

RENDERED: APRIL 21, 2006; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002493-MR

JAMES SEIBER and ERMA SEIBER

APPELLANTS

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 04-CI-00082

MORRIS R. BLAKE; BARBARA BLAKE, HIS
WIFE; SCOTT BLAKE; and SANDRA PATRICIA
BLAKE, HIS WIFE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: James and Erma Seiber (the Seibers) appeal from a Todd Circuit Court judgment that granted a permanent injunction in favor of their neighbors, Morris and Barbara Blake and Scott and Sandra Blake (collectively, the Blakes), to prevent the Seibers from blocking access to a roadway over the Seibers' property.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

This litigation arose over a disputed roadway that crosses the Seibers' property. The road in question runs from Highway 181 in Todd County across the Seibers' property approximately two tenths of a mile to the rear of the Blakes' property. When the Seibers purchased the land in 2000, they erected a gate to prevent others from using the roadway. The Blakes, as neighboring landowners, had previously used this roadway to reach the back acreage of their farm. The circuit court, *sua sponte*, granted the relief sought by the Blakes after hearing the Seibers' counsel's opening statement in which he acknowledged that the thoroughfare in question had at one time been a "public road."

On appeal, the Seibers contend that the circuit court erred by granting judgment in favor of the Blakes without allowing them to offer proof supporting their defense. The record on appeal consists only of the written record of the trial court (pleadings, motions, orders, etc.). The record contains no videotaped proceedings, and specifically missing are the opening statements presented on the day of trial. However, this omission, while troublesome, does not prevent this Court from deciding the case on the merits.

Kentucky Rules of Civil Procedure (CR) 98 provides, in pertinent part, that:

[(2)(a) Videotape Recordings.] The official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings. Upon the filing of a notice of appeal, one of the two videotape recordings . . . shall be filed with the clerk and certified by the clerk as part of the record on appeal.

. . . .

(3) Record on Appeal

. . . The official videotape recordings, together with the clerk's written record, shall constitute the entire original record on appeal. . . .

While the circuit court clerk should have included the videotape of the opening statements that began the trial, it was the Seibers' responsibility as appellants to ensure that the entire record was transmitted to this Court.² Since they did not do so, we assume that the portion of the record not before us supports the judgment granted by the circuit court.³

Despite an incomplete record, we believe justice is served by review of the court's written record, and most importantly, by review of the judgment and injunction granted the Blakes.

The statute at issue in this case is Kentucky Revised Statutes (KRS) 178.116, which addresses the discontinuance of a road.

² *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968).

³ *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

(1) Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least one (1) of the following conditions exists:
(a) A public need is served by the road;
(b) The road provides a necessary access for a private person;
(c) The road has been maintained and policed by the county or state within a three (3) year period.

The Seibers claim that the road in question was discontinued by operation of the statutory language "formerly maintained by the county." They further argue there had been no maintenance of the road for more than three years.

According to the circuit court,

. . . the statute cited states the conditions upon which a county road or a state road would cease to be a county or state road and would revert to the owners. The Court does not believe that the cited statute abrogates the common law regarding the establishment or abandonment of public roads and passways.

Even under an interpretation most favorable to the Seibers, the statute does not apply in this case. Accordingly, the circuit court correctly proceeded to a determination that the roadway was not abandoned under common law principles.

The Seibers suggest that they could have offered proof the county had supplied gravel to the road at an earlier point in time. While this may be true, this act did not constitute

maintenance by the county under the statute. Indeed, prior to the enactment of KRS 178.116, the Supreme Court noted that infrequent incidents of county employees depositing gravel on an old roadway were insufficient to deem the road controlled by the county.⁴ Consequently, the Seibers are not entitled to relief as a matter of law, and the circuit court properly granted a permanent injunction barring them from obstructing the Blakes' use of the roadway to access their farm.

The judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Daniel C. Hicks
Hopkinsville, Kentucky

BRIEF FOR APPELLEES:

Jesse L. Riley, Jr.
Russellville, Kentucky

⁴ *Sarver v. County of Allen*, 582 S.W.2d 40, 43 (Ky. 1979).