

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

NO. 2017-CA-001117-MR

TROY BENNETT

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 16-CI-00324

GLENN BENNETT, INDIVIDUALLY AND AS  
CONSERVATOR

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Troy Bennett appeals from the Meade Circuit Court's grant of summary judgment in favor of Glenn Bennett and upholding the Meade District Court's order of the sale of certain real property. Finding no error, we affirm.

## BACKGROUND

Troy and Glenn Bennett were the sons of Kenneth Bennett. On August 26, 2016, the Meade District Court adjudicated Kenneth wholly disabled in managing his financial resources and appointed Glenn as Kenneth's conservator (the "Conservator"). We note at the outset that the proceedings and pleadings at the Meade District Court level were not included in the record on appeal, so a number of the facts in this section are based solely on the recitation of facts contained in the Meade Circuit Court's order concerning the sale of the real property at issue in this appeal. According to the circuit court's order, the district court fixed Glenn's fiduciary bond at \$70,000.00, and such bond was posted by Glenn and approved by the district court on August 26, 2016.

Thereafter, upon motion by the Conservator, the Meade District Court entered an order on November 23, 2016, under the provisions of Kentucky Revised Statutes (KRS) 389A.010 (the "Sale Order"), empowering the Conservator to sell a 10.11-acre tract of real property owned by Kenneth. Again, according to the circuit court's order, the Conservator's motion to the Meade District Court for the Sale Order included the following language – "THE STATUTE REQUIRES THAT THE MOVANT REQUEST THAT HIS BOND BE INCREASED IN AN ADEQUATE AMOUNT IN ACCORDANCE WITH KRS 395.130 AND T HIS [SIC] THE MOVANT SO REQUESTS. HOWEVER, IT IS EMPHASIZED

THAT THE BOND OF THE UNDERSIGNED IS ALREADY SHOULD BE [SIC] ADEQUATE.” In the Sale Order, the district court made a specific finding that the Conservator had complied with all of the requirements of KRS 389A.010. The Sale Order did not modify the Conservator’s bond.

Troy did not file a motion to alter, amend, or vacate the Sale Order. Rather, on December 15, 2016, Troy commenced an original action in the Meade Circuit Court under the provisions of KRS 389A.010(4), which allows an “aggrieved party” to file an “adversary proceeding” in the circuit court with respect to an order “affecting the right of the fiduciary to sell or mortgage” property. Troy’s complaint alleged the following causes of action: (1) Glenn’s motion for the Sale Order did not contain a statutorily required request for the fiduciary bond to be increased pursuant to KRS 389A.010(2) and (2) Glenn Bennett made false claims at the district court hearing regarding the Sale Order.

Troy’s original complaint in the circuit court named only Glenn, individually, along with two other individuals, as defendants. The Meade Circuit Court subsequently dismissed the other two individuals from the lawsuit and allowed Troy to amend his original complaint twice in an effort to add the Conservator as a party to the action. Troy was never able to successfully do so, incorrectly referring to Glenn in subsequent pleadings as Kenneth’s “Guardian” and continuing to maintain Troy’s claims against Glenn in his individual capacity.

However, Troy's claimed causes of action remained the same in his amended complaints.

Glenn filed a motion to dismiss Troy's complaint on January 7, 2017 and renewed motions to dismiss on February 1, 2017 and February 17, 2017, in response to Troy's amended complaints. Additionally, Glenn filed a motion for judgment on the pleadings on March 2, 2017. In Troy's response to the last of Glenn's renewed motions to dismiss, Troy included an affidavit and an un-notarized and un-recorded deed purporting to convey to Troy 3.55 acres of Kenneth's 10.11-acre tract of real property. Troy had produced neither the affidavit nor the deed at any other time during the previous proceedings in either the district or circuit court.

The circuit court ultimately treated the foregoing motions as a motion for summary judgment based on the inclusion of the extra materials by Troy in his response. Thereafter, the circuit court, via an order entered on April 3, 2017, granted Glenn's motion for summary judgment and dismissed all of Troy's claims. In so doing, the circuit court noted that Troy never successfully captioned the defendant correctly, but declined to dismiss the case based on that issue. Rather, the circuit court found that Glenn had not only included in his motion for the Sale Order a request for an increased bond, but found that Troy's allegation to the contrary was so frivolous and without merit that the circuit court imposed

sanctions under Kentucky Rule of Civil Procedure (CR) 11. Further, the trial court found that there were no facts or evidence supporting Troy's assertions that Glenn had made false statements at the district court hearing or that Troy had a claim to any of Kenneth's real property.

Troy subsequently filed two motions seeking to vacate and set aside the trial court's April 3, 2017 order. The circuit court denied both of those motions on June 14, 2017, and Troy filed a notice of appeal on June 26, 2017.

### ANALYSIS

As a preliminary matter, in contravention of CR 76.12(4)(c)(v), nowhere can this Court discern in the "Argument" section of Troy's briefs any relevant and specific citations to the record on appeal supporting each of his arguments. Rather, the only references made were to case citations, portions of the Meade District Court record that Troy failed to ensure were included in the record on appeal, and a copy of Kenneth's VA card improperly included under CR 76.12(4)(c)(vii) as an exhibit to his brief.

Moreover, the only statement conforming to the requirement of CR 76.12(4)(c)(v) that a brief contain "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner" is one sentence containing an incorrect citation to the record and a blanket assertion that all of Troy's claims on appeal were

presented “by opposing the Appellee’s Motions to Dismiss.” We must assume that Troy is referring to his March 8, 2017 “Response to the Defendants’ Renewed Motion to Dismiss,” in which he discusses his allegations of Glenn’s false testimony to the district court, whether Troy had standing to assert his claims, and whether the district judge was an indispensable party to the proceeding. However, Troy did not specifically point this Court to any part of the record in which his allegations that the trial court’s use of extrajudicial evidence was an abuse of discretion were preserved.

Kentucky courts have held that “[c]ompliance with CR 76.12 is mandatory.” *Stowe v. Realco Limited Liability Company*, 551 S.W.3d 462, 465 (Ky. App. 2018) (citing *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010)). An error “must be precisely preserved and identified in the lower court” to be preserved for review by an appellate court. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citations omitted). Further, as stated by the Kentucky Supreme Court in *Phelps v. Louisville Water Co.*, CR 76.12(4)(c)(v) “mandates that a party indicate how an issue is properly preserved for review by an appellate court . . . and we will not search the . . . record on appeal to make that determination.” 103 S.W.3d 46, 53 (Ky. 2003).

As a result of the foregoing, we are not required to consider the portions of Troy’s brief not conforming to CR 76.12 and may summarily affirm the

trial court on the issues containing such deficiencies. *See Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985) (citing *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) (“Rather than ordering appellants’ brief stricken, however, we have elected not to consider appellants’ remaining three contentions as an appropriate penalty to impose for their failure to comply with CR 76.12.”)).

Therefore, because the other issues in Troy’s brief either did not contain adequate citations to the record on appeal or were not appropriately preserved, the only issue we shall review is whether the circuit court’s April 3, 2017 order properly granted summary judgment in favor of Glenn.

The circuit court properly treated Glenn’s motions to dismiss as a motion for summary judgment, as “reliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion for summary judgment.” *D.F. Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W.3d 818, 821 (Ky. App. 2011) (citing *McCray v. City of Lake Louisville*, 332 S.W.2d 837, 840 (Ky. 1960); CR 12.02). An appellate court reviews a trial court’s granting of summary judgment to determine “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.” *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). This Court must review the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts

are to be resolved in his favor.” *Id.* (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)). Appellate review of the trial court’s ruling is *de novo*. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014).

As previously stated, in this case, Troy asserted two causes of action in both his original and amended complaints: (1) that the Sale Order was invalid because of an alleged failure of Glenn’s motion seeking such Sale Order to include a request to increase the bond and (2) that Glenn allegedly gave false testimony in a hearing before the Meade District Court.

As to Troy’s first claim, because Troy did not ensure that the applicable record from the Meade District Court proceedings were made a part of the record on appeal, we do not have a copy of Glenn’s motion for the Sale Order. While Troy attempted to designate the Meade District Court records in a later order, they were not included in the record on appeal presented to this Court. It was ultimately Troy’s responsibility as the appellant to ensure that the record on appeal was “sufficient to enable the court to pass on the alleged errors.” *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). “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). Here, the circuit



court made a finding of fact that Glenn's motion to the district court concerning the Sale Order specifically included language requesting an increase in the bond. Under the foregoing assumption, there is no genuine issue of material fact as to Troy's first alleged cause of action and the circuit court's summary judgment is affirmed.

Likewise, we do not have any information concerning the Meade District Court hearing with which to conduct a review concerning Troy's second alleged cause of action alleging that Glenn made false statements at such hearing. We were provided with no video or transcript of the hearing or other information upon which to base a decision. Because the Meade District Court records are not included in the record on appeal, this Court must assume that those records support the circuit court's decision in granting summary judgment as to Troy's second claim. Therefore, the Meade Circuit Court's summary judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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