

RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-001411-MR

CLAIRE HICKS LONG;  
ELIZABETH HICKS MOSLEY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 03-CI-001994

ROBERT H. LOEFFLER; PATRICIA  
RICHARDSON STOVALL; SARAJANE  
RICHARDSON LOEFFLER

APPELLEES

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: Claire Hicks Long (“Long”) and Elizabeth Hicks Mosley (“Mosley”) brought this action against Robert H. Loeffler (“Loeffler”), as administrator of the estate of Anita W. Hicks, and as trustee of the Anita W. Hicks Revocable Trust and of the Survivor’s and Decedent’s Trusts created pursuant to

the Hicks Revocable Trust. They also asserted claims against Patricia Richardson Stovall (“Patricia”) and Sarajane Richardson Loeffler (“Sarajane”) to recover assets they received as beneficiaries of the Anita W. Hicks Revocable Trust. Long and Mosley appeal from the trial court’s orders granting summary judgment to Loeffler and assessing attorney fees and costs from their share of the trusts. They also argue that the trial court abused its discretion in denying their motions to compel discovery and to file an amended complaint. We find that the trial court properly granted summary judgment on the issues relating to the Survivor’s Trust, and that the court did not abuse its discretion by denying the motions to compel and to file an amended complaint. However, we conclude that summary judgment was not appropriate on the issues relating to the Decedent’s Trust. Hence, we affirm in part, reverse in part, and remand for further proceedings.

The underlying facts of this action are not in dispute. On August 17, 1993, Charles and Anita Hicks created the Hicks Revocable Trust, also known as the Joint Trust Agreement (“Joint Trust”). Under the terms of the Joint Trust, Charles and Anita served as co-trustees and primary beneficiaries. Upon the death of either person, the Joint Trust directed that the surviving spouse would become the sole trustee. The Joint Trust further directed the surviving spouse to divide the corpus of the trust into two parts, identified as the “Decedent’s Trust” and the “Survivor’s Trust.”

The Decedent’s Trust is an irrevocable trust funded in an amount equal to either the federal estate tax exemption in effect during the year of the

decedent's death, or one-half of the total property in the Joint Trust, whichever amount is less. The surviving spouse was entitled to appoint the undistributed income and principal of the Decedent's Trust to himself or herself up to a maximum of \$5,000.00 or five percent of the aggregate value of the estate per year. The Joint Trust further provided that any assets not allocated to the Decedent's Trust would be allocated to the Survivor's Trust.

The Survivor's Trust is a revocable trust which granted a general and unrestricted power to the survivor to appoint the principal and undistributed income to himself or herself, to his or her estate, to the Decedent's Trust, or to any person or persons. Upon the death of the surviving spouse and after payment of certain debts and expenses, the remaining assets of both trusts were to be equally divided between Charles's children, Long and Mosley, and Anita's nieces, Patricia and Sarajane.

Charles Hicks died testate on July 9, 1996. The assets of the Decedent's and Survivor's Trusts were held for a time in the same account in which the Joint Trust had been held. On July 30, 1996, Anita created the Anita W. Hicks Revocable Trust ("Anita's Trust"). Shortly thereafter, in August 1996, a separate account was opened to hold the assets of the Decedent's Trust. The remaining assets remained in the Joint Trust account, representing the corpus of the Survivor's Trust. By November 1997, Anita appointed all of the assets of the Survivor's Trust to Anita's Trust, leaving the Joint Trust account with a zero balance. Anita also made appointments from the Decedent's Trust.

Anita died on December 1, 2001. Hilliard Lyons, the executor named in Anita's will, declined to serve. Thereafter, Loeffler petitioned and was appointed as administrator of Anita's estate. Loeffler also began serving as trustee of the Decedent's Trust. Loeffler forwarded a partial distribution to Long and Mosley and advised them that there would be no distributions from the Survivor's Trust. Patricia and Sarajane received their shares from the Decedent's Trust, and were also the only beneficiaries of Anita's Trust.

On March 6, 2003, Long and Mosley filed a complaint against Loeffler, as administrator of Anita's estate and as trustee of the various trusts, and against Patricia and Sarajane. In the complaint, they asserted that Anita never properly funded the Survivor's Trust, that she failed to make proper appointments from the Survivor's Trust, and that she made excessive and unauthorized withdrawals from the Decedent's Trust. They sought restoration of the improperly withdrawn funds to the Decedent's and Survivor's Trusts, and a disbursement of these restored funds in accord with the provisions of the Joint Trust.

Loeffler filed a motion for summary judgment on the issues relating to the Survivor's Trust. In an order entered on December 2, 2003, the trial court found that the Survivor's Trust was properly created and funded, and that Anita exercised a valid power to appoint to herself the assets contained in the Survivor's Trust. As a result of the summary judgment, the only remaining issue concerned whether Anita, and Loeffler as successor trustee, made withdrawals from the Decedent's Trust in excess of the amount authorized by the Joint Trust.

On April 4, 2005, Long and Mosley moved to file an amended complaint, asserting that Anita had a conflict of interest in her roles as trustee of the Decedent's and Survivor's Trusts. Consequently, they asserted that Anita was required to obtain court approval before making any withdrawals from either trust. The trial court denied the motion, finding that it was not timely.

Long and Mosley filed a motion to continue the scheduled trial date of April 28, 2005, stating that they had not been able to complete discovery. The trial court denied the motion, but later continued the trial date due to health problems with Long and Mosley's counsel. Subsequently, Loeffler filed a motion for summary judgment on the remaining issues, but the trial court denied the motion on January 16, 2006.

The matter was ultimately scheduled for trial on March 1, 2006. Long and Mosley filed a motion to continue the trial date, stating that they had not been able to complete discovery and because Mosley was unable to attend the trial. The court denied the motion. But on March 1, 2006, the trial court continued the trial date due to a conflict with another matter. Thereupon, Loeffler renewed his motion for summary judgment. Oral arguments were held on March 3, 2006, and after considering Loeffler's argument and Long and Mosley's response, the trial court granted summary judgment for Loeffler on March 16, 2006. Thereafter, the trial court granted Loeffler's motion to assess costs of this action, including attorney fees, against Long's and Mosley's share of the Decedent's Trust. This appeal followed.

On appeal, Long and Mosley raise five basic issues. First, they argue that they were entitled to summary judgment on the issues relating to the Survivor's Trust because that trust clearly required Anita to make all appointments in writing. Second, they argue that the trial court abused its discretion by denying their motion to file an amended complaint. Third, they contend that the trial court abused its discretion by denying their motion to compel discovery from the trusts' attorney. Fourth, they argue that summary judgment was not appropriate on the issues relating to the Decedent's Trust. And fifth, Long and Mosley assert that the trial court abused its discretion by assessing attorney fees from their share of the Decedent's Trust. We shall address each argument in turn.

Long and Mosley first argue that the trial court erred in granting the partial summary judgment finding that Anita exercised a valid power to appoint to herself the assets contained in the Survivor's Trust. This issue turns on the proper interpretation of Article VII, Section B, of the Joint Trust, which sets out the extent of the surviving trustee's power to appoint principal and interest from the Survivor's Trust.

**Powers of Appointment of Principal.** During his or her lifetime, the Survivor shall have a general power to appoint the principal and any undistributed income of the Survivor's Trust or any part thereof, to himself, or to herself, or to any person or persons.

Prior to the death of the Survivor, he or she shall have the power to appoint the principal and any undistributed income of the Survivor's Trust or any part thereof to his or her Estate or to any person or persons, or to the Decedent's Trust. Such power of appointment

shall be exercised only by means of written directions, executed by the Survivor and delivered to the Trustee during the lifetime of the Survivor. If the Survivor executes and delivers more than one such written direction to the Trustee, the last one shall control unless, by its context, the Survivor clearly indicates otherwise.

Long and Mosley focus on the second paragraph of this section, which states that the “power of appointment shall be exercised only by means of written directions . . . .” Based on this language, they assert that all appointments from the Survivor’s Trust must be in writing, including Anita’s appointments to herself. Since Anita failed to provide written directions appointing the assets of the Survivor’s Trust to herself, Long and Mosley argue that those appointments must be deemed invalid. As a result, they assert that any assets which Anita transferred from the Survivor’s Trust to her own trust must be restored.

However, we find that the trial court’s interpretation of this section is more consistent with its plain language when read in conjunction with the rest of the Joint Trust. As the trial court correctly noted, the interpretation of a written instrument is typically an issue of law for the court to decide. *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). A court is obliged to look first within the “four corners” of the document and determine the grantor’s intent from the document itself. *Graham v. Jones*, 386 S.W.2d 271, 273 (Ky. 1965). Where possible, all parts of a trust instrument must be given effect and every part of an instrument must be read in conjunction with every other part. *Department of Revenue v. Kentucky Trust Co.*, 313 S.W.2d 401, 404 (Ky. 1958).

In this case, the trial court noted that the Joint Trust contemplated that the surviving spouse would also be the trustee and primary beneficiary of the Survivor's Trust. Furthermore, the first paragraph of Article VII, Section B, grants the surviving spouse an unrestricted power to make appointments from the Survivor's Trust. The first paragraph of Section B allowed Anita to make appointments to herself without a writing requirement. The direction in the second paragraph – “[s]uch power of appointment shall be executed only by means of written directions” – applied only to Anita's appointments from the Survivor's Trust to her estate, to the Decedent's Trust, or to others. Consequently, the trial court properly granted summary judgment for Loeffler on this issue.

Long and Mosley next argue that the trial court abused its discretion by denying their motion to amend the complaint. On April 4, 2005, they moved to amend their complaint to add an argument that Anita had a conflict of interest in the exercise of any power over the trusts and, as a consequence, her exercise of any power of appointment could only be made with court authorization. The trial court denied the motion, noting its prior order which assigned the case for trial on April 28, 2005, and required pleadings to be amended not less than 45 days before trial.

After a responsive pleading is served, Kentucky Rules of Civil Procedure (“CR”) 15.01 allows a trial court to permit a party to amend a pleading “only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” But while amendments should be freely allowed, the trial court has wide discretion to grant or deny such an amendment,



and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000), citing *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961). In determining whether to permit a party to amend his complaint, a court may consider, among other factors, whether an amendment would prejudice or work an injustice upon the opposing party. *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983).

Long and Mosley note that there is no suggestion that their delay in asserting this claim was in bad faith. They also argue that no party would have been prejudiced by the proposed amendment. Although they filed their motion within 45 days of the scheduled trial, they point out that the trial date was subsequently continued. Consequently, Long and Mosley argue that the trial court abused its discretion by denying their motion to file an amended complaint.

However, there were valid reasons justifying the trial court's denial of the motion. First, Long and Mosley failed to offer any compelling explanation for the delay in asserting this claim. The motion to amend was filed more than two years after the original complaint and less than a month before the scheduled trial. Long and Mosley now suggest that the delay was attributable to problems with discovery. But at the hearing on the motion, their counsel conceded that the claim seemed obvious to him even before discovery was completed.

Moreover, Loeffler would have been prejudiced by the late assertion of this claim. The amended complaint presented a wholly new theory of the case – that Anita lacked authority to make any appointments from either the Survivor's or

the Decedent's Trusts. In conjunction with their motion to amend, Long and Mosley filed a motion to continue the trial to allow them to pursue additional discovery on this issue. The trial court concluded that the additional delay was not warranted. And while the court later granted a motion to continue the scheduled trial date, the continuance was granted because of health issues involving Long and Mosley's counsel. Furthermore, the court granted that continuance on the condition that no additional issues were to be raised. Given these circumstances, we cannot find that the trial court abused its discretion by denying the motion to file an amended complaint.

Long and Mosley next argue that the trial court erred in denying their motion to compel discovery from the trusts' attorney. On March 28, 2005, Long and Mosley moved the trial court for an order compelling production of all attorney billing statements Loeffler received regarding his administration of the trusts. As part of the same motion, Long and Mosley moved to compel deposition testimony from William Wilson, the attorney who drafted the Joint Trust and provided legal services relating to the trusts after Charles's death. In particular, they sought to require Wilson to provide an explanation for all transfers made from the trust accounts.

Loeffler objected on the grounds that the billing statements were irrelevant to the issues presented in this case and that the descriptions contained in the billing statements were privileged as attorney work product. Loeffler also explained that Wilson was able and available to explain all the transfers, but that

doing so would be extremely time consuming. Loeffler further stated that this information was available from the trust records, and that Wilson could explain how Long and Mosley could interpret the trust account statements. Wilson also offered to explain any specific transactions about which Long and Mosley wanted to question him. Loeffler also requested that Long and Mosley pay Wilson for his time if they wished to depose him in detail as an expert witness.

The trial court agreed with Loeffler on both issues, ordering him to provide the billing statements, but stated that the description of legal services was to be redacted if those services pertained to this litigation. The court also denied the motion to compel Wilson to explain all the transactions from the trust accounts, but stated that Long and Mosley could ask Wilson about specific transactions. Long and Mosley argue that the trial court abused its discretion by allowing Loeffler to produce redacted billing statements because he failed to establish that these documents were privileged. They further argue that they were entitled to depose Wilson in detail as part of their claim for an accounting of the trusts.

As to the first issue, we find that the trial court properly ordered the billing statements related to this litigation redacted. We agree with Long and Mosley that claims of privilege are to be carefully scrutinized, and that a party asserting a claim of privilege bears the heavy burden of proving its applicability. *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464, 468-69 (Ky. 1998). Nevertheless, it is equally well-established that factual information appropriately discoverable from a party through deposing an employee or former

employee must be differentiated from mental impressions and advice protected by the attorney-client privilege and trial preparation materials protected by the work-product rule as covered by CR 26.02. *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)

In this case, Long and Mosley were seeking to show that Anita and Loeffler made excessive and unauthorized withdrawals from the Decedent's Trust. The trial court allowed them access to the unredacted attorney billing statements for the period when those allegedly unauthorized withdrawals occurred. These records were potentially relevant to explain certain transfers from the Decedent's Trust. However, they fail to explain how the billing statement details related to this litigation would lead to the discovery of potentially admissible evidence. To the contrary, those statements would be more likely to reveal the attorney's thought processes and plans in regard to the defenses in this litigation. Given the limited relevance and clearly privileged nature of these records, the trial court properly ordered the billing statements redacted.

Likewise, we find that the trial court properly limited the scope of Wilson's deposition testimony. A trial court has broad discretion over disputes involving the discovery process, and we will not disturb that discretion except for abuse. *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). Long and Mosley had access to all relevant account statements for the trusts at issue prior to taking Wilson's deposition on March 11, 2005. At his deposition, Wilson generally explained how and when withdrawals of principal and interest were made, and

offered to explain specific transactions. Considering that there were more than 100 transactions involving the Decedent's Trust, the trial court concluded that Long and Mosley's request to question Wilson in detail about every transaction was unreasonable. Furthermore, Long and Mosley never sought to resume Wilson's deposition to ask about specific transactions. Under the circumstances, we find that the trial court did not abuse its discretion by limiting the scope of Wilson's deposition testimony.

The fourth and most significant issue in this case concerns the trial court's order granting summary judgment on Long and Mosley's remaining claims involving the Decedent's Trust. As previously noted, the Joint Trust permitted Anita to annually appoint to herself undistributed income and principal of the Decedent's Trust in the amount of \$5,000.00, or five percent of the aggregate value of the estate, whichever amount was greater. This authority was commonly referred to as Anita's "five and five powers." In their complaint, Long and Mosley asserted that Anita transferred more assets out of the Decedent's Trust than was permitted under her "five and five powers."

The trial court found that Long and Mosley had been given an ample amount of time to complete discovery, but were still unable to identify any specific withdrawals from the trust which they alleged to be improper. The court further noted their interrogatory response which took the position that Anita was not allowed to withdraw any principal from the Decedent's Trust. As a result, the court concluded that the only contested issue was whether Anita was authorized to

take distributions of principal from the Decedent's Trust. Since the Decedent's Trust clearly allowed her to take such distributions up to five percent of the aggregate value of the estate, and since Long and Mosley had failed to present any specific evidence that Anita had exceeded that authority, the trial court concluded that Loeffler was entitled to summary judgment on this issue.

In reviewing an order granting summary judgment, “[t]he standard of review on appeal . . . is 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), *citing* CR 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992). Summary judgment is appropriate “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 56.03. In making this determination, the trial court must consider all evidence of record, including depositions, answers to interrogatories, stipulations and admissions on file. “[S]ummary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

Long and Mosley argue that summary judgment was inappropriate for several reasons. First, they argue that the matter was not ripe for summary judgment because they had not been given ample time to complete discovery. “[Summary judgment] is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence.” *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007), citing *Pendleton Brothers Vending, Inc. v. Commonwealth, Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988), and *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979).

Unlike in *Suter*, the trial court in this case had issued an order setting the case for trial and setting a date for completion of discovery. Nevertheless, Long and Mosley note that they filed the motion to compel on March 28, 2005, but the trial court did not rule on the pending motion until February 17, 2006. They contend that this delay in ruling on the motion prevented them from completing discovery within the deadline provided in the pre-trial order. They further argue that it would have been useless to re-commence Wilson’s deposition until the trial court ruled on the motion to compel. Thus, Long and Mosley assert that the trial court acted arbitrarily in finding that they had ample time to complete discovery.

But as discussed above, the trial court did not abuse its discretion by denying the motion to compel. Furthermore, Long and Mosley never sought to re-commence the deposition to ask Wilson about specific transactions, as agreed by Loeffler. Instead, they waited until almost one month before the scheduled trial to

remind the court about the pending motion. Finally, this case had been pending for three years when the court granted the motion for summary judgment, and Long and Mosley had access to the trust records for more than a year. Under these circumstances, we cannot find that the trial court's delay in ruling on the pending motion unfairly prevented Long and Mosley from completing discovery before trial.

Long and Mosley next argue that the trial court unreasonably circumscribed the scope of the issues before it on the motion for summary judgment. Loeffler propounded an interrogatory to Long and Mosley asking them, in pertinent part:

Please state each and every fact on which you rely to support your contention stated in Numerical paragraph 20 of your Complaint herein that Anita Hicks wrongfully transferred assets out of the Decedent's Trust in excess of the amount permitted under the terms of the Joint Trust . . . .

On March 29, 2005, Long and Mosley served amended responses stating, in pertinent part:

Plaintiffs contend that all transfers or withdrawals made by either Anita W. Hicks or the Successor Trustee, Robert H. Loeffler, from the Decedent's Trust, which constitute more than the net income of such Trust are a violation of the Joint Trust Agreement of August 17, 1993. Furthermore, the Plaintiffs object to and contend that any payment of principal from the Decedent's Trust was and is a violation of the Joint Trust Agreement of August 17, 1993 and should be restored.



Based on this response, the trial court concluded that it could decide this disputed issue as a matter of law based on the clear language of the Joint Trust. By narrowly focusing on this issue, Long and Mosley contend that the trial court effectively prevented them from litigating the remaining claim in this case – that Anita took distributions of principal from the Decedent’s Trust in excess of her “five and five” powers set out in the Joint Trust.<sup>1</sup>

This issue turns on the effect of Long and Mosley’s amended interrogatory response of March 29, 2005. CR 33.01 permits a party to serve such interrogatories on the opposing party during the discovery process, and interrogatories may relate to any matters which may be inquired into under CR 26.02. CR 33.02(1). A trial court has the authority under CR 37.01 to sanction a failure to answer interrogatories. But there are no Kentucky cases on whether an interrogatory response may restrict the proof which a party may present at trial.

However, cases interpreting Federal Rules of Civil Procedure (“Fed. R. Civ. Pro.”) 33, the federal counterpart to CR 33, have held that, ordinarily, answers to interrogatories do not limit the proof which may be presented at trial.

*Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1396, 1412 (D.N.J. 1996), *citing Pressley v. Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C. 1963); and *McElroy v.*

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<sup>1</sup> Long and Mosley contend that they were entitled to assert their claim that Anita had an inherent conflict of interest in her roles as trustee and beneficiary of the Decedent’s and Survivor’s Trusts. As a result, they argue that she was required to obtain court approval before making any withdrawals from either trust, citing Kentucky Revised Statutes (“KRS”) 386.820(2) and *Wiggins v. PNC Bank Kentucky, Inc.*, 988 S.W.2d 498 (Ky. App. 1998). However, this claim was asserted in their amended complaint, which the trial court did not allow them to file. Since we have previously found that the trial court did not abuse its discretion by denying their motion to file the amended complaint, this issue was not before the court.

*United Air Lines, Inc.*, 21 F.R.D. 100 (W.D. Mo. 1957). These cases are premised on the principle that a party should not be irrevocably bound by an interrogatory which it must answer early in the case, before it has completed discovery and has a full understanding of the case. *Marcoin, Inc. v. Edwin K. Williams & Co., Inc.*, 605 F.2d 1325, 1328 (4th Cir. 1979). See also *Freed v. Erie Lackawanna Railway Co.*, 445 F.2d 619, 620-21 (6th Cir. 1971), and *Victory Carriers, Inc. v. Stockton Stevedoring Co.*, 388 F.2d 955, 959 (9th Cir. 1968).

We find this reasoning to be applicable to interpret Kentucky's CR 33. The trial court may have been within its discretion to penalize Long and Mosley for their failure to identify their expert witness by the date provided in the pre-trial discovery order. The court also might have granted Loeffler's motion *in limine* to exclude any evidence supporting a different theory of the case. However, the trial court did neither.

Rather, the trial court elected to proceed on Loeffler's renewed motion for summary judgment. A party opposing a properly-supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steelvest*, 807 S.W.2d at 482. But under these circumstances, we cannot find that the interrogatory response of March 23, 2005, limited the evidence which Long and Mosley could introduce in response to Loeffler's motion for summary judgment.

Thus, we turn to the ultimate issue of whether Loeffler was entitled to summary judgment. We agree with the trial court that the Decedent's Trust clearly

permitted Anita to withdraw some principal from the Decedent's Trust. But as the court noted in another order denying Loeffler's earlier motion for summary judgment, the issue before the court was whether Anita, and later Loeffler as successor trustee, made withdrawals of principal from the Decedent's Trust in excess of this amount.

In support of his motion for summary judgment, Loeffler submitted the affidavit of William Wilson. Wilson stated that he had reviewed all statements from the trust accounts, and concluded that Anita had not exceeded her "five and five powers" in making appointments from the Decedent's Trust. He also took issue with Long and Mosley's assertion that Anita had wrongfully withdrawn assets from the Decedent's Trust to purchase a condominium for herself. Wilson conceded that Anita had withdrawn funds from the Decedent's Trust to pay an entrance fee for a residential facility. However, he stated that this fee was refunded to the Decedent's Trust upon Anita's death. In the alternative, Wilson took the position that the Decedent's Trust allowed Anita to withdraw principal to provide for her own support, and consequently, her withdrawal of principal from the Decedent's Trust for this purpose was authorized.

Loeffler argues that Long and Mosley failed to present any evidence to rebut Wilson's affidavit. But in response to the motion for summary judgment, Long and Mosley submitted the affidavit of their expert, William R. Klump, C.P.A., dated March 3, 2006, in which he stated that Anita took distributions from the Decedent's Trust in excess of her authority. After reviewing the trust

statements, Klump did not identify as improper any particular withdrawal from the Decedent's Trust. However, he states that the income and five percent of the aggregate value of the Trust for the years 1997 to February 2005 was \$173,751.12, and that during this period Anita and Loeffler transferred a total of \$417,839.74. Klump also notes that a total of \$120,769.00 was transferred back into the Decedent's Trust account after Anita's death.<sup>2</sup> As a result, Klump takes the position that Loeffler must restore \$123,320.64 to the Decedent's Trust. He also states that Loeffler must restore an additional \$65,669.53 to the Decedent's Trust, representing lost income from the improper withdrawals. Klump suggested there may be additional income loss for the period from February 2005 until March 2006.

We are troubled by the late filing of Klump's affidavit and by Long and Mosley's failure to comply with pre-trial discovery orders or to timely prepare for trial. Furthermore, Klump's affidavit does not set out the facts supporting his conclusions. But viewing the matter strictly from a summary judgment perspective, we conclude that Klump's affidavit was sufficient to show the existence of a genuine issue of material fact regarding the withdrawals of principal from the Decedent's Trust by Anita and Loeffler. Therefore, summary judgment was not appropriate.

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<sup>2</sup> This latter amount apparently represents the refunded residential entrance fee refunded to the Decedent's Trust.

And since Loeffler was not entitled to summary judgment at that time, the trial court also erred in granting his later motion assessing the costs of litigation, including attorney fees, against Long's and Mosley's share of the Decedent's Trust. We agree that the trial court has the discretion to assess such costs against the unsuccessful party in an action for settling an estate. KRS 453.040(2). *See also Trustees of Home for Poor Catholic Men v. Coleman*, 122 Ky. 544, 92 S.W. 342 (1906). But in the absence of a final judgment in favor of Loeffler, any such award was premature.

In conclusion, we find that the trial court properly granted summary judgment for Loeffler on Long and Mosley's issues relating to the Survivor's Trust. We also find that the trial court did not abuse its discretion by denying Long and Mosley's motions to file an amended complaint and to compel discovery. However, we conclude that the trial court unduly circumscribed the remaining issues relating to the Decedent's Trust. As a result, the trial court overlooked evidence showing that there was a genuine issue of material fact for trial. Consequently, summary judgment and the award of attorney fees and costs were not appropriate. Therefore, this matter must be remanded for trial on the issue relating to the expenditures made by Anita, and Loeffler as successor trustee, from the Decedent's Trust.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings as set forth in this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

John E. Herbison  
Nashville, Tennessee

James Hays Lawson  
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ORAL ARGUMENT FOR  
APPELLANTS:

Fletcher W. Long, *pro hac vice*  
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BRIEF AND ORAL ARGUMENT  
FOR APPELLEE, ROBERT H.  
LOEFFLER:

William A. Hoback  
Louisville, Kentucky

BRIEF FOR APPELLEES,  
PATRICIA RICHARDSON  
STOVALL AND SARAJANE  
RICHARDSON LOEFFLER:

I. Joel Frockt  
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ORAL ARGUMENT FOR  
APPELLEES, PATRICIA  
RICHARDSON STOVALL AND  
SARAJANE RICHARDSON  
LOEFFLER:

I. Joel Frockt