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IN THE
COURT OF APPEALS OF INDIANA

701 Niles, LLC
Appellant-Defendant,

v.

AEP Indiana Michigan
Transmission Company, Inc., et
al.,
Appellees-Plaintiffs.

July 7, 2022

Court of Appeals Case No.
21A-PL-2123

Appeal from the St. Joseph Circuit
Court

The Honorable John E. Broden,
Judge

Trial Court Cause No.
71C01-2003-PL-140

Altice, Judge.

Case Summary¹

- [1] AEP Indiana Michigan Transmission Company (AEP), a publicly regulated utility, filed a condemnation action against 701 Niles, LLC (701 Niles), seeking to obtain easements, by eminent domain, for AEP's underground electric transmission line (AEP's Line). 701 Niles acknowledged the public purpose of AEP's Line and did not object, but the parties could not agree on the amount of compensation. Thus, a panel of appraisers was appointed pursuant to statute.
- [2] During the appraisal process, 701 Niles discovered that AEP had entered into a memorandum of understanding (MOU) with the University of Notre Dame (the University) to allow the University to concurrently occupy the underground duct bank with the placement of a separate private transmission line. 701 Niles filed a motion to enjoin AEP from using the land for this private purpose. 701 Niles argued that placement of the University's line would constitute a separate and distinct use of the property and that a private easement for the University's benefit was constitutionally prohibited from being taken by eminent domain. AEP, on the other hand, argued that 701 Niles had waived any objection to the proposed easement and that the University's private use thereof would be incidental to the paramount public use and, therefore, not an unconstitutional taking.

¹ Oral argument was held at the Arthur M. Glick JCC in Indianapolis on June 7, 2022. We thank the staff and attendees for the warm welcome and commend counsel on the quality of their written and oral advocacy.

[3] Following a hearing, the trial court denied the injunction sought by 701 Niles. The trial court rejected AEP’s waiver argument but found that irrespective of whether the University was to also occupy the duct bank, AEP would still need the easements for the public purpose of installing and maintaining its transmission line. The court also found that 701 Niles had an adequate remedy at law – compensation for the taking related to the second line. 701 Niles now brings this interlocutory appeal.

[4] We reverse and remand.

Facts & Procedural History

[5] To meet its statutory obligation to furnish adequate, reliable electric services in St. Joseph County, AEP undertook the Mussel-Colfax Transmission Line Rebuild Project (the Project). The Project sought to upgrade the electric transmission system in the area and reduce the risk of extended power outages to the public. AEP ultimately determined that the Project, in relevant part, would require easements across three contiguous parcels of land owned by 701 Niles (the Land) for AEP’s Line.

[6] 701 Niles and AEP had engaged in discussions about the Project since at least early 2018 while the plan was being developed. Additionally, AEP represented to the public, through public meetings and information campaigns, that this was a public utility project, serving the public, for the public good.

[7] On or about December 23, 2019, AEP presented 701 Niles with a Uniform Easement Acquisition Offer, in which AEP offered \$75,875 for the needed

easements across the Land. When the parties could not reach an agreement, AEP filed the instant condemnation action on March 24, 2020, to obtain the easements by eminent domain. Each of the proposed permanent easements provided that 701 Niles grant to “AEP ... and its successors, assigns, lessees and tenants” an easement “for underground electric transmission, distribution, and communication lines and appurtenant equipment and fixtures, being in, on, over, under, through and across” the specifically described lands.² *701 Niles’s Appendix Vol. 2* at 28, 35, 39.

- [8] The trial court set a hearing on any objections to the complaint for August 21, 2020. Two days before the hearing, 701 Niles (and another defendant that was subsequently dismissed from the action) filed a motion to vacate the hearing and to appoint a panel of appraisers. Thus, 701 Niles elected not to file any objections to the complaint and to proceed with the statutory procedure for assessing damages due to the appropriation of the easements. The trial court vacated the hearing and appointed a panel of appraisers pursuant to Ind. Code § 32-24-1-7. On September 21, 2020, the panel took an oath and received instructions, which were later amended. The appraisal process proceeded over the next several months.

² The easements also specifically set out a number of rights granted to AEP including to “now or in the future [] construct, reconstruct, operate, maintain, alter, improve, extend, inspect, patrol, protect, repair, remove, replace, upgrade and relocate within the Easement Area all necessary and convenient facilities” *701 Niles’s Appendix Vol. 2* at 28, 35, 39.

[9] On April 7, 2021, the trial court issued an order indicating that the appraisers were seeking guidance on certain questions that were precluding them from completing their final submission. Accordingly, the court set a hearing for April 16 and instructed the appraisers to confer and submit their outstanding questions to counsel of record prior to the hearing. The appraisers submitted the following valuation dilemma:

The language of the easement includes the ability to construct, cause to construct, build above ground, etc. We understand clearly that **AEP at this time, does not have intentions to do so. The easement language as provided by the Court to the Appraisal Panel leaves a wide berth to do so.** If, in the future, the easement rights are transferred to an alternate owner(s), those entities may wish to install or construct anything that is addressed in the easement description. This leaves the door open for potentially significant damages to 701 Niles, LLC. Potential damage as of the effective date of the “take” could be anticipated by typical market participants.

If the easement holder’s rights can be made **more specific in the easement language**, or if they (AEP) execute a **Memorandum of Understanding** describing in detail that in the future, they (AEP), their heirs or successors shall **NOT** build above grade in this easement, ***our issue is resolved.***

AEP’s Appendix Vol. II at 19 (emphases in original).

[10] At the April 16 hearing, AEP proposed a stipulation to address the appraisers’ dilemma whereby the easements might be revised. The parties agreed to revise the easement language and submit related revisions and stipulations after the hearing. Thereafter, however, the parties were unable to reach an agreement

with respect to revisions. In light of the impasse, on May 11, 2021, AEP filed a motion for the trial court to direct the appraisers to proceed with their valuation of the easements as originally written even though, as AEP conceded, such might result in an award disproportionately in favor of 701 Niles.

[11] Also on May 11, 701 Niles filed a motion for direction from the court. 701 Niles indicated that during the parties' negotiations regarding revision of the easements, AEP disclosed that it intended to lease the easements to a third party. 701 Niles requested documents related to any such lease, which AEP refused to provide. Accordingly, 701 Niles requested that the court set a conference with the appraisers and the parties to address this issue.

[12] 701 Niles's filing made the basis of the parties' impasse clear. Since the April hearing, AEP had informed 701 Niles, for the first time, that it intended to allow the University to "share AEP's underground corridor for [the University's] hydro power project." *AEP's Appendix Vol. II* at 28. AEP agreed to revise the easements to clarify that above-grade use was not permitted and agreed to remove language that gave rights under the easements to AEP's lessees and tenants with the following proposed caveat: "Grantor expressly acknowledges and agrees that AEP may permit the University of Notre Dame to install and maintain its electric transmission facilities within the Easement Area, subject to the rights granted to AEP herein." *Id.* 701 Niles refused to agree to this revision without additional information regarding AEP's agreement with the University, which 701 Niles believed to involve "the

transmission of power from a private generating station to a third party's private facilities." *Id.* at 26.

[13] On May 12, AEP filed a response to 701 Niles's motion and indicated that it was unwilling to remove the "lessees and tenants" language, which had been set forth in the easements from the start and to which 701 Niles had not timely objected. 701 Niles filed its reply the following day and argued, among other things, that AEP's complaint had failed to put 701 Niles on notice of any intent to lease the easements to private third parties (as opposed to other public utilities in the area). Additionally, 701 Niles noted that AEP had chosen to condemn easements over the Land rather than a transfer of fee simple title.

[14] On June 21, 2021, the trial court held a hearing on 701 Niles's motion for direction from the court and then took the matter under advisement. That same day, 701 Niles filed its Motion to Enjoin Plaintiff from Using Defendant's Land for a Private Use (Motion to Enjoin). In its Motion to Enjoin, 701 Niles made the following three assertions, which it supported with detailed arguments:

1. AEP is barred by the Indiana Constitution from taking Defendant's property through [] eminent domain and using it for a private use;
2. AEP has breached the public trust by seeking to use the eminent domain Statute for its own economic benefit;
3. In contravention of Indiana law AEP is attempting to take additional property rights from Defendant without compensation.

701 Niles's Appendix Vol. 3 at 17. Additionally, 701 Niles asserted that construction of the University's private line would cause irreparable harm to 701 Niles for which there was no adequate remedy at law and that equitable relief was within the public's interest of limiting eminent domain proceedings to their intended uses. 701 Niles requested the entry of an order: (1) enjoining AEP from installing any private transmission line(s) on the Land; (2) allowing only public transmission lines; and (3) prohibiting AEP from depriving 701 Niles from the economic benefit of easement(s) with private third parties for use of the Land.

[15] 701 Niles appended a number of exhibits to its motion. Of particular note is the confidential MOU between the University and AEP, which was drafted by AEP on or about November 26, 2019 (that is, about one month before AEP issued the Uniform Easement Acquisition Offer to 701 Niles and four months before the complaint was filed) and executed by the University on December 4, 2019. The MOU indicates that both parties were undertaking projects that required "transmission lines to be constructed in a similar geographic area to achieve both organizations' individual objectives." *701 Niles's Appendix Vol. 3* at 33. According to the MOU, the project teams from both organizations had been working together since the spring of 2019 to identify the scope of work that AEP would include in the Project to accommodate the University's requirements and that the University had agreed to reimburse AEP for the actual costs incurred to complete the scope of work "that is being performed

specifically for [the University’s] needs.”³ *Id.* It was estimated that the University would pay \$699,934 in direct costs to AEP with a cap on recovery of the actual cost at \$750,000.

[16] Additionally, 701 Niles included the affidavit of David M. Matthews, a member of 701 Niles. Among other things, Matthews averred that the University had contacted 701 Niles in 2019 to negotiate an easement across the Land for an electric transmission line. In early 2020, however, the University informed 701 Niles that it wished to “pause negotiations ... until [the University] knew the path for its transmission line.” *Id.* at 44. According to Matthews, 701 Niles was “completely unaware” of any agreement between AEP and the University at the time and believed the University would resume negotiations as its project progressed. *Id.* at 45.

[17] On June 28, 2021, the trial court issued an order directing the appraisers to proceed with their valuation “with the knowledge and understanding that the Easement at issue involves nothing above grade but is all at or below grade.”⁴ *AEP Appendix Vol. II* at 85. Thereafter, upon motion of 701 Niles, the trial court issued an order on July 6, correcting a mistake in the June 28 order by striking

³ The scope of work exclusively for the University’s needs included nearly 22,000 linear feet of 3” conduit, 10-12 manholes, and extra concrete, flowable fill, excavation, and pavement repair due to the “extra width for [the University’s] ducts.” *Id.* at 34.

⁴ The court expressly indicated in its order that the Motion to Enjoin was not yet ripe for decision and remained pending.

“any reference to the limitation of AEP’s use to ‘at or below grade.’” *Id.* at 86. The court directed the appraisers to file their report by August 6, 2021.

[18] In the meantime, on July 1, 2021, AEP filed a response to the Motion to Enjoin.⁵ AEP argued that 701 Niles could not demonstrate a reasonable likelihood of success at trial because the University’s private use of the easements was not a prohibited taking, as the concurrent use was incidental to AEP’s paramount public use. Additionally, AEP argued that 701 Niles had waived any objection to the taking and had failed to show that its remedies at law were inadequate.

[19] 701 Niles filed a reply in support of the Motion to Enjoin on July 7, 2021. 701 Niles made clear that it had no objection to AEP’s Line and that its only objection was to the University’s separate, private line, which was a distinct, unconstitutional taking under Indiana law, any reference to which was entirely absent from AEP’s complaint.

[20] On August 18, the trial court held a hearing on the Motion to Enjoin at which no additional evidence was presented. Thereafter, on August 27, 2021, the trial court entered its order denying the Motion to Enjoin. Based on the parties’

⁵ AEP also filed the affidavit of Richard Bellis, the Associate Vice President for Finance, Treasury Services at the University. Bellis averred that he was the primary person responsible for real estate matters at the University and that he had not spoken with 701 Niles on or after December 2019 regarding the University acquiring an easement over the property of 701 Niles. Further, he was not aware of any other representative of the University having such conversations.

submissions to the court with their various pleadings, the trial court made the following findings:

A) Both parties agree that AEP's proposed condemnation for the easement to construct [AEP's Line] is for a public purpose. B) The Court finds that irrespective of whether the University or another prospective assignee or lessee were to occupy the Easements in question, AEP would still need the Easements to proceed with the Muessel-Colfax Project and construct the underground duct bank and install and maintain the transmission line within the Easements.

701 Niles's Appendix Vol. 2 at 18. The court then concluded:

While the Court is not particularly persuaded by AEP's arguments focused on waiver and the like, the Court is nonetheless persuaded by [AEP's] arguments that 701 Niles has not met its burden of establishing that its remedies at law are inadequate and that it will suffer irreparable harm during the pendency of this action. Ultimately, the Court concurs with the precedent cited by AEP that where the public use of the taking in this instance is primary and paramount, the use of eminent domain will not be defeated by the fact that there are possible incidental, secondary private benefits. *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N.E. 406, 408 (1911). Further, 701 Niles does have an adequate remedy at law and that is to have damages assessed on the basis of the easements to be acquired. There is still ample time and opportunity for 701 Niles to be fully and adequately compensated for any such taking related to the so-called "second line". Where the movant seeking a preliminary injunction can be made whole for its economic injury, then a preliminary injunction is indeed not warranted.

Id. at 18-19 (citation omitted).

[21] 701 Niles now brings an interlocutory appeal of the denial of its Motion to Enjoin. Additional information will be provided below as needed.

Standard of Review

[22] 701 Niles appeals from the trial court’s denial of a preliminary injunction, which we review for an abuse of discretion. *Heraeus Med., LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 152 (Ind. 2019). “An abuse of discretion can occur under various circumstances, including when the trial court misinterprets the law.” *Id.* To the extent our analysis depends on the trial court’s interpretation of a purely legal question, we afford that matter de novo review. *Id.*

Discussion & Decision

[23] Generally, to obtain a preliminary injunction, the moving party must demonstrate the following four elements by a preponderance of the evidence:

(1) there exists a reasonable likelihood of success at trial; (2) the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (3) the threatened injury to the movant outweighs the potential harm to the nonmovant from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction.

State v. Econ. Freedom Fund, 959 N.E.2d 794, 803 (Ind. 2011), *cert. denied*.

“Failure to prove any one of these requires denying the injunction.” *Leone v. Comm’r, Ind. Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1248 (Ind. 2010).

- [24] In this case, the trial court denied the injunction based on the first two requirements listed above. Thus, these are the only requirements addressed by the parties on appeal.
- [25] 701 Niles’s argument is rather straightforward: The University’s contemplated private use of the Land would not be incidental to AEP’s public use and would constitute an unconstitutional taking. In other words, 701 Niles contends that AEP’s Line and the University’s private line constitute two separate, distinct sets of easements and that only the former may be obtained by condemnation. Further, because property rights are unique, 701 Niles argues that there is not an adequate remedy at law for an unconstitutional taking.
- [26] Article 1, section 21 of the Indiana Constitution provides in relevant part: “No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.” This provision has long been held to mean “not only that compensation must be given for a condemnation for a public purpose, but also that private property may not be taken for a private purpose.” *Cont’l Enter., Inc. v. Cain*, 387 N.E.2d 86, 90 (Ind. App. 1979); *see also Pulos v. James*, 302 N.E.2d 768, 771 (Ind. 1973).
- [27] 701 Niles does not dispute that AEP is a publicly regulated utility entrusted with the power to forcibly take private property rights for public use under Ind. Code § 32-24-4-1. Such eminent domain powers, however, are not unlimited, and a private property owner such as 701 Niles has a “right constitutionally to defend against subterfuge and bad faith in the seizure of his property, and may

show that it is not to be applied to the public purpose and use as alleged.”

Derloshon v. City of Fort Wayne on Behalf of Dep’t of Redevelop., 234 N.E.2d 269, 271 (Ind. 1968). Further, I.C. § 32-24-4-1(b) limits a utility’s eminent domain powers to “accommodations, rights, and privileges *necessary to accomplish the use for which the property is taken.*” *Id.* (emphasis added).

[28] “The purpose for which private property is condemned is the very basis of the right to condemn.” *First Nat’l Bank of Mishawaka v. Penn-Harris-Madison Sch. Corp.*, 231 N.E.2d 238, 240 (Ind. 1967) (quoting *Kessler v. City of Indianapolis*, 157 N.E. 547, 549 (Ind. 1927)); *see also Wymberley Sanitary Works v. Batliner*, 904 N.E.2d 326, 334 (Ind. Ct. App. 2009) (“The power of eminent domain may be exercised only for public use.”), *trans. denied*. In determining said purpose, the court’s inquiry is not limited to the purported purpose.

[29] I.C. § 32-24-1-4(b) requires a condemnation complaint to set out, among other things, “[t]he use the plaintiff intends to make of the property or right sought to be acquired.” Here, in seeking condemnation of the easements, AEP alleged in the complaint only one purpose, a public one, to “upgrade and improve the electric transmission system in St. Joseph County, Indiana (“Project Area”), and specifically to increase reliability and reduce the risk of extended power outages in the Project Area.” *701 Niles’s Appendix Vol. 2* at 20-21. AEP alleged that it was pursuing these upgrades to “meet its statutory obligation to furnish adequate, reliable service” and that the easements were required to “construct its electric transmission line in connection with the Project.” *Id.* In the

complaint, AEP made no mention of any intention to allow the University to also use the Land for its separate private line.

[30] On appeal, AEP argues, as it did unsuccessfully below, that 701 Niles waived any objection to the University also occupying the duct bank because 701 Niles failed to follow the statutory procedures for objecting to the condemnation proceedings.⁶ AEP suggests that 701 Niles was on notice of potential concurrent uses by private parties because each of the proposed easements indicates that the rights were being granted to AEP “and its successors, assigns, lessees and tenants.” According to AEP, the onus was on 701 Niles to conduct discovery to identify any intended lessees or tenants and their potential uses of the property and to timely object to the complaint if needed.

[31] We reject AEP’s waiver argument. Waiver is the intentional relinquishment of a known right, which requires both knowledge of the right and intention to relinquish it. *See Pohle v. Cheatham*, 724 N.E.2d 655, 659 (Ind. Ct. App. 2000).

⁶ Ind. Code § 32-24-1-8 provides in relevant part:

- (a) A defendant may object to the proceedings:
 - (1) because the court does not have jurisdiction either of the subject matter or of the person;
 - (2) because the plaintiff does not have the right to exercise the power of eminent domain for the use sought; or
 - (3) for any other reason disclosed in the complaint or set up in the objections.
- (b) Objections under subsection (a) must be:
 - (1) in writing;
 - (2) separately stated and numbered; and
 - (3) filed not later than thirty (30) days after the date the notice required in section 6 of this chapter is served on the defendant. However, the court may extend the period for filing objections by not more than thirty (30) days upon written motion of the defendant.

The condemnation complaint did not put 701 Niles on notice of any intended use of the Land by a private party. AEP asserted only a public use, of which 701 Niles had no objection, and secreted its MOU with the University. Under the circumstances, 701 Niles did not knowingly waive any objections to the University's third-party use of the Land for a wholly private purpose.

[32] Aside from waiver, AEP contends that the University's concurrent use of the Land is permitted under Indiana Law. The trial court agreed with AEP and explained, "where the public use of the taking in this instance is primary and paramount, the use of eminent domain will not be defeated by the fact that there are possible incidental, secondary private benefits." *701 Niles's Appendix Vol. 2* at 18.

[33] The trial court cited *Westport Stone Co. v. Thomas*, 94 N.E. 406, 408 (Ind. 1911), which dealt with the condemnation of a right of way for a lateral railroad to connect a quarry to an existing railroad. The question before the Court was whether the particular use was public or private. The Court observed that "property can only be taken for public use" and explained:

It has been held ... that the test as to whether a use is a public or a private one is, not simply how many persons actually use the way condemned for the purpose for which it is condemned, but whether the public has the right to its use without discrimination. The fact that the construction of such lateral railroad may or will subserve a private interest does not change the character of the use from a public use to a private one. As has been said: The mere fact that the primary purpose of lateral railroad is to accommodate a particular private enterprise is not a controlling test. The character of the use, whether public or private, is to be

determined by the extent of the right of the public to use it, and not by the extent to which the right is or will be used.

Id. at 408 (internal quotations and citations omitted). Considering applicable “railroad law,” the Court observed that by statute, when the appellant quarry “accepts and exercises the power of eminent domain ... it thereby impliedly agrees that said lateral railroad shall be open to the public to be used on equal terms by all who may at any time have occasion to use it, not merely by permission, but by right, even if the complaint in the condemnation proceeding were silent upon this subject.” *Id.* at 409. In rejecting the landowner’s claim that the use was private because the lateral railroad would only be used privately for transporting stone, the Court explained, “the lateral railroad being open to the public upon equal terms as of right, the same is a public use for which land may be condemned under the power of eminent domain, even though the number who require its use may be small.” *Id.*

[34] AEP argues that *Westport* is “analogous” to the instant case because AEP is seeking to acquire easements in which it will construct an underground duct bank for its electric transmission line in order to supply the public with electric service. *Appellee’s Brief* at 27. But we find *Westport* distinguishable, as it dealt with a single lateral railroad that public and private parties alike had the same right to use. Unlike the physical railroad in *Westport*, this case does not involve a concurrent use of the public line (that is, AEP’s Line). Rather, an entirely

separate line will be installed⁷ (and will separately need to be maintained) for the University's sole private use and benefit.

[35] AEP also directs us to *First Nat'l Bank of Mishawaka v. Penn-Harris-Madison Sch. Corp.*, 231 N.E.2d 238 (Ind. 1967), where a school corporation sought to condemn property for a new school building site. The appellants objected because the proposed school was to be constructed by a private corporation and leased to the school before eventually reverting back to the school corporation. The Court noted the general, well-settled rule that “the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the power.” *Id.* at 240. Stated differently, “the controlling question is whether the paramount reason for the taking of the land to which objection is made is the public interest, to which benefits to private interests are merely incidental.” *Id.* In rejecting the appellants' argument, the Court held that “the land was being condemned by a duly organized school corporation for educational purposes” and that “the intervention of a private leasing corporation should not thwart an endeavor to condemn land for a public purpose.” *Id.* In other words, the potential financial

⁷ The MOU reveals that additional materials will be installed on the Land to accommodate the University's scope of work, which will include, among other things, additional manholes, wider ducts, and extra concrete and fill. The private line will also require additional excavation and pavement repair.

benefit to the private company was merely incidental to the paramount public purpose of acquiring a new school site.

[36] In the case at hand, however, AEP did not seek to condemn the Land in fee simple but rather sought only easements for its public electric transmission line. And AEP candidly acknowledged at oral argument that its arrangement with the University to install the separate line within the duct bank did not in any way further AEP's mission in transferring electric services to its customers.

[37] We agree with 701 Niles that there is nothing incidental about the University's potential use of the Land. The University's private line would be distinct from AEP's use and separable without any established burden to the public interest. Further, illustrating that the University's use is an additional and distinct encroachment on the Land is that the University's private line requires extra construction materials and the installation of additional manholes, and AEP acknowledges that the University will inevitably need to traverse the Land for ongoing service and repairs of the underground line.

[38] Under these circumstances, where the distinct public and private uses can be so easily separated without any harm to the public interest, the condemnation proceedings can be allowed only as to the public use. *See Kessler*, 157 N.E. at 550 (observing that "where the public and private purposes may be separated ... the proceeding may be permitted to be taken as to that part which is public in character"). In other words, the University cannot be allowed to piggyback on the easements acquired by AEP through the power of eminent domain and

install an entirely separate line on the Land, which is private and offers no material benefit to the public. *See id.* at 449 (“The power of eminent domain may be exercised only for public purposes and not for a private purpose, and the taking of private property for a private use violates the constitutional rights of the owner.”). To obtain such rights over the Land, the University must privately negotiate with 701 Niles for the needed easements.

[39] Finally, we reject any notion that 701 Niles had an adequate remedy at law to address the unconstitutional taking of its property rights for the University’s private line.

A legal remedy is adequate only where it is as “plain and complete and adequate-or, in other words, as practical and efficient to the ends of justice and its prompt administration-as the remedy in equity.” *McKain v. Rigsby*, 250 Ind. 438, 237 N.E.2d 99, 103 (1968). The trial court has a duty to determine “whether the legal remedy is as full and adequate as the equitable remedy.” *Id.* However, a party which suffers “mere economic injury” is not entitled to injunctive relief because an award of post-trial damages is sufficient to make the party whole. *Xantech Corp. v. Ramco Indus., Inc.*, 643 N.E.2d 918, 921 (Ind. Ct. App. 1994). This is true because the ability to obtain damages, in the form of a money judgment for economic injury, represents an adequate remedy at law.

Daugherty v. Allen, 729 N.E.2d 228, 235 (Ind. Ct. App. 2000), *trans. denied*.

[40] At oral argument, AEP effectively abandoned its adequate-remedy-at-law argument by acknowledging that injunctive relief is the appropriate remedy for an unconstitutional use of eminent domain power. Indeed, looking to whether

there is an adequate remedy at law – that is, financial compensation for an unconstitutional taking – turns eminent domain law on its head.

[41] In sum, we conclude that the University’s private line is separate and distinct from AEP’s Line and placement of each on or through the Land constitutes the taking of a separate property right from 701 Niles. The public one – AEP’s Line – may constitutionally proceed while the private one – the University’s line – must be enjoined. On remand, the trial court is directed to enter an order enjoining AEP from installing the University’s line to the duct bank without 701 Niles’s express consent.

[42] Judgment reversed and remanded.

Robb, J. and Molter, J., concur.