

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002545-MR

RAYMOND CHARLES BISCHOFF

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CI-004396

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

SCHRODER, JUDGE: The issue in this case is whether the failure to demand a jury trial under CR 38.02 operates as an affirmative waiver of the mandate for a jury trial in eminent domain proceedings by both section 242 of the Kentucky Constitution and KRS 416.620(1). We conclude that a failure to make a demand under CR 38.02 does not amount to an affirmative waiver.

Therefore, we vacate and remand for a jury trial on damages.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Louisville and Jefferson County Metropolitan Sewer District (MSD) sought an easement for a sewer line over Raymond Charles Bischoff's (Bischoff) property through eminent domain. The trial court ruled that the MSD had the right to condemn, and set the matter of compensation, or damages, for a bench trial. Subsequently, Bischoff filed a demand for a jury trial on the damages issue. The trial court denied the request for a jury trial on the ground that the demand was untimely under CR 38.02. A bench trial was held on damages.

On appeal to this Court, Bischoff contends that both section 242 of the Kentucky Constitution, and KRS 416.620(1), mandate that in eminent domain proceedings, damages shall be tried by a jury, CR 38.02 notwithstanding. The MSD counters that CR 38.02 required Bischoff to make a timely demand and his failure to do so constituted a waiver of his right to a jury trial.

Section 242 of the Kentucky Constitution authorizes agencies like the MSD to take private property for public use upon payment of just compensation. The Constitution specifically requires that "the amount of such damages shall, in all cases, be determined by a jury[.]" (Emphasis added). Likewise, KRS 416.620(1), part of the Eminent Domain Act Of Kentucky (1976), requires that the amount of compensation (or damages) "shall be determined by a jury[.]" (Emphasis added).

In Keck v. Hafley, 237 S.W.2d 527, 529 (Ky. 1951), the Kentucky Court of Appeals (now our Supreme Court) interpreted the word "shall", in proceedings in the nature of eminent domain, as a mandate for a jury trial, stating that "[t]hough neither party seems to have objected to the Chancellor's award on this ground, we do not think a jury trial could be waived."

In Equitable Life Assurance Society Of United States v. Taylor, 637 S.W.2d 663 (Ky.App. 1982), a panel of this Court had a slightly different issue, "whether the Constitutionally mandated jury determination of damages (§ 242 Kentucky Constitution) can be waived in favor of a bench resolution[.]" Id. at 664. The Taylor Court decided the jury trial requirement was not a mandate but a personal right, that could be waived by an "affirmative waiver of § 242's mandate[.]" Id. at 665. The Taylor Court also decided that the statements in Keck, 237 S.W.2d at 529, which were directly contrary, were "nonbinding dictum". Taylor, 637 S.W.2d at 664. Even though the Taylor Court decided the mandate of section 242 of the Kentucky Constitution was a personal right, the Court nevertheless recognized the right to a jury trial in condemnation cases was a right that "cannot be circumvented or cast aside through the whims or caprices of others." Id. at 665. The Court went on to require an affirmative action to waive the right to a jury trial. In Taylor, both parties signed an order setting the case

for a bench trial, and the court accepted it as an affirmative action.

In our case we do not have any affirmative act or document waiving the right to a jury trial, nor do we have a demand for a jury trial filed under CR 38.02. Therefore, the issue in our case is whether the failure to demand a jury trial under CR 38.02 operates as an affirmative waiver of the mandate for a jury trial under both section 242 of the Kentucky Constitution, and KRS 416.620(1). We believe that the failure to demand a jury trial under CR 38.02 does not constitute an affirmative waiver of the mandate for a jury trial under either section 242 of the Kentucky Constitution or KRS 416.620(1).

CR 38.02 addresses jury trials in general. "Any party may demand a trial by jury of any issue triable of right by a jury[.]" Section 242 of the Kentucky Constitution applies only to eminent domain proceedings. KRS 416.540 *et seq.* (Eminent Domain Act Of Kentucky (1976)) sets forth a specific statutory scheme for using eminent domain. CR 1(2) governs "practice in all actions of a civil nature . . . except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules."

Eminent domain cases have two considerations, the right to take for a public use and just compensation. KRS

416.570. Questions concerning the right to take for a public purpose are to be decided by the circuit court. KRS 416.600 and KRS 416.610(4). Questions concerning compensation are decided by a statutory dispute resolution process whereby three commissioners are appointed (KRS 416.580) to determine compensation for the taking, with an appeal, by way of exceptions to the interlocutory judgment, to a jury (KRS 416.610(3)). KRS 416.610(3) is very clear that the only issue before the jury is "[t]he amount of compensation awarded by the commissioners," and this step is to follow the judge's rulings on the right of the appellant to condemn for a public use. *Id.* at (4).

Commonwealth v. Cooksey, 948 S.W.2d 122, 123 (Ky.App. 1997).

Even without CR 1(2), we believe a failure to demand a jury trial, under the rules, would not waive the constitutional or statutory requirement for a jury trial on damages. In Commonwealth v. R.J. Corman Railroad Company/Memphis Line, 116 S.W.3d 488, 497 (Ky. 2003), our Supreme Court looked at the mandate of section 242 of the Kentucky Constitution, that "damages shall, in all cases, be determined by a jury," and looked to the Constitutional Debates to see what our framers intended. "We provide also that upon an appeal from such preliminary assessment, the amount of damages shall in all cases be determined by a jury[.]" Corman, 116 S.W.3d at 497 (quoting Constitutional Debates, Vol. IV, page 4725 (1890)). In Corman, our Supreme Court recognized summary judgment would act as an exception to the jury determination when the issue of damages

was uncontroverted, "when it appears there are no genuine issues of material fact[.]" Id. at 497. "Lacking a jury question, no violation of Section 242 occurred." Id. at 498. In our case, we have no "operation of law" which extinguishes the right to a jury determination (appeal) of damages nor an "affirmative act" which waives the right to a jury. Therefore, the issue of damages will need to be vacated and remanded for further proceedings.

Bischoff's second argument concerns the expert witness's method of appraisal. Prior to trial, the appraisal did not contain comparable sales, whereas at trial, the witness apparently did testify as to comparable sales. Because we are remanding for a jury determination of damages, this issue is moot.

For the foregoing reasons, the judgment of the Jefferson Circuit Court as to damages is vacated and the matter remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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