

RENDERED: JULY 30, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2009-CA-000650-MR

PAUL THOMPSON AND  
CARLA RENEE THOMPSON

APPELLANTS

v. APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE CHARLES R. HICKMAN, JUDGE  
ACTION NO. 04-CI-00514

BRUCE A. SWETNAM; PATRICIA J. SWETNAM  
AND JAMES E. SWETNAM

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: Paul and Carla Renee Thompson appeal orders of the Shelby Circuit Court denying their requests for judgment on the supersedeas bond posted by Bruce and Patricia Swetnam, and for a hearing to determine whether the bond

amount was sufficient. After careful review of the parties' arguments and the record, we affirm.

The Thompsons and the Swetnams own adjacent property. A dispute arose about the location of the boundary line which separated their respective properties, and specifically about ownership of a parcel of land of approximately three acres. The parties brought their disagreement to the Shelby Circuit Court where they were granted a jury trial. Although the Thompsons' complaint sought damages, the only issue submitted to the jury, and the only issue decided by the jury, was the location of the boundary between the properties. In a judgment entered October 19, 2006, the circuit judge ordered that the deeds and plats be changed to reflect the jury's determination that the property belonged to the Thompsons. No damages were awarded. The Thompsons did not appeal the judgment. The Swetnams posted a supersedeas bond of \$10,000 to stay the judgment and filed an appeal. This Court affirmed the verdict and the Supreme Court denied discretionary review. *Swetnam v. Thompson*, 2007 WL 901691 (No. 2007-CA-000374)(Ky.App. April 4, 2008), *disc. rev. denied*, *Swetnam v. Thompson*, (No. 2008-SC-000440)(Ky. Oct. 15, 2008).

The Thompsons returned to the circuit court to collect costs and damages incurred during the appeal. The circuit judge, however, denied their motion for judgment on the supersedeas bond in an order dated February 4, 2009, ruling, "No money damages were awarded or incurred by [the Thompsons]." The

judge later heard and denied the Thompsons' motion to reconsider. This appeal followed.

On appeal, the Thompsons assert the circuit judge should have afforded them a hearing to determine the extent of damages they incurred during the appeal, but they also claim entitlement to the full amount of the bond, even in the absence of evidence of damages. The Thompsons also claim the circuit judge should have conducted a hearing to determine whether enlargement of the bond amount was appropriate.

Kentucky Rule of Civil Procedure (CR) 73.04 permits the stay of a judgment while the non-prevailing party appeals, provided the party appealing posts a supersedeas bond. If the party is staying enforcement of a money judgment, he or she is required to post bond in an amount sufficient to cover both the award and any damages and costs which may be incurred on appeal. CR 73.04(2). That was not the case here.

When the award concerns the disposition of real property, as here, the appellant must post "such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay." CR 73.04(3).

The purpose of a supersedeas bond is to ensure the compensation of a successful appellee for damages "which otherwise would not have been suffered but for the appeal." *Sotak v. Sotak*, 438 S.W. 2d 490 at 491 (Ky. 1969). In the event the decision of the circuit court is affirmed or the appeal is dismissed, the

bond ensures the appellee receives the compensatory damages awarded by the judgment and additional costs or damages if proven.

The measure of damages on a supersedeas bond, executed pursuant to Section 748 of the old Civil Code, where a writ of possession is stayed, is the fair and reasonable rent on the property during the time a party is kept out of possession of it, plus any damages he may have sustained from waste or injury to the property during that interval.

*Moss v. Smith*, 361 S.W.2d 511, 513 (Ky. 1962)(citations omitted). “[S]uch language from Civil Code Section 748 was embodied in CR 73.04.” *Sotak v. Sotak*, 438 S.W.2d 490, 491 (Ky. 1969). The Thompsons, then, would have been entitled to reasonable rent on the property for the time they were prevented from possessing it and compensation for any damage to the property at least to the extent they could have proved such damage.

The Thompsons argue on appeal that the circuit court denied them the right to a hearing to address the extent of their damages. That, however, is simply not the case. The circuit court conducted hearings on July 25 and August 15, 2007, to determine whether there should be an increase in the bond and to allow the Thompsons to prove damage to the property. The Thompsons presented no evidence or any such damage. Additionally, the court noted that the jury awarded the Thompsons no damages when the case was originally tried. Furthermore, the Swetnams alleged and the Thompsons did not deny that the Thompsons had been exercising control over the property since the time of the jury’s verdict. If that

were true, and the Thompsons presented no evidence, even by affidavit, to the contrary, then no damages could be proved. *See Moss, supra*.

During a motion-hour hearing on February 4, 2009, attorneys for both the Thompsons and the Swetnams appeared before the circuit judge to address the Thompsons' motion to execute judgment on the supersedeas bond; however, the Thompsons' attorney presented no evidence on their behalf. There were no affidavits, no testimony, and no exhibits. When the attorney for the Swetnams called attention to the lack of evidence, the Thompsons' response was essentially that they were not required to present evidence in order to recover on the bond.<sup>1</sup>

Whether a party suffered damages is a factual determination to be made by the trial court. We will therefore reverse the circuit judge's decision that the Thompsons incurred no damages only if it was clearly erroneous. CR 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Jones v. Sparks*, 297 S.W.3d 73 at 76 (Ky.App. 2009); citing *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people]." *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367 at 369 (Ky. 1971)

Here, the Thompsons presented no evidence – they made unsupported, vague claims that they had incurred damages, but nothing more.

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<sup>1</sup> The Thompsons did not raise the argument that they required a hearing longer than the one conducted during motion hour, nor did they suggest they had been denied a hearing, until they argued their motion to reconsider on March 4, 2009.

They argued they had been prevented from amending the plats, changing the property lines, or refinancing the mortgage on the property due to the Swetnams' appeal while the Swetnams presented evidence to the contrary. At best, the Thompsons' claim for damages was speculative. The Thompsons failed to meet their burden of proof, and the trial judge had no choice but to deny their motion for damages.

Undaunted, the Thompsons argue they are entitled to the entire judgment amount simply because they were successful on appeal. The Thompsons contend that, because the bond amount was based upon the amount of damages the circuit judge expected they could incur on appeal, they must have actually incurred the damages the circuit judge calculated, and therefore they are entitled to the entire amount of the bond. That argument is circular and less than convincing. The Rule's purpose of compensating appellees for damages they otherwise would not have suffered except for the appeal presumes that they *actually suffer damages*. Absent proof of the amount of actual damages or how they were incurred, and therefore whether the alleged damages are the result of the appeal at all, it would be improper to award payment of the bond.

The Thompsons have cited *Ash v. Security National Insurance Co*, 574 S.W.2d 346 (Ky.App. 1978) which, according to their brief, stands for the proposition that appellees are automatically entitled to damages "upon the affirmance or dismissal of appeals other than the first appeal." *Ash* at 348. This reading of the case is erroneous. *Ash* interprets KRS 26A.300, which was

declared unconstitutional. *Elk Horn Coal Corporation v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (Ky. 2005). The unconstitutional statute, and its predecessor, KRS 21.130, were “not intended to compensate an appellee for delay in receiving a money judgment; rather, such statutes are intended to discourage frivolous appeals.” *Elk Horn Coal* at 414. Citation to *Ash* or the statutes it interprets fails to support the Thompsons’ argument in any way.

The Thompsons also claim they were entitled to a hearing for another purpose, *i.e.*, to address whether the bond amount was sufficient. The circuit judge did grant a hearing on this matter prior to entry of the supersedeas bond, but declined to do so following the finality of the appeal.

Although the trial court is required to provide “notice and hearing and . . . good cause shown,” CR 73.04(2), before altering the original bond amount, there is no provision of Kentucky law which requires a hearing for every request to enlarge the bond. Generally speaking, it might be the better practice to conduct such a hearing, but there is no requirement that a trial court do so. Further, the Thompsons’ failure to present evidence of any damages at all would logically lead to the conclusion that their damages could not exceed the \$10,000 bond. Given that fact, a hearing was entirely unnecessary, and the circuit judge’s denial of the motion was proper.

We find nothing improper in the circuit court’s orders; they were based on substantial evidence and proper application of the law. The Thompsons were afforded more than ample opportunity to present evidence that they had

suffered damages due to the Swetnams' stay of the judgment on appeal, but failed to take advantage of the opportunities. They were not entitled to an additional hearing to determine whether the bond amount should have been enlarged.

Accordingly, we affirm.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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