

RENDERED: JULY 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001468-MR

HEIDI WEATHERLY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 10-CI-00726

LAKE CUMBERLAND COMMUNITY
ASSOCIATION, INC.;
DAVID REMLEY;
GARY SEAGRAVES;
ROBERT KEISER;
ANTHONY ROGERS; and
D. BRUCE ORWIN

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: Heidi Weatherly appeals an order of summary judgment from the Pulaski Circuit Court dismissing claims of abuse of process she asserted against the above-captioned appellees. Finding no error, we affirm.

On May 21, 2010, Heidi filed a complaint against the appellees in Pulaski Circuit Court. Her complaint set forth the following allegations:

- 1.) The plaintiff, Heidi Weatherly, is the owner in fee simple of certain real property located at 400 Roberts Bend Road in Pulaski County, Kentucky.
- 2.) On or about November 3, 2008, she and her husband were sued in the Pulaski Circuit Court, Civil Action No: 08-CI-01675, by Anthony Delspina, Frances Delspina and Lake Cumberland Resort, Inc. over claims to an unrecorded easement.
- 3.) The defendants herein, Lake Cumberland Resort Community Association, Inc.; the individuals claiming to act as the Association Officers and Directors; and the Counsel for the Association, who also represented the original defendants, filed an intervening complaint thereafter against Heidi Weatherly and her husband seeking to alter the deed of a predecessor in title to include the real property conveyed into the Lake Cumberland Resort when they knew or should have known that such a claim was completely improper.
- 4.) The intervening complaint filed by the Association was dismissed by a Judgment on the Pleadings entered on July 06, 2008, as being contrary to established case law and further the Court denied a motion to amend the intervening complaint as outside the statute of limitations.
- 5.) The intervention of defendants in the Delspina/LCR, Inc. lawsuit was entered into with an ulterior purpose and was a willful act in the use of process not proper in the regular conduct of the legal proceeding.

- 6.) The defendants used the legal process against the plaintiff to accomplish a purpose for which it was not designed and therefore caused harm to the plaintiff by their actions.
- 7.) As a direct result of the actions of the defendants, and each of them, the plaintiff incurred costs and suffered damage in the amount to be proven at trial, but in any event in an amount in excess of the minimum jurisdictional limits of this Court.
- 8.) The actions of the defendants, and each of them, were intentional, and done with malice so as to warrant the award of exemplary or punitive damages in addition to compensatory damages.

Thereafter, each of the appellees filed answers; several years of discovery ensued; dispositive motions were eventually filed; and, on August 20, 2015, the circuit court summarily dismissed Heidi's complaint.

As to why, the circuit court prefaced its order by stating "In her complaint, [Heidi] states only one cause of action, the tort of abuse of process, against the [appellees]." The court then explained that summary judgment was warranted because, despite her broad allegations to the contrary, Heidi had failed to produce any evidence indicating the appellees had initiated legal process against her for an ulterior purpose, or committed any willful act in the use of process not proper in the regular conduct of a legal proceeding—the two material elements of any abuse of process claim.¹

On appeal, Heidi's contentions are two-fold.

¹ See *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980).

First, Heidi argues the circuit court erred in interpreting her complaint as asserting *only* a claim for abuse of process. Heidi contends in her brief that “the facts as alleged, and supported by the evidence could also constitute the tort of wrongful initiation of civil proceedings,” and she reasons that the circuit court erred because it “failed to consider possible applicability” of that other tort.

However, if the circuit court erred in this respect, it was incumbent upon Heidi to bring this error to its attention by filing a timely motion to alter, amend, or vacate the judgment pursuant to Kentucky Rule of Procedure (CR) 59.05. Heidi failed to do so; the circuit court was never apprised of its purported error; and Heidi’s argument in this vein is accordingly unpreserved. “A basic general principle of the Rules of Civil Procedure is that a party is not entitled to raise an error on appeal if he has not called the error to the attention of the trial court and given that court an opportunity to correct it.” *Little v. Whitehouse*, 384 S.W.2d 503, 504 (Ky. 1964) (citations omitted.)

Next, Heidi contends the circuit court erred in summarily dismissing her claims of abuse of process against the appellees.

For purposes of reviewing an order of summary judgment, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (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 Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

As noted, the circuit court determined the appellees were entitled to summary judgment because Heidi failed to present evidence of the two material elements of abuse of process. With that said, Heidi's appellate brief includes no citation to *any* portion of the record, much less any portion of the record providing evidence that a genuine issue of material fact exists with respect to those two material elements. CR 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with *ample supportive references to the record* and citations of authority pertinent to each issue of law. . . ." (Emphasis added.) Because Heidi's brief lacks any supportive references to the record, it does not comply with CR 76.12(4)(c)(v). It is not the responsibility of this Court to search the record to find support for her contentions, assuming it exists. *Smith v. Smith*, 235 S.W.3d 1 (Ky. App. 2006). Rather than ordering her brief stricken for this deficiency,² however, a more appropriate penalty in this instance is to refuse to consider the merits of her contentions regarding the dismissal of her abuse of process claims. *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

In short, Heidi presents no basis for reversing the circuit court. We therefore AFFIRM.

² In light of Heidi's noncompliance with CR 76.12(4)(c)(v), the appellees jointly moved to dismiss her appeal. This Court denied their motion by separate order.

ALL CONCUR

BRIEF FOR APPELLANT:

Tommie L. Weatherly
London, Kentucky

BRIEF FOR APPELLEE LAKE
CUMBERLAND COMMUNITY
ASSOCIATION, INC.:

David A. Nunery
Campbellsville, Kentucky

BRIEF FOR APPELLEE D. BRUCE
ORWIN:

Richard Hay
Sarah Hay Knight
Somerset, Kentucky

BRIEF FOR APPELLEE GARY
SEAGRAVES:

John T. Pruitt, Jr.
Somerset, Kentucky