No. 115,434

IN THE SUPREME COURT OF THE STATE OF KANSAS

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 – Appellant

vs.

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

SUPPLEMENTAL BRIEF OF APPELLEE

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

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INTRODUCTION

This appeal presents two issues for resolution. The first involves the application of the two-year statute of limitations set forth in K.S.A. §60-513 and whether an owner of real property suffers substantial injury for purposes of the accrual of the statute of limitations when their ownership interest in real property is erroneously transferred to a third party. The second issue is whether K.S.A. §58-2222, which imparts notice as to the contents of any written or recorded instrument to all persons from the time of filing with the register of deeds, is sufficient to establish that the fact of injury was and is reasonably ascertainable for purposes of the statute of limitations when the erroneous deed was filed. The answer to each of these questions is yes, and the Court of Appeals erred in reversing, in part, summary judgment entered in favor of RCAT by the trial court in this matter.

For purposes of summary judgment and for purposes of appeal, RCAT did not and does not contest that the deed when prepared should have included language reserving the mineral interests to the Falens. Therefore, whether RCAT breached a duty owed to the Falens or the scope of that duty is not at issue. Rather, RCAT contends that the Falens suffered a substantial and actionable injury when the erroneous deed was filed on January 18, 2008. Upon filing of the deed, the Falens could have maintained a cause of action

against RCAT for negligence as well as breach of fiduciary duty as the Falens' ownership interest in the mineral rights were transferred to Sammy Dean. Because the Falens could have maintained a cause of action against RCAT in 2008, their cause of action for negligence and breach of fiduciary duty accrued at that time. However, the Falens did not file suit against RCAT until December 1, 2014--over six years after the conduct which gave rise to their cause of action and well beyond the two-year statute of limitations set forth in K.S.A. §60-513.

RCAT moved for and obtained summary judgment at the trial court level on the basis that the 2-year statute of limitations barred the Falens' claims for negligence and breach of fiduciary duty. The Court of Appeals reversed. In reversing the trial court, the Court of Appeals did not find that a question of material fact existed. Rather, the Court of Appeals found that, as a matter of law, the Falens did not suffer an actionable injury for purposes of K.S.A. §60-513 and that the Falens injury was not reasonably ascertainably until August 2014. However, the analysis employed by the Court of Appeals ignores the Falens' loss of ownership of the mineral rights as well as over 100 years of Kansas jurisprudence which recognizes that constructive notice is sufficient for purposes of the "discovery rule" under the statute of limitations. Therefore, the opinion of the Court of Appeals should be reversed, and the

trial court's grant of judgment in favor of RCAT and against the Falens based upon the statute of limitations should be affirmed.

ARGUMENT

I. The statute of limitations in an action for negligence as well as breach of fiduciary duty accrues when the conduct at issue first causes substantial injury or, if the fact of injury is not known, when the fact of injury becomes reasonably ascertainable.

It is well settled that the statute of limitations applicable to a cause of action for negligence as well as breach of fiduciary duties is governed by the two (2) year statute of limitations set forth in K.S.A. §60-513(a)(4). *Resolution Trust Corp. v. Scaletty*, 257 Kan. 348, 891 P.2d 1110 (1995). Subsection (b) of Section 60-513 goes on to provide that such causes of action:

> shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party.

K.S.A. § 60-513(b). Based upon the plain language of K.S.A. 60-513(b), an action must be brought within two years of the wrongful act that causes substantial injury. *Admire Bank & Trust v. City of Emporia*, 250 Kan. 688, 829 P.2d 578 (1992). If the fact of injury is not ascertainable at the time of the wrongful act, then the statute of limitations commences when the fact of injury is reasonably ascertainable. *Id.*

Here, the date of substantial injury as well as the date that the injury became reasonably ascertainable are one and the same—January 18, 2008, the date RCAT filed and recorded the deed without reserving mineral rights in favor of the Falens.

II. The Falens suffered an actionable and substantial injury on January 18, 2008 when ownership of the mineral rights was transferred to Sammy Dean.

In reversing the trial court's grant of summary judgment, the Court of Appeals held that the Falens did not suffer an actionable and ascertainable injury until August 1, 2014 when LCL asserted a claim to the royalty payments from the oil and gas lease. However, neither the Falens nor the Court of Appeals dispute that once the deed was filed on January 18, 2008, the ownership of the mineral rights passed to Sammy Dean because the deed did not include any language reserving 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). While there is no dispute that the Falens' ownership in the mineral interests ceased to exist in 2008 and the Falens were injured at that time, the Court of Appeals characterized that injury as simply a "legal" or "paper injury." In characterizing the injury in this manner, the Court of Appeals stated that this "paper injury had absolutely no impact on the Falens' undivided one-half

ownership interest to minerals." However, the Court of Appeals' analysis is fundamentally and fatally flawed.

"Substantial injury" as used in Section 60-513(b) means actionable injury. *See e.g. Roe v. Diefendorf*, 236 Kan. 218, 220-23, 689 P. 2d 855 (1984); *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 262 Kan. 110, 116, 936 P. 2d 714 (1997). Substantial injury does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations. *See e.g. Roe,* 236 Kan. at 222; *Moon v. City of Lawrence*, 267 Kan. 720, 982 P.2d 388 (1999); *Johnson v. Bd. of Cty. Comm'rs of Pratt Cty.*, 259 Kan. 305, 320, 913 P.2d 119 (1996). Rather, "substantial injury" means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages. *Id.* As this Court noted in *Foster v. Humburg*: "Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach or wrong. The right of action is merely the right to pursue a remedy." 180 Kan. 64, 67, 299 P.2d 46 (1956)

The analysis employed by the Court of Appeals in reversing the trial court suggests that any time an owner of real property is deprived of ownership of that real property the owner cannot maintain a cause of action for loss of that ownership interest. Specifically, the Court of Appeals

determined that the Falens cause of action had not accrued because the Falens could not have "filed a claim of negligence at that time [January 28, 2008] because a viable claim for damages did not exist." This analysis is simply inconsistent with Kansas law.

Kansas law recognizes that ownership of mineral interests is an ownership interest in real property. *Kumberg v. Kumberg*, 232 Kan. 692, 699, 659 P.2d 823 (1983). Where real property is taken from the owner, the owner is entitled to adequate and fair compensation for the land taken. *Steiter v. City of Kansa City*, 175 Kan. 794, 799-800, 267 P.2d 474 (1954). The ordinary measure of damages to real property is the difference in value immediately before and after the damage and, in the event of total loss, the fair market value at the time of the loss. *Evenson v. Lilley*, 295 Kan. 43, 52, 282 P.3d 610, 617 (2012). The appropriate measure of damages depends on the facts of the case and there is no one set rule under Kansas law for recovery of damages for the loss of real property. *Foster,* 180 Kan. at 68.

Here, contrary to the statement of the Court of Appeals, the Falens could have maintained a cause of action for negligence or breach of fiduciary duty after the deed was filed on January 18, 2008 for the value of their ownership in the real property and which they had lost as a result of the alleged negligence of RCAT i.e., the fair market value of the mineral interest. In fact,

as set forth in RCAT's Reply in Support of its Petition for Review, the value of the lost mineral interest are damages which the Falens' explicitly sought to recover from RCAT when they filed their third-party petition. In seeking to recover the value of the lost mineral interests, the Falens expressly recognize that the loss of ownership of those mineral interests was and is a substantial injury. The Court of Appeals decision ignores the value of ownership of real property by stating that the erroneous deed which admittedly transferred ownership of the mineral rights to Dean had absolutely no impact on the Falens' undivided one-half ownership interest to minerals. This statement by the Court of Appeals is erroneous.

The Court of Appeals goes through a protracted discussion in its opinion regarding various transfers of the ownership interest among the Falens and related entities as evidence the Falens were not injured as a result of the transfer of their ownership interest in the mineral rights to Dean in January 2008. The Court of Appeals suggests that these transfers establish that the Falens were not deprived of the right to use or the right to benefit from the one-half ownership interest in the minerals. However, contrary to the Court of Appeals position, these purported transfers are in fact evidence that the Falens were injured in 2008 when they lost ownership of the mineral rights. Each of the attempted transfers after January 18, 2008 are and were

void as the Falens no longer owned the mineral rights and could not transfer property they no longer owned. *See Sheils v. Wright*, 51 Kan.App.2d 814, 357 P.3d 294 (2015) (holding that transfer of death deed only conveyed property which decedent owned at time of death). The Falens' loss of ownership and inability to subsequently transfer that real property establishes that the Falens in fact suffered an injury when the deed was filed on January 18, 2008.

The fundamental flaw in the Court of Appeals analysis regarding whether the Falens suffered an injury when ownership of the mineral rights was transferred in 2008 is highlighted by the Court of Appeals discussion of *Bi-State Dev. Vo., Inc. v. Shafer, Kline & Warren, Inc.*, 26 Kan. App. 2d 515, 990 P.2d 159 (1999). In attempting to distinguish *Bi-State* from the present matter, the Court of Appeals noted:

> [T]he plaintiff's cause of action for negligence alleged the defendant breached its professional duty to properly locate an easement, which caused the plaintiff to lose a property right in the easement. ***All benefits attendant to owning the easement extinguished for the plaintiff on June 10, 1986, when the easement was filed and recorded.*** [emphasis added]

The Falens' allegations as well as the alleged injury in this case were and are identical to the allegations raised by and injury suffered by Bi-State. The Falens allege that RCAT breached its professional duty to properly prepare the deed reserving their mineral interests. When the deed was filed, the Falens ownership interest in the mineral rights was extinguished as their

ownership interest was transferred to Dean. Although the Court of Appeals suggests that *Bi-State* is distinguishable, there is no discussion in *Bi-State* that plaintiff was unable to use the property where the easement was located or that any third party claimed ownership of the easement to the exclusion of plaintiff. Rather, the damage incurred, as recognized by the Court of Appeals in its discussion, was loss of ownership of the easement just as the Falens injury in this matter was loss of ownership of the mineral interests. The trial court's decision is consistent with and supported by *Bi-State* as well as Kansas law.

Not only did the Court of Appeals misapprehend Bi-State and the injury suffered by the Falens when their ownership of the mineral rights was extinguished, the Court of Appeals also improperly engaged in an analysis of the degree of injury by characterizing the loss of ownership as a mere paper injury. This Court expressly rejected such analysis in *Roe*, 236 Kan. 218. As this Court noted, an unsubstantial injury as contrasted to a substantial injury is only a difference in degree, i.e., the amount of damages. That is not a legal distinction." *Id.* at 222-23. It is the fact of injury and not the extent of injury which causes the statute of limitations to begin to run. *Id.*

Despite this Court's holding in *Roe*, the Court of Appeals attempted to create a legal distinction between injuries in this case by stating that the Falens

suffered a legal injury when they lost their ownership interest in the property in 2008 but then determining that legal injury was not actionable; however, the Court of Appeals held that the loss of royalty payments in 2014 was actionable. However, even where the damages are nominal, the statute of limitations is a bar to not only the original cause of action but to all the consequential damages resulting from it though such damages may be substantial and not foreseen." *Graham v. Updegraph,* 144 Kan. 45, 58 P.2d 479 (1936).

The approach taken by the Court of Appeals in characterizing the nature and extent of the damages for purposes of the statute of limitations is inconsistent with this Court's decision in *Roe* and its progeny and the Court of Appeals' decision should be reversed.

III. The filing of the deed provided constructive notice to the Falens that the mineral interests were not reserved pursuant to K.S.A. §58-2222.

In addition to erroneously finding that the Falens did not suffer a substantial injury in January 2008, the Court of Appeals held that the Falens injury was not reasonably ascertainable. In so finding, the Court of Appeals looked to the fact that the Falens continued to receive the royalty payments for the mineral interests, paid taxes on those royalties and transferred the

mineral rights amongst themselves. However, these actions do not establish that the injury was not reasonably ascertainable in January 2008.

For over 100 years the law in Kansas has been that the contents of public records are sufficient constructive notice to set in motion the statute of limitations. *See Black v. Black*, 64 Kan. 689, 68 P. 662 (1902); *Smith v. Rector*, 135 Kan. 326, 10 P.2d 1077 (1932); *Malone v. Young*, 148 Kan. 250, 81 P.2d 23 (1938). This continues to be the law in Kansas. *See Sutton v. Sutton*, 34 Kan. App. 2d 357, 118 P.3d 700 (2005). The statute of limitations begins to run, not from the date of actual discovery, but from the time when the injured party was given constructive notice. *Smith*, 135 Kan. 326, 10 P.2d at 1079. As this Court noted:

> [W]here the means of discovery lie in public records required by law to be kept, involving the very transaction in hand, and the interests of the parties to the litigation, in such case the public records themselves are sufficient notice …to set the statute [of limitations] in motion.
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> …
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> Where a public record is required by law to be kept as a source of information respecting property rights and interests, a duty rests upon any one to whom the information is material to improve with diligence the opportunity of learning that which the record discloses. It follows that, if the opportunity be neglected, the interested person will be bound to the same extent as if he had in fact examined the record.

Hutto v. Knowlton, 82 Kan. 445, 108 P. 825, 826 (1910).

Here, it is undisputed that the deed filed with the register of deeds did not include any language reserving the mineral interests to the Falens. It also is undisputed that the deed was the only document related to the sale of the real property which did not include language concerning the reservation of the mineral interests. Finally, it is undisputed that the deed was filed with the register of deeds and was a public record as of January 18, 2008. Pursuant to K.S.A. §58-2222 as well as over 100 years of Kansas law, the Falens are charged with constructive notice of the contents of the deed. Furthermore, the fact that the Falens may not be expert in reading deeds, does not the change the application of the constructive notice. *See Bi-State Dev. Co.*, 26 Kan. App. 2d at 519. Therefore, the alleged injury suffered by the Falens—failure to reserve the mineral interests in the deed—was reasonably ascertainable once the deed was filed with the register of deeds. The two-year statute of limitations began to run at that time.

In rejecting that the Falens injury was reasonably ascertainable, the Court of Appeals examined facts suggesting that the Falens did not have knowledge that the mineral rights had not been reserved in the deed including the fact that they continued to receive royalty payments as well as transferring the mineral rights amongst themselves. However, the term "reasonably ascertainable," in K.S.A. 60-513(b), suggests an objective standard rather

than a subjective standard. *P.W.P. v. L.S.*, 266 Kan. 417, 425, 969 P.2d 896 (1998). The Court of Appeals analysis as to the actions taken by the Falens in attempting to transfer the mineral interests amongst themselves focuses on the subjective knowledge of the Falens rather than an employing an objective standard which is consistent with *Black* and the constructive notice imparted by public records for purposes of the statute of limitations.

Not only are the Falens charged with constructive notice of the contents of the deed based upon K.S.A. §58-2222 and *Black*, the Falens also had actual knowledge of the contents of the deed. It is undisputed that the Falens received a copy of the deed which did not include any language reserving the mineral interests before the deed was filed. The Falens read the deed, signed the deed and ultimately returned the deed to RCAT for filing with the register of deeds. There are no allegations that RCAT made any representations to the Falens regarding the contents of the deed, that RCAT prevented the Falens from reading the deed prior to executing the deed or that the deed filed by RCAT had been fraudulently changed after the Falens signed the deed.

The Falens have suggested that they did not have actual knowledge that the deed failed to include a reservation of the mineral interests. However, this position is of no avail to avoid application of the statute of limitations. A party to a contract has a duty to learn the contents of a contract before signing it.

Marshall v. Kansas Med. Mut. Ins. Co., 276 Kan. 97, 109, 73 P.3d 120 (2003). If, without being a victim of fraud, he fails to read the contract or otherwise learn its contents, he signs at his peril. *Sutherland v. Sutherland*, 187 Kan. 599, 610, 358 P.2d 776 (1961). A party's failure to read a contract or learn the contents of a contract estops the party from avoiding the terms of the contract on the grounds of ignorance of its contents. *Marshall*, 276 Kan. at 109.

While the Falens have repeatedly argued both at the trial court level as well as at the Court of Appeals that they did not know that the deed failed to reserve their mineral interests, their subjective knowledge and belief is irrelevant for purposes of the application of the statute of limitations. Based upon an objective standard, the Falens knew or it was reasonably ascertainable when the deed was filed that the deed did not reserve the mineral interests. Absent from the deed was any reference to the mineral interests. The deed was provided to the Falens and they signed the deed prior to the deed being filed and therefore, knew the content of the deed. If the Falens did not read the deed, their failure to read the deed does not act to toll the statute of limitations. Furthermore, once the deed was filed, the Falens are charged, as a matter of law, with constructive notice of the content of the deed.

It is undisputed that the deed at issue was filed on with the recorder of deeds on January 18, 2008. The statute of limitation on any claim for negligence or breach of fiduciary duty began to run on that date. The Falens did not file suit until over 6 years later, and their claims for negligence and breach of fiduciary duty were barred by the 2-year statute of limitations. The trial court properly applied the statute of limitations to the Falens' claims in this matter and the decision of the Court of Appeals should be reversed.

CONCLUSION

The Court of Appeals erroneously applied Kansas law in determining that the Falens claims were not barred by the 2-year statute of limitations set forth in K.S.A. §60-512. The uncontroverted material facts establish that the Falens were injured in 2008 when their ownership interest in the mineral rights were transferred to Sammy Dean and the Falens injury was reasonably ascertainable at that time. In order to comply with the statute of limitations, the Falens would have had to file their claims no later than January 2010. The Falens filed their third-party petition in December 2014, well outside the limitations period.

WHEREFORE Appellee Rice County Abstract & Title respectfully requests this Court affirm the district court's decision granting summary

judgment in favor of Rice County Abstract & Title, and for such other and further relief as is just and necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of October, 2017, a true and correct copy of the above and foregoing *Brief of Appellee* was mailed to the following:

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