

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-002232-MR

BOBBY JOE BASHAM  
AND DOROTHY BASHAM

APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NO. 07-CI-00974

THE CITY OF BOWLING  
GREEN, KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Warren Circuit Court finding in favor of the appellee, the City of Bowling Green, Kentucky (the City) in a dispute over the purchase of property by the City from appellants, Bobby Joe and Dorothy Basham. For the reasons that follow, we affirm the decision of the trial court.

## BACKGROUND INFORMATION

The Bashams owned property in Bowling Green, Kentucky. They owned a total of four tracts, each purchased on different occasions. Three of the tracts were located adjacent to one another on College Street. The property was purchased by the Bashams at an auction from two separate parties and the Bashams took title to the properties by two separate source deeds. The property fronting on College Street (the Cummings lot”) was transferred by deed from James Cummings and recorded in the Warren County Clerk’s Office in Deed Book 600, Page 819; the rear or flag shaped property (the “Brown lot”) was transferred by deed from the Brown Estate and recorded in the Warren County Cclerk’s Office in Deed Book 600, Page 821. The fourth tract was located on State Street, also in Bowling Green. The Bashams conducted a wrecker service beginning in 1988 at 339 College Street and continuing until the purchase of the property by the City. The Basham’s son, Jeff, operated an automobile repair business through August 2005 at 337 College Street.

The City approached the Bashams in 2004 about purchasing the College Street property at 337 and 339 for the erection of a Recreation Center. An appraisal was made of both 337 and 339 College Street by Leigh Ann Duncan Parkinson. At the time of the appraisal, Dorothy accompanied Parkinson as she examined the properties. Parkinson took photographs of the garage located at 339 College Street. Dorothy also provided Parkinson with a hand-drawn diagram of the garage. The trial court found that Parkinson’s appraisal was based upon both

the Brown and Cummings lots located at 339 College Street for a total of \$133,500. She valued the property located at 337 College Street at \$85,500, so the two properties together were valued at \$219,000.

The City sent a letter to the Bashams with an offer to purchase the properties for \$219,000 plus relocation benefits. The parties eventually agreed to a purchase price of \$260,000 plus the actual cost of the relocation of the Bashams' business. As a result of the agreement, the City's attorney, Gene Harmon and his paralegal, Tammy Wethington, drafted a "Real Estate Sale and Purchase Agreement/Relocation Agreement" (the Purchase Agreement). This agreement set forth that the City would purchase the property located at 337 and 339 College Street from the Bashams. The Purchase Agreement then specifically set forth the Deed Book and Page Numbers for 337 College and the Cummings lot located at 339 College Street. The Brown lot, also located at 339 College Street and purchased separately by the Bashams, was not specifically mentioned by Deed Book and Page Number.

After the Purchase Agreement was entered into (May 2, 2005), a closing was held (May 11, 2005) and the construction of the Recreation Center was completed on the site. The Bashams remained in possession of the properties through August 1, 2005, in order to allow a sufficient amount of time to relocate their business. The Bashams moved equipment, business records, tools, and furniture from the garage located on the Brown lot to their new business location.

They also removed vehicles which were stored on the Cummings lot as well as the fencing that surrounded it.

Based upon eight written requests for reimbursement of costs associated with the relocation of their business, the City paid an additional \$172,819.29 either to or on behalf of the Bashams. After demolition of the garage, the City also performed environmental clean-up on the site at an additional cost of over \$55,000. The cost of building the Recreation Center was over 3 million dollars. At no time during the relocation of the business, demolition and clean-up nor the construction of the Recreation Center did the Bashams assert any type of ownership over the tract at 339 College Street.

In June of 2007, an engineer conducted a survey of the facility and determined that the deed did not specifically describe the Brown lot in the conveyance of the two properties. Dorothy was then contacted by Wethington, who requested she come sign a deed of correction. Dorothy thereafter contacted her attorney and the next day the City received a letter from her attorney asserting that the Bashams were the owners of the Brown lot and that they were willing to sell or lease the property to the City.

The Bashams brought a declaratory judgment action in the Warren Circuit Court for enforcement of the Purchase Agreement and Deed. The court held a bench trial and made the following findings of fact:

Despite Dorothy Basham's testimony to the contrary, the Bashams' actions indicate they also believed that they had conveyed the entirety of 339

College Street to the City. There was never any discussion before or at the closing of the Bashams retaining any portion of their property at 339 College Street. Following the closing, the Bashams proceeded to move all of their property (including built-in bookshelves) from the garage and then gave the keys to the building to the City and did not protest when the City tore the building down. The Bashams' relinquishment of possession coupled with their silent acquiescence to the City's exercise of dominion over the Brown Lot clearly indicates that the Bashams believed they had conveyed the Brown Lot to the City. Additionally, the application for and receipt of relocation benefits in excess of \$172,000, for moving Bashams Wrecker Service from 339 College Street confirms the Bashams' intent to convey to the City the property where their garage was located—i.e., the Brown Lot.

The trial court then concluded that the Purchase Agreement and Deed were ambiguous. As a result of this conclusion, the court went on to hold that:

Because the Purchase Agreement and deed are ambiguous, this Court may consider all of the circumstances surrounding the transaction to aid its interpretation of the parties' intent. . . . The Court concludes that the parties mutually intended to convey all of the Bashams' property located at 339 College Street.

The Bashams then brought this appeal of the trial court's decision.

#### STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of witnesses.” A judgment is not “clearly erroneous” if it is “supported by substantial evidence[.]” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Substantial evidence is “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) quoting *O’Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466, 468 (Ky. 1960).

“The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court. *First Commonwealth Bank of Prestonsburg v. West.*, 55 S.W.3d 829, 835 (Ky. App. 2000). *Hibbitts v. Cumberland Valley Nat. Bank & Trust Co.*, 977 S.W.2d 252, 254 (Ky. App. 1998). Questions of law are subject to *de novo* review. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. 2001). With these standards in mind, we examine the appellants’ arguments.

## DISCUSSION

The Bashams begin their appeal with the argument that the trial court erred in its refusal to apply the law of inverse/reverse condemnation to the proceedings. They argue that when a “taking” has already occurred, a property owner may get compensation through an inverse or reverse condemnation action. The City, of course, argues that there is no need for such an action since it already purchased the property.

As set forth above, the trial court held that there was an ambiguity in the Purchase Agreement and Deed. We agree. “Any contract or agreement must be

construed as a whole, giving effect to all parts and every word in it if possible.”

*City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986). In the present case, the Purchase Agreement set forth as follows:

WHEREAS, Sellers are the fee simple owners of certain real property located at 337 College Street and 339 College Street, Bowling Green, Kentucky (the “property”); and

WHEREAS, Sellers desire to sell and Buyer desires to purchase the property, subject to the terms and conditions more particularly set forth herein; and

WHEREAS, Tenant is made a party to this Agreement due to Tenant’s eligibility for relocation assistance,

NOW THEREFORE, in consideration of the premises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, Sellers, Tenant and Buyer do hereby agree as follows:

1. Upon the terms and conditions set forth herein, Sellers agree to sell and Buyer agrees to purchase for the sum of \$260,000.00, payable as set forth below, the property acquired by deed recorded in deed book 708, page 324, and deed book 600, page 819, (hereinafter collectively referred to as the “property”).

Purchase Agreement at 1.

The first reference to the “property” is set forth as that property located at 337 and 339 College Street. Section 1, however, sets forth a second definition of the “property” which is the property described in deed book 708, page 324 and deed book 600, page 819. The second description does not include the property

recorded in deed book 600, page 821. We agree with the trial court that this is an ambiguity within the Purchase Agreement and subsequent Deed.

“Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002) (Citations omitted). “A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *Id.* (Citations omitted). We find that a reasonable person reviewing the Purchase Agreement would find that the two different definitions of “property” could be interpreted inconsistently. Thus, we agree with the trial court that the Purchase Agreement and Deed were ambiguous and must now determine the intent of the parties. “[O]nce a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues[.]” *Id.* Thus, as set forth above, we will not overturn factual findings of the trial court unless they are clearly erroneous.

In *Hoskins Heirs v. Boggs*, 242 S.W.3d 320, 327-28 (Ky. 2007), the Kentucky Supreme Court held that:

It is generally recognized that where a deed contains both a general and a particular description and contains no language indicating which description shall prevail, the general must yield [to] the particular. On the other hand, where it is manifest from the entire instrument that the general description, in view of the facts and circumstances surrounding the transaction, most clearly



reflects the intention of the grantor, the construction will be adopted which gives it full effect. . . .

Moreover, “[i]n determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution, and courts may also consider the acts of the parties following the conveyance.” Then, if the ambiguity is not resolved by extrinsic evidence of the parties’ intentions, “[t]he rule is . . . well settled that the deed will be construed most strongly against the grantor and in favor of the grantee if it admits of two constructions. (Internal citations omitted).

In this case, the circumstances surrounding the execution of the Purchase Agreement and Deed indicate that the City was interested in purchasing all tracts of property owned by the Bashams located at 337 and 339 College Street. The appraisal included all tracts and the purchase price of the property was more than the appraised value.

While Dorothy asserted that she was not aware the appraisal was for all three tracts, the evidence at trial indicated that she walked with the appraiser through the garage and even gave her a hand-drawn diagram of the garage. The Bashams completely moved their business from the all three lots, removed fences and allowed the City to perform environmental clean-up on the property. The construction of the three million dollar Recreation Center was allowed to take place without any indication from the Bashams that they were the owners of the Brown lot property.

There is nothing to indicate that the Bashams were unaware of the activities of the City, in fact, Dorothy stated that they decided not to say anything because

they were concerned the City would stall the permit process on the new business location. She points to nothing, however, which would indicate these fears were founded.

The trial court also weighed the fact that the Warren County PVA had combined the tax bills for the Brown and Cummings lots after the Bashams had purchased the property in finding that the general description of “property” was the appropriate one in this case. Other than the testimony of the Dorothy Basham, there is no indication from any actions between the parties that the Brown lot was not included in the purchase price. It was not until the City asked Dorothy to sign the Deed of Correction that the Bashams made a demand on the City for further payment on the Brown lot.

We agree with the trial court that the Purchase Agreement and Deed were ambiguous with regard to the definition of “property”. We also hold that the trial court did not err in finding that the Brown lot was meant to be included in the purchase of 337 and 339 College Street by the City from the Bashams. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANT:

Matthew J. Baker  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

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ORAL ARGUMENT FOR  
APPELLEE:

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