

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002029-MR

DR. JAMES LEADINGHAM  
AND LENORA LEADINGHAM

APPELLANTS

v. APPEAL FROM LAWRENCE CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 05-CI-00380

JAMES MARCUM<sup>1</sup>

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,<sup>2</sup> SENIOR  
JUDGE.

COMBS, CHIEF JUDGE: James Leadingham, and his wife, Lenora, appeal from  
a summary judgment granted by the Lawrence Circuit Court to Jimmy Marcum.

After our review, we vacate and remand.

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<sup>1</sup> Although the name of the appellee on the Notice of Appeal is *James* Marcum, we refer to him –  
as does his counsel – by the name of *Jimmy*.

<sup>2</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice  
pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Leadinghams reside at 2135 Highway 1185 in Louisa, Kentucky. They acquired an easement for access to this property from Carla Marcum Quillen in August 1997. In September 2001, they purchased from Quillen twenty-nine acres that adjoined their property. This tract included the access road that the Leadinghams had used since 1997. According to the Leadinghams, the 2001 purchase agreement between the parties incorporated a road maintenance agreement. The recorded road maintenance agreement provides that certain financial responsibilities are to be shared among the adjacent property owners who utilize the road.

In December 2005, the Leadinghams filed a civil action against Quillen and Jimmy Marcum. In their unverified complaint, the Leadinghams alleged that Quillen had sold the remainder of her adjacent property to Jimmy Marcum. They also alleged that Marcum had been using the road daily for convenient access to his property, and they complained that he had failed to contribute to its necessary maintenance. The Leadinghams sought to revoke Quillen's and Marcum's right to any use of the road based upon a breach of the written agreement; they also asked for damages against them for trespass. Their complaint included an allegation that Quillen's and Marcum's wrongful use of their road amounted to an intentional infliction of emotional distress. The Leadinghams sought damages based on the severe emotional distress that they claim to have suffered since Marcum acquired the adjacent property.

In his answer, Marcum admitted that Quillen had conveyed to him the remainder of her property. However, he denied that he had wrongfully used the Leadinghams' road to access this property by virtue of a failure to contribute to its maintenance, and he denied that he had breached any contract with the Leadinghams. Furthermore, he denied that he trespassed upon their property or that he committed an intentional infliction of emotional distress. Quillen did not answer the complaint.

By June 2006, Marcum and the Leadinghams exchanged written discovery; the Leadinghams scheduled Marcum's deposition for July 10, 2006. For reasons not appearing in the record, Marcum's deposition was eventually rescheduled for September 25, 2006, and then again for December 11, 2006. Marcum also scheduled the Leadinghams' depositions for December 11, 2006. However, on October 25, 2006, Marcum filed a motion with the court to dismiss the action for failure to meet the amount of the jurisdictional threshold or, in the alternative, for summary judgment with respect to the issues of intentional infliction of emotional distress and breach of contract. In their response, the Leadinghams agreed to stipulate to a dismissal of the claim of intentional infliction of emotional distress and the claim based upon trespass as long as Marcum agreed to relinquish any right he had to the use of the road.

On December 21, 2006, the trial court concluded that Marcum was entitled to judgment as a matter of law and granted his motion for summary judgment. The finality language included in the court's judgment was

subsequently withdrawn at the Leadinghams' request, and the proceedings continued.

On September 20, 2007, the Leadinghams were granted a default judgment against Quillen in the amount of \$24,193.00 based on her breach of contract, trespass to property, infliction of emotional distress, and damage to property. They also recovered attorney fees and costs. This appeal followed.

As a preliminary matter, we note that Marcum's motion to strike the Leadinghams' brief or those portions of the brief that were unsupported by the record was passed to this merits panel of the court. We have reviewed Marcum's motion carefully, and we agree that portions of the material contained in the Leadinghams' brief were not supported by anything appearing of record. Consequently, those portions of the brief were duly stricken and were not considered by the panel in reaching its legal conclusions.

In reviewing a trial court's grant of summary judgment, our standard of review on appeal is whether the trial court correctly determined 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. Kentucky Rules of Civil Procedure (CR) 56.03. The moving party bears the initial burden of showing that no genuine issue of material fact exists. Then the burden shifts to the party opposing summary judgment to present some affirmative evidence that a genuine issue of material fact does exist for trial. *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky.App.2001).

We conclude that summary judgment was prematurely granted in this case. In their complaint, the Leadinghams alleged that Marcum trespassed daily upon their road. This allegation was not specifically addressed in Marcum's motion for summary judgment. Marcum's written arguments in support of summary judgment focused entirely on the intentional infliction of emotional distress claim and the claim that he had breached a contract with the Leadinghams. However, the court's judgment appears to dismiss the trespass claim along with the others.

In his brief to this court, Marcum argues that the summary judgment should nonetheless be affirmed since the Leadinghams **offered no proof** that they were in actual or constructive possession of the land on which the alleged trespass occurred. Although this argument was never addressed to the court, the fact of the Leadinghams' ownership of the property can be ascertained from a review of the recorded maintenance agreement. In *Roberson v. Lampton*, 516 S.W.2d 838 (Ky. 1974), the court cautioned against the use of summary judgment as a means of luring a party into a "premature showdown." Citing *Conley v. Hall*, 395 S.W.2d 575, the court stated as follows:

We think that it should be borne in mind that the motion for summary judgment is not a trick device for the premature termination of litigation. Its function is to secure a final judgment as a matter of law when there is no genuine issue of a material fact. The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied.

*Id.* at 840.

By mere allegation, Marcum has not established the nonexistence of the Leadinghams' ownership of the property, a fact or premise necessary to maintain an action in trespass. Additionally, a review of the deposition schedule indicates that the parties had not yet completed discovery in this matter. The Leadinghams anticipated an opportunity to develop the facts more fully, and we conclude that they were entitled to do so under these circumstances.

Based upon the foregoing, the judgment of the Lawrence Circuit Court is vacated, and this matter is remanded for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Suleiman Oko-ogua  
Michael T. Hogan  
Louisa, Kentucky

BRIEF FOR APPELLEE:

Brian Cumbo  
Inez, Kentucky