

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002390-MR

WILLIAM PORTER AND
BARBARA PORTER

APPELLANTS

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 05-CI-00264

SHELBYVILLE CEMETERY
COMPANY A/K/A GROVE HILL
CEMETERY COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: William and Barbara Porter (hereinafter “the Porters”)

appeal from a denial of their motion to alter, amend, or vacate both the findings of

fact, conclusions of law and judgment of the Shelby Circuit Court and the

interlocutory order and judgment of the Shelby Circuit Court, allowing Shelbyville

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Cemetery Company d/b/a Grove Hill Cemetery (hereinafter “Grove Hill”) to condemn thirteen acres of property under KRS 416.210. After careful review, we affirm the court below.

Grove Hill was originally established on the east side of Old Mt. Eden Road in Shelby County, Kentucky. The original forty-two acres of the cemetery have been fully developed and all available land appropriate for burial has been utilized. In 1984, the Grove Hill Board of Trustees (hereinafter “the Board”) made a decision that the survival of the cemetery required development on the west side of Old Mt. Eden Road. With this in mind, the Board purchased thirteen acres from Edgar Vaughan on the west side of Old Mt. Eden Road, but only eight and a half acres are suitable for grave sites. In 2002, Grove Hill acquired an additional ten acres composed of three small tracts of land adjacent to the established cemetery on the east side of Old Mt. Eden Road. Of the ten acres, eight are usable for burial sites and have platted development.

The Board of Grove Hill is obligated to maintain an affordable and viable cemetery to the public and must maintain a perpetual care fund equaling not less than 20% of revenues generated from the sale of burial plots. *See* KRS 367.952. Since 1980, Grove Hill has accumulated \$560,000 in its perpetual care fund, and its maintenance and financial obligations are in excess of \$125,000 per year. In order to maintain the grave sites that have already been developed, the cemetery will need an additional \$2.4 million dollars in its perpetual care fund. To

remain economically viable and to build its endowment, Grove Hill has to increase sales and develop additional burial sites.

In 1993 the Porters acquired approximately twenty-six acres on the west side of Old Mt. Eden Road, directly across from the original and primary entrance of Grove Hill. Barbara Porter became a member of the Board of Grove Hill and continued to be a member until removed during this conflict. Situated between the Porters' property and the thirteen acres Grove Hill acquired in 1984 from Edgar Vaughan is the undeveloped thirteen acre tract of land, originally owned by Frank Vaughan, (hereinafter "the Vaughan Property") subject to this condemnation action.

In early December 2004 Frank Vaughan sent a letter to Charles Long, President of Grove Hill, stating that he planned to sell the Vaughan Property and would be accepting offers. After several phone conversations regarding the purchase, Frank informed Long that he had given the Porters the right of first refusal on the Vaughan Property and now intended to sell it to them. On December 15, 2004, the Vaughan Property was sold to the Porters.

On January, 14, 2005, after being notified by the Board that Grove Hill was interested in acquiring the Vaughan Property by any means necessary, the Porters sent a letter to Grove Hill's counsel stating that the Porters "have an executed contract for the purchase of [the Vaughan Property] and it is not for sale." On February 21, 2005, counsel for Grove Hill sent letters to the Porters' counsel requesting that the parties meet to discuss a resolution of this matter.

On March 1, 2005, the Porters closed on the Vaughan Property. As a result of the Porters' refusal to negotiate a resolution of this matter, Grove Hill filed a condemnation action pursuant to KRS 416. 210 in Shelby Circuit Court on May 4, 2005.

On May 27, 2005, the Porters filed a motion to dismiss the petition, alleging that Grove Hill had failed to negotiate in good faith and that its petition was not brought under the name of the real party in interest, the Shelbyville Cemetery Corporation. On August 1, 2005, the Shelby Circuit Court overruled the motion, finding that Grove Hill had satisfied its obligation to negotiate in good faith. Additionally, Grove Hill filed a motion to amend its petition to reflect the legal name of Grove Hill, Shelbyville Cemetery Corporation. Grove Hill simultaneously filed a motion for interlocutory judgment premised on the argument that the Porters were estopped from raising affirmative defenses because Barbara Porter, as a member of the Board of Grove Hill, had breached her fiduciary duty. On October 13, 2005, the Shelby Circuit Court granted Grove Hill leave to file an amended petition reflecting their legal name. On November 3, 2005, the Porters filed their response to Grove Hill's amended petition, asserting the affirmative defenses of failure to negotiate in good faith and lack of necessity.

On August 3, 2006, Grove Hill moved the Shelby Circuit Court for summary judgment. On September 19, 2006, the Porters filed a motion requesting that Grove Hill be required to hold elections for trustees and to obtain approval of the Shelby County Fiscal Court prior to continuing with its condemnation

proceeding pursuant to the new amendments to KRS 416.210. On November 20, 2006, both motions were overruled. In its ruling, the trial court held that material issues of fact existed as to the issue of necessity; that the substantive amendments to KRS 416.210 would not apply retroactively; and that, since the Porters did not seek to invalidate Grove Hill's decision to condemn, the demand for the election of trustees was more properly dealt with in a separate action.

Prior to the hearing in this matter, both parties filed motions *in limine* to exclude the testimony of the other party's expert witness. The court overruled both motions, finding that each proposed expert was qualified to testify and that the testimony would assist the fact finder in understanding the evidence and facts at issue.

A bench trial was held April 26 and 27, 2007. On June 26, 2007, the trial court entered its findings of fact, conclusions of law and judgment, which found that Grove Hill had met its burden of proof in establishing the need to condemn the Vaughan Property. On June 28, 2007, the court entered an interlocutory order and judgment granting Grove Hill the right to condemn the subject property.

On July 6, 2007, the Porters filed a motion to alter, amend, or vacate the findings of fact, conclusions of law and judgment as well as the interlocutory order and judgment. On October 26, 2007, the Shelby Circuit Court overruled the Porters' motion, and this appeal followed.

The Porters first argue that the trial court erred in determining that the 2006 amendment to KRS 416.210 did not apply retroactively. However, KRS 446.080(3) provides that no statute is to be applied retroactively absent an express legislative directive. *See Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006); *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493 (Ky. 1998); *Hamilton v. Desparado*, 868 S.W.2d 95 (Ky. 1993).

Amendments which change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others are considered to be changes in substantive law and come within the rule that statutory amendments cannot be applied retroactively to events which occurred prior to the effective date of the amendment. *Benson's Inc. v. Fields*, 941 S.W.2d 473 (Ky. 1997). Those amendments which apply to the in-court procedures and remedies which are used in handling pending litigation, even if the litigation results from events which occurred prior to the effective date of the amendment, do not come within the rule prohibiting retroactive application. *Peabody Coal Co. v. Gossett*, 819 S.W.2d 33 (Ky. 1991).

See Commonwealth of Kentucky, Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 168 (Ky. 2000). Although the Porters are correct in asserting that the amendment is procedural, it is not an amendment to “in-court procedure . . . used in handling pending litigation.” It is rather a change to the “out-of-court rights, obligations, and duties” and is thus considered a substantive change. *See Id.*; *see also Kentucky Ins. Guar. Ass’n v. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000). Therefore, we agree with the trial court that absent specific legislative intent otherwise; this amendment should not and will not be applied retroactively.

The Porters additionally argue that Grove Hill's corporate charter was revoked in 1897, and thus that the trial court erred in finding that Grove Hill had a right to bring this condemnation action or that its de facto trustees had the right to act. We disagree.

The 1850 Constitution of Kentucky permitted the General Assembly to charter corporations by way of special legislation. Grove Hill was chartered in this manner. However, the current Kentucky Constitution, adopted in 1891, specifically forbade the General Assembly from chartering corporations.

During the 1893 legislative session, the General Assembly created Kentucky's first uniform corporate code by adopting Kentucky Statutes Chapter 32. As part of these statutes, special requirements were imposed on pre-1891 corporations. Said corporations had four years to bring themselves into compliance with the statutes, under the penalty of a statutory revocation of their charters. The records of the Secretary of State do not evidence that Grove Hill ever satisfied the requirements.

However, KRS 271B.18-030, which was originally enacted in 1972 and is current through the 2007 legislative session, clearly states that

[a]ny corporation which was in existence at the time of the adoption of the present Constitution of this state and subsequent thereto has filed in the office of the Secretary of State any amendment of its charter or articles of incorporation shall thereby be deemed to have filed therein an acceptance of the provisions of that Constitution.

Grove Hill filed an amendment to its articles of incorporation with the Secretary of State in March 1910. Moreover, KRS 271B.18-020 establishes that

[t]he corporate existence of each domestic corporation which, upon July 1, 1974, is listed as an existing corporation on the current corporate index maintained in the office of the secretary of state and is then engaged in the usual course of its business shall be, and it hereby is, validated retroactively to the date of its incorporation and continued for the period specified in its articles of incorporation and the amendments thereto. . . .

Grove Hill, since its incorporation, which would be at the latest in 1910 when the amendment to its articles of incorporation was filed with the Secretary of State, has been listed in the Secretary of State's corporate index and at the time of the enactment of KRS 271B.18-020 was engaged in its usual course of business. Therefore, Grove Hill's corporate charter was retroactively validated, and the trial court was correct in finding that it had the right to bring this condemnation action.

As to the Porters' contention that Grove Hill lacked the authority to act because it did not elect trustees as provided in its Articles of Incorporation, we find that the trial court again did not err. Since 1959 trustees have been invited to serve on the Board instead of being elected, Barbara Porter among them.

Kentucky has long recognized that trustees who are appointed rather than elected as required by a corporation's bylaws are still de facto trustees and assume the power to act in that capacity. *See Commonwealth ex. rel. Breckinridge v. Winstead*, 430 S.W.2d 647, 648 (Ky. 1968); *O'Hara v. Williamstown Cemetery Co.*, 119 S.W.234 (Ky. 1909). Accordingly, we again find no error.

The Porters next contend that the trial court erred in determining that Grove Hill negotiated in good faith. They allege that because Grove Hill never named a monetary offer, it cannot be said that they negotiated in good faith. However, the January 14, 2005, letter from the Porters' attorney to Grove Hill's attorney made it clear that the Vaughan Property was "not for sale." Moreover, Grove Hill continued to request discussion of negotiation but was again told the Vaughan Property was not for sale on April 1, 2005. It was not until after this additional rebuff that Grove Hill filed the condemnation action on May 5, 2005. Therefore, we do not find that the trial court erred in its determination that Grove Hill tried to negotiate in good faith.

The Porters also argue that the trial court improperly found that necessity existed for the taking of the Vaughan Property. We disagree.

Kentucky law is clear that "[a] determination by the condemnor that the taking is a necessity is ordinarily conclusive, but the courts will review the condemning body's exercise of discretion for arbitrariness or action in excess of its authority." *See God's Center Foundation, Inc. v. Lexington-Fayette Urban County Government*, 125 S.W.3d 295, 300 (Ky.App. 2002). Also, "[t]he party challenging the condemnation . . . bears the burden of establishing the lack of necessity or public use and abuse of discretion." *See id.*

It is undisputed that Grove Hill sought the property to provide burial sites for residents of Shelby County. It is also undisputed that Grove Hill needs additional land for the sale of plots so that it can continue to grow the endowment

fund to ensure perpetual care of the cemetery grounds as required by KRS 367.952. In *God's Center*, this Court opined that a condemnor's determination of necessity will be respected unless the use is "palpably private or plainly without reasonable foundation." *See God's Center Foundation, Inc.*, 125 S.W.3d at 303. The Porters have failed to prove Grove Hill's use would be private or that it is without reasonable foundation. Additionally, despite the Porters' contentions, the minutes of the Board's meetings on several occasions reflect the discussion of the necessity of acquiring additional property. Therefore, we again find no error.

The Porters also appeal the trial court's admission of the testimony of Grove Hill's expert witness. We review the court's decision regarding the admissibility of expert testimony under an abuse of discretion standard. *Mill v. Eldridge*, 146 S.W.3d 909, 911 (Ky. 2004).

Grove Hill's expert, Dr. Henry Moon, holds a doctorate degree in geography and land use and has extensive experience in condemnation, land use, and land use planning. The record indicates that the Porters' issue with Dr. Moon is that he has only testified in cases involving takings for construction of airports and roads, never in matters relating to a cemetery. They additionally take issue with Dr. Moon's methods in making his determination regarding Grove Hill's needs (i.e., that he used photographs rather than actually going to the site.).

However, the record clearly reflects that the trial court properly considered all the *Daubert* factors in deciding on the admissibility of Dr. Moon's testimony. Dr. Moon's testimony on the highest and best use of the land was instructive to the

court as to the cemetery's need for additional land and his qualifications are without defect. As such, the court did not abuse its discretion in admitting the testimony.

The Porters finally argue that the trial court erred in finding Barbara breached her fiduciary duty to Grove Hill. The trial court did not, however, issue a ruling on this issue but instead only made a passing reference to the issue in its findings of fact. It was not a determining factor of any issue we have addressed in this appeal, and therefore we decline to address it now. Additionally, as we have found that KRS 271B.18-020 retroactively validated Grove Hill's charter, the Porters' argument regarding KRS 273.2527(3) is rendered moot, and we need not address it.

Accordingly, we affirm the findings of fact, conclusions of law and judgment as well as the interlocutory order and judgment of the Shelby Circuit Court.

ALL CONCUR.

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