

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 REPLY BRIEF

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

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STATEMENT OF THE CASE AND OF THE FACTS

In response to the Supplemental Statement of Facts provided by the landowners in their brief^{1/}, petitioner, Florida Power & Light Company ("FPL") notes the lengthy recitation of the expert testimony regarding alleged adverse health and physical effects from 500,000 volt (500 kv) electric transmission lines. (L.B. 4-11) It appears to FPL that the landowners believe that the sheer quantity of the evidence on the subject should somehow justify the admission of the evidence regardless of whether the appropriate legal standard is met. Additionally, FPL notes the attempted distinction by the landowners regarding the testimony of Dr. Wertheimer. With emphasis, the landowners deny that her testimony showed that the high voltage lines "cause cancer" (L.B. 4), yet later in the discussion of Wertheimer's testimony they recite that her study shows a "link" between electric transmission lines and cancer and that the lines "promote(s) cancer" (L.B. 7, 8). In the judgment of FPL, this presents a remarkable distinction without a difference in consideration of the effect of such testimony on a lay jury.

With respect to public awareness of "health problems associated with transmission lines" (L.B. 12), FPL acknowledges that there was testimony at trial concerning

^{1/} This reply brief will use the same references as were used in the initial brief. The initial brief of FPL is referred to as "FPL B. ___". The brief of the landowner-respondents is referred to as "L.B. ___".

articles on the subject having appeared in publications of general circulation. It is absolutely incorrect, however, to suggest that public awareness of "health problems associated with transmission lines" is "demonstrated by newspaper notices of FPL advising the public on the dangers of transmission lines" (L.B. 12). The two newspaper advertisements contained within the appendix of the landowner's brief deal only with the widely known danger of electric shock resulting from contact with any electric lines, transmission or otherwise. See Richmond v. Florida Power & Light Co., 58 So.2d 687 (Fla. 1952). Nothing in either of these two advertisements refers in the slightest way to the alleged health hazards such as "promotion" of cancer which were paraded before the jury below.

ARGUMENT

FIRST POINT

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 RECOVERY OF SEVERANCE DAMAGES

A. Casey

FPL reiterates its first point on appeal as the basis for responding to the somewhat diffused arguments of the landowners raised on their Point 1. The landowners' first attempt to distinguish Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963), on the basis of the quantum of evidence regarding adverse effects from transmission lines presented at trial below in comparison to

the apparent absence of any competent evidence on the subject presented at trial in Casey. This approach is simply misguided. As acting Chief Judge Allen stated in concurring specially in Casey "the 'majority rule absolutely excludes consideration of apprehension of fear (emphasis added)'" , Id. at 173, and in concluding:

recapitulating, it might be said that the strict rule with respect to consideration of public apprehension and its affect on value, absolutely prohibits such consideration. This is the view adopted in the instant majority opinion.

Id. at 176

Casey cannot be distinguished on the basis of the amount of evidence presented. The issue is presented squarely to this Court. The rule in Casey must either be reaffirmed or rejected on this appeal.

B. Alternatives to Casey

As discussed in FPL's brief on the merits, there are two alternatives if Casey is to be abandoned. One of these is the "intermediate rule" which was articulated as follows by the First District in its decision in this case:

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.

FPL v. Jennings, 485 So.2d 1374, 1379 (1986). The predicate essential for admission of evidence under this rule is a

showing that the "fears are entertained so generally as to enter into the calculations of all who propose to buy or sell the adjacent land." FPL v. Roberts, 490 So.2d 969, 971 (Fla. 5th DCA 1986). While FPL does not believe that the intermediate rule is the appropriate alternative to Casey, it would state that there is a bare sufficiency of predicate evidence in the record here from landowner appraisers Reidy and Moody from which it could be argued that buyers and sellers of land in Clay County, Florida have a concern about buying land adjacent to high voltage transmission lines and that the concern is reflected in the price they are willing to pay for such land. However, this does not automatically yield the conclusion that the Norgard and Wertheimer testimony was properly admitted, notwithstanding the opinions of the First and Fifth Districts in Jennings and Roberts supra. Under Willsey v. Kansas City Power & Light Co., 631 P.2d 268 (Kan. Ct. App. 1981), the testimony of appraisers Moody and Reidy was sufficient to meet the test of the intermediate rule and establish the reasonableness of the fear. See discussion infra at 8.

The other, preferable, alternative is the "minority rule". This rule is actually the majority rule as acknowledged by the landowners. (L.B. 22). It has been accepted by eleven states and the United States Court of Appeals for the Sixth Circuit and will be referred to in the discussion below (Point II) as the "prevailing" rule.

SECOND POINT

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

The appropriate alternative to the rule in Casey is the prevailing rule. (FPL B. 13-17). This rule permits admission of evidence of fear on a simple showing that the fear affects market value without any requirement that the fear be shown to be reasonable. As previously set forth, the logical application of this rule would therefore exclude admission of testimony such as that presented through Drs. Norgard and Wertheimer as being irrelevant to the issue of just compensation and, obviously, highly prejudicial.

While the landowners vehemently protest FPL's advancement of the prevailing rule (L.B. 27),^{2/} nowhere do they provide any justification for the admission of the testimony of Drs. Norgard and Wertheimer under the prevailing rule. They claim that FPL is attempting to "avoid the reality of what the owner is confronted with in the market place" (L.B. 27) ignoring that the reality of the market place was amply testified to by appraisers Reidy and Moody who both referred to fear of adverse health effects and the effect of such fear on land values. There was no suggestion, nor could there be, that the "reality...in the market place" in Clay County, Florida comprehends knowledge

^{2/} The position of FPL is hardly a "post hoc change of stripes" (L.B. 27). FPL has contended throughout this case that the Norgard and Wertheimer testimony should not have been admitted.

of the extensively articulated positions of Drs. Norgard and Wertheimer.

In its initial brief, FPL cited Miller v. State, 458 N.Y.2d (Ct. Claims 1982), as direct support for the exclusion of the testimony of Norgard and Wertheimer. FPL reiterates and paraphrases the statement of the New York Court:

Statements of (Norgard and Wertheimer) would only be relevant if it was first shown that purchasers in the (Clay County) market were aware of and affected by (Norgard and Wertheimer's) testimony.

Id. at 976.

The landowners attempt to harmonize the Miller decision by suggesting that the testimony regarding health hazards was rejected by the New York Court because it was hearsay as opposed to the first hand expert testimony in this case. (L.B. 25) This distinction is not correct. The pertinent analysis by the New York Court is made in the context of the statements in question being offered not for their truth or falsity but merely to show that they were made. Lack of relevance was the first basis upon which the statements were excluded. Hearsay was only an alternative basis for the exclusion.

The landowners next complain that the result required by adoption of the prevailing rule would be unfair because they went "the extra mile" in presenting evidence of reasonableness to "meet both the tests of the 'majority rule' and the 'intermediate rule' as set forth in Casey."

(LB. 28)^{3/} They then suggest that this point was resolved in Willsey v. Kansas City Power & Light Co., 631 P.2d 268 (Kan. 1981) where the Kansas Court of Appeals, after expressing its preference for the prevailing rule, stated that the facts presented in that case met the test of the "intermediate rule" which the Court identified as being the "most stringent rule which can justifiably be applied against the landowner." Id. at 278. Willsey does not support the proposition that should this Court prefer the prevailing rule, it could nevertheless affirm the result here. In Willsey the only testimony presented to the jury regarding fear was that of the landowners' real estate appraiser. The appraiser's testimony on the subject is set forth at page 271 and refers to "buyer resistance to high power or high voltage overhead lines" and "latent fear on the part of buyers due to ... high voltage power line(s)". This testimony, remarkably similar to the testimony of appraisers Moody and Reidy in this proceeding (T. 720-721, 789-791), pales in comparison to the extensive and detailed testimony of Drs. Norgard and Wertheimer.

In fact there is no question as to how the Kansas Court of Appeals would rule in this case because in a decision subsequent to Willsey, Meinhardt v. Kansas Power &

^{3/} The majority rule in Casey requires no evidence to meet the test as it requires exclusion of evidence of the nature in question on an absolute basis. See discussion, supra at pages 2 and 3.

Light Co. 661 P.2d 820 (Kan. App. 1983),^{4/} it upheld exclusion of the testimony of a Dr. Beck concerning alleged health hazards related to transmission lines. The reasoning of the Court in that case is particularly responsive to the arguments of the landowners here. The Court noted that the testimony of the landowners' appraisers concerning the reasonableness of the public fear was virtually identical to that presented in Willsey and therefore "no additional evidence by Dr. Beck was needed to validate these opinions ... concluding that the evidence was not germane to the issue of market value." Id. at 822. The same conclusion should be reached here. The testimony of appraisers Moody and Reidy was virtually identical to the appraisal testimony in Willsey and no additional evidence from Norgard or Wertheimer was needed to validate their opinions.

CONCLUSION

It has been held that:

A condemnation trial is a sober inquiry into values designed to strike a just balance between the economic interests of the public and those of landowner. Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed, 215 Cal. App. 2d 60, 69, 29 Cal. Rptr. 847 (1963).

Any chance the jury in this case might have had to indulge in such sober inquiry was obliterated by the admission of

^{4/} 2 of the 3 members of the Willsey panel decided Meinhardt.

the testimony of Norgard and Wertheimer. There was ample testimony from appraisers, Moody and Reidy, regarding the depreciation in land value caused by fear of health hazards. There were also comparable sale studies introduced and relied upon by all three of the landowner appraisers showing depreciation of land value adjacent to transmission lines. The admission of the testimony of Norgard and Wertheimer under these circumstances was not only totally unnecessary but highly and unmistakably prejudicial. The judgments below must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to David W. Foerster, Esquire, 653 Florida National Bank Building, Jacksonville, Florida 32202, Attorneys for Appellees, by mail, this 15th day of September, 1986.

By: Barry R. Davidson
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