

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001245-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEPHEN D. COMBS, JUDGE  
ACTION NO. 03-CI-01314

HOWARD JAMES AND OPAL JAMES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

ABRAMSON, JUDGE: The Department of Highways, a division of the Commonwealth's Transportation Cabinet, appeals from an April 25, 2006 judgment of the Pike Circuit Court dismissing its complaint against Howard James, the owner of a tract of land that abuts U.S. Highway 460 outside Millard in Pike County. The

Department alleges that in the course of excavating a drainage ditch along the edge of

<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

this highway, James compromised the highway's lateral support. The Department's complaint sought an order enjoining James from further activity affecting the highway and requiring him to remediate the alleged damage. In denying the requested relief, the trial court found that the Department had failed to prove that James's excavation either encroached upon the Commonwealth's right-of-way or weakened the highway.

Appealing from that judgment, the Department maintains that the trial court's findings are clearly erroneous. We disagree and so affirm the trial court's judgment.

According to the Department, U.S. 460 was originally constructed in the 1920s or 1930s. It meanders through the mountainous country of southeastern Kentucky from near Prestonsburg, through Pikeville, to near Elkhorn City. The portion at issue in this case lies between Pikeville and Elkhorn City and was carved from the southwestern slope of a mountain that drains into the Russell Fork. James's tract begins on that mountain above the highway and runs down the slope to the river. It includes what appear on photographs and a plat in the record to be several acres in the river's floodplain, which extends from the river to the base of a steep slope about twenty-five feet, according to James, beneath the highway. Not long after James acquired his tract in about 1995, he obtained from the Department what he maintains is an encroachment permit authorizing him to construct a driveway from U.S. 460 onto the lower portion of his tract and to fill in his tract along the highway right-of-way up to the level of the road. James's plan, apparently, is to fill in a substantial portion of his lower tract so as to raise it out of the floodplain. Pursuant to that plan, he testified that in 1996 or 1997 he began

acquiring fill, a loose mixture of dirt and rock, and slowly built up his land to highway level, beginning at the driveway and extending by the time of suit more than one hundred feet along the highway and perhaps some forty or fifty feet toward the river.

At the outset of his project, James testified, not long after he obtained the encroachment permit and before he had acquired much fill, he dug a drainage ditch around the perimeter of his lower tract. Two sides of the ditch are roughly perpendicular to the highway and run to the river, but the third side runs along the base of the highway slope, disturbing and removing the “toe” of the slope. According to testimony by Danl Hall, the Department’s Chief District Engineer for the Pikeville District, in January 2002 the Department received notice of a substantial longitudinal crack in U.S. 460 adjacent to James’s tract and above a portion of his drainage ditch. Upon investigation, which amounted, apparently, to a visual inspection, Hall and another Department engineer, Darrell Slone, determined that James’s disruption of the toe of the slope had compromised the highway’s lateral support and was causing a “cylindrical failure” of the roadway. By that time James’s project was about four-and-a-half years old, and he had already buried a substantial portion of the drainage ditch parallel to the highway beneath twenty-five feet of the dirt and rock fill. According to the Department’s engineers, however, that loose fill would not adequately anchor the compromised slope and might even exacerbate the problem by adding weight to the slope. Consequently, in a series of letters from March 2002 until August 2002 they ordered James either to fill the drainage ditch with rock (including the portion already filled with dirt), or to reinforce the slope

with a double row of interlocking steel posts set into the underlying bedrock. According to Department estimates, these remediations would cost about \$160,000.00 or \$126,000.00, respectively. In August 2003, after James had refused to undertake either form of remediation, the Department brought the present action seeking an order compelling James to comply. As noted above, following a bench trial the circuit court found in favor of the Jameses. On appeal, the Department contends that KRS 177.106 authorizes the relief it seeks and that the trial court's unfavorable findings constitute clear error.

As the Department notes, KRS 177.106 protects the Commonwealth's highways by requiring permits for encroachments upon the right-of-way, and by authorizing the Department to remedy certain encroachments deemed to interfere with the right-of-way:

(1) Before any person shall proceed to cause or continue or allow to remain in existence any encroachment under, on or over any part of the right-of-way of a state highway he shall first obtain from the Department of Highways a permit so to do. Any encroachment heretofore or hereafter placed or allowed to continue or remain under, on or over any road which is found by the Department of Highways to be interfering in any way with the safe, convenient and continuous use and maintenance of such road shall upon thirty (30) days notice to the person or to his chief agent by the Department of Highways be removed or relocated by such person at his own expense.

The Department maintains that James's project of filling in his land along the highway's right-of-way, particularly his excavation at the toe of the slope and his burying the outlet of a drain that passed under the highway from the uphill side to the downhill side, was

not authorized by a valid encroachment permit and interferes with the maintenance and safe use of the highway. Subpart (2) of KRS 177.106 provides that if the responsible party fails to remedy an interfering encroachment as ordered,

the Department of Highways shall proceed to cause the encroachment to be removed; the expense thereby incurred shall be paid out of any money available therefor, and shall be charged against the person and levied and collected and paid into the State Treasury as provided by law.

It is this provision, apparently, that the Department invokes to authorize the injunctive relief it seeks.

The trial court ruled that James's permit authorized his driveway and his filling in along the right-of-way of U.S. 460, that his burying the outlet of the under-the-road drain did not constitute an interference because that drain had long since been sedimented over and abandoned, and that James's drainage ditch excavation was not on the Commonwealth's right-of-way and had not been shown to undermine the road or otherwise to interfere with its use or maintenance. The Department challenges each of these rulings. As the parties correctly note, under CR 52.01 this Court reviews a trial court's factual findings only for clear error, and where, as here, the findings are adverse to the party with the burden of proof they may be deemed clearly erroneous only if "the evidence adduced is so conclusive as to compel a finding in [that party's] favor as a matter of law." *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822, 824 (Ky. 1975) (citing *Begley v. Wooton*, 350 S.W.2d 497 (Ky. 1961)). Because the Department's proof

does not satisfy this compelling evidence standard, we must uphold the trial court's decision.

With respect, first, to James's encroachment permit, the record indicates that he duly applied for a driveway permit in July 1995, that one of the Department's Engineer Technicians, Larry Hampton, inspected the site and recommended that James's application be approved, and that a permit number was assigned to the application, apparently indicating that the application was processed. James testified that he discussed his fill project with Hampton and that Hampton told him he could fill along the highway right-of-way as far as he wished, even for the entire width of his property. He also testified that the Department processed his application and permitted his encroachment on the basis of Hampton's recommendation.

The Department maintains that James's application required not only Hampton's recommendation but also the approval of the Chief District Engineer, and indeed the application form, Transportation Cabinet Form TC 99-1, includes a space for the Chief District Engineer's signature. The Department has not, however, referred us to any source of encroachment permit standards and procedures, and the regulation addressing such permits, 603 KAR 5:150, merely incorporates by reference the Transportation Cabinet's *Permits Manual*, a document which was not made part of the record. Absent some authority establishing the inadequacy of James's application, an application the Department's own agents have apparently accepted and processed, we cannot say that the trial court clearly erred by upholding James's encroachment permit

and deeming him authorized to fill-in his property across its entire width and to encroach to that extent on the U.S. 460 right-of-way.

Nor did the trial court clearly err by finding that James's encroachment does not interfere with an under-the-road drain. In the course of this controversy, Department engineers apparently inspected the original plans for this section of U.S. 460 and discovered that they called for a drain with an inlet on the uphill side of the road, passing under the road, and with an outlet at what has become the entrance to James's driveway. The engineers then dug a hole in the driveway and several feet below the level of the road found the badly weathered and completely sedimented outlet of an old drain. The inlet, too, has apparently completely filled with sediment. If this had been a functioning drain, then James's encroachment would clearly have interfered with it, since his driveway buries the outlet. The evidence showed, however, that the drain has not functioned for a long time—the Department was not even aware that it existed—and the Department did not show that the unavailability of this drain interfered with the use or maintenance of the roadway. Although we emphasize that poor road maintenance in the past does not prevent the Department from attaining higher standards later, we cannot say in this case that the trial court clearly erred by deeming the drain abandoned and thus not affected by James's encroachment.

More troubling are the issues concerning James's drainage ditch. James concedes that he did not tell Larry Hampton, the Department's permit inspector, about the drainage ditch. Hampton apparently believed that James intended only to fill the

slope up to the roadway without disturbing the slope. If James had done just that, engineer Hall testified, then he would indeed have strengthened the slope and the Department would not have objected. Instead, however, as James also acknowledged, he dug the drainage ditch at the base of the slope, and in so doing damaged the toe of the slope, an important element of the slope's support. The Department contends that James should be obliged to restore the slope's integrity, and relies on KRS 177.106 as the source of his obligation. In denying that relief, the trial court found that James's drainage ditch had neither caused nor was likely to cause damage to the roadway. Although the Department's concerns are serious, KRS 177.106 does not provide for the remedy the Department seeks. Moreover, as with the other issues raised by the Department, the trial court's findings are not clearly erroneous.

Highways, of course, are precious public resources, and nowhere more so than in mountainous regions where they are especially costly to build and difficult to maintain. As noted above, to protect those highway resources KRS 177.106 not only authorizes the Department to remedy interfering encroachments, but mandates that it do so. The statute, however, applies only to encroachments "under, on or over" the Commonwealth's right-of-way. The trial court found that James's drainage ditch was on his own property and did not encroach upon the right-of-way. The Department's engineer Hall testified to the contrary, but the Department did not undertake to survey the area or even to make rough measurements. Hall merely asserted that in his opinion the ditch, in some places at least, crossed over onto the right-of-way. This was not an expert

opinion, since it was not based on the application of engineering expertise to relevant data, but instead was more in the nature of a casual observation. Hall's testimony on this issue did not compel a finding in the Department's favor, and therefore the trial court did not clearly err.

The statutory remedy provided by KRS 177.106 is also limited. The statute authorizes the Department to "cause the encroachment to be removed" at its own expense--which it is free to do if the encroachment is on the Commonwealth's right-of-way--and then to seek reimbursement from the responsible party. The statute, however, does not appear to authorize a general injunctive remedy against conditions that interfere with the use or maintenance of the roadway but that do not encroach "under, on or over" the right-of-way. In short, KRS 177.106 neither applies to the drainage ditch on James's property, nor contemplates the injunctive relief the Department seeks.

This is not to say that the Commonwealth has no compensable interest in the lateral support of its roads. On the contrary, the common law recognizes a public right to the lateral support of roadways in their improved condition and provides a cause of action for damage to the surface as a result of removing that support. *Levy v. Curlin*, 241 S.W.2d 997 (Ky. 1951); *Restatement (Second) of Torts* § 817 (1979). Similarly, likely and imminent damage to the highway can be enjoined as a public nuisance. *Horky v. Kentucky Utilities Company*, 336 S.W.2d 588 (Ky. 1960); *Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co.*, 154 F.2d 450 (6<sup>th</sup> Cir. 1946). The trial court found, however, that James's excavation at the toe of the slope had not damaged the roadway

and did not imminently or even in the more distant future threaten to do so. The Department insists that in light of its experts' testimony these findings are clearly erroneous. We disagree.

Engineer Hall explained in general terms how the removal of the toe of a slope can cause the slope to subside along a cylindrical surface, a condition referred to, accordingly, as a cylindrical failure. Both Hall and civil engineer Slone testified that the longitudinal cracks in U.S. 460 adjacent to James's excavation were consistent with a cylindrical failure, and, in their opinions, resulted from James's toe-of-the-slope excavations. They did not testify, however, as to the likelihood or timing of cylindrical failure, whether the particular conditions at James's slope made failure more or less probable, or whether a cylindrical failure would exhibit symptoms other than cracks in the road. James and several other witnesses familiar with U.S. 460 testified as to similar cracks at several places on the highway not adjacent to James's land and also testified that the cracks adjacent to his land had been there for decades prior to James's excavation, requiring the Department periodically to tar them over. The Department's witnesses did not dispute that cracks might develop for reasons other than cylindrical failure, they did not attempt to distinguish the cracks above James's property from other cracks in the highway, and they could not be certain that those cracks did not predate James's excavation. In short, the Department's experts relied on a general engineering theory, but made virtually no attempt to establish how that theory applied to the particular facts and conditions of this case. Thus, while the Department's proof supports, it does

not compel, a finding that James's excavation damaged the road or imminently threatened to do so. Consequently, the trial court did not clearly err by finding to the contrary.

In conclusion, the Department's concerns about the highway adjacent to James's property are legitimate and it certainly appears that some of those concerns would never have arisen had James hired professionals rather than undertaking the excavation work himself. Nevertheless, the evidence does not compel findings that James lacked a permit to fill in his property along the Commonwealth's right-of-way; that his fill encroachment interfered with a drain; that his drainage excavations encroached on the right-of-way; or that his excavations damaged U.S. Highway 460 by undermining its support. The trial court did not clearly err, therefore, by making findings adverse to the Department on all of these issues, or by ultimately denying the Department's request for injunctive relief. Accordingly, we affirm the April 25, 2006 judgment of the Pike Circuit Court.

ALL CONCUR.

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