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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000216-MR

AMY JOHNSON AND
ROBERT BELL — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 18-CI-00765

COMMUNITY TRUST & INVESTMENT
CO., AS EXECUTOR OF THE ESTATE
OF HOBART C. JOHNSON; AND
BENJAMIN JOHNSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Amy Johnson and Robert Bell appeal from the Pike Circuit Court order granting summary judgment to Benjamin Johnson in the declaratory judgment action filed by the executor of their late father's estate. We affirm.

Hobart Johnson was born in 1931. On May 29, 2015, he executed a will which, among other things, named his three children – daughter Amy, son Benjamin, and stepson Robert – as residuary beneficiaries in his estate. On that same date, Hobart deeded to Benjamin a certain piece of property known to the family as the Shelby Creek property. Benjamin did not record the deed but rather held on to it, at Hobart's request, until after Hobart's death.

Hobart passed away on February 1, 2018. His will was admitted to probate one week later in Pike District Court. Community Trust and Investment Company was appointed as executor of the estate. On February 12, 2018, Benjamin notified Community Trust about the deed to the Shelby Creek property and advised the executor of the circumstances surrounding the deed's execution.

On June 25, 2018, Community Trust filed, in the Pike Circuit Court, a declaratory judgment action requesting clarification whether the Shelby Creek property belonged to Benjamin or as property in the residual estate. Amy and Robert filed separate answers in response, and they argued that, because the will predated Benjamin's notification of the unrecorded deed, the will should be given precedence under Kentucky Revised Statute (KRS) 382.270. Benjamin filed his answer and cross-claim on July 19, 2018. In their joint reply to the cross-claim, Amy and Robert alleged that their father "was not competent to execute a Deed as he was suffering from a severe mental impairment."

An agreed order establishing a briefing schedule was entered on August 27, 2018. Within a month, Benjamin filed a motion for summary judgment, and Amy and Robert filed their response four weeks later. A hearing was held on October 26, 2018, and the matter was taken under advisement. On November 27, 2018, the circuit court entered summary judgment in favor of Benjamin. Amy and Robert then filed a motion, pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, to alter, amend, or vacate the judgment. After Benjamin responded to the motion, Amy and Robert filed an amended CR 59.05 motion. Another hearing was held on January 11, 2019. The circuit court entered its order denying the motion on January 15, 2019, and Amy and Robert appeal.

As a preliminary matter, we note that the appellants' brief fails to comply with the mandates of CR 76.12(4)(c)(v) (which requires that an appellant state where in the record an issue was preserved for appeal). "[A]n appellate court cannot consider items that were not first presented to the trial court." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). Thus, CR 76.12(4)(c)(v) serves an important purpose. "It is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court . . . ." *Id.* Past panels of this Court have held that "substantial compliance" with this rule is mandatory. *Id. See also Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. App. 1990).

"It is not the job of this or any appellate court to scour a record to determine whether these citations support a party's assertions. *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016)." *Prescott v. Commonwealth*, 572 S.W.3d 913, 918 (Ky. App. 2019).

Appellants' brief fails to state where and in what manner they preserved the issues raised on appeal. They failed to attempt to remedy these omissions by filing a reply brief. CR 76.12(2)(a). Furthermore, the brief lacks a Statement of Points and Authorities mandated by CR 76.12(4)(c)(iii) for all briefs over five pages (theirs is seven pages in length).

This being the case, our options are "(1) to ignore the deficienc[ies] and proceed with the review; (2) to strike the brief or its offending portions . . . ; or (3) to review the issues raised in the brief for manifest injustice only[.]" *Briggs v. Kreutztrager*, 433 S.W.3d 355, 361 (Ky. App. 2014) (citation and internal quotation marks omitted). Rather than penalize the appellants for errors committed by counsel, we elect to look past these omissions and proceed without sanction against them; and we do so with the confidence that their counsel will comply more strictly with the mandates of CR 76.12 in future appeals.

We next enunciate our standard of review of the granting of summary judgment, namely:

> "The standard of review on appeal of summary judgment is whether the trial court correctly found there

> are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves only legal questions; whether a fact is material and, if so, whether there is a genuine issue regarding that material fact are legal questions. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Thus, we utilize a *de novo* review standard. *Id.*
>
> Kentucky courts have repeatedly stated, and we continue to adhere to these bedrock principles, that summary judgment is an extraordinary remedy, it is to be "cautiously applied[,]" and it "should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). "The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists." *Shelton v. Kentucky Easter Seals Soc'y*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). This requires both the trial court and this Court to 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." *Steelvest*, 807 S.W.2d at 480.

Joiner v. Kentucky Farm Bureau Mutual Insurance Company, 582 S.W.3d 74, 77-78 (Ky. App. 2019). Here, the facts must be viewed in a light most favorable to Amy and Robert. *Id.* at 78.

Appellants argue that summary judgment was improperly granted because Kentucky's recording statute gives priority to the will's devisees since it was filed in probate prior to the recording of the Shelby Creek property deed. That statute, KRS 382.270, is titled "Instruments not valid against purchasers or

creditors unless acknowledged or proved; exemption for instruments otherwise lodged for record." It reads as follows:

> No deed or deed of trust or mortgage conveying a legal or equitable title to real property shall be lodged for record and, thus, valid **against a purchaser for a valuable consideration**, without notice thereof, **or against creditors**, until such deed or mortgage is acknowledged or proved according to law. However, if a deed or deed of trust or mortgage conveying a legal or equitable title to real property is not so acknowledged or proved according to law, but is or has been otherwise lodged for record, such deed or deed of trust or mortgage conveying a legal or equitable title to real property or creating a mortgage lien on real property shall be deemed to be validly lodged for record for purposes of KRS Chapter 382, and all interested parties shall be on constructive notice of the contents thereof. As used in this section "creditors" includes all creditors irrespective of whether or not they have acquired a lien by legal or equitable proceedings or by voluntary conveyance.

(Emphases ours.)

> No mortgage, deed or deed of trust conveying real property is valid against a purchaser for a valuable consideration, without notice thereof, or creditors until it is properly filed. KRS 382.270. A mortgage, deed or deed of trust shall take effect at the time it is filed. KRS 382.280. The combined effect of these statutes is known as the "race-notice" rule. In other words, one must not only be the first to file the mortgage, deed or deed of trust, but the filer must also lack actual or constructive knowledge of any other mortgages, deeds or deeds of trust related to the property.

Wells Fargo Bank, Minnesota, N.A. v. Commonwealth, Finance and Admin., Dep't of Revenue, 345 S.W.3d 800, 804 (Ky. 2011). "Put another way, a prior interest in

real property takes priority over a subsequent interest that was taken with notice, actual or constructive, of the prior interest." *Mortgage Electronic Registration Systems, Inc. v. Roberts*, 366 S.W.3d 405, 408 (Ky. 2012).

The circuit court aptly noted that the statute protects purchasers and creditors but makes no mention of devisees. It stated: "Neither Hobart's Estate, Amy Johnson, [n]or Robert Bell are purchasers under the law thus there is no interpretation of the statute that could be given to bring them within its ambit of protection." We agree. The "race-notice" statute is simply not applicable to the Johnson Family's situation. The circuit court did not err in granting summary judgment to Benjamin regarding the priority of his deed.

Moreover, it makes no sense to this Court that Amy and Robert would question the competency of their father to execute the deed to Benjamin but not Hobart's competency to execute the will itself, even though the will and the deed were executed on the same date. The record is devoid of evidence of Hobart's alleged "severe mental impairment." And, as the circuit court noted, there was no challenge to the validity of the deed other than the date of its filing. We decline to discuss further the appellants' argument that they should have been given more time to buttress these allegations when they had ample opportunity to present the matter to the circuit court yet failed to do so. "[T]he party opposing summary judgment [must] present 'at least some affirmative evidence showing that there is a

genuine issue of material fact for trial."' *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482) (other footnoted citations omitted). Hence, we affirm the circuit court's holding that appellants' failure to offer such evidence was fatal to their claim of Hobart's mental incompetence.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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