

RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000082-MR
AND
NO. 2004-CA-000100-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET, DEPARTMENT
OF HIGHWAYS

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 97-CI-00159 and 97-CI-00162

UNITED SIGN, LTD; C.V.
ADVERTISING; GENE CALDWELL AND LORI
CALDWELL; AND MARVIN BOWLIN AND LANA
BOWLIN

APPELLEES

OPINION
VACATING AND REMANDING

** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the Cabinet) has appealed from an order of the Rockcastle Circuit Court entered on December 22, 2003, which ruled that United Sign, Ltd. and C.V. Advertising

(the appellees)¹ had complied with its previous order requiring removal of several billboards erected along Interstate 75 in Rockcastle County, Kentucky. Having concluded that the trial court misinterpreted the law and, thus, erred in finding the appellees complied with the order, we vacate and remand.

The Cabinet's appeal follows four prior appeals by the appellees to this Court.² The facts in this case were stated, in part, in this Court's February 28, 2003, Opinion as follows:

The six billboards at issue were erected on Interstate Highway 75 without permits in March and July of 1997.³ Permit applications were filed by the [appellees] with the Cabinet at approximately the same time the billboards were erected.⁴ The Cabinet filed its complaints against the [appellees] in the Rockcastle Circuit Court, and therein it sought removal of the billboards for alleged violation of the Billboard Act (KRS⁵ 177.830-890).

¹ The Caldwells and the Bowlins are only parties to this appeal because they own the land on which the billboards were erected.

² Case Nos. 1999-CA-002740-MR and 1999-CA-002757-MR, rendered October 27, 2000, and Case Nos. 2002-CA-000048-MR and 2002-CA-000049-MR, rendered February 28, 2003.

³ Two separate actions were filed in the circuit court, one involving four of the billboards, Case No. 97-CI-00159, and one involving two of the billboards, 97-CI-00162. There is no relevant distinction between the facts of the two cases or the circuit court's rulings. In both actions, the Cabinet sought a judgment declaring that the billboards were illegal, ordering their removal, and imposing fines on the appellees. While separate appeals were filed, this Court issued one Opinion for the two cases in the previous appeals.

⁴ The appellees admit that the billboards were erected without a permit. The appellees jumped ahead of the permit process because of the competition for billboard space on the interstate highways.

⁵ Kentucky Revised Statutes.

The circuit court granted summary judgment in favor of the Cabinet on January 15, 1998,⁶ and amended the judgment on November 19, 1998.⁷ However, in response to the [appellees'] motion to alter, amend, or vacate the judgment, the court suspended the portion of the judgment directing the removal of the billboards during the pendency of the [appellees'] appeals of the judgments.⁸ In an opinion rendered on October 27, 2000, a panel of this court affirmed the judgments of the circuit court. See United Signs, Ltd. [v.] Commonwealth, Ky. App. 44 S.W.3d 794 (2001). A petition for rehearing was denied on December 1, 2000, and the [appellees'] motion for discretionary review was denied by the Kentucky Supreme Court on June 6, 2001.

The Cabinet then filed a motion to reinstate the removal order. The [appellees] responded by filing a motion for summary judgment for the dismissal of the Cabinet's remaining claims, including the claim for orders requiring removal of the billboards. The [appellees] asserted that there were unresolved issues to be determined. On December 5, 2001, the circuit court denied the [appellees']

⁶ This order was in Case No. 97-CI-00159 only, however it was later incorporated into an order in Case No. 97-CI-00162. In this order the circuit court stated:

Summary judgment is appropriate because there is no genuine issue as to the fact that the billboards were erected and placed within 660 feet of the interstate highway, without the permit issued by the Department of Highways, or the determination by the Commissioner of Highways that the location of each sign is compatible with the safety and convenience of the traveling public. . . .

⁷ The circuit court struck the provision of the January 15, 1998, summary judgment ordering a permanent injunction that was final and appealable. On this same date, the circuit court issued a summary judgment in Case No. 97-CI-00162 in favor of the Cabinet for the same reasons as set out in the January 15, 1998, order in the companion case, Case No. 97-CI-00159.

⁸ This order was entered in both circuit court cases.

motions for summary judgment and reinstated the removal orders.⁹ The [appellees] then filed these appeals [footnote omitted].

In their second appeal, the appellees argued that the circuit court erred in granting a mandatory injunction requiring removal of the six billboards. This Court stated that this argument was concerned with the "substantive basis for the prior order of removal rather than the reinstatement of the prior order" and that this issue was or could have been decided in the circuit court's initial summary judgment. Due to the appellees' failure to address all issues in the initial appeal, this Court held that the law-of-the-case doctrine precluded the appellees from litigating the issues brought before the Court.¹⁰

⁹ The circuit court stated as follows:

The statutes, the regulations, and now the final decision of the Court of Appeals makes certain that the law deems any billboard erected within the protected areas adjacent to an interstate highway to be illegal if they were [sic] erected without a prior permit issued by the Transportation Cabinet.

. . .

The fact is established that the advertising structures were located within 660 feet of an interstate highway and were erected without a permit issued by the appropriate agency of the Commonwealth of Kentucky. KRS 177.870 authorizes the removal of the billboards. Whether or not removal is the "appropriate" remedy is immaterial. The statutes authorize the Commonwealth to obtain the removal of such billboards so erected. It is not for the judicial branch of government to select another remedy.

¹⁰ This Court stated:

More to the point, the law of the case doctrine is applicable. "[T]he law of the case doctrine is

The Cabinet then gave the appellees the designated time to comply with the trial court's removal order. Subsequently, the appellees removed the advertising faces from the sites, but left the poles supporting them. The Cabinet then notified the appellees by letter dated July 29, 2003, that if the appellees had not removed the poles by August 12, 2003, the Cabinet would do so.

On August 15, 2003, the appellees filed a motion stating that they had complied with the trial court's order requiring removal of the billboards and asked the trial court to enter an order including a finding to that effect. In support thereof, the appellees argued that the billboards only consisted of the advertising faces which had been removed, and not the supporting structures.¹¹ The Cabinet responded on October 25,

intended to prevent defendants from endlessly litigating the same issue in appeal after appeal. It also prevents a dissatisfied party from presenting piecemeal issues to the appellate courts so that no decision is ever final." Commonwealth of Kentucky v. Tamme, Ky., 83 S.W.3d 465, 468 (2002).

Although the appellants did not address their new issues in the initial appeal, they were free to do so. When this court upheld the summary judgment of the circuit court and discretionary review was denied by the Kentucky Supreme Court, the issue of the Cabinet's right to remove the billboards was final. Only the reinstatement of the order allowing enforcement remained.

¹¹ The appellees argue to this Court that leaving the poles in the ground "provide[s] a degree of protection against the Cabinet's abusive application of ambiguous regulations." Based on the law-of-the-case doctrine, this argument is not valid. The appellees further argue that the poles in the ground are a vested property right and "offer a level of protection from changes in the applicable law during the permit process." Because the

2003, by stating that the support structures, i.e., the poles, are part of the illegal billboards and must also be removed from the sites. The appellees replied that they only wanted the poles to remain for future use should the Cabinet issue permits allowing them to place billboards on those sites. The trial court entered an order on December 22, 2003, stating that the appellees had complied with its previous order of removal, implying that removal of the supporting structures was not necessary. This appeal by the Cabinet followed.

The sole issue on appeal is whether the definition of a billboard, as defined in the Billboard Act,¹² includes the structures which support the sign, i.e., the poles. The Cabinet argues that since the supporting structures remained, pursuant to our Supreme Court's holding in Unisign, Inc. v. Commonwealth,¹³ the trial court erred in finding that the appellees had complied with its order to remove the billboards. We agree.

Statutory construction and application is a matter of law, and we review this issue de novo.¹⁴ “[I]n the

placing of the poles in the ground was illegal in the first place, we are not persuaded by this argument.

¹² KRS 177.830-890.

¹³ 19 S.W.3d 652 (Ky. 2000).

¹⁴ Wheeler & Clevinger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky. 2004) (citing Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998)). See also Cinelli v. Ward, 997

interpretation and construction of statutes, the primary rule is to ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible.”¹⁵ Furthermore, “[w]hen there is no specific statutory definition, words of a statute shall be construed according to their common and approved usage.”¹⁶

The 1996-1997 version¹⁷ of 603 KAR 3:080 defined a “billboard” or “off-premise advertising device” as follows:

[A] device that contains a message relating to an activity or product that is foreign to the site on which the device and message are located or an advertising device erected by a company or individual for the purpose of selling advertising messages for profit.

This regulation establishes that a billboard is a device. Further, 603 KAR 3:080 makes no distinction made between an “advertising device” and a “device.” This regulation adopts the definition of “advertising device” as set out in KRS 177.830(5) of the Kentucky Billboard Act, which states as follows:

“Advertising device” means any billboard, sign, notice, poster, display, or other

S.W.2d 474, 476 (Ky.App. 1998) (stating that “[w]e review questions of law de novo and, thus, without deference to the interpretation afforded by the circuit court”).

¹⁵ Revenue Cabinet v. Comcast Cablevision of South, 147 S.W.3d 743, 747-48 (Ky.App. 2003) (citing Moore v. Alsmiller, 289 Ky. 682, 160 S.W.2d 10, 12 (1942)).

¹⁶ Comcast Cablevision, supra (citing Kentucky Unemployment Insurance Commission v. Jones, 809 S.W.2d 715, 716 (Ky.App. 1991)).

¹⁷ This version of the regulations is applicable to this case and thus any future reference to the regulations will be as stated in the 1996-1997 version.

device intended to attract the attention of operators of motor vehicles on the highways, and shall include a structure erected or used in connection with the display of any device and all lighting or other attachments used in connection therewith. However, it does not include directional or other official signs or signals erected by the state or other public agency having jurisdiction [emphasis added].

This definition plainly indicates that a billboard includes a “structure erected or used in connection with the display of any device.”¹⁸ The word “structure” is not specifically defined in the Billboard Act,¹⁹ nor in the Cabinet’s regulations of advertising devices,²⁰ and no court in this Commonwealth has interpreted the meaning of this term. However, we are persuaded by the definition found in Black’s Law Dictionary of “structure” as “[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together[.]” The appellees argue that the Cabinet’s regulatory definition of billboard focuses on the portion of the structure that contains the message and not the supporting poles. We disagree. The regulation specifically calls a billboard an advertising device and specifically relies on the definition of

¹⁸ KRS 177.830(5).

¹⁹ See KRS 177.830-890.

²⁰ See 603 KAR 3:080.

advertising device set out in KRS 177.830(5), which includes the supporting structure.

Any confusion concerning the definition of billboard was dispelled by our Supreme Court in Unisign, when it stated as follows:

KRS 177.830 states that an advertising device includes "structures erected or used in connection with a display of any device and all lighting and other attachments used in connection therewith" The application by Unisign and the leases entered into with the landowners clearly demonstrate that the purpose of erecting the structures was to display roadside advertising. Consequently, they were clearly erected in connection with the display of advertising devices.²¹

The appellees argue that this case is distinguishable from Unisign. While we do find this case to be factually distinguishable,²² we fail to see how this affects our Supreme Court's holding as to what legally constitutes a billboard.

The purpose of the Kentucky Billboard Act is to "'prevent unreasonable distraction of operators of motor vehicles[,]" to "'preserve and enhance the natural scenic beauty or the aesthetic features of . . . interstate

²¹ Unisign, 19 S.W.3d at 656.

²² Unisign erected billboards, including the support structure, after being denied a permit, whereas in this case, the appellees erected the billboards, including the support structures, while awaiting the permit process.

highways,'"²³ and to "provide[] the maximum amount of safety to drivers and passengers on affected highways."²⁴ This Court in its original opinion in United Sign ruled that under the Billboard Act and the regulations of the Cabinet pertaining to the construction of billboards, a permit must be obtained before any billboards can be legally erected. It is undisputed that the appellees did not obtain the proper permits prior to constructing the billboards, including the support structures. We find no merit in the appellees' argument that their current intent for the supporting structures should justify their failure to remove them, or that they can be used for a legal purpose. We agree with the Cabinet that because the poles were erected in violation of the Billboard Act, they are "public nuisances . . . [and] there is no legal basis for allowing [the] supporting poles to remain in place." Based upon our interpretation of KRS 177.890 and 603 KAR 3:080, we hold that the entire construction of the billboards, which we conclude includes the erecting of the support poles, was illegal, and the

²³ See Commonwealth, Transportation Cabinet, Dept. of Highways v. G.L.G., Inc., 937 S.W.2d 709, 712 (Ky. 1997). See also Moore v. Ward, 377 S.W.2d 881 (Ky. 1964) (noting the constitutionality of the Billboard Act). See also Diemer v. Commonwealth, Transportation Cabinet, 786 S.W.2d 861 (Ky. 1990); and Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, 928 S.W.2d 344 (Ky. 1996).

²⁴ United Sign, Ltd. v. Commonwealth of Kentucky, Transportation Cabinet, Dept. of Highways, 44 S.W.3d 794, 799 (Ky.App. 2000).

trial court's acceptance of the appellees' removal of only the billboard face was error as a matter of law.

Accordingly, we reverse the Rockcastle Circuit Court and remand this matter for entry of an order consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gregory D. Stumbo
Attorney General

Stuart W. Cobb
Assistant Attorney General
Frankfort, KY

BRIEF FOR APPELLEE:

Philip E. Wilson
Lexington, KY