

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001345-MR

CAMILLE E. DEAN, DAVID H. DEAN, JR.,  
AND ROBERT J. BURNS, SR., CO-PERSONAL  
REPRESENTATIVES OF THE ESTATE OF DAVID H.  
DEAN, SR.; AND CAMILLE E. DEAN AND DAVID  
H. DEAN, JR., INDIVIDUALLY AND AS  
BENEFICIARIES OF THE ESTATE OF  
DAVID H. DEAN, SR.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE  
ACTION NOS. 00-CI-005764 AND 01-CI-007505

JOHN T. BONDURANT, WINSTON E. MILLER,  
AND FROST BROWN TODD, LLC, (AS A STAND  
ALONE ENTITY AND AS SUCCESSOR IN INTEREST  
TO BROWN, TODD, & HEYBURN, PLLC, AND  
BROWN, TODD, & HEYBURN, A PARTNERSHIP)  
AND ITS PREDECESSORS IN INTEREST, BROWN,  
TODD, & HEYBURN, PLLC, AND BROWN, TODD, &  
HEYBURN, A PARTNERSHIP

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

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

JOHNSON, JUDGE: Camille E. Dean, David H. Dean, Jr., and Robert J. Burns, Sr., as co-personal representatives of the Estate of David H. Dean, Sr., and Camille and David, Jr., as beneficiaries of the Estate of David H. Dean, Sr., (collectively the appellants) have appealed from the May 7, 2004, order of the Jefferson Circuit Court which granted summary judgment to John T. Bondurant, Winston E. Miller, and Frost Brown Todd, LLC (collectively the attorneys). Having concluded that there is no genuine issue as to any material fact regarding the legal cause of the appellants' alleged damages, and that the attorneys are entitled to summary judgment as a matter of law, we affirm.

David H. Dean, Sr.<sup>2</sup> and his company, Dean Tire and Rubber, were clients of Frost Brown Todd (FBT) for many years.<sup>3</sup> In late 1986 Dean was contemplating a second marriage to Rosalind Syfret Brooks (now Dean, but for clarity hereinafter referred to as "Brooks"). In preparation for his marriage to Brooks, Dean requested his attorney, Henry Heyburn of FBT, to prepare an antenuptial agreement for his benefit and protection.<sup>4</sup>

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<sup>2</sup> Dean was the father of appellants, Camille Dean and David H. Dean, Jr.

<sup>3</sup> Frost Brown Todd, LLC, is a Kentucky Limited Liability Corporation, operating as a law firm with its principal offices located in Louisville, Jefferson County, Kentucky. Frost Brown Todd, LLC, is the successor in interest to Brown, Todd and Heyburn, PLLC, and Brown, Todd and Heyburn, a partnership.

<sup>4</sup> Brooks had the independent advice of counsel during the drafting of the antenuptial agreement.

On February 3, 1987, Dean and Brooks executed the "Antenuptial Agreement/Waiver" as prepared by FBT and were married. Paragraph 10(a) of the Agreement provided as follows:

10. Transfers to Ms. Brooks upon Mr. Dean's Death. Mr. Dean agrees that if he and Ms. Brooks are living together as husband and wife at his death he will leave to Ms. Brooks the following:
  - (a) Either his residence in Kentucky or his residence in Florida, whichever Mrs. [sic] Brooks may choose, provided however, that if Mr. Dean has previously made either of the alternative conveyances to Mrs. [sic] Brooks just referred to, prior to his death, this paragraph (a) shall not apply[.]

The only provision in the agreement restricting the transfer of property was Paragraph 12, and it provided that only transfers between Dean and Brooks were subject to restriction. However, Paragraph 12(a) contained a double negative which hinders its clarity and enforceability. Paragraph 12(a) of the Agreement provided:

12. Restrictions upon Transfers between Mr. Dean and Ms. Brooks. After their contemplated marriage, Mr. Dean and Ms. Brooks further agree that:
  - (a) During their lives, no transfer of property having a value in excess of Ten Thousand Dollars (\$10,000.00) as to each such transfer, with the exception of clothing, jewelry and motor cars, from one of them to (or for the benefit of) the other of them for less than a full consideration in money or money's worth (including transfers of property

into their joint names with right of survivorship) shall not be valid or enforceable unless evidenced by an instrument in writing which is signed by the transferor and which contains a certificate to the effect that it has been acknowledged by the transferor before a notary public (whether or not such a notarized instrument is otherwise required to accomplish such a transfer) [emphases added].

In the late 1980s Dean learned that FBT had failed to make a Subchapter "S" election for his business. As a result of this, Dean terminated his business relationship with FBT and became a client of Greenebaum, Doll, and McDonald, P.L.L.C. (Greenebaum). John Cummins, an attorney at Greenebaum, was retained by Dean and prepared Dean's estate plan, including a trust agreement as well as his Last Will and Testament. Following Dean terminating FBT's representation in the late 1980s, FBT did not perform any legal services for Dean, his company, his children, or his family until after his death.

In March 1996 Dean and Brooks jointly acquired a residence at 10320 U.S. Highway 42 in Jefferson County, Kentucky, with the title held by Dean and Brooks as joint tenants with right of survivorship. On October 26, 1998, Dean and Brooks acquired another tract of real property in Jefferson County, Kentucky, located on Wolf Pen Branch Road. The special warranty deed to the Wolf Pen Branch property stated that the property was conveyed by Ian Y. Henderson, a trustee, to Dean and Brooks "for

their joint lives, with remainder in fee simple[.]” Dean and Brooks signed the deed verifying the consideration and both of their signatures were notarized.

On May 11, 1999, Dean executed his Last Will and Testament, as prepared by Cummins of Greenebaum. Paragraph 2.7 of the will provided, as follows:

2.7 I am making no provision for my spouse regarding my primary residence in Kentucky or Florida pursuant to our Antenuptial Agreement dated February 3, 1987 (“Antenuptial Agreement”). I have satisfied my obligations under Paragraph 10(a) of the said Antenuptial Agreement by arranging title to my Kentucky residence as joint tenants with right of survivorship with my spouse, subject to any mortgage thereon, with her full knowledge and consent.

Further, Paragraph 7.2 of Dean’s will provided, as follows:

7.2 I have entered into the Antenuptial Agreement (as defined hereinabove) with my spouse. I direct my personal representative to take all actions necessary to comply with, and to enforce, its provisions in accordance with the terms of the Antenuptial Agreement.

At the time of Dean’s death,<sup>5</sup> on February 8, 2000, construction had begun on a residence on the Wolf Pen Branch property, however, it was still nine months away from completion. On February 12, 2000, the day after Dean’s funeral, Cummins informed the appellants that Brooks would receive title to both

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<sup>5</sup> Before Dean died, but while he was in the hospital, he endorsed a check for \$500,000.00 which he withdrew from his securities account to be deposited into a building account in order for the Wolf Pen Branch Road residence to be completed.

properties located in Kentucky. Cummins stated that he and Dean had several conversations regarding the Wolf Pen Branch property, and that during these conversations, Dean reaffirmed his desire to take title to the Wolf Pen Branch Property in his and Brooks's joint names. He claimed Dean did this in order to avoid having to rewrite the deed to place the property in their joint names once the U.S. Highway 42 property was sold.<sup>6</sup> According to Cummins, Dean did not want to renegotiate the terms of the antenuptial agreement and he clearly understood that Brooks might receive both Kentucky properties.

Following the conversation with the other appellants and Cummins, Camille discovered that Greenebaum had previously represented Brooks and her son in preparing an estate plan.<sup>7</sup> Based on this information, the appellants decided to terminate Greenebaum and Cummins's representation of the Dean estate because they perceived this to be a conflict of interest. The appellants then retained Bruce Dudley and his law firm, Ogden

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<sup>6</sup> This conversation occurred on October 1, 1998, as reflected in the note drafted by Cummins. Cummins testified that a second conversation between Dean and him occurred on October 15, 1998, in which Dean expressed the same desire to place the property in his and Brooks's joint names to minimize the confusion once the U.S. Highway 42 property was sold.

<sup>7</sup> Camille testified that she discovered this information by going to Dean's office and searching through his files.

Newell and Welch, to represent the interests of the Dean estate. On March 9, 2000, probate of the estate began in Florida.<sup>8</sup>

Meanwhile, Brooks retained John T. Bondurant, an attorney at FBT, to insure that she would receive her share of the Dean estate. Dudley openly and freely negotiated with Bondurant in an effort to resolve the disputes between the appellants and Brooks. After several months of negotiations between Bondurant and Dudley, Bondurant raised the issue that Dudley may have a conflict of interest because he represented both the personal representatives of the estate, as well as the Dean children, who were seeking to administer the estate for their personal benefit. On or about the first of July 2000, the Dean children retained Robert Hallenberg of Woodward Hobson and Fulton, to represent their interests as beneficiaries. Thus, Dudley represented the Dean estate and Hallenberg represented the Dean children, and both of these attorneys continued to negotiate with Bondurant without raising any allegations of him having a conflict.

On September 8, 2000, the appellants filed a complaint for the declaration of rights between the estate and its beneficiaries in both Jefferson County, Kentucky,<sup>9</sup> and in the

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<sup>8</sup> While Dean died in Jefferson County, Kentucky, his domicile was in Florida where his estate was probated. An ancillary administration of the Dean estate was filed in Jefferson County, Kentucky, on September 5, 2000.

<sup>9</sup> No. 00-CI-05764.

Circuit Court for Palm Beach County, Florida.<sup>10</sup> In the complaint, the appellants asked the Jefferson Circuit Court to determine whether the Wolf Pen Branch property should be included as a part of the Dean estate for distribution among the beneficiaries, including the co-personal representatives.

On October 2, 2000, Bondurant filed an answer on behalf of Brooks in the Jefferson Circuit Court which, among other defenses, argued:

39. Subparagraph (a) of Paragraph 12 of the Antenuptial Agreement is so ambiguous and internally inconsistent as to be unenforceable.

Thus, Bondurant argued that the language in the antenuptial agreement was deficient despite the fact that it had been prepared for Dean by his own law firm, FBT, 13 years earlier.

Following the filing of the responsive pleadings, Bondurant continued to negotiate with both Dudley and Hallenberg in an attempt to resolve the conflicts between the appellants and Brooks. At no time did the appellants assert that Bondurant or FBT had a conflict of interest because of their representation of Brooks. However, on November 11, 2000, the contingent

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<sup>10</sup> No. CP 00-1094. Although both parties spend a great deal of time discussing the Florida action in their briefs, the Florida action is inconsequential to this Court's review.

beneficiaries,<sup>11</sup> moved to disqualify Bondurant and FBT because of an alleged conflict.<sup>12</sup> Bondurant asked Dudley and Hallenberg to waive this conflict, but they refused. On December 28, 2000, Bondurant and FBT withdrew from the case rather than challenging the attempt to have them disqualified. Brooks subsequently retained new counsel.

On October 1, 2001, the appellants and Brooks mediated the dispute, and a tentative settlement agreement was reached. The trial court, in an order entered on May 14, 2002, approved the settlement agreement reached by the parties concerning the disposition of the Wolf Pen Branch property.<sup>13</sup>

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<sup>11</sup> The contingent beneficiaries include Helen Dean, Robert A. Dean, Jr., and Minnie Dean. They were represented by Sandra Bennett and are also former clients of FBT.

<sup>12</sup> The motion alleged a conflict because FBT prepared the antenuptial agreement at Dean's request, and by representing Brooks it was now representing a party with an interest adverse to the antenuptial agreement.

<sup>13</sup> The settlement agreement provided that the Wolf Pen Branch property, which was recognized as being held in Brooks's sole name, was to be deeded 50 percent to Brooks and 50 percent to the marital trust consistent with Dean's will. The Wolf Pen Branch property was to be held by Brooks and the marital trust as tenants in common, but with no rights of survivorship. Brooks was to have the sole use of the Wolf Pen Branch property during her lifetime or until she chose to sell it and she could not alienate her interest in the Wolf Pen Branch property. If the property was not sold during Brooks's lifetime, the property was to be sold upon her death. Upon any sale of the Wolf Pen Branch property, the net proceeds were to be divided 50 percent to Brooks or her estate and 50 percent to the marital trust. All proceeds of the sale were to be held by the trust and Brooks was to receive all income from its prudent investment in monthly or quarterly installments during her lifetime with no encroachment on the trust principal. Upon Brooks's death, all remaining trust proceeds were to be paid to the Dean children.

On November 7, 2001, the appellants filed an amended complaint in the underlying declaratory action.<sup>14</sup> The amended complaint alleged, among other things, that the attorneys owed "Dean, his Estate, and his foreseeable and intended beneficiaries the degree of care and skill of professional conduct ordinarily and customarily provided by members of the legal profession." The complaint alleged the attorneys committed three acts of legal negligence: (1) the attorneys argued that the antenuptial agreement, which had been prepared by FBT, was ambiguous and unenforceable; (2) the attorneys represented Brooks in a matter which was substantially related but adverse to their former client's interests; and (3) the attorneys prepared a legal document that contained a double negative and later argued that the document was void and unenforceable. The complaint alleged the appellants incurred damages because of the attorneys' negligence in drafting the antenuptial agreement, which resulted in the Wolf Pen Branch property being excluded from the assets of the estate.

On December 17, 2003, the attorneys filed a motion for summary judgment asserting that the appellants failed to state a claim for breach of ethical obligations and that the attorneys'

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<sup>14</sup> A separate action alleging the same legal negligence was commenced by the Dean children as beneficiaries of the estate, styled *Camille E. Dean, et. al. v. John T. Bondurant, et. al.*, in the Jefferson Circuit Court, Division 13, 07-CI-07505. This action was later consolidated with the senior Division 11 action.

actions were not the legal cause of the damages suffered by the appellants. Following multiple briefings and oral arguments, the trial court granted summary judgment in favor of the attorneys in an order entered on May 7, 2004. On May 17, 2004, the appellants filed a motion to vacate the trial court's judgment. Then, on June 7, 2004, the appellants filed a motion requesting the trial judge to recuse herself. On June 10, 2004, the trial court entered two orders, one denying the appellants' motion to vacate and the other denying the appellants' motion to recuse. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.<sup>15</sup> Summary judgment is appropriate "if 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."<sup>16</sup> In Paintsville Hospital Co. v. Rose,<sup>17</sup> the Supreme Court of Kentucky held that for summary judgment to be

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<sup>15</sup> Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

<sup>16</sup> Kentucky Rules of Civil Procedure (CR) 56.03.

<sup>17</sup> 683 S.W.2d 255, 256 (Ky. 1985).

proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."<sup>18</sup> There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.<sup>19</sup> "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citation omitted].<sup>20</sup> Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."<sup>21</sup>

In a legal negligence action, as in all negligence actions, the burden is on the plaintiff to prove duty, breach of duty, causation, and damage.<sup>22</sup> In the case before us, the parties

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<sup>18</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

<sup>19</sup> Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992).

<sup>20</sup> Steelvest, 807 S.W.2d at 480.

<sup>21</sup> Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

<sup>22</sup> Stephens v. Denison, 64 S.W.3d 297, 298-99 (Ky.App. 2001) (citing Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky.App. 1978)).

agree that Daugherty,<sup>23</sup> properly sets forth the elements for a claim of legal negligence:

As stated by the author in Wade, The Attorney's Liability for Negligence, 12 Vand.L.Rev. 755, 762 (1959), the standard of care is generally composed of two elements—care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.

In determining whether that degree of care and skill exercised by the attorney in a given case meets the requirements of the standard of care aforementioned, the attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession [citation omitted].

As it would be in negligence cases generally, the question of whether the conduct of the attorney meets the standard of care test is one for the trier of the facts to determine [citations omitted].<sup>24</sup>

The issue before us on appeal has been somewhat mischaracterized as whether the issue of causation is a question of fact or a question of law. As noted by the appellants, generally a legal negligence action is no different from any other action for negligence, i.e., questions of fact, including the question of causation, are for the jury to decide. However, as the attorneys correctly argue, even when all the facts are

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<sup>23</sup> 581 S.W.2d at 12.

<sup>24</sup> Id. at 16.

viewed in the light most favorable to the appellants, as a matter of law there are no facts to support the appellants' claim that the attorneys' alleged breach of duty was the legal cause of the appellants' alleged damages.

The trial court granted summary judgment after determining that upon Dean's death, legal title to the Wolf Pen Branch property passed to Brooks under the deed's right of survivorship provision regardless of the antenuptial agreement's Paragraph 12(a). The trial court, in its order dated May 7, 2004, stated:

The existence of [Paragraph 12], despite its ambiguity, must be considered in light of the deed to the Wolf Pen Branch property (the asset at issue herein). That property was transferred to David Dean Sr. and Rosalind Dean jointly, with rights of survivorship on October 26, 1998 from the executor of the estate of one Elbert Gary Sutcliffe (recorded at Deed Book 7129, page 190-192, Jefferson County, Kentucky). This property was never owned solely by David Dean Sr. or Rosalind Dean. Further, there is no subsequent transfer of their individual interest from either of them to the other. Title to the property remained the same from October 26, 1998 to the date of Mr. Dean's death.

If paragraph 12(a) is so ambiguous as to render that provision void, the Antenuptial Agreement would remain valid and enforceable except as to that provision (see paragraph 15, Antenuptial Agreement) and the agreement would be construed and enforced as if it did not include paragraph 12(a).

Regardless of the language of this paragraph, the Deed to the property is controlling. Paragraph 12(a) (despite its

problems) would only apply to the Wolf Pen Branch property if one of the parties (either Mr. Dean or Rosalind Dean) transferred the property or any interest in the property, to the other of them. The plain language of paragraph 12(a) makes it clear that a transfer from a third party to them jointly is not contemplated. Paragraph 12(a) simply does not apply in this case and therefore the Court need not attempt to determine its validity or enforceability, nor construe its meaning in light of the double negatives contained therein.

The Plaintiffs' claims also include legal malpractice based on violations of SCR Code of Professional Responsibility. The Court is unaware of any authority supporting this type of cause of action. In fact, Hill v. Willmont, Ky.App., 561 S.W.2d 331 (1978) addressed a similar issue and declared that the sole remedy for such violations lies with the Kentucky Bar Association.

Assuming the Plaintiffs have or can meet their burden of proof as to two of the elements for malpractice (duty and breach), they [cannot] satisfy the remaining two elements (proximate cause and damages).<sup>25</sup> As addressed earlier herein, the deed to the Wolf Pen Branch property controls. It was not drafted by the Defendants; it clearly reflected the intent of the parties to it; and it clearly transferred to David and Rosalind Dean, the Wolf Pen Branch property jointly with rights of survivorship. This deed is the proximate cause of Plaintiffs' "damages" (the property and attorney fees), not any portion of the Antenuptial [A]greement.

There simply is no genuine issue of material fact and, even considering the facts in a light most favorable to the Plaintiffs, the Plaintiffs would not be able to produce sufficient evidence at trial warranting a verdict in their favor. The Defendants are entitled to judgment as a matter of law.

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<sup>25</sup> We question the trial court's reference to damages, but otherwise agree with its analysis.

We agree with the trial court that the language contained in the deed to the Wolf Pen Branch property controls the ownership of the property. The deed stated that the "Party of the First Part hereby conveys to the Party of the Second Part, for their joint lives, with remainder in fee simple . . . ." Therefore, upon the death of either Dean or Brooks, the surviving spouse would receive through the survivorship clause the title to the property in fee simple.<sup>26</sup> Based upon the language contained in the deed conveying the property to both Dean and Brooks, title to the Wolf Pen Branch property properly passed to Brooks notwithstanding the restriction in Paragraph 12 of the antenuptial agreement. Therefore, the double negative in Paragraph 12(a) of the antenuptial agreement was not the legal cause of the alleged damages suffered by the appellants. Thus, even if the antenuptial agreement had been free of linguistic flaws, title to the Wolf Pen Branch property would have passed by the deed's survivorship clause to Brooks as opposed to reverting to the Dean estate. The purpose of the restrictions in Paragraph 12 of the antenuptial agreement was to prevent Brooks from claiming after Dean's death that he had transferred certain assets to her. Under Paragraph 12(a) no transfer between the parties of real estate having a value in excess of \$10,000.00

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<sup>26</sup> KRS 381.050(2); Nelson v. Mahurin, 994 S.W.2d 10 (Ky.App. 1998).

would be valid unless the writing complied with the terms of the agreement. The two parcels of real estate at issue herein were not transferred between Dean and Brooks, and thus as a matter of law the provisions in Paragraph 12, regardless of any ambiguity, did not apply to those transfers.

In summary, this case presents questions of law on two levels. First, “[g]enerally, the issue of the standard of care and the existence of a duty are legal questions; where as the breach of a duty and causation are factual issues. However, where only one reasonable conclusion can be reached, a court may decide the issue of causation as a matter of law” [citations omitted].<sup>27</sup> Second, our construction and interpretation of the antenuptial agreement is a matter of law.<sup>28</sup> Therefore, since we conclude as a matter of law that Paragraph 12 of the antenuptial agreement has no applicability to the conveyance of the Wolf Pen Branch property, as a matter of law, the attorneys’ alleged breach of duty was not the legal cause of the appellants’ alleged damage. Accordingly, we agree with the trial court that the antenuptial agreement did not apply to the Wolf Pen Branch property; therefore, any alleged negligence by the attorneys was not the legal cause of any damages suffered by the appellants when the Wolf Pen Branch property passed to Brooks by

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<sup>27</sup> Lewis v. B & R Corp., 56 S.W.3d 432, 438 (Ky.App. 2001).

<sup>28</sup> Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky. 1998) (stating that the construction and interpretation of a written instrument are questions of law).

survivorship rather than to the estate. Thus, the trial court properly granted summary judgment to the attorneys.

Having concluded that there is no factual basis for the claim that acts by the attorneys during their representation of Brooks, or in the drafting of the antenuptial agreement, was the legal cause of any damage the appellants suffered as a result of the title to the Wolf Pen Branch property and the U.S. Highway 42 property passing to Brooks by the right of survivorship in the deeds, the trial court's summary judgment in favor of the attorneys is affirmed.

BARBER, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANTS:

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