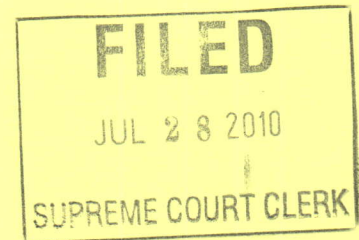


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000417-D
(2008-CA-000696)



REUBIN BAILEY

APPELLANT

ON APPEAL FROM MADISON CIRCUIT COURT
ACTION NO. 06-CI-00442

vs.

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

APPELLEES

APPELLANT'S REPLY TO APPELLEES' BRIEF

CERTIFICATE OF SERVICE

I certify in accordance with Civil Rules 76.12 (6) and 5.03 that a true copy of the foregoing Appellant's Reply to Appellees' Brief, was mailed, postage prepaid, to the following persons at the address listed on this the 23 day of July, 2010, and that this brief was mailed to the Clerk, Supreme Court of Kentucky, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601-3415, this 23 day of July, 2010.

Hon. Jerry W. Gilbert
212 North Second Street
P. O. Box 1178
Richmond, KY 40476-1178

Hon. D. Barry Stilz
301 East Main Street, Suite 800
Lexington, KY 40507

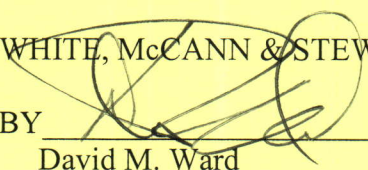
Hon. Julia H. Adams
Senior Status Judge
Madison Circuit Court
101 West Main Street
Richmond, KY 40475

Madison Circuit Court Clerk
P. O. Box 813
Richmond, KY 40476-0813

Respectfully submitted,

WHITE, McCANN & STEWART, PLLC

BY



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ATTORNEYS FOR APPELLANT,
REUBIN BAILEY

PURPOSE

Pursuant to CR 76.12(e) the purpose of this Reply brief is to respond to the Appellees' brief, particularly the incorrect allegations that (1) the constitutional takings question was not presented to the Trial Court and (2) that the state actor who committed the unlawful taking was not identified.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant continues to believe that oral argument would be helpful to the Court in deciding the issues presented in this case.

STATEMENT OF POINTS AND AUTHORITIES

Pursuant to CR 76.12(f) a requirement for a Statement of Points and Authorities is not required for briefs, as is the case here, of five (5) pages or less.

I. APPELLEES' CONTENTION THAT THE CONSTITUTIONAL "TAKINGS" ISSUE PRESENTED BY THIS CASE WAS NOT ADDRESSED TO THE TRIAL COURT IS IN ERROR.

Appellees allege that the unconstitutional application of K.R.S. 178.070 and 178.1116 by the trial court in its April 2, 2008, Order granting "Summary Judgment in Favor of Plaintiffs" was not previously addressed to the trial court. This ignores two things. First, the Court had not unconstitutionally applied the relevant statutes prior to rendering its April 2, 2008, Order granting the Plaintiffs below (Appellees herein) Summary Judgment. Second, the following reprinting of paragraphs 14, 15 and 16 of Appellant's Motion for Summary Judgment, timely filed with the Trial Court with copies to the Appellees, address exactly that issue and urges the Court in paragraph 16 to take the only constitutional course available to it. Said Motion provides:

14. What leads to confusion is subsection four of K.R.S. 178.116 which provides:

(4) If a county road has been discontinued under the provisions of K.R.S. 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.

15. This subsection is astonishing. It provides no agency or court with which the suggested "petition" is to be filed, it apparently fails to acknowledge the common law doctrine set forth in Sarver and Waller, and it fails to recognize that when the Fiscal Court decides to discontinue a county road all the landowners may not desire the outcomes suggested in subsection four. This gives the initial impression that the road would remain open to the public and not revert back to the ownership of the landowners over whom it runs. Of course, if that were the case an unconstitutional taking would occur whereby the private landowners over whom the road runs would be subject to public access and use without compensation for the land utilized by the public and the upkeep¹ of the road.

¹ Said upkeep apparently amount to tens of thousands of dollars according to the Madison County Judge Executive's statements during the Fiscal Court meeting where Dunbar Branch was discontinued. Minutes of said

16. Thus, the only way to avoid a violation of U.S. Constitution Amendments 5 and 14 and Kentucky Constitution Section 1 as well as to prevent the ignoring of the common law dictates set forth in Sarver and Waller is to come to the conclusion suggested herein. That is, when discontinuance of a road is properly determined by the Fiscal Court of the county in which the road lies pursuant to K.R.S. 178.070, the roadbed reverts to the property over which it lies.

II. THE “STATE ACTOR” COMMITTING THE UNLAWFUL TAKING PRESENTED BY THIS CASE IS THE TRIAL COURT.

Appellees argue in Part IV of their Brief that “Appellant’s argument alleging a constitutional violation simply cannot be asserted against Appellees who are private citizens and cannot be deemed to be ‘state actors.’” They go on to argue that since Mr. Bailey did not name a state actor on appeal, his argument alleging a constitutional taking must fail. Similar to Appellees’ earlier argument which fails upon a simple reading of the record, Appellant clearly states in bold and capital letters in Part IV of his brief “THE CIRCUIT AND APPELLATE COURT’S RULINGS CONSTITUTE AN UNLAWFUL TAKING AND USE BY THE GOVERNMENT OF THE PROPERTY OF THE APPELLANT, REBUIIN BAILEY.”

The issue of whether an unlawful taking may occur as a result of judicial action was addressed in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al., 560 U.S. _____ (No. 08-1151, June 17, 2010). Writing for the plurality of four of the eight² Justices participating in the decision, Justice Scalia states “To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it

hearing have previously been filed with the Court by plaintiffs’ counsel.

² Justice Stevens recused himself from the decision as he owns property on the Florida coast.

has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” Stop the Beach, 560 U.S. at slip opinion page 10 (emphasis in original); *See also Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 163–165 (1980).

Notably, not a single Justice disagreed that such judicial action should be prohibited, rather they differ on whether such action is prohibited by the takings clause, the due process clause (Justice Kennedy) or, as was the case with Justice Breyer, whether such issue needed to be addressed at all.

The United States Supreme Court has made it clear that “the Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49 (1960) (emphasis added). As mentioned in Appellant’s brief at pages 14 to 15, “this is exactly why Mr. Bailey should not be forced to bear the public burden of tens of thousands of dollars of road maintenance while being subject to Government imposed access across his land.”

The trial Court’s Summary Judgment of April 2, 2008 and the Court of Appeals affirmation serve to force Appellant to bear a public burden (road upkeep for public use) which in all fairness should be borne by the public as a whole. As the U.S. Supreme Court has stated, this is exactly what the Fifth Amendment was designed to prohibit and an unlawful taking occurs whether such imposition is committed by the executive, the legislature, or the judiciary.

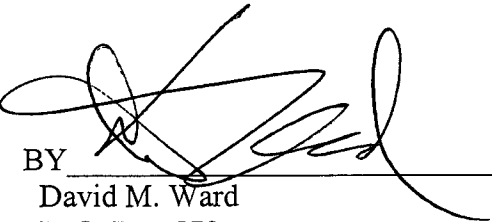
III. CONCLUSION

The potential for an unconstitutional taking was directly addressed to the Trial Court prior to the issuance of its April 2, 2008 Order granting Summary Judgment. Further, the Appellee’s contention that a state actor had not been identified is simply inaccurate. Appellant

made clear that the state actor was the Trial Court and judicial takings have been recognized by the United States Supreme Court. Accordingly and for the reasons set forth herein and in Appellant's brief, the decisions of the Kentucky Court of Appeals and Madison Circuit Court should be reversed and Summary Judgment entered in favor of the Appellant.

Respectfully submitted,

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