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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000189-MR
AND
NO. 2013-CA-000247-MR

DOUGLAS A. VESCIO AND LEE VESCIO — APPELLANTS AND CROSS-APPELLEES

v.

JOHN E. DARNELL AND JANET E. DARNELL — APPELLEES AND CROSS-APPELLANTS

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 99-CI-02531

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, JONES, AND VANMETER, JUDGES.

JONES, JUDGE: This appeal and the related cross-appeal involve a property dispute between neighbors. For the reasons more fully explained below, we affirm

on all issues except for the equitable relief issue. On that issue, we reverse and remand for entry of an order affording the Appellants complete relief.

I. BACKGROUND

In 1987, the Appellants/Cross-Appellees, Douglas and Lee Vescio,[1] purchased a residence located on Ridgeway Road in Lexington, Fayette County, Kentucky. In 1990, John and Janet Darnell,[2] the Appellees/Cross-Appellants purchased an adjacent residence; it is situated behind and uphill to the Vescios' property. The properties are divided by a large brick wall located on the back and on the side of the Darnells' property. At some point in 1997, John Darnell drilled holes in the brick wall. The Vescios requested the Darnells to plug the holes because they believed that the holes were causing flooding to the Vescios' property (backyard, basement, and garage). When the Darnells refused to plug the holes, the Vescios filed suit in Fayette Circuit Court.

Ultimately, the case was tried before a jury. The jury returned a verdict in favor of the Vescios and awarded them $50,000 in compensatory damages and $75,000 in punitive damages. Following the jury's verdict, the Vescios asked the trial court to award them: (1) equitable relief in the form of an order requiring the Darnells to plug all the holes in the wall; (2) prejudgment interest from the date of the verdict up until entry of the final judgment; and (3) their costs and attorneys' fees. By way of orders entered January 25, 2013, and

[1]They are collectively referred to herein as the "Vescios."

[2] They are collectively referred to herein as the "Darnells."

April 9, 2013, the circuit court: (1) partially granted the Vescios' request for equitable relief in that it ordered the Darnells to plug a portion of the holes; (2) it awarded a portion of the attorneys' fees the Vescios had requested; and, (3) it refused to award any prejudgment interest. The Vescios then filed this appeal arguing that the circuit court should have granted them all of the relief they requested.

In turn, the Darnells filed a cross-appeal arguing that the case should have been dismissed long ago for failure to prosecute, or alternatively, that the trial court should have awarded them a directed verdict. They also argued that the trial court erred when it allowed the Vescios to amend their complaint to add a claim for punitive damages.

II. THE DARNELLS' APPEAL[3]

A. Dismissal Under CR[4] 41.02(1) and/or CR 77.02(2)

The Darnells maintain that the issues raised by the Vescios are moot because the trial court erred when it refused to dismiss the Vescios' action for lack of prosecution under either CR 41.02(1) or CR 77.02(2). "CR 41.02 and CR 77.02 serve different functions and thus have different and distinct requirements." *Manning v. Wilkinson*, 264 S.W.3d 620, 624 (Ky. App. 2007); *see also Jaroszewski v. Flege*, 297 S.W.3d 24, 31 (Ky. 2009). Accordingly, we must analyze the Darnells' arguments under each Rule separately.

[3] Because the Darnells argue, in part, that the trial court erred in ever allowing this matter to reach trial, we believe it makes the most sense to address their cross-appeal first.

[4] Kentucky Rules of Civil Procedure.

We will examine CR 41.02 first. It provides a mechanism whereby defendants, like the Darnells, can move the trial court to dismiss an action based on the plaintiffs' failure to prosecute, abide by the Kentucky Rules of Civil Procedure, or abide by any court order. *See* CR 41.02(1). The Darnells filed a CR 41.02 motion on December 11, 2006. Therein, as well as at a hearing on December 22, 2006, the Darnells maintained that they had abated the water problems by plugging some of the holes in the wall and believed the Vescios were satisfied with the results, alleviating the need for any further litigation. The Vescios maintained that the Darnells' actions were insufficient, and they had yet to receive reimbursement for the water damages caused by the holes. During the hearing before the trial court, the parties agreed to continue the matter until April 27, 2007, in hopes that they might be able to resolve the matter. Prior to the April 27, 2007, hearing, the Vescios filed a renewed motion for summary judgment before the trial court. Much of the hearing on April 27, 2007, focused on the merits of the Vescios' renewed summary judgment motion as opposed to the Darnells' motion to dismiss. At one point during the hearing, while discussing the CR 41.02 motion, counsel for the Darnells even stated that perhaps the litigation had moved "on past that." The parties then began discussing other logistical matters such as whether the case should be tried before a jury. At the very end of the conference, the trial court

orally stated that it was overruling the motion to dismiss. However, it does not appear that the trial court ever memorialized its ruling into a written order.[5] The only document appearing in the written record is a copy of the "video log" dated April 27, 2007, the same day as the hearing, entered of record by the circuit clerk. The video log is not signed by the court. It does not contain any findings of fact and conclusions of law. In fact, the video log does not even indicate whether the trial court made any rulings at the hearing; it merely documents that a hearing was conducted on April 27, 2007. The video log does not suffice as a written order.

The lack of a written order documenting the trial court's denial of the Darnells' motion to dismiss is fatal to this portion of their cross-appeal. The circuit court's failure to render a written order on the motion to dismiss is tantamount to it never having decided the motion in the first place. Circuit courts speak "only through written orders entered upon the official record." *Kindred Nursing Ctrs. Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). Specifically, court orders are only effective if they are in writing, entered into the official record by the circuit clerk, and signed by the judge. *Murrell v. City of Hurstbourne Acres*, 401 S.W.2d 60, 61 (Ky. 1966). An appeal cannot lie from an oral order. *See Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012). For this reason, we cannot consider this portion of the Darnells' cross-appeal. *Id.*

[5] To no avail, we have scoured the written record looking for an order on the motion. Furthermore, we note that the Darnells failed to include a written order in their appendix as our appellate rules require. *See* CR 76.12(4)(vii) ("The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court.").

We now turn to the Darnells' argument that the trial court erred when it did not dismiss this case under CR 77.02. CR. 77.02(2) is a "housekeeping rule." *Manning*, 264 S.W.3d at 622. It requires each trial court in the Commonwealth to review all pending matters on its docket "at least once a year" to identify those cases in which "no pretrial step has been taken within the last year." CR 77.02(2). Upon identifying any such case, the trial court must then provide notice to the attorneys of record that the "the case will be dismissed in thirty days for want of prosecution except for good cause shown." *Id.* If the attorneys fail to answer the notice or provide an insufficient answer, the trial court is obligated to dismiss the action without prejudice. *Id.* However, where an answer is provided, the trial court has a wide degree of discretion in deciding whether a party has shown good cause to allow the action to remain on the court's docket. *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009).

For this reason, we review the trial court's action in response to a CR 77.02(2) notice under an abuse of discretion standard. *See Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky. App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

This case came before the trial court, pursuant to CR 77.02(2), on three occasions prior to trial: October 15, 2001, September 20, 2006, and February 9, 2010. Counsel responded to each CR 77.02(2) notice in a timely fashion. And,

each time, the trial court allowed the matter to remain on the court's docket. While we certainly do not believe it is good practice for cases to languish at the trial court level as long as this case did, we cannot identify that the trial court abused its discretion in allowing this matter to remain on the court's docket. While there were delays in docket activity, a closer examination reveals prolonged periods during which the parties attempted to resolve the matter. Additionally, the last delay appears to have been occasioned by a discovery dispute and/or misunderstanding between the parties regarding an expert report. Furthermore, at least initially, it appears that the trial court could have done more to keep this case on track.[6]

In sum, we do not believe the trial court abused its discretion when it failed to dismiss this action pursuant to CR 77.02(2). While the action may have appeared stale at first blush, a closer examination of the entire record revealed an action still very much alive. The parties were engaged in settlement discussions, attempts at resolution, and discovery throughout most of the time at issue. Thus, we believe that trial court exercised its discretion appropriately when it considered these matters, not solely the amount of time that had elapsed since the Vescios

[6]This case was before two different trial court judges. Initially, even though the trial court held some pretrial conferences, no written orders outlining discovery deadlines or other pretrial deadlines were ever entered by the trial court. The first trial date was apparently canceled at the request of the parties, but, again, there is no written order memorializing the cancelation or scheduling an alternative date or conference. We believe some follow through on the trial court's part during the early years of this litigation could have been helpful in keeping this case more on track. This is not to say that trial courts are responsible for mapping out the litigation. However, some basic guidance to the parties in the form of written orders is important. Indeed, at one point early on in this litigation, the trial court marveled at the fact that the parties even showed up for a follow-up conference because the court had neglected to issue a written order setting the conference. This appeared to be somewhat of a routine occurrence. Likewise, summary judgment motions were filed by both parties during the initial few years, without the trial court issuing any written opinions and/or orders on the motions.

filed their original complaint. *See Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970) ("Each case must be considered in the light of the particular circumstances involved and length of time is not alone the test of diligence.").

B. Amendment of Complaint

On November 1, 2010, a little more than a month before the trial of this matter was scheduled to begin, the Vescios filed a motion to amend their complaint to include a punitive damages count. The Vescios stated in their motion that their request was based on their contention that: "Defendants conduct in failing to seal the holes even after Plaintiffs informed them in 1998 of the damage caused by the water pouring through the holes drilled by John Darnell amounts to willful, wanton, reckless, oppressive and malicious conduct which subjected Plaintiffs to cruel and unjust hardship and shows Defendants' flagrant indifference to the Plaintiffs' rights." By written order entered November 29, 2010, the trial court sustained the Vescios' motion. The Darnells assert that allowing the amendment on the eve of trial amounts to an abuse of discretion by the trial court.

CR 15.01 "allows a party to amend a pleading once as a matter of course any time before a responsive pleading is filed. Thereafter, a party may amend his pleading only by leave of court or written consent of the adverse party." *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 548 (Ky. 2001). "[L]eave shall be freely given when justice so requires." CR 15.01. "Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the

amendment itself." *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988).

In this case, the amended complaint filed by the Vescios sought only to add a claim for punitive damages. It did not allege any new factual information. Furthermore, the Vescios justified their delay in filing the motion based on the Darnells' continued refusal to take sufficient action to abate the water damage after being repeatedly notified by the Vescios that the problem persisted, which arose partially after the initial suit was commenced.

The Darnells raised only somewhat vague objections to the Vescios' motion for leave to amend. They objected on that basis that it was "untimely." They pointed out that it "*could* raise issues with regard to insurance coverage." And, finally, they argued that they had not been provided with an opportunity to take any discovery on the "newly asserted claims." However, they failed to explain what insurance issues might be raised, what discovery they would need to defend punitive damages, and, did not discuss any actual prejudice that allowing the amendment would cause to them.

After entertaining the arguments of counsel, the trial court ultimately granted the Vescios' motion to amend.[7] We cannot conclude this was an abuse of discretion. The issue with regard to insurance was somewhat of a red herring as

[7] The trial court originally entered an order granting the motion to amend, on November 15, 2010. That order indicated that there was no objection to the motion. For reasons that are not entirely clear, the Darnells' counsel apparently did not receive notice of the motion to amend and filed a motion asking the trial court to vacate its order. The trial court granted the motion to vacate, entertained arguments on the motion to amend, and, entered a subsequent order on November 29, 2010, overruling the Darnells' objections and granting the motion to amend.

matters concerning insurance cannot be raised at trial. As for discovery, the Darnells failed to identify any discovery that they would need to adequately defend the punitive damages issue at trial. They likewise failed to articulate to the trial court how adding the claim of punitive damages would actually prejudice them in the trial. *Ashland Oil & Ref. Co. v. Phillips*, 404 S.W.2d 449, 450 (Ky. 1966) (holding that the defendant must make a showing that the proposed amendment would cause an actual injustice to justify denial of a motion to amend). Thus, we find no basis upon which to reverse the trial court with respect to amendment of the complaint.[8]

C. The Trial Court's Failure to Set Aside the Verdict

The Darnells' final argument on appeal is that the trial court should have set the jury's verdict aside, in favor of the Vescios, because it was not supported by substantial evidence. The Darnells moved the trial court for a directed verdict at the close of their proof. However, they have failed to cite to any portion of the record where they moved the trial court to enter a judgment in their favor notwithstanding the verdict ("JNOV"). The Vescios maintain that the Darnells' failure to request a JNOV renders the insufficiency of evidence argument unpreserved.

"In order to rely on a claim of insufficiency of the evidence, a party must preserve it through a motion for judgment notwithstanding the verdict, which

[8] Once again, we do not believe that waiting to the eve of trial to seek an amendment is good practice. However, in this instance, we cannot conclude that the trial court's decision to allow the amendment was tantamount to an abuse of discretion.

in turn must be predicated upon a directed verdict motion made at the close of all the proof." *Bryan v. CorrectCare-Integrated Health, Inc.*, 420 S.W.3d 520, 524 (Ky. App. 2013). Thus, we must agree with the Vescios that the insufficiency of evidence issue was not properly preserved for our review on appeal.

Furthermore, even if the Darnells' claim was properly preserved, we do not believe that the trial court committed reversible error when it allowed this matter to reach the jury. The Darnells' argument in favor of a directed verdict is based on the premise that a landowner is not liable if the natural flow of water from his property damages an adjacent property.

The seminal water flow liability case in Kentucky is *Klutey v. Commonwealth, Dep't of Highways*, 428 S.W.2d 766 (Ky. 1967). Therein, our highest court switched from the "common enemy" doctrine to the rule of "reasonable use" approach. The rule of "reasonable use" balances the "common enemy" doctrine (which favors the upper or dominant estate owner) and the "civil law" doctrine (which favors the lower or subservient estate owner). *Id.* at 769. Under the "reasonable use" approach, we view the diffused surface water as a nuisance problem and attempt to balance the "reasonableness of the use by the upper owner against the severity of damage to the lower owner." *Id.*

The rule is that the dominant estate owner may divert water onto the servient estate without liability if the diversion is reasonable. *See Walker v. Duba*, 161 S.W.3d 348, 350 (Ky. App. 2004). Stated another way, "although a lower owner is bound to accept natural drainage from an upper owner, the rights of the

upper owner are not unlimited and that the upper owner may not unreasonably change the natural flow of water or cause it to collect and be cast upon the lower estate at a point where it had not previously flowed or in an increased volume or accelerated rate of flow so as to [cause] substantial damage to the lower owner." *Taylor v. Carrico*, 528 S.W.2d 694, 696 (Ky. 1975).

In determining "reasonableness," the following factors must be considered and balanced: (1) the necessity for the drainage; (2) whether reasonable care was taken by the dominant estate to avoid unnecessary injury to the land receiving the burden; (3) whether the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and, (4) whether the nature of diversion used by the dominant estate was "accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted." *Klutey*, 428 S.W.2d at 769–70 (quoting *Enderson v. Kelehan*, 226 Minn. 163, 32 N.W.2d 286, 289 (1948)). A proper consideration of these factors requires a balancing analysis to be performed "in main part consisting of weighing the reasonableness of the use of the land drained (or the 'utility' of such use) against the gravity of the harm to the land receiving the burden of the drainage." *Commonwealth, Dep't of Highways v. Baird*, 444 S.W.2d 541, 543 (Ky. 1969). This balancing test and the ultimate

question of reasonableness are matters for the jury. *Commonwealth, Dept. of Highways v. S & M Land Co., Inc.*, 503 S.W.2d 495, 497 (Ky. 1972).

"In ruling on either a motion for a directed verdict or a motion for a [JNOV], a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion." *Taylor v. Kennedy*, 700 S.W.2d 415 (Ky. App. 1985). The testimony at trial would certainly have supported a presumption that this case involved far more than damage caused by the natural flow of water from the upper estate onto the lower estate. We believe the evidence was sufficient for the jury to conclude that the Darnells' holes channeled water in a way that increased the flow, and, to some degree, the volume, of water that flowed onto the Vescios' property. Thereafter, it was for the jury to apply the reasonableness test. Accordingly, given the evidence, we believe that the trial court properly allowed the issue of whether the Darnells' actions were reasonable to go before the jury.

III. The Vescios' Appeal

A. Equitable Relief

The Vescios first argue the trial court erred in refusing to grant a Permanent Injunction and/or a Judgment for Specific Acts stopping the water from continuing to flood their property. Specifically, the Vescios maintain they are entitled to injunctive relief and/or a judgment for specific acts to ensure that future harm does not occur to their property in the form of an order requiring the Darnells to plug all the holes in the wall.

In support of their position, the Vescios primarily rely on *Judd v. Blakeman*, 195 S.W. 119 (Ky. 1917). Like the Vescios, we find the facts in *Judd* to be similar to the facts here. In *Judd*, the plaintiff and defendant lived on opposite sides of Russells Creek in Green County. In 1914, the plaintiff filed an action against the defendant alleging that for years, he had been

> cutting and felling timber on his side of the creek in such a way as to build up the land on his side so as to cause the water of the creek to overflow and wash their land, and that he would continue to so cut and fell the trees upon his own land unless enjoined by the court, and that the embankment already formed would continue to turn the water out of its ordinary channel upon appellee's land unless he was required to remove the artificial obstruction he had thus created.

Id. at 120. The trial court found in favor of the plaintiff and required "the defendant to remove that portion of the obstruction which, in the judgment of the court, caused the overflow on plaintiff's land, and awarded the plaintiffs a judgment for $100 for the damages they had sustained." *Id*. The defendant appealed.

On appeal, in affirming the trial court, Kentucky's high court found as follows:

> To raise the land upon one side of the stream within the overflow basin cannot help but increase the flow upon the other side, and it cannot be denied that appellant's action has not only increased the volume of water passing over appellees' land in every time of high water prior to the filing of the suit, but that it will continue to do so as long as the embankment remains. Each recurrent flood will bring with it a new trespass, to prevent which it was the duty and within the power of the chancellor to

> prevent by mandatory injunction; otherwise appellees would be without an adequate remedy. A multiplicity of suits would result, and it would be absolutely impossible in any one suit to determine the full value of the damage that would result from such an obstruction. There was no such permanency to, or necessity for, the embankment that appellant had built upon his land as would render it inequitable to order its removal. It is simply a question of whether appellees should be permitted to enjoy their land in its natural state, or whether they should be deprived of this right in order that appellant might enjoy his lands in an artificial condition detrimental to appellee. Under such state of case authorities are abundant and unanimous that no adequate remedy exists at law, and that equity will extend the remedy by injunction.

Id.

Here, as in *Judd*, the Darnells' actions of drilling the holes in the brick wall created a situation where the water collected by the brick wall was diverted onto the Vescios' property in a concentrated and fast flow manner causing damage to their property. This water, collected by the brick wall and directed onto the Vescios' property, will continue to flood and cause damage to their property so long as the drilled holes remain unplugged in the brick wall.

The Darnells rely on *Klutey, supra,* to support their contention that the Vescios were not entitled to a permanent injunction requiring all the holes to be plugged. We find *Klutey* inapposite on the issue of an injunction. The court in *Klutey* rejected the idea of an injunction because it concluded that, in a prior condemnation action, the landowners had already been permanently compensated for Commonwealth's taking of their land, which included "compensation for the accelerated flow created by these drainage pipes." *Klutey*, 428 S.W.2d at 771.

This, however, is not a condemnation action. The jury awarded the Vescios damages for the flooding already caused to their property and residence. Thus, the jury had already determined that the Darnells' actions were unreasonable under *Klutey*. It is only logical to assume that the flooding will continue if the holes are not permanently plugged, thereby continually increasing the Vescios' damages. And, the Vescios presented proof of this fact. In light of the jury's findings and the practical reality that the flooding will continue unless the holes are permanently plugged, we believe that the trial court should have granted the Vescios' request for equitable relief.

In the absence of such relief, it is clear that multiple, identical lawsuits will occur each time the area experiences flooding rainfalls. This is not in the interest of judicial economy. Accordingly, we must conclude that the trial court erred in refusing to grant the Vescios full equitable relief. *See, e.g.*, *Collins v. Pigman*, 165 S.W.2d 955, 957 (Ky. 1942) (holding that a permanent injunction was necessary to ensure "proper and a complete answer to appellants' complaint" in case where the plaintiffs had sought monetary and permanent injunctive relief for diversion of water).

We are somewhat perplexed by the trial court's stated reason for denying full equitable relief as being that it failed to find "immediate and irreparable harm." We believe the evidence presented to the trial court was clear that the holes in the wall are causing flooding on the Vescios' property and will continue to do so until

plugged.[9] We also do not believe that it was proper for the trial court to require the Darnells to plug only the holes they made. The rule in Kentucky is that a subsequent owner may be liable for a nuisance which the former owner created if he has been requested to abate it. *See City of Newport v. Schmit*, 231 S.W. 54, 58 (Ky. 1921). There is no question that the Vescios requested the Darnells to abate the problems caused by the holes in the retaining wall. Thus, we do not believe the fact that another owner may have drilled a portion of the holes was a sufficient ground upon which to deny the Vescios full equitable relief in the form of an order requiring the Darnells to plug all of the holes in the wall. Thus, we must reverse this portion of the trial court's final judgment. On remand, the trial court shall enter an order directing the Darnells to plug all the holes in the wall.

B. Prejudgment Interest

Next, we turn to the Vescios' argument that the trial court erred in failing to award them prejudgment interest. "The longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands." *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005) (citing *Nucor Corp. v. Gen. Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991)). The Vescios argue that they became entitled to prejudgment interest from the date the jury entered its verdict, December 7, 2010,

[9] The trial court's ruling seems to be based on the standard for a temporary injunction under CR 65.04(1). By contrast, and as noted, Kentucky case law recognizes a party's entitlement to a permanent injunction in situations such as presented herein.

up until the time the trial court entered its final judgment, December 27, 2012. According to their logic, the moment the jury returned a monetary verdict in their favor, they became entitled to recover a liquidated sum. In other words, they believe that the jury's verdict transformed their claim for unliquidated damages into a liquidated sum due and owing to them.

The Vescios admit they have not been able to locate any authority within our Commonwealth to support their argument. They argue, however, that other jurisdictions have adopted a similar rule. To this end, they cite extensively to the Arizona case of *Hall v. Schulte*, 836 P.2d 989 (Ariz. App. 1992). The *Hall* case, however, relied on an Arizona statute, A.R.S. § 12-347, which provides "the clerk of the court shall include in the judgment entered by him the costs and interest on the verdict from the time it was rendered." Relying on this statute, the Arizona court reasoned that Hall was entitled to prejudgment interest from the date of the verdict, even if not entitled to it prior to the verdict.

Kentucky's statute is very different from Arizona's statute. KRS[10] 360.040 provides as follows:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). ***Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that***

[10] Kentucky Revised Statutes.

> ***question, is satisfied that the rate of interest should be less than twelve percent (12%)***. All interested parties must have due notice of said hearing.

KRS 360.040 (emphasis added). Our statute speaks clearly to the issue at hand. A claim for unliquidated damages remains such until a written judgment is entered by the trial court. Even then, the statute vests the trial court with discretion to award less than the standard 12% post-judgment interest if the trial court is satisfied that the rate of interest should be less than twelve percent (12%). The statute makes no mention of interest being mandatory upon entry of the verdict as does the Arizona statute.

Accordingly, we do believe the trial court was required to award the Vescios prejudgment interest between the date of the verdict and entry of the judgment. It was within the trial court's discretion whether to award prejudgment interest. Given that some of the delay between the return of the verdict and entry of the judgment could be attributable to the Vescios, we do not believe the trial court abused its discretion in refusing to award prejudgment interest for this period. Thus, we find no error on the part of the trial court with respect to the issue of prejudgment interest.

C. Attorneys' Fees and Costs

Lastly, we turn to the Vescios' argument that the trial court erred in failing to award them their complete attorneys' fees and all costs. The Vescios "sought recovery of all attorneys' fees and all costs incurred, including those out-of-pockets or disbursements of funds to pay the various experts necessary for proof at trial."

They claim that the trial court's award was inadequate because "it arbitrarily denied fees for the bulk of the time pushing the litigation forward to a jury trial."

CR 54.04 provides for the recovery of costs incurred for "filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party." *Id.* In this Commonwealth, unless specifically authorized by statute, a fee paid by a party to an expert is not recoverable under CR 54.04 as a cost of the action. *Brookshire v. Lavigne*, 713 S.W.2d 481 (Ky. App. 1986). We can find no statute specifically authorizing the recovery of expert fees in a case such as this. Accordingly, we find no error on the trial court's part in refusing to order costs for the Vescios' experts.

Likewise, we find no error with respect to the attorneys' fees issue. The Vescios requested the trial court to award them attorneys' fees of $58,354.64. The trial awarded them $12,606.89 in attorneys' fees. In so doing, the trial court noted this sum represented the fees incurred by the Vescios from the time the matter was filed in 1999 up to May 31, 2007, when the Darnells made an effort to plug a portion of the holes they drilled in the wall.

It is undisputed that an award of attorneys' fees is within the sound discretion of the trial court, and its decision will not be disturbed absent a finding of abuse of discretion. *Ford v. Beasley,* 148 S.W.3d 808, 813 (Ky. App.

2004). Here, the trial court, in agreement with the jury, found that prior to May 31, 2007, the Darnells acted in bad faith by failing to take any corrective measures to prevent further damage to the Vescios' property. After May 31, 2007, however, the court noted there was some effort on the part of the Darnells to plug some of the holes. Based on this conclusion, the trial court believed a partial award of fees was justified.

We would also be remiss if we did not point out that this case lasted an extraordinarily long time. Even though all of the delay may not have been attributable to the Vescios, a review of the record is clear that a portion of the delay can be attributed to various times they failed to move the case forward. Given these circumstances, it was reasonable for the trial court to reject an award of attorneys' fees for the entire period this case was litigated at the trial court level. We believe the trial court appropriately exercised its discretion to award fees that were reasonable and fair under the circumstances.

IV. CONCLUSION

For the above stated reasons, the orders of the Fayette Circuit Court are AFFIRMED IN PART and REVERSED IN PART. This matter is REMANDED for further action consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS
AND CROSS-APPELLEES:

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