

RENDERED: AUGUST 9, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000016-MR

CHARLES MOSLEY AND  
ROSEMARY MOSLEY

APPELLANTS

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NO. 10-CI-00585

BELL COUNTY FISCAL COURT;  
ALBEY BROCK, COUNTY JUDGE  
EXECUTIVE; CHARLES "RICK"  
CORNETT, MAGISTRATE; HAROLD  
BROCK, MAGISTRATE; LONNIE  
MAIDEN JR, MAGISTRATE; COYE  
SILCOX, MAGISTRATE; WILLIAM  
"BILL" S. PARTIN, MAGISTRATE;  
RON BLEVINS; AND TERRY BLEVINS

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Charles and Rosemary Mosley appeal from the Bell Circuit Court's order granting summary judgment in favor of the Bell County Fiscal Court ("Fiscal Court") and its members: County Judge Executive Albey Brock and Magistrates Charles "Rick" Cornett, Harold Brock, Lonnie Maiden, Jr., Coye Silcox, and William "Bill" S. Partin. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

At issue in the underlying action is whether Charles Mosley Road, a/k/a, Mosley Lane is a county road adopted by the Bell County road system in 1999. Mosley Lane begins at Jenson Hollow Road, a county road, extends past the Mosleys' property and dead-ends at the property of Ron and Terry Blevins, which abuts the Mosley property. No other homes lie along Mosley Lane; CSX Transportation operates railroad tracks that run along Mosley Lane and portion of Mosley Lane sits atop the right-of-way owned by CSX.

Historically, the Blevins have not used Mosley Lane as ingress to and egress from their property. Instead, they crossed a county bridge that connected their property to Jenson Hollow Left Road. However, in 2010, the bridge was destroyed by flooding.

Thereafter, the Fiscal Court filed the underlying action seeking a declaratory judgment that Mosley Lane is a county road and to prevent the Mosleys from obstructing access to Mosley Lane by way of Jenson Hollow Road. The Mosleys asserted that Mosley Lane was a private driveway and not a public or county road. The Mosleys filed a counterclaim against the Fiscal Court and its members, in their

official capacities, alleging tortious conduct and property damage as a result of what they deemed an illegal taking of their property by the Fiscal Court.

The parties filed cross-motions for summary judgment. Following a hearing, the trial court held that the Fiscal Court had adopted Mosley Lane into the county road system in 1999, as identified on a county road map prepared by the Department of Transportation (“Department”). The trial court also concluded that the Mosleys’ counterclaims were barred due to improper service of process because no summons was issued to the Fiscal Court members. Additionally, the trial court held the Fiscal Court and its members were entitled to sovereign immunity. This appeal followed.

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<sup>1</sup> 56.03. The trial court must view the record “in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). 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 (citations omitted).

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<sup>1</sup> Kentucky Rules of Civil Procedure.

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 a judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). We review the trial court’s legal conclusions *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

At issue in the underlying request for a declaratory judgment is whether Mosley Lane is a county road that was properly adopted by the Fiscal Court in 1999 or a private drive belonging to the Mosleys. The Fiscal Court claims that it formally adopted Mosley Lane as a county road, as reflected in a 1999 Fiscal Court order that adopted all roads identified on the Department map. In granting summary judgment to the Fiscal Court, the trial court held that Mosley Lane was shown as a county road in Fiscal Court records and identified on the map provided by the Department. The trial court also determined that the county had maintained the road, and the Mosleys had not objected to the maintenance, and therefore were estopped from claiming the road was privately owned.

As an initial matter, the only evidence of county maintenance was an affidavit submitted by County Judge Executive Brock, who testified that Mosley Lane was blacktopped by the Bell County Road Department in 1999. The trial court has not cited, and we are not aware of, any case law supporting its decision that such maintenance estops the Mosleys from objecting to the Fiscal Court’s claim that Mosley Lane is a county road. Generally, the doctrine of equitable

estoppel requires a party to have relied on the other party's conduct to its detriment or prejudice. *Sullivan v. Wolf Creek Collieries*, 294 S.W.3d 474, 476 (Ky. App. 2009) (citation omitted). Here, the record shows that the Mosleys gave the county permission to blacktop the road on one occasion. No alleged facts support the position that as a result, the Mosleys should be estopped from challenging the Fiscal Court's claim to the road. Certainly, public policy does not support, as equitable, the county's obtaining private property merely by taking a step to improve the land. *See Sarver v. Allen County*, 582 S.W.2d 40, 43 (Ky. 1979) (holding that the acts of county officials to improve or maintain a road, alone, would not constitute use by the public to ripen into a prescriptive title) (citation omitted). Therefore, we find the trial court erred by holding the Mosleys were estopped from challenging the Fiscal Court's claim that Mosley Lane was a county road.

The Mosleys object to the Fiscal Court's claim that it adopted the road in 1999. Specifically, the Mosleys contend that Mosley Lane was never a public road and thus the Fiscal Court had no right to adopt it as a county road. We agree.

After the enactment of the Road Act of 1914, county roads were required to be adopted into the county road system by a formal decree. *Porter v. Johnson County Judge/Executive*, 357 S.W.3d 500, 503 (Ky. App. 2010). This Act provided the basis for KRS<sup>2</sup> Chapter 178, which presently governs county roads. *Id.* "County roads" are defined as "public roads which have been formally

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<sup>2</sup> Kentucky Revised Statutes.

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 acquired by the county pursuant to subsection (3) of this section or KRS 178.405 to 178.425.” KRS 178.010(1)(b). Under this statutory scheme, “the terms ‘public roads’ and ‘county roads’ are no longer interchangeable.” *Porter*, 357 S.W.3d at 503.

KRS 178.025(1) provides that “[a]ny road, street, highway, or parcel of ground, dedicated and laid-off as a public way and used without restrictions on a continuous basis by the general public for fifteen (15) consecutive years, shall conclusively be presumed to be a public road.” Indeed, “[b]oth the intention of the owner to dedicate and the acceptance by the public may be inferred from use by the public for a substantial number of years.” *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky. App. 2001) (citation omitted). Dedication by the owner may be established by general and long continued use of a roadway by the public. *Id.* (citation omitted).

Here, the only evidence set forth to show Mosley Lane was a public road was the affidavit of Brock stating that Bell County had blacktopped the road in 1999. In fact, the record shows that entrance to Mosley Lane has been restricted by a locked gate and that the road has only been used by the Mosleys and their invitees. Other than blacktopping a portion of Mosley Lane in 1999, Bell County has done nothing before or after to maintain it. The Mosleys emphasize that they gave the county permission to blacktop Mosley Lane and, by doing so, in no way acquiesced to its use as a public road. Additionally, no evidence has been

presented to indicate the Mosleys, or their predecessors in interest, dedicated the road for public use.

Even if a case could be made that Mosley Lane was used by the general public in a manner provided for in KRS 178.405 to 178.425, those sections do not apply to Mosley Lane. *See* KRS 178.425 (precludes application of KRS 178.405 to 178.425 to any private road while it exists as a dead-end passway with less than four platted lots). The facts establish that Mosley Lane is a dead-end passway abutting two platted lots. Thus, the trial court erred as a matter of law by concluding that Mosley Lane was properly adopted by the Fiscal Court as a county road. Accordingly, we reverse the portion of the order granting the Fiscal Court summary judgment on its action to have Mosley Lane declared a county road, and remand this matter to the trial court to enter an order dismissing with prejudice the Fiscal Court's request for declaratory judgment.

Turning to the Mosleys' counterclaims, we first address the trial court's holding that the Mosleys' claims against the Fiscal Court and its members were barred due to insufficient service of process. Specifically, the trial court held that the Mosleys failed to issue a summons to the members in accordance with CR 3.01.

CR 3.01 provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." However, "a party who enters his appearance to any suit by filing an answer or otherwise responding waives the service of a summons." *Brock v.*

*Saylor*, 189 S.W.2d 688, 690, 300 Ky. 471, 474 (Ky. 1945). Indeed, “[w]here the court has jurisdiction of the subject-matter of the action, a general appearance by the defendant waives all defects in the process or in the service of the process, or even the service of process at all.” *Brumleve v. Cronan*, 197 S.W. 498, 504, 176 Ky. 818, 829 (Ky. 1917) (citations omitted). Here, when all of the named parties in this suit filed an answer to the Mosleys’ counterclaims, they waived any defects in service. As a result, the trial court erred by holding that the claims against the County Judge Executive and the Magistrates were barred on this ground.

With respect to the issue of whether the Fiscal Court and its members were entitled to immunity from the suit, we find that the trial court correctly held that the Mosleys’ counterclaims against the Fiscal Court, the County Judge Executive and the Magistrates were barred on this basis.

“Official immunity” is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity . . . . Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer’s or employee’s actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]

*Yanero v. Davis*, 65 S.W.3d 510, 521-522 (Ky. 2001).

“Kentucky counties are cloaked with sovereign immunity. This immunity flows from the Commonwealth’s inherent immunity by virtue of a Kentucky county’s status as an arm or political subdivision of the Commonwealth.” *Lexington-Fayette Urban County Gov’t v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) (internal citations omitted). When fiscal court members are sued in their official capacity, the action is essentially brought against the county. *Edmonson County v. French*, 394 S.W.3d 410, 414 (Ky. App. 2013) (citations omitted). Like the county, the fiscal court and its members, who are sued in their official capacity, are entitled to sovereign immunity. *Id.*

In this case, the Fiscal Court was entitled to sovereign immunity from the Mosleys’ counterclaims. Likewise, the members of the Fiscal Court, who were sued in their official capacities, were entitled to sovereign immunity from the counterclaims. As a result, the trial court did not err by dismissing the Mosleys’ counterclaims on the basis of sovereign immunity.

The order of the Bell Circuit Court is affirmed in part, reversed in part, and remanded with instructions to enter an order consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

LAMBERT, JUDGE, DISSENTING: I respectfully dissent, and would adopt the Order of the trial court in its entirety.

BRIEFS FOR APPELLANTS:

David O. Smith  
Marcia A. Smith  
Corbin, Kentucky

BRIEF FOR APPELLEES:

Martha L. Brown  
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Neil Ward  
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