

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002130-MR

BETTY HUNSAKER AND
PEGGY GREER

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 93-CI-00325

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

HENRY, JUDGE: Betty Hunsaker and Peggy Greer (hereinafter "Appellants") appeal from an order and judgment of the Letcher Circuit Court requiring them to refund and pay over to the Commonwealth of Kentucky Transportation Cabinet, Department of Highways (hereinafter "the Commonwealth") the sum of \$356,782.50

¹ Senior Judge John Woods Potter, sitting as Special Judge by Assignment of Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

plus interest following a jury verdict in a property condemnation action. Upon review, we affirm.

The chronology of events in this case is as follows: This matter originated in the Letcher Circuit Court on October 20, 1993 as a highway condemnation action brought by the Commonwealth against Mildred Hunsaker and the Bank of Whitesburg. The action was brought pursuant to KRS² 416.540 through 416.670 and KRS 117.081 to obtain a right of way for the construction of the U.S. Highway 23 Jenkins Bypass.

On November 22, 1993, the trial court entered an order appointing commissioners to assess the amount of compensation that should be paid Hunsaker and the bank for the condemnation. On December 1, 1993, these commissioners filed a report finding that Mildred and the bank should be paid \$115,000.00 for the acquisition. The Commonwealth subsequently deposited this amount with the trial court on May 18, 1994.

On September 8, 1994, due to a revision in plans, the Commonwealth filed an amended petition whereby the size of the requested acquisition was increased from .24 of an acre to .67 of an acre. On January 18, 1995, the trial court entered an order to disburse the \$115,000.00 that had been in its possession to Mildred and the bank, with \$40,000.00 going to the former and \$75,000.00 to the latter.

² Kentucky Revised Statutes.

On May 23, 1995, in apparent response to the Commonwealth's amended petition, the trial court entered an order reappointing commissioners. After a report was filed indicating that the new property value was unable to be determined because of an error in the description of the property in the amended petition, the Commonwealth filed another amended petition on December 4, 1995 to correct this error. On February 15, 1996, the trial court again entered an order appointing commissioners, and on March 7, 1996, these commissioners entered a report valuing the property in question at \$691,350.00.

On May 20, 1996, the trial court entered an order revising the commissioners' report so as to set the property value at \$656,782.50, along with an interlocutory order and judgment granting possession of the condemned property to the Commonwealth upon its payment of \$541,782.50 to the Letcher Circuit Clerk.³ The trial court also entered an order allowing Mildred to withdraw this amount once it was paid to the court. The Commonwealth deposited the aforementioned amount with the circuit clerk on May 23, 1996, and on May 30, 1996, the clerk disbursed the additional \$541,782.50 to Mildred. The Commonwealth subsequently filed exceptions to the commissioners'

³ As previously noted, \$115,000.00 had already been paid to Hunsaker and the bank, explaining the discrepancy between the trial court's valuation and the amount ordered to be paid to the clerk.

award on June 17, 1996 on the grounds of excessiveness, and the matter continued to be litigated. Numerous trial dates were set and then postponed for various reasons.

On May 17, 2001, Appellants filed a motion to substitute themselves into the action as parties in place of Mildred Hunsaker. The motion advised the trial court that Mildred had conveyed her interest in the subject property to them (via deed on July 3, 1999), and that they were the "real parties in interest" as a result. Mildred had apparently died on March 26, 2001 after conveying her interest in the property to Appellants. On November 8, 2001, an agreed order was entered allowing Appellants to be substituted for Mildred in the action.

On December 19, 2002, the case finally proceeded to trial, where Appellants asked the jury for an award of \$1.2 million for the condemned property. The jury, however, returned a verdict setting damages at only \$300,000.00—substantially less than the amount that had already been paid by the Commonwealth. The trial court entered an order and judgment in accordance with this verdict on March 10, 2003, and ordered Appellants to refund and pay over to the Commonwealth the sum of \$356,782.50 plus 6% interest from May 30, 1996 until paid (pursuant to KRS 416.620(5)).⁴ This amount represented the difference between the

⁴ KRS 416.620 deals with jury trials and compensation in eminent domain condemnation cases. KRS 416.620(5), which is of particular note here, provides:

\$656,782.50 that had previously been paid to Mildred Hunsaker and the \$300,000.00 that was awarded by the jury. Appellants' post-trial motions were ultimately denied by the trial court on November 10, 2004. This appeal followed.

On appeal, Appellants argue that they should not be obligated to repay the \$356,782.50 plus interest to the Commonwealth because they never received any of the money paid to Mildred Hunsaker and because she received this money more than three years before she deeded the property to them and before they became parties to the action. However, we believe that this argument must necessarily be rejected pursuant to Citizens Bank & Trust Co. v. McEuen, 281 Ky. 113, 134 S.W.2d 1012 (1939), in which it was held that when a party is substituted in the place of another party in a pending action, "[t]he substituted party, as a general rule, takes up the litigation with all of its benefits and with all of its burdens

If the condemnor takes possession of the property condemned and the amount of compensation is thereafter increased over that awarded by the commissioners, the condemnor shall pay interest to the owner at the rate of six percent (6%) per annum upon the amount of such increase from the date the condemnor took possession of the property. If the condemnor takes possession of the property condemned and the amount of compensation is thereafter decreased below that awarded by the commissioners, the condemnor shall be entitled to a personal judgment against the owner for the amount of the decrease plus interest at the rate of six percent (6%) per annum from the date the owner accepted the amount of compensation the condemnor paid into court or to the owner. If the owner at all times refuses to accept the payment tendered by the condemnor, no interest shall be allowed in the judgment against the owner for the amount of the decrease.

(Emphasis added).

just where the predecessor dropped it[.]” McEuen, 134 S.W.2d at 1014 (Citations omitted). The record reflects that Appellants sought to be substituted into this action in place of Mildred Hunsaker on the basis that they had become the “real parties in interest.” Accordingly, we fail to see how McEuen is not applicable here, and Appellants have presented no substantive authority setting forth why it should not be.

Appellants do cite to a federal case, Coalition for Health Concern v. LWD, 834 F. Supp. 953 (W.D.Ky. 1993), for the argument that they lack liability for any repayment because no privity between Mildred Hunsaker and Appellants has been shown by the Commonwealth. However, our review of the record presented on appeal finds that this particular argument was not raised before the trial court. “An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.” Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998), citing Hopewell v. Commonwealth, 641 S.W.2d 744, 745 (Ky. 1982). Indeed, the only argument we can find in the record pertaining to the issues in this appeal is Appellants’ cursory contention in their motion to alter, amend and vacate that they “never received any of the money ordered repaid and therefore cannot be ordered to pay the same.”

Accordingly, we decline to consider this specific argument any further.

Appellants also take issue in their brief with the fact that the Commonwealth "has never named the Estate of Mildred Hunsaker in this action or attempted in any way to seek the return of the \$356,782.50 from Ms. Hunsaker's estate." However, we are of the opinion that if Appellants had concerns about being responsible for any repayment to the Commonwealth pursuant to KRS 416.620(5) or about the estate of Mildred Hunsaker being liable in their stead for any repayment, these concerns should have been raised before the trial court and dealt with there before Appellants were substituted as parties. As, from our review of the record, it appears that they were not, we shall not consider them any further here.

The order and judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Hatton Mullins
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Phillip K. Wicker
Elizabethtown, Kentucky