

COMMONWEALTH OF KENTUCKY  
 SUPREME COURT OF KENTUCKY  
 2011-SC-000612-D  
 (2009-CA-002182 AND 2009-CA-002210)

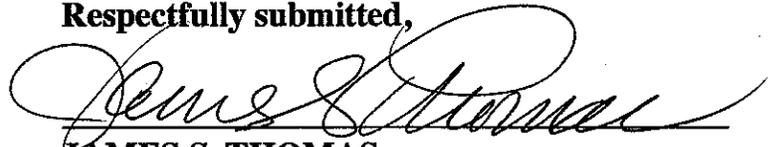
**HAROLD WHITLEY, BONNIE WHITLEY, ET AL** **APPELLANTS**

**V. REPLY BRIEF FOR APPELLANTS**

**MARYANNA ROBINSON;  
 ROBERTSON COUNTY, and;  
 ROBERTSON COUNTY FISCAL COURT** **APPELLEES**

**APPEAL FROM COURT OF APPEALS  
 NOS. 2009-CA-002182 AND 2009-CA-002210  
 ROBERTSON CIRCUIT COURT  
 HONORABLE ROBERT W. MCGINNIS, CIVIL ACTION NO. 04-CI-040**

Respectfully submitted,



**JAMES S. THOMAS**  
 Attorney for Appellants Harold Whitley, et al  
 103 S. Main Street  
 Cynthiana, KY 41031  
 (859) 234-9690

**CERTIFICATE OF SERVICE**

I certify hereby that on this, the 25th day of September, 2012, a true and correct copy of this brief was served by first class U.S. mail, postage prepaid, to: (a) Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; (b) Hon. Jay Delaney, Judge of the Robertson Circuit Court at the Harrison County Justice Center, 115 Court St., Suite 5, Cynthiana, Ky. 41031; Hon. Shannon Upton Johnson, OVERLY & JOHNSON, LLC, 340 Main Street, Paris, KY 40361, and; Hon. Jesse P. Melcher, P.O. Box 345, Mount Olivet, Kentucky 41064.



**JAMES S. THOMAS**  
 ATTORNEY FOR APPELLANTS

**STATEMENT OF POINTS AND AUTHORITIES**

**PURPOSE OF THE BRIEF .....1**

**ARGUMENT.....1**

**I. APPELLEES' MISSTATEMENTS OF THE CASE AND FACTS.....1**

**II. AS APPELLEE ROBINSON ADMITS, THE CIRCUIT COURT HAD  
JURISDICTIONAL AUTHORITY TO DETERMINE THE LEGAL  
STATUS OF BATTE LANE .....9**

**KRS 178.020.....11, 12**

**CONCLUSION.....15**

## **PURPOSE OF THE BRIEF**

This Reply Brief is filed to address the misstatements of the case and facts as contained in the Appellees' Briefs filed herein by Maryanna Robinson and Robertson County. It also addresses Robinson's arguments in her support of the Court of Appeals' Opinion which was founded on errors of fact, and which ignored controlling law such as would operate to deprive all of the appellants' of their right to seek a declaration regarding the legal status of a road and deny the Circuit Court's jurisdictional authority to grant said relief.

## **ARGUMENT**

### **I. APPELLEES' MISSTATEMENTS OF THE CASE AND FACTS**

Like the Court of Appeals and appellee Robinson, Robertson County, for the first time, erroneously states that appellants' underlying suit "was styled as an appeal of the Robertson County Fiscal Court decision not to close the County Road, pursuant to KRS 178.050 and as a declaratory judgment action that the section of road at issue was not a County Road" (Robertson County Brief, p. 3.)

The undersigned respectfully requests this Court to review the actual Complaint. (Complaint, R.4. **EXHIBIT 1**.) Appellants action was for declaratory relief. It is styled "Complaint Seeking a Declaration of Rights and Appeal." Appellants made it clear that this was not an action appealing a refusal to close Batte Lane, but rather an action "seeking a declaration of rights" predicated on the

assertion that the road litigated “was not a county road.” *Id.* And with regards to the “appeal,” Plaintiff Whitley stated his belief that the fruitless discussion before the fiscal court regarding the fact that Batte Lane was not a county road “does not require an appeal,” but that the matter incorporated an “appeal” only “to the extent that Plaintiff, Harold Whitley, may be obligated to appeal....” *Id.*, at R.8.

Any attempt by appellees to characterize the appellants’ cause of action to declare the legal status of Batte Lane as an appeal of a refusal to close an existing county road simply is inaccurate.

Appellants also cannot devote space in this Reply to rebut all of Robinson’s misstatements of facts. However, counsel is compelled to address some.

First, Robinson states that:

Contrary to the assertions of the Whitley Movants that the Fiscal Court Minutes fail to reference its length or location ..., the 1987 resolution of the Robertson Fiscal Court adopting the road identified the location of the county portion as beginning where it departs U.S. Hwy 62 and ending just beyond Greasy Creek and included the length of this county portion as .30 miles.

This is materially false for a variety of reasons. For one, there is no “1987 resolution ... adopting the road.” The Fiscal Court minutes do not even mention the road. This means, likewise, that there is no resolution identifying either the location or length of the road. Additionally, while both a “Mullikin Lane” in Quadrant II and a “Millikan Lane” in Quadrant IV (each identified as having a

distance of 0.30 mile) appear on the *list* of road names for the 1987 county road map, neither are depicted on the map itself, and the name “Milliken’s Lane,” which was the actual name of the road at the time, does not appear at all. Further, an examination of the county road map shows clearly that the actual road leading from Highway 62 toward Greasy Creek does *not* extend “*beyond* Greasy Creek” (Robinson Brief, pp. 2, 3) but rather stops short of Greasy Creek<sup>1</sup>.

Robinson’s argument that the “county portion” of the road extends beyond Greasy Creek (and that the action somehow splits the county road) is a sham.

Robinson bases this “subpart” (*Id.* 3) argument wholly on a map contained in an unofficial collection of maps one can purchase at a book store. Robinson attached a “close up” of this unofficial map at page 2 of her Apx. Tab C, but fails to disclose to this Court that it is not taken from any official county map. The impression left from this failure to disclose is that the exhibit appears to be an “enlargement” of the official county map. This fake map is identified by an encircled enlargement. It bears a blacked out shape of Robertson County and depicts the road extending beyond Greasy Creek. While her brief cites this map as appearing at R. 346-47, the map she proffers does not so appear in the record.

---

<sup>1</sup>In the official county map, Batte Lane would be located at the far left side of the map just below the dividing line of Quadrants IV and III and just to the right of the word “HARRISON.” It can be further located by tracing backwards from the arrow pointing “TO CYNTHIANA 12.9 MILES”.

Neither the 1987 nor the 2001 official county maps depict Batte Lane extending beyond Greasy Creek. Comparison between the proffered map with the enlargement of the official county maps (page 4 of Robinson's Apx. Tab C) reveals the map on page 2 of this Exhibit is not taken from any official county map.

Second, contrary to Robinson's assertions on p. 3 that she "holds...no deeded easement through the Whitley property where the Disputed Section is located," her Deed from Lynn and Janet Bertram does contain a deeded passway "with access to U.S. Highway 62." (See Appellants' original Brief, EXHIBIT L, top of page 2.) Note also that Robinson's deeded passway also contains the following language: "The party of the second part, her heirs and assigns, *shall have the right and privilege, but not the duty, to grade and maintain the passway, if she so desires.*" *Id.*, emphasis added.

Third, Robinson's statement that one of the original gates along the road "was removed when the Battes removed their cattle from the area" (*Id.*, p. 4) is misleading. In actuality, the Battes had a locked gate to keep the cattle from getting on the road. They removed their cattle from the area and fenced off a new area *because* Robinson would leave the gate open, broke the gate down and later removed the gate the Battes had been using to keep the cattle corraled. (R.46.)

Fourth, there is no evidence of record, and the Circuit Court so found, that the public used any portion of Batte Lane. The affidavits of Cain, Pratt and French

were filed by Robinson on September 8, 2009 (R. 667-77) *after* the Court had already rendered its judgment on August 13, 2009 (R. 644), and therefore the filing was improper and cannot be considered as evidence. Beyond that, the affidavits are nothing more than recitations that the road was used by the owners, their families, their licensees and their invitees.

Fifth, Robinson claims “this litigation came during a campaign of relentless harrassment of Ms. Robinson.” (Robinson Brief, p. 7.) In support thereof, Robinson cites three “examples” of harrassment. In the course of the litigation, Ms. Robinson filed a “packet” of material which she had also distributed to the Commonwealth Attorney, to the Kentucky State Police, to the Kentucky Attorney General and to local law enforcement. While this packet should never have been filed into the record, the allegations were investigated fully by the agencies contacted. Robinson’s claims were found to be without merit and no action was taken. As Robinson has injected these allegations without any citation to evidence in support of her claims that these are, in fact, instances of harrassment, the undersigned is obligated to address them.

The first example cited by Robinson is that “signs about Robinson were erected in the yards of Rick Wilson ... and Mark Wilson.” If the Court were to examine the signs contained in the record, it would see not signs harrassing Ms. Robinson, but rather signs erected in response to Ms. Robinson’s bad acts.

When the river and Greasy Creek flood, appellant Rick Wilson and his family are physically cut off by the flooding waters with no way in or out across Batte Lane. Prior to this litigation, Mr. Wilson and Ms. Robinson agreed that, if he built a road and installed a gate on her property for the benefit of both Wilson and Robinson, she would permit him to use this access for ingress and egress through the Harrison County side of her property, when Batte Lane was impassable. Mr. Wilson built the access as agreed. However, when Mr. Wilson joined as a plaintiff in the declaratory action, Robinson retaliated by denying him use of the access, trapping the Wilson family every time the waters flood. Mr. Wilson responded by erecting signs upon his own property expressing his frustration with Robinson, with sayings such as "She demands loyalty from her subjects." The agencies investigating Robinson's allegations concluded that Wilson's responses were valid exercises of his First Amendment right of free speech.

The second instance claims that Robinson's gate was welded shut (Robinson Brief, p. 7). To appellants' knowledge, there was no evidence that Robinson's gate had been welded shut. On the other hand, someone did apply superglue to the internal locking mechanism of appellant Whitley's gate, along with numerous other acts of vandalism (R. pp. 45-46).

Robinson's third allegation of harrassment is the most egregious: "*an effigy of Ms. Robinson was hung and burned* in Harold Whitley's yard just above Batte

Lane,” citing a “*photograph of effigy burning*” at R.264. (*Id.*, emphasis added.) This allegation is wholecloth fiction. The Court is invited to examine the photograph. First, it will be noted that the “effigy” is not “burning.” Second, the Court would note that, below the figure at the base of the tree is a fodder shock. If the photos had shown the rest of the yard, the court would also note the presence of pumpkins and other fall decorations. The “effigy,” which does not even appear to be female, was a Halloween decoration. Not only was it not burned, but the Whitley’s used that decoration at subsequent Halloweens for several years.

Within her arguments, appellee Robinson asserts other matters of “fact” that, simply, are not. For example, Robinson asserts as fact: “[a] portion of Batte Lane was accepted into the Robertson County Road system in 1987, and *the Fiscal Court minutes reflect that the adjoining landowners* (predecessors in title of the Whitley and Batte Movants) *were present at the meetings discussing and adopting the Road.*” (Robinson Brief at unnumbered page 1, emphasis added.) This is patently false as proved by the face of the minutes. There was *zero* discussion about adopting Batte Lane at any meeting of the fiscal court. The minutes of the October and November 1987 meetings (attached at Apx. Tab B to Robinson’s Brief) are devoid of any record of such discussion or adoption. There is not one word mentioned in the minutes of any fiscal court meeting, or any resolution, at any time, of adopting or otherwise establishing Milliken / Batte Lane as a county

road. Robinson can point to no record of the fiscal court where Batte Lane - or any other road purportedly adopted as part of the map - was even mentioned, much less discussed.

Again, as addressed in appellants' prior brief, not all of the adjoining landowners were present at either the October or the November 1987 meetings. While Mr. Pfetzer was present at the October, 1984 meeting (although the Batte family was not), the fiscal court took no action at all with regard to the county road system. Mr. Pfetzer was not present at the November 1987 meeting. The Bertrams were not present at *either* meeting.

As stated, the undersigned cannot address all of Robinson's misstatements of the case or fact, but did feel compelled to address at least a few.

## **II. AS APPELLEE ROBINSON ADMITS, THE CIRCUIT COURT HAD JURISDICTIONAL AUTHORITY TO DETERMINE THE LEGAL STATUS OF BATTE LANE**

Appellants cited multiple Kentucky cases in which declaratory judgment actions were brought to determine the legal status of a road. In the face of these cases, appellee Robinson now admits: "Ms. Robinson is not arguing that a circuit court has no jurisdiction to determine the legal status of a road." Robinson Brief, pp. 15-16. Appellee Robinson has conceded, for the first time, the circuit court's authority to declare a road's legal status, *i.e.*, whether a road is a county road, public road or a private road. Appellants submit that this acknowledgement

should be dispositive of the real issue on appeal, to wit: Did the Robertson Circuit Court have the authority to hear and determine the legal status of Batte Lane?

The Court of Appeals erroneously determined that all of the appellants were bound to administratively appeal the fiscal court's "denial" of appellants Whitley and Batte's "request to abandon" Batte Lane as a lawful "county road." As established by the record, however, no such request was made nor did the fiscal court deny such a petition. Rather, the two appellants and counsel met with the fiscal court to discuss the legal status of Batte Lane with the hope that the fiscal court would acknowledge that Batte Lane was not a county road - i.e., that it was not the county's to abandon or otherwise act upon.

On August 20, 2004, appellants Harold Whitley and Kenneth Batte (who own the first two properties along Batte Lane), requested to speak to the fiscal court. This appearance was not formal. It did not involve, in any way, a petition or request to abandon, alter or amend an existing county road pursuant to KRS 178. No advertisements or notice was given. The fiscal court adjudicated nothing, and appellants did not ask for an adjudication. Appellants did not even ask for a vote.

Mssrs. Whitley and Batte came to fiscal court to discuss the legal status of Batte Lane. It was stated (not "threatened" *id.*, p. 6) to the fiscal court that a declaratory action was going to be filed to determine whether or not the county had lawfully established Batte Lane as a county road. The case law and statutory

law regarding what is required to establish a county road was presented to the fiscal court purely in the hopes of avoiding the effort, time and expense (now painfully obvious) of pursuing this declaratory litigation.

Robinson argues that this courtesy appearance by two of the appellants hoping to avoid years of litigation operated to: (1) deprive all of the appellants of their right to pursue the very declaratory litigation discussed, and; (2) deny the circuit court of its jurisdiction over that litigation. Such a position would run counter to the public policy of encouraging resolutions without litigation.

Despite appellees' insistence that appellants' action was an appeal from a decision of the Robertson County Fiscal Court (see, *e.g.*, *Id.* p. 16 "Circuit courts simply have no jurisdiction to consider *de novo* an appeal from a fiscal court decision"), no one giving even a basic reading of appellants' Complaint and subsequent pleadings could conclude anything other than that this was a declaratory action to determine the legal status of Milliken Lane / Batte Lane.

As noted by Robinson (Robinson Brief, p. 8), the Circuit Court, *at Robinson's insistence*, even added language in paragraph 2 of its Order of November 30, 2009, stating that "[t]he Court permits this Order to reflect that the Court considered Plaintiffs' action to be an original action for Declaratory Judgment." (Appellee's Brief, Apx. Tab L, third order of a group exhibit of three.) Robinson now acknowledges that the circuit court has the jurisdiction to hear such

actions. Again, appellants maintain that this is the real issue, and appellee's admission should dispatch the need to respond further.

Robinson, however, confounds the simplicity of the real issue by her insistence that appellants Batte and Whitley's August 20, 2004, appearance before the Robertson Fiscal Court was, in reality, a petition before the county to *abandon* Batte Lane as an "existing" county road, and her further erroneous insistence that the fiscal court rendered an appealable adjudication denying said petition. Robinson succeeded in confounding the Court of Appeals with said argument.

Importantly, Robinson does not address or acknowledge the requirement found in KRS 178.020 that the road be "heretofore lawfully established and opened" for the road to be an "existing county road." Rather, she merely states that appellants' "theories" are the "same: a request that the Fiscal Court decide that *an existing county road (whether correctly or incorrectly adopted) is no longer a county road.*" (Robinson Brief, p. 15, emphasis added).

Robinson circularly argues that a road not lawfully established (*i.e.*, "incorrectly adopted") is yet an "existing county road." Robinson's argument, then, is that appellants must still petition the county to abandon a "county" road which was not lawfully established as a county road (*i.e.*, to "request that the Fiscal Court decide" that this "existing," but "improperly adopted" road be "no longer a county road").

Conversely, appellants have maintained that, for the language of KRS Chapter 178 to have any meaning, a road not “heretofore lawfully established and opened” *never was* a county road. Otherwise, the statute would have read “whether heretofore lawfully *or unlawfully* established.”

The purported “establishment” of a road by means that are not lawful no more creates an “existing county road” requiring formal proceedings to terminate than an illegal marriage requires a divorce. Both acts are void *ab initio*.

Appellee Robinson’s mischaracterization of the August 20, 2004 fiscal court appearance (erroneously adopted by the Court of Appeals) is apparent throughout her Brief. Like Robertson County’s opening statement, Robinson’s failure to grasp (or refusal to admit) the factual grounds for the underlying declaratory judgment action is apparent in the very first sentence of her brief:

Appellants ... filed this action in 2004 *after they requested, and the Robertson County Fiscal Court declined, to close a county road known as Battle Lane.*” (Appellee Robinson Brief, unnumbered page 1, emphasis added.)

Robinson continues: “Attorney James Thomas threatened the Fiscal Court with legal action *if it did not close the road as requested.*” (*Id.*, p. 6, emphasis added.)

The undersigned did not threaten the fiscal court with legal action if it did not close the road, nor did the undersigned ask the fiscal court to close the road, but rather argued that the road was not the county’s to close.

4. “Whether the request of Whitley Movants was *a request to ‘cease,’ ‘abandon,’ ‘close,’ ‘terminate,’ or ‘discontinue’ the road, the theory and questions before the Court were the same: a request that an existing county road* (whether correctly or incorrectly adopted) *is no longer a county road.*” (*Id.*, p. 15, emphasis added.)

This last quote demonstrates Robinson’s refusal to acknowledge, on every level, what transpired at the August 20, 2004 appearance.

First, appellants Whitley and Batte did not request that the road be “ceased,” “abandoned,” “closed,” “terminated,” or “discontinued.” Rather, they explained to the fiscal court that the road was *not* a county road, and thus the county could *not* act upon the road at all.

Second, Robinson insists that the August 20, 2004 appearance was “a request that an *existing county road* ... [be] *no longer a county road.*” Precisely the *opposite* is true. The appellants demonstrated that Batte Lane was *not* an “existing county road” and that it *never was* a county road.

The insistence that appellants’ appearance in August 2004 involved a request to close an existing county road, and further that the fiscal court took action to refuse to close an existing county road flies in the face of all of the evidence of record. Whitley and Batte’s appearance involved nothing more than a discussion regarding the legal status of Batte Lane in a hopeful attempt to avoid litigation. That discussion was fruitless. There being no statutory procedure in KRS Chapter 178 for petitioning to “terminate” a road that is not a county road,

appellants joined in the statutory remedy available to them - an action to determine the legal status pursuant to a declaration of rights.

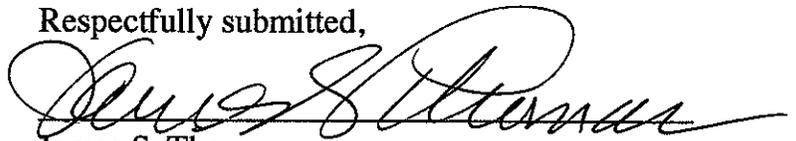
Robinson's remaining arguments have nothing to do with the basis of the Court of Appeals' erroneous Opinion, which is the sole issue before this Court.

**CONCLUSION**

The Court of Appeals erroneously held that the appellants were limited to an administrative review of the arbitrariness, or not, of the Robertson Fiscal Court's "denial" of appellants "request to abandon" Batte Lane in August 2004. On remand, the Circuit Court would be unable to rule upon the arbitrariness of such an action, because the appellants did not make that request and the fiscal court did not act in any way on any such request.

For the reasons stated in appellants' initial Brief and the foregoing reasons, the appellants respectfully request this Court to grant the relief requested on appeal, to REVERSE the Opinion of the Court of Appeals and reinstate the Judgment of the Robertson Circuit Court.

Respectfully submitted,



James S. Thomas

Attorney for Appellants Whitley, et al  
103 South Main Street  
Cynthiana, Kentucky 41031  
859-234-9690

# APPENDIX INDEX

**Document**

**Exhibit Tab**

**COMPLAINT**

(Record on Appeal, p. 4)

**A**