

COMMONWEALTH OF KENTUCKY
DAVISS CIRCUIT COURT
DIVISION II
CASE NO. 21-CI-330

KENTUCKY DIVISION, UNITED
DAUGHTERS OF THE CONFEDERACY

PLAINTIFF

vs.

JUDGE EXECUTIVE, AL MATTINGLY,
ET AL.

DEFENDANTS

ORDER

This matter comes before the Court on Plaintiff's Motion for a Temporary Restraining Order that would prevent Defendants from removing the Owensboro Confederate Monument, which sits on the southwest corner of the lawn of the Daviess County Courthouse, until such time as the issue of ownership of the monument has been determined. This Court having reviewed the record and heard the arguments of counsel and being fully advised, finds as follows:

The Owensboro Confederate Monument has sat on the Courthouse lawn for 121 years, with the exception of its temporary removal in the 1990's for restoration and cleaning. In 1893, The Daviess County Confederate Association was granted permission to erect a memorial to the Confederate dead on the lawn of the Daviess County Courthouse. Plaintiff claims that fundraising for the monument was spearheaded by the women's auxiliary of the Association. One member of the women's auxiliary, a Mrs. Rose (or Rosa) Shelby Todd, later became the founding member of the Daughters of the Daviess County Confederate Association. Plaintiff alleges this new organization continued fundraising efforts for the memorial. In 1899, this organization joined the United Daughters of the Confederacy. In 1900, a bronze statue and granite pedestal were placed upon the designated spot allotted to the Daviess County Confederate Association with the inscription "Erected by the Breckinridge Chapter Daughters of

the Confederacy." A newspaper article dated Friday, April 18, 1902, informs the public that "Major J. H. Bozarth, of the Daviess County Confederate association, received today from Miss Rosa Todd, the sum of \$162.45, it being the balance due on the Confederate monument which is erected in the court house yard. The monument cost \$3,500, and the amount paid today is out of the proceeds of the society minstrels." In no way does this article show that the John C. Breckinridge Chapter purchased the Monument or provided the bulk of its funding. In fact, the article says the money was given to the Confederate Veterans' Association, not to the individual or company that created the monument. Since that time, the Monument has been maintained by Daviess Fiscal Court, it has been insured by Daviess Fiscal Court, and it has been declared as publicly owned on the National Register of Historic Places. The John C. Breckinridge Chapter, Daughters of the Confederacy, dissolved in 1970. Plaintiff, the Kentucky Division, United Daughters of the Confederacy, is a 501(c)(3) non-profit corporation established in 2019. Plaintiff claims the Monument was an asset of the John C. Breckinridge Chapter, Daughters of the Confederacy and claims ownership was somehow transferred to Plaintiff because it is part of the United Daughters of the Confederacy, the organization which the six members of the Daughters of the Daviess County Confederate Association donated \$1,100.00 to join in 1899 thereby creating the John C. Breckinridge Chapter. Defendants, the members of the Daviess Fiscal Court, have previously made statements in public that reflect some uncertainty or unwillingness to claim ownership of the Monument. On June 30, 2020, Defendants even considered a Resolution that would have declared the Monument to be the property of the Kentucky Division, United Daughters of the Confederacy. Though that Resolution was voted down, Plaintiff has seized on those comments as proof of its claim.

Both sides agree that the standard for the Court to consider when asked for a Temporary Restraining Order is found in the case of Maupin v. Stansbury, 575 S.W.2d 695 (Ky.Ct.App. 1978). According to Maupin,

First, the trial court should determine whether Plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the Complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.

Defendants claim that there is no proof of the potential for irreparable injury (1) because they are skeptical of the success of Plaintiff's claim of inheritance, (2) because the statue has been removed before for cleaning and repair without damage or incident, and (3) because the statue is covered under the county's insurance policy if damage were to occur. Whether through accident or malice, the Court believes that moving the extremely heavy, extremely old and extremely controversial Monument to another location pending a resolution of this case is fraught with the possibility of harm. Nearly 30 years have passed since the statue was previously removed for maintenance. The existence of an insurance policy alone is not enough to reimburse Plaintiff if it is victorious in its cause of action as the Monument is unique and, for better or worse, of historical significance. Defendants claim that Plaintiff cannot show the potential for injury is imminent or immediate. The Court disagrees. Defendants in their capacity as Daviess Fiscal Court have voted to remove the Monument from the courthouse lawn and have made public statements that show they are actively attempting to secure an alternate and appropriate residence for the monument. Without an injunction or temporary restraining order in place, the removal and relocation of the Monument could occur at any time, meaning damage to the Monument from its removal and relocation could occur at any time. Therefore, Plaintiff has satisfied the first and second prongs of the Maupin test.

The third prong of Maupin presents more difficulty. Defendants argue that Plaintiff fails to present the Court with a substantial question regarding the merits of the case. Under CR 65.04, entry of a temporary restraining order is appropriate when "it is clearly shown by verified

complaint, affidavit, or other evidence that the movant's rights are being or will be violated." Ky. Rule Civ. Pro. 65.04(1). Defendants argue that Plaintiff has failed to provide a colorable claim to ownership of the Monument. In support of their argument, Defendants referred the Court to Jefferson Circuit Court Case No. 16-CI-02009, a case whose facts, particularly the plaintiff's claims of ownership to a Confederate monument, were substantially similar to the case at bar. In that case, Defendants claim Judge Judith McDonald Burkman found the plaintiff had no standing and declined to issue the temporary restraining order requested by the plaintiff. This Court has reviewed the record of that case and, while very similar to this case factually, there is an important procedural difference. Judge McDonald Burkman issued an *ex parte* temporary restraining order upon the filing of the Complaint and set the matter for hearing. Prior to that hearing, the defendants filed not just a challenge to the temporary restraining order, but a motion to dismiss the case due to the plaintiff's lack of standing. Following the hearing, Judge McDonald Burkman entered an order granting defendants' motion to dismiss the case, thereby terminating the temporary restraining order. No Motion to Dismiss has been filed by the Daviess Fiscal Court at this time.

While CR 65.04 requires the movant's claim be "clearly shown", the Maupin court was lenient as to what this entails, noting the temporary nature of the relief sought and instructing that a motion on a temporary restraining order was not the equivalent of a trial on the merits of movant's claims. Maupin at 698-699, citing Harrison's Sanitarium v. Commonwealth, 417 S.W.2d 137 (Ky. 1967). "Rather, we believe the sufficiency of a verified complaint to support a temporary injunction should be evaluated by a balance-of-the-hardships test." Defendants admittedly have no current plan for the Monument though they wish it to be removed from county property. Defendants are elected officials representing the citizens of Daviess County. To some of those citizens the Monument is accepted with indifference as a historical marker commemorating the past. To others the Monument is a painful reminder of a time and a government that viewed persons as property based on the color of their skin, and the placement

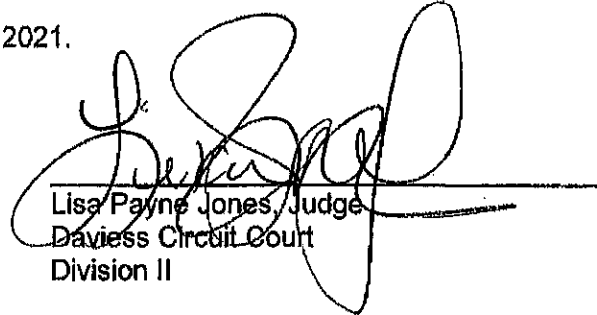
of such a Monument in a place of honor on public property defies all that a government of the people, by the people, for the people should embrace. To yet others, the Monument romanticizes the sacrifice and service of their ancestors who fought a losing battle against changing times and values. Plaintiff who describes itself as a non-profit entity focused on education, benevolence and patriotism does not appear to dispute the right of Defendants to withdraw the license issued in 1893 or the need to remove the Monument from public property. In determining ownership of the Monument, the Court is essentially determining who bears the cost of removal, insurance and transportation and who decides where the Monument will next be placed or even if, once removed, it will be destroyed or ever again be available for public viewing. These are significant matters.

Conscious of the pain, anger, and controversy inspired by the presence of the Monument on the courthouse lawn at the seat of county government, this Court still must grant the temporary restraining order requested by Plaintiff based on the elements of Maupin:

- (1) Plaintiff has submitted a verified Complaint raising the substantial question of ownership. The matter is not appropriately before the Court for the Court to render a judgment on the merits of Plaintiff's case;
- (2) Plaintiff has shown the possibility of irreparable harm. Should harm befall the Monument due to any actions taken by Defendants during the pendency of this case, a mere dollar amount alone cannot reimburse Plaintiff for its loss if Plaintiff were, in fact, to prevail at the conclusion of these proceedings; and
- (3) At this time, a balance of the hardships and equities weighs in favor of granting Plaintiff's Motion. The requested Temporary Restraining Order changes nothing, merely preserves the status quo, as the Defendants, aside from making the decision that the Monument can no longer remain at its current location, have announced no present plans for its removal, destruction or relocation.

THEREFORE, IT IS ORDERED AND ADJUDGED, that, pending the outcome of these proceedings in Daviess Circuit Court, Defendants are restrained and enjoined from altering, destroying or moving the Owensboro Confederate Memorial. This order shall take effect upon the posting of a bond by Plaintiff in the amount of \$2,500.00 with sufficient surety pursuant to CR 65.05 or the depositing of the cash equivalent with the Circuit Court Clerk.

SO ORDERED, this the 7th day of June, 2021.



Lisa Payne Jones, Judge
Daviess Circuit Court
Division II

cc: Hon. Nick Goetz
Counsel for Plaintiff

Hon. Mike Lee
Counsel for Defendants

ENTERED
JUN 07 2021
JENNIFER BEBECKER, CLERK
BY DC