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STATE OF INDIANA	)	IN THE HOWARD SUPERIOR COURT II
	) SS:	
COUNTY OF HOWARD	)	CAUSE NO. 34d02-1612-PL-000937

CITY OF KOKOMO, INDIANA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ESTATE OF AUDRA R. NEWTON,	)
	)
Defendant.	)

FILED
IN OPEN COURT
APR 18 2019
HOWARD SUPERIOR COURT
DIVISION 2

City of Kokomo's Motion to Correct Error

Pursuant to Rule 59(A)(2) of the Indiana Rules of Trial Procedure, plaintiff, the City of Kokomo, moves the Court to reduce the final judgment entered in favor of defendant, the Estate of Audra Newton ("Estate"), because the jury's verdict was excessive.

1. The jury verdict was excessive, because it included damages not recoverable under the Eminent Domain Act.

The undisputed evidence showed that the owner of both the Main Street Property (which was taken in full) and the Union Street Property (the residue) is Brad Newton. He testified that his mother, Audra, owned both properties before her death in December, 2015, and that he inherited both properties under Audra's last will and testament. [Tr. Vol. I at 63–65; Trial Exhibits A–C.][1]

[1] The two volumes of the trial transcript the undersigned counsel for the City ("City's Counsel") obtained from the Court Reporter are attached as Exhibits A (Volume I) and B (Volume II) to the Affidavit of Blake Burgan, filed with this motion as Exhibit 1 ("Burgan Aff"). The trial exhibits the City's Counsel obtained from the Court's records are attached to the Burgan Affidavit as Exhibit C.

The evidence was also undisputed that Kokomo Glass Shop, Inc. ("Kokomo Glass"), operated its business on the Properties. [Tr. Vol. I at 141–47.] The City asks the Court to take judicial notice that Kokomo Glass is an Indiana corporation created in 1961 whose officers are Brad, Wes, and Cathryn Newton. [*See* Burgan Aff. at Ex. D.][2]

Despite the Estate's repeated argument at trial that Brad Newton and Kokomo Glass are one and the same [Tr. Vol. II at 6, 14, 76], Indiana law is clear that "a corporation is a legal entity separate and distinct from its shareholders and officers." *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231–32 (Ind. 1994) (holding that, absent grounds for piercing the corporate veil, "corporate officers and shareholders are generally not personally liable for the contractual

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[2] Exhibit D to the Burgan Affidavit is a record of business information obtained from the office of the Indiana Secretary of State. [Burgan Aff. ¶ 6.] Under Rule 201(a)(1)(B) of the Indiana Rules of Evidence, the Court may take judicial notice of "a fact that ... can be accurately and readily determined from sources whose accuracy cannot reasonable be questioned." Under Evidence Rule 201(d), "[t]he court may take judicial notice at any stage of the proceeding." Indeed, the Indiana Supreme Court has taken judicial notice of facts reflected in the records of the Secretary of State for the first time on petition to transfer. *See Am. Family Ins. Co. v. Ford Motor Co.*, 857 N.E.2d 971, 972 n.2 (Ind. 2006) ("Although neither party placed this information on the record, we take judicial notice of Ford's designated registered office and agent on file at the Indiana Secretary of State as required by Indiana Code section 23-1-49-3."); *see also Wayne Twp. v. Lutheran Hosp.*, 160 Ind. App. 427, 430 n.2, 312 N.E.2d 120, 122 n.2 (1974) ("The stipulated findings of fact adopted by the trial court as well as the rest of the record in this case do not disclose whether Lutheran Hospital is a public institution. However, this Court will take judicial notice of the public records filed in the office of the Secretary of State of Indiana. [Citation omitted.] [Those records] disclose that Lutheran Hospital is not a public hospital ....") (citing *Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 657, 242 N.E.2d 128, 130 (1968) ("This court will take judicial notice of the public records filed in the office of the secretary of state of Indiana, and from an examination of these records it is disclosed that, as of the date these proceedings were instituted, National had not complied with the provisions of the statute [for conducting business under an assumed name].")) Accordingly, the Court may take judicial notice of Exhibit D of the Burgan Affidavit and the fact that Kokomo Glass is an Indiana corporation.

obligations of the corporation"); *Professional Billing, Inc. v. Zotec Partners, LLC*, 99 N.E.3d 657, 662 (Ind. Ct. App. 2018) (rejecting plaintiff's argument for personal jurisdiction over corporate defendant, PBI, based on contacts of its CEO, Hulsey, with State of Indiana, because "PBI and Hulsey are not one and the same")).

The evidence was undisputed (and the parties agreed the jury should be instructed) that the damages for the total taking of the Main Street Property were $100,000. [Tr. Vol II at 59–60.] Based on evidence that there was unity of title, unity of use, and contiguity between the Main Street Property and the Union Street Property (none of which was taken), the Estate also sought damages to the Union Street Property as the "residue" of the two Properties treated as a whole. [Tr. Vol. II at 78–79 (final instructions 11–14).]

In its closing argument, the Estate asked the jury to award "other damages that were suffered by Brad Newton and Kokomo Glass Shop as a result of the taking" [Tr. Vol. II at 69–70], namely:

- $37,000 for building racks "to move everything from the Union Street property"
- $20,000 as "moving costs for the glass alone"
- $35,000 for "moving costs regarding ... the business property at 226 South Union"
- $10,000 for "destroyed metal ... because they were forced to vacate the property"
- $4,000 for "moving a sign from the Union Street property to the new property"
- $5,000 for "appraisals"

- $2,000 for "work orders"
- $4,000 for "increased advertising"

[*Id.*] These items of alleged damage to the "residue" total $117,000 ("Residual Damages") but are not recoverable in this eminent domain action.

The Indiana Constitution mandates that "[n]o person's property shall be taken by law, without just compensation." Ind. Const. Art. 1, § 21. This mandate is implemented in Indiana's Eminent Domain Act, which sets out the elements of "just compensation" for which a condemnor may be held liable:

> (1) The fair market value of each parcel of property sought to be acquired and the value of each separate estate or interest in the property.
>
> (2) The fair market value of all improvements pertaining to the property, if any, on the portion of the property to be acquired.
>
> (3) The damages, if any, to the residue of the property of the owner or owners caused by taking out the part sought to be acquired.
>
> (4) The other damages, if any, that will result to any persons from the construction of the improvements in the manner proposed by the plaintiff.

Ind. Code § 32-24-1-9(c)(1)–(4); *see Cheathem v. City of Evansville*, 151 Ind. App. 181, 188, 278 N.E.2d 602, 607 (1972), *cert. denied*, 410 U.S. 966, 93 S. Ct. 1442, 35 L.Ed.2d 700 (1973).

The City's potential liability for "damages, if any, to the residue" (also known as "severance damages," because the residue is severed from the part of the property taken in fee) is governed by subsection 9(c)(3). "The essence of severance damages is the loss in value to the 'remainder tract' by reason of a partial taking of land. This is predicated on the enhanced value of the 'remainder tract'

because of its relationship to the whole prior to the taking." *State v. Church of Nazarene*, 268 Ind. 523, 526–27, 377 N.E.2d 607, 609 (1978) (citation and internal quotation marks omitted).[3] The Residual Damages the Estate asked the jury to award are not recoverable under subsection 9(c)(3) for three reasons.

First, the Residual Damages were all in the nature of business expenses—primarily relocation expenses—incurred because Kokomo Glass could not conveniently carry on its business after the taking, with its store front on the Union Street Property and its fabrication and warehouse operations at its new location. [Tr. Vol. I at 141–47.] Those were not "damages ... to the residue of the property," I.C. § 32-24-1-9(c)(3) (emphasis added), since they were not caused by "the loss

[3] Respectfully, the Court misplaced its reliance on broad language in *State v. Ahaus*, 223 Ind. 629, 635, 63 N.E.2d 199, 201 (1945) ("In arriving at the amount of damages in this case every element of damage which will naturally and ordinarily result from such taking may be considered.") and *Unger v. Indiana & Michigan Electric Co.*, 420 N.E.2d 1250, 1259 (Ind. Ct. App. 1981) ("Just compensation in cases involving a partial taking is generally the fair market value of the property taken plus all the damages which the residue suffers, *including* the diminution of the fair market value of the remainder." (Emphasis added.)) [Tr. Vol. II at 55–56.] Neither case involved an award of relocation expenses of a business being operated on residue property.

In *Ahaus*, the Supreme Court affirmed an award for water damage caused by construction of a highway through the landowners' property. 63 N.E.2d at 202 ("... changing the flow of surface water could be considered as an element of damages in this case.") The Court held those damages were recoverable—not as "damages ... to the residue of the property ... caused by taking out of the part sought to be acquired" under subsection 32-24-1-9(c)(3), at issue in this case—but as damages "from the construction of the improvements in the manner proposed by the plaintiff," under subsection 9(c)(4). *See State v. Ensley*, 240 Ind. 472, 483, 164 N.E.2d 342, 347 (1960) (reading *Ahaus* as involving "consequential damages under paragraph Fourth, § 3-1706," now I.C. § 32-24-1-9(c)(4)).

In *Unger*, a utility sought to condemn an easement across farmland, and the property owner objected because the utility had not "form[ed] an opinion of the fair market value of the easement sought [or] tender[ed] an offer based on that opinion before filing suit." 420 N.E.2d at 1255. The Court of Appeals agreed, holding that "a condemnor must base its offer upon a stated opinion of fair market value." *Id.* at 1260. This Court's reliance on the quote from *Unger*, above, in instructing the jury, was not supported by the actual holding of the case.

in value to the [Union Street Property] by reason of a partial taking of [the Union Street and Main Street Properties considered as a whole]," *Church of Nazarene*, 377 N.E.2d at 609 (emphasis added). No appraiser testified to any effect on the fair market value of the Union Street Property resulting from the taking of the Main Street Property. Instead, the Residual Damages are all consequential damages,[4] resulting primarily from the relocation of Kokomo Glass's business from the Union Street Property to its new location.

Second, the Residual Damages were not "damages ... to the residue of the property of the owner or owners caused by taking out the [Main Street Property]," as required by subsection 9(c)(3). That is, the Residual Damages were not incurred by Brad Newton, the owner of the Main Street and Union Street Properties, but by Kokomo Glass, which is "a legal entity separate and distinct from its shareholders and officers." *Winkler*, 638 N.E.2d at 1231–32. Indiana law is well settled that claims for severance damages in eminent domain proceedings "'are personal, and must be asserted in the name of the actual owners of the lands affected.'" *State v. Heslar*, 257 Ind. 307, 313, 274 N.E.2d 261, 265 (1971) (emphasis added) (quoting *Glendenning v. Stahley*, 173 Ind. 674, 683–84, 91 N.E. 234, 238 (1910)).

Third, consistent with the requirements of subsection 9(c)(3), "Indiana follows the great weight of authority which denies relocation expenses as a part of

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[4] Consequential damages "to any persons" may be recovered under subsection 9(c)(4), but only if they "result ... from the construction of the improvements in the manner proposed by the plaintiff." I.C. § 32-24-1-9(c)(4) (emphasis added). There was no evidence that construction of any improvements on the Main Street Property caused Kokomo Glass to move from the Union Street Property. [*See* Tr. Vol. I at 142, 162–63.]

'just compensation'" in eminent domain cases. *Cheathem*, 278 N.E.2d at 607. Thus, under Indiana law, the Residual Damages were not recoverable in this case.

This conclusion is bolstered by the Indiana legislature's 1971 adoption of the Relocation Assistance Act. *See id.*, 278 N.E.2d at 607 n.2 (citing I.C. § 8-13-18.5-1 (1971), recodified at I.C. §§ 8-23-17-1 to -35 (the "Act")). In relevant part, section 13 of the Act provides:

> Whenever the acquisition of real property for a project[5] undertaken by an agency[6] ... will result in the displacement[7] of any person,[8] the agency shall make a payment to a displaced person, upon proper application as approved by the agency head, for:
>
> (1) actual reasonable expenses in moving the person, the person's family, business, farm operation, or personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate the property, as determined by the head of the agency; and

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[5] The Act applies when property is taken by eminent domain. *See* I.C. § 8-23-17-27; *City of Mishawaka v. Fred W. Bubb Funeral Chapel, Inc.*, 396 N.E.2d 943, 946 (Ind. Ct. App. 1979) (holding that furnishing relocation assistance was not condition precedent to city's exercise of power of eminent domain).

[6] The term "agency" as used in the Act includes a political subdivision of the State. I.C. § 8-23-17-1.

[7] The term "displacement" and "displaced person" as used in the Act means "a person who moves from real property, or moves personal property from real property, because of ... the partial acquisition of real property to the extent that continued use by the owner or occupant is rendered impossible or impractical," and for purposes of section 8-23-17-13, includes "a person who moves from real property as a result of the acquisition of ... other real property on which the person conducts a business ...." I.C. § 8-23-17-3.

[8] The term "person" as used in the Act includes a corporation. I.C. § 8-23-17-9.

> (3) except as provided in section 12(1) of this chapter, actual reasonable expenses in searching for a replacement business or farm, not to exceed a maximum of five hundred dollars ($500).

I.C. § 8-23-17-13 (emphasis added); *see also id.* § -15 (allowing a business to recover a fixed payment of its average annual net earnings in lieu of payments under section 13).

The provisions of the Relocation Assistance Act cover precisely the types of expenses Kokomo Glass sought to recover as Residual Damages in this eminent domain action. The Act was adopted because Indiana law forbids recovery of these consequential damages under the Eminent Domain Act. Indeed, the court in *Cheathem*, after holding that relocation expenses are not recoverable as "just compensation" in eminent domain, noted that those expenses might have been recoverable under the Act, but for the filing of that lawsuit in 1969, before adoption of the Act in 1971. *Cheathem*, 278 N.E.2d at 607 n.2.

None of the Residual Damages the Estate asked the jury to award were recoverable in this action. The only recoverable damages under the Eminent Domain Act were the $100,000 stipulated as the damages for taking the Main Street Property under subsections 32-24-1-9(c)(1) and (2). [*See* Tr. Vol. II at 59–60.] And because this amount is less than the $160,000 the City offered for taking the Main Street Property [Tr. Vol. II at 88], the Estate was not entitled to recover its attorneys' fees under Indiana Code Section 32-24-1-14(b).

Accordingly, the Court should exercise its power under Trial Rule 59(J)(5) to reduce the final judgment in favor of the Estate to $100,000.

2. Alternatively, even if Kokomo Glass could recover consequential damages under the Eminent Domain Act, the jury's verdict was excessive because it was unsupported by the evidence.

Even if Kokomo Glass could, hypothetically, recover some of the $117,000 in Residual Damages the Estate's counsel asked the jury to award [Tr. Vol. II at 69–70], the jury's verdict of $305,600 (including the stipulated amount of $100,000 for the Main Street Property, leaving "residual" damages of $205,600) was excessive because the evidence did not support the verdict. Following is a summary of each item of Residual Damages requested by the Estate's attorney in closing argument and the evidence (or lack of evidence) presented in support of each item.

- $37,000 for building racks "to move everything from the Union Street property" [Tr. Vol. II at 69–70]

The evidence did support this item of Residual Damages. Brad Carney, of Monroe Construction Group, authenticated an estimate of **$37,900** for constructing racks to move glass from the Union Street Property to Kokomo Glass's new location. [Tr. Vol. I at 129–30; Trial Exhibit M.] Wes Newton confirmed that this amount was paid. [Tr. Vol. I at 171.]

- $20,000 as "moving costs for the glass alone" [Tr. Vol. II at 70]

The evidence did not support this item of Residual Damages. Among the trial exhibits the City's Counsel obtained from the Court's file [Burgan Aff. at Ex. C] is an Exhibit V, which purports to be a "Proposal" for $20,800 from Kokomo Glass to the Estate's counsel, Noel Law. It is dated February 14, 2018 (eight months before Kokomo Glass moved from the Union Street Property in October

2018 [Tr. Vol. I at 142]) and is for "mov[ing] materials only from existing warehouse at 226 S. Main St. to new facility at 3030 S. Lafountain."

This document does not support a claim for $20,000 for moving glass for two reasons. First, the trial transcript the City's Counsel obtained from the Court Reporter does not show that Exhibit V was offered or admitted into evidence at trial.[9] Second, the proposal is for moving materials from the "warehouse at 226 N. Main St." and, as the Court ruled on several occasions at trial, expenses of moving from the Main Street Property were not recoverable. [*See, e.g.*, Tr. Vol. I at 101–04.]

- $35,000 for "moving costs regarding ... the business property at 226 South Union" [Tr. Vol. II at 70]

The evidence did not support this item of Residual Damages. Debbie Bower, of Guyer the Mover, authenticated a "Non Binding Estimate" of $35,910 dated August 1, 2017 (more than a year before Kokomo Glass moved in October 2018 [Tr. Vol. I at 142]) for moving property from the Union Street Property. [Tr. Vol. I at 131–32; Ex. N.] But neither Ms. Bower nor Wes Newton testified that this amount, or any other, was ever paid to Guyer the Mover.

[9] Admittedly, the "tally sheet" of exhibits offered, objected to, admitted, and passed to the jury that was attached to the trial exhibits obtained by the City's Counsel [Burgan Aff. at Ex. C] showed Exhibits V, W, X, and Y were offered and admitted over the City's objection. However, the City's Counsel has scoured the trial transcript and is unable to find where any of these four exhibits was either offered into evidence by the Estate or admitted by the Court.

- $10,000 for "destroyed metal ... because they were forced to vacate the property" [Tr. Vol. II at 70]

The evidence did not support this item of Residual Damages. Among the trial exhibits the City's Counsel obtained from the Court's file [Burgan Aff. at Ex. C] is an Exhibit U, which includes a handwritten notation at the bottom: "Approx. (60) lengths @ $275 ea. = $16,500 x .566 multiplier = $9339.00." But no witness testified to this amount, and the trial transcript obtained by the City's Counsel does not show that Exhibit U was actually offered or admitted into evidence at trial. *See* note 9, above.

- $4,000 for "moving a sign from the Union Street property to the new property" [Tr. Vol. II at 70]

The evidence did support this item of Residual Damages, but only in the amount of **$3,595**. Samantha Milburn, of Huston Electric, authenticated a quote in that amount for removing and reinstalling a "Kokomo Glass Shop" sign at its new location. [Tr. Vol. I at 126–27; Trial Exhibit L, item 2.] She also testified that the work actually occurred [Tr. Vol. I at 127], so it is fair to infer Huston Electric was paid for the work.

- $5,000 for "appraisals" [Tr. Vol. II at 70]

The evidence did support this item of Residual Damages, but only in the amount of **$1,800**. Appraiser William Schreiner testified that he performed an appraisal of the Main Street Property [Trial Exhibit J] and authenticated his invoice for $1,800. [Tr. Vol. I at 116; Trial Exhibit K.] Wes Newton confirmed that this invoice was paid. [Tr. Vol. I at 156.]

Among the trial exhibits the City's Counsel obtained from the Court's file [Burgan Aff. at Ex. C] is an Exhibit Y, which purports to be an estimate of $3,250 from Terzo & Bologna, Inc., for appraising the Union Street Property. But no witness testified to this amount, and the trial transcript obtained by the City's Counsel does not show that Exhibit Y was offered or admitted into evidence at trial. *See* note 9, above. Nor was any other appraisal of the Union Street Property offered or admitted into evidence at trial.

- $2,000 for "work orders" [Tr. Vol. II at 70]

The evidence did not support this item of Residual Damages. The sole reference to "work orders" in the trial transcript appears to refer to materials that were kept at the Main Street Property "for current work orders." [Tr. Vol. I at 159–60.] But there was no testimony or any trial exhibit placing a dollar value on "work orders."

- $4,000 for "increased advertising" [Tr. Vol. II at 70]

The evidence did not support this item of Residual Damages. Although the Estate's counsel argued to the jury that Wes Newton "testified that he has had to incur increased advertising" in the amount of $4,000 [Tr. Vol. II at 70], in the trial transcript the City's Counsel obtained from the Court Reporter, Wes Newton makes no mention of advertising costs.

In addition, among the trial exhibits the City's Counsel obtained from the Court's file [Burgan Aff. at Ex. C] is an Exhibit W, which appears to summarize Kokomo Glass's total advertising costs as trending down from 2016 ($28,240.30) to 2017 ($26,453.45). The document does not show Kokomo Glass's advertising

costs or budget for 2018 or 2019, and there was no testimony regarding those advertising costs. In addition, the trial transcript obtained by the City's Counsel does not show that Exhibit W was offered or admitted into evidence at trial. *See* note 9, above.

Thus, even if Kokomo Glass could recover consequential damages for moving expenses and the like under the Eminent Domain Act (and it can't, as demonstrated in section 1, above), the evidence supported, at most, Residual Damages of ($37,900 + $3,595 + $1,800 =) $43,295. When added to the stipulated amount of $100,000 for the taking of the Main Street Property, the total ($143,295) is still less than the $160,000 the City offered [Tr. Vol. II at 88], and so the Estate is not entitled to recover attorneys' fee under Indiana Code Section 32-24-1-14(b).

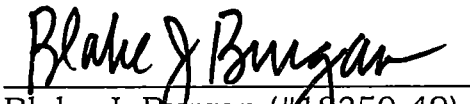
Accordingly—and in the alternative to the relief requested in part 1 of this motion—the Court should exercise its power under Trial Rule 59(J)(5) to reduce the final judgment in favor of the Estate to $143,295.

3. Conclusion

The jury's verdict was excessive because it included an award of damages not recoverable under the Eminent Domain Act. As a result, the Court should exercise its power under Trial Rule 59(J)(5) to reduce the final judgment in favor of the Estate to $100,000. Alternatively, even if the Estate could recover consequential damages under the Eminent Domain Act, the jury's verdict was excessive because it was unsupported by the evidence. As a result, the Court should

exercise its power under Trial Rule 59(J)(5) to reduce the final judgment in favor of the Estate to $143,295.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 18, 2019, the foregoing **City of Kokomo's Motion to Correct Error** was filed with the Howard County Superior Court 2 via First-Class, Certified Mail, Return Receipt Requested pursuant to Indiana Rules of Trial Procedure 5(F)(3) and served upon the following:

By First-Class, United States mail, postage prepaid, upon:

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By First-Class, Certified Mail, Return Receipt Requested, pursuant to Indiana Rules of Trial Procedure 59(C) and 5(F)(3):

The Honorable Brant J. Parry, Judge
Howard Superior Court 2
104 N. Buckeye Street, #304
Kokomo, IN 46901

Blake J. Burgan