wertheimer stated that prior to 1980 studies on electromagnetic fields were performed in a somewhat perfunctory fashion because it was generally considered that no health hazards were associated with these fields. According to Dr. Wertheimer, there has been a recent explosion of information in this field which

contradicts for the most part the views formerly held. She stated that epidemiological studies conducted in Sweden, England, Canada, and the United States, indicate that constant exposure to high voltage electromagnetic fields makes it harder for the human body to fight off cancer once the cancer has started. The experts refer to this effect as one which promotes cancer, rather than one which causes cancer.

FPL presented rebuttal testimony by an electrical engineer and an associate professor of radiation and biology at the University of Rochester Medical School. The electrical engineer stated that although 500,000 volt transmission lines may under some circumstances produce perceptible electric shocks, these currents would never reach levels that are physiologically dangerous. With regard to radio and television interference in proximity to high voltage lines, the engineer acknowledged that during bad weather there would be some background radio noise. He stated also that the video portion of television could be susceptible to such interference. With regard to health effects caused by high voltage lines, the expert gave as his opinion that such effects are remote, but acknowledged the possibility of the existence of subtle or long term effects which may be occurring but are so small that they are not being noted by routine public health screening.

The associate professor, Dr. Miller, a senior scientist, has published 130 articles in the field of radiation biology. His studies have been concerned with the effects of high speed transmission lines on plant life, anatomical effects from exposure to DC magnetic fields, exposure of the human eye to electric fields, and the effects of ultrasonic sound in vitro and in vivo. All of his studies were performed in the laboratory setting, as opposed to the field studies conducted by Dr. Wertheimer. Dr. Miller agreed that from a scientific point of view, it is not possible to say that the transmission line environment is safe.

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FPL respectfully disagrees with the statements of the district court with regard to the testimony on the health effects of electromagnetic fields. Contrary to the district court review of the electromagnetic field effects testimony, the witnesses presented by Florida Power and Light gave definitive and comprehensive testimony about the safety of transmission lines (T. 484-669). Dr. Miller's conclusions of no demonstrations of adverse effects and no scientific expectation of such effects is supported by reviews conducted by the National Academy of Sciences, the highest ranking scientific body in the United States, the United States Environmental Protection Agency and the 1985 Florida Electric and Magnetic Fields Science Advisory Commission (T. 594, T. 627-629).

In contrast, Dr. Wertheimer was the only expert for the property owners to testify that an adverse health effect was present. Dr. Wertheimer did not cite nor did the record reflect a single scientific group or scientist that shared her conclusion that electromagnetic fields associated with transmission lines promote cancer (T. 626). Significantly, Dr. Wertheimer is an epidemiologist, but not an oncologist or etiologist (T. 384-390, T. 428).

Further, the Court's statement that "Dr. Miller agreed that from a scientific point of view, it is not possible to say that the transmission line environment is safe" is misleading since it implies that Dr. Miller felt unsure about the health effects of the electromagnetic fields. Dr. Miller's point, which he clearly made during his cross and re-direct

examination, was that from a scientific standpoint, one can never prove that there are no adverse effects in regard to any environmental factor, whether that factor is electromagnetic fields, toothpaste or the water we drink (T. 656-657, T. 665-666). Essentially, scientists can never prove a "no effect" hypothesis (T. 665-666). This in no way diminishes the validity of the conclusion reached by Dr. Miller and numerous prestigious scientific bodies that no adverse effects from transmission line electromagnetic fields have been demonstrated nor are any expected.

The Court continued:

> The real estate experts who testified for the property owners had all conducted studies of comparable sales of real estate in Putnam and Hernando counties with that of the subject property in Clay County. These witnesses stated that sales on a 500,000 volt line in Hernando County reflected a median loss of 40% when compared to similar sales not on the power line. In Putnam County, sales on a 240,000 volt line reflected a 37% decrease in value due to the power line. In Clay County, the subject county in this appeal, sales on an existing 240,000 volt line reflected a diminution in value of 27 to 33%, and a sale in 1984 on the 500,000 volt line reflected a decrease of 47%. According to these witnesses, their talks with buyers and with real estate brokers reflect that an issue of major concern is the possible health consequences attendant upon living in close proximity to high voltage lines. The experts concluded the present uncertainty regarding the possible detrimental effect of high voltage lines is reflected in real estate prices.
>
> The jury returned verdicts which in each instance exceeded the valuation placed on the subject parcels by FPL's appraisers. In addition, the jury awarded severance damages as to each parcel. FPL filed a motion for

> new trial and/or judgment notwithstanding the verdict. Counsel for the property owners filed motions to assess attorney's fees and costs, and provided supporting affidavits, statements from experts, and a memorandum regarding costs and attorney's fees. After a hearing on the respective motions, FPL's motion was denied and the motions to tax costs and attorney's fees were granted.

485 So.2d 1375-1377.

INTRODUCTION

In its brief to the First District FPL argued that "The final judgments entered on verdicts awarding compensation on the basis of inadmissible and prejudicial opinion testimony that the electric transmission lines would reduce the value of the remaining land and require severance damage due to public apprehension of hazard should be reversed and remanded for a new trial, with directions as to the controlling and applicable rule of law governing the severance damage issue." (FPL Brief 13).

In response the First District did the following:

1) affirmed the judgments by adopting a rule described as the "intermediate rule" which allows

> evidence of the existence of fear and its effect on market value may be admitted into evidence as a factor or circumstance to be considered by the trier of fact in a property valuation proceeding, so long as it is shown that the fear has a reasonable basis.

The Court continued to note that "We consider the expert opinion testimony offered in this case is sufficient to comply with the intermediate rule".

2) acknowledged that its decision conflicts with Casey and the "majority rule" adopted therein which "rejects evidence of fear even though it affects market value," and

3) recognized that its decision is a matter of great public importance and certified the following question to this Court:

> IS EVIDENCE OF THE EXISTENCE OF FEAR AND ITS EFFECT ON MARKET VALUE ADMISSIBLE AS A FACTOR IN PROPERTY VALUATION, IF IT IS SHOWN THAT THE FEAR IS REASONABLE.

485 So.2d at 1379.

At the outset FPL would note that this Court has jurisdiction in this case in consideration of the properly acknowledged conflict and the certification of a question of great public importance by the First District.

SUMMARY OF ARGUMENT

FPL seeks reversal of the final judgments entered on jury verdicts because the jury was permitted to base its verdicts on inadmissible opinion testimony. FPL takes this position on either of two theories.

FPL first contends that the trial judge erred in allowing the jury to consider as the basis for awarding severance damage the opinion testimony of the owners' expert witnesses that electric transmission lines could cause cancer, heart attacks, mental disturbances, and other health hazards. Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA

1963) holds that opinion testimony in a condemnation case based upon fear of high voltage transmission lines is too speculative and conjectural to be considered as an element of damage to adjacent land, and must be excluded from jury consideration, because such a basis cannot possibly result in fair and just compensation. The First District Court should have applied the rule of Casey and reversed the judgments.

FPL alternatively contends that, if Casey is to be overruled by this Court, the appropriate rule to adopt in its place is that characterized by the First District as the "minority rule" which "admits such evidence on a simple showing that fear affects market value." Jennings at 1379. A proper application of this rule will require reversal of the judgments in this case and remand for a new trial, since there would be no basis for admission of the testimony of Drs. Norgard and Wertheimer absent any issue as to the reasonableness of the fear. Additionally, adoption of this rule will require a qualified negative answer to the certified question since reasonableness per se of fear will not be a controlling factor as to admissibility.

ARGUMENT

THE TRIAL JUDGE ERRED IN ALLOWING THE LANDOWNERS TO PRESENT OPINION TESTIMONY THAT ELECTRIC TRANSMISSION LINES CAUSE CANCER AND OTHER HEALTH HAZARDS AS THE BASIS FOR DISCOVERY OF SEVERANCE DAMAGES

Prior to trial in this matter, FPL filed a motion in limine regarding the admissibility of testimony of purported adverse effects of transmission lines. This motion was filed

with the expectation that the landowners would present witnesses Norgard and Wertheimer as referenced in the Statement of the Case and Facts. The motion sought an order prohibiting testimony and evidence regarding purported adverse effects of transmission lines and relied principally upon the only Florida case on point, Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2d DCA 1963).

In Casey, the condemnee sought to introduce evidence that the presence of the transmission lines would result in a general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement, thereby reducing the land's market value. The trial court refused to allow the jury to consider the evidence presented at trial concerning the alleged apprehension and fear caused by transmission lines and the resulting impact on the value of the remaining land.

In analyzing the trial court's ruling, the Second District Court of Appeal noted that the testimony of the landowners' witnesses

> would tend to show that the presence of towers and power lines upon the property would result in a general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement,

and that this alleged reluctance would be caused by the general appearance of the lines and the apprehension of hazard that the lines would present. 157 So.2d at 169.

Simply stated, the issue raised in Casey is whether opinion evidence as to value in a condemnation case, based upon

fear and apprehension caused by the purported adverse effects of transmission lines, is too speculative and conjectural to be considered as an element of damage to the remainder. Adopting the majority rule as the rule in Florida, the Second District held that evidence of this nature is too speculative and conjectural to be considered in determining the amount of compensation to be awarded to the landowner. As the court stated:

> That a prospective purchaser of the land of the respondents will be so timid or so ignorant that he either will not buy at all or will offer less than the true value because of the transmission lines and towers is too highly speculative in regard to this particular land to be taken into consideration. This court, like the majority of other courts, recognizes the owners' right to full and just compensation; but when a jury must base its award upon ignorance and fear, we must draw the line; such a basis cannot possibly result in fair and just compensation.

157 So.2d at 170-71.

Other courts considering this issue have reached the same conclusion and have refused to allow the jury to consider such evidence. See e.g., Alabama Power Company v. Keystone Lime Company, 67 So. 833 (Ala. 1914); Deramus v. Alabama Power Company, 265 So.2d 609 (Ala. Civ. App. 1972); and Central Illinois Light Company v. Nierstheimer, 185 N.E.2d 841 (Ill. 1962). This Court should do the same and reverse the decision by the First District and reaffirm Casey.

EVIDENCE OF FEAR OF DANGER ASSOCIATED WITH HIGH VOLTAGE TRANSMISSION LINES MAY BE ADMITTED ON A SHOWING THAT THE FEAR OF DANGER EXISTS AND AFFECTS MARKET VALUE.

As stated by the First District:

> Florida's constitutional guaranty of full and just compensation in eminent domain actions requires the courts to take into account "all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken. (citations omitted)

Jennings at 1377-1378.

In view of this well established principle of Florida law regarding full and just compensation, if Casey is to be abandoned, then the misnamed "minority rule" which permits admission of evidence of fear on a simple showing that it affects market value should be adopted. This rule is the most logical alternative to Casey since evidence which is shown by competent testimony to affect market value should be admissible regardless of whether there is an underlying "reasonable basis" for the evidence.

Initially, it should be noted that the "minority rule" is, in fact, the majority rule. As recited by the First District, four states including Florida follow the Casey rule, nine states follow the intermediate rule espoused by the First District, and eleven states and the United States Court of

Appeals for the Sixth Circuit follow the rule labeled minority but properly identified as majority. Jennings at 1379.

The most comprehensive recent review of the three rules is found in Willsey v. Kansas Power & Light Co., 631 P.2d 268, 274 (Kan. Ct. App. 1981). The discussion by that court regarding the misnamed minority rule is instructive and entirely consistent with Florida law regarding full and just compensation.

> We therefore regard the question as an open one in this jurisdiction. As we see it, in any condemnation case the objective is to compensate the landowner for damages actually suffered. Remote, speculative and conjectural damages are not to be considered; the owner cannot recover today for an injury to his child which he fears will happen tomorrow. Logic and fairness, however, dictate that any loss of market value proven with a reasonable degree of probability should be compensable, regardless of its source. If no one will buy a residential lot because it has a high voltage line across it, the lot is a total loss even though the owner has the legal right to build a house on it. If buyers can be found, but only at half the value it had before the line was installed, the owner has suffered a 50% loss. If this kind of lost market value is proven to the satisfaction of the jury we see no reason why the landowner should bear the loss rather than the customers for whose benefit the loss is inflicted.
>
> This rationale obviously leads to the third, misnamed "minority" rule, which is the one we prefer.

Id. at 277-278.

Similarly, the Sixth Circuit, which has extensive experience in Tennessee Valley Authority power line condemnation, in reaffirming its adoption of the "minority" approach originally articulated in Hicks v. United States, 266 F.2d 515 (6th Cir. 1959) stated:

> Since the Hicks case was decided nearly ten (10) years ago, TVA has conducted numerous safety studies and has concluded from them that apprehension of injuries is not founded on practical experience and should not be considered in awarding incidental damages. The TVA studies conducted on this issue are also creditable. However, in final analysis, we are concerned only with market value. Although these studies may show objectively the complete safety of these structures, we are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines and, therefore, might be unwilling to pay as much for the property as they otherwise would.

Willsey at 274-275 (citing United States, ex rel. TVA v. Easement and Right-of-Way, 405 F.2d 305, 309 (6th Cir. 1968)).

The logic of this approach is unassailable. Analyzed in the context of the instant case, if property buyers and real estate brokers in Clay County are concerned about the possible adverse health effects of high voltage lines, and that concern is reflected in real estate prices in Clay County, then evidence of that concern which is shown to have a direct effect on property values should properly be admitted with regard to the question of whether there is severance damage to remainders.

The corollary to adoption of this rule, which eliminates the requirement of a showing of a reasonable basis for the fear or concern, should be that independent and wholly collateral evidence detailing the alleged hazard which gives rise to the fear should not be admissible. Under this rule, such evidence has no relevance and serves only to inflame and improperly prejudice a jury given the nature of such evidence which suggests, among other things, that living near transmission lines, or even distribution lines, may "promote" cancer.

In a New York case upholding the rejection of the testimony of Dr. Andrew Marino offered to show the "source of purchaser apprehension" as to land adjacent to high voltage transmission lines, the reviewing court, stated as follows:

> However, if claimants were attempting to show that prospective purchasers were affected by the mere fact that these statements were made, said statements would only be relevant if it was first shown that purchasers in the Massena market were aware of, and affected by, Dr. Marino's testimony. There was no evidence to this effect and, moreover, it is highly unlikely that anyone outside the scientific community would have had contact with Dr. Marino's testimony. (emphasis added)

Miller v. State, 458 N.Y.S.2d 973, 976 (Ct. Claims 1982).

The situation here is identical. While the First District Found that

> talks with buyers and with real estate brokers (in Clay County) reflect that an issue of major concern is the possible health consequences attendant upon living in close proximity to high voltage lines. The experts concluded the present uncertainty regarding the possible detrimental effect of high voltage lines is reflected in real estate prices.

Jennings at 1377.

The First District did not find nor was there the slightest suggestion that these buyers or real estate brokers, or for that matter, anyone else living in Clay County, had ever heard of Dr. John Norgard or Dr. Nancy Wertheimer or any of their extensive and detailed declarations regarding the supposed adverse physical and health consequences relating to high voltage transmission lines. Under these circumstances their testimony was entirely irrelevant. See also Meinhardt v. Kansas Power and Light Co., 661 P.2d 820 (Kan.Ct.App. 1983).

The logical alternative to Casey is the "minority" rule discussed above and its proper application requires reversal of the judgments below since the testimony of Drs. Norgard and Wertheimer was improperly admitted to the substantial prejudice of petitioner as reflected in the jury verdicts and final judgments.

CONCLUSION

The final judgments entered on verdicts awarding compensation on the basis of inadmissible and prejudicial opinion testimony either regarding public apprehension of hazard or, alternatively, regarding alleged adverse physical and health effects relating to high voltage electric transmission lines should be reversed and remanded for a new trial with directions as to the controlling and applicable rule of law governing the severance damage issue.

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