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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000888-MR

DONALD MORGAN AND
MARSHA MORGAN

APPELLANTS

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 15-CI-00353

ALLEN COUNTY, KENTUCKY;
DAMON GREEN; AND
BARBARA GREEN

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: Donald and Marsha Morgan (“the Morgans”) appeal the Allen Circuit Court’s order denying their petition to have Green Lane in Allen County, Kentucky declared a county road. For reasons stated below, we affirm.

I. Factual and Procedural Background

Green Lane is a 0.8 mile gravel road that runs through property owned by Damon and Barbara Green (“the Greens”) and leads to property owned by the Morgans. It is undisputed that the first 0.1 mile of Green Lane, which is surfaced with “chip and seal” material and used as a school bus turnaround, has been accepted into the Allen County road system. However, the parties have had multiple disputes over the years regarding the use and maintenance of the remaining 0.7 mile.

In 1990, the Morgans requested that the Allen County Fiscal Court repair the entirety of Green Lane. The Fiscal Court denied this request after concluding it was not responsible for maintaining roadway that had not been accepted into the county road system. In 1992, the Morgans requested an additional 0.3 mile of Green Lane be accepted into the county road system, but the resolution was never formally adopted by the Fiscal Court. Nonetheless, the county began grading and graveling the roadway leading to the Morgans’ property. This maintenance eventually ceased. As a result, Donald Morgan attended a Fiscal Court meeting in 2009 and once again requested all of Green Lane be accepted into the county road system. This request was denied after road viewers visited Green Lane and discovered it did not meet width and drainage specifications. Around

this time, the Greens began threatening to block the Morgans' passage through Green Lane.

The Morgans eventually filed a petition for declaratory judgment against Allen County and the Greens seeking a judicial decree that all of Green Lane was either a public or county road. The Morgans alternatively asserted that they had an easement over the portion of Green Lane running through the Greens' property by prescription, necessity, estoppel, or dedication. Allen County conceded the first 0.1 mile of Green Lane was a county road and the county received state funds to maintain that portion of roadway. However, it asserted the remaining 0.7 mile was private roadway. Allen County contended that the Fiscal Court's rejection of the Morgans' previous request that it pass an order explicitly declaring all of Green Lane a county road was fatal to the Morgan's declaratory action because KRS¹ 178.010(1)(b) defines county roads as "public roads which have been formally accepted by the fiscal court of the county as part of the county road system[.]"

The matter proceeded to a bench trial. The Morgans attempted to prove Green Lane was a long existing public road by introducing several deeds and topographical maps from the early nineteenth century through the 1950s referencing a road running along the same route. The Morgans argued the Allen

¹ Kentucky Revised Statutes.

County Fiscal Court formally accepted this road as a county road by passing resolutions in 2016, 2014, and 2002, certifying certain maps created by the Kentucky Transportation Cabinet reflected its county road system. All three resolutions stated, in relevant part, the following:

Fiscal Court of Allen County

Resolution adopting and approving the execution of a Rural Secondary Program Agreement between the Fiscal Court and the Commonwealth of Kentucky, Transportation Cabinet, Department of Rural and Municipal Aid, and accepting all roads and streets referred to therein as being part of the County Road System.

Be it resolved by the Fiscal Court that:

The Fiscal Court does hereby certify that all roads and streets referred to in said Agreement are county roads as defined in KRS 178.010(1)(b)[.]

Several witnesses testified that these resolutions were passed because the Transportation Cabinet allocates road funds by using a formula based, amongst other things, on the mileage of county roads within that county. *See* KRS 177.320(3); KRS 177.360(1). Unfortunately, the above resolutions did not specify which roads the Fiscal Court was certifying as Allen County roads.

To overcome this evidentiary deficiency, the Morgans called Kimberly Morrow, the Geographic Information Systems Manager for the Barren River Area Development District (“BRADD”) as a witness. Morrow testified that

BRADD mapped all of the roads in Allen County through an agreement with the Transportation Cabinet. BRADD's report for Allen County, created in August 2002, lists Green Lane as a county road measuring 0.820861 miles. This report stated that BRADD provided county official with its maps in order to verify road names. Accordingly, the report included the signature of Johnny Hobdy, Allen County Judge/Executive at the time, acknowledging he had reviewed BRADD's work for accuracy and completion.

Judge Hobdy testified that the Fiscal Court was not provided with any maps or lists of county roads before it passed the above resolutions. According to Judge Hobdy, the agreements referred to in the resolutions were drafted by the Transportation Cabinet and set out the amount of road funds the county would receive. Judge Hobdy alleged that the Transportation Cabinet calculated this amount by relying on the information the Transportation Cabinet possessed of the Allen County road system. Thus, the Fiscal Court did not know which roads it was certifying as Allen County roads when it passed resolutions accepting state funds from the Transportation Cabinet. Judge Hobdy further testified that the Fiscal Court formally accepted the first 0.1 mile of Green Lane as a county road but denied all requests to accept the remaining 0.7 portion. Judge Hobdy alleged that certain economic factors made it common for only a portion of a road to be

included in the county road system. He was not asked about his signature on the BRADD report.

The Greens disputed the Morgans' claims that the Green Lane was ever a public road. Barbara Green testified that the only use of Green Lane since 1985 was to access the Morgans' and Greens' properties. Barbara alleged that Allen County had performed some maintenance of the chip and seal portion of Green Lane but not the remaining portion, which she testified had always been "rough."

The trial court subsequently entered an order granting the Morgans an easement by prescription for the portion of Green Lane that ran across the Greens' property. However, it denied their request that all of Green Lane be declared either a public road or a county road. In its written findings of fact and conclusions of law, the trial court found that Green Lane could not be a public road because it had not been used by the general public for over fifteen years. The trial court further found Green Lane was not a county road because there was no evidence the Allen County Fiscal Court formally accepted it as part of its county road system. On appeal, the Morgans argue multiple theories that they contend compelled a finding that all of Green Lane was a county road.

II. Standard of Review

In all actions tried without a jury, the trial court’s findings of fact shall not be set aside unless clearly erroneous, “and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR² 52.01. Findings of fact are not clearly erroneous when supported by substantial evidence, that is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). An appellate court reviews the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

III. Analysis

While used interchangeably in the past, the terms “county road” and “public road” are not synonymous. A public road is merely a passageway that may be used by the public free of charge. *Ellington v. Becraft*, 534 S.W.3d 785, 792 (Ky. 2017). Such a road can be created by formal, statutory means or informally through dedication by estoppel or dedication by prescription. *Id.* County roads are public roads for which the fiscal court shall appropriate sufficient money to keep in good repair and free from obstructions. KRS 179.400(1). A public road can become a county road only if it has been formally accepted by a fiscal court as part

² Kentucky Rules of Civil Procedure.

of its county road system. KRS 178.010(1)(b). Thus, “there is a valid public policy behind requiring a fiscal court to evidence its acceptance of a particular road by way of an official order: A county should not be held responsible for maintenance of a road which happens to become public through a process over which it has no control.” *Cary v. Pulaski County Fiscal Court*, 420 S.W.3d 500, 508 (Ky. App. 2013).

It is undisputed that the Allen County Fiscal Court did not pass any resolutions explicitly accepting all of Green Lane into its county road system. Nonetheless, the Morgans contend that the Fiscal Court’s resolutions approving its agreement with the Transportation Cabinet constituted formal acceptance of Green Lane into the Allen County roads system. However, Judge Hobdy testified that no member of the Fiscal Court was aware which roads and streets were being certified as county roads. While the Morgans produced evidence Judge Hobdy reviewed BRADD’s records, the Judge/Executive is not the Fiscal Court.

Moreover, we are not convinced a resolution certifying a map as an accurate representation of the county road system constitutes formal acceptance of that roadway into the county road system. As a previous opinion by the Kentucky Attorney General has explained,

In order to facilitate monitoring of the application of these funds, and in connection with its responsibilities concerning state maintained secondary and rural roads within the counties (e.g., KRS 177.320, 177.330,

177.350), the Kentucky Transportation Cabinet's Department of Rural and Municipal Aid is developing maps known as County Road Series Maps. The maps are presented to the fiscal court of a county for adoption, together with a proposed resolution typically indicating that the map reflects those roads within a county which have been accepted by the fiscal court as county roads.

Presumably a fiscal court would want such map to show every lawfully accepted county road within the county, in order to provide documentation that a given road is eligible for expenditure of state funds made available pursuant to KRS 177.320. We believe this circumstance gives rise to a rebuttable presumption that a road not shown on a County Road Series Map that has been formally adopted for a county, is not a “county road” within the meaning of KRS 178.010(1)(b). Such a presumption may be rebutted by various circumstances. For example, a road that is not shown on such map, but which has in fact been accepted by the fiscal court as a county road, may not have been included on the map through inadvertence, or because it was accepted after the map was prepared. *It might be noted as well, that the fact that a road appears on such map is not absolutely conclusive regarding whether or not a given road is a “county road,” as a road may have been depicted through error, or may have been discontinued through formal action of the fiscal court, but the map has not been updated to reflect such discontinuance.*

Ky. OAG 93-48 (June 29, 1993) (emphasis added). A reviewing court may give great weight to the reasoning contained in opinions by the Attorney General.

Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet, 69 S.W.3d 476, 480 (Ky. App. 2002). We find the reasoning above particularly persuasive to the issue *sub judice*. A fiscal court does not have unlimited discretion to decide which

public roads it accepts as county roads. Only roads that meet certain specifications may be accepted as county roads. *See* KRS 178.040. Moreover, a property owner aggrieved by a fiscal court's decision to adopt a county road has a right to seek a declaratory judgment alleging the county unlawfully incorporated their private drive into the county road system. *Whitley v. Robertson County*, 406 S.W.3d 11, 20 (Ky. 2013). These limitations on the Fiscal Court's authority would be difficult to enforce if it could inadvertently accept a road into the county road system by certifying a map.

Nonetheless, the Morgans argue *Porter v. Johnson County Judge/Executive*, 357 S.W.3d 500 (Ky. App. 2010), supports their argument that a fiscal court's certification of a roadmap created by the Transportation Cabinet constitutes formal acceptance of every road on the map as a county road. In *Porter*, Johnson County proved a road had been formally accepted into the county road system through various pieces of uncontroverted evidence. One piece of evidence was an affidavit from the county road engineer stating that every few years the Transportation Cabinet mapped the county roads and in 1991 the Fiscal Court "readopted" this map as its official road system. *Id.* at 503-04. On appeal, we held that *all* of Johnson County's uncontroverted evidence left no genuine issue of material fact that the disputed road was a county road. *Id.* at 504. Nowhere in the opinion did we hold that a fiscal court's certification of a map created by the

Transportation Cabinet constituted, on its own, formal acceptance of every road on the map as a county road, regardless of the road's prior status. Thus, the trial court correctly found that the Allen Circuit Court's resolutions did not constitute formal acceptance of all of Green Lane into the county road system.

The Morgans' next argument is even more novel. They claim that because they presented evidence that Green Lane was a public road prior to 1914, it became a county road as a matter of law after the passage of the Road Act of 1914. The Morgans' argument relies on the fact that this legislation changed prior law recognizing that a county could accept a road informally. However, the Morgans have not cited, and we have not found, any statute providing that all pre-1914 roads meeting the modern definition of "public road" became county roads after passage of the Road Act of 1914. Instead, the Morgans cited to the following passage from *Maggard v. Breeding*, 290 Ky. 701, 162 S.W.2d 523, 524 (1942),

The General Assembly of 1914 enacted a statute governing the public county roads and their establishment. Section 4295 of the Statutes, a part of that Act, declares that every public road "which has not been lawfully discontinued or vacated shall continue as such, until properly discontinued," and "shall in all courts and places be taken and deemed to be a public road whenever the establishment thereof as such may come in question." Section 4298 provides, "No public road shall be established or discontinued, or the location thereof changed without due notice thereof having been given according to the provisions of this chapter."

Although this passage may appear to suggest that pre-1914 public roads could not be discontinued absent formal government action, this Court has previously recognized that the *Maggard* Court was using the terms “county road” and “public road” interchangeably. *Blankenship v. Acton*, 159 S.W.3d 330, 333 (Ky. App. 2004). Earlier in the opinion, the *Maggard* Court explicitly states the road at issue was a county road created by the Letcher County Court in 1920. *Maggard*, 162 S.W.2d at 523. The holding in *Maggard* was that the county road at issue could not be obstructed by a private landowner because it had not been formally abandoned by the Letcher County government. *Id.* at 524. However, it has long been held that a public road that is not a county road can be abandoned without formal government action. *Sarver v. Allen County, By and Through Its Fiscal Court*, 582 S.W.2d 40, 42 (Ky. 1979). Thus, Green Lane’s status as a public road in the nineteenth and early twentieth century was not relevant to its status as a county road. Regardless, Barbara Green’s testimony disputed the Morgans’ evidence that Green Lane was a long existing public roadway.

Finally, the Morgans argue that Allen County should be estopped from denying that all of Green Lane is a county road because it certified the Transportation Cabinet’s maps of its road system. The Morgans contend they preserved this argument during the bench trial. We have reviewed the recording of the bench trial and have found no instance of counsel referencing estoppel, or any

equitable argument, before the trial court. “It has long been this Court’s view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal.” *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018) (quoting *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011)). Accordingly, we will not reverse the trial court on these grounds.

IV. Conclusion

The order of the Allen Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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