Supreme Court of Kentucky

CASE NO. 2010-SC-0533-D
2011-SC-584
On Appeal from Jefferson Circuit Court
No. 03-CI-10346
and
Kentucky Court of Appeals
Nos. 2008-CA-001155-MR and 2008-CA-001345-MR

PATRICIA W. BALLARD — **APPELLANT**

v.

1400 WILLOW COUNCIL OF CO-OWNERS, INC. — **APPELLEE**

REPLY BRIEF FOR APPELLANT / CROSS-APPELLEE

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ARGUMENT

The jury determined that the Association – not Ballard – was responsible for the replacement of the windows in Ballard's unit.[1] The jury further determined that the Association "knowingly and maliciously communicated, orally or in writing, a false statement which had the effect of disparaging Patricia Ballard's title" to her condominium.[2] Yet in its Response, the Association reargues the evidence in an attempt to establish that it did not know, at the time it filed the *lis pendens*, that Ballard was not responsible for the cost of replacing the windows. The Association cannot re-litigate issues that were decided by a properly instructed jury in a vain attempt to portray itself as the innocent party.

Rather, this appeal concerns the legal issues arising from the trial court's decisions: (i) whether the court correctly ruled that Ballard is the "prevailing party" entitled to her attorneys' fees under Master Deed § 10.2; (ii) whether Ballard's slander of title claim is barred by limitations; (iii) whether the Association's *lis pendens* filing was absolutely privileged, despite the jury's finding that it was made knowingly and maliciously; and (iv) whether the court properly instructed the jury regarding the Association's fiduciary duties to co-owners, including Ballard. On each of these issues, the Court should find for Ballard and affirm the trial court's judgment entered upon the jury's verdict.

I. Ballard is entitled to recover her attorneys' fees in an amount to be determined by the circuit court.

The trial court correctly held that Ballard is the "prevailing party" entitled to recover her costs and attorneys' fees under § 10.2 of the Master Deed. That ruling is not before this Court prematurely. The trial court's determination that Ballard is the "prevailing party" was not an interlocutory decision in connection with a fee petition under JRP 404 – rather, it was a

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[1] Jury Question No. 2, TR 1686, Appellant's Brief at Appendix C.

[2] Jury Question No. 7, TR 1696.

final ruling on **the Association's** post trial motion seeking a declaration that neither Ballard nor the Association was the "prevailing party" for purposes of § 10.2.[3] Upon remand, the trial court will have the opportunity to determine the amount of attorneys' fees to be awarded.[4]

A. Ballard is the "prevailing party" for purposes of Master Deed § 10.2.

Ballard is the prevailing party for purposes of § 10.2 because she prevailed on the central issue in the case, *i.e.*, whether Ballard or the Association is responsible, under the Master Deed, for replacing the windows in her condominium.[5] The Association blatantly misstates the record – inferring the trial court granted partial summary judgment for the Association – when it says: "The trial court found for the Association when it held that Ballard was responsible for window replacement pursuant to the Master Deed."[6] The trial court did not make any such ruling. Quite the contrary, the trial court submitted the issue to the jury, and the jury determined that the Association – not Ballard – was responsible for replacing the window. The Association did not appeal that portion of the jury verdict and it is now the law of the case.

The Association's citation to the record is to (part of) a jury instruction, not to any ruling for the Association. When read in its entirety, the jury instruction states that Ballard is responsible for replacing the window "**unless** you find from the evidence that... [the Association], acting through its Board of Directors, failed to exercise the degree of care one

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[3] TR 1902-1980. Indeed, it is interesting that the Association is now arguing that appellate review is premature, given that the Association raised the issue by motion and appealed from the trial court's order.

[4] The Association says that it expects Ballard will seek "well over $600,000 in attorneys' fees and costs." Response at p. 41, n. 15. That estimate must reflect how much the Association has paid its counsel thus far.

[5] The Association takes issue with Ballard's description of the window facade as a "glass wall," noting that the two-story tall facade contains 21 wood-framed windows. However, the Association misleadingly states that the case began as a dispute "over a single rotted window frame." Response at p. 2. In fact, the rot caused all of the windows to be replaced.

[6] Response at p. 41, citing Jury Instruction No. 2, TR 1684.

would expect an ordinarily prudent Board of Directors to exercise under similar circumstances in providing for exterior maintenance **and that replacement of the Bay Window was rendered necessary as a result of such failure.**"[7] That instruction arose out of: (1) Ballard's claim seeking a declaration that the Association failed to comply with its obligations, under § 3.2 of the Master Deed, to maintain common elements; and (2) the Association's counterclaim that Ballard was responsible for the cost of replacing the windows under § 3.1[b][ii] of the Master Deed. Thus, Instruction No. 2 clearly encompasses claims that arise out of "an alleged failure of a Co-Owner or the [Association] to comply with the terms of the... Master Deed" for purposes of § 10.2, **not** the tort of negligence.[8]

And, when answering the questions that follow Instruction No. 2, the jury specifically determined that the replacement of the window **was** rendered necessary as a result of the Association's failure to exercise reasonable care in providing for exterior maintenance, as required by § 3.2 of the Master Deed, and thus Ballard was **not** responsible for replacing the window under § 3.1 of the Master Deed.[9] This was indisputably the central issue in the case: whether Ballard or the Association was responsible under the Master Deed for replacing the window. The jury determined that it was the Association's responsibility under the Master Deed.

The Association admits that it did not appeal that determination by the jury, stating: "While it disagrees with this verdict, the Association did not appeal it."[10] Despite conceding this fact and observing that "fully set[ting] out the factual record... would serve to divert

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[7] Instruction No. 2, TR 1684 (emphasis added).

[8] Ballard did not plead the tort of negligence; she pleaded the Association's obligation under the Master Deed. The typical "bare bones" Kentucky instruction distilled that claim and the Association's counterclaim for the jury. *See Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503, 506 (Ky. 1989) ("there is no doubt that in Kentucky we observe a 'bare bones' approach to jury instructions").

[9] Question 2, TR 1686.

[10] Response at p. 10.

attention from the relevant questions of law,"[11] the Association proceeds to reargue – at length – the factual issues that had been decided by the jury as to who was responsible for repairing the windows under the Master Deed. The Association is not permitted to collaterally attack a jury verdict it did not appeal – yet the Association is attempting to do just that.

In a further attempt to recast itself as the prevailing party for fee recovery purposes, the Association misconstrues Ballard's claim for breach of fiduciary duty, asserting that Ballard claims the duty "arose under the Master Deed."[12] That is not true. The Association's fiduciary duty arises – as Ballard has consistently asserted – under common law out of the relationship between the parties.[13]

B. Ballard is entitled to be awarded fees as costs and is not required to plead a "claim" for fees.

Ignoring the fact that it was the Association that raised the issue of Ballard's entitlement to attorneys' fees with the trial court, the Association now argues – for the first time – that Ballard is not entitled to fees because she failed to properly plead them.[14] The Association did not present that argument to the trial court and thus it is not reviewable on appeal. *E.g., Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). Moreover, the argument is plainly wrong. As the Association concedes in its brief, "each of Ballard's complaints requested attorneys' fees in the prayer for relief...."[15] This was more

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[11] Response at p. 2.

[12] Response at p. 41.

[13] Appellant's Brief at pp. 26-30.

[14] Response at p. 39.

[15] Response at p. 39.

than sufficient to put the Association on notice that Ballard intended to seek an award of her attorneys' fees if she prevailed on her claims.[16]

Ballard's attorneys' fees are not an element of her damages under her causes of action against the Association. Unlike damages on a claim for relief, attorneys' fees are not appropriately considered at trial on the merits and may only be awarded by the trial court, in the exercise of its discretion. *Gibson v. Kentucky Farm Bureau Mutual Ins. Co.*, 328 S.W.3d 195, 204 (Ky. App. 2010) ("It is the responsibility of the trial court, and not the jury, to determine the availability and amount of attorney fees."). Attorneys' fees may be awarded as costs under CR 54.04 where – as here – there is a contract that provides for such an award. *Smith Rental Enterprises, Inc. v. Stewart*, 2008 WL 3160742 (Ky. App., Aug. 8, 2008) (unpublished)[17] (where lease agreement provided for lessor's recovery of attorneys' fees if lessor prevailed in action, trial court abused its discretion by arbitrarily denying lessor's post-trial motion for fees); *and see, e.g., Strohschein v. Crager*, 258 S.W.3d 25, 30 (Ky. App. 2007) ("Attorney fees are not permitted as costs in the absence of a statute or contract expressly providing for the payment of such fees.").

Accordingly, Ballard was not required to plead attorneys' fees "as a claim" under CR 8.01, as the Association argues.[18] Rather, the fees are part of Ballard's costs to be awarded post-judgment by the trial court under CR 54.04. Moreover, there is no requirement that a

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[16] Courts have even held that a plaintiff's general request, in the prayer for relief, that he be awarded "[s]uch other and further relief as this court deems just and equitable" is adequate to allow the trial court to consider awarding attorneys' fees. *SKW Real Estate Limited Partnership v. Gallicchio*, 716 A.2d 903, 913 (Conn. App. 1998).

[17] Attached as Appendix A, pursuant to CR 76.28(4)(c).

[18] Response at p. 39. Nor would such a requirement make any sense, considering that a party's right to recover fees under a contractual or statutory fee-shifting provision does not arise until the party prevails on the subject claims. Thus, even taking for granted the Association's argument that Ballard's request for attorneys' fees under the Master Deed is a cause of action, Ballard's "cause of action" for fees did not accrue – and could not be "pleaded" – until the trial court entered a judgment on the jury verdict, making Ballard the "prevailing party" in the action.

request for an award of attorneys' fees as costs be stated in a pleading. Such requests are specifically governed by the post-judgment procedures set forth in CR 54.04 and JRP 404.

In sum, Ballard is entitled to an award of reasonable attorneys' fees in connection with this action because she is the "prevailing party" within the meaning of the Master Deed's provision authorizing such an award.

II. Ballard's slander to title claim is not barred by limitations.

A. Ballard's claim did not accrue, for limitations purposes, until she incurred provable damages.

Ballard's slander of title claim did not accrue until she incurred "special damages." *Ideal Savings Loan & Building Ass'n v. Blumberg*, 295 Ky. 858, 175 S.W.2d 1015 (1943); *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980). As the Association concedes, "there is no such thing as slander of title per se."[19] Accordingly, the limitations period for a slander of title claim cannot logically be said to commence until the plaintiff incurs special damages.

Contrary to this self-evident point, the Association argues that the limitations period on Ballard's slander of title claim began to run immediately upon the Association's filing of the *lis pendens* at issue. The Association attempts to analogize slander of title claims to claims for personal defamation *per quod*, which – unlike defamation *per se* – requires proof of injury to the plaintiff's reputation.[20] The Association asserts – without citing any authority[21] – that a claim for defamation *per quod* accrues, for purposes of the statute of limitation, at the time of publication without regard to when the plaintiff incurred special

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[19] Response at p. 15 (quoting *Bonnie Braes*, 598 S.W.2d at 766).

[20] Response at p. 26. *See Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 870 (Ky. App. 2007) ("The difference between defamation *per se* and defamation *per quod* is that, in the former, damages are presumed and, in the latter, the plaintiff must prove special damages.").

[21] *Lashlee v. Sumner* is not a defamation *per quod* case and the issue with respect to the statute of limitation in that case was whether the discovery rule applied to extend the limitation period. 570 F.2d 107 (6th Cir. 1978).

damages. But it has long been the law in Kentucky that where a claim requires proof of special damage, the limitation period does not begin to run until the loss has accrued. *E.g., Hancock v. Wilhoite*, 62 Ky. 313 (1864).

In *Hancock v. Wilhoite*, the court specifically referenced this distinction in the context of defamation of character. *Hancock* involved an action by a father for the loss of services of his daughter, due to her pregnancy and birth of a child, allegedly as a result of the defendant's wrongful seduction. The court held that the claim for loss of services was not barred by the applicable statute of limitation because the period did not commence to run until the loss had accrued – that is, when the daughter gave birth to her child. In an action for seduction, on the other hand, the limitation period began to run from the time of the act of seduction. In explaining the distinction, the court observed that, with the tort of defamation, "the cause of action for words, *per se* actionable, commences with the publication, yet it does not exist for special damage, resulting from words not actionable in themselves, until such damage shall have accrued."

The Association also asserts – again without any authority – that Ballard's slander of title claim accrued on the date of the *lis pendens* filing because she could have immediately sought an appraisal of the value of her property to quantify her damages.[22] But in *Meade County Bank v. Wheatley*, this Court held that an appraisal of property encumbered by a lien did not render the damages sufficiently fixed and non-speculative to commence running of the statute of limitation on a claim arising out of a lawyer's erroneous title opinion. 910 S.W.2d 233, 234-35 (Ky. 1995). In a claim for slander of title, a plaintiff must "plead **and prove**" that she has incurred damages as a result of the defendant's conduct. *Bonnie Braes*, 598 S.W.2d at 766 (emphasis added). The Association attempts to distinguish *Wheatley* based on

[22] Response at pp. 26-27.

the fact that it involved a different tort claim (legal negligence versus slander of title), but fails to explain why the special damages required for a slander of title claim should be subject to a lesser standard. Indeed, when the Association asserts that "the harm arises as soon as the plaintiff's interest in property is disparaged," it is essentially arguing for slander of title *per se*, which does not exist under Kentucky law.[23]

B. Slander of title involves injury to real property and should be subject to the five year limitation period under KRS 413.120.

The one year limitation period that applies to actions for "libel or slander" should not apply to Ballard's slander of title claim.[24] Slander of title shares an unfounded association with the tort of defamation (*i.e.,* libel and slander) simply because of its name. As a result, a number of courts have – with little or no analysis – simply lumped the two concepts together and concluded that "slander of title" and "slander" should be considered the same for purposes of applying the statute of limitation.[25] But "disparagement" of title[26] is a separate

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[23] Response at p. 27, n. 12.

[24] In a footnote, the Association asserts that Ballard is raising this issue for the first time. Response at p. 21, n. 7. Ballard prevailed on her slander of title claim in the trial court and this Court may affirm that judgment on "any ground on which the decision could properly have been made," even if it was not previously raised by the parties. *Old Republic Ins. Co. v. Ashley*, 722 S.W.2d 55, 58 (Ky. App. 1986).

[25] *See, e.g., Howard v. Hudson*, 259 F.2d 29, 31 (9th Cir. 1958) ("The real nature of the action must be kept in mind, so as to avoid the error of assuming that the law of personal slander governs."); *Kensington Development Corp. v. Israel*, 419 N.W.2d 241, 244 (Wis. 1988) ("Because of the unfortunate association with 'slander,' a supposed analogy to defamation has hung over the tort like a fog . . . .'") (quoting PROSSER & KEETON ON TORTS, INJURIOUS FALSEHOOD, § 128, pp. 962-63).

[26] The RESTATEMENT categorizes disparagement of property as a subset of injurious falsehood, rather than defamation. *See* RESTATEMENT (SECOND) OF TORTS § 624.

tort that evolved to protect different interests.[27] Accordingly, it should not be subject to the same limitation period unless the Legislature explicitly so provides.[28]

The Association asserts that Ballard has not shown that the legislative intent behind KRS 413.120 (the five year statute) was to include slander of title actions[29], but the Association's approach to statutory interpretation is backwards. The one year statute specifically states that it applies to "[a]ctions for libel or slander," which are torts for injury to reputation, but does not state that it applies to slander of title, which is a tort for injury to economic interests in real estate. KRS 413.140(1)(d). In other words, there is no indication that the Legislature intended KRS 413.140 to apply to the separate tort of slander of title. Thus, the catchall provision for "[a]n action for an injury to the rights of plaintiff, not arising on contract and not otherwise enumerated" applies to Ballard's slander of title claim. KRS 413.120(7).

An opinion by the Supreme Court of Missouri illustrates the proper analysis. *State ex. rel. BP Products North America Inc. v. Ross*, 163 S.W.3d 922 (Mo. 2005). In that case, the plaintiffs asserted claims for injurious falsehood based on business losses allegedly due to the defendants' false statements to police. *Id.* at 924-25. The defendants argued that the claims

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[27] *See* Appellant's Brief at p. 20.

[28] *See, e.g., Howard v. Hudson*, 259 F.2d 29, 32 (9th Cir. 1958) (applying California law and holding that slander of title is subject to three year limitation applicable to an "action for trespass or injury to realty" rather than one year limitation for libel or slander); *Lase Co. v. Wein Products, Inc.*, 357 F. Supp. 210, 212-13 (N.D. Ill. 1973) (under Illinois law, slander of title claim subject to five year statute applicable to damages to property rather than one year statute for libel and slander, "[s]ince the thrust of the tort of slander of title is the interference with a prospect of sale or the exercise of a proprietary right..."); *Boaz v. Latson*, 580 S.E.2d 572, 579 (Ga. App. 2003) (slander of title claim subject to four year limitation period for "[a]ll actions for trespass upon or damage to realty...."), *reversed, in part, on other grounds*, 598 S.E.2d 485 (Ga. 2004). *See also State ex. rel. BP Products North America Inc. v. Ross*, 163 S.W.3d 922, 927 (Mo. 2005) (claim for injurious falsehood subject to five year limitation period rather than two year period applicable to claims for libel or slander); *Patel v. Soriano*, 848 A.2d 803, 834 (N.J. Super. App. Div. 2004) (trade libel claim subject to six year statute rather than one year statute for libel or slander).

[29] Response at p. 22.

were barred by the two year limitation period applicable to "[a]n action for libel, slander, assault, battery...." *Id.* at 925. The Supreme Court of Missouri held that the claims were instead subject to the five year period applicable to "[a]n action... for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." *Id.* at 927. Examining the two statutes, the court observed: "[The two year statute] expressly lists the claims to which it applies, and that list does not include the tort of injurious falsehood, which has been recognized in Missouri for more than 25 years." Referring to the "catchall provision" in the five year statute, the court concluded: "The plain language of these two statutes dictates that the five-year statute of limitations applies to injurious falsehood claims." *Id.*

Contrary to the Association's assertion, there are sound reasons to apply a longer limitation period to slander of title claims than the one-year period applicable to personal defamation claims. Damage to an individual's reputation has a shorter limitation period for the same reason that an individual's physical injury has a short limitations period – namely, the injury is personal and evidence involved in such claims tends to degrade relatively quickly, making them more difficult to defend over time. Conversely, injury to real property – like other types of primarily economic injuries – has a longer limitations period.

There is no binding precedent on this issue in Kentucky. *Montgomery v. Milam* is a 3-3 decision that has no *stare decisis* effect. *Hudson v. Commonwealth*, 202 S.W.3d 17, 21-22 (Ky. 2006). Likewise, *dicta* from the Court of Appeals' opinion in *Keith v. Laurel County Fiscal Court*, 254 S.W.3d 842 (Ky. App. 2008) and the unpublished opinion in *Utley v. First Citizens Bank of Hardin County*, 2003 WL 21299394 (Ky. App. Jun. 6, 2003)[30] do not

[30] Copy attached as Appendix E to Appellee's Response.

establish a rule.[31] If the Court reaches this issue[32], it should clarify the law and hold that the five year limitation period under KRS 413.120 applies to actions for slander of title.

III. Knowingly false and malicious statements in a *lis pendens* are not absolutely privileged.

The Association's knowingly false and malicious filing of the *lis pendens* is not protected by an absolute privilege merely because the filing complied with the procedural requirements KRS 382.440(1). There is no Kentucky precedent for extending the judicial statements privilege to such conduct.

There are sound reasons for applying an absolute privilege to witness statements in connection with judicial proceedings.[33] Those reasons do not support an absolute privilege with respect to knowingly false and malicious real estate filings. *Rogers v. Lutrrell*, cited by the Association, is simply another application of the testimonial privilege. 144 S.W.3d 841 (Ky. App. 2004). The defendant in that case was a psychologist appointed by the family court to supervise child visitation and provide regular status reports to the court. The plaintiff's defamation claim was entirely based upon a statement in one of those report letters, and thus was entitled to protection under the judicial statements privilege.

By contrast, a *lis pendens* is not in the nature of witness testimony and thus falls outside the scope of the judicial statements privilege and the interests it seeks to protect. While some courts have held to the contrary, the better reasoned authorities hold that a *lis pendens* is only qualifiedly privileged and will not shield the filer from liability where it is knowingly false or malicious. *E.g., Macquarie Bank Ltd. v. Knickel*, 723 F. Supp. 2d 1161,

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[31] *See* Appellant's Brief at p. 19, n. 46.

[32] In the alternative, the Court may affirm the trial court's conclusion that Ballard's slander of title claim is not time barred because (1) the limitation period did not begin to run until Ballard incurred special damages; and/or (2) the trial court did not abuse its discretion in holding that Ballard's claim related back to her original Complaint under CR 15.03.

[33] Appellant's Brief at pp. 23-24.

1190 (D. N.D. 2010); *Warren v. Bank of Marion*, 618 F. Supp. 317, 325 (W.D. Va. 1985); *Gregory's, Inc. v. Haan*, 545 N.W.2d 488, 494 (S.D. 1996); *Kensington Development Corp. v. Israel*, 419 N.W.2d 241, 244 (Wis. 1988).

The Association was not required to file a *lis pendens*, and yet the jury found that the Association chose to do so maliciously, knowing that the filing contained false statements.[34] The Association argues that there was no "false statement" in the *lis pendens* because the "Master Deed provided for a lien for all costs incurred by the Association."[35] But that statement is not accurate. The Master Deed only provides for a lien with respect to properly allocated assessments and maintenance, repair, or replacement expenses attributable to a co-owner's willful or negligent conduct[36] – and the jury specifically found that the replacement of the windows in Ballard's unit was necessary as a result of the **Association's** failure to adequately provide for exterior maintenance.[37] However, the *lis pendens* falsely stated that Ballard "willfully or negligently failed to repair or replace" the windows in her unit.[38] The Association now improperly attempts to reargue the evidence and assert that it did not act maliciously, despite the jury verdict to the contrary.[39] In essence, the Association is trying to defend the slander of title claim on the evidence while pretending to be defending it on the law.

It is one thing to give notice of a claim that one genuinely believes is valid, and thereafter lose the case. It is another thing to file a knowingly false claim and impair the adverse party's title by also filing a notice of lien. In the former event, such conduct should

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[34] *See* Jury Question No. 7, TR 1696.

[35] Response at p. 17.

[36] Master Deed §§ 3.3, 4.4, TR 77, 78. Master Deed attached as Appendix E to Appellee's Response.

[37] Jury Question No. 2, TR 1686.

[38] TR 132, Appellant's Brief at Appendix B.

[39] Response at pp. 16-17.

be protected by a qualified privilege. In the latter – which is what the jury found happened here – no privilege applies.

IV. Ballard's breach of fiduciary duty claim is based on the Association's common law duties to the co-owners – not the statutory duties owed by the individual directors to the entity.

Under Kentucky common law and in the context of the relationship between condominium associations and condominium unit owners, the trial court correctly instructed the jury that the Association had a duty "to exercise good faith and loyalty in conducting the business of the [Association] which includes an obligation to exercise good faith and loyalty in making decisions with respect to all co-owners, including co-owner, Patricia Ballard."[40]

It is well-established that the common law of Kentucky recognizes the existence of fiduciary relationships "under a variety of circumstances" and "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 485 (Ky. 1991) (quotation omitted). Such a relationship exists in common-interest communities between the property owner members and the owners' association, which manages the owners' collective resources, exercises considerable power over the community, and is charged with numerous responsibilities – including the maintenance of the common elements – for the benefit of the owners. Accordingly, unlike in the realm of for-profit corporations, courts have recognized that common-interest associations – as separate from their members – owe common law duties that run to the individual members of the association. *E.g., Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 655 (1983) (homeowners' association, in enforcing restrictive covenants, owed to individual lot owners a fiduciary duty to act in good faith and to avoid

[40] Jury Instruction No. 4, TR 1689.

arbitrary action); *Wolinsky v. Kadison*, 449 N.E.2d 151, 157 (Ill. App. 1983) (condominium association owed fiduciary duty to the members of the association).[41]

The Association ignores its common law duty and predicates its entire argument upon KRS 273.215(1), which provides the standards for the duties of directors of a nonprofit corporation to that corporation.[42] But the Association's (and the Court of Appeals') reasoning simply fails to meet the issue, because Ballard did not sue the individual members of the Board for breach of their statutory duties to the nonprofit corporation. Rather, Ballard sued the nonprofit corporation – the entity – for breach of its common law duties to her as an owner. These are two separate and distinct concepts, which the Association repeatedly conflates by referring interchangeably to the duties owed by the Board of Directors (or the "Board"), and duties owed by the Association.

The Association mistakenly relies on a Sixth Circuit case, *Radol v. Thomas*, which deals with a claim by shareholders against individual directors of a for-profit corporation. 772 F.2d 244 (6th Cir. 1985).[43] In that case, the court applied the well settled derivative damage rule, holding that the individual directors' duty runs to the corporate entity, and that shareholders of a for-profit corporation cannot recover personally for the directors' breach of duty, but must sue derivatively on behalf of the corporation. *Id.* at 258-59. Ballard is not suing as a shareholder. She is not invoking the statute. She is asserting a common law claim. Ballard sued the Association for breach of its common law duties to her – she is not seeking

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[41] *And see* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.13, cmt. a ("The argument that the association is the members and therefore cannot have duties to itself does not apply because the members, acting collectively, have the power to override the wishes and damage the interests of individual members. Individual members need and are entitled to protection against actions taken in breach of duty by either the governing board or the membership acting collectively that cause them injury.").

[42] Response at pp. i, 11.

[43] Response at pp. 34-35.

to hold the Association liable for any breaches by the directors of their individual duties to the Association under KRS 273.215(1).

Moreover, the Association's proposed analogy to the relationships among directors, shareholders, and the corporate entity in a **for-profit** corporation is inapt because not-for-profit corporations do not have shareholders. The statutory language of KRS 273.215 does not foreclose the existence of fiduciary duties arising at common law. Illustrative of this point is *Patmon v. Hobbs*, in which the Kentucky Court of Appeals held that a managing member of a limited liability company owes a common law fiduciary duty to the other members of the LLC, just as a partner in a partnership owes a duty to every other partner. 280 S.W.3d 589, 595 (Ky. App. 2009). The court recognized this duty of "the utmost good faith" as going beyond the statutory "duty of loyalty" described in KRS 275.170.

The LLC example provides a closer analogy than standard business corporations. But still, common-interest communities are, by their nature, significantly different from for-profit corporations – and even from other types of nonprofit entities – and those differences can give rise to duties that differ from those traditionally recognized in other corporate contexts. Commentators have identified three major differences that justify the need for greater judicial review of the conduct and decisions of common-interest associations. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.13, cmt. b (2000). First, co-owners in an association have a much higher stake in their investments than typical shareholders in business corporations because a co-owner's "investment" is her home. Second, an association holds a significantly broader range of power over the well-being, quality of life, and property values of individual

co-owners than a typical business corporation holds with respect to its shareholders.[44] Third, there is a significant difference in the liquidity of the ownership interest: co-owners in an association ordinarily cannot sell their homes as easily as they can sell shares of stock in a for-profit corporation.

In deciding this issue here, the Court may limit its holding to the unique relationship between a condominium co-owner and the association of co-owners that governs the condominium. The holding need not have broader implication for other not-for-profit entities. The trial court's instruction to the jury regarding the Association's duties is consistent with Kentucky common law and the nature of the relationship between condominium associations and condominium unit owners, and the judgment entered on the jury's verdict should be affirmed.

CONCLUSION

The jury determined that the windows in Ballard's condominium unit needed to be replaced due to the Association's failure to adequately maintain the building's exterior. The Association did not appeal that part of the verdict and cannot be heard to reargue the evidence to this Court. Thus, Ballard is indisputably the "prevailing party" for purposes of the Master Deed's fee recovery provision, as the trial court correctly held.

The trial court also correctly held that Ballard's slander of title claim is not barred by limitations. In addition to the ground explicitly noted by the trial court – *i.e.*, that Ballard's claim relates back to her original Complaint under CR 15.03 – Ballard's claim also survives limitations because: (a) her claim did not accrue until she incurred provable "special damages"; and (b) slander of title is not the same as "libel or slander" and thus should be

[44] As one court observed: "[M]embership in an association is usually mandatory. .... And the powers of such association are extensive. .... With power, of course, comes the potential for abuse. Therefore, the Association must be held to a high standard of responsibility[.]" *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651 (1983).

subject to the five year limitation period under KRS 413.120 rather than the one year period under KRS 413.140(1)(d).

Likewise unavailing as a defense is the Association's contention that the *lis pendens* at issue – which the jury determined was knowingly and maliciously filed by the Association – is absolutely privileged by extension of the common law privilege afforded to statements in judicial proceedings. There is no binding Kentucky precedent for such an extension of the absolute privilege and the better reasoned authorities from other jurisdictions hold that a *lis pendens* is only qualifiedly privileged.

Finally, the trial court properly instructed the jury regarding the Association's common law duty to "exercise good faith and loyalty in making decisions with respect to all co-owners, including [Ballard]." Ballard is suing the Association as an entity, not the individual members of the Board. KRS 273.215(1) only relates to nonprofit directors' duties to the corporation and does not apply here. The trial court's instruction is consistent with Kentucky common law regarding fiduciary duties and the special relationship of trust that exists between a condominium owner and the owners' association.

For the foregoing reasons, the Court of Appeals' decision should be reversed and the Circuit Court's judgment based upon the jury's verdict should be affirmed.

Respectfully submitted,

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