

RENDERED: MAY 13, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000354-MR

THE ESTATE OF KENNETH PRICE  
AND JOYCE PRICE, HIS WIFE

APPELLANTS

v. APPEAL FROM WEBSTER CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 93-CI-00167

CONNIE TOWNSEND

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: This case arose over a dispute regarding a debt owed by Kenneth Price, now deceased, to Morris R. Townsend, also deceased. The circuit court found that there was no material issue of fact and entered a judgment in favor of Morris's widow, Connie Townsend, in the amount of \$34,078.37

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

payable with interest.<sup>2</sup> The appellants contend that there are material issues of fact precluding summary judgment. We disagree and affirm the circuit court.

Kenneth and Joyce Price leased to Morris and Joel C. Rich the right to mine coal from their property. The lease provided that if after the second year of the lease no coal was mined, Morris and Rich would pay five dollars per acre per annum as an advanced royalty. After the execution of the lease, the Prices received a demand for payment of a loan for which the leased property was collateral. Kenneth and Morris discussed Kenneth's financial situation and Morris agreed to loan Kenneth \$34,000. There was no promissory note or any other written document executed pertaining to the loan.

Morris died in June, 1991. In accordance with the lease provisions, Connie Townsend and Rich paid a \$2,305 advanced royalty payment to Kenneth but no further payments have been made and no coal has ever been mined from the property.

Following Morris' death, Connie confronted the Prices regarding the \$34,000 and demanded payment. The Prices did not dispute that the money was owed, but contended that the debt was to be repaid from coal royalties. Connie disputed that this was to be the method of payment and commenced this action to collect the debt. In April 2000, a trial was held that resulted in a

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<sup>2</sup> Although entitled an "order", it recites that it is before the court on Townsend's motion for summary judgment.

hung jury. Subsequently, Connie filed a motion for summary judgment and a hearing was held on February 2, 2001. On January 22, 2004, the circuit court granted Connie's motion and awarded her \$34,078.37 with interest to accrue at the rate of 9.24% from June 29, 1993.

The Prices contend that the circuit erred in entering summary judgment because there are material issues of fact.<sup>3</sup> In response, Connie contends that the Prices agreed to submit the case to the trial court for decision on the record and, therefore, they are precluded from arguing that a material issue of fact exists.

It is impossible for this court to afford meaningful review to either contention. Although this case was tried before a jury and the court relied, in part, on the evidence presented at the trial when considering the summary judgment motion, the trial record is not included in the record on appeal. And the record that is before this court indicates that there is a video tape of the summary judgment hearing, but it is not included in the appellate record. The burden is on the appellant to assure that the appellate record is complete and if the record is incomplete, the reviewing court must assume that

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<sup>3</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

the omitted portions support the trial court's order.<sup>4</sup> Because the record is inadequate for this court to determine whether there exists a material issue of fact, we must presume that the evidence presented at trial supports the circuit court's finding that there is none.

The summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert B. Frazer  
GREENWELL & FRAZER  
Marion, Kentucky

BRIEF FOR APPELLEE:

Stephen M. Arnett  
HULETTE & ARNETT  
Morganfield, Kentucky

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<sup>4</sup> Commonwealth, Dept. of Highways v. Richardson, 424 S.W.2d 601 (Ky. 1967).