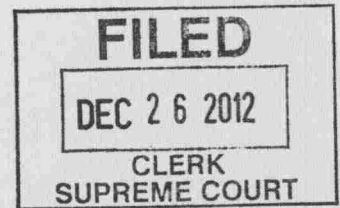


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2011-SC-000587



RICK PANNELL

APPELLANT

Appeal from the Kentucky Court of Appeals
Case No. 2010-CA-001172

v.

and
Fayette Circuit Court
Case No. 06-CI-03131

ANN SHANNON AND
ELEGANT INTERIORS, LLC

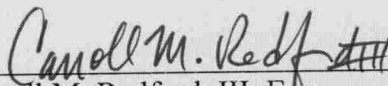
APPELLEES

REPLY BRIEF OF APPELLANT RICK PANNELL

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the Reply Brief of Appellant, Rick Pannell, were served upon the following named individuals by U.S. mail on this the 21st day of December, 2012: Hon. Kimberly N. Bunnell, Judge, Fayette Circuit Court, 521 Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, Kentucky 40507; Wilma Fields Lynch, Fayette Circuit Court Clerk; 103 Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington, Kentucky 40507; Sam P. Givens Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Dan M. Rose, Hanly A. Ingram, Christopher L. Thacker, Stoll Keenon & Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507. The undersigned does also certify that the record on appeal was not withdrawn by the undersigned from the Fayette Circuit Clerk's office on or before this date.


Carroll M. Redford, III, Esq.

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I. KRS 14A.7-030(3)(c) DOES NOT APPLY TO THE INSTANT CASE, AND ITS ENACTMENT DOES NOT SUPPORT APPELLEE'S ARGUMENTS OR CONSTRUCTION OF KRS 275.295(3)(c).

Appellee's Brief begins with the faulty proposition that the "General Assembly has now supplemented the language of the controlling statute in a manner that clearly ratifies the holding of the lower courts in this case."¹ The undersigned is unaware of any process by which the General Assembly may "ratify" the holding of a "lower court." The General Assembly acts through passing statutes, and it is well-settled that statutes are *not* retroactive unless the General Assembly's intention of retroactive application is expressly stated.² Appellee does not argue or suggest that the General Assembly made application of KRS 14A.7-030(3)(c) retroactive. It clearly did not. Therefore, the new statute does not, and cannot, control in the instant case.

Appellee argues that the 2012 enactment of KRS 14A.7-030(3)(c) "confirm[s]" her interpretation of KRS 275.295(3)(c).³ As evidence of the General Assembly's purported intent in enacting KRS 14A.7-030(3)(c), Appellee cites only a law journal article authored by Hon. Thomas Rutledge, a law partner of Appellee's counsel. Appellee argues that his partner's law journal article "explains the General Assembly's reason for making these amendments," and then further posits that the new statute is a rejection of *Forleo*. A reading of the law journal article may, at best, be said to reflect Mr. Rutledge's personal disagreement with the result reached by the *Forleo* Court and his "reason" for lobbying the General Assembly for passage of KRS 14A.7-030(3)(c), but it does not provide any insight into the reasoning of the General Assembly or its intention in enacting that statute.

¹ Appellee's Brief, p. i.

² See KRS § 446.080(3) ("No statute shall be construed to be retroactive, unless expressly so declared").

³ Appellee's Brief, p. 21.

KRS 14A.7-030(3)(c) is the codification of House Bill 341 ("the Bill"). The Bill was presented to the House Judiciary Committee on February 22, 2012. The *entire* Bill was discussed for approximately six (6) minutes prior to a vote being taken⁴. See Partial Transcript, Appendix 1.⁵ There was no testimony before the Committee concerning those sections of the Bill that would become KRS 14A.7-030, much less Subsection (3)(c) in particular. There were no statements or arguments about the *Forleo* case. The only provisions of the Bill about which the Committee heard specific testimony were amendments to the Statutory Trust Act. There was absolutely no discussion of the statutory provision at issue here, or, in particular, the new language adopted in Subsection (3)(c) pertaining to the liability of agents that could give insight into the General Assembly's intention in adopting that specific Subsection. Although Appellee's citation to Mr. Rutledge is logical given his relationship to Appellee's counsel, it does not constitute any evidence surrounding the intention of the actual legislature.

Finally, that the General Assembly chose to amend the statute in 2012 only demonstrates the propriety of Appellant's position. As the *Fairbanks* Court explained:

When we interpret a statute, we attempt to ascertain and effectuate the intent of the General Assembly. We also construe the statute in such a way that, if possible, no part of it will be rendered meaningless or ineffectual. We neither add to nor subtract from the statute.

⁴A video record of the February 22, 2012 House Judiciary Committee meeting is available at http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+013126. The Court may take judicial notice of the records and actions of the General Assembly. See generally *Fox v. Grayson*, 317 S.W.3d 1, 18 (Ky. 2010) (Supreme Court would take judicial notice of legislative record as the Court may "properly sua sponte consider documents available to the general public"); *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) ("A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.").

⁵Appellant prepared this unofficial transcript of the February 22, 2012 meeting for the Court's convenience based upon the video record cited in footnote 4.

Fairbanks Arctic Blind Co. v. Prather & Associates, Inc., 198 S.W.3d 143, 145 (Ky. App. 2005).

Appellee's interpretation in this case of KRS 275.295 would render KRS 14A.7-030(3)(c) meaningless. In *eServices, LLC v. Energy Purchasing, Inc.*, 2012 WL404957 (E.D. Ky. 2012) (unpublished), Judge Coffman opined:

... while the statute [KRS 275.295] is indeed silent on the issue of personal liability, it does not need to explicitly provide for limited liability because the concept of limited liability is, as discussed above, an inherent part of a corporation "carrying on its business." To exclude the corporate shield against personal liability from the corporation's business is to add meaning to the statute that is not present on its face. *See Fairbanks* at 145. *Id.* at *2.

Appellee cannot have it both ways. If the *eServices* Court's interpretation of KRS 275.295(3)(c) were to be considered correct, then there would have been no need to amend the statute to add Subsection (3)(c) addressing the issue of individual officers' liability. This interpretation would be inconsistent with well-settled rules of statutory construction.⁶

This same quandary is presented if the Court considers correct the reasoning found in *Eve v. Cosmo's, LLC*,⁷ also cited by Appellee. There, the plaintiff directed the Court to the provision of KRS 275.295(3)(c) stating that upon reinstatement "the limited liability company shall resume carrying on business." The plaintiff argued that this language "impl[ies] that the Kentucky legislature only intended that LLC members receive LLC protection after the reinstatement." *Id.* at 9. The *Cosmos* Court held:

The Court rejects Plaintiff's tortured reading of the statute for a couple of reasons. First, if the legislature wanted to include that caveat in the

⁶ See generally *Kennedy v. Kentucky Bd. of Pharmacy*, 799 S.W.2d 58, 60 (Ky. App. 1990) ("It is basic that in construing a statute the courts must examine and give effect to each word, clause or sentence that allows for reasonableness.").

⁷ Case No. 06-188-DLB, Memorandum Order (E.D. Ky. Mar. 27, 2008).

statute, they could have done so, and second, the Court believes the plain and ordinary meaning of the statute controls. *Id.*

Again, if the personal liability of officers and/or members were truly resolved by giving KRS 275.295(3)(c) its “plain meaning,” the additional provisions of KRS 14A.7-030(3)(c) would have been unnecessary.

The only logical conclusion, which provides a reasonable interpretation of both statutes, KRS 275.295, in effect in 2006, and KRS 14A.7-030(3)(c) enacted in 2012, is that the former did not in fact address personal liability of officers (as opposed to the liability of the corporation for interim acts), and that the General Assembly (following lobbying efforts and testimony from Appellee’s counsel’s law partner) changed the statute to address the personal liability of agents of the LLC subsequent to this case.

II. THE “RELATION BACK” RULE DOES NOT APPLY IN THIS CASE.

Appellee urges the Court to adopt the *Fairbanks* Court’s construction of KRS 275.295 over the *Forleo* Court’s holding. Appellee asserts that her position is supported by the purported “plain language” of KRS 275.295. As seen above, this argument is inconsistent with the subsequent enactment of KRS 14A.7-030(3)(c).

Appellee cites *Fairbanks*, which held that KRS 275.295(3)(c) “validates any action taken by a corporation between the time it was administratively dissolved and the date of its reinstatement.”⁸ As explained more fully in Appellant’s Brief, the above language of *Fairbanks* makes clear that KRS 275.295 was intended to address only the corporation’s liability for interim acts. Neither the statute, nor *Fairbanks*, speaks to the liability of the individual actors who happen to be officers. The Court may not read into the applicable statute provisions that are simply not there.

⁸ *Fairbanks*, *supra* at 146; Appellee’s Brief at p. 11 (emphasis added).

Attempting to distinguish *Forleo*, Appellee can argue only that “in *Forleo*, the corporation was not reinstated until after the trial court had already entered judgment against the individual defendants.”⁹ Appellee gratuitously ignores that in her own case, she did not bother to reinstate her LLC until after she had been served with a Summons and Complaint in the instant case. Appellee does not explain why conceptually (or legally) it should matter whether the LLC is reinstated after a judgment is entered against the individual or after she is served with a Summons and Complaint alleging acts by her individually for her personal benefit. In both instances, the reinstatement is clearly an after-the-fact act designed to circumvent liability for conduct undertaken by an individual who was not acting through an active LLC.

It is quite telling even today that Elegant Interiors, LLC was once again dissolved, this time on September 10, 2011, immediately following the Court of Appeals’ August 26, 2011 Opinion in the instant matter.¹⁰ There is no evidence in the record that Elegant Interiors, LLC has conducted *any* business since it was first dissolved.¹¹ Yet Appellee urges an interpretation of KRS 275.295 that would permit her to use the personal liability “shield” that the General Assembly intended to provide to limited liability companies *actually doing business* in Kentucky. This sort of gamesmanship is foreclosed by the sound reasoning of the *Forleo* Court.

The additional cases cited by Appellee are distinguishable.¹² For example, in *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713 (Del. 1968), the plaintiff, Krapf

⁹ Appellee’s Brief, p. 13.

¹⁰ See Secretary of State Information, Appendix 2 hereto. The Court may take judicial notice of this public record. See *infra* at p. 2, fn. 1.

¹¹ Shannon abandoned the premises on June 1, 2006. See *infra* at p. 10; Appendix 3 hereto.

¹² Appellee confidently declares that the “majority of other states” support its reading of KRS 275.295. Appellee’s Brief, p. 17. In support of this statement, Appellee cites only three cases – *two* applying Missouri law, and one from

& Son, sued the president and shareholder of Wilmington Boneless Beef Company. The plaintiff had entered into a contract for the building of a slaughter house in late 1962. Like the instant case, the corporation was dissolved at the time the contract was executed. However, unlike the instant case, it was undisputed that "[b]oth Krapf & Son and Gorson at the time intended the obligation to be that of the corporation." *Id.* at 714. Moreover, the statute at issue, under which the Court found that Gorson was not personally liable for the debt, was significantly different from KRS 275.295(3)(c). The Court cited a provision of the Delaware code that "provide[d] that upon reinstatement of a charter all contracts and other matters done **and performed by the corporate officers** during the time the charter was inoperative shall be validated, **and be the exclusive liability of the corporation.**" *Id.* at 715, citing Del.C. § 312(3) (emphasis added).

KRS 275.295(3)(c), contrarily, simply does not address the issue of the corporate officers' personal liability. Rather, it makes clear that the corporation remains liable for acts of the corporation undertaken during the period of dissolution. If KRS 275.295(3)(c) had actually addressed that issue, as the Delaware statute did, the General Assembly would not have enacted Subsection (3)(c) of KRS 14A.7-030; there would have been no need for that Subsection. It is well-settled that the Court must interpret statutes in a manner that give meaning to all provisions and each and every word.¹³

Colorado, for a grand total of two jurisdictions. Appellee's Brief, pp. 17-19. Appellant has cited case law from Vermont, New York, Illinois, Iowa, Tennessee, Virginia, and Kentucky in support of its position. See Appellant's Brief, p. 25-34 and Exhibit 17 to Appellant's Brief. Appellant has additionally located case law from Oregon and Oklahoma that support its position. In *Lents, Inc. v. Borstad*, 445 P.2d 597 (Or. 1968), for example, the Oregon Supreme Court held that reinstatement of a corporation did not relieve the corporate president for liability under a contract even where (unlike the instant case) the contract was executed when the corporate charter was valid. *Id.* at 598. See also *Nicholas-Homeshield, Inc. v. Mid-American Construction Supply, Inc.*, 643 P.2d 309 (Okla. 1982) (officers of corporation liable for debts incurred by corporation during the period of "suspension"). *Lents* and *Nicholas-Homeshield* are attached hereto as Appendix 4.

¹³ See *Kennedy*, *supra* at 90; *infra* at p. 3.

Bergy Brothers, Inc. v. Zeeland Feeder Pig, Inc., 327 N.W.2d 305 (Mich. 1982), is also distinguishable. In *Bergy*, the Court emphasized that it was undisputed that the debt was incurred in the corporation's name and not in the name of the corporate officer. The Court explained: "In cases such as these, it is often a difficult question whether the debtor considered that he was dealing with the corporation or the individual. This issue is not present here." *Id.* at 305-06. Contrarily, in this case, it is clear that Shannon represented to Appellant that she was acting individually (through her own preparation and execution of the March 2006 Release, providing for her personal responsibility of the Lease payments going forward and release of any prior claims against her personally), and further signed the Lease in an individual capacity.¹⁴

Harshman Construction & Electric, Inc. v. Witte, 2012 WL 2471445 (Ky. App. 2012) (unpublished), an unreported Kentucky case cited by Appellee, is also inapplicable. There, the Court held that the trial court erred in denying the individual defendants' motion to dismiss the plaintiff's complaint. The individual defendants were owners of a construction company. The plaintiffs sued the company and the individual defendants alleging breach of a contract to construct a residential home. The Court held that the defendants were not individually liable under the contract, but it was undisputed that "the corporation was active when they entered into a contractual relationship with the [plaintiffs] in March 2007." *Id.* at *2. The corporation was dissolved in November 2007. *Id.* at *1. The case is therefore actually consistent with the result urged by Appellant, as the contracting party was held liable for the bargain it made.

¹⁴ See Release, Exhibit 4 to Appellant's Brief.

The Court in *Dolphin Offshore Partners, L.P. v. Industrial Resources Corporation*, 499 F.Supp.2d 1025 (E.D. Tenn. 2007), made this very point. There, the corporate president executed a contract when the corporation had been administratively dissolved. The Court held the president's estate liable under the contract. Applying Kentucky law and discussing the relationship between *Forleo* and *Fairbanks* at length, the Court determined that Fairbanks was distinguishable because the issue of officer liability "was not before that court." Additionally, the Court reasoned, "*Fairbanks* and *Forleo* share an important common theme of holding contracting parties responsible for the bargains they make." *Id.* at 1027.¹⁵

As was the case in *Forleo* and *Dolphin*, Appellant's interpretation of the statute at issue would simply have the effect of holding the contracting party liable for the bargain she made. It would prevent the strategic misuse and abuse of the corporate form that is evidenced, in this case, by Shannon reinstating the LLC *only* after she was served with a Summons and Complaint, paying the annual filing fees (but not conducting any business through the LLC) during the pendency of the litigation to support her "relation back" argument in the lower courts, and then once again permitting dissolution of the LLC once the Court of Appeals ruled in her favor and against personal liability. There were no such considerations at issue in *Bergy*, *Harshman*, or *Krapf & Sons*.¹⁶

III. SHANNON INDIVIDUALLY ASSUMED LIABILITY UNDER THE LEASE.

Appellee argues that the Lease is "plain and unambiguous" that Elegant Interiors, LLC is the tenant, and not her, based on a recitation in the introductions of the Lease

¹⁵ Indeed, the instant case presents an even better argument for personal liability than *Dolphin*. In *Dolphin*, it was undisputed that the president executed the contract signed the contract designating a corporate capacity, while here, Shannon signed the Lease in her individual capacity and not as "member" or "manager" of the LLC. See *Dolphin*, *supra* at 1026.

¹⁶ Likewise, in *Eve v. Cosmo's, LLC*, *supra*, also cited by Appellee, there was simply no issue of holding the proper party liable for contractual obligations – the case concerned tort claims only.

referring to "Elegant Interiors, a LLC corporation."¹⁷ However, the Lease also recites that it is a Lease for "Ann Shannon," and Shannon further signed the Lease¹⁸ without any corporate designation.¹⁹

At most, the language of the Lease can be said to have been ambiguous as to the tenant's identity.²⁰ It is well-settled that extrinsic evidence is admissible to determine the parties' intent under these circumstances.²¹ While Shannon obviously wishes to distance herself from the Release prepared by her own hand,²² it clearly demonstrates her intention to be personally liable for the rent for the down-sized space going forward. In exchange for that promise, Appellant agreed to reduce the space, reduce the rent going forward and further paid to partition the rental space (to decrease Shannon's monthly rental expense) at his own cost.²³

Appellee argues that Appellant was "on notice that he was dealing with a limited liability entity" in March 2006 because Shannon purportedly paid rent through checks "drawn from the Elegant Interiors, LLC's corporate account."²⁴ The record reflects, however, that construction on the partitioned space was completed on April 30, 2006.²⁵ Shannon closed her store on June 1, 2006. On June 6, 2006, Appellant sent a letter to

¹⁷ Appellee's Brief, p. 24.

¹⁸ The document signed as the March 2006 Lease was the 2004 Lease with handwritten edits by the parties for their new agreement. Neither had counsel for the 2006 transaction.

¹⁹ See Exhibit 5 to Appellant's Brief.

²⁰ It should be noted that Appellant does not have to prove that Shannon was individually the tenant under the Lease in order to prevail under the holdings of *Forleo* and *Dolphin*. The Lease was indisputably executed months after the LLC had been dissolved, and KRS 275.295 does not provide a corporate officer with limited liability under those circumstances. See *infra* at pp. 4-8.

²¹ *L.K. Comstock & Co., Inc. v. Becon Const. Co.*, 932 F. Supp. 948, 965 (E.D. Ky. 1994).

²² Appellee argues that the Lease was prepared by Appellant and should be construed in Appellee's favor. Appellee's Brief, at p. 29. Of course, Appellant simply ignores that *she* prepared the Release and presented it to Appellant, and that document must therefore be construed in Appellant's favor. The combination of the two documents comprises the agreement of the parties.

²³ The notion that Appellant would allow the defaulted tenant (LLC) to downsize, reduce rent, not pay the arrearage and the Appellant pays for the space fit-up is simply not fathomable.

²⁴ Appellee's Brief, p. 24.

²⁵ See Affidavit of Gary Larkin, part of collective Exhibit 3 to Appellant's Brief.

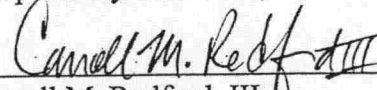
Shannon *individually* informing her that he had not received "your rent for the month of June."²⁶ At most, rent would have been due for two (2) months in the time between the execution of the new Lease and Shannon vacating the premises. However, it is clear that rent went unpaid, which precipitated the forcible detainer proceedings. Appellee brought the forcible detainer proceedings against "Ann Shannon, d/b/a Elegant Interiors."²⁷ Therefore, the *only* documentary evidence in the record reflects that Appellant believed that he was dealing with Shannon individually following execution of the new Lease in March 2008.²⁸

Finally, the terms of the Release **prepared by Shannon** and relied upon in good faith by Appellant clearly meet the requirements of *RIF 2000 v. Clay Ward Agency*, and constitute a written, unequivocal assumption of liability under the new Lease.²⁹

IV. CONCLUSION

This Court should follow the analysis of the *Forleo* and *Dolphin* Courts. An oral argument is clearly necessary given Appellee's reliance on a 2012 statute for events in 2006.

Respectfully submitted,


Carroll M. Redford, III
ATTORNEYS FOR APPELLANT,
RICK PANNELL

²⁶ See Appendix 5 hereto.

²⁷ See Forcible Detainer Complaint and Summons, Exhibit 6 to Appellant's Brief.

²⁸ Appellee also attempts to support her position by reference to the language of Appellant's Complaint. This red herring is obviously undermined by the fact that Appellant **sued Shannon individually** in the Complaint. Appellee decries that "the Release is not even mentioned in the Complaint." It is well-settled that Kentucky is a notice pleading state. *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420 (Ky. App. 1986). The language of the Complaint was sufficient to state claims against Appellee (who did not move for dismissal of the individual claims against her, instead reinstating her former LLC to attempt to escape liability under the Lease).

²⁹ 320 S.W.3d 654 (Ky. 2010).