COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2010-SC-000332-D
(COURT OF APPEALS NO. 2009-CA-001092)

KENTON SMITH and SANDRA SMITH **APPELLANTS**

Appeal from Meade Circuit Court Action No. 07-CI-00342
Hon. Stephen Ryan, Special Judge

vs.

RICHARD WILLIAMS, JEANIE WILLIAMS, **APPELLEES**
BART STITH, CINDY STITH,
JOHN MARK STULL, PATRICIA STULL,
ALVIN C. LYNCH, JR., DONNA LYNCH, and ROBERT S. WILLIAMS

APPELLEES' BRIEF

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CERTIFICATE OF SERVICE

I certify copies of this brief were served September 6, 2011 by first class mail on the following: I further certify the record on appeal was not removed:

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STATEMENT CONCERNING ORAL ARGUMENT

Appellees believe that oral argument may be helpful to the Court. The issues concerning which of the parties is the party to be charged under KRS 371.010, et. seq. and application of the exceptions to the applicability of the rule as an equitable defense are fact sensitive and require careful scrutiny so the Kentucky Statute of Frauds is not improperly applied.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellees accept that part of the Appellants' Statement of the Case which was gleaned from the facts set forth by the Court of Appeals in determining that the trial Court inappropriately granted the movants, Kenton R. Smith and Sandra Smith, summary judgment. As indicated in the opinion of the Court of Appeals, the case was remanded to the trial Court for consideration of whether an oral buy-sell agreement existed and how such agreement may have affected the disposition of the subject real property in dispute. This was, and is, a proper disposition of this case.

However, as might be expected, the entirety of the Appellants' statement is slanted in an attempt to persuade the Court that the Appellants are somehow the victims of nefarious conduct of the Appellees (the "Williams Group"), thus justifying Smith's demand to be paid $250,000 on an investment of $10,600.

These "facts" could not be further from the truth.

What the record does reveal is that, at one time, all of the parties to this appeal were friends in the best sense of the word and purchased this property ("Big Bend") on the Ohio River in Meade County with the unquestioned intention that the owners, their families, and other friends could use the property for recreational purposes. In fact, many of these same parties jointly engaged as co-owners in the use of other real property for hunting purposes ("Bull Creek").

Although mentioned in a footnote in the Appellants' brief, it is important for this Court to remember that the Appellees, Richard and Jeanie Williams ("the Williams") found and purchased the subject property and thereafter transferred the ownership of the land to the group from which the Smiths seek to partition the property in this action. Smith was an attorney who the Williams entrusted to prepare the legal documents to transfer the property, first from the previous

owner to the Williams and later, from the Williams to the group (comprised of the Appellants and the Appellees/Williams Group[FN1]). The Appellees unanimously agree that the Big Bend property was to be used for "fun" and not for "profit."

Williams had no obligation to invite Smith into the group. Richard Williams' testimony in the record is consistent with that of all of the owners of the property, including Smith's brother, Timothy W. Smith, who at one time also was an owner. All of the owners of the property reasonably expected that anyone who wanted to leave the ownership group would be paid "what he/they had in it" to leave – just as was the case with the hunting property (Bull Creek).

The simple fact that the acquisition of the property was for enjoyment and not profit led the Appellees (which included a banker, an engineer, timber buyers, and a construction company owner) to become involved without the formalities that one might expect if the property was purchased for development or for other profit-making motives. This fact is amplified by the uncontested evidence that Williams, who found the land and cut the timber on it, used one-half of the proceeds from the sale of timber, not for himself, but to pay toward the note owed to Meade County Bank for money borrowed to purchase the land. The co-owners, other than Smith, all understood going in that, if they wanted out

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FN1: Appellants seek to garner some advantage in this matter from the fact that Smith's law partner, Steven R. Crebessa, signed as preparer of the deed in which the Smiths gained an interest in the property. They claim there is "... no evidence in the record that any party to the transaction instructed Crebessa to include any buy-sell agreement in the deeds or draft the same at any point thereafter." (See Appellants' brief, p. 14.) The Appellees assert that there is also no proof in the record that Crebessa had any conversation with any of the members of the Williams Group and it is suspected that he merely signed the deed at the request of Smith. Fundamentally, the Williams Group would have had no reason to instruct Crebessa to do anything, since they reasonably expected Smith to protect the members' interests and the intentions in this matter. This is an issue that needs to be determined at trial and cannot be the basis for a summary judgment award.

thereafter, they would be paid what they had individually paid to pay-off the note and/or for taxes and for other costs otherwise associated with ownership of this property. In fact, the Appellees believe the facts at trial will show that Charles S. Williams and Timothy W. Smith (both original members who left the ownership group prior to this partition action) were paid "what they had in it" when they left – in one fashion or another.

The Appellees agree with Smith that all went well for about 11 years. Then, for some reason, greed, rather than friendship, took over.

As a reason for wanting out, Smith, the Commonwealth Attorney for the 46th Judicial District of Kentucky, including Meade County where the property is located and where most, if not all, of the owners reside, claimed that a number of his erstwhile co-owners and his brother-in-law, Clifford "Stud" Lynch, used methamphetamines on the property. As a result of this "finding," Smith wrote co-owner Bart Stith[FN2] a letter (See Appendix A; Record, pp. 104-108) saying he (Smith) could no longer be a co-owner of the property and that he "... now know(s) a whole lot, enough for a lot of people to go to jail now." Smith goes on to say he will "keep quiet" if Stith "shoots straight" and, further, that he can no longer co-own property with Ricky (Williams) and that if "... suitable arrangements cannot be reached, I'll force a sale, and soon." (See Appendix A.)

Even though Smith had only contributed approximately $5,300 to the payoff of the Meade County Bank loan and perhaps various other expenditures in a like amount, after he acquired his brother Timothy's interest in the subject property ("Big Bend") for a minimal sum, Smith demanded $250,000.00 for his now one-quarter interest in the real property. When the Williams Group failed to

FN2: To Stith's credit, he acknowledged he had a substance abuse problem and addressed it. He has been sober for almost four years.

cower from Commonwealth Attorney Smith's threats of criminal action against some or all of his co-owners and refused to pay him $250,000, Smith filed this partition action.

ARGUMENT

I. Genuine Issues of Material Fact Exist that Preclude the Granting of Summary Judgment in this Case.

As recognized by the Court of Appeals in its Opinion of April 23, 2010, the law in Kentucky regarding the granting of summary judgment is clear. Since at least *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476 (Ky.1991), the law in Kentucky is settled that summary judgment cannot be granted unless the moving party shows that the non-movant cannot prevail under any circumstances. *Steelvest*, at 480. Under *Steelvest*, the standard of review also requires the trial Court to view the record in a light most favorable to the party opposing the motion. Further, a party opposing a properly-supported motion for summary judgment must present some affirmative evidence to show that a genuine issue of material fact exists to defeat the summary judgment motion. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). Since the record reveals that the Williams Group is unanimous in stating that there is an oral buy-sell agreement between the parties if an owner, such as Smith, wants to sell his/their ownership interest, the Court must assume for the purpose of ruling on the summary judgment motion that such an agreement exists.

Accordingly, a genuine issue of material fact exists which precludes the granting of summary judgment by the trial Court.

II. As a Matter of Law, The Kentucky Statute of Frauds, KRS 371.010, et.seq., Does Not Bar the Appellees from Asserting the Oral Buy-Sell Agreement as a Defense to a Partition Action.

To counter the obvious issue of genuine material fact presented to the trial court to overcome Smith's Motion for Summary Judgment, the Appellants have claimed that, even if such an oral agreement exists, it is not enforceable under Kentucky law because it is not in writing and thus is barred by the Kentucky Statute of Frauds.

In pertinent part, KRS 371.010(6), states:

> No action shall be brought to charge any person ...
> (6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year ... unless the promise, contract, agreement, representation, assurance, or ratification or some memorandum or note thereof, be in writing and signed *by the party to be charged therewith*, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence. *KRS 371.010(6).* (Emphasis added.)

Despite its apparent simplicity, the phrase, "signed by the party to be charged" has caused much conflict and confusion throughout the years.

In its opinion, the Court of Appeals clearly recognized the true role of the Statute of Frauds in this case. It is the Smiths who brought an action to force sale of the subject property. It is the Williams Group who is attempting to use the oral buy-sell agreement to establish the price of purchase and as a defense to the partition action. **IF** the Williams Group was attempting to force Smith to sell his interest in the Big Bend property for "what he had in it," then perhaps the Statute of Frauds would have some application in the case at bar. If such was the case, the Smiths might have some standing to claim to be "the party to be charged." But, as evidenced in this entire record, the Williams Group has never told the Smiths that they are forcing the Smiths out and are requiring the Smiths

to sell their interest in the real property back to the group. As far as the Williams Group is concerned, the Smiths are entitled to remain as one-fourth owners. If the Smiths want to sell, they may. If the Smiths want out, the Williams Group agrees, and has always agreed, to pay the Smiths the amount the Smiths "have in the property," per the understanding all of the parties had when the property was purchased.

The "party to be charged" clause set forth in the statute serves an important role in the equitable and intended use of the Statute of Frauds. Early on, in the case of *Bullock v. Young*, 252 Ky. 640, 67 S.W.2d 941 (Ky. 1933), the Kentucky high Court recognized that the statute was to be used as a "shield" against fraud and not as a "sword." *Bullock*, at 946. The case at bar illustrates the wisdom in such a distinction.

To circumvent the clear holding of *Bullock*, *supra*, upon which the Appellees and the Court of Appeals in its Opinion and Order rely, the Appellants cite *Terry v. Terry*, 95 S.W.2d 282 (Ky. 1936). [FN3] *Terry* is distinguishable on its facts. *Terry* involved the attempted enforcement of oral antenuptial contract under old Kentucky Statute of Frauds Sec. 470(5). It has nothing to do with the conveyance of real estate or an oral buy-sell agreement.

In *Terry*, a widow renounced her husband's will that left everything to his legal heirs and sought to recover her dower and distributable share in her deceased husband's estate. The decedent's two sons were appointed executors in Terry's will and claimed in answer to the widow's suit filed to enforce her statutory renunciation rights that there was an oral antenuptial agreement, wherein their stepmother and father each had waived and relinquished their

FN3: *Terry* was reversed on grounds having nothing to do with the Statute of Frauds issue discussed in this case.

respective marital rights in the estate of the other. Thus, the executors claimed the widow's renunciation of the will which had left her nothing was null and void.

Tellingly, both the *Terry* trial Court and appellate Court rejected this argument and the executors' attempted use of the oral antenuptial agreement to bar the widow's claim. When reviewing the true holding in the case, *Terry* truly finds *in favor* of the Williams Group's position. Further, contrary to the Smiths' assertion, *Terry* does not overrule *Bullock*, *supra*. In truth, *Terry* does not even discuss *Bullock* – much less overrule it.

Actually, *Terry* is important for this Court to consider, because it truly reaffirms the holding in *Bullock* that has been the law in Kentucky since at least *Drake v. Rowe*, 162 Ky. 646, 172 S.W. 1068 (Ky. 1916) through *Midwest Mutual Ins. Co. v. Wireman*, 54 S.W.3d 177 (Ky.App. 2001). The line of cases commencing with *Drake* forward clearly hold that *the Kentucky Statute of Frauds applies as a bar to actions and does not bar oral agreements as defenses* under certain fact situations, such as the one at bar.

The inaccurate and simplistic position espoused by the Smiths in their attempts to use *Terry* in support of their position that oral agreements otherwise within the Statute of Frauds cannot be used as a defense can be easily explained if one actually reads *Terry* and not just the headnotes. To illustrate, the *Terry* Court takes great pains to discuss another aspect of *Terry* that is fact sensitive – that being that, prior to the marriage, the wife conveyed all of her property to her children with the husband's consent. *Terry*'s executors claimed that this conveyance constituted partial performance and espoused that this pre-marital conveyance eliminated the use of the Statute of Frauds as a defense.

The *Terry* Court disagreed and affirmed the Kentucky rule that partial performance does not take a case outside the Statute of Frauds, though the Court significantly acknowledged that, when considering the rule and evaluating

certain facts, "... a party may have equitable rights which he may enforce." *Terry*, at 284. The Court goes on to say:

> Nor is there any merit in the contention that *in the circumstances here presented*, the contract, though within the Statute of Frauds, may be relied on by way of defense. *All that that means is that the contract itself may for the purpose of defense be used as a shield to protect the defendant* ***(e.g., the Williams Group)*** *against unconscientious demands and claims* ***(e.g., of Kenton and Sandra Smith)*** *growing out of the contract* ***(e.g., the deed)***. *In short, the statute will not operate so as to permit the party who refuses to carry out his old contract* ***(e.g., the oral buy-sell agreement)*** *to be enriched at the expense of the other. With the exception of this limitation, contracts which are within the Statute of Frauds can no more be made the basis of a defense than the subject of an original action, if the result is an indirect enforcement of the contract.* *Terry*, at 284-285. (Emphasis and insertions regarding the case at bar added.)

Merely reading the headnotes to *Terry* would lead one to believe that *Terry* and *Bullock* are in conflict. But, when the entire passage as set out above is read, there is a very clear, rational, necessary and reasonable exception to the general rule, which does not exclude oral buy-sell agreements from being presented as a defense to a partition action. As set forth in the undersigned section above, Kenton Smith cannot use the Statute of Frauds to avoid his agreement to sell the property back to the group for what he has in it, since to permit him to avoid his agreement upon which the Williams Group claims was a basis for his invitation to ownership, would permit him to be enriched at the expense of his co-owners.

The Smiths also rely upon the *Restatement (Second) of Contracts,* The Statute of Frauds, *Sec. 138, p. 353; 72 Am Jur.* 2d, Statute of Frauds Sec. 52, p. 584; and *Casolo v. Nardella*, 275 App.Div. 502, 90 N.Y.S. 2d 420 (3d Dep't.

1949), in support of their position that an oral agreement not to bring a partition action is void as a matter of law. Assuredly, this New York case and these statements of "law" are not controlling in this case in light of the case law in Kentucky since *Drake v. Rowe*, *supra*.

Moreover, the Appellants' reliance on these *Restatement* sections without factual relevance do not square with the provisions of law succinctly set forth by the very same publication. Some of these sections are directly on point. In that regard, Appellees note that in *73 Am. Jur. 2d,* Statute of Frauds, Sec. 521, "Limitations on Rules," *Terry*, *supra*, is cited in full support of the Williams Group's position when it states:

> ... an oral contract within the statute of frauds may, for the purpose of defense, be used as a shield to protect the defendant against unconscionable demands and claims growing out of the contract, for the statute (of frauds) will not be allowed so to operate as to permit a party who refuses to carry out his contract to be enriched at the expense of the other. *73 Am. Jur. 2d,* Statute of Frauds, Sec. 521, p. 151.

Thus, *Terry* is actually in accord with *Drake*, *Bullock*, *Motorist Mutual,* et. al. The holding in *Terry* recognizes an equitable exception to the general rule that permits an oral contract such as the buy-sell agreement the Williams Group asserts as a defense to be used as a "shield" to prohibit a party, such as Smith, from using the Statute of Frauds to enrich himself at the expense of his former friends and co-owners of the subject property.

Since Kentucky case law clearly and unequivocally permits equitable exceptions to the rote application of the Statute of Frauds to a fact situation similar to that at bar, the rule of law set forth in *Smith v. Ash*, 448 S.W.2d 51 (Ky.

1969), applies in the case, sub judice. In *Smith v. Ash*, the Kentucky high court acknowledged the adoption of the equitable estoppel doctrine, thus preventing a party from invoking the Statute of Frauds to improperly overcome an interest in land that otherwise might be barred by the statute. *Smith v. Ash* states:

> "... This (estoppel) is based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in *the perpetration of a fraud,* or in the *consummation of a fraudulent scheme.* It is called into operation to defeat what would be an *unconscionable* use of the statute, and guards against the utilization of the statute as a means of *defrauding innocent persons* who have been induced or permitted to change their position in reliance upon oral agreements within its operation.
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> "As has been said, the statute of frauds was designed as a weapon of the *written* law to prevent *fraud*, while the doctrine of estoppel is that of the *unwritten* law to prevent *like evil.* Each is effective in its appropriate field. Both are essential to prevent *wrongs.* ..." (court's emphasis). *Smith*, at 53, quoting 49 *Am.Jur.*, Statute of Frauds, Sec. 581, pp. 888-9.

Assuredly, had Ricky Williams ever dreamed that Kenton Smith would attempt to use the Big Bend property for profit in lieu of pleasure, Williams would never have asked Smith to draft the requisite deed, much less would he have invited Smith into the group.

Equally instructive is *Nicholson v. Clark*, 802 S.W.2d 934 (Ky.App. 1990),[FN4] wherein the Court of Appeals discussed the Statute of Frauds in a case

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FN4: *Nicholson* has been overruled on sections of the opinion that do not apply to the case at bar.

where a land owner attempted to force a sham bidder to purchase real property bid upon at auction. In *Nicholson*, the Court, relying upon *Smith v. Ash*, *supra*, stated:

> The vital principle is that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party. The party asserting the estoppel must, therefore, show affirmatively that he has done or omitted some act or changed his position to his prejudice in reliance upon the acts, conduct (active or passive), language or representations of the person sought to be estopped which he would not have done except for such acts, language or conduct. *Nicholson*, at 939.

The Court disposed of Nicholson's claim by recognizing that the Statute of Frauds only applies when it is to be used against the "party to be charged." In our case, that party would, of course, be Kenton and Sandra Smith. However, since the Williams Group is not attempting to force the Smiths to sell their interest for what they have in it, the statute has no application to the case at bar, especially when viewed in conjunction with the equitable exceptions set out above.

Accordingly, if the Williams Group's assertion is correct that an oral buy-sell agreement exists, neither the Statute of Frauds nor Kentucky case law interpreting it prohibits the buy-sell agreement from being used as a defense to a statutory partition action.

CONCLUSION

In its decision in this case, the Court of Appeals recognized equitable and legal exceptions to the Statute of Frauds when it correctly ruled that Smith was

not the party to be charged in this case. The Williams Group is undoubtedly the party seeking to maintain the status quo. On the other hand, Smith is attempting to use the absence of a written buy-sell agreement in conjunction with the Statute of Frauds as a weapon so that he can benefit from his failure as attorney-scrivener to prepare a written agreement for the group to sign when the group was formed and purchased the property from Richard and Jeanie Williams. Whether Smith calculated this strategy from the inception to later deprive his co-owners of their property rights, use, and enjoyment of Big Bend is not important. What is important is that Smith cannot now use his own failure to draft and have the parties sign a written buy-sell agreement, in conjunction with the Statute of Frauds, as a sword to enable him to do so.

Kenton Smith repeatedly insists that **HE** is the victim of fraud in this transaction. However, the Smiths were invited by Ricky Williams and the Williams Group to be co-owner of this recreational land on the Ohio River. The Smiths used the property in conjunction with their former friends while Kenton Smith was the Commonwealth Attorney for Meade, Breckinridge, and Grayson Counties, Kentucky. There is no real dispute that Smith was charged with drafting the deeds wherein Richard and Jeanie Williams first purchased the subject property and thereafter conveyed it to a group of co-owners including Smith and his wife.

Smith has a relatively small "investment" in the land totaling approximately $10,600 – yet he has demanded his co-owners pay him $250,000 for his one-fourth interest or he would force sale of the property. Smith brazenly claims he

was or is subject to being the victim of "fraud" because his co-owners are attempting to enforce an oral buy-sell agreement requiring that a co-owner who wants "out" to be paid only the amount he "has in the property" when he leaves. This is the agreement all the other co-owners acknowledge exists and which has been the basis upon which the sale of the interests of two other of the original co-owners back to other members of the group were transacted, including Timothy Smith's conveyance of his one-eighth interest to Kenton Smith prior to Kenton Smith's filing this suit.

Equally obvious is the fact that the co-owners other than Kenton Smith were not attorneys and that they relied upon him to draft legal documents to transfer the property among them in a form and fashion that protected and insured that their unanimous desire that the subject property retain its nature as "recreational" be honored and respected.

Greatly disturbing is the fact that Smith, an attorney and law enforcement officer of the Commonwealth changed with prosecuting criminals, wrote at least one letter to a co-owner threatening prosecution that would "... put a lot of people in jail now if suitable arrangements cannot be reached" (e.g., the payment of $250,000 for Smith's interest in the property). Further, that, if he was not paid his price, Smith would "force a sale, and soon." Such conduct is unethical and not permitted under the law or by the facts and equities of this case. Smith's pious attempts to be painted as a "victim" in this transaction ring hollow indeed. The depth of his friendship and support of his co-owners are trampled by his unnerving attempt to profit using as an excuse the human weakness of one of his

partners, who has fought valiantly and successfully to remain sober for the last four years.

The French philosopher Rousseau is credited with proclaiming that "man is born free, and everywhere he is in chains." The parties to this action were free to associate and to develop and enjoy the Big Bend property as they did for 11 years until Kenton Smith's greed got the better of him. If Smith truly had or has a problem with associating himself with his co-owners, he is free to remove his shackles and move on. He cannot, however, improperly invoke a fundamental tenant of law in an attempt to enrich himself at the expense of his partners and co-owners.

The Court of Appeals' Opinion recognized this and its decision must be affirmed and the case remanded as ordered.

Respectfully submitted,

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