IN THE COURT OF APPEALS OF IOWA

No. 1-213 / 10-1339
Filed May 11, 2011

EDWARD A. GREEN and MELVIN J. GREEN,
Plaintiffs-Appellees,

vs.

WILDERNESS RIDGE, L.L.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Wilderness Ridge appeals from the district court's condemnation order following a remand. **AFFIRMED.**

Brian J. Kane of Kane, Norby & Reddick, P.C., Dubuque, for appellant.

Stephen W. Scott of Kintzinger Law Firm, P.L.C., Dubuque, for appellees.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

This private condemnation case returns to the appellate courts following the district court's revised determination of the "nearest feasible route" to an existing public road for the owners of the Wilderness Ridge, L.L.C., to reach their landlocked recreational tract. *See* Iowa Code § 6A.4(2) (2007). Faced with the choice between a northern and southern route across the Green brothers' 400-acre property, the district court originally condemned the southern route, declining to consider the impact of the condemnation on the Greens' farming operation. In January 2010, our supreme court remanded the matter to the district court for additional fact finding and a determination "which takes into consideration the cost of acquiring the condemned property." *Green v. Wilderness Ridge, L.L.C.*, 777 N.W.2d 699, 705 (Iowa 2010).

On remand, the district court condemned the northern route, relying on the Greens' real estate experts who opined that the southern route would be costly and disruptive to the farming operation. Wilderness Ridge appeals, arguing the Greens' evidence does not support the condemnation damages alleged. Giving due weight to the district court's factual findings and considering both the ease of constructing the road and its harm to neighboring properties, we agree the northern approach is the "nearest feasible route" and affirm.

I. Background and Proceedings

Dave Buchheit and Tim Nefzger own the limited liability corporation known as Wilderness Ridge. The two friends wanted to acquire timberland for hunting, camping, and other recreational purposes, as well as occasional logging. To this

end, Buchheit and Nefzger purchased a seventy-five-acre tract of land in rural Dubuque County in July 2006. The owners knew the property was not accessible by a public roadway and instituted a private condemnation action under Iowa Code section 6A.4(2) to secure access through neighboring tracts, including farm land owned by brothers Edward and Melvin Green. The Greens conduct dairy cow and beef cattle operations, as well as crop farming, on their 400 acres purchased in 1982.

On June 18, 2007, the Greens filed a petition in equity, arguing the route proposed by Wilderness Ridge was not the "nearest feasible route" to an existing public road, as required under section 6A.4(2).

> Specifically, the Greens asserted that Wilderness Ridge's proposed route, known as the southern route, would have a devastating impact on their dairy farm. They argued that the southern route, which would bisect the farm, would decrease the value of their property and inhibit their day-to-day farming operation because moving the cattle would be more onerous and half of their land would now be cut off from electricity and water. Nevertheless, the Greens did not challenge Wilderness Ridge's need for private condemnation. Instead, the Greens proposed an alternative route, the northern route, which would traverse the northern-most portion of their property.

Green, 777 N.W.2d at 701.

Following a trial, the district court entered an order on May 15, 2008, concluding the appropriate route to be condemned was the southern one favored by Wilderness Ridge. In selecting the "nearest feasible route," the district court declined to consider the impact of the condemnation—including the devaluation of the Greens' farm. The Greens appealed that order. A divided panel of our court affirmed. On further review, the supreme court decided the district court

erred in "not considering the costs of condemnation in selecting the 'nearest feasible route.'" *Green*, 777 N.W.2d at 705. The supreme court remanded the case for the district court to engage in additional factfinding regarding the costs of acquiring either route and to reach a conclusion as to the more feasible route on the existing record. *Id.*

On remand, the district court directed the parties to file briefs supporting their positions based on the record made at trial. On June 1, 2010, the district court issued an order concluding that "the northern route is the nearest feasible route." The court premised that conclusion on the following factual findings:

> It appears inherent in the ruling of the supreme court that this Court must consider the fact that if the southern route (Route No. 6) were chosen, Plaintiffs would have to fence the condemned roadway which would reduce the value of the land. . . . Plaintiffs' experts testified that the erection of a fence across the condemned roadway would, in effect, divide the Green Brothers' farm into two pieces which would reduce the value of the land by $180,000 or $190,000. Wilderness Ridge purchased the property in 2006 for the sum of $130,000. Plaintiffs accurately state that the costs of acquisition and development of the northern route (Route No. 8) would be in the area of $25,000.

Wilderness Ridge moved to enlarge the court's factual findings. The motion asserted: "Nowhere in the supreme court's opinion did it make a finding that a fence would be required. The supreme court left the fact of whether a fence would be required to this Court." Wilderness Ridge went on to argue that fencing would not be required by the statute and the court should not consider the "unneeded fence" when determining the reduction to the value of the Greens' land. The motion also attempted to discredit the Greens' expert while touting the credibility of its own real estate specialist.

The Greens responded to the motion to enlarge as follows:

> While the Supreme Court did not expressly state that a fenced roadway was required, that conclusion is inherent in its opinion; that conclusion is clearly supported by the record and is required by law. The Green Brothers have a duty to restrain their livestock and the only way to restrain 200+ head of cattle is a fence.

The Greens also replied to Wilderness Ridge's arguments concerning the relative reliability of the expert witnesses.

On July 15, 2010, the court overruled the motion to enlarge findings "for the reasons stated in the Response to Motion to Enlarge filed by Plaintiffs." Wilderness Ridge now appeals.

II. Standard of Review

When the district court conducts a trial in equity, our review is de novo. Iowa R. App. P. 6.907. Even on de novo review, we accord weight to the factual findings of the district court, especially when they involve witness credibility. *See Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

III. Analysis

A. Wilderness Ridge waived its claim that the northern route was not "on" or "immediately adjacent" to a division line.

As its first ground for reversal, Wilderness Ridge contends the northern route "does not comply with the statutory requirements for a condemned public way" because the route does not stay on or immediately adjacent to "a division, subdivision or 'forty' line" as required by section 6A.4(2)(b). Wilderness Ridge does not point us to where in the record it preserved error on this argument. It asserts only that error was preserved by filing a timely notice of appeal. "While

this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Anuradha Vaitheswaran & Thomas Mayes, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (Fall 2006) (explaining that "[a]s a general rule, the error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court").

We are unable to find that Wilderness Ridge raised the issue of compliance with the proximity requirement in section 6A.4(2)(b) during the remand proceedings or that the district court rejected that argument in condemning the northern route. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) (noting we will only review an issue raised on appeal if it was presented to and ruled on by the district court). The district court mentioned this issue in an April 16, 2008 order on Wilderness Ridge's motion to adjudicate law points. But the court did not address the claim in its June 1, 2010 order and Wilderness Ridge did not urge this argument in its motion to enlarge findings. We decline to address an issue on appeal where there is nothing to review from the district court. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998).

B. The district court properly considered devaluation of the Greens' property when choosing the nearest feasible route.

As a second basis for reversal, Wilderness Ridge argues that the district court erred in relying on the Greens' evidence concerning the acquisition costs of the southern route. The crux of the argument is that no law requires the condemned roadway to be fenced. Specifically, Wilderness Ridge looks to the

following language in section 6A.4(2)(c): "When passing through enclosed lands, the public way shall be fenced on both sides by the condemnor upon request of the owner of the condemned land." Wilderness Ridge asserts that the Greens' land was not enclosed, citing to testimony in the record from Dave Buchheit and realtor Cornelius Donovan that the fencing around the northern portion of the property was not "livestock-proof." Any desire the Greens may have to erect a fence, according to Wilderness Ridge, should not contribute to the court's calculation that their property is harmed by the condemnation.

On appeal, the Greens admit the condition of their fences is "less than perfect." But in arguing that their land is "enclosed" within the meaning of section 6A.4(2)(c), they point to undisputed testimony that they rotationally graze as many as 225 head of dairy cows and feeder cattle on their farm and have never had animals wander onto neighbors' property. They further argue that even if their land were not considered "enclosed" under the condemnation statute, they have a legal duty to restrain their livestock. Finally, the Greens contend that even if there were no fence erected along the southern route, the construction of a road bisecting their farm at that location would cause significant damage.

In exercising our de novo review of the record, we find that the Greens' farm was "enclosed" within the contemplation of section 6A.4(2)(c). The term "enclosed lands" as used in the private condemnation provision means "lands surrounded by fences or other obstructions signifying boundaries protecting the land." *Schafer v. Cocklin*, 504 N.W.2d 454, 455 (Iowa 1993). In reaching this construction, the supreme court looked to the purpose of the statute:

> In requiring fencing of a right of way through enclosed lands, the legislature recognized that farmers with livestock might wish to have their animals protected from traffic on the right of way or from gates being left open. If their own land was unfenced, the condemnees would not have such problems. To require fencing of unfenced land would be in the nature of a penalty, rather than a necessity.

Schafer, 504 N.W.2d at 455.

The Greens' property is demarcated by a fence line, even if it is not in the best shape. We don't read *Schafer* as requiring the existing fence to be impervious to the errant cow. The Greens have livestock they wish to be protected from traffic on the right of way. It was proper for the district court to factor in the cost of constructing a fence when deciding on the nearest feasible route through the Greens' farm.

Two farm realtors testified that fencing off the access road along the southern route would significantly reduce the value of the Greens' property. Dennis Meyer estimated that the fence would decrease the per acre value by as much as $1200 resulting in a total devaluation of $190,000. Cornelius Donovan opined that the Greens' farm would be less attractive to potential buyers after the construction of a fenced access road and estimated a diminution in the land's value of approximately $180,000.

Furthermore, we agree with the Greens that even if fencing was not required, building an access road along the southern route takes a toll on their farm in other ways. Construction of the road itself will alter the crop field borders and point rows which will shrink the productive capacity of the land. Real estate broker Meyer estimated that the reduction in tillable acres alone from

construction of the southern route would cost the Green brothers as much as $27,500 over the next twenty years. Edward Green testified that construction of an access road along the southern route through his farm also would create new drainage issues: "It changes the direction the water goes. It concentrates more water in the waterway instead of water flowing across the field when you get a heavy rain." Even when we take the cost of fencing out of the equation, the southern route's impact on the Greens' farming operation makes it less feasible than the northern route.

In interpreting the phrase "nearest feasible route" in section 6A.4(2), our supreme court emphasized the need for an individualized determination "that extends beyond a mere determination of which route is the easiest to construct without consideration of land acquisition costs." *Green*, 777 N.W.2d at 704. The court held: "In this instance, determining the 'nearest feasible route' of condemnation requires consideration of which route is easier to construct *and* which route will do less harm to the neighboring properties." *Id.* We agree with the district court's determination that the northern route will do less harm to the Greens' property and, in this instance, is the "nearest feasible route" to an existing public road.

AFFIRMED.