

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000031-MR

JAMES SEIBER AND  
ERMA SEIBER, HIS WIFE

APPELLANTS

v. APPEAL FROM TODD CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 99-CI-00175

BENNY M. BAILEY AND  
JUANITA H. BAILEY, HIS WIFE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: James Seiber and his wife, Erma Seiber, have appealed from two judgments of the Todd Circuit Court granting the motion for a permanent injunction filed by Benny M. Bailey and his wife, Juanita H. Bailey, and dismissing the Seibers' civil action against the Baileys with prejudice. The only issue presented for our review is whether the trial court abused its discretion by denying the Seibers' motion to continue the

hearing on the Baileys' motion for a permanent injunction. Having concluded that the trial court did not abuse its discretion by denying the motion to continue the hearing, we affirm.

The Baileys and the Seibers own adjacent parcels of real estate in Todd County, Kentucky. Since 1982, the Baileys have accessed their property by traveling down Hurricane Hill Road<sup>1</sup> from its intersection with Rattlesnake Road. Hurricane Hill Road runs through the Seibers' property.

Prior to November 1999, the Seibers complained to the Baileys about their<sup>2</sup> use of Hurricane Hill Road. After voicing these complaints, the Seibers erected locked gates along Hurricane Hill Road in order to prevent the Baileys from accessing their property via the Seibers' pasture.<sup>3</sup> To reach their property via Hurricane Hill Road, the Baileys contacted the Todd County Sheriff's office to get assistance in cutting the locks off the erected gates.

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<sup>1</sup> Hurricane Hill Road is also known as Poe Hill Road. We will identify this road as Hurricane Hill Road.

<sup>2</sup> The Baileys have also allowed others access to the property for deer hunting purposes. From our review of the videotaped record, it appears that the Baileys use their property primarily for hunting purposes.

<sup>3</sup> While Hurricane Hill Road is recognized as a county road in Todd County, the portion of the road at issue has not been properly maintained by the Todd County Fiscal Court. Apparently, the Seibers had incorporated the disputed portion of the road into their pasture based upon the county's failure to maintain the road.

On November 19, 1999, the Seibers filed this action claiming that the Baileys had trespassed on their property. The Baileys answered that the roadway on which they traveled in order to access their property was a public passageway.

In March 2000 the Baileys approached the Todd County Fiscal Court about action being taken to actively maintain Hurricane Hill Road by the county. The Todd County Fiscal Court notified the affected landowners, who consisted of only the Baileys and the Seibers, of the request the Baileys had made. After hearing from both sides, the fiscal court voted unanimously for Todd County to maintain the disputed portion of Hurricane Hill Road.

On September 19, 2001, the Baileys filed a motion to permanently enjoin the Seibers from denying the Baileys and others use of Hurricane Hill Road for access to the Bailey property. The Seibers were properly notified of the hearing, scheduled for September 26, 2001, but appeared without counsel.<sup>4</sup> The trial court rescheduled the hearing for October 23, 2001. The trial court also instructed the Seibers to appear with counsel and to be prepared for the rescheduled hearing.

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<sup>4</sup> The attorney who represented the Seibers and the attorney who represented the Baileys were forced to withdraw after the Baileys' attorney joined the firm of the Seibers' attorney. The Seibers briefly retained Harold M. Johns, who is also the county attorney for Todd County, to represent them in this matter. However, when the case involved Todd County to a greater extent, Johns withdrew from representing the Seibers citing the conflict that could arise between the Todd County Fiscal Court and the Seibers concerning the maintenance of Hurricane Hill Road.

The Seibers retained counsel on October 21, 2001, two days prior to the scheduled hearing. Counsel appeared at the October 23, 2001, hearing and orally requested a continuance so that he could properly prepare for the hearing. The trial court denied the motion for a continuance and proceeded with the hearing. During the hearing, two Todd County Fiscal Court Magistrates, Paul Addison Jr., and Carl Templeman, testified that Hurricane Hill Road was the second oldest county road in Todd County and that the fiscal court had issued no order closing or abandoning the road. The magistrates did state, however, that Todd County has not properly maintained the road at issue since the 1960's because of budgetary constraints.

Benny Bailey also testified at the hearing concerning his use of Hurricane Hill Road. Benny testified that he has, since the early 1980's, used the road to get to his property. Benny also testified that the Seibers erected locked gates at two points on Hurricane Hill Road to prevent access to the Bailey property. Finally, Benny introduced into evidence two photographs of the locked gates, a receipt from a bulldozer operator for two hours of delay caused by the locked gates, and a map of Hurricane Hill Road.

Counsel for the Seibers cross-examined every witness presented by the Baileys. James Seiber also was called to testify on his own behalf. While most of James's testimony was

irrelevant to the matter before the trial court, James did state that he caused the locked gates to be erected to keep trespassers off of his property.

On November 13, 2001, the trial court permanently enjoined the Seibers from denying the Baileys access to their property from Hurricane Hill Road because the road was a public road and had not been abandoned from public usage for a continuous period of 15 years. On November 26, 2001, the trial court dismissed the Seibers' trespass action against the Baileys with prejudice. This appeal followed.

The Seibers argue that the trial court abused its discretion by denying their motion to continue the hearing concerning the motion for a permanent injunction. "The decision whether to grant or to deny a motion for continuance lies within the sound discretion of the trial court."<sup>5</sup> Based upon our review of the videotaped hearings held in this matter, we conclude that the trial court did not abuse its discretion by denying the Seibers' motion for a continuance.

From our review of the videotaped record, we note that the trial court continued the hearing concerning the motion for permanent injunction so the Seibers could retain counsel. The trial court also instructed the Seibers to appear with counsel on the new hearing date and to be prepared to proceed at the

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<sup>5</sup> Kentucky Farm Bureau Mutual Insurance Co. v. Burton, Ky.App., 922 S.W.2d 385, 388 (1996).

hearing. The Seibers did not retain counsel until October 21, 2001, two days prior to the hearing. The record further shows that the Seibers knew about the October hearing and understood that they needed to have prepared counsel present for the hearing. The record, however, is silent concerning the Seibers' attempt to obtain representation after the September hearing date other than trial counsel's statement that he agreed to represent the Seibers' upon his return from vacation.

Our review of the hearing concerning the permanent injunction motion also revealed that the Seibers were adequately represented by counsel. Trial counsel properly cross-examined all of the witnesses the Baileys presented and provided valid arguments against the issuance of a permanent injunction. We fail to see how the Seibers were prejudiced at this hearing, but even if they were prejudiced, we must conclude that it was a result of their own failure to prepare their case for final adjudication. It is undisputed that the Seibers failed to initiate even the most basic discovery efforts aimed at proving their trespass action or at uncovering the basis for the Baileys' defense. Kentucky law clearly provides that a party is not entitled to a continuance because it neglected to make the best use of common discovery techniques.<sup>6</sup> Based upon the Seibers' failure to retain counsel in a timely manner and

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<sup>6</sup> Id.

because of their lack of diligence in preparing their case for final adjudication, we conclude that the trial court did not abuse its discretion by denying the Seibers' motion to continue the October 23, 2001, hearing.

For the foregoing reasons, the judgments of the Todd Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel C. Hicks  
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

John J. Chewning  
Hopkinsville, Kentucky