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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002182-MR

MARYANNA ROBINSON — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
APPEAL NO. 2011-SC-000612-DG

APPEAL FROM ROBERTSON CIRCUIT COURT
v. HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 04-CI-00040

HAROLD WHITLEY; BONNIE WHITLEY; RICHARD WILSON; TONYA WILSON; MARION BALDWIN; PATSY BALDWIN; DAVID WIGGLESWORTH; LYNDA WIGGLESWORTH; JEREMY MCCLOUD; KIM MCCLOUD; REBEKA BERTRAM; DAVE ALLEN WELCH; JIM ALEXANDER; ROSE MARIE ALEXANDER; JIM ANDREWS, III; MARK WILSON; JAN BERTRAM; HELEN (BILLIE) BATTE; AND HELEN BATTE — APPELLEES

AND

HAROLD WHITLEY; BONNIE WHITLEY; RICHARD WILSON; TONYA WILSON; MARION BALDWIN; PATSY BALDWIN; DAVID WIGGLESWORTH; LYNDA WIGGLESWORTH; JEREMY MCCLOUD; KIM MCCLOUD; REBEKA BERTRAM; DAVE ALLEN WELCH; JIM ALEXANDER; ROSE MARIE ALEXANDER; JIM ANDREWS, III; MARK WILSON; JAN BERTRAM; HELEN (BILLIE) BATTE; AND HELEN BATTE — CROSS-APPELLANTS

ON REMAND FROM THE KENTUCKY SUPREME COURT
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CROSS-APPEAL FROM ROBERTSON CIRCUIT COURT
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MARYANNA ROBINSON; ROBERTSON COUNTY; AND ROBERTSON COUNTY FISCAL COURT — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: On remand from the Kentucky Supreme Court, we must reconsider our previous opinion in this case, *Robinson v. Whitley*, 2009-CA-002182-MR, 2009-CA-002210-MR (Ky. App., July 22, 2011), applying the

Supreme Court's holding that Harold and Bonnie Whitley's ("Whitleys")[1] action seeking a declaration that a road was not properly adopted by the county into the county road system is best construed as a quiet title action brought as a declaratory judgment action rather than an appeal from a fiscal court ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

The procedural posture of the case, resulting in the remand, was set forth in the Supreme Court's decision:

> Batte Lane is single lane, dirt and gravel road located in Robertson County that traverses Whitley's property and serves as access to the property of several other parties to this action, including Appellee Maryanna Robinson. Appellants contend that Whitley has fee simple title to the passway pursuant to his deed. Appellees contend that Robertson County has title to the property by its lawful incorporation into the Robertson County road system in 1987.
>
> Whitley and his wife bought the affected land in 1994 and assumed then that Batte Lane was legally and formally part of the Robertson County road system. However, in January 2004, burdened by what he regarded as undesirable traffic which he wanted to limit by erecting gates, Whitley petitioned the Robertson County Fiscal Court to abandon, or formally "discontinue" from the county road system pursuant to the relevant provisions of KRS[2] Chapter 178, the portion of Batte Lane that traversed his property. In February 2004, the matter was formally addressed by the Fiscal Court at a public hearing on the issue, after which the Fiscal Court formally decided against Whitley's petition

[1] Other plaintiffs in the original action include: Richard Wilson; Tonya Wilson; Marion Baldwin; Patsy Baldwin; David Wigglesworth; Lynda Wigglesworth; Jeremy McCloud; Kim McCloud; Rebeka Bertram; David Allen Welch; Jim Alexander; Rose Marie Alexander; Jim Andrews, III; Mark Wilson; Jan Bertram; Helen (Billie) Batte; and Helen Batte.

[2] Kentucky Revised Statutes.

and voted against the discontinuance of the roadway. This decision of the Fiscal Court was not appealed.

In the following months, additional study of the records relating to the legal status of the road led Whitley to believe that road had never been properly adopted by the county as a part of the official county road system, and therefore was not actually the county's road to abandon. So, at the August 20, 2004 regular meeting of the Fiscal Court, Whitley appeared with his attorney and presented the Fiscal Court with information supporting his claim that the road had never belonged to the county because it had never been properly incorporated into the county road system. Notably, he did not repeat his February 2004 request for the county to officially "discontinue" the road because his point was that the county had lacked any legal interest that it could "discontinue." Instead, Whitley asked the Fiscal Court to acknowledge that there had never been a formal adoption of Batte Lane into the official county road system. The Fiscal Court declined to make that concession; it simply reaffirmed it legal position that Batte Lane "is part of the county road system."

In September 2004, the Appellants filed a Complaint in Robertson Circuit Court seeking a declaratory judgment that the disputed section of Batte Lane was not a lawfully adopted county road. The pleading is captioned "Complaint Seeking Declaration of Rights and Appeal." Robertson Fiscal Court, Robertson County, and Robinson were named as defendants. Appellees answered the complaint and asserted that the disputed section of Batte Lane had properly been adopted as a county road pursuant to KRS 178.115(1), and in the alternative, that the road was a "public road" by prescription or other method. The parties eventually filed cross-motions for summary judgment on the substantive issue of the road's legal status as a duly adopted county road, a public passway, or a private lane.

Ultimately, the trial court granted Appellants' motion for summary judgment, holding that there were no genuine issues of material fact which would

> necessitate a trial and that, as a matter of law, the disputed section had not been properly adopted as a county road pursuant to the statutory requirements of KRS Chapter 178. The circuit court also concluded that the disputed segment of Batte Lane was not a "public" road pursuant to the provisions of the Chapter. Post-judgment motions to alter, amend, or vacate the judgment (or portions thereof) followed in the normal course. At the request of Appellee Robinson, the circuit court entered an order altering the final judgment "to reflect that the Court considered [the] action to be an original action for Declaratory Judgment," rather than a KRS Chapter 178 appeal from a county fiscal court road issue.
>
> In the Court of Appeals, the Fiscal Court and Robinson asserted not only that the trial court erred in its judgment regarding the road's legal status, but that the circuit court also erred by treating the case as an original action pursuant to the declaratory judgment statute instead of an appeal pursuant to KRS 178.100 from an action of the county fiscal court. As previously noted, the difference is significant because under [*Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky. App. 1993)], judicial review of a fiscal court decision "ordering a new road to be opened, or ordering an alteration or discontinuance of an existing road, or allowing gates to be erected across a road or abolishing existing gates, or a decision refusing any such order," KRS 178.100, is limited to a determination of whether the county court's decision "was arbitrary, including whether there was substantial evidence to support the decision." *Snyder*, 866 S.W.2d at 126. On the other hand, an action for declaratory relief commenced in the circuit court is an original action to be tried *de novo*, in which the circuit judge ascertains the facts without deference to the fiscal court's view.

Whitley v. Robertson Cnty., 406 S.W.3d 11, 13-15 (Ky. 2013) (internal footnotes omitted).

The Supreme Court, in vacating our opinion, found that at the August 2004 fiscal court meeting, the Whitleys did not request, and the fiscal court did not order or refuse to order, "a change in the physical or legal status of a road." *Id*. at 16. Instead, the fiscal court refused an admission that the formal adoption of the road into the county system had never occurred, an event not mentioned as appealable to the circuit court pursuant to KRS 178.100. *Id*. Hence, the standard of review for an appeal from a fiscal court decision, pursuant to *Snyder* and KRS Chapter 178, was inapplicable.

The Supreme Court noted that KRS 418.040 and 418.045[3] are suitable to resolve the present controversy, which the Court described as a "dispute . . . also concerned with *title* to the disputed section; that is, whether the Whitleys still own the property or whether the county has obtained title to it by its incorporation into the county road system or through some other means. In addition, the parties contest the *status* of the disputed section; i.e., whether or not it is a county road or a private drive." *Id*. at 18. Thus, an original action for declaratory judgment, seeking a determination of who has title to and the status of Batte Lane, was permitted. In concluding, the Supreme Court held that the circuit court's *de novo* adjudication of the Whitleys' original action for declaratory judgment was proper, and directed us to consider "the remaining unaddressed issues." *Id*. at 20.

[3] KRS 418.040 permits a plaintiff to ask the court for a declaration of rights when an actual controversy exists. KRS 418.045 provides, in relevant part, "[a]ny person interested under a deed," . . . or "who is concerned with any title to property" . . . or "status" . . . "may apply for and secure a declaration of his right or duties."

II. STANDARD OF REVIEW

Since Robinson and the Fiscal Court originally appealed the circuit court's grant of summary judgment in favor of the Whitleys, our standard of review on remand is limited to the summary judgment appellate standard. CR[4] 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.,* 319 S.W.3d 366, 370-71 (Ky. 2010).

III. ARGUMENTS

On appeal, Robinson makes three arguments not addressed by our prior opinion. First, she argues that the circuit court erred by finding that the disputed portion of Batte Lane was never properly adopted into the county road system by the fiscal court. On this matter, Robertson County argues that strict compliance with the requirements of KRS Chapter 178, outlining the procedure for adopting a road into the county system, is unnecessary; rather, substantial compliance is sufficient to achieve adoption. Secondly, and in the alternative,

[4] Kentucky Rules of Civil Procedure.

Robinson argues that Batte Lane was a public road, either by formal dedication or prescription, and the circuit court erred by finding that no evidence had been presented of public use of Batte Lane. Thirdly, Robinson argues that the circuit court erred by ruling that the Whitleys were permitted to erect a gate over the disputed passway. This court also addressed three arguments aside from the road status issue in its prior opinion which were not overturned or addressed by the Supreme Court's opinion reversing and remanding. In the interest of clarity, we will reiterate our previous holdings herein.

A. COUNTY ROAD STATUS

Robinson and Robertson County claim that the trial court erred in its finding that the disputed portion of Batte Lane was never properly adopted into the county road system pursuant to KRS Chapter 178, and therefore, was not a county road. Robertson County, by and through the Robertson Fiscal Court, approved a motion to adopt all county roads listed in the Kentucky Department of Transportation's County Road Map, which included the disputed portion of Batte Lane, in November 1987.[5] The county has maintained the portion of the road at issue since that time.

KRS 178.010(1)(b) defines "county roads" as "public roads which have been formally accepted by the fiscal court of the county as a part of the county road system, or private roads, streets, or highways which have been

[5] The Robertson County Fiscal Court also adopted the Kentucky Transportation Cabinet's County Road Map, which included the disputed section, in December 2001.

acquired by the county[.]" Kentucky precedent holds that adoption of a county road requires a formal order; maintenance by the county is insufficient. *Sarver v. Allen Cnty.*, 582 S.W.2d 40, 41 (Ky. 1979). Thus, a formal process exists for the establishment of a county road, delineated in KRS Chapter 178.

Specifically, Robertson County failed to publish notice of the establishment of Batte Lane as a county road. KRS 178.050 directs:

> (1) No county road shall be established or discontinued, or the location thereof changed unless due notice thereof has been given according to the provisions of this chapter.
>
> (2) Notices and advertisements for the establishment, alteration or discontinuance of any county road, bridge or landing, and all notices and advertisements for the letting of contracts for construction or maintenance of county roads and bridges under the provisions of this chapter shall be published pursuant to KRS Chapter 424 by the county road engineer.

The purpose of posting notice of a county road adoption is to give the property owners advance notice so that they may protest or take action if they are opposed to such adoption. *See Prather v. Fulton Cnty.*, 336 S.W.2d 339, 342 (Ky. 1960). Here, the county admits that it failed to publish notice or advertise the establishment of the road.[6]

Since the county provided no notice to landowners, the county failed to comply with the requirements of KRS Chapter 178, and substantial compliance

[6] Robinson argues that the landowners of the disputed section of the road were present at the November 1987 fiscal court meeting, and thus were notified of the of the adoption of Batte Lane into the county road system. Our review of the record does not support this allegation.

is insufficient for adoption. Since the county did not follow the procedure for a formal adoption of Batte Lane into the county road system, we agree with the trial court that the disputed portion of Batte Lane was never actually a county road.[7]

B. PUBLIC ROAD STATUS

In the alternative, Robinson argues that Batte Lane is a public road and contrary to the circuit court's findings, ample evidence in the record supports this position. In this vein, Robinson makes two alternative arguments; 1) the road became public by prescription since the public has used it consistently since 1964; or 2) the road was formally dedicated as a public road in 1987 when the property owners at that time were present at the meeting at which the fiscal court attempted to adopt the road into the county road system and did not object. However, the only evidence in the record of public use of the disputed portion of Batte Lane comes in the form of affidavits filed along with Robinson's motion to alter, amend or vacate the circuit court's judgment. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). The affidavits, therefore, cannot be considered and we find no evidence of use of Batte Lane by anyone other than adjoining landowners and their invited guests.

[7] In addition, Robinson's argument that KRS 178.116 prohibits discontinuation of Batte Lane is inapplicable since Batte Lane was never a county road.

Use of the road by adjacent landowners does not constitute use by the public. *See Sarver,* 582 S.W.2d at 43; *Cummings v. Fleming Cnty. Sportsmen's Club, Inc*., 477 S.W.2d 163, 165 (Ky. 1972); *Cole v. Gilvin*, 59 S.W.3d 468, 474-75 (Ky. App. 2001). Even occasional use by individuals other than adjacent landowners has been held insufficient to constitute public use. *See Gilvin*, 59 S.W.3d at 474-75. Since the only evidence presented prior to the circuit court's judgment shows use only by adjoining landowners, we agree with the trial court that Robinson failed to prove that the disputed portion of Batte Lane is, or ever was, a public road dedicated by prescription.

Additionally, as we previously noted, the record does not indicate that the landowners were present at the 1987 Fiscal Court meeting or that the landowners in any way acquiesced to the county's attempted adoption of Batte Lane in to the county road system. Hence, Batte Lane was also never formally dedicated for use by the public and is not a public road.

C. GATE ON BATTE LANE

We further agree with the trial court that the Whitleys may place a gate on their private passway despite Robinson's easement over the passway. Where grants of easements are in general terms, as Robinson's is, construction of gates on a private passway by the servient estate does not violate the dominant estate owner's easement rights. *See Herndon v. McKinley*, 586 S.W.2d 294, 295 (Ky. App. 1979). The court must apply "a doctrine of reasonableness and a balancing of the rights, needs and interests of the parties." *Id*. at 296. Thus, as

long as the gate does not unreasonably interfere with Robinson's use of the road, the gate is permitted. We believe the trial court fairly decided that the gate at the entrance to the Whitley's property does not unreasonably interfere with Robinson's passage.

D. PREVIOUSLY ADDRESSED ARGUMENTS

In this court's prior opinion, we addressed three arguments aside from the issue on which the Supreme Court reversed and remanded. We reiterate below our prior holdings on these issues as the Supreme Court's opinion has no bearing on their outcome.

First, Robinson argues the circuit court erred by entering an order prohibiting her from communicating with the property owners. We disagree. Both parties agree that Robinson contacted Jan Bertram, a property owner and a party to this litigation, to discuss the subject matter of the litigation despite a request by counsel for the property owners that she not do so. Robinson fails to set forth any authority in support of her position that she should not have been prohibited from communicating with the property owners. We note that trial courts have broad discretion over disputes during the discovery process, and we will not disturb a discovery ruling absent an abuse of discretion, which Robinson has failed to show. *Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 317 S.W.3d 23, 39 (Ky. 2010).

Next, Robinson contends the circuit court abused its discretion by denying her motion for Rule 11 sanctions and attorney fees against counsel for

Robertson County and the Robertson County Fiscal Court. We disagree. Rule 11 provides, in relevant part:

> The signature of an attorney or party constitutes a certification by him that the has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If this rule is violated, the court is required to sanction the violator. *Id*.

In this case, Robinson alleges that opposing counsel violated Rule 11 by submitting an agreed order to the court prohibiting the county from paving Batte Lane until resolution of the underlying action. Robinson claims she did not consent to the agreed order. Counsel for Robertson County maintains that he did not believe it necessary to obtain Robertson's consent prior to submitting the agreed order. We find nothing in the record to indicate counsel for property owners acted in bad faith and do not read Rule 11 to prohibit such an action. Furthermore, Robinson provides no authority to support her position. Under this set of facts, we find no cause for Rule 11 sanctions, and affirm the circuit court's decision to deny Robinson's motion.

Finally, on cross-appeal, the Whitleys argue the circuit court erred by ruling on Robinson's motion to alter, amend or vacate its order since the motion was untimely from the date of the August 13 order. Specifically, the Whitleys

claim the August 13 order was final and appealable, and since the motion to alter, amend or vacate was untimely, it failed to toll the time for Robinson to file a notice of appeal. As a result, the Whitleys argue the notice of appeal was untimely, and we are without jurisdiction to review Robinson's appeal. We disagree.

CR 59.05 provides that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." A judgment is final and appealable if it has adjudicated all the rights of all the parties in an action or has been made final under the recitation required by CR 54.02. CR 54.01.

In this case, the August 13 order was not a final and appealable order because the circuit court reserved ruling on the issue of where to place the gate. Additionally, the order did not recite that it was final and appealable per CR 54.02. The circuit court entered a final and appealable order on October 22, 2009, which Robinson moved to set aside, amend or vacate within ten days of entry. We are not persuaded by the Whitleys' argument that the August 13 order was actually final and appealable because it resolved the ultimate issue of whether Batte Lane was a county or private road, since by declaring the road private, further issues needed to be resolved by the court. Thus, Robinson's motion to alter, amend or vacate the October 22 order was timely and effectively tolled the running time to file her notice of appeal. *See* CR 73.02(1)(e); *see also Univ. of Louisville v. Isert*, 742 S.W.2d 571, 573 (Ky. App. 1987) (the time to file a notice of appeal is stayed

by filing a timely motion pursuant to Rule 59 to alter, amend or vacate the judgment). Accordingly, the circuit court did not err in this regard.

IV. CONCLUSION

In sum, the circuit court properly granted summary judgment in favor of the Whitleys. Therefore, the Robertson County order granting summary judgment is affirmed.

ALL CONCUR

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