

RENDERED: APRIL 11, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-001789-MR

TONY LAWSON AND SANDRA LAWSON

APPELLANTS

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 97-CI-00339

CENTRAL ASSOCIATED ENGINEERS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE. Tony and Sandra Lawson appeal from an order of the Russell Circuit Court granting summary judgment in favor of Central Associated Engineers (CAE) on the Lawsons' complaint for damages involving a trespass on their property. We affirm.

On September 25, 1989, the Lawsons purchased a 1½ acre parcel of undeveloped realty in Russell County near Lake Cumberland from Delmer and Edna Roy. The deed was filed on

March 29, 1991. In connection with its project to upgrade the telephone system in Russell County by laying an underground fiber-optic telecommunications cable line, Duo County Telephone Cooperative Corporation contracted with CAE in January 1995 to provide design and engineering services that included, among other things, surveying the proposed line, placing stakes at necessary locations, on-site inspection and monitoring, and obtaining private right-of-way easements from property owners. Generally, CAE entrusted the responsibility for obtaining the right-of-way easements to the resident engineer or the field-staking engineer for each particular area. Often, the engineer would seek permission to lay the cable and obtain an easement by speaking directly with each landowner discovered on the site. In July 1996, Duo County Telephone contracted with United, Incorporated, to install the underground cable.

In connection with this case, the CAE resident engineer spoke with Delmer Roy, who indicated that he owned the property previously conveyed to the Lawsons. Roy executed a written document on January 17, 1996, granting Duo County Telephone a right-of-way easement to a 20-foot wide strip on the property. CAE did not search the county property records to determine legal ownership before obtaining the easement from Roy.

At some point, the Lawsons were informed that the underground telephone cable had been laid across their property without their consent. On November 13, 1997, the Lawsons filed a civil complaint in the Russell Circuit Court against Duo County Telephone based on a willfull, illegal trespass. They alleged damage to their property by the cutting of trees, ditch digging, erosion of soil, and deposits of petroleum products contaminating the soil. They sought both compensatory and punitive damages.

Duo County Telephone filed an answer and counterclaim seeking condemnation under KRS¹ Chapter 416 (the Eminent Domain Act) of a strip of land 20-feet wide and 730-feet long for purposes of a right-of-way easement. Duo County Telephone filed a third-party complaint joining CAE and United as third-party defendants seeking indemnification or contribution as a result of the Lawsons' action. The Lawsons subsequently obtained leave to file an amended complaint to set out their claims against CAE and United.

Meanwhile, pursuant to KRS 416.580, three commissioners were appointed by the circuit court in the Duo County Telephone condemnation action. They issued a report

¹ Kentucky Revised Statutes.

determining that the difference in the fair market value of the Lawsons' property before and after the taking was \$700 and that the fair rental value of the temporary easement was \$500.² The Lawsons filed exceptions to the report that were rejected by the trial court, which entered a judgment granting an easement for the purpose of construction and maintenance of the subterranean cable line to Duo County Telephone upon payment of \$700 to the Lawsons.

On October 26, 2000, the trial court entered an agreed order dismissing the Lawsons' claims against Duo County Telephone based on a settlement between those parties. The order, however, stated that the Lawsons' claims against CAE and United remained unaffected. Thereafter, CAE filed a motion for summary judgment based on the settlement between the Lawsons and Duo County Telephone. Following the Lawsons' response, the trial court granted CAE's motion for summary judgment and dismissed the complaint against CAE. The trial court subsequently entered an agreed order dismissing the Lawsons' claims against United as settled.

² The commissioners assessed the fair market value before and after the taking of \$1,500 and \$800, respectively.

The Lawsons filed a CR³ 59.05 motion to alter, amend or vacate the order granting summary judgment to CAE. CAE filed a response to the motion asserting that the Lawsons could not receive further damages from CAE in light of the settlement agreements with the other two parties.⁴ The trial court denied the CR 59.05 motion, and this appeal followed.

The Lawsons contend that CAE was not entitled to summary judgment because CAE was individually liable for trespassing on their property and that there is a factual dispute concerning whether CAE acted negligently in performing its contractual duties.

Generally, 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 of material fact and that the moving party was entitled to judgment as a matter of law. Palmer v. Int'l Ass'n of Machinists, Ky., 882 S.W.2d 117, 120 (1994); Stewart v. University of Louisville, Ky. App., 65 S.W.3d 536, 540 (2001); CR 56.03. The court must view the record in a light most favorable to the nonmovant and resolve all factual doubts in his favor. Lipsteuer v. CSX

³ Kentucky Rules of Civil Procedure.

Transportation, Inc., Ky., 37 S.W.3d 732, 736 (2000);
Commonwealth, Natural Resources and Environmental Protection
Cabinet v. Neace, Ky., 14 S.W.3d 15, 19 (2000). An appellate
court need not defer to the trial court's decision on summary
judgment and will review the issue de novo because only legal
questions are involved. See Lewis v. B & R Corp., Ky. App., 56
S.W.3d 432, 436 (2001); Barnette v. Hospital of Louisa, Inc.,
Ky. App., 64 S.W.3d 828, 829 (2002).

The Lawsons begin by arguing that CAE was an
independent contractor under the nine-factor analysis set forth
in Purchase Transportation Services v. Estate of Wilson, Ky., 39
S.W.3d 816 (2001)(quoting Ratliff v. Redmon, Ky., 396 S.W.2d
320, 324-25 (1965)). Armed with this proposition, the Lawsons
contend they can recover damages against CAE despite the
settlement agreement with Duo County Telephone.

Although the Lawsons' assertion that CAE was acting as
an independent contractor is persuasive, we do not agree with
the conclusions they draw from this fact. It is undisputed that
CAE was acting as an agent on behalf of Duo County Telephone on
the latter's public works project of installing subterranean
telecommunications fiber-optic cable. While the general rule is

⁴ CAE indicated in the response that the Lawsons had received
\$2,500 from Duo County Telephone and \$5,000 from United under
(FOOTNOTE CONTINUED)

that an employer or principal is not liable for the torts of an independent contractor, a governmental entity is constitutionally obligated to provide just compensation for damage to or interference with a property right sufficient to constitute a "taking."⁵ Ky. Const. §§ 13 and 242.⁶ This constitutional principal represents a waiver of governmental sovereign immunity. See Holloway Const. Co. v. Smith, Ky., 683 S.W.2d 248, 249 (1984); Kentucky Bell Corp. v. Commonwealth, Ky., 295 Ky. 21, 172 S.W.2d 661, 663 (1943). Whether a claim

their settlement agreements.

⁵ "Taking" under the power of eminent domain with respect to an easement has been generally defined as entering upon private property for more than a momentary period and under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment of it. See City of Winston-Salem v. Ferrell, 79 N.C. App., 103, 338 S.E.2d 794, 798 (1986).

⁶ Ordinarily, under the law of eminent domain, the condemnor must seek condemnation and provide just compensation prior to a "taking." However, where the "taking" has already occurred, a property owner can procure compensation through a civil action referred to as "inverse" or "reverse" condemnation. See, e.g., Commonwealth, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co., Ky., 678 S.W.2d 378 (1984); Jones v. Commonwealth, Transportation Cabinet, Ky. App., 875 S.W.2d 892 (1993). This case began as a type of inverse condemnation action but was transformed into a regular condemnation action based on Duo County Telephone's counterclaim. The difference is more technical than substantive because inverse condemnation is treated in the same fashion as regular condemnation by eminent domain. Stearns Coal and Lumber, supra; Keck v. Hafley, Ky., 237 S.W.2d 527 (1951).

is based on riparian rights, trespass, or nuisance, government action constituting a "taking" of property rights creates liability for just compensation by the government. See Commonwealth, Dep't of Highways v. Cochrane, Ky., 397 S.W.2d 155 (1965); Lehman v. Williams, 301 Ky. 729, 193 S.W.2d 161 (1946) (condemnation based on trespass amounting to a taking). The governmental condemnor remains liable for a "taking" for public use even if it results from actions by its independent contractors acting as agents on behalf of the condemnor according to its plans. Cochrane, 397 S.W.2d at 156; Wireman v. City of Greenup, Ky. App., 582 S.W.2d 48, 50 (1979).

A condemnor is not liable for the negligent acts or torts of its independent contractors. See, e.g., Pursifull v. City of Pineville, 298 Ky. 453, 183 S.W.2d 32 (1944); Perry County v. Tyree, 282 Ky. 708, 139 S.W.2d 721 (1940).

Conversely, an independent contractor is liable for damages resulting from his own negligence but is not responsible for trespass or negligence for actions done in conformity with the reasonable plans of the governmental entity according to his contract and within the right-of-way. See Commonwealth, Dep't of Highways v. Gisborne, Ky., 391 S.W.2d 714 (1965); Combs v. Codell Const. Co., 244 Ky. 772, 52 S.W.2d 719, 720 (1932); Hall v. Ellis & Brantley, 238 Ky. 114, 36 S.W.2d 850, 851 (1931); Adkins v. Harlan County, 259 Ky. 400, 82 S.W.2d 425 (1935). But

see Breathitt County v. Hudson, 265 Ky. 21, 95 S.W.2d 1132 (1936)(suggesting contractor may be secondarily liable for work done in conformity with government entity's plans).

In the current case, the Lawsons maintain that CAE is individually liable as an independent contractor for trespass onto their property. They allege that CAE was negligent in not determining the proper owner of their tract and that a trespass action is viable even though CAE honestly, but mistakenly, believed it had authority to be on the land. See Lebow v. Cameron, Ky., 394 S.W.2d 773 (1965). The Lawsons further contend that trespass involves injury to the right of possession and that they are entitled to at least nominal damages for CAE's actions. See generally Ellison v. R & B Contracting, Inc., Ky., 32 S.W.3d 66 (2000)(recognizing availability of nominal damages for trespass).

The Lawsons' position is flawed for several reasons. First, an independent contractor acting as an agent for a governmental entity who performs his contract according to the plans of the governmental entity within a right-of-way is not liable for trespass. While a contractor may be liable if he carries out his duties negligently, that exception does not apply to the facts of this case. The negligence by CAE alleged by the Lawsons involved its failure to search the property records to discern the actual legal owner prior to entering onto

the land. As indicated by the court in Witbeck v. Big Rivers Rural Electric Cooperative Corp., Ky., 412 S.W.2d 265 (1967), overruled on other grounds by Commonwealth, Dep't of Highways v. Stephens Estate, Ky., 502 S.W.2d 71 (1973), any recovery for an unauthorized premature entry by a contractor acting on behalf of a condemnor is available only in the condemnation action.

Appellee's contractor entered upon appellants' land two or three days before the refusal by appellants of the damages tendered. For this reason appellants claim that appellee trespassed and that they are thereby entitled to punitive damages. The rule is that where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that "just compensation for property taken" shall be made. This remedy is frequently referred to as "reverse condemnation." The measure of damages is the same as in condemnation cases. Separate recovery of punitive damages is prohibited.

Id. at 269 (citations omitted). The only injury resulting from CAE's alleged negligence was its entry onto the land, which was a necessary aspect of its contract with and the "taking" by Duo County Telephone. Consequently, CAE was not liable to the Lawsons for trespass for entering onto their property within the right-of-way easement acquired by Duo County Telephone.

In addition, the Lawsons have already received compensation for CAE's entry onto their property. As part of the condemnation action, the Lawsons were awarded \$500 as the

fair rental value for a temporary easement in addition to the fair market value of a permanent easement. In settling the condemnation action with Duo County Telephone, the Lawsons received full compensation for all aspects of the "taking," including any claim for a temporary easement associated with the actions of the contractors necessary to creation of the right-of-way easement. See, e.g., City of Miami v. Osborne, 55 So. 2d 120 (Fla. 1951)(settlement of condemnation action was res judicata for prior entry onto property). Therefore, the trial court correctly concluded that recovery of even nominal damages by the Lawsons for CAE's entry onto their property would constitute a double recovery.

In conclusion, even assuming it was negligent in failing to search the property records to determine the legal owner of the Lawsons' tract, CAE was entitled to summary judgment as a matter of law because it was not separately liable for entering onto the Lawsons' property pursuant to its duties as agent for Duo County Telephone and because the Lawsons had already received compensation for any injury caused by CAE as part of the settlement of the condemnation action.

For the foregoing reasons, we affirm the judgment of the Russell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew B. Leveridge
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BRIEF FOR APPELLEE:

Jeffrey A. Darling
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