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2017 Apr 17 PM 5:23
CLERK OF THE APPELLATE COURT
CASE NUMBER: 115434

No. 16-115434

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IN THE SUPREME COURT OF THE STATE OF KANSAS

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LCL, LLC
Plaintiffs

vs.

JAMES W. FALEN, in his capacity as sole Trustee of the James W. Falen Living Trust U/A/ dated April 30, 2007; JULIE D. FALEN; GREGORY A. FALEN; and MARYL M. WESLOWSKI
Defendants/ Third Party Plaintiffs – Appellees

vs.

RICE COUNTY ABSTRACT & TITLE CO., INC.
Third Party Defendants – Appellant

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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Appeal from the District Court of Rice County, Kansas
Honorable Steve Johnson, Judge
District Court Case No. 2014 CV 35

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I. The Falens suffered an actionable injury in 2008 when the deed prepared by RCAT transferred ownership of the mineral rights from the Falens to Sammy Dean.

In their response to RCAT's Petition for Review, the Falens rely primarily on this Court's decisions in *Ford v. Guarantee Abstract and Title Co., Inc.*, 220 Kan. 244, 553 P. 2d 254 (1976) as well as *Dearborn Animal Clinic v. Wilson*, 248 Kan. 257, 806 P. 2d 997 (1991) in support of the Court of Appeals holding that the Falens' claim for negligence and breach of fiduciary duty are not barred by the 2 year statute of limitations. However, neither the Falens' position nor the holding of the Court of Appeals finds support in either of these decisions.

The Falens' argue that *Ford*, stands for the broad proposition that the relationship between the Falens' and RCAT is a fiduciary relationship analogous to the attorney/client relationship. In support of this position, the Falens seize upon language in *Ford* that a company which examines and guarantees titles to real estate and "assumes to discharge the same duties as an individual conveyancer or attorney has the same responsibility and its duty to its employer is governed by the principles applicable to attorney client." 220 Kan. at 257. However, in reversing the trial court's grant of summary judgment, the Court of Appeals did not hold that RCAT owed no duty to the Falens. Rather, the Court of Appeals incorrectly held that the Falens did not suffer a substantial injury until LCL made a claim for the royalties in 2014. The nature of the relationship between the Falens and RCAT is immaterial to when the Falens first suffered injury sufficient for purposes of the application of the 2 year statute of limitations. Therefore, this Court's opinion in *Ford* is neither binding nor persuasive to the issues raised in RCAT's Petition for Review.

Even if the nature of the relationship somehow affected when the statute of limitations begins to run, the Falens' reliance on *Ford* is misplaced as it is readily distinguishable from and

inapposite to the facts of this matter. The court in *Ford* discussed and analyzed the duty a title company owes to a ***buyer*** of real property when performing a title examination, abstract, issuing title insurance or is otherwise providing advice to the buyer. 220 Kan. at 254-260. As this Court noted, historically, ensuring that a buyer was receiving good and clear title to property was performed by the buyer's attorney. *Id.* at 262-263. However, today, "the former function of the buyer's attorney in examining the abstract of title is now performed by the title insurance company's examiner." *Id.* at 264. Therefore, the relationship that is akin to the attorney/client relationship is between the buyer of property and the title company. *Ford* does not establish that the relationship between the Falens and RCAT was a fiduciary one.

The Falens were not the buyers of the Subject Property rather, they were the sellers. Therefore, RCAT did not perform a title search on behalf of the Falens, did not issue a title commitment to the Falens, did not obtain title insurance on behalf of the Falens and, in fact, did not provide any advice or guidance to the Falens as to whether they could obtain free and clear title to the Subject Property. (R. V, 835). The title insurance commitment and ultimately the policy of title insurance issued by First American as part of the Sammy Dean/Falen transaction insuring against defects in the title to the property was issued to Sammy Dean and not the Falens. The analysis employed by this Court in *Ford* is simply inapplicable to the facts of the present matter and provides no guidance or support in applying the statute of limitations to the Falens' claims.

The Falens also suggest that *Dearborn*, 248 Kan. 257, supports the Court of Appeals holding that the Falens did not suffer an injury in January 2008 and the statute of limitations did not begin to run until 2014. Once again, the Falens' reliance on *Dearborn* in misplaced.

In *Dearborn*, plaintiffs sued their attorney for negligent preparation of an asset purchase agreement for the sale of a veterinary clinic. In addition to the veterinary clinic, Plaintiffs intended that the asset purchase agreement would include a provision that the purchasers would be required to purchase stock in plaintiffs' holding company. Plaintiffs hired an attorney to prepare the asset purchase agreement including the purchase of stock in the holding company. However, when drafted, the agreement included an option to purchase stock rather than requiring the purchase of stock. The plaintiff's filed suit against their attorney who prepared the asset purchase agreement after the buyer refused to exercise the option to purchase the stock. The defendant attorney sought summary judgment arguing that the statute of limitations barred the plaintiffs' claims because the negligent act giving rise to their cause of action occurred at the time the agreement was drafted. This Court rejected the position of the defendant attorney.[1] In doing so, this Court recognized that the negligent act of the attorney occurred when the purchase agreement was drafted however, "no actionable injury occurred because [buyer] might have elected to exercise his option." *Id.* at 265.

The Falens attempt to equate the negligent preparation of the asset purchase agreement in *Dearborn* to the alleged negligent preparation of the deed by RCAT in this matter. However, there is a significant and compelling difference between the facts of *Dearborn* and the facts of the present matter--the Falens suffered an immediate injury i.e., the loss of ownership, upon the filing of the deed with the recorder of deeds office. Unlike *Dearborn* where the buyer could have exercised an option to purchase the stock eliminating any potential injury, here, as a matter of law, the Falens' ownership of the mineral rights was transferred to Sammy Dean when the deed was

[1] Ultimately, this Court held that the plaintiffs' claims were barred by the statute of limitations in *Dearborn* because plaintiffs suffered an injury when the buyer refused to exercise the option and plaintiffs were aware that the injury was due to the conduct of defendant attorney at the latest when plaintiffs signed interrogatory responses in the litigation between plaintiffs and the buyer seeking to enforce the purchase of the stock. 248 Kan. at 270-71.

filed and did not reserve the mineral interests to the Falens. *See* K.S.A. §58-2202; *Fast v. Fast*, 209 Kan. 24, 28–29, 496 P.2d 171 (1972); and *In Re Estate of Bush*, 2017 WL 1105397 (Kan. Ct. App. 2017). No further action on the part of Sammy Dean or any other party was necessary for the Falens' to suffer the loss of their ownership of the mineral rights once the deed was filed in 2008.

While the Falens' claim they did not suffer an injury until 2014, the Court of Appeals recognized that the Falens suffered an injury in 2008 when the deed was filed stating: "the Falens did, in fact, suffer a legal injury when RCAT recorded the deed on January 18, 2008, without reserving the mineral rights in their favor." The error committed by the Court of Appeals and the flaw in the Falens' position before this Court is the improper characterization of this admitted injury suffered in 2008 as neither substantial nor actionable for the purposes of the statute of limitations.

Neither the Court of Appeals nor the Falens have suggested that the Falens retained ownership of the mineral rights when the deed at issue was filed in 2008. To do so would be contrary to well settled Kansas law. *See Fast*, 209 Kan. 24. Rather, both the Falens and the Court of Appeals focus solely on the fact that the Falens continued to receive royalty payments as evidence that the Falens were not damaged. However, as set forth in RCAT's petition for review, one measure of damages in this matter is the value of the mineral interests at the time the Falens' ownership of those mineral interests was lost. The value of the mineral interest (real property) is separate and distinct from the royalty payments received by the Falens (personal property). In their opposition, the Falens' suggest that there is nothing in the record to support any measurable difference between the Subject Property's value with and without the minerals. The Falens own pleadings belie this contention.

In filing their third party petition, the Falens expressly recognized that the loss of ownership of the mineral interests, by itself, constituted damage sufficient to support a cause of action for negligence. In fact, the value of the mineral interests was one element of damages the Falens sought to recover from RCAT in their third party petition. (R. 1, 60-78). Specifically, the Falens pled that if LCL prevailed in its quiet title action the Falens would "lose ownership of the Term Mineral Interest" and that RCAT "should be responsible for all monetary loss caused by [RCAT's] negligence...including the value of the Term Mineral Interest." (R. 1, 63-64). Certainly, if the loss of ownership of the mineral interests was sufficient for the Falens to maintain a cause of action in 2014 the loss of ownership of the mineral interests in 2008 was as well.

The fact that the precise value of the mineral rights in 2008 does not appear in the record before this Court is not fatal to nor determinative of RCAT's position that the statute of limitations began to run in 2008. Rather, for purposes of the statute of limitations, RCAT must simply show that the Falens were injured in 2008 and that such injury was actionable. *Roe v. Diefendorf*, 236 Kan. 218, 223, 689 P.2d 855 (1984). By their own admissions, the Falens loss of ownership of the mineral interests was an actionable injury. It is undisputed that this loss of ownership occurred in 2008. The Court of Appeals erred and ignored the law in Kansas for over 30 years by engaging in an analysis of whether that injury was substantial or unsubstantial for purposes of the application of the statute of limitation. Therefore, this Court should grant RCAT's Petition for Review.

II. The constructive notice imparted by K.S.A. §58-2222 is sufficient under Kansas law to establish that the Falens' injury was reasonably ascertainable in January 2008 for purposes of the statute of limitations.

As set forth in RCAT's Petition for Review, K.S.A. §58-2222 provides that every written, recorded, and certified instrument "shall, from the time of filing the same with the register of deeds

for record, impart notice to all persons of the contents thereof." In an effort to avoid the constructive notice imparted by K.S.A. §58-2222 both the Falens as well as the Court of Appeals engage in an analysis of the Falens' subjective knowledge of whether or not the Falens, in fact, knew that they had lost their ownership interest in the mineral rights in 2008 when the deed was filed. However, such an inquiry is improper under Kansas law.

The discovery rule, as codified at K.S.A. §60–513(b) and (c), states that the limitations period starts when the 'fact of injury' is 'reasonably ascertainable.' *Davidson v. Denning*, 259 Kan. 659, Syl. 2(c), 914 P.2d 936 (1996). Reasonably ascertainable does not mean actual knowledge. *Id.* A plaintiff need not possess actual knowledge of an injury and its wrongful cause before the limitations period commences. *Bonura v. Sifers*, 39 Kan. App. 2d 617, 622, 181 P.3d 1277 (2008). Rather, under K.S.A. §60-513 the proper inquiry is when was the fact of injury reasonably ascertainable based upon an objective examination of the evidence and **not** the actual knowledge of the plaintiff. *Davidson*, 259 Kan. 659. [emphasis added]

Here, both the Falens and the Court of Appeals analysis suffer from the same fundamental flaw. They each focus on the actual knowledge of the Falens to determine if the Falens injury was reasonably ascertainable when the defective deed was filed in January 2008. However, the proper inquiry is whether the loss of ownership of the mineral interests was reasonably ascertainable in 2008 when the deed failing to reserve the mineral interests was filed with the recorder of deeds. As a matter of law, the answer to this question is yes.

As set forth above, K.S.A. §58-2222 provides constructive notice to all persons the contents of a deed. This Court has held that based upon K.S.A. §58-2222 that the statute of limitations for fraud begins to run when a deed is filed in the public record as all parties are charged with notice of the contents of the deed. *See Smith v. Rector*, 135 Kan. 326, 10 P. 2d 1077 (1932). Furthermore,

"the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud,' does not necessarily mean until the party complaining had actual notice of the fraud alleged to have been committed; for constructive notice of the fraud is sufficient to set the statute in motion, even though there may be no actual notice." *Id.* citing *Black v. Black*, 64 Kan. 689, 704, 68 P. 662 (1902).

This long standing rule of law in Kansas was applied by the court of appeals in *Bi-State Development Co., Inc. v. Shafer, Kline & Warren, Inc.*, 26 Kan. App.2d 515, 990 P.2d 159 (1999). Both the Falens and the Court of Appeals misapprehend the import of this decision and the fact that it is dispositive of the issue of whether the Falens injury was reasonably ascertainable when the erroneous deed was filed for purposes of the statute of limitations.

In *Bi-State*, a landowner brought a professional negligence claim against an engineering firm for negligently preparing a real estate plat alleging that the engineering firm failed to properly locate an easement. *Bi-State*, 26 Kan.App.2d at 516. The easement was filed with the register of deeds on June 10, 1986. *Id.* Plaintiff discovered an error with the easement in the summer of 1995 and filed suit in December 1996. *Id.* The engineering firm moved for summary judgment based on the expiration of the statute of limitations. *Id.* Plaintiff claimed that it filed its action within the statute of limitations because it commenced the action within two years of the discovery of the injury. *Id.* at 518. However, the Kansas Court of Appeals held that the landowner was charged with constructive notice of the defective easement on the date it became a public record, June 10, 1986. *Id.* at 519.

The Court of Appeals and the Falens attempt to distinguish *Bi-State* on the basis that the Falens continued to receive royalty payments after the deed was filed. They argue the receipt of

royalties is evidence that the constructive notice provided by K.S.A. §58-2222 was insufficient for purposes of the statute of limitations. However, this is a distinction without a difference.

As *Bi-State* recognized, the Falens were charged with constructive knowledge of the contents of the deed the date it was filed. This constructive knowledge included the fact that the deed did not include any language reserving the mineral interests to the Falens. In fact, the Falens acknowledged that they received the deed prior to filing and the deed did not contain any language reserving the mineral interests despite the fact that every other documents associated with the sale of the Subject Property to Sammy Dean did include language reserving the mineral interests to the Falens. The fact that the Falens continued to receive the royalty payments is irrelevant to whether constructive notice imparted by K.S.A. §58-2222 was sufficient so that the Falens' injury was reasonably ascertainable in January 2008.

Noticeably absent from both the Court of Appeals opinion as well as the Falens' opposition to the petition for review is any decision from a Kansas court suggesting that the constructive notice of K.S.A. §58-2222 is insufficient to establish that an injury is reasonably ascertainable where the injury is disclosed by the public record. To the contrary, as set forth above, Kansas courts have long held that the constructive notice is sufficient to begin the statute of limitations. *Travis v. Glick*, 150 Kan. 132, 141, 91 P. 2d 41 (1939). Furthermore, this is the approach taken by other jurisdictions with similar statutes. *See Calvert v. Swinford,* 382 P. 3d 1028 (Okla. 2016). The analysis employed by the Court of Appeals as well as the Falens ignores long standing precedent of this Court as well as the Court of Appeals decision in *Bi-State*. It also vitiates the constructive notice imparted by K.S.A. §58-2222 as it allows any litigant to argue that they simply did not understand the legal effect of a deed to avoid constructive notice imparted by K.S.A. §58-

2222. Such a result is contrary to Kansas law and review of the Court of Appeals decision is appropriate.

III. The Falens cannot maintain any cause of action against RCAT arising out of the 2014 transaction involving Sammy Dean and LCL.

In their opposition, the Falens suggest that if this Court determines that the statute of limitations bars the Falens' claims for negligence and breach of fiduciary duty arising out of the deed prepared and filed in 2008, then the Falens should be able to maintain a cause of action against RCAT related to a transaction in 2014 between Sammy Dean and LCL. Once again, theie position sails wide of the mark.

While Kansas courts have recognized that a continuing relationship between parties may create a fact issue as to when an injury is ascertainable (*Hall v. Miller*, 29 Kan. App.2d 1066, 36 P.3d 328 (2001)), here there was no continuing relationship between the Falens and RCAT in 2014 which would give rise to a claim for breach of fiduciary duty. The Falens were not a party to the transaction in 2014. Although the Falens seek to distinguish the alleged negligence and breach of duties which occurred in 2008 to an alleged breach that occurred during a separate transaction in 2014, the Falens provide no evidence that any separate breach occurred in 2014 distinguishable from the initial alleged breach which occurred in 2008 upon the filing of the incorrect deed. In other words, all of the Falens claims are related to the original preparation and filing of the deed in 2008 by RCAT and any cause of action for breach of fiduciary duties accrued in 2008.

The Falens suggest that RCAT had a duty in 2014 to report the error in the deed to the Falens when RCAT discovered the error in the deed. Any fiduciary obligations RCAT owed the Falens ceased when the 2008 transaction was completed with the filing of the deed. *See Jeanes v. Bank of America, N.A.*, 40 Kan. App.2d 281, 191 P.3d 325 (2008). Two types of fiduciary

relationships exist: (1) those specifically created by contract such as principal and agent; and, (2) those implied in law due to the factual situation surrounding the involved transaction and the relationship of the parties to each other and to the questioned transaction. *Dana v. Heartland Mgmt. Co.*, 48 Kan. App. 2d 1048, 1067, 301 P.3d 772, 785 (2013).

Here, it was and is undisputed that no written contract existed between RCAT and the Falens. Therefore, to the extent any fiduciary relationship existed between the Falens and RCAT, that relationship arose out of the 2008 transaction and not the transaction in 2014 as the Falens were not a party to that transaction. Because the fiduciary duty between RCAT and the Falens arose out of the 2008 transaction, the Falens cannot maintain a cause of action for actions RCAT took in 2014 related to another transaction to which the Falens were strangers.

Finally, the Falens argue that RCAT should be estopped from asserting a statute of limitations defense for concealing its breach. There are no allegations or facts asserted regarding deception, concealment, or fraud in any portion of the record. To the contrary, RCAT provided a copy of the deed to the Falens for their review and signature prior to filing the deed. The Falens admittedly reviewed the deed and did not see any indication in the deed that the mineral interests were reserved. Quite simply, there is no evidence that RCAT engaged in any deception, concealment or fraud sufficient to toll the statute of limitations or to estop RCAT from availing itself of the statute of limitations.

CONCLUSION

For all the reasons addressed above, RCAT requests that its Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of April, 2017, a true and correct copy of the above and foregoing *Reply in Support of Petition for Review* was mailed to the following:

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