No. 16-115434-A

IN THE SUPREME COURT FOR THE STATE OF KANSAS

LCL, LLC

Plaintiffs

vs.

JAMES W. FALEN et al.

Defendants/Third-Party Plaintiffs – Appellants

vs.

RICE COUNTY ABSTRACT & TITLE CO., INC.

Third-Party Defendants - Appellee

APPELLANTS' BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLEE

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

Gordon B. Stull - #08906
Joshua V.C. Nicolay #25119
STULL, BEVERLIN, NICOLAY & HAAS, LLC
1320 East First St.
Pratt, KS 67124
Phone: (620) 672-9446
Fax: (620) 672-3228
Email: gstull@stull-law.com
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENTS AND AUTHORITIES

I. Plaintiffs' loss of title resulting from the defective deed is the fact of injury under Defendant's theory, but Defendant and the record provide no factual basis for the measure of damages for this fact of injury.

The Court of Appeals correctly held that Plaintiffs did not suffer substantial injury necessary to commence the two-year statute of limitations under K.S.A. §60-513 until August 1, 2014. The basis for the Court's reasoning on this is that Plaintiffs were allowed the full benefit and enjoyment of their contracted mineral interest until August 1, 2014 even though loss of record title occurred on paper in 2008.

K.S.A. §60-513(b) states, in part, that a negligence cause of action "shall not be deemed to have accrued until the act giving rise to the cause of action *first causes substantial injury.*" "[Substantial Injury] means the victim must have sufficient ascertainable injury to justify an action for recovery of damages, regardless of extent." *Bryson v. Wichita State Univ.*, 19 Kan. App. 2d 1104, 1108 (1994). The question of substantial injury is a factual determination that "[where] the evidence is in dispute as to when substantial injury first appears or when it becomes reasonably ascertainable, the issue is for determination by the trier of fact." *Bryson*, 19 Kan. App. 2d at 1108.

Defendant's argument and the District Court's ruling regarding analysis of K.S.A. §60-513(b) looked only at the presumption of constructive notice conferred as a matter of law by K.S.A. §58-2222 to come to the factual determination that Plaintiffs were substantially injured, and said injury was reasonably ascertainable, on the day the defective deed was filed of record with the Rice County Register of Deeds. Even if Plaintiffs were to agree that the "paper injury" (as characterized by the Court of Appeals) was their substantial injury, it was their execution and

delivery of the defective deed which caused this injury, not filing it of record. Constructive notice under K.S.A. §58-2222 "[imparts] notice to all persons of the *contents*" of the document filed of record and nothing in the filed deed gave any indication of the measure of damage occasioned by Plaintiffs' execution and delivery of the defective deed. Moreover, the District Court's order explicitly adopted all the factual allegations made in Plaintiffs' Response to the Motion for Summary Judgment, and these adopted allegations clearly illustrate a factual dispute as to when substantial injury occurred and was reasonably ascertainable; therefore, summary judgment was inappropriate given that the determination of when substantial injury first appears or becomes reasonably ascertainable is a disputed question of fact. At best, constructive notice of the *contents* of the defective deed is just one fact for the trier of fact to consider when making the determination of when Plaintiffs' injury first occurred or became reasonably ascertainable.

II. Plaintiffs reasonably relied on Defendant's professional duty to create the deed in a non-negligent manner and constructive notice pursuant to K.S.A. §58-2222 should not be used to circumvent Defendant's duty to Plaintiff.

The Defendant argued, and the District Court agreed, that Plaintiffs' substantial injury first occurred when Plaintiffs lost record title to the minerals in the Subject Property. If loss of title on paper (despite not having lost any of the benefits or responsibilities incident to mineral title ownership) is when substantial injury occurred, then this injury occurred when Defendants drafted a defective deed and directed Plaintiffs to execute and deliver the defective deed, *not* when it was recorded with the Rice County Register of Deeds. Despite arguments to the contrary, Defendant's position is focused solely on the question of when Plaintiffs' damage became reasonably ascertainable and relies exclusively on the constructive notice presumption of K.S.A. §58-2222. The threshold question raised by Defendant's reliance on K.S.A. §58-2222 is the extent of the recording statute's effect – to what are Plaintiffs given constructive notice?

"'Constructive notice' is information or *knowledge of a fact* imputed by law to a person, although he or she may not actually have it, *because he or she could have discovered the fact by proper diligence*, and his or her situation was such as to cast upon him or her the duty of inquiring into it." 58 Am. Jur. 2d Notice § 6 (emphasis added). K.S.A. §58-2222 reads in its entirety:

> Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, *impart notice to all persons of the contents thereof*; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice. (Emphasis added).

Under the express language of the statute, *all* persons are given notice of a *document's contents* from the time the document is filed with the register of deeds. In other words, K.S.A. §58-2222 gives all parties notice of the words and language contained within a document filed of record because any person could have discovered the words and language contained therein upon examination of the title record. For the present case, however, notice of the defective deed's contents is an insignificant consideration – it is undisputed that Plaintiff's signed and executed *the very document* for which they're imputed constructive notice, and, according to Defendant's Statement of Facts, Plaintiffs took the opportunity to review the defective document prepared by Defendant prior to signing. Assuming arguendo that these allegations are true, then Plaintiffs had actual notice of the document's *contents* and constructive notice of the document's contents adds nothing to Defendant's argument. Under either situation however, the District Court explicitly found that the Plaintiffs' could not have known of their injury but for the notice statute:

> This Court appreciates, under the alleged facts as drawn in the light most favorable to the nonmoving party, that the Falen's [sic] were completely unaware of this until someone contested their right to receive oil runs in 2014. The alleged facts demonstrate an egregious wrong for which recourse should be available and would be if the statute of limitations had not run. However, these facts are not relevant and the statute of limitations has run when applied to the relevant facts. Memorandum Opinion Granting Defendant's Motion for Summary Judgment, filed January 8, 2016, page. 11.

Defendant's argument, however, does not rely on Plaintiffs' notice (either actual or constructive) of the defective deed's contents; rather, Defendant seeks to have this Court impute knowledge of the document's *legal effect* (or more precisely, impute the correct legal interpretation of the document) onto the Plaintiffs as of the moment it was filed of record. "[C]onstruction of a written instrument is a question of law, and the instrument may be construed and its legal effect determined by the court." *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 455 (1992). This is where the case gets problematic for Defendant - but for constructive notice of the defective deed's legal effect assumedly imputed by K.S.A. §58-2222, Plaintiffs have significant undisputed factual allegations to support the argument that their injury was not reasonably ascertainable until August 2014 and in fact was not ascertained until that time.

Even if this Court were to rule that K.S.A. §58-2222 imparted constructive notice of Plaintiffs' divestment of their contracted mineral interest, Kansas cases have consistently held that notice imparted by law can be subject to exception in the event of a fiduciary relationship. "Where fiduciary relations exist requiring the disclosure of the true state of facts, there is no reason to anticipate unfaithfulness, and the obligation to search the records is relaxed." *Hutto v. Knowlton*, 82 Kan. 445, 446 (1910). In the present case, Defendant was hired for escrow services as a title professional which included drafting a deed that would, in part, retain and reserve Plaintiffs' mineral interest. It is undisputed that the fiduciary relationship between title professional and client imposed by *Ford v. Guarantee Abstract & Title Co.,* 220 Kan. 244 (1976) is applicable to Plaintiffs and Defendant.

Plaintiffs were clearly not going to come to a new or better understanding of the filed deed's legal significance were they to examine it in the register of deeds within the two years after filing, especially when considering they continued receiving royalties and paying taxes thereon. Plaintiffs therefore had one reasonable option with regard to this filed deed: rely on the parties' fiduciary relationship and presume Defendant adhered to its professional duty in preparing the deed in a non-negligent manner, a presumption that was buttressed by Plaintiffs' continued royalty payments. The undisputed facts indicate Plaintiffs did not have the knowledge and understanding necessary to know the deed was in error, and under these circumstances Plaintiffs should not have been required to hire a third-party attorney to determine if the recorded deed prepared by fiduciary Defendant (for which they were receiving full benefit) was properly prepared. Had Plaintiffs been under an obligation to hire outside counsel to review the work of fiduciary Defendant, such a course of action would have required Plaintiffs to assume that the attorney reviewing the deed *also* adhered to their professional duty and examined the document in a non-negligent manner. If the attorney failed to find the defect, any cause of action against the attorney would also have been barred well before any actual damages occurred under Defendant's theory of constructive. Defendant's argument in this matter essentially boils down to the idea that recording the defective deed thereby triggered an obligation in the Plaintiffs to examine the record and find Defendant fiduciary's negligent action. Such a holding effectively destroys a title professional's duty to their client upon the record filing of a prepared document.

Given the express language of the statute, it would be difficult to maintain that the purpose of K.S.A. §58-2222 is to preclude parties from relying on any title professional's (which includes attorneys) adherence to professional duties and standards of care when they have no reason from the surrounding circumstances to question the services provided. Moreover, nothing in the express

language of K.S.A. §58-2222 indicates the legislature intended to eviscerate the fiduciary relationship that exists between title professional and client.

III. *Bi-State Dev. Co v. Shafer, Kline & Warren, Inc.* is effectively a judicial modification of K.S.A. §60-513 and converts the factual inquiry of when a title-related injury becomes reasonably ascertainable into a question of law.

As promulgated by the Kansas Legislature, K.S.A. §60-513(b) states that a negligence cause of action is not deemed to have accrued "until the fact of injury becomes reasonably ascertainable to the injured party." The inquiry of when an injury becomes reasonably ascertainable "implies some obligation to investigate the factual sources available," and Plaintiffs do not disagree with Defendant that the inquiry is an objective standard based on an examination of *all* the surrounding factual circumstances. *Davidson v. Denning*, 259 Kan. 659, 678 (1996). In short, a determination of when a party's injury becomes reasonably ascertainable under K.S.A. §60-513(b) is a factual determination that requires an examination of all circumstances surrounding the party's fact of injury to establish when the party could have reasonably discovered their fact of injury.

K.S.A. §60-501 states that the provisions of the article "govern the limitation of time for commencing civil actions, *except where a different limitation is specifically provided by statute*." (emphasis added). "[It] is not [an appellate court's] practice to manufacture judicial exceptions to plain and unambiguous statutory language." *Schlaikjer v. Kaplan*, 296 Kan. 456, 465 (2013); *see also Fernandez v. McDonald's*, 296 Kan. 472, 481, (2013) ("Courts should not engraft an exception that the legislature has not included in the statute"). In interpreting a statute, "any doubt should be resolved *against the exception*, and anyone claiming to be relieved from the statute's operation must establish that he comes within the exception." *Broadhurst Found. v. New Hope Baptist Soc.,* 194 Kan. 40, 44 (1964). Kansas law is replete with examples of where the legislature

explicitly created exceptions to the express language of K.S.A. §60-513: K.S.A. §58a-1005 (exception to statute of limitations for breach of fiduciary duty claims against trustees); K.S.A. §65-4908 (exception to statute of limitations by adding tolling provision for certain medical malpractice claims); K.S.A. §60-4702 (exception to statute of limitations by adding tolling provision for certain construction defect claims); K.S.A. §5-515 (exception to statute of limitations by adding tolling provision for cases in alternative dispute resolution); K.S.A. §84-2-725 (exception to statute of limitations for certain actions under the Uniform Commercial Code). All of these examples are express legislative exceptions as required K.S.A. §60-501, but contrary to the language of that statute, Defendant is requesting a judicial exception in reliance on K.S.A. §58-2222.

Bi-State Dev. Co v. Shafer, Kline & Warren, Inc., 26 Kan.App.2d 515 (1999) and the District Court's absolute reliance constructive notice imparted by K.S.A. §58-2222 does away with the factual inquiry of when Plaintiffs' injury became reasonably ascertainable imposed by K.S.A. §60-513(b) and converts the inquiry a question of law. The District Court's conclusion in the present case even recognizes that the Plaintiffs "were completely unaware of [Defendant's negligence] until someone contested their right to receive oil runs in 2014" and that the surrounding circumstances "demonstrate an egregious wrong for which recourse should be available." However, because Plaintiffs were imparted constructive notice of the contents of the defective documents on the date of filing *as a matter of law*, the District Court held that none of the other factual sources available were relevant to the inquiry of when Plaintiffs' injury became reasonably ascertainable. Such a holding carves out a special exception to the factual inquiry imposed by K.S.A. §60-513(b) for title-related injuries, but neither K.S.A. §60-513 nor §58-2222 indicate that the Kansas Legislature intended for such an exception as required by K.S.A. §60-501.

IV. *Bi-State Dev. Co. v. Shafer, Kline & Warren, Inc.'s* exclusive reliance on K.S.A. §58-2222 can produce absurd results and therefore should either be explicitly distinguished or overruled by the Kansas Supreme Court.

Plaintiffs' briefs and Response to Petition for Review, along with the Kansas Court of Appeals decision, spend a great deal of time distinguishing *Bi-State Development* from the present case. As such, this responsive supplemental brief will not re-hash those arguments. However, Plaintiffs would like this Court to consider possible results from a holding that K.S.A. §58-2222 imparts constructive notice of not only a documents contents but also its legal effect. In holding as such, it is important to remember that the Court would effectively be ruling the entire public has constructive notice of the legal effect for all documents for all chains of title in every tract of real property in the State of Kansas.

For example - should Defendants' argument stand, no title opinion from a title professional would be of any real value to a client seeking to assure themselves of title in property. An oil and gas operator retains an attorney to conduct a drilling title opinion so that the operator can assure itself that leases have been secured from all necessary parties. Should the attorney negligently interpret a necessary document in chain of record title, the operator would have no cause of action against the attorney because the operator would have been previously imputed knowledge of the document's legal effect via K.S.A. §55-2222; the operator's damage resulting from a title bust would be proximately and directly caused by the operator *disregarding* the knowledge constructively imposed on the operator by law. Even worse, should the attorney completely overlook a deed in the chain of title, the operator's constructive knowledge of that deed's legal effect would make it impossible for him to claim justified reliance on the attorney's now *knowingly* defective title examination. The far-reaching effects of Defendant's theory could also have

incredibly adverse implications for slander of title causes of action and existing title insurance policies.

CONCLUSION

K.S.A. §58-2222 gives the public notice that a document is filed of record which could impact title on a specific tract of land, and gives notice of what the document contains. It does not impute an understanding of *how* the document specifically impacts the legal rights of the parties with an interest in the property, and it should not be used as a statutory termination of title professionals' fiduciary obligations to their clients. Should the purpose of K.S.A. §58-2222 be for any purpose other than its express language, the Kansas legislature is the appropriate authority for making such changes to either K.S.A. §58-2222 or K.S.A. §60-513.

WHEREFORE the Falens request this Court to uphold the ruling of the Kansas Court of Appeals remand the case to Rice County District Court for trial in compliance with this Court's order.

Respectfully submitted,

/s/ *Gordon B. Stull*
Gordon B. Stull #8906
Josh V. C. Nicolay #25119
Stull, Beverlin, Nicolay & Haas, LLC
1320 East First St.
P.O. Box 345
Pratt, KS 67124
Phone: (620) 672-9446
Fax: (620) 672-3228
Email: gstull@stull-law.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November 2017, a true and correct copy of foregoing *Appellants' Brief in Response to Supplemental Brief of Appellee* was mailed to the following:

Jeffrey C. Baker
William P. Denning
Sanders Warren Russel & Scheer LLP
40 Corporate Woods
9401 Indian Creek Pkwy, Ste. 1250
Overland Park, KS 66210

/s/ Gordon B. Stull