RENDERED: OCTOBER 10, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000273-MR

TIMOTHY CARNES, JENNIFER CARNES,
AND MORGAN CARNES — APPELLANTS

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 05-CI-00386

RUSSELL COUNTY BOARD OF EDUCATION,
BY AND THROUGH ITS SUPERINTENDENT,
SCOTT PIERCE; FRANK MERRILL, INDIVIDUALLY
AND IN HIS CAPACITY AS A MEMBER OF THE
SITE BASE COUNCIL FOR RUSSELL COUNTY
HIGH SCHOOL; DARYL SELBY, INDIVIDUALLY
AND IN HIS CAPACITY AS A MEMBER OF THE
SITE BASE COUNCIL FOR RUSSELL COUNTY
HIGH SCHOOL; SCOTT WESTON, INDIVIDUALLY
AND IN HIS CAPACITY AS A MEMBER OF THE
SITE BASE COUNCIL FOR RUSSELL COUNTY
HIGH SCHOOL; DEBRA WADE, INDIVIDUALLY
AND IN HER CAPACITY AS A MEMBER OF THE
SITE BASE COUNCIL FOR RUSSELL COUNTY
HIGH SCHOOL; TRACY SIMMONS, INDIVIDUALLY
AND IN HER CAPACITY AS A MEMBER OF THE
SITE BASE COUNCIL FOR RUSSELL COUNTY
HIGH SCHOOL; DARREN GOSSAGE, INDIVIDUALLY
AND AS PRINCIPAL OF RUSSELL COUNTY HIGH
SCHOOL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,[1] SENIOR JUDGE.

NICKELL, JUDGE: Timothy Carnes and Jennifer Carnes ("Parents"), and their daughter, Morgan Carnes ("Morgan"), (collectively "Carneses") have appealed from the January 18, 2007, entry of a summary judgment against them by the Russell Circuit Court. For the following reasons, we affirm.

Morgan is a 2005 graduate of Russell County High School who is currently attending the University of Kentucky. Throughout her high school career, Morgan's goal was to graduate as valedictorian of her class. In an effort to do so, she elected to take all of the "weighted" courses[2] offered by the school. Near the end of her senior year, Morgan learned she would not, in fact, be named valedictorian of her graduating class, but would rather be ranked fourth in her class. Morgan and her Parents met with the high school's guidance counselor, Angela Emerson, the principal, Darren Gossage, and the superintendent, Scott

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Standard courses are graded on a traditional four-point scale, with a student receiving four points for an "A", three points for a "B", and so on. To reward students participating in some of the more difficult classes offered, weighted courses are graded on a five-point scale, with an "A" earning five points, a "B" earning 4 points, and so on. In this way, students taking higher level courses may increase their overall Grade Point Average ("GPA"), the determining factor of a student's class rank.

Pierce. As a result of these meetings, Morgan was informed she had not received weighted credit for a particular class she had completed, Dual Credit History.

The Russell County Schools Code of Conduct and Attendance Policy ("Code of Conduct"), among other things, sets forth the policy on weighted credits. In delineating the courses carrying weighted credit, the Code of Conduct states "[e]xtra points shall be given for Honors English IV, Political Science or Dual Credit History, Foreign Language II, Calculus and Chemistry II." School administrators explained it was their position that although six courses were offered for weighted credit, the language of the Code of Conduct mandated a student could only receive credit for taking five of these courses. Specifically, extra credit could be obtained for either Political Science or Dual Credit History, but not both. Morgan disagreed with the school's interpretation, insisting use of the word "or" between Political Science and Dual Credit History in the Code of Conduct was intended to be inclusive. Thus, she argued she was entitled to receive weighted credit for both classes.

The Carneses ultimately filed suit in the Russell Circuit Court in December 2005 against the Russell County Board of Education, by and through its superintendent, all five members of the Russell County High School Site Based Council, and the school's principal ("the Defendants"). All were named individually and in their official capacities. The complaint alleged that Morgan and the Defendants had entered into a contract when Morgan signed the Code of Conduct acknowledging her acceptance of its terms. Morgan alleged that the

Defendants had breached their contract with her by refusing to give her weighted credit for both Political Science and Dual Credit History and giving her different advice than that given to other students. She further alleged she had been subjected to humiliation, embarrassment and ridicule by the actions of the faculty and staff because of her failure to be named class valedictorian, thereby causing her great pain and suffering. Although unable to identify any specific examples, Morgan alleged her lower class ranking prevented her from obtaining scholarship money available only to valedictorians. She also alleged she was not given applications for certain scholarships for which she qualified,[3] thus resulting in the additional loss of scholarship assistance. Her Parents alleged they had suffered emotional distress due to the treatment Morgan had received and had also been subjected to humiliation, mental anguish and pain and suffering. The Carneses sought to have Morgan named as the 2005 valedictorian retroactively and prayed for financial compensation for the loss of scholarship monies and for their pain and suffering.[4]

---

[3] Morgan was able to specifically identify only one such scholarship for which she believed she qualified although she was not aware of the specific qualification requirements. She testified she was unaware if any of the other students had been informed of this scholarship or had received applications. She further stated she knew there were "some" other scholarships she was not informed of but could not recall any specifics about them and she was unaware of the qualification requirements for any of these other potential scholarships.

[4] During the course of discovery, Morgan indicated she was seeking the sums of $50,000.00 for loss of scholarship funds, $200,000.00 for embarrassment, mental anguish, emotional distress and humiliation, and $100,000.00 for "wrongful and malicious acts." She also wanted an apology and a report to be placed in the local newspaper indicating she had been named as valedictorian.

The Defendants denied entering into a contract with Morgan, but rather contended that Morgan had agreed to be bound by and comply with all of the rules, regulations and policies contained in the Code of Conduct when she signed a copy of same. In addition to specifically denying the majority of the allegations contained in the Carneses' complaint, the Defendants raised the affirmative defenses of failure to exhaust administrative remedies, contributory and/or comparative fault, waiver and estoppel, failure to prosecute by the real party in interest, failure to name an indispensable party, failure to state a claim upon which relief could be granted, and generally denied that Morgan or her Parents were entitled to any relief.

Morgan and her Parents were each deposed in April 2006. They also filed answers to written discovery requests propounded to them by the Defendants. Each Defendant served a written response to the Carneses' discovery requests, including interrogatories and requests for production of documents, in May 2006. No further discovery occurred throughout the remainder of the litigation.

In August 2006, the Defendants moved the trial court for entry of a summary judgment in their favor. In September 2006, counsel for the Carneses moved to withdraw from the matter. New counsel was subsequently obtained and a written response to the summary judgment motion was filed in the trial court. Following a hearing on December 12, 2006, the trial court took the matter under advisement and ultimately granted the Defendants' motion and dismissed the

Carneses' complaint by a judgment entered on January 18, 2007. This appeal followed.

Before this Court, the Carneses allege the trial court erred in basing its ruling on an incomplete record as discovery had not been completed. Additionally, they allege the trial court erred in entering summary judgment because a genuine issue of material fact existed as to interpretation of the word "or" in the Code of Conduct, thus precluding the trial court from granting the Defendants judgment as a matter of law. We disagree and affirm the trial court.

First, the suggestion of an incomplete record is without merit. As we recently stated in *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 69 (Ky.App. 2006), in responding to a motion for summary judgment, a party "cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery" (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky.App. 1979)). Here, substantial discovery had occurred prior to the filing of the motion for summary judgment. Morgan and her Parents had each been deposed. They, along with the Defendants, had propounded and answered written discovery requests. Further, more than a year had passed between the filing of the complaint and the grant of summary judgment. Clearly, ample opportunity to conduct discovery was available to the parties. The Carneses cannot now be heard to complain of an incomplete record when their failure to take additional steps in the

discovery process created the inadequacy of which they complain. Thus, the trial court did not err in basing its ruling on the record before it.

Second, the standard of review governing appeals from the grant of summary judgment is well settled. We are to determine whether the trial court erred in concluding there was no genuine issue of any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[5] 56.03. In *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Appellate courts are not required to defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be

[5] Kentucky Rules of Civil Procedure.

resolved in his favor [citation omitted]." *Steelvest,* 807 S.W.2d at 480. Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. *See also* Philipps, *Kentucky Practice,* CR 56.03, p. 418 (6th ed. 2005).

After careful review of the record, in the case *sub judice* we are unable to hold that the Carneses presented evidence of the existence of any genuine issue of material fact. There is no question that Morgan did, in fact, complete all of the courses listed in the Code of Conduct as being weighted classes. It is also undisputed that she did not receive extra credit for all of the classes she completed. The only contested issue presented to the trial court was proper construction and interpretation of the word "or" in the Code of Conduct. No argument is made regarding any other issues of law or fact.

Without citing any supporting authority, the Carneses allege that the issue surrounding the construction and interpretation of the Code of Conduct is one of material fact, thereby precluding entry of summary judgment. However, it is well established that the proper construction and interpretation of the terms in a written instrument are matters of law for the court to decide, not matters of fact for jurors to resolve. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. 1998) (citing *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992). As all of the Carneses' claims were dependent upon proper resolution of this singular issue of law, and no evidence regarding the existence of a genuine issue of

material fact was presented, we hold the trial court correctly granted the motion for summary judgment. The Defendants were entitled to judgment as a matter of law.

Finally, because of our resolution of the summary judgment issue, a detailed discussion regarding the trial court's interpretation of the Code of Conduct is unnecessary. However, we have carefully considered the matter and believe the trial court correctly chose to give the word "or" its common meaning and usage as a disjunctive in the unambiguous phrase under review. *See* KRS 446.080(4). *See also* 73 Am. Jur. 2d Statutes §156 ("In its elementary sense the word "or," as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately.").

For the foregoing reasons, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Joel R. Smith
Jamestown, Kentucky

BRIEF FOR APPELLEES:

Timothy L. Mauldin
Bowling Green, Kentucky