

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000968-MR

CLAY HORN AND  
SUSAN KAY HORN

APPELLANTS

v. APPEAL FROM GARRARD CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 07-CI-00275

STEPHEN A. HUFFMAN;  
CAROLYN S. HUFFMAN;  
NATURE'S TRACE HOMEOWNERS  
ASSOCIATION INCORPORATED;  
AND ELLEN L. MILLER

APPELLEES

AND

NO. 2008-CA-001589-MR

CLAY HORN; AND  
SUSAN KAY HORN

APPELLANTS

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NATURE'S TRACE HOMEOWNERS  
ASSOCIATION INCORPORATED;  
ELLEN L. MILLER; AND HON.  
HUNTER DAUGHERTY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,<sup>1</sup> SENIOR  
JUDGE.

VANMETER, JUDGE: These are consolidated appeals from orders entered by the  
Garrard Circuit Court in proceedings relating to subdivision deed restrictions. We  
affirm.

Appellants Clay Horn and Susan Kay Horn are the owners and  
residents of a house located in Nature's Trace subdivision in Garrard County.  
Appellees Stephen A. Huffman and Carolyn S. Huffman are the owners and  
residents of another house in the same subdivision. The parties' property deeds are  
subject to the terms of a deed restrictions document recorded by the subdivision's  
developer in 1998. The document includes the following provisions:

11. No above ground pools on any lot.

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22. The restrictions shall continue in force unless  
changed by a vote of at least three-fourths (3/4) of all  
property owners, with one vote for each lot owned.

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

23. Any lot owner may enforce the restrictions and covenants aforesaid by appropriate legal procedure. . . . In any action to enforce these restrictions, the successful party shall be entitled to recover attorneys' fees incurred in said action.

In March 2006, a meeting was held to organize a subdivision homeowners association. Clay Horn attended the meeting and requested permission to install an above ground pool at his home. However, he was advised that the restriction against such pools could be altered only by approval of three-fourths of the subdivision property owners. The Horns do not allege such approval was obtained. In May 2006, appellee Nature's Trace Homeowners Association was incorporated with a primary stated purpose of enforcing the subdivision's deed restrictions.

One year later, on May 22, 2007, the Horns installed a pool on their property. The Homeowners Association advised the Horns that the pool directly violated the deed restriction against above ground pools and that, unless they could prove the restriction had been amended, they must immediately remove the pool or face legal consequences. The pool was not removed and appellees filed the underlying complaint in July 2007.

In March 2008, after a hearing, the trial court granted a summary judgment for appellees. Finding that the Horns had violated the deed restrictions by installing an above ground pool, the court ordered the Horns to remove the pool within fifteen days and to pay appellees' attorney's fees. On April 23 the court

entered an amended summary judgment providing sixty days for compliance.

Appeal No. 2008-CA-000968 followed.

Next, in July 2008 appellees filed a motion asserting that the Horns did not remove the pool within sixty days and requesting that they be held in contempt for failing to obey the court's orders. On August 14 the court found the Horns in contempt, ordered them to remove the pool within thirty days or pay a daily fine, and awarded attorney's fees to appellees. The Horns filed Appeal No. 2008-CA-001589, which subsequently was consolidated with the first appeal. Meanwhile, a panel of this court granted interlocutory relief and stayed imposition of the circuit court's orders pending the outcome of these appeals.

First, the Horns contend that the trial court erred by granting summary judgment for appellees. We disagree.

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR<sup>2</sup> 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative

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<sup>2</sup> Kentucky Rules of Civil Procedure.

evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. On review, the appellate court must determine “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

Here, Section 11 of the deed restrictions clearly prohibits the installation of above ground pools. The record is undisputed that the Horns were aware of the restriction, that the restriction was not amended to permit above ground pools, and that the Horns did not obtain the building permit needed for the construction of an in ground pool although they did obtain a permit for the construction of the wooden deck around the pool. Further, the pool seller’s advertising information and receipt clearly identify the pool as a freestanding, prefabricated, above ground model. Finally, the photographs supplied by the Horns show that the ground was slightly dug out around or below the pool, that a wooden deck and lattice fencing were constructed around the pool, and that large amounts of dirt were hauled in and piled against the pool to conceal at least one exposed side.

Reviewing the record and viewing the evidence in the light most favorable to the Horns shows that no genuine issue of material fact exists as to the fact that the pool is an above ground pool. Its existence therefore violates the terms of the deed restrictions as a matter of law, and the trial court did not err by entering a summary judgment for appellees.

Next, the Horns contend the trial court erred by finding them in contempt of court and imposing sanctions against them.

Civil contempt of court occurs when a party fails to comply with a court order to do something for the benefit of another party to the proceeding. *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996); *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky.App. 2001). KRS 432.280. A trial court has almost unlimited discretion in exercising its contempt powers, and an appellate court will not disturb a trial court's contempt decision absent an abuse of that discretion. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky.App. 2007).

The Horns rely on *Boyle County Fiscal Court v. Shewmaker*, 666 S.W.2d 759 (Ky.App. 1984), as support for their argument that they were denied the opportunity to offer evidence prior to the court's contempt finding. However, *Boyle* addressed a situation in which a fiscal court, which was not a party to the underlying action, was ordered but failed to pay certain legal defense expenses of a criminal defendant. The trial court's order holding the fiscal court in contempt was reversed on appeal, as the record did not show that the contempt was committed in the trial court's presence, or that the fiscal court was present in court or was advised of the contempt charge by the issuance of a show cause order or the service of a rule. *Id.* at 763. Here, by contrast, the Horns were parties to the underlying action. Moreover, they were advised of the pending contempt charge by appellees' "Motion for Contempt and Attorney's Fees," and they were present with counsel during a hearing on the motion. The trial court did not err or abuse its

discretion by finding the Horns in contempt and awarding attorney's fees against them.

Next, the Horns assert the Homeowners Association lacked standing to bring this action. They rely on Section 23 of the deed restrictions document, which states in part that “[a]ny lot owner may enforce the restrictions and covenants aforesaid by appropriate legal procedure.” However, nothing in the document prohibits other parties from enforcing the deed restrictions. Thus, the owners of the subdivision lots were entitled to subsequently establish the Homeowners Association and to vest it with the “primary purpose of enforcing all building restrictions[.]” The trial court did not err by failing to dismiss the Homeowners Association as a party to this action.

Finally, the Horns claim that the trial court erred by awarding attorney's fees because appellees failed to provide adequate documentation regarding the calculation of expenses. However, the Horns did not allege in their brief, and we have found nothing to show, that this issue was preserved for appellate review. CR 76.12(4)(c)(v). The issue therefore shall not be considered on appeal.

The orders of the Garrard Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Richard Clay  
Danville, Kentucky

BRIEF FOR APPELLEES:

Ellen L. Miller  
Nicholasville, Kentucky