SUPREME COURT OF KENTUCKY
CASE NOS. ~~2010-SC-000533~~ and 2011-SC-000584

On Appeal From
Court of Appeals of Kentucky
NO. 2008-CA-00115-MR and 2008-CA-001345-MR
and
Jefferson Circuit Court
No. 03-CI-10346

PATRICIA W. BALLARD — APPELLANT/CROSS-APPELLEE

VS.

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

1400 WILLOW COUNCIL OF CO-OWNERS, INC. — APPELLEE/CROSS-APPELLANT

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CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the foregoing was mailed this 24th day of May, 2012, to Sheryl G. Snyder, Susan L. Williams, Griffin Terry Sumner and J. Kendrick Wells IV, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9929; the Hon. Ann O'Malley Shake, Senior Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and the Hon. Irv Maze, Jefferson Circuit Court, Tenth Division, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202.

Counsel for Appellee/Cross-Appellant

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Appellee/Cross-Appellant 1400 Willow Council of Co-Owners, Inc., by counsel, for its reply, states as follows.

It is now clear that Appellant/Cross-Appellee Patricia Ballard is seeking changes in Kentucky law on every issue in this case. On her slander of title claim, she is seeking to expand the time for accrual of the claim indefinitely, and she is seeking to expand the statute of limitations for the bringing of a claim from one to five years. On her claim of breach of fiduciary duty, she is seeking to overrule the clear intent of the legislature when it defined the duties of the boards of directors of non-profit entities. It also is now clear that Ballard seeks these changes for her primary purpose of claiming attorneys' fees.

Ballard erroneously maintains that a cause of action for defamation *per quod*[1] does not accrue upon publication of the allegedly defamatory words, as a claim of defamation *per se* does, but rather accrues only when special damages have been "incurred." (Reply Br. for Appellant/Cross-Appellee at 6-7.) This is an incorrect statement. Under Kentucky law, a cause of action for slander or libel, whether it is *per se* or *per quod*, arises immediately upon publication of the allegedly defamatory words.[2] In search of support of her contrary, incorrect statement of the law, Ballard relies upon dicta from an 1864 case which states that at that time, a "cause of action for words" *per se* "commence[d] with the publication," but where special damages were required, the cause

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[1] Defamation *per quod* requires "proof of extrinsic facts or explanatory circumstances and special damages." Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 794 (Ky. 2004).

[2] Under Kentucky law, "[t]he tort occurred when the slander was uttered. This is in accord with the general rule that a cause of action for defamation accrues at the time of publication." Lashlee v. Sumner, 570 F.2d 107, 109 (6th Cir. Ky. 1978)(citing 50 Am. Jur.2d, Libel and Slander, § 390). "The general rule with defamation cases is that the cause of action accrues at the time of publication of the defamatory statement." Kindoll v. Gonterman, 2005 Ky. App. Unpub. LEXIS 43 (Ky. App. Feb. 18, 2005)(citing 50 Am. Jur. 2d, Libel and Slander, § 421 (1995))(attached as App. A).

did not "yet exist ... until such damage shall have accrued."[3] If this was ever the law of Kentucky, it is not the law now.

Ballard draws this mistaken picture of defamation law in support of her argument (also mistaken) that her slander of title claim arising from a *lis pendens* filed in 2003 did not arise at the time of publication but rather lay dormant until 2006, when she received an offer she did not like on her condominium, constituting her first alleged "special damages." Ballard argues this despite the clear intent of the legislature that causes of action accrue upon definable, readily ascertainable events. See Northwestern Nat. Ins. Co. v. Osborne, 610 F.Supp. 126, 128 (E.D. Ky. 1985). She also asserts that two Kentucky cases, Bonnie Braes Farms and Ideal Sav. Loan & Bldg. Ass'n, stand for the proposition that her slander of title claim did not ripen until she received the 2006 offer, even though neither case states such a proposition.[4] (Reply Br. at 6.) In sum, Ballard's principal argument that a slander of title claim can lie inchoate and can only arise years after the publication of the alleged slander is without support in Kentucky law. In fact, Ballard's special damages, if any, occurred and were sufficiently ascertainable in 2003.

Ballard's damages, if any, occurred at the time of the filing of the document containing the alleged slander of title. After that filing, any question concerning damages

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[3] Hancock v. Wilhoite, 62 Ky. 313 (1864), concerned the limitations period for a claim of loss of services arising from the tort of seduction. Hancock mentioned "the cause of action for words" in one sentence, as an aside. In the intervening 148 years, Hancock has never been cited by any Kentucky court as establishing when a claim of defamation accrues. Since being cited for the one and only time in 1920 in Cravens v. Louisville & Nashville R. Co., 188 Ky. 579, 582, for its holding on loss of services, Hancock has been a dead letter in Kentucky law. Moreover, much has changed since the mid-19th century. For example, Kentucky courts then recognized that "where the action was grounded on the negligence of the attorney, it was held that the statute runs from the time the party was guilty of the negligence, and not from the time when the special damage accrued." Ellis v. Kelso, 57 Ky. 296, 300 (Ky. 1857).

[4] Ballard cites Ideal Sav. Loan & Bldg. Ass'n v. Blumberg, 175 S.W.2d 1015 (Ky. 1943) and Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765, 766 (Ky. App. 1980), for the proposition that Ballard's slander of title claim "did not accrue until she incurred 'special damages.'" (Reply Br. at 6.) There is no such holding in either case.

was simply a matter of proof. In any event, a mere offer made more than two years after the filing of the *lis pendens* does not constitute proof of the value of the condominium, or proof of Ballard's alleged damages. To date, Ballard has not sold her condominium. Under her theory of this case, therefore, her damages still are not ascertainable and her claim still has not ripened.[5]

Similarly, Ballard finds no support in Kentucky law for her assertion that the fiduciary duties of the directors of the Association are to each individual owner, as opposed to the corporate entity the board is elected to run. She makes this argument despite the clear direction of the legislature in KRS 273.215(1), and despite the findings of Kentucky courts, that the duty of KRS Chapter 273 directors in fact run to the corporate entity.[6] Characterizing her breach of fiduciary duty claim against the Association as a common law claim, Ballard seeks support in the decision in Patmon v. Hobbs, 280 S.W.3d 589 (Ky. Ct. App. 2009). There, the court looked to partnership law[7] for guidance as to duties owed by members of limited liability companies. However, the court expressly did so in Patmon "in the absence of clear caselaw and statutory guidance" regarding LLCs, and because of "the hybrid nature of a limited liability company." 280 S.W.3d at 595. Here, there are no such gaps in Kentucky law regarding the duties of directors of Chapter 273 entities. The legislature clearly set out the duties in KRS 273.215(1), and the leadership of the Association was bound by law to act

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[5] The reality is that the *lis pendens* could have been paid off for $63,300 and removed from the record. Even if Ballard had brought a proper and timely claim, damages in no case could exceed that amount.

[6] See Gerstle v. Moore, 2004 Ky. App. Unpub. LEXIS 762, 13-14 (Ky. App. Feb. 13, 2004)(attached as App. B)(holding that condominium directors failed to act " in the best interests of the association they represented."); see also Fenley v. Kamp Kaintuck, Inc., 2011 Ky. App. Unpub. LEXIS 829 (Ky. App. November 10, 2011)(attached at App. C)(holding that duties of a non-profit board member run to the entity, not the member, and that a shareholder or member, such as Ballard, must pursue a derivative action).

[7] The duties of partners in Kentucky are set out in common law, not statute.

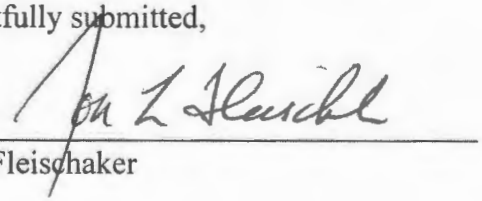
accordingly. Where there is a clear and unequivocal legislative statement of the duty, the law is settled on the question. Ballard therefore had no viable claim of breach of fiduciary duty, and the claim should be dismissed entirely.

Finally, despite devoting her opening argument in each of her briefs, and substantial percentages of each brief, to the question of "prevailing party" for purposes of attorneys' fees, Ballard nevertheless (1) acknowledges that the trial court's Instruction No. 7 plainly stated that she, Ballard, was responsible for replacing the windows, and (2) acknowledges that Instruction No. 7 recited the classic language of the negligence standard. Nevertheless, Ballard asserts that the trial court did not find that she was responsible for the windows, and she asserts that the claims at issue arose from the Master Deed, "not the tort of negligence." (Reply Br. at 3.) Ballard is wrong on each point. What is evident is that the primary issue for Ballard in this case, attorney's fees, has caused her to strain to see herself as prevailing party entitled to fees, where in fact (a) she has made no proper claim for fees; (b) the Court of Appeals was correct in holding that the issue was prematurely before the court, and (c) under the current status of this case, she has not prevailed on any issue arising from the Master Deed.

CONCLUSION

For the reasons set out herein, Ballard's claim of breach of fiduciary duty should be dismissed in its entirety and the Opinion Reversing and Remanding of the Court of Appeals entered May 21, 2010, should be otherwise affirmed.

Respectfully submitted,



Jon L. Fleischaker

APPENDIX

A. *Kindoll v. Gonterman*, 2005 Ky. App. Unpub. LEXIS 43 (Ky. App. February 18, 2005)

B. *Gerstle v. Wrighthouse*, 2004 Ky. App. Unpub. LEXIS 762 (Ky. App. February 13, 2004)

C. *Fenley v. Kamp Kaintuck, Inc.*, 2011 Ky. App. Unpub. LEXIS 829 (Ky. App. November 10, 2011)