

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

NO. 2009-CA-001986-MR

KNOCKOUT SPORTS SALOON, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 08-CI-006675

LOUISVILLE METRO GOVERNMENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The appellant, Knockout Sports Saloon, Inc.

(“Knockout”), appeals a declaration of rights issued by the Jefferson Circuit Court that declined to award attorney’s fees for violations of the Open Records Act (“the Act”). Knockout asserts that violations of the Act by the Louisville Metro Police Department (“LMPD”) were willful and entitled them to costs pursuant to

Kentucky Revised Statutes (KRS) 61.882(5). After conducting a hearing on the issue, the circuit court found that LMPD violated the act. However, it determined that Knockout failed to establish willfulness and declined to award costs. We affirm.

This appeal arises from a request for records made to the Louisville Metro Police Department. Although there were requests made to multiple offices within the Louisville Metro Government, only those requests made to LMPD are at issue in this appeal. Knockout fails to provide any citations to the record and we are not required to scour the record for facts that support Knockout's argument. *See Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. 2011). Further, we are without the complete record on appeal and any omissions in the record are assumed to support the circuit court's findings. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Therefore, for the sake of efficiency, we turn to the facts as set forth by the circuit court in its declaration of rights:

Officer Charles Weathers of the Metro Department of Inspections, Permits, and Licenses/Alcoholic Beverage Control ("ABC") issued a citation against Knockout for disorderly premises on December 22, 2007, January 3, 2008, and January 12, 2008, for a fight, shooting, and knife fight occurring on its parking lot on those dates, respectively. On January 30, 2008, ABC issued an Order of Show Cause for Knockout to appear at a February 19, 2008 hearing regarding the citations. On February 5, 2008, Knockout made a request to ABC, pursuant to the Kentucky Open Records Act, for "any and all evidence or information within the procession(sic) or control of the Department and/or LMPD arising out of or related to the Order of Show Cause...[and] all documents that relate, refer or constitute evidence of any

complaint that formed the basis for any investigation or issuance of each Uniform Citation.”

On February 6, 2008, ABC responded to Knockout’s request, providing Knockout with a copy of citations issued by Officer Weathers, a copy of LMPD’s citation relating to the knife fight, and copies of the LMPD Investigative Report Forms 1, 2, 3, and 6 regarding the shooting. According to ABC, LMPD did not issue a citation for the shooting because no suspect had been charged, therefore, a copy was not in ABC’s file. Similarly, ABC could not provide a copy of the LMPD citation for the December 22 fight because it had not yet received it from LMPD. Knockout states that it did not receive “the proper agency response” to its request and therefore met with William P. Schreck (“Mr Schreck”), Director of ABC, on February 15, 2008. On the same date, Mr. Schreck sent a “follow-up” email to counsel for Knockout, in which he stated, among other things, “[T]he information requested is all the records associated with the charges made by our office relative to referrals made by metro police for incidents on 12-22-07[,] 1-3-08 and 1-12-08. I agreed to cancel the schedule (sic) hearing until such time that these records are obtained from metro police and supplied to your office.” Knockout delivered a letter to Mr. Schreck dated February 18, 2008, confirming the discussion of issues regarding ownership of a coin operated game and the cancellation of the hearing scheduled for February 19, 2008.

On March 21, 2008, Knockout made an Open Records request to the Louisville Metro Police Department (“LMPD”) for “[c]opies of any and all evidence or information within the possession or control of the [LMPD] arising out of, related to or constituting the several 911 calls reporting a shooting at the Guardian Court Apartments” and a copy of “any DVD or tape which has been enhanced by LMPD relating to this incident.” Police Legal Advisor, William Sims (“Mr. Sims”) denied the request by letter dated April 23, 2008. Mr. Sims informed Knockout that the request was denied pursuant to KRS 61.878(1)(h) because the records “are

part of an ongoing investigation and will not be disclosed at this time.”

Knockout then sent a letter to Mr. Schreck dated April 28, 2008, as a follow-up to the February 15 meeting, asserting that Knockout “[has] not received any evidence or information whatsoever from the Department, LMPD and/or the City for any of the three incidents we discussed other than a copy of the underlying citations,” and informing ABC that LMPD denied Knockout’s request. ABC responded to Knockout by letter dated May 2, 2008, sending to Knockout the same records it had already provided, except it also provided Knockout with the LMPD citation for the December 22, 2007, fight, which had been added to the file. In the letter accompanying records, Mr. Schreck stated that these were all the records available in its office regarding Knockout.

Knockout replied to Mr. Schreck by letter dated May 8, 2008, asserting that Mr. Schreck’s response “does not answer whether metro Police has any underlying investigative notes, other documents and recordings of 911 calls that relate to the events in question.” Knockout also stated that during the February 15 meeting with Mr. Schreck, it “felt assured that would be provided with everything that ABC or the Police had in their possession and that you would undertake to obtain them.” Counsel for ABC responded by letter dated June 12, 2008, again asserting that Mr. Schreck has provided Knockout all of its records, that Mr. Schreck and ABC “have no intention of telling the police how to run their office,” and that ABC intended to schedule a hearing.

On July 9, 2008, Knockout made Open Records requests to both ABC and LMPD for additional records, including documents transmitted between ABC and LMPD regarding Knockout, all documents relied upon in issuing citations, documents ABC or LMPD transmitted to two specific elected officials and any other elected official regarding Knockout. Mr. Schreck responded by letter dated July 11, 2008, reasserting that it had previously provided Knockout all of its records. Mr.

Schreck also offered to make the entire file available for Knockout's review. Knockout refused the offer by letter dated July 14, 2008, asserting that the file may not contain all of the records that are responsive to his request. Mr. Schreck responded by letter dated July 17, 2008, explaining in detail that each of the documents Knockout listed in the July 9, 2008, request had already been provided or were not in ABC's possession.

LMPD responded to Knockout's request on July 21, 2008, addressing each document requested. LMPD asserted that it is not in possession of ABC documents or the elected officials' documents, and directed Knockout to contact ABC and/or the listed elected officials.

On October 21, 2008, the parties agreed LMPD would release the documents related to the citations. LMPD delivered documents to Knockout on the same date. The administrative hearing was held on February 10, 2009, during which a detective for LMPD testified that photographs from the shooting existed but have not been provided to Knockout because there was an open investigation. On February 12, 2009, the Respondent filed a pleading asserting that it has provided all records requested and disclaiming any privileges and exceptions.

(TR at 314-27).

On May 18, 2009, the circuit court conducted a hearing to determine if ABC or LMPD violated the Act. This hearing is not included in the record. Knockout's post-hearing brief asserted that Mr. Schreck agreed to obtain and deliver documents from LMPD; LMPD did not show that the records were exempt; and ABC and LMPD willfully violated the Act. As a result of the alleged willfulness, Knockout sought to recover its attorney's fees, costs, and per diem sum of \$11,625 based upon 465 days at \$25.00.

Louisville Metro filed its response, contending that the Act does not require ABC to provide documents out of its possession; LMPD's records were exempt because they were part of an ongoing investigation; and Knockout failed to establish willfulness.

As previously mentioned, this appeal only concerns the actions of LMPD. The circuit court determined that LMPD did violate the Act as a result of its tardy responses to Knockout's requests. However, the circuit court also determined that LMPD's response to Knockout's March 21, 2008, request properly asserted an exemption pursuant to KRS 17.150 and KRS 61.878(1)(h), and Knockout does not present an argument to the contrary. While the circuit court was troubled that LMPD was "remiss" in its failure to hand over all of the documents it agreed to disclose, the court determined that Knockout failed to show that LMPD acted willfully because it did not establish bad faith.

KRS 61.882(5) gives the circuit court discretion to award fees and other costs if it determines that a violation of the act is "willful." Willfulness is a factual determination to be made by the circuit court and will only be disturbed if it is clearly erroneous. *Sinha v. Univ. of Ky.*, 284 S.W.3d 159, 162 (Ky. App. 2009). To establish willfulness, the party seeking costs must show bad faith with intent to violate the Act, and there must be no plausible explanation for the alleged errors. *Id.*

However, even if the circuit court finds willfulness, KRS 61.882(5) does not impose a requirement that fees be awarded. Instead, the statute instructs

that the circuit court “may” award costs. KRS 61.882(5). Thus, a second inquiry is required to determine if the circuit court abused its discretion in failing to award attorney’s fees despite finding willfulness. An abuse of discretion occurs when a decision is “arbitrary, unfair, or unsupported by sound legal principles.”

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With this in mind, we turn to the arguments on appeal.

Knockout bears the burden of establishing that the LMPD acted in bad faith when it failed to turn over the records in a timely manner. *See, e.g., Sinha*, 284 S.W.3d at 162 (professor was required to show bad faith in order to be awarded costs). However, on appeal Knockout fails to provide a single citation to the record in support of its contention. Instead, Knockout refers us to attachments that are not copied from the record and fails to conform with Kentucky Rules of Civil Procedure (Cr) 76.12 (iv)-(v). This court “will not search the record for testimony....” *Young v. Newsome*, 462 S.W.2d 908, 910 (Ky. 1971).

Even if we turn to the record, we find that it is incomplete. Knockout failed to designate the administrative hearing as part of the record. Perhaps more importantly, we are without the circuit court hearing held to determine if violations of the Act occurred and were willful. “It is the appellant’s duty to present a complete record on appeal.” *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). Indeed, “It has long been held that, when a complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Thompson*, 697 S.W.2d at 145. Assuming that the

omitted record supports the circuit court's decision, we do not find that the circuit court abused its discretion when it declined to award costs, and the decision of the circuit court is affirmed.

ALL CONCUR.

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