

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002613-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 00-CI-00161; 00-CI-00163; 00-CI-00165

TIMOTHY KELLER; DONNA KELLER,
his wife; JOHN E. KELLER, BETTY
KELLER, his wife; LEON RUSSELL,
and BRENDA RUSSELL, his wife

APPELLEES

OPINION

AFFIRMING

** ** * * *

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

EMBERTON, CHIEF JUDGE. This appeal arises from a condemnation proceeding. The appellant, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, contends that three separate parcels of property should not have been combined for purposes of the condemnation award.

The property in dispute is eighty-five acres abounding both sides of U.S. Highway 460 in Morgan County, Kentucky, and consists of three separate parcels owned by different individuals. Timothy Keller and his wife, Donna, own parcel no. 2; parcel no. 8 is owned by John Keller and his wife Betty, Timothy Keller, Donna Keller and Leon Russell and his wife, Brenda; Timothy Keller, Donna Keller, John Keller and Betty Keller own parcel no. 9. Grassy Auto Parts is operated on all three parcels.

On October 25, 2001, a pretrial conference was held at which time the Transportation Cabinet indicated it was agreeable to trying all the cases together and combining the parcels for valuation purposes. Although there is no written transcript of the pretrial hearing, both parties filed narrative statements detailing the communications regarding the trial of the cases together. In its statement, the Transportation Cabinet acknowledges that both sides and the court met for the purpose of determining whether all three cases would be tried together and "tentatively agreed to a joint trial," but states that it understood it had the option to reconsider prior to trial. On October 26, 2001, appellees' counsel notified the Transportation Cabinet's counsel that the cases would be tried together. On the morning of trial, the Transportation Cabinet's counsel objected to trying the cases together and valuing the parcels as

a single property. The trial court overruled the objection and the trial proceeded.

At trial, the Transportation Cabinet's appraisal witness gave both before and after values of each of the three parcels individually, then combined the values, resulting in a before taking value of \$762,000, and an after taking value of \$460,000, for a difference of \$302,000. The appraiser valued the temporary easements from the three parcels at \$3,000. The appellees' appraisal witness testified that the before taking value is \$925,000, and the after taking is \$375,000, for a difference of \$550,000. The value of the easements, he testified, was \$8,000. The jury concluded that the difference before and after the taking is \$460,000 and the rental value of the easements is \$8,000. The sole issue on appeal is whether the trial of all three cases together and the resulting single award is proper.

There is no written order of the trial court consolidating the cases for trial; however, even the Transportation Cabinet's recollection of the October 25, 2001, meeting is that there was an agreement between it, the appellees, and the court that the cases were to be tried as one. Even after receiving the appellees' confirmation of the agreement, it did not voice its opposition until the day of trial. It is apparent from the narrative statements submitted

and from the transcript that it was the understanding of the appellees and the court that all had come to try all three cases. If appellant had an objection to the court's procedure, it could have been raised at the pretrial meeting, or at least in the days between receipt of appellees' confirmation of the agreement and the trial date. The appellant is not entitled to raise the issue on appeal.¹

The judgment of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas S. Miller
Jackson, Kentucky

BRIEF FOR APPELLEES:

Truman L. Dehner
DEHNER & ELLIS, P.S.C.
Morehead, Kentucky

¹ See Urban Renewal and Community Development Agency v. Fledderman, Ky., 419 S.W.2d 741, 743 (1967).