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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-002217-MR

ORRIS SALISBURY; EMMIT SALISBURY; CHARLOTTE SALISBURY; and GERTRUDE BOGGS — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 03-CI-01308

EARL HALL, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

DIXON, JUDGE: Appellants, Orris and Emmit Salisbury, appeal from an order of the Floyd Circuit Court granting summary judgment in favor of Appellee, Earl Hall, Jr., in this will contest matter. Finding no error, we affirm.

On October 11, 2000, Jay Salisbury, a resident of Floyd County, executed a will directing the disbursement of his estate and naming his nephew, Appellee Hall, as

executor of the will. On October 21, 2001, Salisbury passed away; his will was admitted for probate by Appellee on December 11, 2001.

In December 2003, Salisbury's other heirs, Appellants Orris Salisbury and Emmit Salisbury, as well as Charlotte Salisbury and Gertrude Boggs, filed a complaint in the Floyd Circuit Court challenging the will. Specifically, Appellants claimed that Salisbury lacked testamentary capacity at the time he executed the will, and that the will was unnatural and the "product of coercion, undue duress and fraud perpetrated on and against the decedent as well as the [Appellants]." Further, Appellants asserted that the will violated the presumption against disinheritance.

In February 2004, Appellee submitted interrogatories and a request for production of documents to each of the heirs. Following an order to compel, Appellants herein filed their answers to interrogatories and a response to the request for documents. However, Charlotte Salisbury and Gertrude Boggs failed to comply and were subsequently dismissed from the action on November 21, 2005.

Appellee thereafter filed a motion for summary judgment in April 2006, claiming that Appellants had failed to produce any evidence to support their claims. Appellants did not file a response or appear in court to argue the motion. Without objection, the trial court granted summary judgment in favor of Appellee on April 24, 2006.

On May 3, 2006, Appellants filed a CR 59.05 motion to alter, amend or vacate the order of summary judgment. At a subsequent hearing, Appellants' counsel

attempted to argue the merits of Appellee's summary judgment motion, producing a document indicating that Jay Salisbury had been discharged from the United States Army in 1944 under Section 8 for mental disabilities. Notwithstanding, the trial court ruled that counsel failed to present any testimony or evidence supporting his CR 59.05 motion, and thereafter denied the motion. This appeal ensued.

Appellants argue in this Court that the trial court erred in granting summary judgment as there are genuine issues of material fact, and also erred in dismissing the action on behalf of Gertrude Boggs and Charlotte Salisbury. We disagree.

In *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001), this Court addressed the proper standard of review in appeals from summary judgments:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." 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.* (citations in footnotes omitted).

Summary judgment is only appropriate if the movant's "right to judgment is shown with such clarity that there is no room left for controversy." *Steelvest, Inc., supra,* at 482. Summary judgment must be "cautiously applied," and the trial court should not render a summary judgment "if there is any issue of material fact." *Id.* at 480. A material fact is one which has the power to alter the outcome of the case under the existing law if the controversy surrounding that fact is decided in favor of the nonmovant. 73 Am.Jur.2d *Summary Judgment* § 48 (2001). *See also Absher v. Illinois Central Railroad Co*., 371 S.W.2d 950, 953 (Ky. 1963).

However, it is well established that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (*citing Steelvest, Inc., supra.*) As noted in *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co*., 579 S.W.2d 628, 631 (Ky.App. 1979), "[w]hen the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by evidentiary material reflecting that there is a genuine issue of material fact." In *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968), our predecessor Court explained the reasons underlying this rule:

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, . . . that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

To defeat Appellee's properly supported motion for summary judgment, it was incumbent upon Appellants to make some showing that they could produce proof at trial that Jay Salisbury lacked testamentary capacity at the time he executed his will, or that the will was unnatural and the product of coercion, undue influence or fraud. The record herein, however, shows that the only discovery undertaken in this matter was the depositions of Appellants taken by Appellee's counsel. And as is evidenced by the fact that Appellee submitted Appellants' depositions in support of his motion for summary judgment, Appellants offered no affirmative proof in their deposition testimony to establish their claims. Rather, Appellants simply claimed that Salisbury's will was unnatural and must have been the product of coercion because he left all of his estate to Appellee. However, the law is clear that a testator can convey the bounty of his estate to whomever he chooses. *Burke v. Burke*, 801 S.W.2d 691, 693 (Ky.App. 1990).

Appellants have failed to produce any affirmative evidence that, at trial, they could prove the allegations set forth in their complaint. *See Tarter v. Arnold*, 343 S.W.2d 377 (Ky. 1961). Although Appellants were given ample opportunity to discover and present such evidence, they failed to explain why such evidence was not presented, nor did they request a continuance from the trial court in order to obtain such evidence.

*See Hartford Insurance Group, supra.* As such, the trial court properly granted summary judgment.

We likewise find that the the trial court properly denied Appellants' CR 59 motion to alter, amend or vacate the summary judgment. CR 59.05 provides: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment. *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). *See also Hopkins v. Ratliff*, 957 S.W.2d 300 (Ky.App. 1997). Although CR 59.05 does not set forth the grounds for the motion, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Gullion, supra*. (citations omitted).

The only evidence offered by Appellants during the hearing on the CR 59 motion was a copy of a document indicating that Jay Salisbury had been discharged from the United States Army in 1944 under Section 8 for mental disabilities. Such evidence was available and should have been presented during the summary judgment proceedings. Notwithstanding, we fail to perceive how a 62-year-old document would have been relevant to the issues in this case.

Finally, we conclude that Appellants have failed to properly preserve the issue pertaining to the dismissal of Charlotte Salisbury and Gertrude Boggs. Following the trial court's order dismissing them as parties to the complaint for failing to comply,

Appellants neither filed a CR 59.05 motion nor appealed the trial court's order under CR 73.02. Thus, we cannot and will not consider the argument herein.

The order of the Floyd Circuit Court granting summary judgment in favor of Appellee, Earl Hall, Jr., is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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