

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001544-MR

PAULA NAPIER AND LARRY NAPIER

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 04-CI-00423

JAMES D. FUGATE AND ALICE FUGATE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Larry and Paula Napier appeal from a judgment of the Perry Circuit Court quieting title to a parcel of real property. The Napiers maintain that the trial court erred by entering a judgment even though they were not given notice of a surveyor's deposition and before they were able to obtain an order with discovery deadlines. For the reasons stated below, we affirm the judgment on appeal.

James and Alice Fugate filed the instant action in Perry Circuit Court seeking to quiet title and establish a boundary line on a tract of real property to which they hold title. The action was filed against the adjoining land owners, Larry and Paula Napier, who answered and counterclaimed. The parties trace their titles to a common source, namely a 30 acre parcel once owned by James and Paula's grandparents.

In quieting title in favor of the Fugates, the circuit court relied on a boundary description set forth in the Fugates' predecessor deeds, the testimony of the parties, and the findings of a surveyor who established the location of a boundary rock. The court found the location of this rock to be dispositive in resolving the title action in favor of the Fugates, and the Napiers filed the instant appeal.

The Napiers first argue that the trial court committed reversible error by quieting title in favor of the Fugates when the Napiers were unable to find a signed discovery order in the record. Counsel for the Napiers notes that she was unable to find such an order at the Perry County court house even with the assistance of the court clerk, and appears to maintain that it was improper for the circuit court to enter a judgment before the Napiers could examine and comply with such an order. As such, the Napiers seek a "finding" that the circuit court erred

in ruling in favor of the Fugates on the disputed boundary issue.

Having reviewed this claim of error, we must first note that the appellants' brief fails to comply with CR 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky.App. 1985).

Nevertheless, we have closely examined the Napiers' argument and find no error. The Napiers direct our attention to the conduct of their trial counsel, who purportedly attempted to find in the record a signed discovery order. Counsel's attempts to locate such an order are not memorialized in the record. Our review is confined to matters properly made a part of the record below. *Fortney v. Elliott's Adm'r*, 273 S.W.2d 51, 52 (Ky. 1954); *Rohleder v. French*, 675 S.W.2d 8, 9 (Ky.App. 1984). Furthermore, CR 76.12(8)(a) provides that a brief may be stricken "for failure to comply with any substantial requirement of . . . Rule 76.12." Similarly, CR 76.12(4)(c)(iv) requires "ample references to the specific pages of the record," clearly

referring to the record on appeal. Thus, the Napiers' reliance on evidence outside the record, and their failure to cite to the record on this issue, form an insufficient basis for concluding that the trial court erred in entering a judgment in favor of the Fugates.

Arguendo, even if the Napiers did cite to evidence in the record in support of this argument, the claim of error is refuted by a discovery order contained in the record that was entered on January 27, 2005. Furthermore, the Napiers stated in their motion to alter, amend or vacate that, "[D]efendants were present in Court when time line [sic] on Discovery was stated by the Judge." In sum, we are not persuaded by the Napiers' argument and find no error on this issue.

The Napiers also argue that the trial judge erred in quieting title when the Napiers were not notified of a deposition of surveyor James Campbell. The Napiers note that after twice being delayed, notice of Campbell's impending deposition was filed in the court case history on March 2, 2005, but they were not given notice of the deposition. The deposition was conducted on March 8, 2005.

Again, the Napiers did not comply with CR 76.12(4)(c)(v) and did not cite to the record in support of this

argument. In the amended notice of deposition¹ filed on March 2, 2005, the Fugates' counsel certified that she gave notice to counsel for the Napiers via the U.S. Postal Service. Furthermore, and as the Napiers acknowledge, the filing of the notice is contained in the court case history. The burden rests with the Napiers to overcome the strong presumption that the order denying the motion to alter, amend or vacate was correct. *City of Louisville v. Allen*, 379 S.W.2d 179 (Ky. 1964). Given the totality of the record, and because the Napiers have not overcome the presumption that the order was correct, we find no error on this issue.

For the foregoing reasons, we affirm the judgment of the Perry Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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¹ Page 92 of the record on appeal.