

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000392-MR

LONNIE OLIVER

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 97-CI-00151

NICKY BAKER, JOHNNY STONE, LINDA OLIVER,  
CHARLES TINSLEY, RICKY CAPPS, TED MARTIN,  
PHILLIP THOMAS, GEORGE KILGORE, in their  
respective capacities as Magistrates;  
and VAN KNIGHT, Caldwell County  
Judge-Executive;

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, EMBERTON, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Lonnie Oliver appeals from an order of the Caldwell Circuit Court denying his motion to alter, amend, or vacate the court's judgment that a road which crossed his property was a public road at the time it was accepted into the Caldwell County road system. Finding no error, we affirm.

Oliver purchased a farm from William Holloway in 1975. The road in question, Redbud Trail, ran from Highway 91 up to and across railroad tracks and entered Oliver's property where it

ended at a home on the property. On January 10, 1995, the Caldwell County Fiscal Court passed an ordinance adopting its county road system which included Redbud Trail in its entirety.

In April 1997, Oliver's nephew placed a gate across the road at the point it entered Oliver's property. The gate was intended to keep cattle from straying off the property onto Highway 91; however, it also prevented Ricky Cartwright, one of Oliver's neighbors, from accessing his property. The gate was eventually removed after the matter was brought to the attention of Caldwell County officials and the Kentucky State Police, but the dispute over the character of the road remained.

On August 4, 1997, Oliver filed a declaratory judgment action in the circuit court asking that the portion of the road on his property be declared a private road and that it be stricken by court order from the county road system. The action was filed against the magistrates, individually and in their capacities as magistrates, against the county judge-executive, and against the road superintendent, individually and in his official capacity. Prior to judgment, the circuit court dismissed the claims against the magistrates in their individual capacities and the claims against the road supervisor in both his individual and official capacity.<sup>1</sup>

On June 2, 1998, the court entered an order and judgment granting the appellees' motion for summary judgment in

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<sup>1</sup> In light of these dismissals by the circuit court, Oliver's notice of appeal improperly names the magistrates in their individual capacities and the road superintendent as appellees. We have corrected this designation and have properly named the appellees above.

part but denying it in part. The court determined that the requirements of KRS<sup>2</sup> 178.115 were met by the fiscal court in adopting Redbud Trail into the county road system. However, the court found that there was a factual issue regarding whether the road qualified as a "public road" capable of being adopted into the system. Therefore, the court denied summary judgment on that issue.

A bench trial was held on July 1, 1999, and the court rendered its judgment on October 5, 1999. Based on the evidence at trial, the court found that the road had been used by the public in excess of fifteen years and further found that the road had been maintained by the county for several years.<sup>3</sup> Thus, the court concluded that the road was a public road which was capable of being adopted into the county road system. When the trial court denied Oliver's motion to alter, amend, or vacate, this appeal followed.

Without making specific references to the trial court record,<sup>4</sup> Oliver argues that the fiscal court's determination that Redbud Trail was a public road, and the incorporation of it into the county road system, was arbitrary and capricious and amounted to the taking of his property without compensation. In essence, he argues that the trial court erred in determining otherwise.

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

<sup>3</sup> In determining that the road had been used by the public for "many years far exceeding fifteen," the court stated that its finding was supported by the testimony of Allen Kennedy, Louis Cartwright, and James Riley.

<sup>4</sup> See Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iii) and (iv).

Citing his testimony and that of Holloway, he asserts that the road was a private road that was never dedicated as a public roadway.

In designating the untranscribed portion of the proceedings pursuant to CR 75.01, Oliver designated the untranscribed testimony of himself and Holloway. He also designated the deposition of John Call. However, he did not designate the untranscribed testimony of Allen Kennedy, Louis Cartwright, and James Riley, witnesses upon whom the trial court relied in its finding that the roadway had been used by the public for more than fifteen years. CR 75.01(1) provides in relevant part:

Unless an agreed statement of the case is certified as provided in Rule 75.15, or there are no proceedings to transcribe, the appellant shall file a designation of untranscribed material. . . . The designation shall: (1) list such untranscribed portions of the proceedings videotaped or stenographically or mechanically recorded as appellant wishes to be included in the record on appeal and (2) list any depositions or portions thereof as have been filed with the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal. Within 10 days after the service and the filing of such designation, or within 10 days after the time for filing of such designation has expired, any other party to the appeal may file a designation of additional portions of the untranscribed proceedings videotaped or stenographically or mechanically recorded as that party wishes to be included.

While the appellees had the option of filing a designation of additional portions of the untranscribed proceedings, including the testimony of the witnesses relied upon by the trial court, it declined to do so. Therefore, it relied

on the rule that "all undesignated parts of the trial record support the judgment of the trial court." Colonial Life & Accident Ins. Co. v. Weartz, Ky. App., 636 S.W.2d 891, 893 (1982).

CR 52.01 states in pertinent part that "[f]indings 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." The burden is on the party seeking to have the court's findings vacated to show that the findings are clearly erroneous and not supported by substantial evidence. Byerly Motors, Inc. v. Phillips Petroleum Co., Ky. 346 S.W.2d 762, 765 (1961). In the case *sub judice*, we must weigh the evidence designated by Oliver against the undesignated and untranscribed portions of the evidence which were relied upon by the trial court. In doing so, we must assume that the undesignated portion supports the trial court's judgment. See Colonial Life, 636 S.W.2d at 891. Under these circumstances, we conclude that the trial court's judgment was not clearly erroneous.

The judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willard B. Paxton  
Princeton, Kentucky

BRIEF FOR APPELLEE, CALDWELL  
COUNTY FISCAL COURT:

James S. Miller  
Princeton, Kentucky

BRIEF FOR APPELLEE, JAMES  
RICKY CARTWRIGHT:

James C. Brantley  
Dawson Springs, Kentucky