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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000211-MR

PAUL J. VESPER; ALBERT J. VESPER;
STEPHEN J. VESPER; DENNIS J. VESPER;
RONALD J. VESPER; ENTERPRISE VI,
A KENTUCKY GENERAL PARTNERSHIP — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 10-CI-00561

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: Paul J. Vesper, Albert J. Vesper, Stephen J. Vesper, Dennis J. Vesper, and Ronald J. Vesper, partners in Enterprise VI, a Kentucky General Partnership, Inc. (hereinafter "Vesper landowners") appeal the order of the Boone

Trial court that denied their motion "To Enforce the Agreed Order dated October 19, 2010." The Department of Highways, which is a division of the Kentucky Transportation Cabinet of the Commonwealth of Kentucky (hereinafter "the Department of Highways") is the other party to the appeal.

The Vesper landowners maintained that no ambiguity existed in the final judgment and, consequently, it should be enforced as written, but the Department of Highways insisted upon a different interpretation. The trial court, however, determined that an ambiguity existed and concluded that evidence supported the Department of Highways' interpretation of the ramifications of the final judgment. For the reasons stated below, we affirm the order.

FACTS

The Department of Highways planned to construct a new four-lane highway. The road was to be built north from KY 18 in Burlington, Kentucky, to a location near Turfway Park in Florence, Kentucky. The proposed highway was designed as a limited access highway to be named the South Airfield Connector. Construction of the highway would affect two properties. These properties were the Cincinnati/Northern Kentucky Airport and land belonging to the Vespers. The airport donated the property for the right-of-way, but no agreement could be reached with the Vesper landowners as to the acquisition of their property.

Thereafter, the Department of Highways initiated an eminent domain action against the Vesper landowners in Boone Circuit Court. The petition submitted by

the Department of Highways had an exhibit attached to it. This exhibit, titled "Exhibit A," showed both a "metes and bounds" description of the property and actual highway plans. The plans for the highway in "Exhibit A" showed two entrances on the proposed highway.

Subsequently, the parties met for mediation. As the result of the mediation, the parties entered into an agreed order dated October 19, 2010. At mediation, it was determined that the compensation for the Vesper property was $80,000 per acre for fee and $72,000 per acre for permanent easement. Furthermore, the parties discussed the addition of a third entrance to the plans. The Vesper landowners wanted a third entrance added to the road plans. Another exhibit, titled "Exhibit 1," was prepared for the mediation. "Exhibit 1" had a third entrance on the plans for the highway.

The parties now disagree as to the meaning of the agreement as it relates to a third entrance and responsibility for constructing it. The Vesper landowners assert that the Department of Highways agreed to absorb the cost of the third entrance at no cost to the Vesper landowners; whereas, the Department of Highways claims that the Vesper landowners agreed to pay for the cost of the third entrance.

Following the mediation, another exhibit was prepared – "Exhibit B," which was attached to the agreed order. "Exhibit B" included both a new description of the "metes and bounds" of the land acquired from the Vespers and also new highway plans. Apparently, the new highway plans were sent to the

Vesper landowners, who signed and approved them. Most definitely, the highway plans in "Exhibit B" were the ones put out for bid and used in construction. While "Exhibit B" showed three entrances, only two entrances were stubbed into the plans.

Approximately a year later, the Vesper landowners realized that the construction of the new highway did not include three entrances. Accordingly, the Vesper landowners made a motion to "Enforce the Agreed Order dated October 19, 2010." It was their allegation that the only relevant portion of "Exhibit B" was the section devoted to the description of "metes and bounds," and that "Exhibit 1" is representative of the agreement.

In essence, the parties interpreted the obligations and benefits incurred in the final judgment differently. Under the Vesper landowners' interpretation of the agreed order, they are entitled to a third constructed entrance similar to the two being constructed. Therefore, they maintained that the trial court should order that "Exhibit B" be changed (redrawn) to show a third entrance similar to the other two entrances and that this entrance be built.

Conversely, the Department of Highways suggests that "Exhibit 1" and "Exhibit B" do not conflict and, therefore, there is no need for the trial court to amend "Exhibit B" by redrawing the highway plans to show a third entrance. Further, it alleges that "Exhibit B" does not conflict with any of the eight (8) written points agreed to by the parties during mediation and written onto a page of "Exhibit 1."

In its order, entered September 21, 2012, the trial court determined that the final judgment supported both parties' interpretation. Consequently, the trial court concluded that the language in the final judgment was ambiguous. It went on to use extrinsic evidence to ascertain the meaning of the agreement. The trial court found that the evidence supported the Department of Highways' interpretation. Thus, the trial court denied the Vespers' motion. The Vesper landowners now appeal the trial court's September 21, 2012 order.

STANDARD OF REVIEW

Settlement agreements are contractual in nature and, thus, their interpretation is a question of law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). We review questions of law *de novo* and are not required to defer to the trial court's decision. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). Moreover, questions regarding ambiguity of a contract are also questions of law to be decided by a court. *Frear*, 103 S.W.3d at 105.

But when it is ascertained that a contract is ambiguous on a vital matter, a trial court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) (citations omitted.) "However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues

and construction of the contract become subject to resolution by the fact-finder." *Id*. We now turn to the case at hand.

ANALYSIS

On appeal, the Vesper landowners contend that the trial court erred by discerning ambiguity in the mediated agreement, which was ultimately incorporated into the agreed order. Additionally, they argue that the trial court erred in redressing the ambiguity by referring to provisions in the amended petition, in particular, "Exhibit B." According to the Vesper landowners, "Exhibit B" was not a part of the amended petition, and the trial court should have determined the meaning of the contract from its four corners. Nonetheless, they do allow that the section of "Exhibit B" that restates the "metes and bounds" of the property is applicable to the amended petition.

Further, the Vesper landowners argue that no ambiguity existed in the terms of the settlement found in "Exhibit 1," which was incorporated into the Agreed Order. Hence, its terms prevail. Under their interpretation, the language of "Exhibit 1," which was written on the exhibit during the mediation, clarifies the agreement.

The Department of Highways concurs with the Vesper landowners that no ambiguity exists in the agreed order. Interestingly, it puts forward a completely different stance as to the meaning of the amended order. The Department of Highways declares that "Exhibit 1" and "Exhibit B" are not

contradictory. In addition, it maintains that the amended petition incorporates "Exhibit B" with the Agreed Order.

Given the two diametrically opposed interpretations by the parties of the agreed order, on its face clearly ambiguity exists. Yet, we must still review the facts. Before doing so, however, we remark on the Vesper landowners' allegation that because the trial court initially observed that a dispute existed between the parties, it illogically determined and erred when it decided that the agreement was ambiguous. Clearly, our review indicates that the trial court did not create, start, or begin its reasoning with a dispute but instead observed that the parties had a different understanding of the settlement's terms.

The primary point of disagreement on the meaning of the contract terms centers on whether three entrances were required to be built in the original construction of the limited access highway and, if so, the party responsible for payment of the third entrance. The discussion revolves around the meaning of the final judgment (Agreed Order Dated October 19, 2010) and the legal effect of the attached documents - "Exhibit 1" and "Exhibit B."

We begin our analysis by noting, in particular, three of the ten individual paragraphs of the agreed order. These paragraphs were discussed in the parties' briefs and are relevant for our *de novo* review. The paragraphs are numbered one (1), four (4) and five (5):

> (1)That the Petition, Report of the Commissioners, and Interlocutory Order and Judgment,[1] all of which have been previously filed and/or entered herein, are hereby amended so as to delete the description of Parcel No. 1 Tract A, Parcel No. 1 Tract B, and Parcel No. 1 Tract C as set forth therein and to substitute in their place the following descriptions of Parcel No. 1 Tract A, Parcel No. 1 Tract B, and Parcel No. 1 Tract C as set forth below.
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> (4) That the attached plan sheet, marked Exhibit "B" which depicts the revisions as set forth in numerical paragraph (1) hereinabove is filed in substitution of Exhibit "A" originally filed with the Petition, and that said Petition is further amended to read Exhibit "B" wherever the language Exhibit "A" appears.
>
> (5) For the consideration as agreed to in Exhibit 1, the Plaintiff, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, shall now pay to the Defendants, the sum of One Million Six Hundred Seventeen Thousand Sixteen Dollars ($1,617,016.00). Said payment to be made to Paul Vesper, Attorney, and said funds distributed through his escrow account.

Significantly, paragraph one (1) was followed by approximately seven (7) pages of revised "metes and bounds" descriptions.

Notably, in paragraph (4), the parties state that "Exhibit B" would be substituted for "Exhibit A" in the Petition. Second, the language in paragraph (5), where the Commonwealth agrees to pay the Vesper landowners $1,617,016.00, acknowledges "Exhibit 1." "Exhibit 1" consists of two pages of plans on which, during mediation, the parties had written the following items:

1. Three (3) entrances requested by the property owners;
2. No owner contribution to the construction costs;

[1] Apparently, the interlocutory order with judgment was never entered in the record; it does not exist.

3. $80,000 per acre taking; $72,000 easement;
4. Construction plans currently submitted as minimally amended for entrances;
5. Approval of Fiscal Court;
6. Property owner's request for permits into easement not unreasonably withheld;
7. Close by 30 September 2010;
8. Separate check to Sunset Valley Farm, LLC for $120,000.00 – (part of total settlement).

Because the actual agreed order refers specifically to "Exhibit 1" and "Exhibit B," it is not possible to ascertain the settlement agreement without reference to these documents. Therefore, based on the fact that they are referenced in the agreed order and attached to it, the final judgment includes these documents.

Hence, since the agreement incorporated these documents, the agreement is not set out verbatim. Using the language found in the Agreed Order, "Exhibit 1" and "Exhibit B," either the Vesper landowners' or the Department of Highways' understanding regarding the third entrance could be inferred from the settlement agreement. "Exhibit 1" refers to three entrances and shows them, whereas "Exhibit B" shows only two of the three entrances stubbed into the plans. To determine if an ambiguity truly exists, we must evaluate whether the provision in question is susceptible of contradictory interpretations. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky. App. 1994). As noted, clearly that is the case here. Thus, ambiguity exists in the settlement agreement.

As explained in *Elmore v. Commonwealth*, 236 S.W.3d 623, 627 (Ky. App. 2007), if the terms of the contract are ambiguous, the court may consider extrinsic evidence. If the language of a contract is ambiguous on a vital matter, a

court may consider extrinsic and parol evidence to ascertain the meaning of the contract terms. *See also Reynolds Metals Co. v. Barker*, 256 S.W.2d 17, 18 (Ky. 1953). Here, the trial court did so and found that the evidence established that while the Department of Highways agreed to a third entrance, it did not agree to build it.

In *Cantrell*, our Court held that if a trial court decides that a contract is ambiguous, construction of the contract becomes subject to resolution by the fact-finder. *Cantrell*, 94 S.W.3d at 385. Factual findings of the trial court "are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence." *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011). Further, due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. *General Motors Corp. v. Herald*, 833 S.W.2d 804, 806 (Ky. 1992).

In the case at bar, not only did substantial evidence support the trial court's findings but also the trial court had adequate opportunity over the history of the case, including an evidentiary hearing, to so decide.

CONCLUSION

The agreement of the parties, which ultimately became a final judgment, was ambiguous as to the construction of entrances on the South Airfield Connector, a limited access highway. We concur with the trial court's decision regarding the existence of ambiguity. Moreover, the trial court was not clearly

erroneous because substantial evidence supported its finding that although the Department of Highways agreed to a third entrance, it did not agree to build it.

The September 21, 2012 decision of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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