

RENDERED: DECEMBER 20, 2002; 10:00 a.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001372-MR

LARRY DALE CARTER; AND
MYRTLE KIRBY

APPELLANTS

APPEAL FROM ROCKCASTLE CIRCUIT COURT
v. HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 94-CI-00214

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
AFFIRMING
* * * * *

BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Larry Dale Carter and Myrtle Kirby have appealed from a summary judgment entered by the Rockcastle Circuit Court on March 9, 2001, which ruled that a billboard that they had erected was in violation of KRS¹ 177.830-177.890 and that it should be immediately removed. Having concluded that there is no genuine issue as to any material fact and that the Commonwealth was entitled to summary judgment as a matter of law, we affirm.

¹Kentucky Revised Statutes.

On December 27, 1994, the Transportation Cabinet of the Commonwealth of Kentucky filed a complaint against Carter and Kirby alleging that they had erected and maintained a billboard advertising device on Interstate 75 in Rockcastle County, Kentucky, near mile post 69.1, in violation of KRS 177.830-177.890 and applicable regulations. The sign was more than 660 feet from the right of way of Interstate 75 and was visible and readable from the highway. Carter was the owner of the billboard and Kirby owned the land upon which the billboard had been erected.

After discovery was completed, this matter was originally set for a bench trial on June 21, 2000. The trial, which was continued three times, was finally scheduled for December 5, 2000. On December 4, 2000, and December 19, 2000, the trial court entered orders which provided that the parties had "reached an agreement" that "there are no material issues of fact in this matter" and that "this matter should be submitted on a summary judgment basis[.]" On March 9, 2001, the trial court ruled in favor of the Transportation Cabinet and ordered that the billboard be immediately removed. This appeal followed.

Summary judgment is proper "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."² In Paintsville Hospital Co. v. Rose,³ our Supreme Court held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."⁴ The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law.⁵ There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.⁶ "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."⁷

On appeal, Carter and Kirby argue that a factual issue exists as to whether the sign was located on or within a commercially active area. In their brief, they stated:

²Kentucky Rules of Civil Procedure (CR) 56.03.

³Ky., 683 S.W.2d 255 (1985).

⁴Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁵Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

⁶Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

⁷Steelvest, supra at 480.

A genuine issue of material fact exists. Owners' billboard would not lose its status as a "legal non-conforming advertising device" unless it was located in a commercially active area. There was no evidence offered by appellee as to the status of the area and the court cannot take judicial notice of this fact.⁸

However, this alleged error is not properly before this Court. Carter and Kirby cannot argue on appeal that a factual issue exists when they filed a motion of their own asking the trial court to grant summary judgment in their favor. Carter and Kirby cannot have it both ways. They cannot be permitted to argue that there is no genuine issue as to a material fact when they are seeking summary judgment, but now take a completely different position after the trial court has determined that summary judgment was proper for the Cabinet.

In BTC Leasing, Inc. v. Martin,⁹ this Court stated, "[t]his position is indeed odd in light of the fact that BTC also moved the trial court to utilize a summary judgment on its own behalf. Having taken the stance by summary judgment that there was no genuine issue of fact, we feel that BTC should not now be permitted to assume a completely inconsistent posture to defeat

⁸We assume that this summary of the appellants' position contains a misstatement and that the appellants should have used "if" instead of "unless". Appellants argued in their memorandum in support of a summary judgment that "the sign is located within a commercially active area, which is an exception to the law and prevents its removal." KRS 177.860(4) provides that "[a]dvertising devices which . . . are to be located in a commercially or industrially developed area" "shall not be deemed a violation of KRS 177.830 to 177.890[.]"

⁹Ky.App., 685 S.W.2d 191, 193 (1984).

the decision of the trial court by claiming there was a genuine issue of fact." As our Supreme Court stated in Kennedy v. Commonwealth,¹⁰ "[t]he appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court" [citations omitted].

The record shows that on November 22, 2000, the Commonwealth filed a renewed motion for summary judgment.¹¹ As we previously noted, on December 4, 2000, the trial court entered an order continuing the trial date that had been scheduled for December 5, 2000, and stated that "[t]he parties hav[e] notified the court that they agree there are no material issues of fact in this matter, having notified the Court that they agree in this matter should be submitted on a summary judgment basis[.]" On January 18, 2001, Carter and Kirby filed their own memorandum in support of summary judgment. Among the arguments made in support of their claim to summary judgment was their claim that "the sign is located within a commercially active area, which is an exception to the law and prevents its removal."

While the trial court did not address this specific argument in the summary judgment, the parties had agreed that there was no genuine issue as to any material fact for the trial court to decide and it would appear that the appellees' argument that the sign was located in a commercially active area would

¹⁰Ky., 544 S.W.2d 219, 222 (1976).

¹¹The Commonwealth had previously filed a motion for summary judgment in 1998 that was denied by the trial court because genuine issues of material fact remained to be determined.

have required a factual finding. Furthermore, when the appellees on March 16, 2001, filed their motion pursuant to CR 59.05 to alter, amend, or vacate the summary judgment, they failed to raise this argument which involved a factual issue.¹²

For the foregoing reasons, the summary judgment of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jerry J. Cox
Mt. Vernon, Kentucky

BRIEF FOR APPELLEE:

John B. Baughman
Frankfort, Kentucky

¹²The motion was denied by an order entered on June 18, 2001.