

RENDERED: JULY 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002182-MR

MARYANNA ROBINSON

APPELLANT

v.

APPEAL FROM ROBERTSON CIRCUIT COURT
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

NO. 2009-CA-002210-MR

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

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

MARYANNA ROBINSON;
ROBERTSON COUNTY; AND
ROBERTSON COUNTY FISCAL
COURT

CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: DIXON, KELLER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Maryanna Robinson appeals from the order of the

Robertson Circuit Court granting summary judgment in favor of property owners¹

who sought a declaratory judgment that Batte Lane, a road adjoining and servicing

¹ The property owners include Harold Whitley, Bonnie Whitley, 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.

their property, is a private road. The property owners cross-appealed. For the following reasons, we reverse in part, affirm in part, and remand the matter to the trial court.²

In November 1987, Robertson County adopted a new county road map and for the first time depicted Batte Lane as a county road. In January 2004, Harold Whitley, an owner of property adjoining Batte Lane, petitioned the Robertson County Fiscal Court to abandon a portion of Batte Lane to make it a private road. At a public hearing, Robinson opposed abandonment of the county road. The fiscal court voted to not abandon Batte Lane, thereby it maintained its status as a county road. At a later public hearing, Whitley, through counsel, requested the fiscal court to abandon the road on the basis that the road was never properly adopted by the county in 1987. The fiscal court again declined to abandon Batte Lane.

In September 2004, the property owners filed the underlying action seeking a declaratory judgment that Batte Lane was not a lawfully adopted county road. Robinson was named as a defendant in the action due to her opposition to abandoning Batte Lane as a county road, and she filed counterclaims alleging the property owners breached warranty deeds and interfered with easements. Robertson County and Robertson County Fiscal Court were also named as co-defendants.

² Robertson County and Robertson County Fiscal Court were named Defendants in the action brought by the property owners, and are included as Cross-Appellees for purposes of this appeal.

During the course of the proceedings below, the trial court entered an order upon motion by counsel for property owners that prohibited Robinson, an attorney, from speaking to the property owners regarding the litigation. On August 13, 2009, the trial court entered an order granting the property owners' motion for summary judgment, holding that Batte Lane was not formally adopted as a county road in 1987 and was a private road which could be gated. The trial court reserved for a later hearing issues regarding the nature of the gate to be placed on Batte Lane. On October 22, 2009, the trial court entered a final order denying Robinson's motion for CR³ 11 sanctions, dismissing all counterclaims and holding that a gate could be erected across Batte Lane. Robinson filed a motion to alter, amend or vacate the order, which the trial court denied. This appeal followed.

Robinson first argues the trial court erred by treating the action as an original action and hearing the issue *de novo*. Specifically, Robinson maintains the trial court should have been limited to a review of whether the fiscal court's decision was arbitrary, namely whether substantial evidence existed to support the decision. We agree.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the

³ Kentucky Rules of Civil Procedure.

motion for summary judgment and all doubts are to be resolved in his favor.”

Steevest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

On appeal from a granting of summary judgment, our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996)). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

KRS⁴ 178.100 provides:

From a decision of the fiscal court 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*, the party aggrieved may bring an action in the Circuit Court of the county where the road is located to contest the decision of the fiscal court.

(emphasis added). Indeed, the circuit court is conferred jurisdiction under KRS 23A.010(4), which specifies:

The Circuit Court may be authorized by law to review the actions or decisions of administrative agencies,

⁴ Kentucky Revised Statutes.

special districts or boards. Such review shall not constitute an appeal but an original action.

Accordingly, the property owners maintain, and the trial court agreed, that since the action sought a declaratory judgment to determine the status of Batte Lane, the trial court has jurisdiction to review the action *de novo*.

We find the issue to be analogous to the one raised before this court in *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky.App 1993). In *Snyder*, property owners petitioned the Trimble Fiscal Court to abandon a portion of a road running across their property, which the fiscal court denied. *Id.* at 125. The property owners then filed an original action in the Trimble Circuit Court, which held a *de novo* trial and ordered the abandonment of said road. *Id.* In overruling the Trimble Circuit Court, this court stated,

[w]hen the [fiscal court] is used as a vehicle not to make general applicable law, rules or policy, but to decide whether a particular individual as a result of a factual situation peculiar to his situation is or is not entitled to some form of relief, then the [fiscal court] must act in accordance with the basic requirements of due process as are applicable generally. Judicial review in this particular situation to determine whether or not the action is “arbitrary” concerns itself with whether the basic elements of due process have been afforded including whether the action was based upon substantial evidence.

Id. at 126 (quoting *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1973)). The court held the fiscal court’s determination of whether or not to abandon a county road was subject to due process, and, thus, judicial review was “limited to determining whether the decision not to close the road was arbitrary,

including whether there was substantial evidence to support the decision.” *Snyder*, 866 S.W.2d at 126 (citations omitted). Since “[a] challenge to a fiscal court’s action must be designated as an ‘original action,’ because the fiscal court is not a judicial court, which precludes an ‘appeal’ *per se*[.]” this court was not persuaded that KRS 23A.010(4) provided authority to hear the trial *de novo*. *Id.* at 127 (citations omitted). As a result, this court reversed the Trimble Circuit Court’s order on the basis that it failed to undertake the proper standard of review and to limit itself to the record before the fiscal court. *Id.*

In this case, the Robertson County Fiscal Court declined Whitley’s requests to abandon a portion of Batte Lane as a county road. As in *Snyder*, the fiscal court’s determination of whether Whitley is entitled to relief is based on a particular factual situation, and thus the determination is subject to the basic requirements of due process. Accordingly, the trial court was required to limit its review to the record before the fiscal court and to determine whether the action taken by the fiscal court was arbitrary. Since the trial court did not undertake the proper standard of review, we must vacate the portion of the order holding Batte Lane to be a private road.

Next, Robinson argues the trial 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 that discretion, which Robinson has failed to show. *Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov.*, 317 S.W.3d 23, 39 (Ky. 2010) (citation omitted).

Finally, Robinson contends the trial 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 he 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 city 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 Robinson'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 trial court's decision to deny Robinson's motion.⁵

On cross-appeal, the property owners argue the trial 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 property owners 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 property owners 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 CR 54.02. CR 54.01.

In this case, the August 13, 2009, order was not a final and appealable order because the trial 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.

⁵ We will not address Robinson's remaining claims in light of our decision to reverse the trial court's order granting summary judgment.

The trial 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 of the order. We are not persuaded by the property owners' 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 as private, further issues needed to be resolved by the court. Thus, Robinson's motion to alter, amend or vacate the October 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 trial court did not err in this regard.

The Robertson County order granting summary judgment is reversed in part, affirmed in part, and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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