RENDERED: NOVEMBER 13, 2026; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-1355-MR

HOWARD MILLER, DARREN HULINGS, AND MOIRA MYER — APPELLANTS

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
ACTION NO. 25-CI-00072

DARLENE CAMP; JANIE O'DONOGHUE; GREG E. MOORE; KATHLEEN MOORE; BRADLEY N. BRUNER; SARAH BRUNER; DONALD O'DONOGHUE; STEVEN HAYCRAFT; KIM MCCARTY; CONNIE WEBSTER; RUTH K. O'DONOGHUE; BRENT PRIEST; MARY JO HESS; RONALD O'DONOGHUE; TESSA K. O'DONOGHUE; JOSEPH T. O'DONOGHUE; LARRAINE O'DONOGHUE; DENISE HEAVRIN; DAVID HEAVRIN; DANIEL F. O'DONOGHUE; AND PATRICIA O'DONOGHUE — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ECKERLE, L. JONES, AND KAREM, JUDGES.

KAREM, JUDGE: Howard Miller, Darren Hulings, and Moira Myer ("the appellants") appeal from the Breckinridge Circuit Court's findings of fact, conclusions of law, and judgment. The appellants filed suit against the developers of their subdivision, alleging breach of a written agreement to maintain a private roadway. Before any discovery was taken, the circuit court granted the developers' motion to dismiss. In doing so, it considered matters outside the pleadings, thereby converting its ruling into a summary judgment. Because a summary judgment may not be granted unless there has been an opportunity to conduct discovery, we vacate and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1997, a group of twenty-six individuals, "The Buddy O'Donoghue Estate and Heirs," created a subdivision in Breckinridge County. At that time, they signed a document styled "Private Roadway Maintenance Agreement" ("the Agreement").

The Agreement states in pertinent part as follows:

> Developer has reserved a 40 foot easement for road and utility purposes . . . for the purpose of providing ingress and egress from the public road **Sandy Beach** to the

subdivided tracts for the owners, their heirs, assigns and invitees to freely pass over, as shown on the above mentioned plat.

NOW THEREFORE, in order to provide for the future maintenance of the private road, the easement for which is shown on the aforesaid plat, the Developers do hereby establish a Private Roadway Maintenance Agreement and do hereby impose the following covenants and stipulations on the properties adjoining the private road:

1. This agreement shall be binding upon the successors and assigns of the Developers. This agreement shall also be binding on additional tracts that may be subdivided from the original division of August 16, 1997.

2. No lien on the land shall be created or imposed by this agreement and all charges made herein shall be personal in nature and may be enforced in any court with jurisdiction in Breckinridge County, Kentucky, as any personal debt. Every person purchasing said property shall consent to the jurisdiction and venue of the appropriate civil court in Breckinridge County, Kentucky by accepting delivery of the deed. It is the intention of the developer that no liens be imposed on any of the land by this contract, but that charges made herein shall be enforceable as any unsecured lien. . . .

3. The Developers shall act as the Improvement Committee until the conditions mentioned hereinafter occur. They shall have all the powers and duties of the committee.

4. After the closing of the sale of the subdivided tracts, one of the Developers, Sarah Bruner, shall appoint three tract owners of the divided land to serve for two (2) years as Trustees of the Improvement Committee, hereinafter referred to as Committee. The Committee

shall exercise those duties and functions set forth in this agreement. Any vacancy on the Committee shall be filled by a majority vote of tract owners as provided by rules adopted for the Conduct of Business of the Committee. The Committee shall make reasonable rules and regulations for its operation and election of Trustees and may employ such agents as will enable it to carry out provisions of this agreement. A quorum may be less than 50% of the tract owners if agreed upon by the owners and their rules and regulations may be enforced by law or equity as part of this agreement.

5. Each of the tracts included in the Division served by the road shall be subject to an annual maintenance charge of $75.00 per year. The charge shall become due and payable first upon delivery of deed by Developer and on **September 16th** of each year thereafter. It is the Developer's intention that each tract owner pay the maintenance charge on delivery of deed and on each and every **September 16th** thereafter, as long as this agreement exists. Each additional tract created by a further division, shall count as an additional tract for road assessment purposes.

Annual maintenance charges may be increased upon affirmative written approval of forty (40%) percent of the tract owners, which may be obtained by simple petition of the Trustees.

6. The Committee shall apply the funds raised from maintenance charges towards the payment of maintenance expenses incurred for, but not limited to, the following purposes:

a. For improving, cleaning, maintaining, and required construction of the road to the public road maintained for the general use of the owners and occupants of the land described in the original tracts.

> b. For the operation and maintenance of any storm water drains now or hereinafter constructed on said tracts and the mowing and cleaning of road right of way.
>
> c. For legal expenses and costs in enforcement of street damage or any matter affecting the road providing access to the tracts described herein.
>
> d. For reimbursement on a pro rata tract basis of any funds on hand at termination of this agreement, when said road is dedicated to a public use and becomes County or State Maintained.
>
> . . . .
>
> 8. The terms and conditions of this Private Roadway Maintenance Agreement shall be covenants running with the land and shall continue until said road has been dedicated to a public use.
>
> 9. The aforesaid road may be dedicated to the public use upon affirmative written approval of at least 50% of the tract owners. A tract owner is considered as any owner required to pay the $75 annual road maintenance fee as set out in paragraph 5 above.

Over the following twenty-eight years, the condition of the roadway deteriorated. According to the appellants, trees and vegetation were permitted to grow in the easement and, in many places, the roadway is now no more than a grass-covered path.

On March 24, 2025, the appellants, a group of current property owners in the subdivision, filed a complaint against twenty-one of the original

twenty-six signatories of the Agreement ("the appellees").[1] The complaint asserted that they had purchased their properties in reliance on the Agreement, and that the appellees had bound themselves and their successors and assigns to its terms. The complaint asked the court to require the appellees to implement and abide by the terms of the Agreement; enter judgment in an amount necessary to restore the roadway; to mark and designate the roadways subject to the Agreement and to provide an accounting of all monies received or collected for the implementation of the Agreement.

On April 10, 2025, the appellees filed a motion to dismiss, pursuant to Kentucky Rule of Civil Procedure (CR) 12.02, arguing that they had fulfilled any and all of their duties under the Agreement and that any further obligation to fund the road maintenance lies with the landowners and the Trustees to oversee the funds. Attached to the motion was a copy of a letter purporting to confirm that on September 16, 1997, Sarah Bruner, one of the original developers, appointed James E. O'Donoghue, George Fentress, and Daniel F. O'Donoghue as Trustees of the Improvement Committee. These three individuals signed a document stating that they had received "payment of said Road Maintenance Agreement in full." Also attached to the motion was a bank statement for the month of November 2015, showing a balance of $2,188.29 in a Road Fund held by Eddie O'Donoghue and

[1] Several of the original developers are now deceased.

Danny O'Donoghue, and a cashier's check dated December 22, 2015, for that amount, payable to Ronnie Henning. According to the motion, this sum was payment for gravel for the road. The motion states that this was the last known bank account for the road fund and it was closed after this payment.

With the motion to dismiss, the defendants also tendered proposed findings of fact, conclusions of law, and judgment, granting the motion to dismiss with prejudice, at the plaintiffs' cost.

The appellants filed a response on May 6, 2025, arguing that because the motion to dismiss had referred to and included exhibits outside the pleadings, it should be treated as one for summary judgment. They pointed out that no answer had been filed and that summary judgment was only appropriate if the opposing party had been afforded ample opportunity to complete discovery. They reiterated that they purchased their properties in reliance upon the existence of the Agreement and that the original developers were still subject to the covenants and stipulations running with the land.

On May 7, 2025, an order was entered transferring the case from Division I to Division II of the Breckinridge Circuit Court. On May 13, 2025, the circuit court, Division II, entered an order stating that it had reviewed the pleadings, motions, and briefs filed in the case and believed that the motion to dismiss should be treated as a motion for summary judgment. The court held the

motion to dismiss in abeyance and ordered the defendants to file an answer to the complaint within ten days.

The appellees filed an answer on May 21, 2025, arguing that they had fulfilled any and all of their duties under the Agreement, were not obligated to fund improvements to the road, and were not proper parties to the lawsuit.

On August 4, 2025, the circuit court signed and entered the findings of fact, conclusions of law, and judgment, tendered by the appellees with their original motion to dismiss. The circuit court applied the motion to dismiss standard found in CR 12.02 and concluded that plaintiffs had failed to state a claim upon which relief might be granted against the defendants because none of the defendants as developers had any additional obligations under a clear reading of the Agreement, and that the obligation for funding and maintenance of the road lies with the landowners and Trustees.

The appellants filed a motion to alter, amend, or vacate, pursuant to CR 59.05 and CR 60.02, reiterating their previous arguments. The court entered an order setting a briefing schedule, giving the defendants twenty days to respond to the motion to alter, amend, or vacate and ten days for the plaintiffs to file a reply. On September 4, 2025, the appellees filed a response arguing that the appellants had failed to meet the standard for relief under CR 60.02. The appellants did not

file a reply. On September 24, 2025, the circuit court entered an order denying the motion to alter, amend, or vacate.

This appeal followed.

ANALYSIS

CR 12.02 provides in part as follows:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

CR 12.02.

Thus, "[a] trial court 'may properly consider matters outside of the pleadings in making its decision [on a motion to dismiss]. However, reliance on matters outside the pleadings by the court effectively converts a motion to dismiss into a motion for summary judgment.'" *Chen v. Lowe*, 521 S.W.3d 587, 591 (Ky. App. 2017) (quoting *D.F. Bailey, Inc. v. GRW Eng'rs, Inc.*, 350 S.W.3d 818, 820-21 (Ky. App. 2011)). In its order of May 13, 2025, the court itself stated that it believed the motion to dismiss should be treated as one for summary judgment.

Because the circuit court in this case considered matters outside the pleadings, we must treat its ruling as a grant of summary judgment. *Id*.

In reviewing a grant of summary judgment, our inquiry focuses on "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); CR 56.03. Of particular relevance to this case, "[e]ven though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Puckett v. Elsner*, 303 S.W.2d 250 (Ky. 1957)).

It is a well-established principle, stated in CR 12.02 and reiterated in our case law, that summary judgment should not be granted unless the opposing party has been given an opportunity to conduct discovery.

> A trial court can grant a summary judgment only after the litigants have been provided an ample opportunity to complete pretrial discovery. It is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and then fail to produce any evidence to create a genuine issue of material fact.

Martin v. Pack's Inc., 358 S.W.3d 481, 485 (Ky. App. 2011) (citing *Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet*, 758 S.W.2d 24 (Ky. 1988)). Recently, the Kentucky Supreme Court referred to its "repeated affirmation that summary judgment motions should not even be considered by trial

courts until the opposing party has had an adequate opportunity for discovery." *Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc.*, 701 S.W.3d 129, 141 n.9 (Ky. 2024) (citing *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010)).

The reason for following this rule is that "a premature summary judgment inevitably leads the record to be fatally incomplete[.]" *Bowlin Group, LLC v. Rebennack*, 626 S.W.3d 177, 187 (Ky. App. 2020). "'[F]or summary judgment to be properly granted, the party opposing the motion must have been given adequate opportunity to discover the relevant facts. Only if that opportunity was given do we reach the issue of whether there were any material issues of fact precluding summary judgment.'" *Id*. (quoting *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007)).

"The question is not whether the nonmoving party 'has actually completed discovery'—rather, the question is whether the nonmoving party 'has had an opportunity to do so.'" *Id*. at 188 (quoting *Hartford Ins. Group v. Citizens Fidelity Bank & Tr. Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979)). We are directed to "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling[,] a decision which we review for abuse of discretion." *Id.* at 187 (internal quotation marks and citation omitted).

Because the appellants were not afforded any opportunity to conduct discovery, the circuit court's decision to dismiss the case was an abuse of its discretion.

CONCLUSION

For the foregoing reasons, we vacate the circuit court's findings of fact, conclusions of law, and judgment, and remand for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Stephen G. Hopkins
Hardinsburg, Kentucky

BRIEF FOR APPELLEES:

Jessica Brown Roberts
Kenton R. Smith
Brandenburg, Kentucky