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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001788-MR

CINDY MUNCIE AND
JIM MUNCIE — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 13-CI-00688

PATRICIA WEISEMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Cindy and Jim Muncie have appealed from the order of the Oldham Circuit Court granting summary judgment to Patricia Wiesemann[1] on their claim for stigma damages arising from an oil leak on Wiesemann's property that caused damage to the Muncies' property. Finding no error, we affirm.

[1] Patricia Wiesemann's last name was misspelled in the body of the Notice of Appeal as Weiseman.

The underlying facts of this case are briefly set forth in a series of correspondence between and from Kentucky officials in the Energy and Environment Cabinet. A memorandum dated January 13, 2011, from Environmental Response Branch Manager Robert Francis to Energy and Environment Cabinet Secretary Leonard K. Peters provided in relevant part as follows:

> On December 2, 2010, the Energy and Environment Cabinet's Environmental Response Branch responded to a release of 1000 gallons of #2 Fuel Oil (aka Home Heating Oil) from a failed underground storage tank. The tank is an "unregulated" home heating oil tank at an unoccupied house owned by the Martha Magel Estate. The oil migrated several hundred feet through the subsurface and began entering the basement sump pump at the home of Jim and Cindy Muncie. The executrix of the Martha Magel Estate hired an environmental contractor to remove the failed tank, and to prevent the entry of petroleum into the Muncie residence. However, as of December 8, petroleum continued to enter the Muncie residence. Additionally, the sump pump failed, causing the basement to be flooded with petroleum contaminated water.
>
> Based on the continued impacts to an off-site residence, it was necessary that our agency implement emergency abatement procedures at the Muncie residence to limit any human health or environmental impacts. In accordance with the statutory authority stipulated in KRS 224.46 580 (3), the Department is requesting that an environmental emergency be declared to expedite the efforts that occurred to limit any human health or environmental impacts.

The memorandum went on to request funds from the Hazardous Waste Assessment Account to fund the abatement actions; the estimated cost of the emergency phase

of the cleanup of the site was not expected to exceed $70,000.00. In a letter to Wiesemann dated January 3, 2012, Ron Lovitt, a supervisor from the Petroleum Cleanup Section of the Superfund Branch, provided the following information:

> The Kentucky Division of Waste Management (KDWM) has reviewed the final sampling data taken December 15, 2011 to confirm the results of remedial activities preformed [sic] on the Muncie property to remediate the contaminated soil and groundwater. The data documents that the soil and groundwater has been remediated and no further action is needed at both the Magel Estate and Muncie properties. The analytical results document that the previously impacted areas are all below regulated levels. Therefore, KDWM concludes that no further action is required at this time. This site has met the Option C (Clean Closure-Restored) cleanup requirements.
>
> This closure brings this site into compliance with 401 KAR 100:030 and KRS 224.01-405. This compliance extends only to the known aspects of this release and any additional information on this release or other releases may require additional work.

Auto-Owners Insurance Company provided liability insurance for Wiesemann, and in May 2011, Auto-Owners filed an Interpleader Complaint in the United States District Court for the Western District of Kentucky in Louisville against Wiesemann, the Muncies, Samuel and Bonnie Dunkle, Shield Environmental Associates, Inc., and the Kentucky Department for Environmental Protection (specifically, its Environmental Response Team and the division of Waste Management, Superfund Branch). Auto-Owners had $300,000.00 in liability coverage for claims made against Wiesemann related to the oil leak in November 2010 or the cleanup of the leak.

The parties in the federal action entered into a partial settlement and partial release agreement in September 2013. Auto-Owners had already paid $112,221.30 to parties for cleanup costs, leaving a remaining balance of $187,778.61, which it paid into the Clerk's registry account. Doing so discharged Auto-Owners' obligation to any claims from third parties. From those funds, the Muncies received $60,000.00, the Dunkles received $7,000.00, Shield Environmental Associates received $70,000.00, and the Kentucky Department for Environmental Protection received $50,778.61. The parties also agreed to a dismissal of all claims upon the effective date of the agreement, with the following the exceptions:

> The Agreed Order shall provide for dismissal of all claims by all parties against Wiesemann and the Estate of Magel, with prejudice, ***except for (i) claims by the Muncies asserting the diminution of the value of their real estate due to the stigma resulting from the contamination, and (ii) for claims asserted by the Muncies for personal injuries.*** The Agreed Order shall further provide for dismissal with prejudice of all other claims, ***except the Muncie's [sic] claims against Shield for basement interior damage (including any floor covering or other fixtures affixed to that part of the real estate) arising out of performance of the cleanup services, generally set forth in Count 5 of the Muncie's [sic] Amended Cross-Claim, Exhibit 3 to document No. 40 in the Action.*** . . . All claims by the Muncies for contamination and/or damage to the exterior of their home and surrounding grounds, including but not limited to, the pool liner, driveway, landscaping, and/or septic tank, arising from either or both the leak or clean-up activities, are not within the scope of this reservation of claims, and thus are fully released and discharged.

The federal action was dismissed shortly thereafter pursuant to the terms of the agreement.

In October 2013, the month after the parties entered into the agreement in the federal action, the Muncies filed a state claim in Oldham Circuit Court against Wiesemann and Shield Environmental Associates.[2] They alleged 1) that Wiesemann negligently maintained or operated the fuel tank at the property, which resulted in the oil discharge and damage at the Muncies' residence; 2) that Wiesemann caused a trespass on their land through the negligent or reckless introduction of oil from her property; and 3) that Wiesemann's actions created a permanent nuisance on their property. In her answer, Wiesemann opposed the Muncies' allegations in the complaint and raised several affirmative defenses, including that the complaint failed to state a claim upon which relief could be granted and that their claims were barred by the release and by the doctrines of accord and satisfaction, estoppel, res judicata, and collateral estoppel.

In May 2015, Wiesemann filed a motion for summary judgment arguing that the release in the interpleader settlement in the federal action barred the Muncies from any recovery in the present action because they had already been fully compensated for their contamination claims. She stated that stigma damages are not recoverable in Kentucky as a matter of law, citing *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52 (Ky. 2007). Because the Muncies had been compensated for the claims of actual damages due to contamination, to permit them to collect

[2] The Muncies alleged that Shield Environmental Associates performed work at Wiesemann's direction to remediate the oil contamination, but failed in its duties to do so. This appeal only concerns the Muncies claims against Wiesemann; their claim against Shield Environmental Associates is still pending. Therefore, we shall confine our review of the record only to matters that concern Wiesemann.

stigma damages would allow them to receive a double recovery. Wiesemann also asserted that the Muncies had abandoned their personal injury claim by failing to itemize any amount of damages for this claim and declining to answer any interrogatories related to their alleged injuries and health.[3] The Muncies objected to Wiesemann's motion, arguing that summary judgment was premature because discovery had not closed and the expert deadline had not passed, and that Wiesemann misapplied the existing law on stigma damages.

By order entered June 12, 2015, the court granted summary judgment and dismissed with prejudice the Muncies' claims for personal injury, pain and suffering, injury to or loss of personal property, the costs of remediation and clean up on their property, and the loss of use of their basement, as the Muncies did not object to the dismissal of those claims. The court scheduled a hearing on the issue of diminution in value of the property due to the stigma of environmental contamination.[4]

On October 16, 2015, the court ruled on Wiesemann's motion for summary judgment on the Muncies' stigma claim. Relying upon *Smith v. Carbide & Chems. Corp.*, *supra*, *Powell v. Tosh*, 942 F.Supp.2d 678 (W.D. Ky. 2013), and *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000), the circuit court held that while stigma damages may be included in the measure of damages, the

[3] Shield Environmental Associates also filed a motion for partial summary judgment on the same grounds.

[4] The video recording of this hearing is not included in the record on appeal.

Muncies were not entitled to both the costs of remediation and the diminution in value due to the impact of the resulting stigma or reputation of the property. Because the Muncies had settled their remediation claim, they did not have a further remedy. Therefore, the circuit court granted summary judgment and dismissed the Muncies' claim for stigma damages against Wiesemann. The court later amended the order to make it final and appealable. This appeal by the Muncies now follows.

On appeal, the Muncies present two arguments: 1) whether damages for diminution of value to real property due to an environmental stigma are recoverable where there has been actual damage to the property, and 2) whether remediation is a bar to the recovery of stigma damages. Wiesemann contends that the circuit court's judgment should be affirmed under either argument raised in the summary judgment motion below.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an

appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). The parties appear to agree that there are no disputed issues of material fact, despite the Muncies' argument below. Therefore, we shall review the circuit court's legal rulings *de novo*.

For their first argument, the Muncies argue that they should be permitted to prove the diminution in value due to stigma as an item of damage, stating that it was based on actual harm to their real property. Wiesemann contends that Kentucky law does not permit an independent right for recovery of stigma damages, which is what the Muncies attempted to do with the settlement agreement.

In its order, the circuit court appears to have decided this issue in the Muncies' favor in acknowledging that stigma damages may be included in the measure of damages, although it cannot create a right of recovery on its own. The court relied upon the federal district court's opinion in *Powell v. Tosh*, *supra*, which analyzed the Supreme Court of Kentucky's opinion in *Smith v. Carbide & Chems. Corp.*, *supra*:

> In *Smith v. Carbide & Chems. Corp.*, the Kentucky Supreme Court, answering certified questions of Kentucky law for the Sixth Circuit, differentiated between the right to recovery and the measure of damages, holding that although mere damage to the

> reputation of real property does not create a right to recovery, it may nonetheless factor into the measure of damages once actual injury is established. *Id*. Where a plaintiff has shown actual injury to real property, "the diminution in fair market value is a recognized measure of damages." *Id*. at 55 (emphasis omitted). Thus, Kentucky law merely prohibits recovery for damage to the reputation of land where there has been no actual injury to the property. *See id*. at 55–56. It follows that stigma damages may be included in the measure of damages despite not creating a right of recovery in and of itself. *See id*. at 55–56. Therefore, the Court is unpersuaded by the Tosh Defendants' argument that Clay's testimony must be excluded because she [included] the cost of stigma in calculating the measure of damages to the Plaintiffs' properties.

Powell v. Tosh, 942 F.Supp.2d at 691-92.

We agree with this statement of the law in Kentucky and hold that when there is actual damage to real property, stigma or reputation damages may be included as a measure of damages. But there is not an independent right of recovery available for such damages, as the Muncies argue. The Muncies rely in large part on the dissenting opinion of Justice Cunningham in *Smith v. Carbide & Chems. Corp.*, *supra,* to support their position. In essence, the Muncies are requesting that this Court overturn precedent from our Supreme Court, which we cannot do as an intermediate appellate court. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Rules of the Supreme Court (SCR) 1.030(8)(a). *See also Fields v. Lexington-Fayette Urban County Gov't*, 91 S.W.3d 110, 112

(Ky. App. 2001) (the Court of Appeals is "without the authority to [overturn a decision of the Supreme Court of Kentucky] even if we were so inclined.").

For their second argument, the Muncies contend that they are entitled to recover damages for diminution in value due to stigma despite having received compensation for the remediation of the real property. The circuit court rejected this argument, relying upon the Supreme Court's opinion in *Ellison, supra*, for its statement of the law that a claimant is not entitled to damages for both the costs of remediation and diminution in value. *Ellison* provides in relevant part as follows:

> As a practical matter, therefore, the amount by which the injury to the property diminishes its total value operates as an upper limit on any damage recovery. Claimants may receive restoration cost damages in injury-to-property cases only when compensation in the form of restoration costs is the least expensive way to make those claimants whole. This Court's most recent opinions addressing the issue of the damages available in injury-to-property cases have sidestepped the "permanent" versus "temporary" distinction and focused on the way in which the amount by which the decrease in property value operates as a practical limit on the amount of recovery.

Ellison, 32 S.W.3d at 70 (footnotes omitted).

These "most recent opinions" included *Kentucky Stone Co. v. Gaddie*, 396 S.W.2d 337, 340 (Ky. 1965), holding modified by *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 n.5 (Ky. 2000), in which the Supreme Court held that "the measure of damages in this type case is the cost of repair, if repair may be readily accomplished—or, if not, then the difference in market value before and after the alleged damage[,]" and *Burkshire Terrace, Inc. v. Schroerlucke*, 467 S.W.2d 770,

772 (Ky. 1971), holding modified by *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000), which cited to *Gaddie* and held as follows:

> The measure of damages for injury to real estate 'is the cost of repair, if repair may be readily accomplished—or, if not, then the difference in market value before and after the alleged damage,' *Kentucky Stone Company v. Gaddie*, Ky., 396 S.W.2d 337, 340 (1965), though in no case, of course, may the amount of recovery exceed the diminution in market value. In the latter respect, if the costs of restoration exceed the diminution in value they are presumptively unreasonable. *Cf. State Property & Building Comm., etc. v. H. W. Miller Const. Co.*, Ky., 385 S.W.2d 211, 214 (1964) for analogy.

The *Ellison* Court went on to state that the "cost to repair damages are available only where the factfinder determines that the injury to the property may properly be characterized as 'temporary' by finding that the property may be restored at an expense less than the total amount by which the injury decreased the property's value." *Id*. at 70. The Court ultimately held that "where a claimant seeks compensation in the form of repair costs for an injury to land, trial courts shall require the jury to find whether the injury may be repaired at a cost less than the diminution in the value of the property, and, if the jury finds otherwise, limit the claimant's recovery to the diminution in the value of the property." *Id*.

This rule against double recovery in matters of property damage has been enunciated in other cases as well, including *Young v. Vista Homes, Inc.*, 243 S.W.3d 352 (Ky. App. 2007), wherein this Court addressed the rule in the context of a series of complaints related to home construction in which the homeowners made allegations of code violations, misrepresentation, negligent construction,

breach of warranty, and loss of use of their property, discomfort, and annoyance. The Court concluded:

> [T]he trial court correctly noted the damages for the misrepresentation and the code violation claims were overlapping. For misrepresentation, a plaintiff is allowed the diminution in fair market value or a reasonable cost of repair which is allowed to measure a diminution in fair market value. *Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 865 (Ky. App. 1977). For the code violation, a plaintiff is allowed either the cost of repair to bring the property up to code compliance or payment of the diminution in fair market value of the property because of code infractions, whichever is less. *Franz*, 885 S.W.2d at 927. Since none of the homeowners presented evidence showing a diminution in the fair market value of their homes, the only evidence of damages was the cost of repair. The trial court concluded that the homeowners were fully compensated by the award for the code violation. Consequently, the court concluded that they were entitled to no more than nominal damages for the misrepresentation.

Id. at 366.

The Muncies attempt to persuade this Court that our decision in *Mountain Water Dist. v. Smith*, 314 S.W.3d 312, 315 (Ky. App. 2010), supports their claim that they are entitled to recovery for diminution in value of an irremediable item of damage: "The effect of *Ellison* is to prevent a claimant from seeking cost of repair damages that exceed the diminution in fair market value. This rule, therefore, assumes the claimant has repaired, or has the ability to repair, the property damage because the claimant is seeking those repair costs as damages." But as Wiesemann points out in her brief, the context of the above quote refers to the part of the *Ellison* rule limiting the amount of recovery of the

cost of restoration to the amount of the diminution in value. Therefore, *Smith* does not affect the application of *Ellison* in this case.

Because the Muncies received a remediation settlement in the federal action, we agree with the circuit court that they do not have a further remedy to recover for alleged diminution in value of their real property.

For the foregoing reasons, the summary judgment of the Oldham Circuit Court is affirmed.

ACREE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I agree with the majority that under Kentucky law, when there is physical damage to real property caused by an environmental spill, the property owner may recover stigma damages. I disagree that the Muncies are not entitled to prove and recover stigma damages after they executed a partial settlement agreement expressly reserving that claim.

As the instances of environmental contamination have increased so has the recognition that in many cases, a claimant can only be fully compensated by the award of stigma damages. The Court in *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998), explained the purpose of stigma damages in cases where the physical damage is not cured by remediation.

> [S]tigma damages compensate for loss to the property's market value resulting from the long-term negative perception of the property in excess of any recovery

> obtained for the temporary injury itself. Were this residual loss due to stigma not compensated, the plaintiff's property would be permanently deprived of significant value without compensation.

Id. at 1246. (internal citations omitted).

Our Supreme Court addressed the availability of stigma damages to property owners in *Smith v. Carbide & Chems. Corp*., 226 S.W.3d 52 (Ky. 2007). Subsequently, in *Powell v. Tosh*, 942 F. Supp. 2d 678, 691-92 (W.D. Ky. 2013), interpreting *Smith*, the federal court held that in Kentucky, stigma damages may be recovered where there is actual injury to property. The majority does not disagree that this is the law but then denies the Muncies the right to conduct discovery on this issue for the reason that they have been partially compensated by the settlement agreement.

The majority's reasoning is flawed, first, because the settlement agreement expressly reserved the right to seek stigma damages in addition to the damages for remediation. Second, *Ellison v. R & B Contracting, Inc*., 32 S.W.3d 66 (Ky. 2000), does not compel the result reached by the majority.

Relying on *Ellison*, the majority states that the Muncies cannot recover damages for the cost of remediation and diminution in value. This is incorrect.

In *Ellison,* the claimant sought cost of repair damages. The Court held that "the amount by which the injury to the property diminishes its total value operates as an *upper limit* on any damage recovery. Claimants may receive restoration cost damages in injury-to-property cases only when compensation in the form of

restoration costs is the least expensive way to make those claimants whole." *Id*. at 70 (emphasis added). In other words, diminution in value is the *most* a plaintiff can recover. The rule acknowledges that it would be unreasonable to expend more in repairs than a property is worth.

This Court examined *Ellison* in *Mountain Water Dist. v. Smith*, 314 S.W.3d 312, 315 (Ky. App. 2010), and held:

> The effect of *Ellison* is to prevent a claimant from seeking cost of repair damages that exceed the diminution in fair market value. This rule, therefore, assumes the claimant has repaired, or has the ability to repair, the property damage because the claimant is seeking those repair costs as damages. In this case, the [claimants] are seeking diminution in value damages, in part, because they claim they were unable to repair the damage, and presented evidence to that effect in the form of an appraisal.

This is precisely what the Muncies seek in the form of stigma damages. If remediation fully compensated the Muncies so that there is no diminution in value to the property caused by the stigma of being previously contaminated, then they are not entitled to further recovery. However, if it is proven that the public perception of the property after contamination has caused its value to decrease, they are entitled to recover that additional amount. There is no double recovery because stigma damages are those awarded to compensate for the loss after remediation.

I would reverse and remand for discovery on the amount, if any, of stigma damages incurred. At trial, any possibility of double recovery would be cured by appropriate jury instructions.

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