

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001066-MR

BHASKAR PATEL and JAMINI PATEL

APPELLANTS

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 96-CI-000105

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: JOHNSON, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Bhaskar and Jamini Patel (the Patels) appeal from a summary judgment issued by the Rockcastle Circuit Court in favor of the Transportation Cabinet, Department of Highways (the Cabinet). We reverse and remand for further proceedings.

In May 1989, the Patels erected a billboard on a tract of land they leased, located in Rockcastle County on the east side of Interstate 75 south, at the Mount Vernon-Livingston exit. The billboard advertised the "Holiday Motel," owned and operated

by the Patels. Several years later, in April 1996, the billboard was damaged by a severe thunderstorm. It appears from the record that on April 25, 1996, the Patels hired William Hammons to repair it, paying him \$500 that day and an additional \$1800 on May 2, 1996.¹

Meanwhile, on April 23, 1996, following the storm, Joe Rogers, program coordinator for the permits branch of the Cabinet, drove Interstate 75 in Rockcastle County to ascertain the damage done to billboards along that route. He reported the damage suffered by the Patels' billboard to Brent Wilson, a permits inspector for the Cabinet. Wilson traveled to the site where the billboard is located and, evidently from the vantage point of the interstate, photographed it. The record reflects a letter from a Cabinet engineer, dated April 26, 1996, and addressed to the Holiday Motel, P.O. Box 336, Mt. Vernon, stating, in part, as follows:

Dear Sir:

During a field inspection on April 23, 1996 at the above referenced location, it was discovered that an advertising device leased by you and owned by Ruth Potter was destroyed by a storm.

In accordance with KRS 177.830-177.890 you are hereby notified that the destroyed advertising device cannot be reconstructed or repaired.

On May 2, 1996, the Cabinet filed a complaint against the Patels for injunctive relief, alleging that although the billboard had been a legal nonconforming advertising device prior

¹The actual date of repair is not made clear from the record.

to the storm, the billboard had been "destroyed" by the storm, as that term is used in the Cabinet's administrative regulations, and was rendered illegal. The Cabinet asked the court to issue a permanent injunction ordering the Patels to remove the billboard from the site, and fined each of them \$500. In October 1996, the Cabinet filed a motion for summary judgment.

By way of order entered February 20, 1997, the trial court found that the evidence established the Patels' billboard had been "effectively destroyed in excess of fifty per cent (50%)," and that, as such, the billboard was now illegal and must be removed by the Patels. The court granted summary judgment in favor of the Cabinet. In April 1997, by way of response to a CR 59 motion filed by the Patels, the trial court found an alternative basis upon which to support summary judgment in favor of the Cabinet. It found the billboard had been subjected to more than routine maintenance, and that under 603 KAR 3:080 § 3(5), the billboard must be removed. We disagree.

We are mindful of the standard by which we are to review the trial court's summary judgment:

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Furthermore, the trial court must view the evidence in a light most favorable to the party opposing the summary judgment motion, and summary judgment should be granted only if it "appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor."

Leslie v. Cincinnati Sub-Zero Prod., Inc., Ky. App., 961 S.W.2d 799, 804 (1998) (citations omitted).

On appeal, the Patels argue the trial court did not have before it evidence sufficient to determine their billboard had been "destroyed," as that term is used in the Cabinet's regulations. As such, they maintain, there are genuine issues of material fact which must be addressed prior to any such determination. We agree.

The Cabinet acknowledges that in 1990, due to regulatory changes, the Patels' billboard became a legal nonconforming advertising device. However, the Cabinet alleges, the billboard was destroyed in April 1996, rendering it illegal. For purposes of review, the applicable regulation in this case is 603 KAR 3:080 § 3(3)(a)-(e) addressing those conditions under which a legally nonconforming billboard may remain on-site:

An off-premise nonconforming advertising device may continue to exist until just compensation has been paid to the owner, only so long as it is:

(a) Not destroyed, abandoned or discontinued;

(b) Subjected to only routine maintenance;

(c) In conformance with local zoning or sign or building restrictions at the time of the erection; and

(d) In compliance with the provisions of Section 4(3) of this administrative regulation and KRS 177.863.

(e) Performance of other than routine maintenance on a nonconforming device shall cause it to lose its status and to be classified as illegal.

In its summary judgment, the trial court determined the Patels' billboard had been "destroyed" and, as such, could no

longer exist on the property. "Destroyed" is defined in the 1995 regulations, still in effect in April 1996 when the billboard was allegedly destroyed, as follows:

"Destroyed" means that the advertising device has sustained damage by any means in excess of sixty (60) percent of the depreciated replacement cost. The damage is such that to be structurally and visually acceptable, one (1) or more of the following remedies is essential:

- (a) Adding guys or struts;
- (b) Adding new supports or poles by splicing or attaching to existing supports;
- (c) Adding separate new auxiliary supports or poles;
- (d) Adding new or replacement peripheral or integral structural bracing or framing; or
- (e) Adding new or replacement panels or facings.

603 KAR 3:080 § 1(12).

Effective August 1996, several months after the Patels' billboard was damaged, the Cabinet revised the above regulation, redefining a "destroyed" billboard as one which has "sustained damage by any means in excess of fifty (50) percent of the entire advertising device which includes supports, poles, guys, struts, panels, facing, and bracing."

The trial court in this case, when it granted summary judgment in favor of the Cabinet, found that the evidence established the Patels' billboard had been "effectively destroyed in excess of fifty per cent (50%)." However, the court expressed no opinion whether the billboard had sustained damage to the extent set forth in the 1995 regulation, i.e. whether it had

sustained damage in excess of sixty percent (60%) of the depreciated replacement cost. In fact, there is no evidence in the record addressing, or establishing, the billboard's depreciated replacement cost. Thus, it would appear the trial court erroneously reviewed the case pursuant to, and ultimately applied, the 1996 version of 603 KAR 3:080, as opposed to the 1995 regulation, which was in effect at the time the Patels' billboard was damaged.

As such, we believe there exists a genuine issue of material fact concerning the amount of damage sustained by the Patels' billboard, rendering the case inappropriate for summary judgment at this stage of the proceedings. Further, pursuant to 603 KAR 3:080 § 1(12), once the amount of damage is ascertained, the remedial measures needed must be reviewed to determine whether any of those identified are "essential" to render the billboard structurally and visually acceptable. It is not clear from the evidence in the record precisely what repairs William Hammons made to the Patels' billboard. Thus, we find another issue which must be addressed prior to the trial court's consideration of summary judgment.

In response to the CR 59 motion filed by the Patels, the trial court upheld its ruling that the billboard had been destroyed and was subject to 603 KAR 3:080 § 3(3)(a) requiring removal of nonconforming billboards if they have been "destroyed, abandoned or discontinued[.]" However, the court found an additional, and alternative, basis upon which to grant summary judgment. Based upon a copy of the work order executed by the

individual who repaired the billboard after it was damaged,² the court found the billboard was subject to 603 KAR 3:080 § 3(3) (e) requiring removal of nonconforming billboards when they have been subjected to other than "routine maintenance."³

"Routine maintenance" is defined in 603 KAR 3:080 § 1(30) as:

(a) The maintenance of an advertising device which is limited to replacement of nuts and bolts, nailing, riveting or welding, cleaning and painting, or manipulating to level or plumb the device;

(b) The routine change of message; and

(c) The fixing of existing panels or facings at a location other than that of the advertising device.

(d) Routine maintenance shall not mean:

1. Adding guys or struts for the stabilization of the device or substantially changing the device; or

2. Replacement of panels or facings or the addition of new panels or facings[.]

We believe that any analysis of this case under the "routine maintenance" provisions of the regulations is inappropriate. This case does not involve a billboard which, due to neglect, has fallen into a state of disrepair such that something more than routine maintenance is needed. It is not the

²The work order executed by the repairman, William Hammons, stated: "William Hammons will furnish 1 post and about 10 broken boards, plus paint and letters for damaged plywood, 12 bags of concrete to go around posts. He is to furnish plywood for sign."

³603 KAR 3:080 § 3(3) (e): "Performance of other than routine maintenance on a nonconforming device shall cause it to lose its status and to be classified as illegal."

Patels' maintenance of their billboard which is at issue, but rather, their repair of it once it had been damaged.

The proper question is whether the billboard was damaged to such an extent it was effectively "destroyed" or, on the other hand, whether the billboard sustained sufficiently minimal damage such that the Patels may be allowed to repair it. In fact, by the very manner in which the term "destroyed" is defined, the regulations contemplate the situation in which the owner will be allowed to repair a damaged billboard, i.e. (1) if the damage is less than sixty percent (60%) of the billboard's depreciated replacement cost; and, (2) if certain remedial actions (as they are identified in the regulations) are not essential to render the billboard structurally and visually acceptable. However, it stands to reason that where the billboard has been merely damaged, not destroyed, it may nonetheless be "repaired," perhaps beyond the scope of "routine maintenance," as that term is defined in the regulations, but not to the extent necessary to repair a billboard which has been effectively destroyed.

For this reason, we believe that under the facts of this case, whether the billboard has been subjected to other than "routine maintenance" should not have been used as alternative means by which to determine whether the Patels' billboard must be removed from its site. Thus, on remand, the trial court need focus solely on the question whether the billboard was "destroyed," as that term is defined in the 1995 regulations. If it was not, we believe the Patels were entitled to repair the

billboard and, then, continue to maintain it within the scope of the regulation's routine maintenance provisions.

For the foregoing reasons, we reverse the judgment of the Rockcastle Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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