

RENDERED: SEPTEMBER 5, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000592-MR

CARL DOUGLAS BUSH;  
KATHY BUSH; DANIEL RAY BUSH;  
AND ROBIN LOIS BUSH

APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KEN M. HOWARD, JUDGE  
ACTION NO. 07-CI-00670

MARY TERESA BENNETT, INDIVIDUALLY;  
SYLVESTER BENNETT; MICHAEL EDWIN  
BUSH, INDIVIDUALLY; TERRI BUSH;  
MARY TERESA BENNETT AND MICHAEL  
EDWIN BUSH AS CO-EXECUTORS OF THE  
ESTATE OF CARL E. BUSH, JR.; JACQUILINE  
CAROL BUSH; LISA JUNE MASON;  
MIKE MASON; AND SUSAN BELLE BUSH

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Carl Douglas Bush, Kathy Bush, Daniel Ray Bush and Robin Lois Bush have appealed from the Hardin Circuit Court's March 6, 2012, order awarding damages to Mary Teresa Bennett, individually; Sylvester Bennett; Michael Edwin Bush, individually; Terri Bush; Mary Teresa Bennett and Michael Edwin Bush as Co-Executors of the Estate of Carl E. Bush, Jr.; Jacqueline Carol Bush; Lisa June Mason; Mike Mason; and Susan Belle Bush. Following a careful review, we affirm.

This case arises from a dispute over a lease with an option to purchase pertaining to a parcel of property located in Hardin County, Kentucky. Carl D. Bush leased the premises from his father, Carl E. Bush, Jr., for a five-year term commencing September 1, 2004. Rental payments were to be \$1,000.00 per month and Carl D. Bush was granted a first option to purchase the property at lease-end for the sum of \$80,000.00. The lease was executed on July 13, 2005, by Carl D. Bush, Lessee, and Daniel R. Bush as power of attorney for Carl E. Bush, Jr., Lessor.

Carl E. Bush, Jr. died on August 25, 2005. Mary Bennett and Michael Bush were appointed as co-executors of his estate. Believing the July 13, 2005, lease had been improperly entered into, the Appellees—five surviving adult children of Carl E. Bush, Jr., along with their spouses—instituted the instant action on March 30, 2007, against the Appellants—two additional surviving adult children of Carl E. Bush, Jr., and their respective spouses—alleging the Appellants had colluded to defraud the estate of their deceased father and that Daniel Ray

Bush had breached his fiduciary duty under his father's power of attorney in executing the lease. Of primary concern were the monthly rental amount and the purchase price, both of which were alleged to be well below fair market value for the property, resulting in a substantial financial detriment to the estate and its heirs. The Appellees sought avoidance of the lease, immediate possession of the premises, payment of fair rental value for the property, damages for the Appellants' wrongful conduct, and other similar relief.

The Appellants responded, denying the allegations in the complaint and asserting counterclaims for breach of contract, tortious interference with a contractual relationship, malicious prosecution, abuse of process and breach of warranty. They sought specific performance and compensatory and punitive damages. Because they believed the lease was valid, the Appellants continued tendering the monthly rental payments to the Appellees, but the Appellees refused to negotiate the payments. In an effort to protect the interests of all parties, the trial court entered orders directing all rental payments coming due during the pendency of the action to be tendered to the circuit court clerk for placement in a special escrow account pending final resolution of the litigation.

On December 12, 2008, the Appellees moved the trial court for entry of default judgment, alleging the Appellants were over \$10,000.00 in arrears on the required monthly rental payments. Upon receiving documentary evidence and hearing oral arguments from both sides, the trial court entered an order on September 4, 2009, wherein it determined the Appellants had continued to occupy

and use the leased premises but failed to make the \$1,000.00 monthly rental payments for a thirteen-month period which included August and September 2005 and March 2006 through and including December 2006, for a total arrearage due of \$13,000.00.

On January 15, 2010, the Appellants tendered payment of \$10,000.00 to the circuit court clerk. In a February 8, 2010, letter, counsel for the Appellees informed the Appellants of the \$3,000.00 deficiency, but no payment for that amount was forthcoming. On August 17, 2010, the Appellees moved for summary judgment. After a full briefing schedule, the trial court entered an order on December 27, 2010, concluding the Appellants had previously been adjudicated to be \$13,000.00 in arrears; had paid only \$10,000.00 towards the arrearage; were notified by the Appellees that the failure to pay the remaining amounts would be considered a default under the terms of the lease; and the subsequent failure for ten months to pay the outstanding amounts constituted a default. The court further found the lease had expired on its own terms on August 30, 2009. Based on these findings and conclusions, the trial court granted summary judgment in favor of the Appellees and concluded they were “entitled to exercise those remedies for default which are provided in the lease agreement or by law.” A subsequent motion to alter, amend or vacate that order was denied.

A bench trial to determine damages was convened on December 12, 2011, during which it was stipulated: Don Pierce, a certified appraiser, had concluded the fair market value of the property was \$235,000.00 and the fair rental

value was \$2,000.00 per month; a copy of the recorded lease would be introduced without objection; the trial court would take judicial notice of the amount of money paid into escrow on behalf of the Appellants and being held by the Hardin Circuit Court Clerk; and the trial court would take judicial notice of the entire record in rendering its decision. Following the bench trial, the parties were permitted to file memoranda supportive of their respective positions. The Appellees demanded recovery of the premises within thirty days, payment of the funds held in escrow, additional rent for the time the Appellants had occupied the property at a rate of \$2,000.00 per month from the date of default until eviction, judicial release of the recorded lease, and their fees and costs. The Appellants argued they had stipulated only to what Pierce's testimony regarding the property values would be, not that his testimony was correct; insisted the \$1,000.00 monthly rate stated in the lease agreement should be used to calculate any amounts due; and, in the event the trial court restored the property to the Appellees, requested return of all funds held in escrow to prevent "manifest injustice, and the unjust enrichment of the [Appellees] to the substantial detriment of the [Appellants]."

On March 6, 2012, the trial court entered its damage judgment concluding the lease had never been voided or vacated, thus obligating the Appellees to pay the rentals of \$1,000.00 per month as specified in the lease from its inception on September 1, 2004, to its expiration on August 30, 2009. Beginning September 1, 2009, the Appellants became holdover tenants and, under

the provisions of KRS<sup>1</sup> 383.160, the trial court presumed the terms of the original lease carried over during any such period. The holdover period was determined to have ceased upon entry of the December 27, 2010, order declaring the Appellants to be in default, thereby obligating the Appellants to pay the fair market rental value for using the premises. Finding the only evidence regarding fair rental value to be the stipulated and uncontroverted testimony of Pierce, the trial court determined the amount to be \$2,000.00 per month, and this amount was to be paid for the time period commencing January 1, 2011, until such time as the Appellants vacated the premises. At the time of entry of the judgment, a total of \$102,000.00 was calculated to be due and owing and the special escrow account balance was \$71,318.01, for which the Appellants were given credit. This appeal followed.

The Appellants first contend the trial court's grant of summary judgment and finding of default constituted an abuse of discretion. Second, they argue the trial court clearly erred in concluding the fair rental value of the premises was \$2,000.00 per month. Finally, the Appellants aver the trial court's decision to award payment of all rents to the Appellees—regardless of the amounts used in the calculation—grants a windfall to the Appellees to the substantial detriment of the Appellants. Following a careful review, we conclude the Appellants' first argument is not properly before us and reject the second and third as being without merit.

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<sup>1</sup> Kentucky Revised Statutes.

The Appellants first argument centers around the trial court's entry of summary judgment against them and the finding in that order that they were in default under the terms of the lease. However, our review of the record indicates the trial court's entry of summary judgment occurred on December 27, 2010, and the Appellants' March 28, 2012, notice of appeal recites the appeal is being taken "from the Damage Judgment entered by Hon. Ken Howard, Judge of the Hardin Circuit Court, Division II, on March 6, 2012." No reference to the summary judgment order appears on the face of the notice of appeal. While the summary judgment was interlocutory and nonappealable, upon entry of the March 6, 2012, damage judgment—which was undoubtedly a final adjudication—the summary judgment became reviewable on appeal. However, no timely notice of appeal was filed with respect to that judgment. It is axiomatic that the timely filing of a notice of appeal is the procedural method by which jurisdiction of an appellate court is invoked and failure to strictly comply with this requirement is automatically fatal. *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918, 921 (Ky. App. 1988). Therefore, issues related to the trial court's grant of summary judgment are not properly before us and warrant no discussion.

Next, the Appellants contend the trial court abused its discretion in determining the fair market rental value of the leased premises was \$2,000.00. We disagree.

The standard of appellate review of questions regarding a trial court's findings of fact is well-established. Factual determinations made by the circuit

court will not be disturbed on appeal unless clearly erroneous. CR<sup>2</sup> 52.01.

Findings of fact are not clearly erroneous if supported by substantial evidence.

*Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)).

Although the Appellants believe the fair rental value of the premises should have been \$1,000.00 as called for under the terms of the lease, they fail to recognize the sole evidence regarding the actual fair rental value was the undisputed and stipulated opinion of Pierce, the real estate expert. In Pierce's expert opinion, he found the fair market value for the property to be \$235,000.00 and the fair rental value was \$2,000.00 per month. No other evidence was presented upon which the trial court could have based its determination regarding the appropriate rental value. Although the lease did, in fact, set the rental amount at \$1,000.00 per month, nothing in the record indicates the basis for this amount, whether it was fair and reasonable under the circumstances, or was in any way indicative of the fair rental value of the property. Thus, the rental amount set by the lease was of no evidentiary value on the subject matter of the trial court's decision, and we cannot say the trial court's reliance on the sole competent evidence presented on the matter constituted an abuse of discretion. Under these circumstances, we are simply unable to discern the logic of the Appellants' argument to the contrary.

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<sup>2</sup> Kentucky Rules of Civil Procedure.



Finally, the Appellants contend the trial court's decision to pay all rents to the Appellees was erroneous. Without citation to any authority supportive of their position nor to the record where this argument was presented to the trial court for adjudication, the Appellants baldly assert "it would be fundamentally unfair, and would constitute unjust enrichment, for the [Appellees] to receive any of the rental income escrowed and held by the Hardin Circuit Clerk." They further assert the Appellees will benefit from the "unwinding" of the lease while the Appellants will be completely denied the benefit of their bargain. Again, the Appellants cite no authority for their assertion. Bald assertions, lacking any evidentiary support and deficient in legal and logical reasoning, carry no weight and form an insufficient basis for relief. With no factual or legal basis presented, we are loathe to create an argument for a party and will not practice the case for them. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. 1979).

Having discerned no error, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Danny Butler  
Greensburg, Kentucky

BRIEF FOR APPELLEES:

Dwight Preston  
Elizabethtown, Kentucky