

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001011-MR

DUANE ROBINSON AND  
JEAN ROBINSON

APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, JUDGE  
ACTION NO. 08-CI-00536

JASON GARDNER AND  
SHELLY GARDNER

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Duane and Jean Robinson appeal from a summary judgment granted by the Graves Circuit Court to Jason and Shelly Gardner in this boundary dispute case.

The Robinsons and the Gardners own adjoining parcels of land located on the east side of Highway 1949 in Graves County, Kentucky. The Robinsons own the tract to the north and the Gardners own the tract to the south.

Both tracts originated from the same parent tract of approximately two acres. Donald and Belvie Whitt, who owned the entire parent tract, conveyed a southern portion of the property to Suzanne Whitt by deed dated March 5, 1999. Later that year, Suzanne Whitt conveyed a strip of land running along her southern boundary to her neighbors, the Lampes. She received in exchange some land on her eastern boundary. The strip that she conveyed to the Lampes was fifteen feet wide at Highway 1949 and widened eastwards to twenty-seven feet in width.

On December 31, 2009, Jason Gardner and Shelly Cooper (now Gardner) purchased Suzanne Whitt's parcel of land. In 2006, Belvie Whitt conveyed the remainder of the parent tract, lying in the north, to the Robinsons.

The conflict began when the Gardners, believing that the Robinsons were encroaching on their property, had a survey performed by Dennis Looper of Purchase Area Surveying. The boundary line shown on the survey did not match the fence line that had been erected by the Robinsons.

On October 10, 2008, the Robinsons filed a petition for declaration of rights in the Graves Circuit Court, asking the court to establish the correct boundary between their property and that of the Gardners. The Gardners filed an answer, but no further action was taken in the case for over a year. A notice to dismiss for lack of prosecution was served on the parties in May 2010, but at the Robinsons'

request, the matter was allowed to remain on the court's docket. On November 30, 2010, the Gardners filed a motion for summary judgment. The Robinsons asked for the matter to be delayed, as they were in Florida for an extended stay, and also needed to retain new counsel. The trial court denied the motion for summary judgment because it was not accompanied by affidavits. The motion was re-noticed and, at the request of the plaintiffs' new attorney, summary judgment proceedings were continued. The Robinsons filed a response to the motion, asking that summary judgment be denied. On March 16, 2011, the Gardners moved for the matter to be set for trial. On March 22, 2011, the Robinsons filed a motion for summary judgment. On April 7, 2011, the trial court entered summary judgment in the Gardners' favor, relying on the Looper survey. The Robinsons filed a motion to alter, amend, or vacate, which was denied. This appeal followed.

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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996) (citing 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 Serv. Ctr, Inc.* 807 S.W.2d 476, 480 (Ky. 1991).

In granting summary judgment, the trial court relied on the deeds in the record, and the Looper survey submitted by the Gardners. The Robinsons claim

that they submitted a survey that contradicted the Looper survey, thus raising genuine issues of material fact about the location of the boundary. But the Robinsons' purported survey was first submitted to the trial court as an attachment to their motion to alter, amend, or vacate the summary judgment. The document is unauthenticated and appears to be hand-drawn. In its order denying the motion, the trial court explained that "[t]his survey is a stranger to the record, and has neither been introduced or mentioned before. The Plaintiffs have made no motion to introduce it into the record, nor could they at this late date. It is difficult to see how the survey they had performed could now be admissible under any theory considering especially that this action has pended for over two and one-half years." We agree with the trial court's decision in this matter. The Robinsons had more than enough time within which to submit an opposing survey, and any other evidence, for the trial court's consideration. "[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." *Steevest, Inc. v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

*Neal v. Welker*, 426 S.W.2d 476, 479–80 (Ky.1968) (internal citation omitted).

The trial court held that there had been an error in calculating the frontage of the original two-acre tract. Based on the acreage, the original tract should have had a frontage along Highway 1949 of approximately 312 feet. When the southern tract was conveyed to Suzanne Whitt, and the fifteen-foot strip was subsequently conveyed to the Lampes, there was a shortfall along the highway frontage of about thirty feet. The Looper survey was based on the theory that the thirty-foot shortfall should be taken from the Robinson tract, rather than the Gardners' tract. The Robinsons argue that when Suzanne Whitt conveyed the fifteen-foot strip to the Lampes, a new line was established by that deed, and that Dennis Looper should have recognized it as the Gardner and Lampe boundary. But the Robinsons have not pointed to any tangible evidence in the record, beyond their own interpretation of the pertinent deeds, to contest the trial court's reliance on the Looper survey. Under these circumstances, the trial court correctly ruled that the Robinsons were entitled to judgment as a matter of law.

The summary judgment is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

J. Todd Elmore  
Mayfield, Kentucky

BRIEF FOR APPELLEE:

David L. Hargrove  
Mayfield, Kentucky