[Cite as *Koehler v. Ohio Dept. of Transp.*, 2007-Ohio-1609.]

Court of Claims of Ohio
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R. EUGENE KOEHLER

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2005-11183-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, R. Eugene Koehler, owns land adjacent to and abutting US Route 23 and US Route 30 in Wyandot County. Plaintiff stated 4.6 acres of soybeans planted on his land in 2005 failed to ripen and consequently had no cash value. Plaintiff further stated the soybean crop planted next to the roadway failed to ripen due to constant light from "highway (tower) lights" that had been installed along the roadway. The roadway lights had previously been installed by defendant, Department of Transportation ("DOT"), and plaintiff claimed the light beams emitted prevented certain sections of the crop to mature.

{¶2} Plaintiff contended 4.6 acres of his crop failed as a result of artificial light from the newly installed roadway lights bleeding onto his fields abutting the roadway. Plaintiff estimated 4.6 acres of planted soybeans normally yielded about 40 bushels of beans per acre. Plaintiff determined he lost about 184 bushels of beans at about $5.30 per bushel for a total monetary loss of $975.20. Plaintiff has asserted defendant should bear the responsibility for his crop failure. Consequently, plaintiff filed this complaint seeking to recover $975.20, the estimated price of 184 bushels of beans. The filing fee was paid.

{¶3} Defendant related, "[i]n 1997 the Department of Transportation completed the lighting along the portion of US-30 Expressway abutting [plaintiff's] property." Defendant pointed out high mast lighting was installed to safely illuminate the roadway. Furthermore, defendant related, plaintiff, "planted soybeans during the spring of 2005," and portions of the crop at the "easterly end of the U.S. 30/U.S. 23 interchange," did not ripen, "allegedly because of lighting ODOT had previously installed to illuminate the highway in December, 2004." Defendant explained the lights had existed along this section of roadway since 1997 and DOT was unaware that light sensitive soybeans would be planted near the lighting. However, defendant contended plaintiff was aware that particular crop section would not mature due to the constant light exposure, because DOT in past years, "had compensated [plaintiff's] son, Keith, for soybeans not ripening at this location when he rented the land from his father." Defendant asserted plaintiff knew a soybean crop section would not mature, and should not be granted any monetary recover for this crop loss when he knew the crop would fail.

{¶4} Plaintiff, in his response to defendant's investigation report, countered with the argument that past compensation and his notice should have no bearing on the action before the court. Plaintiff, in his response, noted:

{¶5} "In the years that I grow soybeans, I do not have the use of approximately 4.6

acres. This is a direct result of the lights that were installed in 1997. For almost ten years, the farmer of this field has been compensated for soybean loss. The loss of the potential income from this field is the same as a taking, and I should therefore be compensated."

{¶6} Defendant alleged plaintiff's damage to a particular part of his bean crop is not compensable due to the fact the injury claimed, "falls under the doctrine of damnum absque injuria." Defendant, citing *Smith v. Erie RD. Co.* (1938), 134 Ohio St. 135, 16 N.E. 2d 310, contended when a party "is uniquely affected in degree but not in kind by a highway improvement," any damage claim recovery is barred by the damnum absque injuria doctrine. The issue in *Smith*, id. is the same issue in the instant claim, whether or not defendant's act constituted a taking of plaintiff's property. "Under Section 19, Article I, of the Constitution which requires compensation to be made for private property taken for public use, any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises, entitles the owner to compensation." *Smith*, supra at paragraph 1 of the syllabus. However, "[w]hen there is no taking altogether or pro tanto, damages consequential to the taking of other property in the neighborhood, or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is damnum absque injuria." *Smith*, supra, at paragraph 2 of the syllabus. Defendant has contended the acts of DOT, in the instant claim, of installing a roadway lighting system did not constitute a pro tanto taking of plaintiff's property and consequently, any damage suffered is noncompensable. Defendant insisted plaintiff's injury ("impacted plant development") from the roadway lights was a harm suffered in degree by other landowners adjacent to a lighted highway. Therefore, defendant asserted the suffered harm did not differ "in kind" from that sustained by the general public and renders the harm damnum absque injuria.

{¶7} Defendant offered *New York, Chicago & St. Louis Rd. Co. v. Busci* (1934), 128 Ohio St. 134, 190 N.E. 562, for the proposition that a land owner cannot be compensated for a harm which differs in degree, but not in kind from the general public

because the landowner's legal status is categorized as damnum absque injuria. In *Busci*, id. a public improvement rendered the street where plaintiffs lived a cul de sac, thus hindering ingress and egress to the property. The court determined hindered access to a non-abutting property owner is an injury of degree and not of kind. In the instant claim, plaintiff owns abutting land affected by defendant's improvement and the action pursued does not involve hindered access to the property.

{¶8} Additionally, defendant argued the act of installing the lights on U.S. Route 23 and US Route 30 was done in compliance with DOT's obligation to make improvements upon highways for serving the public and promoting the public good and consequently, none of plaintiff's property was taken by this public improvement. Defendant produced the following quote by the Ohio Supreme Court in the case of *State ex rel. Schiederer v. Preston* (1960), 170 Ohio St. 542 at 544, 166 N.E. 2d 748 at 750 (quoting I Lewis on Eminent Domain (3d Ed.), 179 et seq. Section 120), to support this argument:

{¶9} "[A]s all streets are established primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And * * * it follows that, when such uses or improvements are made, no private right is interfered with and consequently no private property is taken."

{¶10} The facts of *State ex rel. Schiederer*, id., involved a situation where a public roadway improvement raised the grade of part of a street in front of the land abutting that street, thereby interfering with the abutting land owner's view over the particular street and affecting the harmony of the street with the abutting land. The Supreme Court in *State ex rel. Schiederer*, at 548, concluded no actionable taking of property occurred when a public highway improvement raised the grade of part of a street and, "substantially interferes with the view that the owner of that land had over that street and with the relative harmony of the street with his land." The holding in the previous mentioned case has no bearing to the

action before this court. "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St. 3d 529, 533, 2001-Ohio-1276, 751 N.E. 2d 1032, 1037. "In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right . . . (cites omitted). Such an interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises." *State ex rel. OTR v. City of Columbus* (1996), 76 Ohio St. 3d 203, 206, 667 N.E. 2d 8, 12.

{¶11} Alternatively, defendant stated DOT, "enjoys immunity for its decision to install roadway lighting." Presumedly, defendant also appears to be asserting DOT should be immune from any harm caused by the lighting installation and use. Defendant explained DOT was acting under statutory authority (See R.C. 5501.31[1]) when installing the lighting along U.S. Route 23 and US Route 30. Defendant explained engineering judgment was utilized in making a decision to install the lighting along the roadway. Therefore, defendant expressed the position DOT should be excused from liability for any damage caused from the exercise of this judgment. Defendant cited *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App. 3d 143, 572 N.E. 2d 208, for the proposition that deference is generally paid to the decisions of DOT engineers in respect to authorizing roadway improvement. The facts of *Lunar*, id. involved an automobile collision and the issue of whether an engineering decision to not install a guardrail along the roadway concrete median exacerbated the effects of a crossover-type collision, thereby constituting negligent design. Conflicting engineering expert testimony was presented by both parties and the trial court concluded DOT engineers acted reasonably in deciding not to install guardrails along a roadway concrete median. The holding in *Lunar*, id. regarding DOT engineering

[1] R.C. 5501.31 in pertinent part states:

"The director may alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system . . ."

decisions has no bearing on the question presented in the instant action. Despite defendant's assertion, this court concludes DOT's reliance upon engineering judgment regarding roadway light installation does not protect DOT from liability.

{¶12} Defendant also presented an immunity argument based on the contention that the decision to install roadway lighting on U.S. Route 30/U.S. Route 23 interchange was a policy decision involving a high degree of independent judgment and therefore DOT has immunity from the consequences of this decision. Defendant specifically relied on *Garland v. Ohio Dept. of Transp.* (1990), 48 Ohio St. 3d 10, 548 N.E. 2d 233, in promoting the immunity defense. In *Garland*, the Ohio Supreme Court held DOT's decision to install a traffic light was discretionary and once the decision was made, DOT had a reasonable amount of time to implement the installation of the device without incurring liability in tort. Additionally, the court in *Garland* wrote: "* * * the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. * * *" quoting *Reynolds v. State* (1984), 14 Ohio St. 3d 68, 471 N.E. 2d 776 at page 11. However, once a decision has been implemented the state may be held liable for negligent conduct in the performance of carrying out the actual implementation of that decision. *Reynolds*, id. Defendant is not immune from liability for the negligent acts or omissions of DOT employees in engaging in the performance of their planned duties.

{¶13} Furthermore, defendant contended if plaintiff's claim is actionable he should nevertheless be barred from recovery based on his own voluntary act of planting crops in an area consistently illuminated by artificial light. Defendant suggested plaintiff should have known a bean crop planted near the roadway would not thrive due to the roadway lights installed by DOT in 1997. Also, defendant asserted even if the high mast highway lighting was deemed a nuisance, plaintiff could not recover since he planted his crop in the vicinity of this potential nuisance which would invoke the defense of "coming to the

nuisance." Defendant related plaintiff cannot prove the high mast lighting constituted a nuisance condition due to the premise a qualified nuisance condition requires proof of negligence. *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 55 N.E. 2d 724; *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855. Defendant maintained plaintiff offered no proof of negligence in this matter. Defendant argued for the court to consider the benefit the high mast lighting gave to thousands of motorists weighed against the harm the lights caused plaintiff in destroying 4.6 acres of his bean crop. Defendant essentially proposed plaintiff should have to bear a financial burden for his crop loss in a situation where he was legally using his land for a specific valuable purpose and the harm caused was attributable to the acts of DOT.

{¶14} In *Taylor*, particular types of nuisance, both absolute and qualified were defined. The court stated, "[s]ummarized, then, absolute nuisance may be defined as a distinct civil wrong, arising or resulting from the invasion of a legally protected interest, and consisting of an unreasonable interference with the use and enjoyment of the property of another; the doing of anything, or the permitting of anything under one's control or direction to be done without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights; the unlawfully doing of anything, or the permitting of anything under one's control or direction to be done, which results in injury to another; or the collecting and keeping on one's premises of anything inherently dangerous or likely to do mischief, if it escapes, which, escaping, injures another in the enjoyment of his legal rights." *Taylor*, supra, at 440.

{¶15} Conversely, a qualified nuisance was distinguished from absolute nuisance as the following: "nuisance dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another." *Taylor*, supra, at 445. This court, in the instant action, agrees with defendant's position that plaintiff has not shown the DOT installed lighting fit the applicable description of a nuisance, either absolute or

qualified.

{¶16} After review of the plaintiff's complaint, defendant's investigation report, the response and all materials in the claim, the court makes the following determination. Evidence in the claim file suggests the essence of plaintiff's claim is consistent with a taking action.

{¶17} Section 19, Article I, Ohio Constitution, states:

{¶18} "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deductions for benefits to any property of the owner."

{¶19} Generally claims arising out of the United States or Ohio Constitutions, are not cognizable in this court. However, a specific exception exists where the issue involves an uncompensated taking of property in alleged violation of Section 19, Article I of the Ohio Constitution. *Kermetz v. Cook-Johnson Realty Corp.* (1977), 54 Ohio App. 2d 220, 376 N.E. 2d 1357; *Nacelle Land Mgt. Corp. v. Ohio Dept. of Natural Resources* (1989), 65 Ohio App. 3d 481, 584 N.E. 2d 790. Plaintiff may file an uncompensated taking action in this court if the taking is instituted by DOT.

{¶20} The Fifth Amendment to the United States Constitution provides, " *** nor shall private property be taken for public use, without just compensation." In order for compensation to be required in a particular case, there must be a taking. The Ohio Supreme Court has defined "taking" in accordance with the United States Supreme Court's interpretation of that word. In *Smith v. Erie RD. Co.*, supra, at 142, the court held. "*** there need not be a physical taking of the property or even dispossession; any substantial

interference with the elemental rights growing out of ownership of private property is considered a taking." Later, in *McKee v. Akron* (1964), 176 Ohio St. 282, 199 N.E. 2d 592, the court gave more of a negative definition of the term; something more than loss of market value or loss of comfortable enjoyment of the property is needed to constitute a

{¶21} taking. Specifically, the court stated, " *** governmental activity must physically displace a person from space in which he was entitled to exercise dominion consistent with the rights of ownership ***." Id. at 285. Thus, in order for a governmental activity to constitute a "taking" there must be a substantial interference with the owners property rights. Furthermore, according to *Smith*, supra, the actual harm suffered by the plaintiff must differ "in kind" rather than "in degree" from the general public. Contrary to defendant's contention, the court, in the instant claim, determines the harm suffered by plaintiff, the loss of a portion of his bean crop, was indeed a harm suffered in kind. Therefore, the court, in the instant claim, concludes the lights installed by DOT on the US Route 30/US Route 23 interchange resulted in an uncompensated taking of plaintiff's property which is actionable and compensable. Defendant is liable to plaintiff for the crop loss in the amount of $975.20, plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $1,000.20, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
2/8
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