

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002811-MR

WILLIAM LEWIS COLLINS, INDIVIDUALLY;  
WILLIAM LEWIS COLLINS, AS  
CO-EXECUTOR OF THE ESTATE OF  
JOANNE LEWIS COLLINS;  
SAM COLLINS III, INDIVIDUALLY;  
SAM COLLINS, III, AS CO-EXECUTOR  
OF THE ESTATE OF JOANNE LEWIS COLLINS;  
MARIETTA COLLINS, WIFE OF SAM COLLINS,  
III; AND ANNE LESLIE COLLINS,  
INDIVIDUALLY

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 91-CI-00232

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. William Lewis Collins and Sam Collins III, individually and in their capacity as Co-Executors of the Estate of Joanne Lewis Collins, Marietta Collins, and Anne Leslie Collins (collectively Collins) appeal from a judgment of the Letcher Circuit Court finding that the Commonwealth of Kentucky,

Transportation Cabinet, Department of Highways (the Cabinet) has the right to condemn real property owned by Collins (the Collins property) through eminent domain proceedings. We affirm.

This case arises from the construction of the Whitesburg Bypass (the bypass). It involves two pieces of property, one owned by Collins and another owned by the Lucas/Donovan family (Lucas). In documents prepared by the Cabinet relating to the construction of the bypass, the Collins property is referred to as Parcel 149 W and the Lucas property as Parcel 191 W.

The Cabinet decided a hollow on the Lucas property would be an ideal location in which to construct a waste area in which to dump dirt displaced over the course of construction of the bypass. The problem was that the Collins property is situated between the bypass and the Lucas property. In order to develop the waste area, the Cabinet initiated condemnation actions on both pieces of property in 1979.

According to the Cabinet's petition to condemn the Collins property, the Cabinet sought fee simple title, which it alleged was "for the public purpose of construction and maintenance of the bypass." Collins filed an answer contesting the Cabinet's right to condemn the property.

For purposes which are not relevant to this appeal, the Cabinet decided to take temporary construction easements over both the Collins and Lucas properties. According to the terms of an agreed interlocutory order and judgment entered July 2, 1979, the Cabinet was permitted to condemn the Collins property "as a

temporary construction easement for the sole purpose of constructing and using a road to reach a waste area" in exchange for \$10,000. The agreed order further provided that the easement would terminate upon completion of the bypass, and that Collins would "have access to [the] property by way of said access road upon termination of said easement." The interlocutory judgment was finalized by entry of an agreed final order on December 3, 1979. Upon completion of the bypass the access road was returned to Collins pursuant to the terms of the agreed order.

Due to the fact that the record of the proceedings in the Lucas condemnation action is not before us on this appeal, it is impossible to determine what exactly transpired between Lucas and the Cabinet once the temporary easements dissolved. However, we do know that on July 10, 1985, the Letcher Circuit Court entered an order in the Lucas condemnation action in which it found that the Lucas property was now landlocked. The Cabinet best described its position following the July 1985 order in a memo dated February 8, 1988:

After considering the potential of an extremely large verdict in Letcher Circuit Court for landlocking the property, [the Cabinet's attorney] recommended that action be taken to acquire the access road as fee right of way. He is of the opinion that the Department may legally do this and could result in several hundred thousand dollars in savings.

The Cabinet filed its second petition to condemn the Collins property on July 31, 1991. Once again, the Cabinet sought fee simple title to the property "for the purpose of

constructing and maintaining the" bypass. Once again, Collins challenged the right of the Cabinet to condemn the property.

After the initial filing and response, the matter languished until July 1993, when Collins moved to dismiss for failure to prosecute. Collins alleged that he served requests for production of documents on the Cabinet in December 1991 and had not yet received a response. In an order entered July 23, 1993, the trial court gave the Cabinet additional time to respond to Collins' discovery requests and indicated that it would withhold ruling on the motion to dismiss.

The Cabinet served its discovery responses on September 15, 1993. Four pages of negotiation records were attached to its response, along with the following explanation:

Any paper records [pertaining to the matter] would have been destroyed approximately five years ago, when the files were routinely purged. Those records were not in existence when the case was filed in 1991. This counsel went to Frankfort and inquired with [various Cabinet members]. There were no files to be had except the Negotiation sheets filed herewith.

On May 16, 1997, the trial court entered an order requiring the parties to brief the issues regarding the Cabinet's right to condemn the property. Collins objected on the ground that he was entitled to a hearing, and once again alleged that the Cabinet had not given an adequate response to his discovery requests. The trial court entered an order granting Collins' motion to compel on September 8, 1997. The Cabinet filed supplemental responses to Collins' request for production of documents, this time attaching more documents than were

originally produced. By way of explanation, the Cabinet indicated that the additional documents were found upon a review of the archives as well as the file on the Collins matter.

Collins filed its brief on the issues on December 11, 1997. Collins argued that: (1) the condemnation action was barred by the doctrine of res judicata; (2) the Cabinet could not condemn the property for a private purpose; (3) Official order 80316 did not authorize the taking; and (4) that the Cabinet's discovery abuses warranted dismissal of the action.

At a hearing before the trial court, the Cabinet called Roland Price, a Cabinet engineer, to testify. Price stated that the property was needed for an access road, that the State would maintain it, and that it would be open for public use. In a supplement memorandum filed after the hearing, the Cabinet admitted that it was seeking to condemn the property "for the purpose of providing access to adjacent property."

On October 20, 1998, the trial court entered its findings of fact, conclusions of law, and judgment finding that the Cabinet had the right to condemn the property. The trial court found that Collins had presented no evidence of fraud, bad faith, or abuse of discretion on behalf of the Cabinet and further stated:

Res judicata does not act as a bar on a subsequent action if different factual issues or questions of law are presented. [citations omitted] Different issues exist in this case . . . . First, the Letcher Circuit Court had yet to rule that [Lucas was] landlocked and needed reasonable access to their property. Second, the use of the [Lucas] property has changed since 1979. At [that] time, . . . the Plaintiff was using the [Lucas] property

to construct a waste area. Now, the Plaintiff wants to put a road through the Collins' property to provide the public and [Lucas] access to the Whitesburg Bypass.

Having ruled in favor of the Cabinet, the trial court ordered it to file an interlocutory judgment pursuant to KRS 416.610. Collins filed a notice of appeal from the October 1998 order on November 10, 1998. The Cabinet's interlocutory judgment was filed on November 30, 1998. This appeal followed.

Before addressing the merits of Collins' appeal, we must first address the Cabinet's argument that the appeal should be dismissed because Collins failed to comply with CR 73.02, which requires the notice of appeal to be filed within thirty days of "the date of notation of service of the judgment." The Cabinet argues that Collins should have appealed from the interlocutory judgment as opposed to the findings of fact and conclusions of law, and maintains that due to the lack of a timely notice of appeal from the interlocutory judgment the appeal should be dismissed pursuant to CR 73.03(2).<sup>1</sup> We disagree.

We agree with the Cabinet that Collins should have appealed from the interlocutory judgment. However, the fact that the notice of appeal was filed prematurely does not warrant dismissal. In Johnson v. Smith, Ky., 885 S.W.2d 944 (1994), the Kentucky Supreme Court ruled that premature notices of appeal

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<sup>1</sup>The Cabinet filed a motion to dismiss Collins' appeal based on the same argument with this Court. It was denied by an order entered by a three-judge motion panel of this Court on May 11, 1999.

relate forward and will be treated as being filed as of the date final judgment is entered. In so ruling, the Court stated:

The federal courts have long construed a notice of appeal filed prematurely as relating forward and filed after entry of final judgment. . . . The U.S. Supreme Court construes the federal rule as follows:

"A premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the rule treats the premature notice of appeal as 'filed after such entry' . . . it . . . permits a premature notice of appeal . . . to relate forward to judgment and serve as an effective notice of appeal from the final judgment. [FirstTier Mtge. v. Investors Mortgage Ins. Co., 498 U.S. 269, 275, 111 S.Ct. 648, 652]."

. . .

We deem the federal approach adopted in . . . FirstTier Mtge. . . . appropriate for present purposes.

Johnson, 885 S.W.2d at 949-950. Thus, Collins' notice of appeal will be deemed to have ripened after entry of the final judgment on November 30, 1998.<sup>2</sup>

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<sup>2</sup>The Cabinet's reliance on Stewart v. Kentucky Lottery Corporation, Ky. App., 986 S.W.2d 918 (1998) is misplaced. In Stewart, the court clerk noted entry of a summary judgment order on the docket but failed to mail copies of the order to the parties. This Court ruled that the untimeliness of the appeal was not excused by the clerk's neglect, and that the doctrine of substantial compliance could not be used to remedy the untimely filing of the appeal. Stewart, 986 S.W.2d at 921. Stewart did not involve the filing of a premature notice of appeal.

As to the merits, Collins maintains that the doctrine of res judicata precludes the Commonwealth from attempting to foreclose on the property a second time. In support of its argument, Collins points to the agreed interlocutory judgment and order entered in the 1979 condemnation action in which the Cabinet was given a temporary construction easement over the property. We disagree.

Res judicata is defined as follows:

an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

46 AmJur 2d, Judgments, § 514 (1994). Res judicata has two sub-parts - namely claims preclusion and issue preclusion. For claim preclusion, which Collins maintains is at issue here, to preclude litigation there must be: (1) identity of parties; (2) identify of causes of action; and (3) the previous action must have been decided on the merits. Yeoman v. Commonwealth, Health Policy Board, Ky., 983 S.W.2d 459, 465 (1998). It is the second element that Collins cannot satisfy.

Our review of the record shows that the 1979 condemnation of the Collins property was sought to provide access to a waste area constructed on the Lucas property. As the Cabinet points out and the trial court recognized, there had been no finding in 1979 that the Lucas property was landlocked and had no access to the state highway system. It was not until the temporary construction easement over the Collins property



evaporated upon completion of the bypass that the Lucas property became landlocked, which is what the Letcher Circuit Court found in its order of July 10, 1985. When the Cabinet sought to condemn the Collins property in the second action, it was doing so to provide highway access to the Lucas property, not to give itself access to a waste area. Thus, because Collins cannot show identity of causes of action between the 1979 and 1991 condemnation actions, the trial court did not err in finding that the doctrine of res judicata does not apply.

Collins next argues that allowing the Cabinet to condemn the property to construct a roadway to the Lucas property confers a private benefit to the property owners and is thus improper. While we agree with the Cabinet's argument "that the 'necessity' for the exercise of eminent domain is one primarily and almost exclusively for the legislative branch, the question of whether the proposed condemned property is to be used for a "public" purpose is one to be determined by the judiciary." City of Bowling Green v. Cooksey, Ky. App., 858 S.W.2d 190, 192 (1993).

The question of whether the Cabinet is seeking to condemn the Collins property for a private purpose can be answered by analyzing two cases - Sturgill v. Commonwealth, Department of Highways, Ky., 384 S.W.2d 89 (1964) and Commonwealth, Department of Transportation, Bureau of Highways v. Knieriem, Ky., 707 S.W.2d 340 (1986).

In Sturgill, the Cabinet sought to condemn the claimant's property for the purpose of constructing an access

road between Newtown Road in Lexington, Kentucky, and a piece of property containing a Holiday Inn which had become landlocked due to a road construction project. The road, which was to be constructed for the sole purpose of providing access to the motel, was to be maintained by the Commonwealth and held open for public use. The claimants contested condemnation of their property, arguing that it was being taken for a private purpose. In upholding condemnation of the property, the Court stated:

Any public way naturally concurs a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead [end] streets or highways inevitably and particularly subserve the private interests of the last property owner on the line. Yet the public has [an] interest in reaching other members thereof. As a practical manner, the right of condemnation for highway purposes could not be made to depend upon the predominance of the public interest over private benefit. If this consideration were a determining factor, the condemnor would endlessly be forced to 'battle in every county courthouse.' [citation omitted] The accepted test is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage.

Sturgill, 384 S.W.2d at 91 (emphasis added).

In Knieriem, the Cabinet sought to condemn a strip of land owned by Knieriem in order to widen I-65. The strip of land sought to be condemned was subject to an easement in favor of land owned by the Bluegrass Saddle Club. The Club's land would be landlocked were it not for the easement. In attempting to avoid landlocking the Club, the Cabinet sought to take a second strip of the Knieriem property in order to replace the easement destroyed by the taking of the first strip. In holding that this

would result in taking private property for a private purpose,  
the Court stated:

In Sturgill . . . we held that the Commonwealth could condemn property for the purpose of constructing a two-lane access road, to be maintained by the Commonwealth and to be used by the public, to property that would otherwise be landlocked. . . . The accepted test of a public use, we said there at page 91, "is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage." Highways fail [sic] to meet this test in the case presently before us. In the instant case, Highways seeks to condemn property for the purpose of restoring an easement to provide ingress and egress to the Bluegrass property. The Commonwealth would not maintain it and, presumably, Bluegrass could exercise control over it. . . . Taking the Knieriem's second strip of land for the purpose of restoring an easement for Bluegrass is a taking of property for a private use, and is forbidden by our Constitution.

Knieriem, 707 S.W.2d at 341.

This case appears to be a factual combination of Sturgill and Knieriem in that we have an undeveloped piece of private property which has become landlocked due to construction of a roadway, We believe that the distinction between Sturgill and Knieriem is that in Sturgill there was evidence which showed that the Commonwealth would maintain the access road and hold it open for public use, while in Knieriem there was no such showing, Hence, the condemnation for the purposes of providing access to a landlocked piece of property is proper if the Commonwealth undertakes maintenance of it and holds it open to the public, even if it appears that the landlocked property owners may be the only members of the public to benefit therefrom. Thus, the trial

court did not err in finding that the property is being condemned for a public purpose.

Finally, Collins argues that the trial court abused its discretion in refusing to dismiss the Cabinet's complaint due to alleged discovery abuses on its behalf. Again, we disagree. The Cabinet responded when faced with the orders to compel discovery, and its explanation for its failure to originally produce documents attached to its supplemental response is acceptable.

Having considered the parties' arguments on appeal, the order of the Letcher Circuit Court is affirmed.

ALL CONCUR.

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