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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
011-SC-000612-D
(2009-CA-002132 AND 2009-CA-002100)

HAROLD WHITLEY, BONNIE WHITLEY, ET AL APPELLANTS

V. BRIEF FOR APPELLANTS

MARYANNA ROBINSON,
ROBERTSON COUNTY and
ROBERTSON COUNTY FISCAL COURT APPELLEES

APPEAL FROM COURT OF APPEALS
NOS. 2009-CA-002132 AND 2009-CA-002100
ROBERTSON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, CIVIL ACTION NO. 04-CF-040

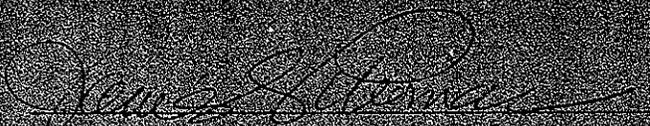
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify herewith that on this 11th day of July, 2012, a true and correct copy of this brief was served by first class U.S. airmail postage prepaid, as captioned, of the Court of Appeals, 401 Democrat Drive, Frankfort, KY 40601, on Hon. Jay DeLoach, Judge of the Robertson Circuit Court, at the Harrison County Justice Center, 115 Court Sq., Suite 3, Cynthiana, KY 40301, Hon. Shannon Burton Johnson, OVERLEY & ROBINSON, LLC, 240 Main Street, Paris, KY 40361, and Hon. Jesse P. Mitchell, P.O. Box 245, Mount Olive, Kentucky 40061.



JAMES S. THOMAS
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INTRODUCTION

This is case in which multiple property owners along a private road sought, and received, declaratory relief on the legal status of that road, which the county admitted had not been established in compliance with KRS Chapter 178. The appellant property owners appeal from a Court of Appeals' Opinion which overturned the judgment of the Robertson Circuit Court on the grounds that the Circuit Court did not have authority to hear the action as an original declaratory judgment action due to the Appeals' Court's erroneous understanding of the facts.

STATEMENT CONCERNING ORAL ARGUMENT

The appellants believe that oral argument would not be necessary to understand the issues that are before this Court. However, appellants request oral argument if it would assist in avoiding any possibility of confusion over what the case *sub judice* was, and was not, about. Appellants maintain that this matter is primarily a question of whether Circuit Courts have authority to hear Declaratory Judgment actions on the legal status of a road. Appellants' statements of fact and applicable law are wholly divergent from that posited by appellee Robinson at the Court of Appeals. Oral argument may be helpful to clarify the facts and legal issues, and appellants desire to participate therein should this Court believe that it would be helpful.

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STATEMENT OF THE CASE

The appellants submit the following summary of facts as essential to a fair understanding of the case.

I. FACTUAL BACKGROUND

Milliken Lane (also known as Batte Lane) was a private dirt and gravel drive serving the Herbert Batte family farm land abutting US Highway 62 at the Harrison and Robertson County lines, near Claysville Kentucky (see, *e.g.*, Plat, R. 28). The Licking River runs alongside a portion of the land. The road remains a dirt and gravel drive today.

The tract immediately adjacent Highway 62, and running with the drive to the property line flanked by guardrails encompasses a "boat dock" formerly leased by the Commonwealth from the Batte family. This tract is still owned by the Batte family appellants. Their farm was the parent tract for most of the property along Batte Lane.

Appellants Whitley's property line begins at the guardrails flanking the drive where the boat ramp ends and continues through the Whitley property to Greasy Creek. The Whitleys purchased this property from Dennis Pfetzer's widow, Deborah (Deed, R.12) who, together with her deceased husband, had purchased

this tract on July 30, 1976 (*Id.*, source of title). It is this portion of Batte Lane/ Milliken Lane that is the subject of the litigation.

Beyond Greasy Creek, the drive serves the other appellants and appellee Robinson, whose property line is at the terminus of the drive, and where she maintains a locked gate to her farm.

Landowners owning property purchased from the parent tract received an easement to use the drive, and this easement is referenced at least as early as February 5, 1937 in a Deed from Herbert Batte, *et al* to R.K. Batte, which easement reads as follows: "There is also hereby conveyed the use of a passway running along the River over the lands of Herbert Batte, at the place and within the lines where the road was heretofore and is now established." (Deed, **EXHIBIT E**, located on p.98 in the "WhitleyDocs" file on the digital media disk attached to the "Whitley Discovery." The digital disk is found in the Record on page 324, and hereafter is referenced as "disk"). **NOTE: EXHIBITS A - D consist of the Opinions of the Court of Appeals (A) and the trial court's Orders (B, C and D.)**

On February 26, 1987, Herbert W. Batte (now deceased) and appellants Helen W. Batte and Helen S. Batte leased a small portion of river frontage to the Commonwealth of Kentucky Department of Fish and Wildlife Resources. The lease provided access to the Licking River for the development of "a concrete boat ramp and a gravel parking area." (Lease, R. 701-03). The term of the lease was twenty

years, and expressly “grants to the Commonwealth all rights of ingress and egress to said property by the public *during the lease period* for purposes of using the boat ramp...” (*Id.*, 701-02, emphasis added).

This lease and the aforementioned easements evidence that, prior to 1987, Batte Lane was, from its start at US Highway 62, a private drive. Subsequent to 1987, the public’s right to use that front portion of Batte Lane (which did not extend beyond the boat ramp) was via the leased “ingress and egress” and was effective only “during the lease period,” being 20 years. (*Id.*, Item 6, R. 702). The lease itself was between the Batte family and the Commonwealth only, and only applied to the property owned by the Batte family. It did not extend to the Whitley property, nor could it have as Whitley’s predecessor (Dennis and Deborah Pfetzer) were not parties to the lease nor was their property included in that lease.

Tracts were sold off throughout the years, and from 1964 to 1987, the drive served only as access to farm and vacant land owned by Herbert W. Batte, Helen W. Batte and Helen S. Batte (See, *e.g.*, modified Drawing/Plat, R. 30); Dennis Pfetzer (who, in 1976, purchased the property immediately beyond the boat ramp, and whose property is now owned by appellant Whitley, *Id.*, and Deed at R.12), and; Lynn Bertram and appellant Janet (Jan) Bertram (who purchased 203 acres from John R. Wilson, Phyllis F. Wilson, Chester N. Wilson and Margaret M. Wilson in 1964); See February 27, 1984 Deed of Correction, which corrected the omission

of the use of the “passway running along the river over the lands of Herbert Batte (now Billy Batte, et al).” **EXHIBIT F**, p.106 on disk attached to R. 324.

Chester and Margaret Wilson had owned an interest in the 203 acres since February 28, 1953. Their deed also included the easement granting use of the private passway. (Deed, **EXHIBIT G**, p.93 in disk, R. 324). The same easement (sometimes with changed wording, now referencing it as an “easement” or “right of ingress and egress” instead of a “use of a passway’) has been deeded to all landowners since 1987 as well (see, *e.g.*, **EXHIBIT H**, Deed to Hicks in 1991, *Id.*, p. 109 on disk, who conveyed to appellants Richard and Tonya Wilson in 1998, **EXHIBIT I**, *Id.*, p. 113 on disk; and see Deed to French in 1992, **EXHIBIT J**, *Id.*, beginning on p. 116 of disk, who conveyed that tract to appellee Maryanna Robinson on May 7, 2001, **EXHIBIT K**, *Id.*, p. 118 on disk. The Bertrams also sold acreage to appellee Maryanna Robinson on July 27, 2001 and included the use of the passway “over the lands of [appellant] Helen Batte [Herbert was deceased].” (Deed, *e.g.*, **EXHIBIT L**, *Id.*, beginning p. 132 on disk, R. 324. This is a 20 page deed. To save space, only the first three relevant pages, are included as an exhibit herein).

The above history is helpful because, throughout the litigation and the appeal, appellee Robinson has continued to allege that the road “had been dedicated to public use by the adjoining landowners allowing the public to openly and freely

use the road beginning in 1964.” (*e.g.*, Robinson Brief at Court of Appeals, hereafter identified as “COA”, p. 14). There is no record of any such dedication.

The drive had been gated at US 62 until a flood washed the first gate away in 1964. However, two other locked gates along the drive remained across the road even at the time Ms. Robinson purchased her property (see, R.46). Appellee admitted this fact. (Response to Request for Admission No. 6, R. 200). Appellee Robinson also admitted to “removing” at least one of those gates (see, *e.g.*, Answer to Interrogatory No. 18, R. 212) and also stated that this gate was “replaced by unknown persons” (Robinson’s Admission No. 8, R. 201). Replacement gates were installed on the drive (see, *e.g.*, photo, found as “Whitley 20.1.jpg” on the media disk under the “Whitley photos” file attached to appellants’ Discovery, R. 324, attached hereto in **GROUP EXHIBIT M**). These gates were repeatedly “removed.” Multiple newly installed gate posts were cut off (*e.g.*, *Id.*, Whitley 17.7.jpg; *Id.*, Whitley 17.9.jpg; *Id.*, Whitley 17.10.jpg; *Id.*, Whitley 17.11.jpg; *Id.*, Whitley 18.4.jpg, and; *Id.*, Whitley 18.6.jpg) and the new gate either thrown into the weeds or carried away altogether (*e.g.*, *Id.*, Whitley 17.4.jpg, and; *Id.* Whitley 17.1.jpg). Appellee Robinson first stated that she “removed” the gate and took it to the sheriff (Answer to Requests for Admission No. 7, R. 201). She later admitted that she actually *kept* the gate but “the sheriff was advised that Ms. Robinson had the gate in the event anyone claimed it.” (Answer to Interrogatory No. 18, R. 212).

Robinson has asserted that the drive was used by members of the general public “for more than 40 years, since 1964.” (Robinson COA brief, p.2). Robinson has declined to, and/or failed to, identify even one such member of the general public (see, *e.g.*, Responses to Request for Admission No. 2, R. 199 and Answer to Interrogatory No. 2, R. 205-06. Robinson did state, however, her mistaken belief that a landowner using the easement to access his or her own property constituted a “member of the public” for purposes of establishing “public use”: “*the Plaintiffs herein, their predecessors, Ms. Robinson and Ms. Robinson’s predecessors-in-interest*” were “*members of the public.*” (R. 205-06, emphasis added). See also Answer to Interrogatory No. 3, *Id.*, 206. Nor would there have been any need for anyone other than the Batte family and the Bertrams to use this drive in 1964.

Similarly, Appellee Robinson referenced three affidavits she filed (R. 665) - which affidavits were filed *after* the Circuit Court had entered its judgment, and were thus not proper for consideration as they were not part of the record. However, these affiants were not members of the “general public,” but were invitees or licensees - friends and/or relatives of prior owners Darrell and Laura French, and/or workers who performed farm labor on the properties served by the road. (Robinson COA brief, pp. 4, 14). Robinson asserted at the Court of Appeals that these affidavits were proof of “public” use (*Id.*), ignoring the fact that the affiants clearly stated that they were family, or other invitees, of prior owners. Interestingly, all

three affidavits confirm the presence of two gates on the road, and further confirm that at least one gate was locked from time to time. This negated Robinson's insistence of the public nature and use of the road beyond Greasy Creek, and also negated her alleged "need" for the public to use any portion of the road servicing the private property beyond the guardrail (see, *e.g.*, R. 675).

The record is replete with evidence that the various landowners, and even the Commonwealth of Kentucky, historically considered the road private both prior to and after the adoption of the county road map in 1987. There is no evidence that the road was "dedicated" to the public by the landowners and appellee Robinson does not cite any such act of dedication.

Even though the 1987 lease provided ingress and egress to the boat ramp, the public use never included the private drive beyond the boat ramp, delineated by guardrails flanking the drive as it entered Pfetzer's (now Whitley's) property.

The lease has since expired, and has not been renewed, although the owners, Appellants Batte, would like to do so. Part of the reason for non-renewal has been the numerous acts of trespassers and vandals (see, *e.g.*, appellants' itemized documentation of trespassing and vandalism, including burglary and arson, R. 350-51 and the unnumbered page following, which should have been p. 352).

On November 20, 1987, Robertson County adopted a new county road map (Minutes, R. 379 and 423). Contrary to Robinson's assertions, the county took no

specific action to adopt the road. There is no record of any discussion of Milliken Lane whatsoever in the November 20, 1987 minutes. Nor does the record from that meeting contain any advertisements or other notice to landowners. The fiscal court “adopted” a county wide map, on which the litigated portion of this road was depicted.

On this map, a portion of the drive now appeared as a county road named “Milliken Lane.” As depicted, this road extended beyond the boat ramp, past the guard rail and through what is now appellant Whitley’s property, terminating just before Greasy Creek.

It is important to note that, contrary to appellee Robinson’s repeated assertions - which are anticipated to be repeated again before this Court - not all of the appellants’ predecessors in title were at that meeting.

There is no record of notice to the landowners, and no record of compliance with any other procedural requirement for adoption of a road as mandated in KRS Chapter 178. Importantly, Robertson county has *admitted on the record* that it did not give notice to the landowners prior to adoption of the map and that it “did not strictly comply with the requirements of KRS Chapter 178.” (R. 339-40).

II. PROCEDURAL BACKGROUND

In January, 2004, appellant Harold Whitley, beleaguered by trespassers and vandals who ventured beyond the guardrails at the end of the boat ramp, petitioned the Robertson County Fiscal Court to “abandon” that portion of Milliken/Batte Lane that crossed his private property and led to the other private property further down the lane. He desired to place a gate located at the guardrails separating the boat ramp from his property. (R.509). The hearing was scheduled for February 20, 2004.(R.505).

Appellee Robinson initially *supported* Whitley’s plan to place a gate at the guardrail and, on January 2, 2004, wrote a letter to the Robertson County attorney, Hon. Jesse Melcher, stating: “Pursuant to the request of Harold Whitley, this is to advise you that I have no objection to Mr. Whitley’s installation of a gate across River Road in Robertson County below the boat dock, i.e. between the boat dock and Greasy Creek.” (**EXHIBIT N**, R.53). For clarity, appellee has historically referred to Milliken/Batte Lane as “River Road” (See, *e.g.*, R. 20).

Appellant Whitley petitioned the fiscal court with the understanding that all the landowners along the lane were in agreement, including Robinson. At that time, it was unknown and unsuspected to Whitley that the road had not been lawfully adopted in the first place. Thus, the issue of Milliken Lane’s status as a lawfully adopted county road was not the subject of that hearing.

At the hearing, appellee Robinson opposed the petition to abandon the road, (R.505). With no concensus, the fiscal court decided to “leave the road as is,” but voted to put up “signs indicating *end of road maintenance and or dead end road.*” (*Id.*, emphasis added.) That vote further proves the county’s understanding that this was, essentially, a private road.

Subsequent to that meeting, it was ascertained that the Robertson Fiscal Court had never properly adopted Milliken Lane pursuant to the statutory mandates after 1914. Appellant Whitley asked to be put on the agenda of the August 20, 2004 regular meeting of the Fiscal Court. Whitley, together with counsel, presented the fiscal court with statutory and case law regarding the requirements for formal adoption pursuant to KRS Chapter 178.

At this August 20, 2004 hearing, Whitley asked the Robertson Fiscal Court to acknowledge that the statutory requirements had not been met and, therefore, to acknowledge that Milliken Lane was not a county road.

At this hearing, appellant Whitley did not ask the fiscal court to abandon Milliken Lane. Rather, he demonstrated that Milliken Lane was not lawfully established as a county road pursuant to the requirements of Kentucky law, and therefore was not the county’s to exercise control over - either to abandon, maintain or otherwise. Whitley argued that the road’s status as a “county road” was void *ab initio*. He requested the fiscal court to recognize that they had failed to follow the

law on establishment of a road and that, therefore, Milliken Lane simply was not a county road. Neither the appellant nor the county could have followed statutory procedures to “abandon” Milliken Lane because it wasn’t the county’s to abandon.

The responses of the various county officials were reported in the *Ledger Independent* (R. 447-48). The county officials explained that recognition of the law would “open a pandora’s box,” adding that “most of the roads the county maintains were never formally adopted” and “a decision to take this step with Milliken [Lane] could have far reaching implications.” (*Id.*, 448). The county did not “refuse to abandon” a county road, nor were they asked to. The fiscal court took no appealable action and entered no order. Rather, they “affirmed” that the lane was a county road. *Id.*

On September 20, 2004, appellants filed a Complaint for declaratory relief (R. 4, and see Amended Complaint, R. 71) asserting that Batte Lane was not lawfully adopted as a county road and requesting the Court to determine the legal status of Batte Lane. Additionally, the Complaint included, “to the extent necessary (R.8),” an :

.... Appeal of the results of a request to the Robertson County Fiscal Court wherein said Plaintiff requested the Fiscal Court to recognize that a certain portion of a drive was not a County road, which the Fiscal Court declined to do... . (*Id.* R. 4 and Amended Complaint, R. 71)

Whitley, now joined by the other residents on Milliken/Batte Lane, sought a determination as to whether the road was a lawfully adopted county road. Secondly, and only “to the extent necessary,” Whitley “appealed” the Robertson County Fiscal Court’s failure to acknowledge, on August 20, 2004, that Milliken Lane was not a county road. (Complaint and Amended Complaint, *Id.*)

Appellee Robinson was named as a “defendant” because she had now appeared of record in opposition to appellants’ wishes and it was believed she would want to be heard on the matter. Robinson filed no Answer to the original Complaint, but ultimately filed an Answer to an Amended Complaint and, in the same pleading, asserted “Counterclaims” against some of the appellants for monetary damages. (R. 125-40).

On cross-motions for summary judgment, the Court entered an Order dated August 13, 2009 (**EXHIBIT B**, R. 644) holding that the county had not legally adopted Batte Lane into the county road system and thus it was not a county road. The Circuit Court also found that the road served no public purpose and held the road to be a private road which could be gated, but not locked. The Court’s Order asked the parties to agree on placement of the gate, and provided for relief by motion if no agreement was reached on the gate’s placement.

On August 31, 2009, appellee Robinson filed a CR 59.05 motion to vacate, alter or amend this order (R. 650). Appellants filed a Response and requested the

Circuit Court to strike the 59.05 motion as untimely served and filed. (R. 680). Before the Court could hear and consider the appellants' arguments, shortly after the case was called, appellee's counsel elicited an oral statement from the Court that he did not consider the August 13, 2009 Order "final and appealable" because the placement of the gate had not been agreed upon (Tape, September 14, 2009 motion hour, beginning at approximately 46 seconds into the tape). This statement, and the hearing of the 59.05 motion implicitly overruled appellants' motion to strike.

As Robinson declined to discuss placement of the gate, the Court, in a subsequent Order dated October 22, 2009 (**EXHIBIT C**, R. 737) set the gate's location, and overruled Robinson's motion to vacate, alter or amend the August 13, 2009 Order. The October 22, 2009 Order also overruled Robinson's previously filed motion for Rule 11 sanctions against the County attorney and Appellants' counsel. The Order stated that it also "incorporates and readjudicates all interlocutory Orders" and recites that it adjudicated and disposed of all other claims and counterclaims "finally." (*Id.*)

Appellee Robinson then filed another motion to alter, amend or vacate. This time, Robinson filed to vacate both the August 13, 2009 and the October 22, 2009 Orders. Robinson also requested that the Court state that it considered the underlying action to be a declaratory judgment action. In a new Order, entered November 30, 2009 (**EXHIBIT D**, R. 788), the Court overruled appellee's new

motion. It did state: "The Court permits this Order to reflect that the Court considered Plaintiff's action to be an original action for Declaratory Judgment. The Court clarifies that it does not consider this to be an amendment to the Order entered October 22, 2009." *Id.*

Appellee Robinson appealed from the October 22, 2009 Order, and argued that the Plaintiffs could not seek a declaration from the Circuit Court as to whether Batte Lane was, or was not, a legally adopted county road. Robinson argued that plaintiffs were limited purely to seeking a determination as to whether the fiscal court acted arbitrarily in "refusing to abandon" the road. This wholly misstated the matter before both the fiscal court and the circuit court.

Appellants Harold Whitley, *et al*, argued at the Court of Appeals that the fiscal court wasn't asked to "abandon" a "county road," but rather were asked to recognize that Batte Lane/Milliken Lane was not a county road, as it had never been adopted into the county road system pursuant to mandatory law. The appellants argued that there is no statutory procedure to petition the fiscal court to relinquish its claim to something it does not own. The remedy available was a declaration of the legal status of the road.

The appellants also argued that Robinson's CR 59.05 motion was untimely, making her "Notice of Appeal" untimely, and therefore should have resulted in a dismissal of her appeal to the Court of Appeals. Appellants maintain that the

Circuit Court was mistaken in its belief that the August 13, 2009 Order did not adjudicate all the rights of the parties, and that it was error for the Circuit Court to entertain the CR 59.05 motion as the Court had lost jurisdiction over the matters decided in the Order. Once the court declared the road to be private, the road could be gated as a matter of law. Placement of the gate was a “housekeeping” measure, at best. There was also Robinson’s pending motion for sanctions against the county attorney and appellants’ counsel, which the Court overruled, but, again, that was an extraneous matter, unrelated to the actual rights of the parties to the action.

On appeal, the Court of Appeals reversed the trial court’s finding that the road was not lawfully adopted. It held that the Circuit Court had no authority to entertain a declaratory judgment action, but rather was “limited to a review of whether the fiscal court’s decision [not to abandon the road] was arbitrary.” (Opinion, **EXHIBIT A**, at p. 7.) The Opinion, however, was based upon material factual errors.

The Court of Appeals incorrectly stated that appellant Whitley had asked the fiscal court to “abandon” the county road at the August 2004 hearing and that the fiscal court “refused to abandon” the road. The Court of Appeals remanded the matter back to the Circuit Court to determine if the action taken in refusing to abandon the county road was arbitrary. (*Id.*, p. 10.)

Appellants timely petitioned for a rehearing, which petition was denied.

This matter is now before this Court on appellants' Motion for Discretionary Review. Appellants respectfully request this Court to find that the Court of Appeals' Opinion, dated July 22, 2011, was based upon critical factual errors and ignored the Circuit Court's lawful authority to declare the rights of parties, including deciding the legal status of a road. Further, if the Opinion is permitted to stand, the Circuit Court will be unable to make a determination regarding the arbitrariness, or not, of the fiscal court's refusal to abandon a county road because there was no request to abandon a lawfully established county road pursuant to KRS Chapter 178, nor did the fiscal court refuse any such petition.

For the foregoing facts and following reasons, the appellants respectfully request this Court to REVERSE the Court of Appeals and AFFIRM the trial court's judgment that Milliken Lane is not a county road.

ARGUMENT

The Complaint filed by the appellants was an action to declare whether or not a portion of Milliken Lane (a/k/a Batte Lane), was legally a county road (R. 4 through 10). The county's November 20, 1987 adoption of a county wide road map, and a subsequent "approval" of a new map in 2001 (2001 minutes, R. 380) are the acts of "establishment" claimed by the County (County's Answers to Interrogatory No. 3, R.331-32). The county would occasionally grade, gravel or

perform snow removal on that portion of the road (R. 332), but admitted that it had not performed snow removal since the Whitleys' move there in 2003. (R. 341).

The main issues before the Robertson Circuit Court were:

Issue 1: Is strict compliance with the requirements set out in KRS Chapter 178 necessary for a county to adopt a road into the county road system?

Issue 2: If so, did Robertson County strictly comply with the requirements set out in KRS Chapter 178 when it included Milliken Lane in the county road system?

Appellants maintained that these two questions should have been the only focus of the litigation *sub judice*. Appellants will address, *infra*, the grounds supporting the Circuit Court judgment that strict compliance with the statutes was necessary and that Robertson County failed to strictly comply. However, appellants must first address the Court of Appeals' error in holding that the Circuit Court lacked authority to decide this matter as an action for declaration of rights.

I. THE COURT OF APPEALS' JULY 22, 2011 OPINION IS PREDICATED ON A FATAL FACTUAL ERROR, BASING ITS OPINION ON THE MISCONCEPTION THAT THE CIVIL DECLARATORY ACTION FOLLOWED A REQUEST TO "ABANDON" THE ROAD. INSTEAD THE ACTION FOLLOWED A REQUEST TO RECOGNIZE THE ROAD WASN'T THE COUNTY'S TO EXERCISE CONTROL OVER, INCLUDING ABANDONMENT

The Court of Appeals's Opinion (**EXHIBIT A**) is based upon critical factual errors which materially affect the Court's decision and will create an impossibility on remand.

The Court's Opinion predicates its ruling on the following factual errors: "At a later public hearing, Whitley, through counsel, *requested the fiscal court to abandon the road* on the basis that the road was never properly adopted by the county in 1987. The fiscal court again *declined to abandon Batte Lane.*" (*Id.*, emphasis added.) Both are material errors of fact.

Harold Whitley's second appearance in August 2004 before the fiscal court had nothing to do with abandonment of Batte Lane. He did not request the fiscal court to abandon the road. Rather, Whitley requested the fiscal court to acknowledge that Batte Lane was not lawfully established and, therefore, was not a county road.

Whitley presented statutory and case law regarding the requirements for the lawful establishment of a road, demonstrated to the fiscal court that the laws

regarding adoption were not followed (to which they conceded) and requested that the fiscal court recognize that - in light of this mandatory law which they did not follow - the road was simply not theirs, either to abandon, refuse to abandon, or otherwise to exercise control over.

Neither did the fiscal court decline to abandon Battle Lane. Rather they simply reaffirmed the status of Batte Lane as a county road. This is evidenced by the August 24, 2004 Minutes of the Robertson County Fiscal Court wherein it is recorded:

Jim Thomas spoke to the group on behalf of Harold Whitley and Kenny Batte concerning Batte Lane. Discussion was held *on the status of said road as a county road*. Motion by Terry Norris to *reaffirm that Batte Lane is part of the county road system*. Terry Cracraft seconded. Unanimous. (Minutes, emphasis added, part of an unnumbered Group Exhibit attached to the Record on Appeal)

(NOTE: the group exhibit comprising the original records of the Robertson Fiscal Court were deposited with the Circuit Court Clerk at the request of the Circuit Judge. Per the Circuit Court Clerk, these exhibits were not individually numbered by the Clerk as they were original documents of the Fiscal Court).

In stating its position that Batte Lane was “part of the county road system,” the fiscal court took no appealable action. Appellant Whitley gave the fiscal court an opportunity to avoid being named as a party in a declaratory judgment action by acknowledging that the mandatory procedures for establishing a road were not

followed. The fiscal court acknowledged that Whitley was correct, and that “most roads” in the county “were not formally adopted” (R. 447-48), but, because it would open a “Pandora’s box,” declined to take any action in recognition of, or conformity with, that knowledge. (*Id.*)

Appellants’ Complaint before the trial court was, primarily, an action for declaratory relief. The first paragraph states that it is a “Complaint seeking a declaration of rights and a Declaratory Judgment by which those rights may be enforced ...” (Complaint, R. 4, at R.5 and Amended Complaint, R. 71 at R.72).

Paragraph III in both the Complaint and Amended Complaint state:

All of the other Plaintiffs join in this Complaint to seek a declaration of the property owners rights, and all Plaintiffs join in asking the Court to declare that a certain segment of this private drive is not a county road but a private drive which may be gated and closed to prevent said trespassers and vandals from coming onto their property and to otherwise protect the property of the various Plaintiffs. (R. 8 and R. 74-5, respectively, emphasis added.)

With regard to the portion of the Complaint designated as an “appeal” of the fiscal court’s failure to recognize Batte Lane was not lawfully established as a county road, the appellants stated:

On August 20, 2004, Plaintiff Harold Whitley requested the Fiscal Court of Robertson County to recognize that a certain segment of this private drive was not a County road. ... Said portion has never been formally adopted as required by the statutes and Kentucky law. The Robertson County Fiscal Court declined to so recognize. While the

Plaintiff does not believe the failure to act is a matter which requires an appeal, to the extent that Plaintiff, Harold Whitley, may be obligated to appeal this decision of the Fiscal Court, this Complaint and Appeal is being filed ... to preserve any rights which may be affected by the Robertson County's inaction. (Complaint, R. 8; Amended Complaint, R. 75, emphasis added.)

Plainly, the portion of the Complaint pertaining to any “appeal” applied only to appellant Harold Whitley. The other appellants were not before the fiscal court in August of 2004. Moreover, the “appeal” was asserted only to the extent it *may be necessary*.

Focusing only upon the “appeal” portion of the Complaint, appellee Robinson mischaracterized appellants’ entire underlying action as an “appeal” from the Robertson County Fiscal Court. (Robinson Brief COA, pp. 7, 11), and sought to make the necessity of the “appeal” binding on the other appellants who were not even present at the August, 2004 fiscal court meeting. Apparently, the Court of Appeals accepted Robinson’s argument.

Robinson argued that the circuit court proceedings constituted an appeal of the Robertson Fiscal Court’s “refusal to abandon” Batte Lane as a county road (See, *e.g.*, “Plaintiff’s action is an appeal, therefore this Court’s jurisdiction is limited to affirming or remanding the action back to the Robertson County Fiscal Court... .” (R. 650) and “[t]he only issue properly before the Court is whether the

Robertson County Fiscal Court properly refused to abandon Batte Lane in February, 2004.” (R 651.)

Before the Court of Appeals, Robinson renewed her arguments that the circuit court lacked jurisdiction to consider appellees’ request for a declaration of the road’s legal status. She argued that the court was strictly limited to a review of whether the fiscal court acted arbitrarily in refusing to abandon the road (Robinson Brief COA, p. 7).

Appellee characterized Whitley’s presentation of the law on adoption of roads to the fiscal court on August 2004 as submitting the same issue: “even if Appellees’ theory had changed, the question before the court remained the same, i.e. whether to close part of the road.” (Robinson Brief at COA, p. 11, emphasis original.) Again, the question before the fiscal court in August 2004 had *nothing to do with closing a county road*. It had everything to do with acknowledging that the road was not a county road. The “theories” and the “question before the court” were most definitely not the same.

At the Court of Appeals, appellee cited cases such as *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky.App.,1993). *Snyder*, and the similar cases relied upon by appellee and cited in support of its Opinion by the Court of Appeals, involved a fiscal court order to keep a *lawfully adopted* county road open. It did not address the issue here: whether the road was lawfully established as a county road.

Appellee Robinson also cited *Black v. Utter*, 190 S.W. 2d 541 (1945), *Triad Development/Alta Glyne, Inc. v. Gellhaus*, 150 S.W.3d 43 (Ky. 2004) and others to support her position that the Circuit Court does not have jurisdiction over appellants' declaratory action. However, none of the cases cited by Robinson involved a cause of action seeking a declaration as to whether the fiscal court followed KRS Chapter 178 to formally adopt the road pursuant to the law. The cases cited by Robinson are strictly related to matters for which there were specific statutory remedies available.

Embracing Robinson's mischaracterization of the nature of the underlying litigation, the Court of Appeals premised its Opinion on the factual errors that, at the second hearing, Appellant Whitley requested the fiscal court to *abandon* a county road, and that the fiscal court took some appealable action in response thereto - *i.e.*, that they *refused to abandon* the road. The Court then opined that the examination of the fiscal court's refusal to abandon the road is limited to a determination regarding arbitrariness of that refusal according to the record before the fiscal court.

Like Robinson, the Court of Appeals also erroneously analogized the action *sub judice* with *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky.App.,1993). The analogy is erroneous because, in *Snyder*, the road in question was, indisputably, a lawfully established county road.

As correctly summarized by the Court of Appeals at pages 6 and 7 of its Opinion, *Snyder* involved a request to abandon a lawfully established county road, which request was refused. In such a case, the circuit court would be limited to a review of whether the fiscal court's refusal to abandon was arbitrary, based upon the matters of record before it. Unfortunately, the Court of Appeals erroneously applied *Snyder*'s facts and holding to the instant action, which did not involve a request to abandon a lawfully established county road.

The error is patent as the statutory law on discontinuance of a county road requires, as a prerequisite, that the road be "lawfully established." KRS 178.020 provides, in part:

178.020 Roads, bridges, and landings continued -- Removal from through road system.

Every county road, bridge, and landing, and every city street and alley heretofore lawfully established and opened and not lawfully discontinued or vacated shall continue as such, until properly discontinued. ... (Emphasis added).

The Court of Appeals' Opinion effectively strips the circuit courts' authority to make a determination as to whether or not the prerequisite element of KRS 178.020 is met - namely, whether the road was lawfully established. This error has the secondary effect of placing that determination squarely into the hands of the fiscal court, removing all remedy of judicial review from those aggrieved.

The Court of Appeals incorrectly accepted Robinson's argument that there were "statutory procedures" in place for the discontinuance of a lawfully established county road as dispositive of the circuit court's authority, while ignoring the real issue in controversy: that the road was not "heretofore lawfully established."

Further, if the Court of Appeals' decision is permitted to stand, it remands the action back to the Circuit Court to make a determination on the "arbitrariness" of an act that never happened. The Court of Appeals Opinion held:

In this case, the Robertson County Fiscal Court declined Whitley's requests to abandon a portion of Batte Lane as a county road. As in Snyder, the fiscal court's determination of whether Whitley is entitled to relief is based on a particular factual situation, and thus the determination is subject to the basic requirements of due process. Accordingly, the trial court was required to limit its review to the record before the fiscal court and to determine whether the action taken by the fiscal court was arbitrary. (Opinion, p. 7, emphasis added.)

Neither of these two events (1. that Whitley requested the fiscal court to abandon a portion of Batte Lane as a county road, and; 2. that the fiscal court denied this request) took place at the August 2004 meeting of the fiscal court. Therefore, it would be *impossible* for the Circuit Court, on remand, to "determine whether the action taken by the fiscal court was arbitrary." The fiscal court simply took no such action.

Even Robertson County itself does claim those facts to be accurate. In its Answer to the Complaint, the County stated:

Defendants, Robertson County, as well as Robertson County Fiscal Court, *admit* that part of the stated averments in numerical paragraph IV, *that Plaintiff Harold Whitley, requested the Robertson County Fiscal Court to declare a County Road [sic] is not part of the County Road System, due to alleged failure to officially adopt the road as a County Road* and the Robertson County Fiscal Court *declined to declare the County Road as not having been officially adopted...* (Id, parag. No. 2, R. 16-17, emphasis added.)

Note that Robertson County's Answer does not state that appellant Whitley requested the fiscal court to abandon Batte Lane or that the county declined to abandon the road. Rather, Robertson County makes a judicial admission that Whitley asked the fiscal court to *declare* the road *was not a county road* due to failure to officially adopt the road, and that it declined to do so. While the county's summarization of appellants' paragraph IV in the complaint is not a mirror image of appellants' language, this admission of fact by the fiscal court is consistent with numerical paragraph IV of the Complaint, which stated, in its entirety:

On August 20, 2004, Plaintiff Harold Whitley *requested the Fiscal Court of Robertson County to recognize that a certain segment of this private drive was not a County road.* The portion of the drive, which has been known as Batte Lane, about which Plaintiff Whitley made this request runs from a guard rail located just past the boat dock ending at a certain creek (Greasy Creek) which bisects the drive. *Said portion has never been formally adopted as required by*

the statutes and Kentucky law. The Robertson County Fiscal Court declined to so recognize. While the Plaintiff does not believe the failure to act is a matter which requires an appeal, to the extent that Plaintiff, Harold Whitley, may be obligated to appeal this decision of the Fiscal Court, this Complaint and Appeal is being filed, and the County and its Fiscal Court named as Defendants, to preserve any rights which may be affected by the Robertson County's inaction. (Complaint, paragraph IV, at R. 8, and Amended Complaint, at R. 75, emphasis added.)

The county itself admitted that Whitley's appearance on August 20, 2004 was not a request to abandon the road, but rather a request to acknowledge that Batte Lane was not a county road because it had not been properly adopted into the county road system. The county also admitted it declined to recognize that Batte Lane was not a county road, as opposed to having declined to abandon the road.

The Court of Appeals should have been bound by these fact regarding what happened at the fiscal court, as stated by appellants and judicially admitted to by the county - the only two parties involved - and as supported by both the minutes of the fiscal court and the newspaper account of that meeting.

In any event, it is clear from both the appellants' account and that of appellee Robertson County that the Court of Appeals' Opinion remands this case to the trial court on nonexistent "facts." The trial court will not be able to review administratively for arbitrariness the fiscal court's refusal to abandon a lawfully established county road pursuant to KRS Chapter 178, because that never happened.

What was before the fiscal court was a request to acknowledge that the county failed to strictly comply with the statute.

Whether a statute requires strict compliance is a question of law, and a fiscal court is not competent to determine whether it must strictly comply with a statute. "The interpretation of a statute is a matter of law for the court." *White v. McAllister*, Ky. 443 S.W.2d 541 (1969), and see *Keeton v. City of Ashland*, 883 S.W. 2d 894 (Ky.App. 1994). Neither is the fiscal court the proper venue to impartially judge the legality and sufficiency of its own acts.

The Appellants' sought to ascertain whether or not the county had, in fact, lawfully established and opened Batte Lane. Appellants maintained that the county's basis for exercising control over Batte Lane was legally defective. There is no statutory remedy found in KRS Chapter 178 to resolve the legality and validity of the county's claim. There is such a remedy found in KRS Chapter 418.

II. THE COURT'S OPINION OVERLOOKS CONTROLLING STATUTORY AND CASE LAW WHICH SECURES THE RIGHT TO DECLARATORY RELIEF FOR APPELLEES

Where the validity of a fiscal Court's interpretation, or application, of a law is challenged, or where ownership or title to real property is in question, or the validity of an action, regulation or policy of a governmental entity is challenged, KRS

418.040 and 418.045 provide for redress by an action for declaratory relief in the Circuit Court. KRS 418.040 provides:

418.040 Plaintiff may obtain declaration of rights if actual controversy exists.

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

and KRS 418.045, which provides:

418.045 Persons who may obtain declaration of rights -- Enumeration not exclusive.

Any person interested under a *deed*, will or *other instrument* of writing, or in a contract, written or parol; *or whose rights are affected by statute, municipal ordinance, or other government regulation*; or who is *concerned with any title to property, office, status or relation*; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, *may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked.* The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under KRS 418.040, whether such other instance be of a similar or different character to those so enumerated. (Emphasis added.)

Declaratory judgment actions have been used historically to resolve claims involving title to real property allegedly achieved through legally defective methods

(for example, a fatally defective Deed). (See, *e.g.*, *Proctor v. Mitchell*, 194 S.W.2d 177 (Ky.App. 1946).

The Circuit Court has uniformly exercised authority to pass upon the legal status of a road by original civil action. *Hudson v. Ayars*, 2001-CA-002331-MR (2003), an unpublished opinion (copy attached, R. 486), involved facts that are strikingly similar and the same issues regarding whether a road was properly adopted by the county. The action was brought as an original declaratory judgment action. The Court of Appeals determined that the road was not a county road because the County had not formally adopted the road in strict compliance with KRS 178. These unpublished opinions were cited before the Court of Appeals, and are cited here, as they have similar facts and support the Circuit Court's authority to hear a declaratory action on the legal status of a road.

Many other cases involving the determination of the legal status of a road (i.e., cases that sought a determination as to whether a road was a county, public or private road) were brought as declaratory judgment actions. Unfortunately, like *Hudson v. Ayars, supra*, these cases tend to be unpublished. Still, these cases afford this Court with evidence that, *procedurally*, Kentucky's circuit courts' have uniformly exercised judicial authority to pass upon the legal status of a road by rendering declaratory relief. See, *e.g.*: *Jessamine County Fiscal Court v. Henry*, 2005-CA-000469-MR (Ky.App. 2006), and; *McCoy v. Vance*, 2005-CA-000501-MR (Ky.App.

2006). (NOTE: Copies of the foregoing unpublished opinions accompany the filing of this brief.) The undersigned could find no case (published or unpublished) denying the circuit court's authority to hear such cases.

The fact that Harold Whitley attempted to avoid the cost and effort of litigation by asking the fiscal court to voluntarily acknowledge the legal status of the road without having a court declare it should not operate to strip the appellants of their right to seek judicial redress if the fiscal court refused. Such a result would discourage good faith attempts to resolve differences without litigation, and would be against public policy.

Further, the Circuit Court has jurisdiction to review a governmental body's refusal or failure to act. *Hudgins v. Carter County*, 72 SW 730 (1903); *Metcalf v. Howard*, 201 S.W.2d 197 (1947) (recognizing the distinction between appealing from an act of the fiscal court and filing an original action in Circuit Court when the fiscal court fails to act: "There is a material difference where the court has refused to perform a duty imposed by statute.")

Miller v. Bell, 453 SW 2d 746 (1970), opines that an appeal is not even available as a remedy when the fiscal court fails to act, leaving only a direct action as the proper remedy. As the Court concluded: "Of course there can be no appeal from a failure to act." *Id.* at 747.

In *Padgett v. Sensing*, 438 S.W.2d 501 (Ky.App. 1969) it was held that an administrative appeal of a fiscal court's passage of a resolution was not necessary where the parties were seeking a determination of their rights:

Really this is an action for declaratory judgment under KRS 418.040 *et seq.* to interpret the rights of the parties under the resolution passed by the fiscal court. Cf. *Board of Ed. of Campbellsville Ind. Sch. Dist. v. Faulkner*, Ky., 433 S.W. 2d 853 (1968).

An action for declaration of rights is also recognized as the proper remedy to determine whether a fiscal court followed statutory requirements. In *Enterprise Publishing Co. v. Harlan County*, 310 S.W.2d 551 (Ky.App., 1958), the Plaintiff sought declaratory relief with regard to whether the fiscal court had followed statutory requirements regarding the payment of legal advertisements pursuant to KRS 424.030. The trial court dismissed the declaratory judgment action on the basis that it believed the Plaintiff was limited to an appeal of the orders and could not bring an independent, *de novo* action. On appeal, with regard to the question of whether the fiscal court followed the statutory requirements of KRS 423.030, the Court held:

[T]his is exactly the type of controversy recognized by KRS 418.040 and 418.045 as authorizing a declaratory judgment action.

Defendants contend that the request for a declaration of rights is in effect an attempt to relitigate the original claim of the plaintiff, which we have above determined should have been prosecuted by

appeal. *This is not so. Plaintiff properly could have brought this action for a declaration of rights regardless of whether or not it had a specific claim against the fiscal court ... Id., at 353-54. (Emphasis added.)*

Pursuant to the logic and holding of *Enterprise Publishing*, construction of a statute (such as whether KRS Chapter 178 requires “strict compliance” or permits “substantial compliance” - the resolution of which declaration would determine the lawful status of Batte Lane) and a determination of compliance therewith, is within the jurisdiction of the Circuit Court to render a declaration of rights in an independent, *de novo* proceeding.

Had Whitley not sought to avert litigation by approaching the fiscal court first, he - or any other aggrieved person (including the other appellants) - was always free to seek a declaration of rights with regard to whether strict compliance was required, whether or not the county had strictly complied and, consequentially, whether the road was, properly, a county road. Whitley’s request to the fiscal court merely sought to avoid the necessity of filing such an action.

The appellants maintained that the fiscal court could not take any action whatsoever regarding the road, including abandonment, because Batte Lane/ Milliken’s Lane was never, lawfully, the county’s to act upon. The fiscal court admitted, and the circuit court found, that the Robertson Fiscal Court did not take any of the steps necessary to comply with the statutory requirements of KRS

Chapter 178 when Milliken Lane was “established” as a “county road.” The Court of Appeals should not have set aside the trial court’s findings unless those findings are “clearly erroneous.” *Whilden v. Compton*, Ky. App., 555 S.W.2d 272 (1977).

III. THE CIRCUIT COURT ALSO HAD JURISDICTION TO HEAR THE CASE PURSUANT TO KRS 424.380

As admitted, the county did not publish notice in conformity with KRS 178.050 and 424.380. This failure not only rendered the proposed act of “adoption” voidable, but specifically vests jurisdiction with the Circuit Court.

KRS 178.050 mandates that no county road shall be established without first publishing notices and advertisements *in accordance with KRS 424:*

178.050 Notice and advertisement of establishment, alteration or discontinuance, and of letting of contracts.

- (1) No county road shall be established or discontinued, or the location thereof changed unless due notice thereof has been given according to the provisions of this chapter.
- (2) Notices and advertisements for the establishment, alteration or discontinuance of any county road, bridge or landing, and all notices and advertisements for the letting of contracts for construction or maintenance of county roads and bridges under the provisions of this chapter shall be published pursuant to KRS Chapter 424 by the county road engineer. (Emphasis added.)

There is no question from all that is in the record that the county did not publish notice or advertise the establishment of the road. Pursuant to *Vandertoll v.*

Commonwealth, 110 S.W.3d 789 (Ky., 2003): “Giving statutory notice when mandated is “a condition precedent to the accrual of the landowner’s cause of action” Being “an issue of strict compliance” failure to comply “effectively delay[s] the running of the limitations period... .” *Vandertoll, supra*, citing *Forwood v. City of Louisville*, 140 S.W.2d 1048, 1051 (1940).

KRS 424.380 provides:

424.380 Failure to comply with publication requirements.

Any resolution, regulation, ordinance or other formal action of any public agency which is required to be published, that is adopted without compliance with the publication requirements of this chapter, shall be voidable by a court of competent jurisdiction. The Circuit Courts of this state shall have the jurisdiction to enforce the purposes of this chapter (Emphasis added.)

Appellants argued before the Court of Appeals that, pursuant to the above statutes, the Circuit Court had additional statutory jurisdiction to render the act of adoption of the road by Robertson County void for failure to comply with the publication requirement. The Court of Appeals did not address this argument.

IV. THERE IS NO STATUTORY PROCEDURE IN KRS CHAPTER 178 FOR DETERMINING A ROAD’S LEGAL STATUS

There is a statutory procedure available in KRS Chapter 178 for discontinuing *lawfully established* county roads. However, there is no statutory procedure in that chapter for securing a valid determination that a road was lawfully established. Appellee Robinson complained that Whitley’s request was not made by

a formal petition with notice (Robinson Brief COA, 3). But early in the action, Robinson herself recognized that this was NOT an appeal pursuant to KRS Chapter 178, and that there was neither statutory procedure nor notice requirement for a request to acknowledge the *nonexistence* of a county road: “*This request was not made pursuant to KRS 178.070 or 178.080, nor could it have been, and thus no notice was provided under KRS 178.050 and 178.070.*” (R. 22, emphasis added.) Robinson continued by correctly stating: “*The Fiscal Court declined to recognize this portion of the road as a ‘private driveway.’*” (*Id.*, emphasis added.)

Robinson should have been bound by her judicial admissions that appellant Whitley had *not* requested the fiscal court to discontinue or alter Batte Lane pursuant to KRS Chapter 178.070 or 178.080. She also knew that the fiscal court had not taken any appealable action by refusing to “abandon” the road. However, Robinson argued the opposite at the Court of Appeals, stating that appellants were “appealing” from a denial of a request to discontinue the road pursuant to KRS Chapter 178, which argument was accepted by the Court of Appeals.

Respectfully, the Court of Appeals’ Opinion of July 22, 2011, was erroneously founded upon material factual errors. This was not a request for discontinuance of the road and the county did not deny a request to discontinue the road. The county admitted these facts, as did appellee Robinson. The fiscal court took no appealable “action” with regard to Whitley’s request, nor could they have.

Appellants' remedy was to seek declaratory relief pursuant to KRS 418.040 *et seq.* The Court of Appeals' Opinion overlooks this statutorily established right and applicable law providing declaratory relief for the cause of action alleged.

V. THE CIRCUIT COURT CORRECTLY HELD THAT BATTE LANE / MILLIKEN LANE WAS NOT A COUNTY ROAD AND ITS JUDGMENT SHOULD BE AFFIRMED

So that this Court is apprised of the grounds supporting the Circuit Court's determination that Batte Lane was not a county road, the appellants offer the following and ask the Court to affirm the trial court's Judgment.

After filtering through numerous arguments, the Robertson Circuit Court ultimately decided two issues: (1) whether strict compliance with KRS Chapter 178 is necessary for the establishment or adoption of a road as a county road, and; (2) If so, whether Robertson County strictly complied with those statutes in incorporating Batte Lane into the county road system. The trial court found that strict compliance was necessary based on controlling legal precedent. Based upon the record and the county's forthright admissions that it did not comply at all with the statutes, the trial court correctly held that Batte Lane was not lawfully a county road.

**A. STRICT COMPLIANCE WITH KRS CHAPTER 178 IS
NECESSARY TO ADOPT A COUNTY ROAD**

Robertson County stated that its motions to adopt the maps in 1987 and 2001 “substantially complied” with KRS Chapter 178 (R.331). Kentucky precedent holds that adoption of a “county road” requires strict compliance. *Sarver v. County of Allen*, 582 S.W.2d 40 (Ky. 1979). *Sarver* also holds that adoption requires more than merely including it on the county road map and occasional maintenance. Per *Sarver*, adoption must be formal and strictly comply with KRS Chapter 178 (*Id.*, at 41). Additionally, of importance to the case *sub judice*, the Court also stated that “acts of county officials in improving or maintaining a road” are not sufficient to convert the road to public use. (*Id.*, at 43). See also *Watson v. Crittenden County Fiscal Court*, 771 S.W.2d 47 (Ky.App. 1989).

Bevins v. Pauley, 77 S.W. 2d 408 (1934) is an early case which holds that opening a new road requires a petition, notice and a commissioner’s report expressly describing the road, or the “adoption” is fatally deficient. *Potter v. Matney*, 176 S.W. 987 (1915) and *Jones v. Avondale Heights Co.*, 47 S.W. 2d 949 (1932) hold that an order of the county court establishing a road is void *ab initio*, unless the statutory process is followed. See also *Illinois Central Railroad Co. v. Hopkins County*, 369 S.W. 2d 116 (Ky. App. 1963).

B. THE COUNTY DID NOT STRICTLY COMPLY WITH THE STATUTORY REQUIREMENTS FOR ADOPTION AS ADMITTED ON THE RECORD

Throughout the litigation, it was undisputed by the county that the Robertson County fiscal court did not comply with KRS Chapter 178 in adopting Milliken Lane. The county made the following admission on the record:

REQUEST NO. 1: Please admit that the County *did not strictly comply with the requirements of KRS Chapter 178* in adopting the litigated portion of Batte Lane into the County road system?

RESPONSE: *Admit.* (R. 339, emphasis added).

Robertson County additionally admitted that:

a. At the time they “adopted” the map/road, they did not notify the owner of the property *over which* the proposed county road runs (R. 339, Response 2);

b. At the time they “adopted” the map/road, they did not notify the landowners *to which* the proposed county road runs (R. 340, Response 3);

c. At the time they took action to maintain Batte Lane, they did not notify the owner of the property over which the proposed county road runs or any owners of any property beyond Greasy Creek (R.340, Responses 4 and 6 [*sic*]);

d. At the time they took action to adopt and maintain Batte Lane, there was no one living on Batte Lane at all (*Id.*, Responses 7 and 8);

e. That no person residing on Batte Lane requested adoption of Batte Lane into the county road system (R. 342, Response 16).

Pursuant to the definition found in KRS 178.010(b): “County roads” are public roads accepted by the fiscal court of the county as part of the county road system or private roads, streets or highways which have been acquired by the county pursuant to KRS 178.405 to 178.425.”

The litigated portion of Milliken/Batte Lane was a private driveway prior to adoption. It was not a public road and therefore could not become a county road pursuant to the definition of same in KRS 178.010(b) unless acquired pursuant to KRS 178.405 to 178.425.

KRS 178.405 to 178.425 specifically provides “conditions precedent” before a “private road” could become a county road. First, it requires the road be “used by the general public openly, continuously, and notoriously for at least fifteen (15) years.” Milliken Lane was a private drive all the way to the time Robertson County “adopted” the map. There is no evidence in the record of public use, and certainly not 15 years of adverse use, prior to 1987.

Second, KRS 178.405 requires a written petition, signed by at least 55% of the property owners abutting the drive stating that they are willing to dedicate the road to public use. No such petition was ever circulated or signed. In fact, no

affected property owners were even notified of the “adoption,” as the County admitted.

Third, even if the other requirements had been met, KRS 178.410 further requires the fiscal court to (a) make a determination as to whether the conditions of KRS 178.405 have been satisfied, and (b) notify all appropriate agencies of the dedication. *Id.* Neither was done.

Fourth, KRS 178.420 requires: “[t]he county works department shall maintain a road, street, or highway which it has acquired pursuant to the provisions of KRS 178.405 to 178.425 in the same manner as it maintains any other county road.” Sporadically graveling a road does not meet this requirement. The county clearly did not adopt Milliken Lane pursuant to KRS 178.405-.425.

Appellee Robertson County stated that it based its authority to adopt Milliken Lane upon KRS 178.115 (R. 334). However, any purported adoption pursuant to KRS 178.115 failed for the following additional reasons:

a. KRS 178.115 on its face applies to the establishment of “*public roads*,” not “county roads.” It is unknown what the legislative intent was or how the courts would interpret this language given the distinction made between “county roads” and “public roads” as enunciated in *Sarver v. County of Allen*, 582 S.W.2d 40 (Ky. 1979);

b. Even if KRS 178.115 applied to county roads, the fiscal court was required to “adopt a resolution setting forth the necessity for such public road...” which Robertson County never did;

c. Additionally, KRS 178.115(1) mandates that a certified copy of any such resolution “shall be posted at the courthouse door of the county within five (5) days after its adoption and a certified copy of said resolution shall be posted by the county road engineer of the county along or at the proposed road... within five (5) days after its adoption.” Both are mandatory. Neither was done;

d. The mandatory notice requirements of KRS 178.050, which must be followed prior to establishment of a road were also not followed.

With regard to the notice requirements of KRS Chapter 178, appellee Robinson has repeatedly, and erroneously, alleged that all of the appellants’ predecessors in interest were present when the road map was adopted in 1987 and therefore the “notice” requirement was met. Hopefully, to avoid the possible need to address this argument in a reply brief, appellants will address it pre-emptively.

At the October 1987 fiscal court meeting, a road map was handed out to the magistrates. However, *no action was taken* at that meeting. (Minutes, R. 421.) The following month, on November 20, 1987, Robertson County “adopted” a new county road map (Minutes, R. 379 and 423).

At that time, the property of appellee Whitley was owned by Dennis R. Pfetzer in 1987 (see source of title in Whitley Deed, R. 12). As depicted in the new county road map, the “county” portion of Milliken Lane did not stop at the boat ramp bounded within the property owned by the Batte family. Rather, it extended beyond the guardrail, passing through the Pfetzer property, and stopping just before Greasy Creek (Official 1987 County Road Series Map, R. 345, just below the dividing line between Quadrant IV and Quadrant III, on the far left side of the map. Note: the map index incorrectly spells the road’s name as “Millikan Lane”).

Notably, there is no mention in either the October or November, 1987 minutes of the proposed adoption of Milliken Lane into the county road system. No reference is made as to its length or location. No resolution was passed pursuant to KRS 178.115. No mention was made of the necessity of adoption of Milliken Lane or any other road. There were no advertisements, written notices, nor even mention of the name “Milliken Lane” in the record. There is no evidence of meeting any of the formal, mandatory procedural requirements of KRS 178 by the Fiscal Court. The lack of compliance with these statutory requirements was admitted to by Robertson County. (See, *e.g.*, Answers to Requests for Admission, R. 339-40).

Focusing only the lack of statutory notice, appellee Robinson contended that there was no need for such notice because the appellants’ predecessor in title were “actually in attendance when the Road was adopted” (Robinson Brief at COA, p. 8,

emphasis original) “and therefore clearly had actual knowledge.” (*Id.*, p. 15.) These allegations are false.

While “Billy Batte” is listed as being in attendance at the November 20, 1987 meeting when the road map was adopted, Dennis Pfetzer was not. The November 20, 1987 minutes of the fiscal court show only that the *October* minutes were amended to reflect that Dennis Pfetzer was “added on the list of guests attending the [October] meeting.” (R. 379, 423). Pfetzer was not present when the road map was adopted in November. The litigated portion of the lane is confined within the boundaries of appellee Whitley’s (then Pfetzer’s) property.

Neither the October minutes nor the November minutes state why Mr. Pfetzer was at the October, 1987 meeting. They do not state that he was aware Milliken Lane had been added to the map. They do not state whether he was for or against adding Milliken Lane to the county road system. They do not state that maps were furnished to the public. The minutes state that “The Robertson County Road system was discussed. Maps were given to each magistrate outlining the county roads as shown by the state. *No action was taken.*” (October 1987 Minutes, R. 421, emphasis added). Pfetzer may have opposed the adoption of the map, or opposed the inclusion of anything beyond the boat ramp. Perhaps that is why the map was not adopted in October.

Additionally, it is undisputed that appellant Jan (Janet) Bertram and her husband Lynn Bertram were not present at either meeting. There was no notice, and there is no record of notice, to the Bertrams. The records clearly reflect that they were not in attendance at either meeting. Lynn Bertram (now deceased) and appellant Jan Bertram owned 203 acres on Milliken Lane, deeded to them in 1964 (See Deed, *supra*) and sold acreage to appellee Robinson.

Robinson's repeated assertions that the records "unequivocally show that the landowners were not only notified but were in fact present during the adoption proceedings" (Robinson Brief COA, 15) are simply untrue. Her claims that the records "clearly demonstrate the County Attorney was mistaken in his 'admission' that the property owners were not notified of the proposed adoption of Batte Lane" (*Id.*) is likewise false. Appellants submit that the county's judicial admission that it failed to follow the requirements of KRS Chapter 178 in establishing the road, including notice to all the property owners, is supported by the record. As these admissions have not been refuted by any evidence, they are conclusive proof of the issue.

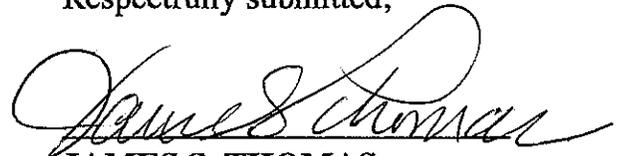
CONCLUSION

Robertson County did not establish Batte Lane as a county road pursuant to any statutory authority. There was no doubt, even in the county's opinion, that the county failed to comply with any of the requirements found in KRS Chapter 178.

Legal precedent holds that strict compliance with KRS 178 is required. Pursuant to *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991), the county could not prevail on the issue. The Robertson Circuit Court correctly adjudged that the county failed to adopt Milliken Lane in compliance with KRS Chapter 178. (Order, R. 644.)

The Circuit Court did not commit error in hearing the declaratory judgment action and deciding the legal status of Milliken Lane/Batte Lane. Appellants ask this Court to REVERSE the Court of Appeals judgment holding that the Circuit Court had no authority to hear the matter as an original, declaratory judgment action and AFFIRM the Circuit Court's judgment that the road subject of the action is not a county road.

Respectfully submitted,



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APPENDIX

APPENDIX INDEX

Document	Exhibit Tab
OPINION, Court of Appeals , Entered July 22, 2011 From which Appellants Harold Whitley, et al, appeal	A
ORDER, Robertson Circuit Court , Entered August 13, 2009 Holding that Batte Lane was not a county road (R.644)	B
ORDER, Robertson Circuit Court , Entered October 22, 2009 Ordering placement of the gate on Batte Lane (R.737)	C
ORDER, Robertson Circuit Court , Entered November 30, 2009 Denying Motion to Alter, Amend or Vacate (R. 788)	D
1937 Deed to R.K. Batte located on p.98 in the "WhitleyDocs" file on the digital media disk attached to the "Whitley Discovery." The digital disk is found in the Record on page 324.	E
1984 Deed of Corrections to Bertram located on p.106 in the "WhitleyDocs" file on the CD referenced in Exhibit A, (R.324)	F
1953 Deed to Chester Wilson located on p.93 in the "WhitleyDocs" file on the CD referenced in Exhibit A, (R.324)	G
1991 Deed to Hicks located on p.109 in the "WhitleyDocs" file on the CD referenced in Exhibit A, (R.324)	H
1998 Deed to Richard Wilson located on p.113 in the "WhitleyDocs" file on the CD referenced in Exhibit A, (R.324)	I
1992 Deed to French located on p.116 in the "WhitleyDocs" file on the CD referenced in Exhibit A, (R.324)	J

- 2001 Deed French to Robinson** located on p.118 in the **K**
“WhitleyDocs” file on the CD referenced in Exhibit A, (R.324)
- 2001 Deed Bertram to Robinson (1st 3 pages)** located on p.132 in **L**
“WhitleyDocs” file on the CD referenced in Exhibit A, (R.324)
- Nine (9) Photographs of vandalism to gates** located in the **M**
“Whitley photos” file on the CD referenced in Exhibit A, (R.324)
- January 2, 2004 Letter Robinson to Melcher consenting to gate** (R.53) **N**