

RENDERED: AUGUST 6, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000663-MR

LAQUATA GASPARAC DANIEL AND
ROY DANIEL

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 03-CI-00387

THOMAS GREEN AND
PAMELA GREEN

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Laquata Gasparac Daniel and Roy Daniel (hereinafter “the Daniels”) appeal from the March 30, 2009, order of the Magoffin Circuit Court which dismissed the Daniels’ cause of action with prejudice for a lack of

prosecution and adopted the recommended findings of fact and conclusions of law submitted by the special commissioner. After our review of the parties' arguments, we decline to review the merits of said arguments, as the Appellants' brief does not comply with CR 76.12(4)(c). Accordingly, we affirm the Magoffin Circuit Court.

The Daniels initiated suit against Thomas and Pamela Green to settle a boundary dispute between the parties regarding approximately 1.19 acres of land. Multiple depositions and affidavits were submitted to the court, along with a survey. The court referred the matter to a special commissioner who issued recommended findings of fact and conclusions of law in favor of the Greens on September 12, 2007. No exceptions to the recommendations were submitted. On January 21, 2009, the court pursuant to CR 77.02(2), issued a notice to dismiss for lack of prosecution. Thereafter, on March 19, 2009, the parties appeared before the court. The court noted that no exceptions to the special commissioner's recommendations had been filed and thus, it would adopt said recommendations. On March 30, 2009, the court entered its order dismissing with prejudice the Daniels' cause of action for lack of prosecution and adopted the special commissioner's recommendations. It is from this order that the Daniels now appeal.

On appeal the Daniels present a single argument, that the trial court erred in dismissing this case for lack of prosecution and adopting the special commissioner's recommendations as the Daniels had been in open, notorious

possession of the disputed property for more than fifteen years and have made improvements to the disputed property in the form of excavation, dirt removal, and landscaping. The Daniels assert that none of these facts were taken into consideration when the court adopted the commissioner's recommendations.

Conversely, the Greens argue that the trial court's decision was supported by substantial evidence, as the evidence within the record supports the finding that the disputed property belonged to the Greens and that the Daniels did not sustain their burden of proof. After our review of the parties' arguments, we decline to review the merits of said arguments, as the Appellants' brief does not comply with CR 76.12(4)(c).

First, the Daniels do not inform this Court as to whether the claimed evidence or theory which supports their case was ever presented to the trial court. The Daniels do not cite to the record where such evidence or theory was presented, nor do they address whether the claimed error was preserved for appeal.

It is the responsibility of the Appellants to provide this Court with citation to the record supporting their arguments and to present to this Court how the claimed error was preserved for appeal. CR 76.12(4)(c)(v). It is not the function of this Court to scour the vast record on appeal in order to plead the Appellants' case for them.¹ *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53

¹ We note that the argument concerning the propriety of dismissing the cause of action with prejudice under CR 77.02(2) has not been raised and thus we shall not address this issue. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky.App.1979):

Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors....An appellant's failure to discuss particular

(Ky. 2003). *See also* CR 76.12(4)(c)(iv) and (v). It is also the responsibility of an appellant to ensure the record on appeal is complete and contains all of the evidence needed to facilitate appellate review, and in the absence of a complete record, we must assume the omitted portions of the record support the rulings of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Accordingly, we decline to address these arguments as we are unclear if these arguments or the evidence were presented to the trial court or preserved for appellate review. *See Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-351 (Ky.App.2008)(“The circuit court did not address any of these issues in reaching its decision. We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible.”) and *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App.1998)(“[A]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.”).

In light of the foregoing, we affirm the Magoffin Circuit Court.

VANMETER, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

errors in his brief is the same as if no brief at all had been filed on those issues...Consequently, the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed.
Milby at 727 (internal citations omitted).

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