

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000703-MR

PIKE COUNTY, KENTUCKY

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 02-CI-00943

DENNIS BARTLEY;
REBECCA BARTLEY

APPELLEES

OPINION AFFIRMING

** ** * * * **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

HENRY, SENIOR JUDGE: Pike County, Kentucky, appeals from a jury verdict awarding Dennis and Rebecca Bartley \$15,000.00 for damage to their property in this reverse condemnation action. We hold that the doctrine of sovereign immunity does not protect the county from such an action, and we find that the trial court correctly overruled

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Pike County's motion for a directed verdict based on insufficient proof of causation.

Thus, we affirm.

SUMMARY OF FACTS AND PROCEDURE

Dennis Bartley bought the land which is the subject of this action from his father in 1977. Kettle Camp Creek borders the Bartleys' property, and a county road runs along the other side of the creek. In the 1980s the Bartleys moved onto the property after preparing a home site on a large flat area by the creek. Over the years the county performed occasional maintenance on the road. Dennis Bartley testified that the county's efforts to widen and maintain the road resulted in moving Kettle Camp Creek toward his property and eroding his hillside. He testified that the road work caused a slight disturbance of his property in the 1990s, but that he repaired the damage himself and it remained stable for a period of years. Then, in the late 1990s, a Pike County road crew installed 12 galvanized steel drain tiles, each 4 feet in diameter by 20 feet long, at the base of the mountain, in an attempt to widen the creek. To install these tiles the crew had to dig down 8 or 9 feet from the level of the road. The dirt from the excavation was hauled away from the site, and the tiles were later covered with dirt taken from the Bartleys' property. A few years later five of the galvanized tiles collapsed and were removed. These tiles were not replaced. Thereafter the hill, including part of the Bartleys' front yard, slipped or slid down the hillside from above the location where the tiles had been removed. An appraiser testified that the Bartleys' tract was worth \$35,000.00 before the slide, and \$20,000.00 after the slide.

On July 9, 2002, the Bartleys filed this action alleging that in 2001 and 2002 Pike County “appropriated for public use a portion of the Plaintiffs' property by digging out the creek, taking a portion of the Plaintiffs' property and putting tiles in.” A jury trial was conducted on January 17, 2006. A unanimous verdict was returned in favor of the Bartleys, awarding them damages in the amount of \$15,000.00. Pike County's motions for a new trial, for judgment notwithstanding the verdict and to alter, amend or vacate the judgment were overruled, and this appeal followed.

ISSUES ON APPEAL AND STANDARD OF REVIEW

Pike County raises two issues on appeal: first, that the doctrine of sovereign immunity protects the county from liability for damages caused by work done on a county road, and second, that the Bartleys failed to prove that the road work caused the damage to their property. The county moved for a directed verdict based on these grounds at the close of the Bartleys' case. The trial court deferred ruling on the motion until the close of all the evidence. The county renewed the motion at that time, and the Bartleys moved for a directed verdict on causation. All directed verdict motions were overruled and the case was submitted to the jury. Thus, our review of the causation issue is limited to a determination of whether the trial court erred in failing to grant a directed verdict. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). But we review the court's refusal to grant a directed verdict on the issue of sovereign immunity, a question of law, de novo. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). We first examine the issue of sovereign immunity.

SOVEREIGN IMMUNITY

There is no question that Kentucky counties are cloaked with sovereign immunity. *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003). But the question in this case is whether that immunity bars a reverse condemnation suit. In a line of cases extending back over a hundred years, the answer to that question has been “no”.

At least since 1902, Kentucky's appellate courts have held that Section 242 of the Kentucky Constitution authorizes an action against a county for the uncompensated taking of private land for public use. *Layman v. Beeler*, 24 Ky.L.Rptr. 174, 67 S.W. 995 (1902). While the earlier cases relied almost entirely upon Section 242, by the 1940s, reverse condemnation cases routinely cited both Sections 242 and 13 of the Constitution as conclusive authority for such actions. *Kentucky Bell Corporation v. Commonwealth*, 295 Ky. 21, 172 S.W.2d 661, 663 (1943). In a 1951 case in which the plaintiff sued the Commonwealth to recover for damage caused by water diverted onto his land by highway construction, the former Court of Appeals noted that “[i]t has been many times held that under Sections 13 and 242 of our Constitution, the State is not immune from suit if it fails to bring a condemnation proceeding, and the present suit is in effect a condemnation in reverse.” *Keck v. Hafley*, 237 S.W.2d. 527, 529 (Ky. 1951). Although *Keck* speaks only in terms of the Commonwealth's lack of immunity from such actions, many of the cases cited therein involved suits against counties, and it is clear from the cases that the same principle applies with equal force to counties. Reverse condemnation actions do not sound in tort, but arise from the Kentucky Constitution's provisions against

taking private property without just compensation. Thus, the plaintiff must only show that his property was taken for a public use without compensation, not that the government acted wrongfully or negligently. *Wireman v. City of Greenup*, 582 S.W.2d 48, 50 (Ky. 1979). And, it is not necessary that the injured party give the condemnor a deed for property that is the subject of a reverse condemnation. *Commonwealth, Department of Highways v. Widner*, 388 S.W.2d 583, 588 (Ky. 1965). The trial court correctly overruled Pike County's motion for a directed verdict on the issue of sovereign immunity.

PROOF OF CAUSATION

Pike County asserts that the Bartleys failed to prove that the county road crew's actions caused their damages. The jury found otherwise. Our review of factual determinations made by juries is limited, as described by the Kentucky Supreme Court:

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d at 462.

We have carefully reviewed the trial record under the standard set out above, and we find no error in the trial court's ruling. A trial court "is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which

reasonable men could differ.” *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). The court must consider the evidence in the strongest possible light in favor of the party opposing the motion. *Id.*

Further, we note that despite Pike County's assertions to the contrary, the record contains substantial evidence supporting the Bartleys' contention that the actions of the road crew caused the earth to slide above the area where the tiles were removed and not replaced. There was testimony that the area had been stable for several years after Mr. Bartley repaired it himself in the early 1990s, and that the major slide occurred only after the road crew dug out the creek to a depth of 8 or 9 feet and installed the large galvanized culverts, five of which collapsed and were removed with nothing put back in their place. This slide occurred above the area where the tiles were removed and nowhere else. It was reasonable for the jury to conclude that the actions of the road crew resulted in the landslide.

Finally, we find no support in the record for Pike County's assertion that “this was a damage suit that the landowners tried as a reverse condemnation suit.” The complaint pleaded that the county took the Bartleys' property for public use without compensation. The only instruction offered by the Bartleys was based on a theory of reverse condemnation, not negligence. The county, having neither objected to this instruction nor tendered one of its own, waived any argument that the jury should have been instructed on another theory. Kentucky Rules of Civil Procedure (CR) 51(3); *Burke Enterprises, Inc. v Mitchell*, 700 S.W.2d 789, 792 (Ky. 1985). As we noted earlier, in

reverse condemnation cases the jury is not required to find that the condemnor acted negligently, only that a taking occurred without compensation. *Wireman*, 582 S.W.2d at 50. The court correctly overruled the motion for directed verdict.

CONCLUSION

The judgment of the Pike County Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT
FOR APPELLEES:

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