

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002337-MR

THOMAS R. PETERSON

APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, JUDGE  
ACTION NO. 04-CI-00455

WOODFORD R. LONG

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Thomas R. Peterson, appeals from an order of the Shelby Circuit Court granting summary judgment and awarding costs and attorney's fees in the amount of \$6,602.87 to Appellee, Woodford R. Long.

In 1984, Appellant purchased two farms that fronted Christianburg Road in Shelby County. The two tracts of land were separated by a driveway that was owned by the Hardy family. The driveway provided the sole legal access to the Hardy Farm. In

1992, Appellant was share farming with Appellee and obtained permission from Mr. Hardy to cut holes in the boundary fences along both sides of the driveway and construct new fences that would permit Appellant to move his cattle across the driveway between his two farms. In exchange, Appellant gave Hardy and Appellee permission to access the Hardy farm using a graveled abandoned railroad track bed.

At the time Appellee was considering purchasing the Hardy farm in 2004, he expressed concern that the only access to the property was the railroad track bed, which was partially owned by Appellant. It is uncontroverted that Appellant acknowledged he was not the rightful owner of the driveway and agreed to work on a land exchange whereby Appellant would receive legal title to the driveway and Appellee would receive legal title to the track bed.

Six months after purchasing the Hardy farm no agreement had been reached concerning the land exchange. Appellee then notified Appellant that he intended to open up the driveway to insure a legal right of access to his property that did not depend on the permissive use of the railroad bed. Appellee offered to continue to permit Appellant to transfer his cattle across the driveway. In response, Appellant allegedly threatened to have Appellee arrested. Thereafter, Appellant blocked the railroad bed, denying Appellee access to his farm.

In August 2004, Appellee filed an action seeking a declaration of rights and damages for breach of private right of enjoyment. Appellant thereafter filed a counter complaint alleging ownership of the driveway by adverse possession. However, in February 2005, Appellant filed a motion to dismiss the case with prejudice, stipulating

that Appellee owned the driveway “in fee simple and that [Appellant] ha[d] no easements or other rights to use that passway without [Appellee’s] permission.” The trial court denied the motion to dismiss.

In March 2006, Appellee filed a motion for summary judgment on the adverse possession claim, arguing that Appellant had effectively abandoned the claim by conceding his use of the driveway was permissive. Appellant filed no response and failed to appear for the hearing. On May 2, 2006, the trial court granted summary judgment in favor of Appellee. Further, the court ruled, “[B]ecause no legal basis exists to assert an adverse possession claim, the Court further awards [Appellee] his fees, costs and expenses incurred in defending this claim and bringing this motion.” Appellee thereafter submitted documentation of legal expenses in the amount of \$5,802.87.

In May 2006, Appellant filed a CR 59.05 motion to alter amend or vacate the order of summary judgment on the grounds that (1) he did not receive notice of the summary judgment hearing; (2) the summary judgment was not supported by law or fact, and (3) an indispensable party to the action had not been named. However, the motion offered no details, substance or legal authority to support Appellant’s arguments. The trial court thereafter denied the motion, again noting that “Appellant’s motion was not brought in good faith and served to needlessly delay these proceedings and unnecessarily increase litigation costs pursuant to CR 11. Consequently, [Appellant] is ordered to reimburse [appellee] his legal fees in the amount of \$800,<sup>1</sup> incurred as a result of having to file a Response and Appear in Court.” Appellant thereafter appealed to this Court.

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<sup>1</sup> This \$800 was in addition to the prior expenses of \$5,802.87.

On appeal, Appellant does not challenge the trial court's grant of summary judgment on the substantive claim. Rather, Appellant's sole issue concerns the trial court's award of attorney's fees and costs to Appellee. Appellant argues that Kentucky has adopted the "American Rule" with respect to recovery of attorney's fees, whereby fees are not allowable as costs in the absence of a statute or contract expressly providing therefore. *See Flag Drilling Company, Inc. v. Erco, Inc.*, 256 S.W.2d 762 (Ky. App. 2005). Appellant further contends that the trial court's reliance on CR 11 was inappropriate because his counter claim was based in good faith and upon the advice of counsel. Finally, Appellant urges that even if this court were to conclude that an award of fees and costs is appropriate, the amount claimed by Appellee is excessive and unreasonable.

We do not reach the merits of Appellant's arguments because we conclude that the issues are not properly preserved for review. In compliance with CR 76.12(4)(c)(v)<sup>2</sup>, Appellant notes in his brief that all issues were preserved in the trial court by virtue of his Rule 59.05 motion. However, that motion states in its entirety:

Comes now the Defendant Tom Peterson, and pursuant to Civil Rule 59.05, moves the Court to Alter, Amend and or in the alternative, Vacate the Order of this Court dated May 2, 2006 upon the grounds that (1) Defendant and his counsel did not receive notice that the Court was going to consider the matter leading to the entry of this Order; (2) that the entry of this order is not supported by the record or the law; and (3) that the Defendant has discovered that a necessary and indispensable party to this action, namely WRL, LLC owners of the property in dispute have not been made parties to this action.

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<sup>2</sup> CR 76.12(4)(C)(v) requires a statement at the beginning of the argument "with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

Appellant's motion fails to cite any legal authority or evidentiary basis for his nonspecific conclusory claims. Certainly, no issue was specifically raised with regard to the award of attorney's fees and costs.

Consequently, the sum and substance of Appellant's arguments in this Court was never presented to the trial court in such a way as to give the court a fair opportunity to consider them. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986); *see also Payne v. Hall*, 423 S.W.2d 530, 532 (Ky. 1968). Thus, we decline to consider the merits of Appellant's arguments for the first time on appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Judy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

B. Ballard Rogers  
Louisville, Kentucky