12-15-1999

Motion in Limine to Exclude Specific Items of Physical Evidence

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(6) (6)

IN THE COURT OF COMOM PLEAS
CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator of the Estate of SAMUEL H. SHEPPARD	Judge Ronald Suster
	Case No. 312322
Plaintiff	MOTION IN LIMINE TO EXCLUDE SPECIFIC ITEMS OF PHYSICAL EVIDENCE
vs.	
THE STATE OF OHIO	**Oral Hearing Requested**
Defendant	

Defendant hereby moves this court to exclude the specific items of physical evidence that are not properly authenticated prior to their mention or use at trial for the reasons set forth in the attached brief.

Respectfully Submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County

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Attorneys for Defendant

BRIEF

Introduction and Facts

The plaintiff intends to offer several items of physical evidence and the results of tests conducted on those items during their case-in-chief. This motion involves the exclusion of two of those items of physical evidence. The first item is purported to be a bloodstained chunk of wood taken from the Sheppard home upon which plaintiff's expert conducted DNA testing. The second item is purported to be a bloodstain taken from the wardrobe door in the bedroom where Marilyn Sheppard was murdered.

Law and Argument

The principles of the rule of evidence make authentication *a prerequisite* to admissibility. (Evid. R. 901). (Emphasis added). This rule is consistent with prior Ohio law. (See Steinle v. Cincinnati, 142 Oh. St. 550 (1944).

Rule 901(a) is the general provision regarding authentication. The rule represents a special application of rule 104(b) on conditional relevancy. The trial court does not decide whether evidence is authentic: the court decides only *whether sufficient evidence has been introduced* to support a finding of authenticity. This requirement necessarily means that the offering party must provide *some evidence* (as opposed to no evidence) that the item is what it purports to be. If sufficient evidence has been adduced to support a finding of authenticity, the evidence is admitted, and the jury then decides if the evidence is authentic.

Evidence rule 104(a) provides "preliminary questions concerning the admissibility of evidence shall be *determined by the court* subject to the provisions of subdivision b."

In part rule 104(b) provides "when the relevancy of evidence depends upon the fulfillment of the condition of fact, the court shall admit it upon...the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In short, a party seeking to introduce at trial evidence such as the purported wood chip must authenticate the wood chip by proper testimony pursuant to rule 901(a). The court, pursuant to rule 104, will determine *as a preliminary matter* whether the condition of authentication has been satisfied before admitting the wood chip into evidence.

Evidence rule 901 provides that the authentication requirement imposes on the offering party the burden of proving that an item of evidence is genuine-that it is what it purports to be.

Prior to mentioning these items or the results of any tests performed on these items, the plaintiff must authenticate them with testimony subject to cross examination. That testimony must establish the whereabouts of these items from July 4, 1954 until they arrive in the courtroom. Furthermore, the defendants have not had an opportunity even to physically inspect these particular items.

In this case, Cynthia Cooper who was in possession of a purported wood chip taken from the Sheppard home, has clearly indicated her hostility toward any questions by the State of Ohio concerning her involvement in the investigation of the death of Marilyn Sheppard. She has refused to detail her handling of this item. And she has also failed to submit to a complete deposition on her involvement in the matter concerning the death of Marilyn Sheppard. The State of Ohio believes that Cynthia Cooper will not appear in the upcoming trial and the trier of fact will be deprived of information concerning her involvement in the uncovering of this purported evidence. Without her

testimony and the testimony of others establishing the whereabouts of these items from July 4, 1954 to the moment they arrive in the courtroom there is insufficient evidence *as a matter of law* to authenticate these items.

For these reasons the plaintiff should be required to authenticate these items and their whereabouts from July 4, 1954 until their presentation at trial. If they are unable to do so they should be prohibited from even mentioning these items or the results of any tests conducted on these items.

Respectfully Submitted,
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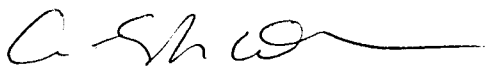
Attorneys for Defendant

CERTIFICATE OF SERVICE

The foregoing motion to exclude physical evidence was served upon the plaintiff at the offices of Terry Gilbert, 1370 Ontario street, 17th Floor, Cleveland, Ohio 44113 by regular U.S. Mail this 15 day of December, 1999.

Respectfully Submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County



A. Steven Dever (0024982)
Chief Trial Counsel
Cuyahoga County Prosecutor's Office

*550 142 Ohio St. 550

53 N.E.2d 800, 27 O.O. 488

STEINLE
v.
CITY OF CINCINNATI.

No. 29600.

Supreme Court of Ohio.

Feb. 23, 1944.

1. NEW TRIAL⚖ 116.2
275 ----
275III Proceedings to Procure New Trial
275k115 Time for Application
275k116.2 Commencement of time.

Formerly 275k116(2)

Ohio 1944
In action tried by court without jury, motion for new trial filed within three days after trial court's finding was filed for journalization was within time.

2. NEW TRIAL⚖ 117(2)
275 ----
275III Proceedings to Procure New Trial
275k115 Time for Application
275k117 Limitations as to Time or Term of Court
275k117(2) Premature application.

Ohio 1944
In trial of cause to court without jury, filing of a motion for new trial should await decision or finding in which all material issues are finally disposed of.

3. EMINENT DOMAIN⚖ 271
148 ----
148IV Remedies of Owners of Property; Inverse Condemnation
148k271 Recovery of damages.

Ohio 1944
Property owner seeking damages from city for depreciation in value of property caused by escape of water from defective sewer could present case on theory that there was a temporary appropriation of the property to public use. Gen.Code, § 11224; Const. art. 1, § 19.

4. EMINENT DOMAIN⚖ 2(1)
148 ----
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2(1) In general; interference with property rights.

Ohio 1944
Any substantial interference with the elemental rights growing out of ownership of private property is considered a "taking" within constitutional provision relating to taking property for public use. Const. art. 1, § 19.

See publication Words and Phrases for other judicial constructions and definitions.

5. PARTIES⚖ 1
287 ----
287I Plaintiffs
287I(A) Persons Who May or Must Sue
287k1 Capacity and interest in general.

Ohio 1944
The right to maintain an action must be in the person instituting it.

6. EMINENT DOMAIN⚖ 284
148 ----
148IV Remedies of Owners of Property; Inverse Condemnation
148k284 Persons entitled to sue.

Ohio 1944
Where any taking or appropriation by city of property resulting from escape of water from defective sewer was temporary and had ended before plaintiff bought the property, she could not maintain action for compensation for temporary appropriation of the property for public use, since right to damages was in one who owned the land when taking or injury occurred. Gen.Code, § 11224; Const. art. 1, § 19.

7. EMINENT DOMAIN⚖ 284
148 ----
148IV Remedies of Owners of Property; Inverse Condemnation
148k284 Persons entitled to sue.

Ohio 1944

Plaintiff who bought property after temporary taking of property for public use by city resulting from escape of water from defective sewer could derive no benefit from purported assignment of claim for damages from former owner after plaintiff had commenced the action, since plaintiff was not "real party in interest" when she commenced action. Gen.Code, § 11241.

See publication Words and Phrases for other judicial constructions and definitions.

8. EVIDENCE⊜ 370(11)

157 ----
157X Documentary Evidence
157X(D) Production, Authentication, and Effect
157k369 Preliminary Evidence for Authentication
157k370 Necessity in General
157k370(11) Instruments, and assignment, indorsement, or guaranty thereof.

Ohio 1944

Assignment of claim for damages was not admissible over defendant's objection, where proof was not required as to its execution and authenticity, which was condition precedent to its admission.

9. EMINENT DOMAIN⊜ 300

148 ----
148IV Remedies of Owners of Property; Inverse Condemnation
148k294 Evidence
148k300 Weight and sufficiency.

Ohio 1944

Plaintiff was not entitled to damages for temporary appropriation of property for public use resulting from escape of water from city's defective sewer, where there was lack of evidence that water escaping from sewer actually permeated lot owned by plaintiff, evidence merely tending to show that water found its way into ground underlying nearby properties, and a finding that plaintiff's land was similarly invaded would rest on conjecture. Gen.Code, § 11224; Const. art. 1, § 19.

Syllabus by the Court.

1. In an action at law submitted to the court without a jury, the filing of a motion for a new trial is within time when done within three days after the court has filed for journalization a finding which disposes of all the controlling issues in the case.

2. In an action against a municipality where damages are claimed for the depreciation in value of real property resulting from the percolation of water into such [53 N.E.2d 801] property from a broken sewer, after notice to the municipality of the defect, the case may be presented on the theory of the taking or appropriation of private property for a public use, the allegations of the petition will so permit. City of Norwood v. Sheen, Ex'r, 126 Ohio St. 482, 186 N.E. 102, 87 A.L.R. 1375, approved and followed.

***551** 3. The right to damages for injury to real property by its temporary appropriation to a public use is in the one who owns such property when the appropriation and injury occur, and such right does not ordinarily pass to a subsequent grantee who acquires the property after such appropriation has ceased.

4. To maintain an action, the plaintiff must have a right to be enforced or a wrong to be prevented or redressed.

5. An instrument purportedly assigning a claim for damages is not admissible in evidence, over objection, in the absence of preliminary proof as to its execution and authenticity.

Appeal from Court of Appeals, Hamilton County.

Action by Mary B. Steinle against the City of Cincinnati to recover damages for depreciation in value of real property by reason of injuries caused by escape of water from a broken and defective sewer, commenced in a Court of Common Pleas. Judgment was rendered for plaintiff, but on appeal to the Court of Appeals the judgment was reversed and judgment was rendered for defendant, 52 N.E.2d 80, and plaintiff appeal.--[Editorial Statement.]

Judgment of Court of Appeals affirmed.

On June 20, 1939, Mary B. Steinle filed her petition in the Court of Common Pleas of Hamilton county, claiming damages of $5,500 against the city of Cincinnati, for depreciation in the value of her real property by reason of injuries thereto caused by the escape of water from a broken and defective

sewer.

In her petition plaintiff alleged that in 1913 defendant obtained a ten-foot right of way from the owners of the property to the west and north of her lot and agreed to construct and maintain a sewer without expense to the grantors of the right of way; that defendant constructed the sewer and thereafter failed to maintain it in good repair; that the sewer became broken and clogged so that large quantities of water escaped therefrom into the premises of the plaintiff and into those of other nearby owners; that in 1930 defendant was notified that the sewer was out of repair; that beginning in 1933 the residence structure of plaintiff began to settle as a result of the water discharged from the sewer, washing out the earth below the surface of the ground of her premises and thereby causing the land to settle and the house and garage to crack; and that in 1934 defendant repaired the sewer so that ***552** by the middle of the year 1935 plaintiff's house, garage and the surface of her lot ceased to sink.

Answering, the defendant admitted it obtained the right of way for the sewer in 1913, constructed a sewer through such right of way and repaired it in 1934. It further averred that plaintiff's house was constructed on a deep artificial fill; that any sinking and cracking of the same was wholly attributable to the settling of such fill; that he cause of action alleged by the plaintiff did not accrue within four years of the filing of the petition; and that plaintiff did not acquire the described property until 1936, a date subsequent to the accrual of the cause of action set forth in the petition.

A jury being waived, the case was tried to the court, largely on the bill of exceptions in another cause of a kindred nature. It was stipulated between the parties that, if plaintiff were entitled to damages, the amount thereof would be $3,000.

On the trial plaintiff testified that she purchased her property from Mrs. Theresa McLaughlin in March of 1937. The bill of exceptions then shows:

'Q. I hand you a paper Mrs. Steinle and ask you what that is or do you know about the giving of that? A. No I do not.

'Mr. Dickerson: Well, may it please to court; I wish to introduce this in evidence. It is an assignment of any right of claim of Theresa Ann McLaughlin against the city of Cincinnati to the witness Mary B. Steinle for damage to the property at 138 Warner street, Cincinnati, Ohio.'

The instrument bore date of December 13, 1941. Its introduction was objected to by counsel for the city. It was marked for identification and the court reserved ruling on its admissibility and validity. Later it was admitted, and counsel for the city took exception thereto.

The court rendered a memorandum opinion dated August 27, 1942, announcing a decision[53 N.E.2d 802] in favor of the ***553** plaintiff, but leaving open for future determination the question raised by the answer as to the right of the plaintiff to maintain the action.

On October 15, 1942, counsel for plaintiff filed this written opinion without any order of the court to do so. Then, on October 29, 1942, the court entered a finding for the plaintiff, which recited that on October 28, 1942, there was further presentation and argument on the question reserved, 'upon consideration of all of which the court does find in favor of the plaintiff and does find that the plaintiff should recover against the defendant, the city of Cincinnati, the sum of three thousand dollars ($3,000), together with her costs herein expended.'

Defendant's motion for a new trial and its motion for judgment notwithstanding the finding were filed within three days after the entry of the above finding. These motions were overruled and judgment rendered for plaintiff in the sum of $3,000 with interest.

An appeal from such judgment was prosecuted to the Court of Appeals, whereupon plaintiff filed a motion to dismiss the appeal and to strike the bill of exceptions from the record because no proper motion for a new trial had been filed within three days after the decision and finding of the trial court on August 27, 1942.

Both branches of the motion were overruled and, upon a consideration of the case on its merits, the judgment of the trial court was reversed and final judgment entered for the defendant.

Allowance of the motion for certification brings the case to this court for review.

E. C. Hauer and R. T. Dickerson, both of Cincinnati, for appellant.

John D. Ellis, City Sol., Ed. F. Alexander, Nathan Solinger, and Robert J. White, all of Cincinnati, for appellee.

*554 ZIMMERMAN, Judge.

[1] No error was committed by the Court of Appeals in its holding on the procedural question. The trial court made no complete and final disposition of the matter in plaintiff's favor until its finding of October 29, 1942, which was filed for journalization on that date and the motion for a new trial filed within three days afterwards was within time. See In re Estate of Lowry, 140 Ohio St. 223, 42 N.E.2d 987; State ex rel. Curran v. Brookes, 142 Ohio St. 107, 5o N.E.2d 995.

[2] The generally accepted rule appears to be that in the trial of a cause to the court without the intervention of a jury, the filing of a motion for a new trial should await a decision or finding in which all the material issues are finally disposed of. 39 American Jurisprudence, 184 Section 181; Southern Colonization Co. v. Howard Cole & Co., 185 Wis. 469, 201 N.W. 817.

[3] As to the merits, plaintiff, to avoid the four-year limitation for the bringing of an action as prescribed by Section 11224, General Code, presented her case on the theory that, by the escape of the water into her land from the defective underground sewer, there was a temporary appropriation of the property to a public use, and she was entitled to prevail on taht basis within the principles stated in City of Norwood v. Sheen, Ex'r, 126 Ohio St. 482, 186 N.E. 102, 87 A.L.R. 1375.

In the Sheen case the rule was announced that where a municipality deposits sewage from a sewer upon private property, such property is thereby subjected to a public use, and a taking occurs within the meaning of Section 19, Article I of the Constitution of Ohio, for which damages may be claimed. See 18 American Jurisprudence, 759, Section 134.

[4] It will be observed that in connection with cases involving the appropriation of private property to a public use, Ohio has adopted the liberal view that 'any substantial interference with the elemental rights *555 growing out of ownership of private property is considered a taking.' Smith v. Erie R. Co., 134 Ohio St. 135, 142, 16 N.E.2d 310, 313, and the cases therein cited.

Assuming, for the purposes of discussion, that the appropriation theory is supportable under the allegations of the petition, is plaintiff entitled to succeed?

[5] It is elementary that the right to maintain an action must be in the person instituting it. Here, plaintiff's claim for damages is based on the depreciation in value of the property, caused by the water escaping from the broken sewer. She purchased the property in 1937 as it then was. The city had repaired the sewer in 1934 and had stopped the leakage. According to the allegations of the petition, 'thereafter the ground on plaintiff's premises and to the west thereof gradually dried out and by [53 N.E.2d 803] the middle of the year 1935 the house, garage and surface of plaintiff's lot ceased to sink.'

[6] Any taking or appropriation by the city was temporary and had ended before plaintiff bought the property. Such right of action as there might have been under the appropriation theory would have belonged to the one who owned the property when the appropriation and injury happened.

The general rule is that the right to damages for the taking of land or for injury to land is in the one who owns the land when the taking or injury occurs, and does not ordinarily pass to a subsequent grantee. 29 Corpus Juris Secundum, Eminent Domain, p. 1115, § 202; 30 Corpus Juris Secundum, Eminent Domain, p. 101, § 389. See 18 American Jurisprudence, 864, Section 231. Any right on the part of the subsequent grantee to damages is dependent on a new taking or injury after his acquisition of title. 30 Corpus Juris Secundum, Eminent Domain, p. 102, § 390.

[7] [8] Plaintiff can derive no benefit from the purported *556 assignment from Theresa McLaughlin in 1941 of the claim for damages. In the first place, Section 11241, General Code, requires that 'an action must be prosecuted in the name of the real party in interest.' Plaintiff did not answer that description when she brought her action in 1939. In the second place, if the assignment may be accorded effect on any basis, it is not properly in

evidence over the defendant's objection. As a condition precedent to its admission, proof was required as to its execution and authenticity, which was not furnished. 17 Ohio Jurisprudence, 601, Section 495; Walsh v. Barton, 24 Ohio St. 28, 41; 20 American Jurisprudence, 776, Section 922; 32 Corpus Juris Secundum, Evidence, p. 476, § 625.

[9] Finally, the Court of Appeals found a lack of evidence, as a perusal of the bill of exceptions herein discloses, that water escaping from the broken sewer actually permeated the lot now owned by plaintiff. True, evidence is present tending to show that such water did find its way into the ground underlying nearby properties, but a finding that plaintiff's land was similarly invaded would rest on conjecture.

Defendant offered persuasive testimony to the effect that any uneven settling of the buildings in proximity to the sewer, causing them to warp and crack, was due to the loosely filled ground on which they were built. Some of the defendant's witnesses also testified that excessive moisture in the ground adjacent to the sewer was attributable to drainage conditions disassociated from the sewer.

Upon the record, our conclusion is that plaintiff failed to establish an enforceable claim against the city, and the judgment of the Court of Appeals is therefore affirmed.

Judgment affirmed.

*557. WEYGANDT, C. J., and MATTHIAS, HART, BELL, WILLIAMS, and TURNER, JJ., concur.

HART, Judge (concurring).

I concur in the syllabus and judgment of the court in this case, but in doing so I desire to express my view as to the rule of law set out in the second paragraph of the syllabus.

A clear distinction must be maintained between an abatable nuisance temporarily affecting the use of real property, and a similar nuisance which, during its continuance, has permanently injured and diminished the value of the property.

The remedy for a wrongful invasion of the former type, such as the overflow of vacant land by water, is an action for damages limited by the four-year statute of limitation, in which there may be recovered the amount of the resultant diminution in the rental value of the property. The remedy for a wrongful invasion of the latter type, such as the permanent destruction of buildings by their submergence in water or sewage escaping from defective drains or pipes constructed and maintained by a municipality, is an action to recover damages for the partial appropriation of the property for a public use, limited by the 21-year statute of limitation, in which action there may be a recovery for the permanent depreciation of the property, measured by the difference between the value before and the value after the damage or injury.

On the theory that the second paragraph of the syllabus in this case relates to a situation of the latter type, and is descriptive of an action to recover damages for permanent injury to the real estate of the appellant, I concur in that paragraph as well as other paragraphs of the syllabus.