RENDERED: JANUARY 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000188-MR

FLOYD PARSLEY AND DELORES A. PARSLEY
AS TRUSTEES FOR THE FLOYD PARSLEY AND
DELORES A. PARSLEY REVOCABLE LIVING TRUST;
FLOYD PARSLEY, INDIVIDUALLY; AND
DELORES A. PARSLEY, INDIVIDUALLY — APPELLANTS

APPEAL FROM HARRISON CIRCUIT COURT
v. HONORABLE A. BAILEY TAYLOR, JUDGE
ACTION NO. 11-CI-00204

ESTATE OF LEROY B. MCCAULEY BY
AND THROUGH THE CO-EXECUTORS
JUDY HETTERMAN, PATTY HOUSE, AND
TIM MCCAULEY; JUDY HETTERMAN, INDIVIDUALLY;
PATTY HOUSE, INDIVIDUALLY; AND
TIM MCCAULEY, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

STUMBO, JUDGE: Appellants are appealing an order granting summary judgment which fixed the boundary lines to two adjoining pieces of property. The summary judgment also awarded damages to Appellees in excess of $11,000. We find summary judgment was proper and affirm in part. We also find that the trial court erred in its calculation of costs and remand for that issue only.

The underlying action was brought by Appellees. The parties own farms adjacent to one another. At issue are the locations for two common boundary lines. Appellees sought to quiet the title to the land described in their deed, pursuant to Kentucky Revised Statutes (KRS) 411.120, as well as costs and damages. KRS 411.120 states in pertinent part:

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs[.]

Appellees filed their complaint in this case on June 29, 2011. In support of the complaint, they attached a number of documents, including their land's deed and a legal description and survey plat created by Darnell Engineering, Inc. Appellants, through their first attorney, filed their answer on July 22, 2011. The answer generally denied the allegations of the complaint, but did not assert any counterclaim or counter petition to quiet title. Shortly thereafter, Appellants' trial counsel moved to withdraw, which was permitted by the court. Appellants' new counsel appeared before the court in September of 2011.

On October 20, 2011, Appellees propounded to Appellants their first set of interrogatories. One interrogatory sought the identity of any surveyors or other experts which Appellants planned to use at trial, as well as copies of any surveys, plats, memorandums, photographs, or other information which would be relied upon or introduced as evidence. Appellees received the answers to the interrogatories in January of 2012. In response to the interrogatory regarding the surveyor Appellants would be using, Appellants stated: "To be determined."

In response to the failure to answer this interrogatory, Appellees moved to compel Appellants to answer. On or about January 20, 2012, the trial court ordered Appellants to answer the omitted discovery request within thirty days. Additionally at this time, a trial date was set for May 15, 2012. On March 29, 2012, Appellees had still not received any information regarding any surveys Appellants intended to use at trial. Appellees then filed a motion in limine seeking to exclude Appellants from calling any surveyors or producing any surveys at trial. The trial court gave Appellants one further extension and ordered that they provide Appellees with the information regarding the surveyor and surveys by April 24, 2012; otherwise the evidence would be excluded at trial. Appellants ultimately failed to produce the information by the deadline and the trial court prohibited them from calling any surveyors or producing any surveys at trial.

On May 3, 2012, Appellants' second trial counsel moved to withdraw. Over Appellees' objection, the trial court permitted the withdrawal. Shortly thereafter,

new counsel made his appearance on behalf of Appellants and moved for a continuance of the trial. That motion was granted.

On October 2, 2012, Appellees moved for summary judgment, requesting that the trial court enter an order quieting title to the land described in their deed and as shown on the survey completed by Darnell Engineering, Inc. On October 16, 2012, Appellants filed a response to the motion arguing that there were still material issues to be determined. Appellants claimed that the metes and bounds listed in their deed conflict with those listed in Appellees' deed and that they did have a survey that supported their position. Appellants did not name the surveyor, prepare a copy of the survey for the court, attach any affidavit to the response, or request the trial court to vacate its prior order denying them the opportunity to present a surveyor or survey at trial.

A hearing on the motion for summary judgment was held on October 22, 2012.[1] On November 27, 2012, the trial court granted summary judgment on behalf of Appellees and entered an order quieting title to the land as it was described in the survey of Darnell Engineering, Inc. The court reserved the issue of costs and damages until a hearing on December 21, 2012. After the hearing, on December 27, 2012, the trial court entered an order awarding $11,953.26 to Appellees. This figure breaks down as such: $2,001.05 for surveying expenses, $9,152.62 for attorney's fees and court costs, and $799.59 for fencing supplies purchased to replace the fence destroyed by Appellants. This appeal followed.

[1] If this hearing was recorded, it is not made part of the record; therefore, we do not know what evidence was presented by either party other than that stated in their respective pleadings.

> The standard of review on appeal of a summary judgment 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "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." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Appellants first argue on appeal that the trial court erred in granting summary judgment. They argue that the court failed to take into consideration the fact that they had evidence to support their claim, meaning that there were still genuine issues of material fact. Specifically, they claim they had a survey from a licensed surveyor, deeds, and testimony which would support their claim. We find that summary judgment was warranted in this case.

In the trial court, Appellants opposed the motion for summary judgment by arguing that the deeds conflicted and that they had a survey which supported their position in regards to the boundary lines. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Id.* at 436 (citation and footnote omitted). In the case at hand, Appellants only make allegations as to the evidence which supports their position. Appellants do not indicate what testimony was available as evidence, who their purported surveyor was, or in what ways the deeds conflicted. On the other hand, Appellees produced a licensed surveyor, a survey plat, and an affidavit in support of their motion. Appellants produced no "affirmative evidence" to sufficiently oppose the motion for summary judgment; therefore, we affirm.[2]

Appellants next argue that the court erred in awarding damages to Appellees. We agree in part. Most of the costs and damages awarded to Appellees were proper; however, the award of attorney fees was not. KRS 411.120 allows the prevailing party to recoup their "costs" from the defendant. In this case, Appellees were the prevailing plaintiffs; therefore, their costs, as well as damages

[2] As noted previously, the hearing on the motion for summary judgment was not included in the record. "Appellant has a responsibility to present a 'complete record' before the Court on appeal." *Hatfield v. Commonwealth*, 250 S.W.3d 590, 600 (Ky. 2008)(citation omitted). "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)(citation omitted).

for the destroyed fence, were recoverable. The recovery of costs by the prevailing party is permissible pursuant to CR 54.04. CR 54.04(2) lists such costs as:

> filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party.

In addition, KRS 453.050 lists such recoverable costs as:

> the tax on law process and official seals, all fees of officers with which the party is chargeable in the case, postage on depositions, the cost of copy of any pleading or exhibit obtained, the cost of any copies made exhibits and the allowance to witnesses, which the court may by order confine to not more than two (2) witnesses to any one (1) point.[3]

"Under our law, attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore." *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984). Here, the surveying costs, court costs, and damages for the destroyed fence are all recoverable, but the attorney fees are not. We therefore reverse the $9,152.62 award for attorney fees and court costs and remand for a new calculation which allows for the recovery of court costs only.

The final argument on appeal is that the trial court erred in granting the motion in limine. Appellants cite to no civil rule or procedure, statute, or case law to support this argument. It is within the discretion of the trial court to exclude

[3] KRS 453.050 allows attorney fees to be recoverable by the successful party, but only in a specific amount. For this case, that amount would be $5. KRS 453.060.

evidence when said evidence is not disclosed during discovery. *See Kemper v. Gordon*, 272 S.W.3d 146, 154 -155 (Ky. 2008); CR 37.02; CR 37.04. Here, Appellants had ample opportunity to disclose the identity of their surveyor or present the court with a survey plat, but did not do so. The court was within its discretion in granting the motion in limine to exclude such evidence.

Based on the foregoing, we affirm in part, reverse in part, and remand for a recalculation of costs which exclude the recovery of attorney fees.

ALL CONCUR

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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