

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000696-MR

REUBIN BAILEY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 06-CI-00442

PRESERVE RURAL ROADS OF
MADISON COUNTY, INC.; AND
CURTIS TATE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Reubin Bailey appeals from a summary judgment entered by the Madison Circuit Court in an action relating to the discontinuance of county maintenance of a roadway across his property. We affirm.

Dunbar Branch Road runs across several tracts of private property, including that owned by Bailey in rural Madison County. In August 2005, the

Madison County Fiscal Court conducted a public hearing to address the possible discontinuance of county maintenance of several county roads, including Dunbar Branch Road. According to the discussion, maintaining Dunbar Branch Road had become very expensive because of its partial location in or immediately adjacent to a creek bed. Not only did the roadbed frequently wash out due to high water, but the county was subject to federal fines due to the road's environmental impact. After noting that a decision to discontinue maintenance would not constitute a closure of Dunbar Branch Road, the Fiscal Court voted to discontinue the road's maintenance. Meanwhile, Bailey installed or helped install locked gates across the road, providing keys to those whose premises were accessed by the road.

In April 2006, appellees Preserve Rural Roads of Madison County, Inc., and Curtis Tate filed a complaint in the Madison Circuit Court seeking the Fiscal Court's resumption of the maintenance of Dunbar Branch Road, as well as the removal of Bailey's gates. The court granted summary judgment for the Fiscal Court in June 2007,¹ finding as a matter of law that the Fiscal Court had followed the procedures set out in KRS² 178.070 when discontinuing maintenance of

¹ The July 2007 summary judgment for the Fiscal Court included finality language which appellees moved the trial court to set aside, pending resolution of all claims against the parties. A handwritten civil docket entry in September 2007 indicated appellees' motion was granted, and appellees' attorney was directed to tender an order removing the finality language. However, we do not find such a tendered or signed order in the record, and appellees' attorney later prepared the final summary judgment order stating that in July 2007, the trial court upheld the Fiscal Court's discontinuance of maintenance on Dunbar Branch Road. Nevertheless, we need not resolve whether the summary judgment in favor of the Fiscal Court became final in 2007 or 2008, as the Fiscal Court was not named as a party to this appeal.

² Kentucky Revised Statutes.

Dunbar Branch Road in August 2005. In April 2008, the trial court granted summary judgment for appellees, noting in part:

KRS 178.116 provides for the initiation of formal proceedings for the reversion to former land owners [of] a roadway formerly maintained by the county. See Blankenship v. Acton, Ky.App., 159 S.W.3d 330 (2003). As no such proceeding has been initiated, [Bailey] is without legal right or ownership to prohibit others from using the . . . road.

Bailey was directed to remove barriers from Dunbar Branch Road, and he was permanently enjoined from further restricting or impeding the access of others to the road. This appeal followed. We note the parties agree that the issues raised below were ripe for summary judgment, as no genuine issues existed as to any material facts. CR³ 56.03.

First, we address Bailey’s assertion that the trial court erred by failing to find that Dunbar Branch Road reverted to private ownership after county maintenance was discontinued. We disagree.

For purposes of KRS Chapter 178, county roads are defined in pertinent part as “public roads which have been formally 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). Any such county road “lawfully established and opened and not lawfully discontinued or vacated

³ Kentucky Rules of Civil Procedure.

shall continue as such, until properly discontinued.” KRS 178.020. A fiscal court may relinquish its responsibility for a county road by intentionally directing that it

be discontinued. Notice must be published, according to the provisions of KRS 178.050, and in addition, notices must be placed at three (3) prominent and visible public places within one (1) mile of the road. After posting the notices, the fiscal court shall appoint two (2) viewers who have no vested interest in the discontinuance of the road and who, together with the county road engineer, shall view the road and report in writing at the hearing what inconvenience would result from the discontinuance. Upon presentation of the report and other evidences, if any, at a public meeting of the fiscal court, the court may discontinue the road.

KRS 178.070. As stated in *Blankenship v. Acton*, 159 S.W.3d 330, 333 (Ky.App. 2004) (citing *Sarver v. Allen County*, 582 S.W.2d 40 (Ky. 1979)),

while a county road is necessarily a public road, not all public roads are county roads. Consequently, a county road adopted by formal action after 1914 may only be abandoned by formal governmental action, but a public road that is not a “county road” can be abandoned without formal action.

Nevertheless, the discontinuance of a county road does not necessarily create a private road in its place. In 1980, the Kentucky General Assembly enacted KRS 178.116 to address the informal discontinuance of roads adopted or maintained by the county. Under KRS 178.116(1), ownership of an informally discontinued county road may revert to prior owners of the land under certain circumstances:

Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract

of land to which it originally belonged unless at least one (1) of the following conditions exists:

- (a) A public need is served by the road;
- (b) The road provides a necessary access for a private person;
- (a) The road has been maintained and policed by the county or state within a three (3) year period.

However, such automatic reversion of roadway ownership does not apply to those county roads which are formally discontinued by fiscal court action pursuant to KRS 178.070. Instead, such roads are specifically addressed by KRS 178.116(4), which requires joint action by all private parties who are entitled to necessary access to the particular road:

If a county road has been discontinued under the provisions of KRS 178.070, then by a joint petition of all private parties entitled to necessary access the road shall be closed to public use but remain open in accordance with its condition and use for the access of the private parties involved, or by a joint petition of all parties entitled to necessary access the road shall revert to the owner or owners of the tract or tracts of land to which it originally belonged.

Here, the record shows that in accordance with KRS 178.070, the Fiscal Court formally discontinued Dunbar Branch Road as a county road in August 2005. Thus, the road could be closed to public use only in accordance with KRS 178.116(4). However, as a joint petition for the road's closure to public use was not filed by Bailey and the other "private parties entitled to necessary access[,]” KRS 178.116(4), the road continued in its status as a public road even

after it no longer was a county road. Therefore, the trial court did not err by finding that the road did not revert to private ownership.

Next, Bailey asserts appellees lack standing to bring this action, as they have no claim against him personally because Dunbar Branch Road now is a private road in which appellees hold no interest.⁴ We disagree.

As stated in *Warren County Citizens for Managed Growth, Inc. v. Bd. of Comm'rs*, 207 S.W.3d 7, 13 (Ky.App. 2006),

standing to sue is a judicially recognizable interest in the subject matter. The interest may not be remote and speculative, but must be a present and substantial interest in the subject matter. Simply because a plaintiff may be a citizen and a taxpayer is not in and of itself sufficient basis to assert standing. There must be a showing of a direct interest resulting from the ordinance. Nevertheless, the burden was on the appellees to show that none of the appellants were aggrieved by the [zoning] map amendment.

(Footnotes omitted.) *See also City of Beechwood Village v. Council of St.*

Matthews, 574 S.W.2d 322, 324-25 (Ky.App. 1978) (“[t]o prevail on the issue of standing, it would be necessary for appellees to show that none of the appellants had standing to maintain the suit”).

Appellees admit that the directors of Preserve Rural Roads, including Curtis Tate, do not own property on Dunbar Branch Road. No official membership records were produced or were alleged to exist. However, appellees alleged that Ida Wall, who owns land accessed by Dunbar Branch Road, belonged to the group

⁴ Issues regarding appellees’ standing to challenge the Fiscal Court’s decision will not be addressed since the Fiscal Court is not a named party to this appeal.

and opposed the gates across the road. Although Wall did not testify below and is not named as a party to this proceeding, the record contains a check which she allegedly wrote in support of the organization.

Further, several members of the Preserve Rural Roads organization testified before the Fiscal Court or submitted affidavits describing their regular use of Dunbar Branch Road as a shortcut to another highway, or their occasional use of the road to view sites of historical or sentimental significance. In particular, Tate testified by deposition that he traveled Dunbar Branch Road in his business, and that the road satisfied a public need for other people. He testified that he needed access to the road

not only for my own personal use that my parents and grandparents were raised up and down that road, that my family cannot go back to see the bridges that they built and have their name on, but also for work. There's a lot of times that if you're working in Doylesville and you need to go to Red House, you can go through that way and cut across and save ten miles. Of course, there's three outlets and we've got farms that we rent, that from time to time it's easier for us to cut through and go to another farm. We don't own that, but we rent.

Tate testified that traveling from Doylesville Road to Stony Run Road involved travel of about three or four miles if using Dunbar Branch Road, or travel of perhaps fourteen or fifteen miles if using roads other than Dunbar Branch Road.

Although Bailey asserts that the road traverses only private property and is accessible to all the owners of such property, he fails to address the direct interests raised by the members of the appellee organization, or to show that

appellees in fact were not aggrieved by his installation of locked gates across a public road. As Bailey therefore failed to counter Tate's showing that he had a "direct and substantial interest in the subject matter[.]" *Warren County Citizens for Managed Growth, Inc. v. Bd. of Comm'rs*, 207 S.W.3d 7, 13 (Ky.App. 2006), we are not persuaded that appellees lack standing to bring this action.

Finally, we are not persuaded by Bailey's assertion that the summary judgment for appellees resulted in an unlawful taking of his property. Bailey's argument turned on his claim that, subject only to private easements, the road became his private property when the Fiscal Court discontinued its maintenance, and that compelling public access to the property amounted to an unconstitutional taking of private property by governmental action. Again, although the roadway no longer is a county road, it continues to be a public road absent a closure to public use pursuant to KRS 178.116(4). Given that Bailey produced no evidence of prior ownership of the roadbed itself, he has made no showing that he possesses anything more than a mere expectancy of eventually gaining ownership of the roadbed, or that a taking of his property in fact occurred.

The Madison Circuit Court's summary judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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