RENDERED: APRIL 4, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000710-MR

PEYTON REYNOLDS
and JOSEPHINE D'AMATO RICHARDSON — APPELLANTS

APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NOS. 09-CI-00063; 09-CI-00065; 09-CI-00068; 09-CI-00252

CHILDERS OIL COMPANY;
HINDMAN PETROLEUM SERVICES;
and MOUNTAIN RAIL
PROPERTIES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND MOORE, JUDGES.

MOORE, JUDGE: Peyton Reynolds and Josephine Richardson appeal from an order of summary judgment entered by the Letcher Circuit Court dismissing their

claims of nuisance, trespass, and negligence against the above-captioned appellees (who we will collectively refer to as "Childers"). We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This is a continuation of the case addressed in *Childers Oil Co. v. Reynolds*, No. 2011–CA–001352–ME, 2012 WL 1900135 (Ky. App. May 25, 2012) (hereafter "Childers I"). We will therefore paraphrase the factual and procedural background of this case, as discussed in that opinion, to the extent that it is relevant and supported by the record before us.

On or about November 1, 2008, Childers dumped sludge from an oil plant into a plastic-lined pit next to the Kentucky River in Whitesburg, Kentucky. The sludge from the pit seeped into the river and flowed downstream toward the drinking water treatment plant operated by the Letcher County Sewer and Water Company which provides water to the residents and businesses of Whitesburg, Kentucky, as well as the surrounding Letcher County communities. Subsequently, Kentucky's Department for Environmental Protection ("DEP") issued an advisory to consumers informing them that they should not use the water pumped out of the plant except for flushing toilets. The advisory was in effect from November 1 through November 6, 2008.

Again, in February 2009, a diesel fuel tank stored on Childers' property began leaking into the water. From February 16 through February 25, 2009, the DEP issued another water quality advisory, which lasted ten days. During this time period, residential and business customers of the Letcher County

Sewer and Water Company were again advised by the DEP not to use the water supply for anything other than flushing toilets. The DEP eventually determined that Childers' sludge pit was the source of the spill in the November 2008 incident and issued it a notice of violation. The DEP also issued a notice of violation to Childers Oil with regard to the February 2009 occurrence.

By March 2009, four separate civil actions involving over eighty named plaintiffs had been filed against the appellees with respect to the two water advisories. At least two of these civil suits requested class action status. Most of these lawsuits were filed in Letcher Circuit Court and were later consolidated on April 2010.[1] The named plaintiffs asserted the same theories of liability and causes of action (*i.e.*, nuisance, trespass, and negligence), and sought redress for damages allegedly caused by the November 2008 and February 2009 spills, specifically, monetary damages representing inconvenience and loss of the use and enjoyment of their homes and businesses due to the two water advisories.

After completing written discovery, the plaintiffs then sought an order certifying the action as a class action under Kentucky Rules of Civil Procedure (CR) 23.01 and CR 23.02(c). The circuit court held a class action certification hearing on June 28, 2011. At the conclusion of the hearing, the circuit court confirmed that the case was best managed as a class action and instructed Peyton Reynolds and the other plaintiffs to tender findings of fact with a corresponding

[1] The one suit that was not filed in Letcher Circuit Court and was not consolidated with these other actions was that of an out-of-state dialysis company which instead chose to file an action in federal district court. *See, e.g., Total Renal Care, Inc. v. Childers Oil Co.*, 743 F. Supp. 2d 609 (E.D. Ky. 2010).

order that directed the certification of the class. Further, the circuit court advised Childers that it could submit objections to these findings of fact. Afterwards, on July 20, 2011, the circuit court entered an order certifying the class action and designating two subclasses of plaintiffs: 1) a class of residential customers of the Letcher County Sewer and Water Company, to be represented by plaintiff Peyton Reynolds; and, 2) a class of its business customers, to be represented by plaintiff Josephine Richardson d/b/a The Courthouse Café.

Following an interlocutory appeal, however, we reversed the circuit court's order and remanded for additional findings. Of relevance to this appeal, we remanded for a determination of whether the plaintiffs had asserted an amount of damages sufficient to invoke the circuit court's jurisdiction.

Upon remand, Childers then filed a motion for summary judgment. Regarding the plaintiffs' claims for trespass, Childers argued: 1) the two interruptions in water services alleged in the plaintiffs' complaint did not satisfy the element of trespass requiring an "interference with exclusive possession of property"; 2) the evidence did not support that anything had entered and harmed the plaintiffs' respective properties during the advisories; 3) even if Childers had played a role in causing the state environmental agency to issue the consumer advisories in November 2008 and February 2009, the issuance of consumer advisories, by itself, was not evidence that trespasses had occurred; and 4) even assuming any trespass had occurred, no evidence of record supported that Childers had caused it or acted intentionally in doing so.

Regarding the plaintiffs' claims for private temporary nuisance,[2] Childers argued: 1) the plaintiffs had failed to produce evidence demonstrating standing to sue (*i.e.*, that they each had title and possession of affected property); 2) no evidence supported that any property had actually received contaminated water or had otherwise become contaminated due to the water during the two advisories; 3) no evidence established that any contaminants had originated from Childers; and 4) the plaintiffs had adduced no evidence demonstrating the extent to which any purported contamination caused the value of use or the rental value of any property to be reduced.

With regard to the plaintiffs' claims for negligence, Childers argued: 1) no plaintiff had asserted injuries consisting of anything other than real property damage and damages to real property caused by another's negligence sound in trespass, not negligence; and, 2) no plaintiff had produced evidence demonstrating that Childers had damaged any property.

Finally, Childers argued that the plaintiffs had also failed to produce any evidence demonstrating that Childers had acted, if at all, in any manner that would support awarding punitive damages.

[2] It is unclear from the record below whether the plaintiffs asserted claims for private or public nuisance because their complaint is general enough to interpret their nuisance claim either way. If they did assert a claim of public nuisance, they have either abandoned it or waived any error regarding its dismissal; their appellate brief only contains an argument regarding a claim for "private temporary nuisance." *See Cherry v. Augustus*, 245 S.W.3d 766, 780 (Ky. App. 2006) ("As a general rule, assignments of error not argued in an appellant's brief are waived." (Citations omitted)).

Initially, the plaintiffs responded to Childers' motion with four arguments. First, they argued that the sworn testimony of Michael Klein (one of their experts and an engineer specializing in hazardous materials and water resources) "not only addresses Defendant Childers' failure to comply with environmental standards, industrial facility standards, and other industry standard violations, it stands completely uncontroverted." However, the plaintiffs' responsive pleading cited no particular section of Klein's testimony in support of this general statement.

Second, the plaintiffs argued that Childers had

> [W]holly fail[ed] to address the Consent Judgment entered into by the Defendants. Obviously, at this juncture, this Court has not had an opportunity to rule upon what kind of preclusive or *res judicata* effect the Consent Judgment has on Defendant Childers as it relates to the allegations and claims in this case.

We note that this "consent judgment" was briefly mentioned in *Childers I*, 2012 WL 1900135 at *1. However, the specifics of that purported judgment are unknown, it does not exist in the record before us, and there is no indication that it was ever added to or considered part of the record below.

Third, the plaintiffs argued that summary judgment was inappropriate because their complaint had pled the requisite elements of trespass, nuisance, and negligence, and because Childers had failed to present evidence demonstrating that it was *not* liable for trespass, nuisance, and negligence.[3] In making this argument,

[3] To illustrate, the plaintiffs responded to Childers' contentions regarding their negligence claims by stating:

however, the plaintiffs misunderstood what the function of summary judgment is (as discussed further below), along with whose responsibility it was for carrying the burden of proof in this matter. *See* CR 43.01(2) ("The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side," *e.g.*, the *plaintiffs*, not Childers).

Fourth, with respect to Childers' argument that the plaintiffs lacked standing to sue, the plaintiffs produced no evidence to the contrary. The extent of the plaintiffs' response was:

> As it relates to standing, each of the Plaintiffs and class members by definition would own or possess the property at issue via their status as a residential or business customer. Compensation for a private nuisance is based upon the lessening of the value of the use of the property to the plaintiff as a result of the nuisance. (See 13 Ky. Prac. Tort Law Sec. 14.3 (1995)). For a temporary nuisance, as is the situation in this case, compensatory damages are measured by how much the value of the property is reduced by the presence of the nuisance during the continuance of the nuisance.

Approximately one month later, the plaintiffs then filed another pleading in response to Childers' motion for summary judgment. As before, this additional pleading urged that summary judgment in favor of Childers would be inappropriate because

---

> Defendant has postured that Plaintiffs' claim for negligence should be dismissed despite identifying that Plaintiffs claim that Defendant maintained a duty of care, a failure to abide by that duty of care, and resultant damages. Without citing any authority to support this position, Defendant alleges that there has not been any factual evidence of causation asserted in the Complaint. Kentucky law requires only the elements as set forth above to be pled in an action for negligence. There is no additional requirement, nor is one provided by Defendant.

> Defendant's Motion for Summary Judgment is completely devoid of any evidence properly considered for summary judgment purposes that is even remotely supportive of Defendant Childers, its conduct in operating and maintaining its facility, or suggesting Defendants were *not* responsible for causing the water advisories. There is zero evidence properly considered by the Court for summary judgment purposes that stands for the proposition that Defendant Childers did *not* cause the two respective water contaminations and advisories. Without any testimony, lay or expert in support of its Motion for Summary Judgment, it is curious how Defendant Childers could ask the Court to find, as a matter of law, without introducing any evidence, that all of the Plaintiffs' claims are properly disposed of, especially when the standard requires that the evidence be viewed in a light most favorable to the Plaintiffs.

(Emphasis added.)

Aside from again misconstruing their burden of proof, the plaintiffs also quoted portions of Michael Klein's deposition testimony which they regarded as evidence that Childers had in fact contaminated their drinking water with diesel fuel. This testimony is discussed further in the context of our analysis, below.

After considering Childers' motion and the plaintiffs' responses, the circuit court entered summary judgment in favor of Childers. Its order of summary judgment merely provided: "Based upon the record and the applicable law, the Defendant's motion for Summary Judgment is granted. There being no just cause for delay, this is a final and appealable Order entered this 22 day of March, 2013." Based upon the circuit court's order and our review of the record as a whole, the circuit court apparently determined that the plaintiffs had sufficiently invoked its subject matter jurisdiction, but that it deemed the matter of class certification at

issue in the prior appeal moot after finding that the named plaintiffs had failed to present a genuine issue of material fact capable of overcoming Childers' motion for summary judgment regarding their claims of trespass, nuisance, and negligence.

Thereafter, a notice of appeal captioned "Peyton Reynolds, et al. vs. Childers Oil Company, Hindman Petroleum Service, Inc.; and Mountain Rail Properties, Inc." was filed. In its entirety, the body of the notice stated:

> Notice is hereby given that Peyton Reynolds, Josephine D'Amato Richardson, et al., by and through counsel, hereby appeal to the Kentucky Court of Appeals from the Summary Judgment Order entered by the Court on March 22, 2013. The Appellants in this proceeding are Peyton Reynolds and Josephine D'Amato Richardson, et al. are [sic] the two Plaintiff Class Representatives in this proceeding. The Appellees against whom this appeal is taken are Childers Oil Company, Hindman Petroleum Services and Mountain Rail Properties, Inc., defendants in this proceeding. Pursuant to CR 76.42(2)(b), the filing fee of $175.00 has been paid to the Clerk of this Court simultaneously with the filing of this Notice of Appeal.

II. SUBJECT MATTER JURISDICTION

A concern in the previous appeal of this case was that the amount in controversy did not meet or exceed the $4,000 "amount in controversy" threshold necessary for invoking the circuit court's subject matter jurisdiction. We directed the circuit court to make additional findings in this regard. The circuit court made no such findings, but nevertheless asserted subject matter jurisdiction over this case in order to dismiss it on the merits. *See Clemmer v. Rowan Water, Inc.*, 277

S.W.3d 633, 635 (Ky. App. 2009) ("[A] dismissal for lack of subject matter jurisdiction does not constitute an adjudication on the merits").

Upon review of the record, we find that subject matter jurisdiction was properly asserted. The plaintiffs below filed a "motion for supplemental findings of fact" following remand, pointing out that they had each filed written discovery answers alleging compensatory damages of "$1,000 per day for each day that they were inconvenienced by the loss of water"; that the water advisory in November, 2008, had lasted for six days; and, that the water advisory in February, 2009, had lasted for ten days. The claimed amounts for each month exceeded $4,000, and were therefore sufficient for jurisdictional purposes. *See Jackson v. Beattyville Water Dept.*, 278 S.W.3d 633, 637 (Ky. App. 2009) ("[P]leadings and answers *are not proof of damages*. Rather, they merely represent the amount in controversy as required by KRS[4] Chapters 23A and 24A and the caselaw."); *see also Montgomery v. Glasscock*, 121 S.W. 668 (Ky. 1909) ("Jurisdiction in such cases depends, not upon the amount to which plaintiff shows himself entitled, but upon the amount sued for.").

III. THE IDENTITIES OF THE APPELLANTS IN THIS APPEAL

Appellants Peyton Reynolds and Josephine D'Amato Richardson refer to themselves throughout their brief as "class representatives" and indicate that their co-plaintiffs below also have a stake in this appeal.[5] Before proceeding with

[4] Kentucky Revised Statutes.

[5] The notice of appeal filed in *Childers I* listed all of the named plaintiffs below as appellees. They were: Peyton Reynolds; Barbara Johnson; Tammy Mauk; William Mauk; John Milam;

any substantive review, we pause to clarify that our jurisdiction only recognizes two appellants in this matter: Peyton Reynolds and Josephine D'Amato Richardson.[6]

An appellant must set forth all parties by name in the notice of appeal. CR 73.03(1). This is because "[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court." *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky.1990). Where persons are not named as parties to an appeal, then, this Court has no jurisdiction over them. *Watkins v. Fannin*, 278 S.W.3d 637 (Ky. App. 2009).

As noted, the only appellants named in the notice of appeal are "Peyton Reynolds and Josephine D'Amato Richardson." Use of "et al." in the

---

Amanda Santos; Valentin Santos; Cayden Santos; Lisa Williams; Juan Hernandez; Steve Baker; Timothy Baker; Christopher Baker; Sheena Cornett; Stacy Lynn Baker; Donald Ratliff; John Jent; Rosetta Jent; Edith White; Novel White; Lucy Maggard; Colan Collins; Peter Antonakos; Phyllis Antonakos; Larry Ingram; Katherine Wiygul; Thomas Hutton; Monek Hutton; Jack Cantrell; Kathleen Brown; Ken Trent; Ken Trent, Jr.; Jerry Adams; Michael Adsher; Michael Adams; Josephine Richardson, individually and d/b/a Rita's Courgar Hall; Kathy Kincer, individually and d/b/a Hobo's Diner; Kelly Spangler, d/b/a Shear Beauty; Joe Beverly, d/b/a Summit City; Richard Brown, d/b/a Cut Away Beauty Salon; Jerry Collins, d/b/a Jerry's Barber Shop; Bonita Adams, d/b/a Appalachian Early Child Development Center; Barry Amburgey; Jim Mullins; Joel Beverly; Amelia Kirby; Sheila Rose; James Hall; Ashley Collins; Stephanie Conrad; Charles Cowden; Martin Adams; Randy Taylor; Selena Taylor; April McIntosh; Tonya Wilson; Anthony Wilson; John Hopkins; Tracy Blair; David Fields; Opal Strange; Judith Adams; Billie Martin; Nancy Adams; Grant Eldridge; Peggy Ison; Talitha Speager; Amelia Pickering; Freida Eldridge; Donald Eldridge; Eddie Profitt; Rebecca Fields; Gary Taylor; Belinda Hall; Whitney Hogg; Craid Conrad; Gladys Davis; Matthew Caudill; Jeff Burns; Karen Burns; Shannon Hogg; Billy Martin; Adam Holbrook; and Gwendolyn Holbrook.

[6] It is irrelevant that this issue was not identified by the parties because "'jurisdiction may not be waived, and it cannot be conferred by consent of the parties. This [C]ourt must determine for itself whether it has jurisdiction.'" *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005) (quoting *Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (1946)).

notice did not operate to bring any of their other co-plaintiffs below within our jurisdiction. *See* CR 73.03(1); *Browning v. Preece*, 392 S.W.3d 388, 392 (Ky. 2013). Moreover, despite their respective self-styled titles of "class representative," CR 23.01 provides that Reynolds and Richardson would only have had the authority to "sue or be sued as representative parties on behalf of [a class]," or, for that matter, to prosecute an appeal on behalf of a class, if the circuit court had entered a valid order appointing them class representatives and certifying a class for them to represent. Here, no such order was ever entered by the circuit court. *See Clay v. Clay*, 707 S.W.2d 352, 353 (Ky. App. 1986) ("When a judgment is reversed on direct appeal, it is as though it never existed.").

IV. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "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 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and ... the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing

Chesapeake & Ohio Ry. Co. v. Yates, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

V. ANALYSIS

The circuit court's order of summary judgment generally dismissed all of the claims presented below. In the absence of any further specificity we must presume that the circuit court's order was based upon each of the grounds Childers asserted in its motion for summary judgment (which are the same grounds that Childers continues to argue in its appellate brief) and that the circuit court considered and rejected each of the opposing arguments the appellants offered in response. *See, e.g., Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."); *see also Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 125 (Ky. App. 2012). Therefore, if Childers' motion for summary judgment asserted any proper grounds for dismissing the claims presented, we must affirm. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) ("when a judgment is based upon alternative grounds, the judgment must be affirmed on appeal unless both grounds are erroneous.").

With this in mind, we will begin our analysis with the appellants' claims of private temporary nuisance and the assumption, correct or not, that such claims could be based upon a release of pollutants that directly affects a municipal water supply but does not interfere with any private water source located on any plaintiff's property.[7] KRS 411.560(5) provides that "No person shall have standing

[7] The matter of standing is dispositive of the appellants' claims of nuisance. We add, however, that we are further convinced that their claims sound in public nuisance, rather than private nuisance. The proper characterization of a nuisance as either private or public depends on the nature of the interest affected by the defendant's conduct. Generally speaking, a private nuisance

to bring an action for private nuisance unless the person has an ownership interest or possessory interest in the property alleged to be affected by the nuisance." KRS 411.510(4) defines "ownership interest" to mean "holding legal or equitable title to property in fee or in a life tenancy," and KRS 411.510(6) provides that "possessory interest" means "lawfully possessing property but does not include mere

---

interferes with the use or enjoyment of privately owned land, whereas a public nuisance—a claim that is not at issue in this appeal (*see* Note 1)—interferes with a public right or inconveniences an indefinite number of people. *City of Mt. Sterling v. Donaldson Baking Co.*, 155 S.W.2d 237, 239 (Ky. 1941); *see also* KRS 411.530(2) and 411.540(2) (providing that a permanent or temporary private nuisance must interfere with the use and enjoyment of the claimant's property). Here, the plaintiffs have not alleged that Childers' purported release of pollutants affected any private water source or the groundwater below any privately owned land; rather, they allege that it directly affected a public water supply provided to all Letcher County Sewer and Water Company customers. A county or municipal water supply is a public source of water. When a county or municipal water company provides water to the general public, the right to clean water from that company is a right common to all customers and not the right of each individual recipient. *See* Restatement (Second) of Torts § 821B cmt. g ("A public right is one common to all members of the general public.") Therefore, "The right to be free of contamination to the [county or] municipal water supply is clearly a 'right common to the general public', thus interference with that right would be a public nuisance." *Anderson v. W.R. Grace & Co*., 628 F. Supp. 1219, 1233 (D. Mass. 1986); *see also* Restatement (Second) of Torts § 821B cmt. b (explaining that conduct interfering with the public health constitutes a public nuisance).

With this in mind, the Federal Court of Appeals for the Fourth Circuit similarly determined that claims roughly identical to those asserted by the appellants herein failed as a matter of law as private nuisance claims because they were at best claims for public nuisance. *See, e.g., Rhodes v. E.I. du Pont de Nemours and Co.*, 636 F.3d 88, 96-97 (4th Cir. 2011). The Court's reasoning, which we also find persuasive on this point, was as follows:

> If the only interest that is invaded is an interest shared equally by members of the public, then the alleged nuisance is public in nature. Such a circumstance is precisely the situation presented here, because DuPont's allegedly tortious conduct interfered with the general public's access to clean drinking water. The fact that the water eventually was pumped into private homes did not transform the right interfered with from a public right to a private right. We therefore conclude, as the district court did, that when a release of pollutants directly affects a municipal water supply and does not interfere with any private water source, such as a well drilled on private property, the presence of the pollutants in the public water supply will not support a private nuisance claim.

Id. at 96-97 (internal citations omitted). *See also Anderson*, 628 F. Supp. at 1233 (contamination of public water source held to be a public nuisance, but private individuals had standing to assert public nuisance claim because special damages were alleged aside from those suffered from the public in general, *i.e.*, plaintiffs alleged that they suffered a variety of illnesses as a result of exposure to the contaminated water).

occupancy." Here, Reynolds, Richardson, and the other plaintiffs merely alleged property ownership and possessory interests in their pleadings. Pleadings and allegations contained in pleadings are not evidence. *Educ. Training Sys., Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003). We have not located nor have we been directed to any evidence of record establishing that any plaintiff below, much less Reynolds and Richardson, held an ownership or possessory interest in any property purportedly affected by contamination. Indeed, the appellants have altogether failed to brief, and have therefore conceded, the issue of standing. *See Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000) ("Any part of a judgment appealed from that is not briefed is affirmed as being confessed."). Accordingly, we affirm the circuit court's decision to dismiss this claim.

As it relates to Reynolds' and Richardson's remaining claims of trespass and negligence, we pause to note that these two claims are actually one and the same—they are both claims for negligent trespass. To explain, both are based upon the same allegations, namely, that Childers caused contaminants to enter the public's drinking water, and that the contaminant-laden drinking water was then dispersed to the appellants' respective properties through the system of public waterworks. To the extent that these allegations could provide a basis for an action in trespass, nothing of record supports (and no argument is made supporting) that it was intentional. Moreover, Kentucky regards a negligence claim as a negligent trespass claim where, as here, the negligence claim merely

asserts injury to real property. *See Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759 (Ky. App. 1987); *see also Childers I*, 2012 WL 1900135 at *8 ("During oral arguments in this case, the [appellants] informed the Court that the parties' damages would be determined by the difference between the value of the use of a party's home with water compared to the value of the home without the use of water during the two water advisories."); *Id*. at *5 ("Peyton Reynolds and the other plaintiffs are not seeking a class action for claims like personal injury, increased cancer risks, future medical monitoring, or unsellable homes, which might necessitate individualized proof. They have, in fact, specifically excluded such claims from the class action.").

Negligent trespass requires three basic elements: (1) the defendant must have breached its duty of due care (negligence); (2) the defendant caused a thing to enter the land of the plaintiff; and (3) the thing's presence must cause harm to the land. *See Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604, 620 (Ky. App. 2003) (citing *Mercer v. Rockwell Intern. Corp.*, 24 F. Supp. 2d 735, 740 (W.D Ky. 1998)). With that said, the only evidence of record cited by Reynolds and Richardson to support their claims of negligent trespass, along with all of their other claims in this matter, are the following portions of the deposition testimony of their expert, Michael Klein:

> Q: So is it your opinion that the November 2008 incident resulted in Childers Oil contaminating the water that was ultimately used or consumed by the residents of Letcher County? Is that your opinion?

KLEIN: It's my opinion that the improper storage of that waste and the fact that they did not recognize that and augment and update their groundwater protection plan, which means they have to do monitoring and inspection, and they failed to do that. The failure to do that, the liners failed, and the material was released into the environment. And the material released into the Kentucky River was the water supply for the city. And that was taken in by that intake and then distributed to the consumers.

* * *

Q: But my question is, is it your testimony that the November 2008 incident involved Childers Oil causing contaminated water to be used or consumed by any resident or business of Letcher County, Kentucky?

KLEIN: I do not know if the consumers used or consumed it, so I can't testify to that, to the actions of the actual tap users of the water. I can testify that that release was—that release entered the water supply of that water treatment plant, and it was distributed, but the consumer complaints that were issued, to the City of Whitesburg. Whether or not the individuals consumed the water, I can't testify to that.

* * *

Q: I'm referring to whether or not contaminated water actually made it to any end user, such as residents or business, again the same dates . . . do you have any evidence that any water that was contaminated, that it was in a contaminated state at the time it reached the user, be it a residential or business user, do you have any evidence that any of those individuals received and actually had contaminated water?

KLEIN: Yes.

* * *

KLEIN: My recollection of the data is that they[8] had detectable—when they went and they sampled the distribution system, that they had detections of contaminants in the system, in xylene, benzene, toluene.

Q: All right. Let's define "distribution system." Okay?

KLEIN: The distribution system is the—once it leaves the water treatment plant and enters the distribution system to the consumer, and there is a storage tank, and there is piping. The piping goes into the homes, into the spigots. They went to several locations to see if contamination was at these various locations. And my recollection is that they got hits.

* * *

KLEIN: So we do know there was a release into the Kentucky River, and we do know it was taken up by the plant. We do know that the plant operators smelled the strong petroleum in the plant itself. We do know that they had measured that and found detectable—and previously they had not found any of these particular types of contaminants, but they did find these contaminants. They may have been below the action levels for the MCL,[9] but they were never present there before. And in the judgment of the operators, because they didn't have real time data as to what those levels were—they just had their sense of smell- they were prudent, because their responsibility is protection of human health. They shut the facility down, and they issued a consumer advisory not to drink the water until they could properly investigate it.

* * *

KLEIN: And the fact that they applied vacuum trucks to there and removed 35,000 gallons of water and free

[8] "They," from the context of Klein's deposition, apparently refers to investigators from Kentucky's Natural Resources and Environmental Protection Cabinet.

[9] "MCL" is a reference to the "maximum contaminant level" for drinking water allowable under the Federal Safe Drinking Water Act, 42 United States Code (U.S.C.) § 300f, *et seq*.

product, and then once they implemented that corrective action, and that corrective action was complete, their follow-on sampling showed no evidence of contamination in the river. That indicates to me, more likely than not, that that was the source of the contamination. And once they remediated that, that source was gone.

* * *

Q: But my question is, do you stand by that statement there, that the drinking water was not fit for drinking or bathing during the time period of the no-consumption order?

KLEIN: Yes.

* * *

KLEIN: I do. And the reason I do is that they didn't have the documentation or evidence that it was fit for use. And so until they can demonstrate that it is fit for use, then they can lift the order, and then you can use it. There—they have to be protective of human health. And when they have a question that they're not protective of human health, such as smelling gasoline fumes in the treatment plant or consumer's complaints saying that they're smelling gasoline at their tap, they have to take action and protect the individual, protect the consumer. During that period of time, it wasn't fit for drinking or bathing, until they determined it was fit.

* * *

Q: In fact, at no time was there any evidence that there were contaminants in the water produced by the water treatment plant that exceeded the safe drinking standards, correct?

KLEIN: That's not accurate, counselor. What is accurate is that the operators recognized that they had, within their facility itself, in the flocculation basins and the filters, the contaminants were volatilizing. And they could smell those volatile chemicals in the facility itself.

> They also had consumer complaints that, at the tap, the water they were distributing to the city, the city taps, also had a gasoline smell to it, a petroleum smell to it.
>
> * * *
>
> Q: My question is, is it your opinion Mr. Klein that the water was ever above the MCL?
>
> KLEIN: More likely than not, in the initial incident, the initial days of the incident, that it was above the MCL.

In sum, the deposition testimony cited above indicates Klein formed his opinion that Childers contaminated the drinking water in Whitesburg, Kentucky, based exclusively upon his recollection of these hearsay[10] sources: "consumer complaints" of a "gasoline smell"; a "strong petroleum smell" as described at some point by the operators of Whitesburg's water treatment plant; and, sample data from investigative reports.

A fundamental problem with Klein's testimony stems from the brief that the appellants filed in this appeal. Klein's deposition testimony is in most part a dissertation of facts ostensibly derived from the evidence in this matter. But, the appellants' brief makes no attempt to locate any supportive evidence of record, let alone the hearsay sources Klein may have relied upon to form his opinions. Aside from the portions of Klein's testimony quoted above, the brief filed by Reynolds and Richardson merely contains a general statement that this Court

[10] Elsewhere in his deposition, Klein testified that he had no personal knowledge regarding the November 2008 and February 2009 incidents, had not personally spoken with any agency or other individual who investigated Childers' alleged contamination, and had conducted no independent testing.

should direct its "attention to all of the evidence properly before the Court that overwhelmingly supported Plaintiffs' claims. Written discovery answers, notices of violations citations and a Consent Judgment entered into by Childers Oil with the State of Kentucky along with the entire deposition of Plaintiffs' liability expert, Michael Klein, E.P."

The "consent judgment" alluded to does not exist in the record before us. The transcript of Klein's deposition indicates that the parties' respective counsel introduced several documents as "exhibits," and these exhibits may have included several of the documents Klein relied upon. As it appears of record, however, Klein's deposition contains no appendix of exhibits. We are also unable to determine what part of the remainder of this generally described evidence supports the appellants' negligent trespass claim, but it is not our duty to do so in any event. Absent specific citations to the record as required by CR 76.12(4)(c)(v), which the appellants' brief plainly lacks, we will not search the record for evidence supporting the appellants' arguments. *See Young v. Newsome*, 462 S.W.2d 908, 910 (Ky. 1971); *Combs v. Stortz*, 276 S.W.3d 282, 293 (Ky. App. 2009). Moreover, we are not aware of any evidentiary rule that would allow this Court to consider, as evidence, an expert opinion that is not based upon any identifiable evidence of record. *See American Hardware Mut. Ins. Co. v. Fryer*, 692 S.W.2d 278, 281 (Ky. App. 1985) (holding that an expert witness may express a testimonial opinion that is based upon "hearsay material *produced* by qualified personnel and on which experts customarily rely." (Emphasis added)).

Another problem is that Klein's opinion is based in large part upon speculation and conjecture, inasmuch as it stands for the proposition that contaminated water actually arrived at any location in Whitesburg with access to public water during the November 2008 and February 2009 water advisories. Klein's statement that "More likely than not, in the initial incident, the initial days of the incident, that [the drinking water] was above the MCL" was based upon what he represented was the plant operators' ability to smell "the strong petroleum in the plant itself." But, Klein later conceded during his deposition that "smell" is not a recognized metric for determining whether drinking water exceeds MCL and should therefore be considered contaminated. And, aside from Klein's assumptions regarding the smell of the drinking water, no documented investigation of record determined that any drinking water in Whitesburg, at any time relevant to this case, ever exceeded any MCL standard.

The most compelling reason for affirming the circuit court's decision to dismiss the balance of the appellants' claims, however, is Childers' argument with regard to whether its alleged conduct caused any legally cognizable injury.

Reynolds and Richardson made no arguments and presented no evidence that their properties or persons suffered any injury as a consequence of the alleged contaminations.[11] And, notwithstanding Klein's statements regarding reports of gasoline odor in the water, no one has argued that the odor in question,

[11] Although it bears repeating that Reynolds' and Richardson's co-plaintiffs below are not appellants in this matter, we note that they, too, did not make any arguments or present any evidence that their properties or persons suffered injury as a consequence of the alleged contaminations.

even if it existed, was intolerable enough, or even lasted long enough, to cause substantial or unreasonable annoyance or interference with the use and enjoyment of any property. *See* KRS 411.540(2) ("A temporary nuisance shall exist *if and only if* a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the value of use or the rental value of the claimant's property to be reduced."); *see also Smith v. Carbide and Chemical Corp.*, 226 S.W.3d 52, 56-57 (Ky. 2007) (holding in the context of trespass that if property owners cannot prove a health risk due to contamination, they must nonetheless prove that the contamination unreasonably interferes with their current use and enjoyment of their property in order to prove an actual harm or injury and be entitled to actual damages); *Cantrell v. Ashland Oil, Inc.*, Nos. 2006-SC-000763-DG, 2007-SC-000818-DG, 2010 WL 1006391at *15, note 8 (Ky. March 18, 2010) (interpreting *Smith, supra*, as authority that a claim of negligent trespass requires a showing of actual harm and does not warrant nominal damages).[12]

Indeed, the appellants' argument is not that contamination or odor caused by Childers interfered with their use of property or caused them any kind of injury; rather, their argument is that *obeying the November 2008 and February 2009 water advisories issued by the DEP* caused them annoyance and inconvenience.

[12] For this proposition of law, we find *Cantrell* to be persuasive authority in this case and proper to cite as it fulfills the criteria of CR 76.28(4)(c).

The November 2008 and February 2009 consumer water advisories merely warned the public of the DEP's *suspicions*. Each of the DEP's news releases relating to both consumer advisories, and produced of record, stated that "A consumer advisory is issued when there is a possibility that consumption of water produced by a water treatment plant may be harmful to human health." To be sure, agencies such as the DEP, along with public water providers, have an obligation to affirmatively protect the public from contaminated water. And, it would be an extremely bad rule to only allow the DEP to issue a consumer water advisory in the event that it *knew* (more probably than not), rather than merely *suspected* (and wished to further investigate), that the water being supplied to the public was contaminated and hazardous.

Paying heed to the DEP's suspicions was certainly a reasonable course of action for the appellants to have taken. But, like speculation and conjecture, suspicion is not evidence and it is not compensable. It is not enough to prove that a trespass has occurred or that a nuisance is being or has been maintained. The law of Kentucky does not allow for a nuisance or trespass claim to be based simply upon the *risk* of contamination or negative publicity surrounding such a risk. *See Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604, 627 (Ky. App. 2003); *Smith v. Carbide and Chemicals Corp.*, 507 F.3d 372, 381 (6th Cir. 2007); *McCaw v. Harrison*, 259 S.W.2d 457, 458 (Ky. 1953) (a cemetery did not constitute a nuisance "merely because it is a constant reminder of death and has a depressing influence on the minds of persons who observe it, or

because it tends to depreciate the value of property in the neighborhood, or is offensive to the aesthetic sense of the adjoining proprietor").

VI. CONCLUSION

The appellants have failed to demonstrate that the Letcher Circuit Court committed error in dismissing their claims. We therefore affirm.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Damon B. Willis
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES:

J. Dale Golden
Drew Byron Meadows
Lexington, Kentucky