

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**DALE STERBENZ AND NORMA
STERBENZ**

APPELLANTS,

**v.
KANSAS CITY POWER AND LIGHT
COMPANY**

RESPONDENT.

DOCKET NUMBER WD71776
DATE: October 5, 2010

Appeal From:

Jackson County Circuit Court
The Honorable Michael W. Manners, Judge

Appellate Judges:

Division One: James M. Smart, Jr., Presiding Judge, Mark Pfeiffer and Cynthia L. Martin,
Judges

Attorneys:

James B. Jackson, Independence, MO, for appellants.

Walter M. Brown, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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STERBENZ,**

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v.

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No. WD71776

Jackson County

Before Division One Judges: James M. Smart, Jr., Presiding Judge, Mark Pfeiffer and Cynthia L. Martin, Judges

This case involves a suit by property owners against a utility for trespass damages following the installation of an underground utility line without an easement. Dale and Norma Sterbenz appeal from the trial court's judgment denying their motion for a new trial following the entry of a jury verdict in their favor against Kansas City Power and Light. The Sterbenzes' claim that the trial court erred in denying their motion for new trial because: (1) the jury award for a permanent easement was not supported by competent and substantial evidence in that it was outside the range of the evidence; (2) the jury award for a temporary easement was not supported by competent and substantial evidence in that it was outside the range of the evidence; (3) jury instructions five and six were improperly submitted to the jury as an affirmative defense of failure to mitigate was not supported by the facts in this case; and (4) the trial court improperly submitted the issue of attorney's fees to the jury.

REVERSED AND REMANDED.

Division One holds:

(1) Trespass actions against entities with the power of eminent domain are a unique subset of trespass actions. When an entity entitled to exercise the power of eminent domain ignores that power and trespasses upon private land, the landowner has an election of remedies. The landowner may seek an injunction; or he may sue in ejectment; or he may seek damages. If damages are sought, the landowner may either seek compensatory damages for inverse condemnation, or he may seek trespass damages.

(2) If recovery of trespass damages is the remedy elected in an action against an entity with the power of eminent domain, the measure of actual damages will vary depending on the nature of the trespass. If the trespass is of a temporary nature, the measure of actual damages is generally the cost of restoration and the loss of use. A recovery for permanent damage is not recoverable. Successive actions for temporary trespass damages may be brought. If the trespass is of a permanent nature, the measure of actual damages is the same as in condemnation--the diminished value of the property. The cost of restoration of the property to its original condition

(without the permanent trespass) is not the measure of damages. In such a case, only one cause of action for all and the entire damages is permitted. Punitive damages, nominal damages, other compensatory damages supported by the evidence and attorney's fees and costs (if permitted by statute) may be recovered in either a temporary or a permanent easement case.

(3) The underground electric line installed by KCP&L on the Sterbenzes' property was a "permanent" structure. The Sterbenzes were thus entitled to permanent trespass damages. Their actual damages were measurable by the difference in the value of their entire tract before and after the permanent trespass.

(4) Given the permanent nature of the trespass, the Sterbenzes' were not entitled to temporary trespass damages. The Sterbenzes were obligated to bring a single trespass action for all of their past, present, and future damages.

(5) The labels ""temporary easement" and "permanent easement" were not properly employed by the Sterbenzes.

(6) MAI 4.02 is the required damage instruction in cases involving property damages only, and is thus the proper damage instruction in a trespass case, though it will require modification.

(7) The jury's award for property damage was within the range of evidence.

(8) It was prejudicial error to submit instructions 5 and 6 on failure to mitigate damages due to the Sterbenzes' claimed refusal to permit KCP&L to remove the underground line. At the time of trial, KCP&L had sued the Sterbenzes for eminent domain, and the parties had stipulated that the utility line would *stay at the location where it was installed* and that the Sterbenzes, once paid their trespass damages, would deliver a written easement to KCP&L for the easement tract. Any notion that the utility line would ever be removed was no longer applicable. The effect of the mitigation instruction was to permit KCP&L to argue for a material reduction in the damages otherwise awardable to the Sterbenzes for the permanent trespass on their property, while permitting KCP&L to keep the utility line in place without compensation for the "taking."

(9) The Sterbenzes presented evidence regarding their attorney's fees to the jury. As such, the trial court did not abuse its discretion in refusing the Sterbenzes' request to withdraw the determination of attorney's fees from the jury's consideration as to permit the court to decide the issue.

Opinion by: Cynthia L. Martin, Judge

October 5, 2010

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