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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002220-MR

CHRIS JACKSON
and
STACI SMITH JACKSON — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 04-CI-00413

JACK T. CLOYD and REED'S
HEAVY EQUIPMENT PARTS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: Chris and Staci Jackson appeal an order of the Laurel Circuit Court granting summary judgment to appellees, Jack Cloyd and Reed's Heavy Equipment Parts, Inc. After reviewing the facts of the case and the pertinent law, we affirm.

These following underlying facts are undisputed: In 2002 and 2003, Cloyd hired Reed's Heavy Equipment to excavate the property around his office in order to construct a parking lot. In the process, Reed's Heavy Equipment excavated a significant portion of the Jacksons' adjoining property.

On April 21, 2004, the Jacksons filed a lawsuit against Cloyd and alleged willful trespass. They sought damages for the encroachment. Cloyd filed a motion for summary judgment supported by a sworn affidavit that detailed the extent to which he had cautioned Reed's Heavy Equipment concerning the boundary lines. On November 16, 2004, the Jacksons filed an amended complaint, adding Reed's Heavy Equipment as a defendant. Reed's Heavy Equipment has never disputed that it was responsible for the Jacksons' damages. The only contested issue was the amount of damages.

The Jacksons hired an appraiser, Douglas Mosely, to determine the difference in the value of the property before and after the excavation. Mosely wrote a report in which he concluded that the property's value had been diminished by $18,800 as of May 7, 2005. Before Mosely could be deposed or otherwise offer sworn testimony concerning the report, he passed away. The Jacksons then hired John Chandler to conduct a second appraisal. Chandler determined the difference in the value of the land before and after the appraisal to be $231,020.

On August 29, 2008, David Altizer, an engineer, conducted an appraisal of the property in order to determine the cost of restoring the land to a usable

condition. He presented three methods. The most expensive cost was $462,000 while the least expensive projected cost was $83,000.

The trial court ruled that Mosely's appraisal was admissible because the Jacksons had relied on the report in their interrogatories. However, it excluded the appraisal of Chandler because he had not been qualified as an expert. Cloyd and Reed's Heavy Equipment filed a motion for summary judgment. Reed's Heavy Equipment offered to pay the Jacksons damages in the amount of $18,800. On November 22, 2011, the trial court entered an order granting the motion for summary judgment and ordering Reed's Heavy Equipment to pay $18,800. This appeal follows.

We first note that the briefs submitted all suffer from several deficiencies. Kentucky Rule[s] of Civil Procedure (CR) 76.12 provides clear instructions of how briefs are to be written. CR 76.12(4)(c)(iv) and 76.12(4)(d)(iv) both mandate that the arguments in appellant's and appellee's briefs should include "***ample*** references to the ***specific pages*** of the ***record***." (Emphases added). The briefs submitted by the Jacksons and by Cloyd do not include citations to the record. Additionally, all three parties rely in part on depositions which have not been made part of the record. "[M]aterials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." CR 76.12(4)(c)(vii). Therefore, we could not consider those portions of the briefs which refer to depositions that were not included in the appellate court record.

In order for summary judgment to be appropriate, the movant must prove that no genuine issue of material fact exists and that he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. On appeal, our standard of review 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).

As noted earlier, the question before the trial court was the proper amount of damages that the Jacksons should receive as a result of the trespass on their land. On appeal, the Jacksons argue that the court committed error by admitting Mosley's report and by not admitting Chandler's report. We must examine the method by which damages are determined in order to evaluate whether summary judgment was entered appropriately.

Real estate may suffer two types of damages – permanent and temporary. *Ellison v. R&B Contracting, Inc*., 32 S.W.3d 66, 69 (Ky. 2000). If the injury is permanent, the damages are determined by the difference between the value of the property before and after the trespass. The resulting figure is the diminution in value. *Id*. If the injury is temporary, the damages represent the cost of restoring the property to its pre-trespass state. *Id*. The injury is deemed to be temporary if

the cost of restoration is less than the amount of diminution. *Id*. at 70. Questions concerning the cost of repair and diminution in value are to be determined by the finder of fact. *Id*.

The record indicates that Mosley and Chandler provided values of diminution, while Altizer provided cost of restoration. If both appraisals of diminution had been considered admissible by the court, an issue of fact would have been created for a jury. Summary judgment would not have been inappropriate.

The Jacksons contend that it was improper for the court to consider Mosley's appraisal because Mosley died before either party had the opportunity to depose him. They rely on *Wise v. Commonwealth*, 600 S.W.2d 470 (Ky. App. 1978), which holds that both parties are entitled to impeach witnesses about prior inconsistent statements. However, the Jacksons do not explain how *Wise* applies to their contention that they should have had the opportunity to question Mosley about his methodology in order to render his appraisal admissible. They do not cite or allege any prior inconsistent statements made by Mosley.

Additionally, we find no error by the trial court because the Jacksons themselves introduced Mosley's appraisals in their answer to the interrogatories of Reed's Heavy Equipment. Answers to interrogatories can be used as admissions against the party who provided them. Robert G. Lawson, *Kentucky Evidence Law Handbook* § 8.25[3] (4th Ed. 2003). CR 56.03 provides that a court should base its grant of summary judgment on "pleadings, depositions, ***answers to***

interrogatories, stipulations, and admissions on file, [and] affidavits." (Emphasis added.) Because the Jacksons both referenced Mosley's appraisal of $18,800 in their answers to the interrogatories and attached it to the answers, the court properly considered the report when it addressed Reed's Heavy Equipment's motion for summary judgment.

The Jacksons also contend that the court erred in excluding Chandler's report. Kentucky Rule[s] of Evidence (KRE) 702 sets forth that a witness must be qualified as an expert in order to testify about scientific, technical, or specialized knowledge. Trial courts conduct hearings pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) in order to determine whether a witness may be qualified as an expert.

The Jacksons contend that the trial court disqualified Chandler as an expert because he was not an engineer. The court conducted a *Daubert* hearing and found that he was not qualified to assess the cost of restoration of the property. Nonetheless, the Jacksons argue that Chandler was qualified to provide an appraisal of the before-and-after value of the property. However, the record does not include a transcript or recording of the hearing. The order in the written record merely recites that Chandler was disqualified pursuant to *Daubert* in response to the Defendants' motion. That motion is in the record, and it also alleges that Chandler's methodology for determining the diminution value was flawed. Because the record does not include the *Daubert* hearing, we must assume that the

record supports the trial court's decision not to qualify Chandler as an expert. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

The Jacksons also rely on Chandler's deposition as basis for their argument that he was improperly disqualified. However, as mentioned before, the record does not include Chandler's deposition. Pursuant to CR 76.12(4)(c)(vii), we are precluded from considering the citations to the deposition. We cannot conclude that the trial court committed error when it disqualified Chandler as an expert.

Because the trial court did not err in its decisions to admit Mosley's report and to exclude Chandler's report, there was no question of fact concerning the value of the damages. The diminution value admitted by the Jacksons was $18,800, which was lower than the cost of restoration. Accordingly, the trial court's order granting summary judgment was not erroneous.

We affirm the judgment of the Laurel Circuit Court.

ALL CONCUR.

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