

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000640-MR

ELMO MARTIN;  
AND MARTHA MARTIN, HIS WIFE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 99-CI-000756

COMMONWEALTH OF KENTUCKY,  
DEPARTMENT OF TRANSPORTATION,  
BUREAU OF HIGHWAYS

APPELLEE

NO. 2000-CA-002083-MR

DON C. KELLY,  
AS SECRETARY OF TRANSPORTATION;  
AND TRANSPORTATION CABINET,  
COMMONWEALTH OF KENTUCKY;  
AND JERRY ANGLIN,  
COMMISSIONER OF HIGHWAYS

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE CHARLES E. LOWE, JR, JUDGE  
ACTION NO. 93-CI-01553

EVERETT R. THOMPSON, JR.  
AND DEBORAH T. HARRIS,  
CO-EXECUTORS OF THE ESTATE  
OF EVERETT R. THOMPSON;  
DENNY MOORE; AND SOUTHSIDE REAL  
ESTATE INVESTORS, INC.

APPELLEES

OPINION  
REVERSING AND REMANDING  
IN APPEAL NO. 2000-CA-000640-MR  
AFFIRMING  
IN APPEAL NO. 2000-CA-002083-MR  
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BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: These are two consolidated appeals which arose separately but involve the same issues. In both cases, the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the Cabinet),<sup>1</sup> condemned real property during the late 1970's, but failed to develop all of the property within eight years. The former property owners brought actions to enforce their statutory right to repurchase property at the price paid by the Cabinet. The Cabinet argues that the actions brought by the former property owners were untimely. In Appeal No. 2000-CA-002083-MR, the Pike Circuit Court determined that the statute of limitations was tolled by the Cabinet's failure to properly notify the former property owners of their statutory right to repurchase. In Appeal No. 2000-CA-000640-MR, the Jefferson Circuit Court concluded that claims under KRS 416.670 are governed by the five-year statute of limitations and that the former property owner's claims were untimely. Although we agree with the Jefferson Circuit Court that these actions are governed by the five-year statute of limitation, we also agree with the Pike Circuit Court that the statute of limitations does not commence to run until the Cabinet gives the former property owner

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<sup>1</sup> Formerly, the Department of Transportation, Bureau of Highways.

actual notice of their statutory right to repurchase. Hence, we affirm in Appeal No. 2000-CA-002083-MR, and we reverse and remand in Appeal No. 2000-CA-000640-MR.

Because these appeals involve the same issues of law, we shall begin by briefly discussing the statutory right of redemption contained in KRS 416.670. In 1976 the Legislature enacted the Eminent Domain Act of Kentucky requiring the condemning authority either to commence development of a property within eight years or to sell it back to the former owner at the same price paid by the condemnor; however, the statute specifically excluded condemnations by the [former] Department of Transportation. In 1980, the statute was amended eliminating the exception for the Cabinet.

KRS 416.670 is entitled, "Limitations on condemnation powers - Rights of current landowner." The subsections relevant to this appeal provide:

(1) Development shall be started on any property which has been acquired through condemnation within a period of eight (8) years from the date of the deed to the condemnor or the date on which the condemnor took possession, whichever is earlier, for the purpose for which it was condemned. The failure of the condemnor to so begin development shall entitle the current landowner to repurchase the property at the price the condemnor paid to the landowner for the property. The current owner of the land from which the condemned land was taken may reacquire the land as aforementioned.

(2) Any condemnor who fails to develop property acquired by condemnation or who fails to begin design on highway projects pursuant to KRS Chapter 177 within a period of eight (8) years after acquisition, shall notify the current landowner of the provisions of subsection (1) of this section. If the current landowner refuses to purchase

property described in this section, public notice shall be given in a manner prescribed in KRS Chapter 424 within thirty (30) days of the refusal, and the property shall be sold at auction. Provided, however, that this section shall not apply to property acquired for purposes of industrial development pursuant to KRS Chapter 152.

In Miles v. Dawson,<sup>2</sup> our Supreme Court held that this statute gives a former property owner the right to repurchase any portion of a tract of property which has been condemned but not developed.

The pertinent part of the statute states that condemnee landowner is entitled to repurchase the property at the price the State paid to the landowner for the property. Implicit in this calculation is a pro rata method of determining the repurchase price. It does not require any complex computation and involves only a very rudimentary calculation. This section of the statute further supports the legislative intent to return unused property to its original owners.<sup>3</sup>

On the prior appeal of Kelly v. Thompson,<sup>4</sup> the Cabinet argued that the right of redemption provisions of KRS 416.670 only apply to condemnation petitions which were filed after July 15, 1980, the effective date of the statute. The Supreme Court found that the right to repurchase vests upon the failure of the condemning authority to begin development within eight years. Until that event occurs, there is no right to repurchase under the statute. Therefore, the Supreme Court concluded that KRS 416.670 was not retroactively applied to the Thompson's claim

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<sup>2</sup> Ky., 830 S.W.2d 368 (1991).

<sup>3</sup> Id. at 370.

<sup>4</sup> Ky., 983 S.W.2d 457 (1998).

because their right to repurchase did not accrue until after the effective date of the statute.<sup>5</sup>

**Appeal No. 2000-CA-002083-MR**

In 1978, the Cabinet instituted an action in Pike Circuit Court seeking to condemn two tracts of real estate containing just over six acres of land. At the time, the properties were owned by Everett R. and Mary F. Thompson.<sup>6</sup> The property was condemned for the purpose of constructing and maintaining the Pikeville-South Williamson Road, U.S. 119. On August 18, 1978, the court entered an interlocutory order and judgment granting the condemnation petition. The Cabinet deposited with the circuit clerk the sum of \$107,246.80, which was the appraised fair-market-value of the property. In 1983, the parties reached an agreement by which the Thompsons would convey 4.869 acres to the Commonwealth for \$75,000.00. In essence, the Thompsons refunded approximately \$32,000.00 and kept a portion of the property which was the subject of the court's 1978 order. Under the agreement, the Thompsons were also given the right of first refusal to repurchase any portion of the condemned property which was not needed for the project.

By letter dated July 1, 1988, the Transportation Cabinet informed the Thompsons that not all of the property obtained from them was necessary to the completion of the project. The Cabinet offered them a .89 acre tract for

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<sup>5</sup> Id. at 459.

<sup>6</sup> Action No. 78-CI-240.

repurchase at the price of \$106,600.00. Mr. Thompson expressed his interest in repurchasing the property, but he attempted to negotiate a lower sale price. The Cabinet declined to negotiate the sale price, and ultimately the Thompsons refused to purchase the property at the price offered by the Cabinet. In 1990, the Commonwealth entered into a purchase agreement with Denny Moore to sell the .89 acre tract, along with an additional tract, for \$149,600.00. Pursuant to this agreement, the Cabinet executed a deed on June 14, 1993 conveying the property to Moore's assignee, Southside Real Estate Developers, Inc.

On November 29, 1993, Everett Thompson brought an action in Pike Circuit Court.<sup>7</sup> He sought to enforce his right, pursuant to KRS 416.670, to repurchase the .89 acre tract for the pro-rata price of \$13,709.18. He further sought to enjoin the Cabinet from delivering a deed to Moore, or to set aside the deed if delivery had already been made. The Cabinet raised a number of affirmative defenses, including statute of limitations, waiver, estoppel and laches. Primarily however, the Cabinet argued that KRS 416.670's right of redemption provisions could not be applied retroactively to a condemnation which occurred before that statute's effective date, July 15, 1980. The trial court agreed and dismissed Thompson's complaint.

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<sup>7</sup> Mary F. Thompson died at some time prior to the filing of this action. Everett R. Thompson died on October 24, 1994, and the appellants, Everett R. Thompson, Jr., and Deborah T. Harris, as co-executors of the elder Everett Thompson's estate (hereafter, "Thompson"), were substituted as plaintiffs.

As noted above, this Court and the Kentucky Supreme Court reversed the trial court's dismissal.<sup>8</sup> On remand, the Cabinet argued that Thompson's claim to repurchase the property was subject to the five-year statute of limitations contained in KRS 413.120(2). Since the Cabinet offered the property to the Thompsons in July 1988, but Thompson did not bring an action to enforce his right to repurchase until November 1993, the Cabinet took the position that the claim was time-barred. Thompson responded by arguing that claims under KRS 416.670 are governed by the fifteen-year statute of limitations contained in KRS 413.010. In addition, Thompson contended that the Cabinet's failure to give notice of the statutory right to repurchase tolled the running of any statute of limitations.

Following cross-motions for summary judgment, the trial court agreed with Thompson on this latter ground, holding:

The Court finds no need to decide the issue as to which statute of limitations should apply, as it finds merit with the Plaintiff's argument the Commonwealth has failed to provide the notice required by KRS 416.670. It is apparent from the terms of the statute that the burden is on the Commonwealth to advise the former landowner of its right to repurchase at the same price the condemnor paid for the property. In this case, the Commonwealth has not advised the Plaintiff of that right, and therefore the statute of limitations issue is moot. . . .

The Commonwealth argues that when it offered to sell the property to Mr. Thompson on July 1, 1988, for the sum of \$106,000.00, Mr. Thompson's cause of action under KRS 416.670 arose and accrued. KRS 416.670 is very clear as to the obligation of the Commonwealth, and that is to inform the landowner of his right to repurchase at the

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<sup>8</sup> Kelly v. Thompson, *supra*.

price paid by the condemnor. To allow the Commonwealth to offer property to a prior owner at the then fair market value, as the Commonwealth has done in this case, would allow it to circumvent the intent of the legislature in adopting KRS 416.670.

Consequently, the trial court granted Thompson's motion for summary judgment, setting aside the Cabinet's deed to Moore and directing the Cabinet to offer the property to Thompson at the price paid at the time of the condemnation. The Cabinet now appeals from this judgment.

**Appeal No. 2000-CA-000640-MR**

In October 1978, the Cabinet filed a petition in Jefferson Circuit Court seeking to condemn real property which was owned by Elmo and Martha Martin.<sup>9</sup> The property was in fact condemned, and the Cabinet paid the Martins the sum of \$102,500.00. In February 1999, after the Supreme Court's decision in Kelly v. Thompson became final, the Martins filed a complaint seeking to enforce their right to repurchase the property pursuant to KRS 416.670. The Cabinet responded that the Martin's complaint was governed by the five-year statute of limitations contained in 413.120(2), and was untimely.

Thereafter, the Martins and the Cabinet filed cross-motions for summary judgment. In an order entered on September 14, 1999, the trial court granted the Cabinet's motion and dismissed the Martins' complaint. The court found that the five-year statute of limitations contained in KRS 413.120(2), rather than the fifteen-year statute contained in KRS 413.010, applies

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<sup>9</sup> Action No. 78-CI-09089.



to the Martins' claim. As a result, the trial court found that the limitations period began to run in 1988, and the Martins' claim was time-barred no later than 1993. The Martins appealed.

Due to the common issues and the inconsistent results, this Court ordered the appeals to be heard together. The central issue in both of these appeals concerns which statute of limitations applies to claims brought under KRS 416.670. In addition, this Court is presented with the questions of when the former property owner's cause of action accrues, and when the statute of limitations begins to run on the cause of action.

On the first question, the Martins argue that the Jefferson Circuit Court erred in applying the five-year statute of limitations in KRS 413.120(2) for "[a]n action upon a liability created by statute, when no other time is fixed by the statute creating liability." The Martins and Thompson contend this case is governed by KRS 413.010, which applies to an "action for the recovery of real property." As a result, they claim that they had 15 years to bring an action to recover "their property." Furthermore, the Martins and Thompson assert that KRS 413.120(2) does not apply because it speaks in terms of a "liability" created by statute, rather than a "right." We disagree.

KRS 413.010 provides that "[a]n action for the recovery of real property may be brought only within fifteen (15) years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." Most commonly, this

statute applies to adverse possession claims.<sup>10</sup> The Martins and Thompson argue that this statute applies because they are bringing "an action for the recovery of real property."

However, adverse possession is a common law doctrine. Any action either to obtain rights to real property by adverse possession or to recover real property which has been adversely possessed is created by the common law. In contrast, the right of the current landowner to repurchase and the obligation of the condemnor to develop the property within eight years are both created by statute. Without KRS 416.670, neither would exist. Therefore, we hold that this is an action upon a liability created by statute, and the appropriate period of limitations is the five-year period in KRS 413.120(2).<sup>11</sup>

On the second question, it is well established that a cause of action accrues when a party has the right and capacity to sue.<sup>12</sup> As noted in Kelly v. Thompson,<sup>13</sup> it is not the act of condemnation which gives a former owner a right to repurchase, but rather the failure of the condemning authority to begin development within eight years which entitles the current owner

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<sup>10</sup> See e.g. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., Ky., 824 S.W.2d 878 (1992).

<sup>11</sup> See Pike v. Harold (Chubby) Baird Gate Co., Ky. App., 705 S.W.2d 947 (1986); Auditor v. Halbert, 78 Ky. 1 Ky. L. Rptr. 253 (1880).

<sup>12</sup> Lexington-Fayette County Urban Government v. Abney, Ky. App., 748 S.W.2d 376, 378 (1988).

<sup>13</sup> 983 S.W.2d at 457

to repurchase such surplus property.<sup>14</sup> Therefore, the right to bring an action accrues upon the condemnor's failure to begin development within eight years.

Nonetheless, while the former property owner's cause of action under KRS 416.670 accrues when the right to repurchase accrues, the statute of limitations does not begin to run until he or she knows or has reason to know that the right to repurchase exists. This doctrine, commonly known as the discovery rule, provides a means to identify the "accrual" of a cause of action where the injury or right of action is not readily ascertainable or discoverable.<sup>15</sup> The statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered.<sup>16</sup> The plaintiff must have reason to know of the basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged; one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed.<sup>17</sup>

The nature of condemnation actions presents special problems in determining when a plaintiff has knowledge of a right of action. Once the condemnor takes exclusive possession of the property, it may be difficult for a former property owner to find

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<sup>14</sup> Id. at 459.

<sup>15</sup> Wiseman v. Alliant Hospitals Inc., Ky., 37 S.W.3d 709, 712 (2000).

<sup>16</sup> Hackworth v. Hart, Ky., 474 S.W.2d 377, 379 (1971).

<sup>17</sup> Wiseman, 37 S.W.3d at 712 (citing Drake v. B.F. Goodrich Co., 782 F.2d 638, 641 (6th Cir. 1986) and Hazel v. General Motors Corp., 863 F. Supp. 435, 438 (W.D. Ky. 1994)).

out if the condemnor has taken steps to develop the property within eight years. For this reason, KRS 416.670(2) imposes an affirmative obligation upon the condemnor to notify a former landowner of his or her right to repurchase real property. The statute explicitly requires the condemnor to notify the former landowner of his or her right to repurchase at the price which the condemnor paid.

The Cabinet contends that the tolling of a statute of limitations based upon its failure to give a required notice essentially involves an estoppel. The Cabinet correctly notes that equitable estoppel applies to governmental agencies only in exceptional circumstances.<sup>18</sup> Furthermore, as a general rule, mere silence with respect to an operative fact is not a basis to estop a party from pleading a statute of limitations.<sup>19</sup> However, an exception to this general rule may be found if a party remains silent when the duty to speak or disclose is imposed by law.<sup>20</sup> Clearly, the Cabinet's duty to notify former landowners of their statutory right to repurchase is imposed by law.

In response, the Cabinet points out that in Hazel v. General Motors Corporation,<sup>21</sup> the United States District Court for the Western District of Kentucky held that a manufacturer's

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<sup>18</sup> J. Branham Erecting & Steel Service Co. v. Kentucky Unemployment Insurance Commission, Ky.App., 880 S.W.2d 896, 897 (1994).

<sup>19</sup> Gailor v. Alsabi, Ky., 990 S.W.2d 597, 603 (1999) (*citing additional cases*).

<sup>20</sup> Id. See also Munday v. Mayfair Diagnostic Laboratory, Ky., 831 S.W.2d 912, 914 (1992).

<sup>21</sup> 863 F. Supp. 435, 438 (W.D. Ky. 1994) (interpreting Kentucky law).

failure to comply with a statutory duty to notify purchasers of a design defect did not toll the running of the statute of limitations. But in Hazel, the court held the injury caused by the defective product was sufficient to put the plaintiff on inquiry notice of the right to bring an action.

In the case of the Thompsons, the Cabinet notified them of their contractual right to repurchase the .89 acre tract on July 1, 1988. However, that letter gave them no notice of their statutory right to repurchase at the price paid at the time of the condemnation. Furthermore, the Cabinet consistently took the position that KRS 416.670 did not apply. Instead, it demanded that the Thompsons pay fair market value, and it rebuffed any efforts by the Thompsons to negotiate a lower price. Having forestalled any claim by the Thompsons following the initial notice, the Cabinet is not entitled now to take the inconsistent position that the Thompsons were required to bring an action under KRS 416.670 within five years.<sup>22</sup> Under the circumstances, the trial court correctly found that Thompson's claim was not time-barred.

In the case of the Martins, their cause of action accrued in 1987, eight years after the Cabinet obtained a right to enter the property. Nonetheless, there is no evidence in the record that the Cabinet took any steps to notify them of their right to repurchase. The Cabinet asserts that the Martins could have discovered their cause of action to recover the property had

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<sup>22</sup> See Laughead v. Commonwealth, Dept. of Transp., Bureau of Highways, Ky., 657 S.W.2d 228 (1983).

they exercised due diligence. Likewise, the trial court, addressing the issue in its order denying the Martins' motion to reconsider, stated that had the Martins investigated, they would have discovered that the Cabinet had not developed the property.

However, a former landowner's means to discover that real property has not been developed is limited. The Cabinet makes no argument as to what conduct would constitute "due diligence." Furthermore, the trial court's reasoning imposes a duty on a former landowner to investigate whether property has been developed. KRS 416.670(2) clearly places the duty on the condemning authority to give notice to the former landowner. Consequently, we conclude that the Jefferson Circuit Court erred in finding that the Martins' claim was time-barred.

The Cabinet asserts that prior to the Supreme Court's decision in Kelly v. Thompson, it had no reason to believe that the Martins or the Thompsons possessed a right to repurchase or that it had an obligation to inform them of their rights. As a result, it contends that it should not be punished for failing to recognize rights and obligations which it could not have known existed. However, the Supreme Court in Kelly specifically held that in 1980, the legislature intended to define the limits of the right of eminent domain and to establish the specific terms under which the condemning authority may exercise such power.<sup>23</sup> The State's authority to take private property for public use

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<sup>23</sup> Kelly v. Thompson, 983 S.W.2d at 458.

derives from that statutory authority, and it must be strictly construed within the legislature's grant of authority.<sup>24</sup>

Finally, the Cabinet claims that this interpretation of KRS 416.670 will force it to provide notice to every property-owner from whom it has ever condemned property. We believe that this dire forecast is based on an overly-broad reading of Kelly v. Thompson. Kelly v. Thompson does not hold that the right of repurchase provisions of KRS 416.670 apply to all condemnations, whether they occurred before or after the effective date of the statute. To the contrary, the Supreme Court held that the right to repurchase does not vest on the date of the condemnation, but upon the failure of the condemning authority to begin development within eight years.<sup>25</sup> So long as the right to repurchase accrued after the effective date of the statute, the Supreme Court concluded that KRS 416.670 was not retroactively applied.

Until 1980, when the legislature amended KRS 416.670, property owners did not have a right to repurchase condemned property from the Cabinet. No such right could accrue because it did not exist until July 15, 1980. Therefore, under Kelly v. Thompson, KRS 416.670 applies only to claims which accrue after the effective date of the statute. As a result, we find that the Cabinet's fear of an undue burden is not well founded.

In conclusion, we find that the five-year statute of limitations applies to claims brought pursuant to KRS 416.670. A cause of action under this statute accrues eight years after the

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<sup>24</sup> See Miles v. Dawson, 830 S.W.2d at 370.

<sup>25</sup> Kelly, 983 S.W.2d at 459.

condemnor takes possession of the property. However, the statute of limitations does not commence to run until the former landowner is given actual notice of his or her right to repurchase under the statute.

Accordingly, we find that the Pike Circuit Court correctly held that Thompson's claim was timely. The judgment of the court in Appeal No. 2000-CA-002083-MR is affirmed. We further find that the Jefferson Circuit Court erred when it concluded that the Martins' claim was untimely. Hence, the judgment of the court in Appeal No. 2000-CA-000640-MR is reversed, and this matter is remanded for a determination of whether the Martins are entitled to repurchase the property under KRS 416.670.

ALL CONCUR.



BRIEF AND ORAL ARGUMENT FOR  
APPELLANTS IN APPEAL NO. 2000-  
CA-000640-MR ELMO MARTIN, ET  
AL.:

R. Dale Warren  
Louisville, Kentucky

BRIEF FOR APPELLANTS IN APPEAL  
NO. 2000-CA-002083-MR AND  
APPELLEES IN APPEAL NO. 2000-  
CA-000640-MR COMMONWEALTH OF  
KENTUCKY, TRANSPORTATION  
CABINET, ET AL.:

Randall L. Gardner  
Wendi Swinson Wagner  
Borowitz & Goldsmith  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS  
IN APPEAL NO. 2000-CA-002083-  
MR AND APPELLEES IN APPEAL NO.  
2000-CA-000640-MR COMMONWEALTH  
OF KENTUCKY, TRANSPORTATION  
CABINET, ET AL.:

Wendi Swinson Wagner  
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BRIEF AND ORAL ARGUMENT FOR  
APPELLEES EVERETT R. THOMPSON,  
ET AL.:

Charles F. Wilson, Jr.  
Pikeville, Kentucky