

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001568-MR

PATRICIA RAGLAND MCGEHEE AND
RICHARD MCGEHEE APPELLANTS

APPEAL FROM HARDIN CIRCUIT COURT
V. HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CI-01508

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND
STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Hardin Circuit Court finding the property of the appellants, the McGehees, to be condemned by the Commonwealth. The McGehees appeal arguing two issues: (1) that they were not properly served, and (2) that the trial court erred in allowing the condemnation of their property. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

The McGehees own property in Hardin County, Kentucky. On August 21, 2006, the Transportation Cabinet Department of Highways (the “Cabinet”) filed a petition with the Hardin Circuit Court to condemn a portion of their property. The Cabinet contended that it was necessary to condemn the property in order to effectuate the construction, alteration, relocation, and/or extension of KY 3005 to the Western Kentucky Parkway. This is known as the “Ring Road Extension.”

The McGehees defended this action by arguing that they were not properly served by the Cabinet and that it was an abuse of discretion for the trial court to allow the condemnation of the property. After a hearing before the trial court at which time the parties called witnesses and presented evidence, the trial judge entered an interlocutory order condemning the property. The McGehees now appeal that decision.

DISCUSSION

In *Com. Transp. Cabinet Dept. of Highways v. Taub*, 766 S.W.2d 49, 51 (Ky. 1989), the Kentucky Supreme Court acknowledged that in enacting Kentucky Revised Statutes (KRS) 177.081, “the Legislature delegated broad authority to the bureau of highways (Department of Transportation) to determine necessity and condemn land for an adequate system of highways.” It continued to reiterate that “[u]pon a determination of necessity, the Commonwealth’s right of acquisition may be defeated only by

proof of fraud, bad faith or abuse of discretion, and the landowner opposing condemnation bears the burden of proof.” With this standard in mind, we will review the condemnation proceedings.

In the present case, the McGeehees start by asserting that they were not properly before the trial court as they had not been properly served. Kentucky Rules of Civil Procedure (CR) 4.01 provides that when a complaint is filed, the clerk shall issue the summons and (as relevant here):

(b) Cause the summons and complaint (or other initiating document), with necessary copies, to be transferred for service to any person authorized, other than by paragraph (1) of this Rule, to deliver them, who shall serve the summons **and accompanying documents**[.] (Emphasis added).

The McGehees contend that when they filed their answer and counterclaim, they had not been served with Exhibit A, which was referenced in and attached to the complaint. Thus, they contend they were not properly served and that the action should have been dismissed against them for this reason.

The Commonwealth contends that the McGehees were properly served and that such service was also in accordance with the Kentucky Eminent Domain Act, KRS 416.570. Said statute requires the filing of a verified petition and a “particular description of the property” which is the subject of the petition to condemn. The Commonwealth also argues that the cases cited by

the McGehees in support of their argument (*Potter v. Breaks Interstate Park Com'n*, 701 S.W.2d 403 (Ky. 1985); *R. F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co.*, 471 S.W.2d 708 (Ky. 1971); *Miller v. McGinty*, 234 S.W.3d 371 (Ky. App. 2007); and *Cornett ex rel. Cornett v. Smith*, 446 S.W.2d 641 (Ky. 1969)), did not involve personal jurisdiction where the defendants were served with the initiating documents.

We agree with the Commonwealth that the cases cited can be distinguished. None of the factual situations was similar enough to the instant case to be controlling. The facts here involve both defendants being served with the initiating complaint which set forth a description of the property involved. While the plans which made up Exhibit A were not served upon the McGehees in the beginning, they eventually received them. The purpose of service is to provide one with notice of a suit. The McGehees had ample notice through the service of the complaint as to what the action was and the property which was involved. We consider this to be proper service under CR 4.01.

The final issue before us involves the merits of the condemnation. Specifically, the McGehees contend that the decision to condemn their property was arbitrary and that the trial court erred in finding that they did not meet their burden of proof. KRS 177.081(1) provides, in relevant part, that:

The official order of the Department of Highways shall be conclusive of the public use of the condemned property and the condemnor's

decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

Thus, the McGehees had to have proven either fraud, bad faith or an abuse of discretion to the trial court in order to overturn the Cabinet's decision. They did not prove any of these conditions.

The McGehees attacked the condemnation arguing that it was not a necessity and, therefore, it is constitutionally forbidden. They contended that the condemnation of the property was not for a public use but was, rather, for a private one. Specifically, the McGehees asserted that the Cabinet wanted to expand the road project to allow for access to private subdivisions and businesses. This, they argue, is not constitutional.

In *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5 (Ky. 1979), the Kentucky Supreme Court held that:

The Kentucky Constitution, particularly Section 13 and 242, has been interpreted repeatedly to prohibit the taking of private property for public use without compensation, and this prohibition has been consistently construed to forbid the taking of private property for private uses.

The use of a road to expand development in areas or to relieve congestion in areas in which growth is predicted is not for private use.

The testimony of Gary Valentine, the Cabinet's Manager for Pre-Construction and a licensed engineer,

was that a 1987 study had been made and that it indicated that the Ring Road Project needed to be extended to US 62 from the Western Kentucky Parkway. The road would then be extended to Interstate 65 and eventually to US 31W. The reasons cited by Valentine for this extension were the elimination of traffic in Elizabethtown, Kentucky, as well as opening up new areas of industrial expansion, residential growth and the additional need to alleviate traffic to and from Fort Knox. Clearly, these are valid public uses.

The necessity requirement which was statutorily mandated was clearly met in this case. There was no fraud, bad faith nor abuse of discretion in the condemnation and, therefore, it was constitutionally sound. As a result, the trial court did not err in entering an interlocutory order condemning the property.

Finally, the McGehees contend that the trial court erred in failing to make detailed findings of fact regarding the condemnation. They assert that it was a violation of CR 52.01 and CR 52.04 when the trial court failed to cure this error after they timely made a motion requesting that it do so. We disagree. CR 52.01 provides that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds

of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

After the McGehees moved the trial court for further findings, the trial court ruled that:

. . . in a condemnation case such as this, the Court is directed by statute to make findings in conformity with KRS 416.610, which lists very specifically what information is essential to the Interlocutory Order and Judgment. It is this Court's belief that its Order of June 2, 2008 complies with KRS 416.610.

The Court agrees that a great deal of information was presented, but believes strongly that no compelling evidence of fraud, bad faith or abuse of discretion was heard. While there always can be disagreement in condemnation cases, as here, on the severity of the need and possible alternate routes, (and in this case historical and environmental

concerns were raised as well) the Court simply heard nothing which it believed met the [McGehees'] burden in any of its multiple arguments.

We agree with the trial court that its findings conformed to KRS 416.610 which provides, in relevant part:

(4) If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered. If the court determines that petitioner does not have such right, it shall enter a final judgment which shall contain, in substance:

(a) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(b) A finding that the petitioner is not authorized to condemn the property or the use and occupation thereof for the purposes and under the conditions and limitations set forth in the petition, stating the particular ground or grounds on which the petitioner is not so authorized;

(c) An order dismissing the petition and directing the petitioner to pay all costs.

We find the following to be in conformity with the above statute:

- (1) . . . that the Defendants failed to prove that the Plaintiff abused its discretion, acted in bad faith, or committed fraud in deciding its need to acquire portions of the property of the Defendants; that the Defendants' challenge to the Plaintiff's right to condemn is dismissed because the Defendants failed to prove the Plaintiff abused its discretion, acted in bad faith, or committed fraud in deciding it needed to acquire portions of the property of the Defendants; that it is necessary that the Plaintiff acquire the property described in the Petition and again below; and that the Plaintiff has the authority to condemn the said property;
- (2) That the Plaintiff under provisions of KRS 416.540-416.680 is entitled to condemn the lands and materials hereinafter described;
- (3) That the Report of Commissioners conforms to the provisions of KRS 416.580[.]

Order and Judgment entered June 4, 2008.

Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

W. Henry Graddy, IV
Randal A. Strobo
Midway, Kentucky

10a

ORAL ARGUMENT FOR APPELLANT:

W. Henry Graddy, IV
Midway, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

John F. Estill
Maysville, Kentucky

11a

Supreme Court of Kentucky

2010-SC-0317-D

(2008-CA-1568)

PATRICIA RAGLAND MCGEHEE MOVANTS
and RICHARD MCGEHEE

HARDIN CIRCUIT COURT

V. 2006-CI-1508

TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS,
COMMONWEALTH OF
KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court
of Appeals is denied.

ENTERED: October 13, 2010.

/s/ John D. Minton Jr.
Chief Justice

Exhibit G

12a

**NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION**

File Name: 12a1269n.06

No. 12-5112

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PATRICIA A. RAGLAND MCGEHEE;	)	
RICHARD MCGEHEE,	)	
Plaintiffs-Appellants,	)	
v.	)	
UNITED STATES ARMY CORPS	)	ON APPEAL
OF ENGINEERS; ROBERT L.	)	FROM THE
VAN ANTWERP, Lieutenant,	)	UNITED
Commander and Chief of Engineers,	)	STATES
U.S. Army Corps of Engineers;	)	DISTRICT
KEITH LANDRY, Colonel, District	)	COURT
Commander, U.S. Army Corps of	)	FOR THE
Engineers; FEDERAL HIGHWAY	)	WESTERN
ADMINISTRATION; VICTOR M.	)	DISTRICT OF
MENDEZ, Federal Highway	)	KENTUCKY
Administrator, Federal Highway	)	
Administration; COMMONWEALTH	)	(Filed Dec. 10,
OF KENTUCKY;	)	2012)
TRANSPORTATION CABINET;	)	
DEPARTMENT OF HIGHWAYS;	)	
MIKE HANCOCK, Secretary,	)	
Kentucky Transportation Cabinet,	)	
Defendants-Appellees.	)	

BEFORE: BOGGS and McKEAGUE, Circuit Judges; CARR, District Judge.*

PER CURIAM. Patricia A. Ragland McGehee and Richard McGehee, wife and husband, appeal a district court order dismissing their action against several federal and state agencies and officials alleging violations of a number of federal and state statutes in the condemnation of a parcel of land on their farm in order to build a road.

The Commonwealth of Kentucky initiated a condemnation proceeding in state court to acquire a small portion of the McGehees' farm to build a road. The McGehees filed this action in federal district court alleging that the defendants were violating the National Historic Preservation Act, because their farm was a designated historic site, as well as environmental statutes including the Clean Water Act, Safe Drinking Water Act, and National Environmental Policy Act. On September 6, 2011, the parties attended a settlement conference and agreed that the state would pay the McGehees \$400,000 in settlement of all their claims, the McGehees would be permitted to move their house and other structures from the condemned parcel to a different location on the farm, and both the state and federal actions would be dismissed. The district court entered an order on September 8, 2011, declaring that the settlement agreement mooted all pending motions, including a motion by the federal

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

defendants to dismiss the claims against them for lack of jurisdiction. The order stated that the case would remain on the docket until the structures were moved and the amount of the settlement was paid.

Defendants later moved to enforce the settlement agreement because the McGehees had refused to sign the written settlement agreement and release. The district court held a telephone conference with counsel for the parties, and, on October 7, 2011, entered an order adopting the written settlement agreement as the agreement of the parties. Shortly thereafter, the McGehees signed the written agreement and completed the transfer of the buildings to the remaining portion of their farm. The amount of the settlement was paid by the state defendants in the state-court proceeding. On January 4, 2012, defendants filed a motion to dismiss, because the conditions specified in the district court's original order had been satisfied. Defendants noted that the McGehees had obtained new counsel and were continuing to submit filings in the state-court action, although nothing had been filed in the federal case. On January 9, 2012, the district court entered an order dismissing the action as settled. The McGehees filed a notice of appeal on February 3, 2012, and now argue that the district court's order must be vacated because they were not afforded an opportunity to respond to defendants' motion to dismiss. We denied the McGehees' motion for a temporary injunction to prevent the completion of the road construction, as well as their motion for reconsideration of that order.

Upon review, we conclude that the district court properly dismissed the action for lack of jurisdiction after the controversy was rendered moot by the settlement agreement. *See Pettrey v. Enterprise Title Agency, Inc.*, 584 F.3d 701, 703 (6th Cir. 2009). The McGehees argue that they wished to challenge the dismissal on the ground that they were under duress when they agreed to the settlement. This issue was not raised in the district court, either in response to defendants' motion to enforce the agreement in October 2011 or at any other time prior to the order of dismissal in January 2012. The McGehees' argument that they had insufficient time to raise their claim of duress between the filing of defendants' motion to dismiss and the district court's order is unpersuasive, given the number of other opportunities that they had to present the issue to the district-court judge, who would have personal knowledge of the merits of the assertion of duress. The McGehees also did not raise their argument that the district court's order of dismissal should be set aside to allow them to respond to the motion to dismiss in a motion for reconsideration or to set aside the settlement agreement following the district court's order. We will not address issues raised for the first time in this court, as there is no ruling below to review. *Jolivette v. Husted*, 694 F.3d 760, 770 (6th Cir. 2012).

Both the state defendants and the McGehees have filed motions to take judicial notice. To the extent the McGehees request that we take judicial notice of filings in the district court, their motion is unnecessary. Both parties also ask that we take judicial notice of

filings in the contemporaneous Kentucky state-court proceeding, which are public records and are properly noticed. *See Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999). We decline to take judicial notice of any other documents submitted, the origin and relevance of which are unclear.

The state defendants also request in their brief that sanctions be imposed against the McGehees pursuant to Federal Rule of Appellate Procedure 38. However, Rule 38 requires the filing of a separate motion in order for sanctions to be imposed. *See Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 308 (6th Cir. 2008).

Because the settlement agreement below rendered this controversy moot, we affirm the district court's order of dismissal.

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Supreme Court of Kentucky

2017-SC-000195-D

(2012-CA-000384)

PATRICIA RAGLAND MCGEHEE MOVANTS
and RICHARD MCGEHEE

HARDIN CIRCUIT COURT

V. 2006-CI-01508

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court
of Appeals is denied.

Wright, J., not sitting.

ENTERED: August 16, 2017.

/s/ John D. Minton Jr. _____

CHIEF JUSTICE
