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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2009-SC-000417-D
(2008-CA-000696)

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REUBIN BAILEY

APPELLANT

vs.

ON APPEAL FROM MADISON CIRCUIT COURT
CIVIL ACTION, FILE NO. 06-CI-442
HON. JULIA H. ADAMS, JUDGE

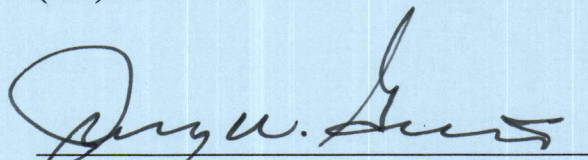
PRESERVE RURAL ROADS OF MADISON
COUNTY, INC., and CURTIS TATE

APPELLEES

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

The undersigned hereby certifies that a true and accurate copy of the Brief of Appellees was delivered by U.S. mail to Madison Circuit Court, 101 W. Main Street, Madison County Courthouse, Richmond, Kentucky 40475; Hon. Julia H. Adams, Judge, Madison Circuit Court, 101 W. Main Street, Madison County Courthouse, Richmond, Kentucky 40475; David M. Ward, Esq., White, McCann & Stewart, PLLC, P.O. Box 578, Winchester, Kentucky 40392-0578; on this 9th day of July, 2010. The Appellees further certify that the record on appeal has not been removed by Appellees.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellees submit that the facts and application of the law are clear and that oral argument would not assist the Court in deciding the issues presented herein.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

	Page
I. APPELLEES HAVE A DIRECT INTEREST IN AND ARE AGGRIEVED BY THE ACTIONS OF THE APPELLANT IN ILLEGALLY AND WITHOUT RIGHT ERECTING BARRIERS AND BLOCKING THEIR PASSAGE OVER A COUNTY ROAD	
<u>Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green</u> , 207 S.W.3d 7 (Ky. App. 2006)	1,3
<u>City of Louisville v. Stock Yards Bank & Trust Co.</u> , 843 S.W.2d 327 (Ky. App. 1992)	1
<u>Deters v. Kenton County Public Library</u> , 168 S.W.3d 62 (Ky. App. 2005)	3
<u>City of Beechwood Village v. Council of St. Matthew</u> , 574 S.W.2d 322 (Ky. App. 1978)	2
Court of Appeals Opinion	2
KRS 178.116	3
II. THE COUNTY'S DISCONTINUANCE OF MAINTENANCE DOES NOT CHANGE THE STATUS OF DUNBAR BRANCH ROAD AS A PUBLIC, COUNTY ROAD ACCESSIBLE BY THE PUBLIC	
<u>Sarver v. County of Allen, Kentucky</u> , 286 S.W.2d 894 (Ky. 1956)	3
<u>Blankenship v. Acton</u> , Ky. App. 159 S.W.3d (Ky. 2005)	4
KRS 178.116	3,4
III. APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE APPLICATION OF KRS 178.070 AND KRS 178.116 WAS NOT PRESENTED TO THE TRIAL COURT AND THUS WAS NOT PRESERVED ON APPEAL	
<u>Massie v. Persson</u> , 729 S.W.2d (Ky. App. 1987)	6
<u>Pittsburg and Midway Coal Mining Co. v. Rushing</u> , 456 S.W.2d 816 (Ky. 1969)	6
<u>Akers v. Floyd County Fiscal Court</u> , 445 S.W.2d 146 (Ky. 1977)	6
<u>Carr v. Cincinnati Bell, Inc.</u> , 651 S.W.2d 126 (Ky. App. 1983)	6
<u>Kaplon v. Chase</u> , 690 S.W.2d 761 (Ky. App. 1985)	6
CR 59	6
CR 52	6
CR 76.12	6

IV. THE DISCONTINUANCE OF MAINTENANCE IS NOT AN UNLAWFUL TAKING

<u>Jackson v. Metropolitan Ed. Co.</u> , 419 U.S. 345, 95 S.Ct. 499, 42 L.Ed.2d 477 (1974)	7
<u>Capitol Area Right to Life, Inc. v. Downtown Frankfort, Inc.</u> , 862 S.W.2d 297 (Ky. 1993)	7
<u>Blankenship v. Acton</u> , 159 S.W.3d 330 (Ky. 2005)	7
KRS 178.116	7

INTRODUCTION

This is an appeal from the Judgment of the Madison Circuit Court permanently enjoining Appellant from barricading a county road. Appellant herein asserts lack of standing of a non-profit citizen's action group and an individual who routinely used and traversed the road prior to Appellant's unilateral action blocking the roadway. Appellant is also now improperly asserting on appeal a constitutional argument against private parties that was not presented to nor addressed by the trial court.

COUNTERSTATEMENT OF THE CASE

The Appellant, Reubin Bailey, in July of 2005 erected barriers across Dunbar Branch Road, a road incorporated into the Madison County Road system (Answer of Reubin Bailey, paragraph 7 and Reubin Bailey deposition, hereafter RB deposition, pp. 1-4). The barriers consisted of locked gates and prohibited access of individuals attempting to traverse the county road (RB deposition, p. 7 and Curtis Tate deposition, hereafter CT deposition, p. 21). The actions of Mr. Bailey in barricading the county road were undertaken by him without authority of the Madison County Fiscal Court (RB deposition, p. 5).

Thereafter procedures were invoked by the Madison County Fiscal Court under KRS 178.070 regarding the road at issue, Dunbar Branch Road, Whitlock Road and Old Doylesville Loop (County Roads 1046, 1336 and 1067, respectively). This statutory procedure provides as follows:

The fiscal court may direct any county road to be discontinued. Notice must be published, according to the provisions of KRS 178.050, and in addition, notices must be placed at three (3) public places in the vicinity of the road. After the posting of the notices as aforesaid, the fiscal court shall appoint two (2) viewers 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 such report and other evidences, if any, the court may discontinue the road. KRS 178.070.

Pursuant thereto, the County published advertisements, and posted notices of a public hearing on the matter. However, the notices plainly add reference to discontinuance "of maintenance" referring to the County's intent not to close the road or abandon the public right of way. The Fiscal Court conducted a hearing on August 23, 2005. This intent was reaffirmed by the County Judge and the members of the Fiscal Court by numerous statements prior to and during the public hearing to the effect that the roads would not be closed. The actual motion was to "stop maintenance" on the roads, clearly not intending to abandon the public right of way.

This action was initiated by Preserve Rural Roads of Madison County, Inc., a non-profit citizen action group and Curtis Tate, an individual affected by the discontinuance of maintenance of Dunbar Branch Road by the County and its continued obstruction by Mr. Bailey. Following submission of the Notices, Minutes of the Fiscal Court hearing and its Order discontinuing maintenance, the Fiscal Court and Mr. Bailey both moved for Summary Judgment regarding the propriety of the Fiscal Court's actions in discontinuing maintenance of the road. The Madison Circuit court entered an Order granting Summary Judgment on July 16, 2007, specifically finding that "the Fiscal Court properly and legally utilized and filed the procedures set-forth in KRS 178.070 in order to discontinue its maintenance obligations upon Dunbar Branch Road in August of 2005." The trial court did not find that the road was discontinued, only that its maintenance obligation ceased. No appeal was taken from this Order and the Madison Fiscal Court is not a party to this appeal.

Following the trial court's determination that the Fiscal Court acted properly in discontinuing maintenance upon Dunbar Branch Road, the remaining parties both moved for Summary Judgment concerning the propriety of Mr. Bailey continuing to block access to the roadway.

At this juncture, Mr. Baily had not presented nor alleged any constitutional claims or arguments. His Answer does not assert a constitutional challenge, nor do his Motions for Summary Judgment or other pleadings filed on his behalf contain any such claim or argument.

On April 2, 2008, the Madison Circuit Court entered Summary Judgment in favor of Preserve Rural Roads of Madison County, Inc. and Mr. Tate finding that Dunbar Branch Road remained a county road, that Mr. Bailey had not availed himself of the procedures contained in KRS 178.116 for reversion of roadways formerly maintained by the County, and that his actions in barricading the roadway were without right. He was permanently enjoined from impeding access to the road.

Thereafter, on April 8, 2008, Mr. Bailey filed a Notice of Appeal. On the same date, Mr. Bailey filed a Notice to Attorney General alleging for the first time that the application of KRS 178.070 and KRS 178.116 effected a constitutional violation.

The Court of Appeals, in an unpublished opinion, upheld the Judgment of the Madison Circuit Court. The Court of Appeals properly determined that Preserve Rural Roads of Madison County, Inc. (whose members included a landowner whose access to her property was affected by the obstruction and others who regularly used the road) along with Mr. Tate who regularly used the road, had a direct and substantial interest in the subject matter of the litigation and had standing to bring the lawsuit. Further, that KRS 178.116 specifically set forth procedures for reversion that had not been undertaken. Finally, Mr. Bailey's constitutional claim was rejected as he had not made a proper showing of ownership that would constitute a taking.

This Court granted discretionary review on March 9, 2010.

I. APPELLEES HAVE A DIRECT INTEREST IN AND ARE AGGRIEVED BY THE ACTIONS OF THE APPELLANT IN ILLEGALLY AND WITHOUT RIGHT ERECTING BARRIERS AND BLOCKING THEIR PASSAGE OVER A COUNTY ROAD.

The Appellees are Preserve Rural Roads of Madison County, Inc., a non-profit corporation, and Curtis Tate, a citizen of Madison County, Kentucky. Mr. Tate is also an officer in the corporation. The corporation activities are funded by contributions from its members. These contributing members were identified individually in response to discovery requests. One of the contributors/members of Preserve Rural Roads of Madison County, Inc. is Ida Wall, a landowner who uses Dunbar Branch Road as access to her property and is directly affected by the gate.

Kentucky courts afford citizen's groups standing to challenge actions in which a member or members have "a present and substantial interest in the subject matter." Warren County Citizens for Managed Growth, Inc. v. Board of Commissioners of City of Bowling Green, Ky. App. 207 S.W.3d 7, 13 (2006), citing City of Louisville v. Stock Yards Bank & Trust Co., Ky., 843 S.W.2d 327, 328-29 (1992). In other words, a litigant must have "a direct interest" or are "aggrieved" by the action. Id. at 13.

Here a member of the Appellees' citizens group (Ida Wall) has property cut off by the gates erected by Mr. Bailey. Further, other members of Preserve Rural Roads of Madison County, Inc. have submitted affidavits that they live in Doylesville and regularly used Dunbar Branch Road as a pass through to Boonesboro Road. They are aggrieved by the Appellants' actions. Jimmy Wall, a member of the citizen's group, told the Fiscal Court of the historical value of Dunbar Branch and its use by the public as an access from Stoney Run to Doylesville Road (Transcript, R, p. 61). Mr. Tate, an individual Appellee, testified in his deposition that he traveled the road prior to its closure

for business purposes and private pleasure to view historical family locations. (Deposition of Curtis Tate, R, p. 142). He is likewise aggrieved by the Appellant's actions in prohibiting him from the use of the county road.

In order to successfully argue lack of standing, it is necessary for Mr. Bailey to show none of the Appellees had standing to maintain the suit. City of Beechwood Village v. Council of St. Matthew, 574 S.W.2d 322 (Ky. App. 1978) at 324-5. This burden was simply not met, as correctly determined by the Court of Appeals:

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 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.

Court of Appeals Opinion, pp. 7-8.

The case cited by the Appellant, Deters v. Kenton County Public Library, Ky. App. 168 S.W.3d 62 (2005), involves a lawsuit to “enjoin an official act.” Id. at 63. The posture of these proceedings is beyond the propriety of the county’s official action and is now focused on the propriety of Mr. Bailey’s private acts in blocking a county road when the requirements of KRS 178.116 are absent. As in Warren County Citizens for Managed Growth, Inc., *supra*, the members of this citizens group live in the area and use the road, which is evidence that they are directly affected by its improper closure by the Mr. Bailey. The citizens group, Preserve Rural Roads of Madison County, Inc., includes members in addition to Curtis Tate who are directly affected by the Appellant’s closure of the road, justifying its standing to institute proceedings to seek injunctive relief. Both Preserve Rural Roads of Madison Co., Inc., and Curtis Tate have standing to complain of Mr. Bailey’s actions in prohibiting travel over the county road.

II. THE COUNTY’S DISCONTINUANCE OF MAINTENANCE DOES NOT CHANGE THE STATUS OF DUNBAR BRANCH ROAD AS A COUNTY ROAD ACCESSIBLE BY THE PUBLIC.

A county road is necessarily a public road. Sarver v. County of Allen, Kentucky, 286 S.W.2d 894 (1956). KRS 178.116 outlines the required procedure for county roads to be deemed discontinued and revert to the adjoining land owners. This statute provides:

178.116. Discontinuance of road.

- (1) 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;
 - (c) The road has been maintained and policed by

the county or state within a three (3) year period.

- (2) If the only condition which exists is for a necessary access for a private person, by a joint petition of all parties entitled to such access, the road shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged.
- (3) If the only condition which exists is for a necessary access for a private person, by joint petition of all parties entitled to such 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.
- (4) 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.
- (5) For the purposes of this chapter "necessary access" shall be construed to include access to any farm, tract of land, or dwelling, or to any portions of such farm, tract of land, or dwelling.

KRS 178.116(1) requires formal action to discontinue "[a]ny county road formerly maintained by the county or state." Blankenship v. Acton, Ky. App., 159 S.W.3d 330 (2005) at 334. There have been no proceedings under KRS 178.116(1) to close Dunbar Branch Road. Further, since Dunbar Branch Road has been maintained by the County within a three (3) year period, Mr. Bailey cannot claim reversion or ownership of the public roadway. Blankenship, supra at 334. Until there is action initiated under KRS 178.116, Dunbar Branch Road is a county road (albeit one not maintained with county funds) accessible by the public at large. The actions of Mr. Bailey to restrict and impede access to and over the county road were unlawful and without legal basis and the trial court properly enjoined the same.

The Appellant propounds a continuing argument that the actions of the Fiscal Court were to discontinue or close the road. This not only is contrary to the statements made by the County Judge-Executive and Magistrates at the hearing, but also contradicts to the actual motion, vote, and minutes of the meeting.

In addition to such statements, the transcript of the hearing also reveals the County Judge-Executive making the following statements:

But in this case, Ms. Wall doesn't want the road closed so we can't close it. So we are looking at discontinuance of service. The reason the gates were put up, it is my fault. I misunderstood, I was going by another statute that would allow them to. (Transcript, R, p. 62)

and

We have no authority to allow anybody to close the road. (R, p. 62).

All four (4) of the Magistrates in explaining their vote to discontinue maintenance emphasized that they were not voting to close the road. While KRS 178.070 may be utilized to close a county road, the notice and hearing provisions of that statute were used only to address whether *maintenance should be discontinued*. This fact is demonstrated by the notices, motion, and vote of the Fiscal Court and found to be proper in the prior Order of Summary Judgment issued by the trial court in favor of the Fiscal Court, an Order from which no appeal was taken.

KRS 178.116 clearly envisions county roads which are no longer maintained . This statute sets forth the precise manner in which the formerly maintained county road may revert to the adjoining owners. Reversion of “[a]ny county road formerly maintained by the county or state” requires formal action. Blankenship v. Acton, *supra* at 334. Since the conditions set forth in the statute have not been met (primarily that the road has been maintained within a 3 year period), nor

have there been any proceedings to establish same, the road has not reverted. The trial court properly granted Summary Judgment on the claim of the Appellees against Appellant.

III. APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE APPLICATION OF KRS 178.070 AND KRS 178.116 WAS NOT PRESENTED TO THE TRIAL COURT AND THUS WAS NOT PRESERVED ON APPEAL.

Mr. Bailey did not plead or present any constitutional challenge in any motion or response presented to the trial court. He first raised the specter of a constitutional challenge in giving notice to the Attorney General simultaneously filed with his Notice of Appeal. Mr. Bailey failed to utilize the procedures in CR 59 or CR 52 for the trial court to address this new claim. The failure to present this issue to the trial court should preclude its consideration on appeal.

CR 76.12(4)(c)(iv) requires an appellant to provide reference to the record where the issue was preserved for review. "[T]his emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review." Massie v. Persson, 729 S.W.2d (Ky. App. 1987) 448 at 452 citing Pittsburg and Midway Coal Mining Co. v. Rushing, Ky., 456 S.W.2d 816 (1969). In accord see Akers v. Floyd County Fiscal Court, Ky., 445 S.W.2d 146 (1977); Carr v. Cincinnati Bell, Inc., Ky. App., 651 S.W.2d 126 (1983); Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985). Mr. Bailey's failure to fulfill his obligation to present the constitutional issues to the trial court "is a waiver of [his] right to depend on [constitutional] protection when raised first through an appeal." Massie v. Persson, supra at 452. The waiver is not cured by subsequent notice to the Attorney General as prescribed in KRS 418.075. Massie v. Persson, supra at 453.

IV. THE DISCONTINUANCE OF MAINTENANCE IS NOT AN UNLAWFUL TAKING.

The 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". Jackson v. Metropolitan Ed. Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) and Capitol Area Right to Life, Inc. v. Downtown Frankfort, Inc., Ky., 862 S.W.2d 297 (1993). In addition, this argument was not preserved, as any claim to the constitutional propriety of the actions of the governmental entity, the Madison County Fiscal Court, should have been directed towards that party. No appeal was taken against the Fiscal Court or the Summary Judgment Order upholding the propriety of discontinuing maintenance. Appellant's Brief repeatedly refers to the extraordinary cost imposed upon him as a result of the action taken by the Fiscal Court. Yet there is absolutely no proof as to the figures loosely used to bolster his argument. Since Mr. Baily did not raise this issue with the trial court, did not adduce any proof or testimony on the subject and did not name the state actor on appeal, his argument alleging a constitutional taking must fail.

Further, there is no factual dispute that Dunbar Branch is, and was prior to the August 23, 2005, hearing, a county road. Mr. Bailey cannot have something taken from him that he did not have. KRS 178.116(1) is clear that formal action is required to discontinue "[a]ny county road formerly maintained by the county or state." Blankenship v. Acton, supra at 334. There have been no proceedings initiated under KRS 178.116(1). Since Dunbar Branch Road has been maintained by the County within a three (3) year period, Mr. Bailey cannot claim reversion or ownership of the public roadway. Blankenship v. Acton, supra at 334. Until there are proceedings initiated under KRS 178.116, Dunbar Branch is a county road (albeit not maintained with county funds) accessible by the public at large. Mr. Bailey has a statutory remedy to petition for the reversion and his failure

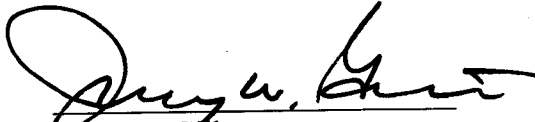
to avail himself of that remedy negates any claim of an unlawful taking.

CONCLUSION

The actions of the Madison County Fiscal Court in deciding to discontinue maintenance of Dunbar Branch Road were proper and did not close the road or discontinue it as a county road. In fact, the motion and order of the Fiscal Court specifically provided otherwise. Mr. Bailey has not availed himself of his statutory right to seek reversion of the roadway formerly maintained by the county, and as such, is without legal right to erect the barriers or claim an unlawful taking. The Judgment of the Madison Circuit Court and the opinion of the Court of Appeals accurately applies the law to undisputed facts and must be affirmed.

Respectfully submitted,

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