

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002546-MR

DEL KERWYN MARTIN

APPELLANT

V. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE CHARLES LOWE, JR., JUDGE  
ACTION NO. 87-CI-90

ROY CRAWFORD III, Individually and  
in his Capacities with ODESSA  
CORPORATION; ODESSA CORPORATION,  
a Kentucky Corporation; DKM COAL  
CORPORATION, INC., a Kentucky  
Corporation; EDWIN P. NEWELL,  
Individually and in his Capacities  
with ODESSA CORPORATION; and LAUREL  
KNUCKLES MARTIN (or SEATON)

APPELLEES

AND

NO. 1997-CA-002564-MR

LAUREL KNUCKLES SEATON

APPELLANT

V. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE CHARLES LOWE, JR.  
ACTION NO. 87-CI-90

ROY CRAWFORD III, Individually and  
as an Officer of ODESSA CORPORATION;  
and ODESSA CORPORATION, a Kentucky  
Corporation

APPELLEES

OPINION AND ORDER AFFIRMING IN PART AND  
DISMISSING IN PART APPEAL NO. 1997-CA-002546-MR,  
AND DISMISSING APPEAL NO. 1997-CA-002564-MR

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: These are related appeals from a partial summary judgment, entered by the Letcher Circuit Court, which adjudged appellants liable to appellees pursuant to a lease agreement, and dismissed appellants' counterclaim against appellees. For the reasons stated hereafter, we dismiss Appeal No. 1997-CA-002564-MR in its entirety. Further, we dismiss Appeal No. 1997-CA-002546-MR insofar as it pertains to the finding of liability under the lease agreement, and we affirm it in all other respects.

Appellees filed verified complaints alleging that appellants failed to pay, and conspired to deprive, Odessa Corporation (Odessa) of certain rents and royalties due under a lease. The separate actions against appellants were consolidated, and appellants denied the allegations and counterclaimed, asserting that the allegations were libelous.

On June 11, 1997, the trial court granted partial summary judgment to appellees as to appellants' liability, denied summary judgment as to the amount of damages, and dismissed the counterclaim. On September 12, 1997, the court denied appellants' motions to alter, amend or vacate, but stated that "[i]t appearing to the Court that there is no just reason for delay, this Judgment is FINAL and APPEALABLE." These appeals,

which were designated to be heard together, followed. Both appeals address the partial summary judgment as to liability, while Appeal No. 1997-CA-002546-MR also addresses the dismissal of the counterclaim.

First, both appellants contend that the trial court erred by granting a partial summary judgment as to liability. However, even assuming for purposes of this appeal that the September 12 order was sufficient to finalize the June 11 judgment as fully as possible, we must conclude that the appeals from the partial summary judgment are interlocutory.

Indeed, the court's partial summary judgment is interlocutory by its very nature since it adjudicates only part of appellees' claim against appellants by adjudicating the question of liability but leaving open the issue of damages. See Chittum v. Abell, Ky., 485 S.W.2d 231, 237 (1972). A judgment which is interlocutory by its very nature may not be made final and appealable by the inclusion of CR 54.02 language. Hook v. Hook, Ky., 563 S.W.2d 716 (1978); Hale v. Deaton, Ky., 528 S.W.2d 719 (1975). Hence, we are compelled to dismiss Appeal No. 1997-CA-002564-MR in its entirety, and to dismiss Appeal No. 1997-CA-002546-MR insofar as it pertains to the partial summary judgment.

Next, appellant Del Kerwyn Martin (Martin) contends that the trial court erred by dismissing the counterclaim against appellees. We disagree.

The counterclaim alleged that appellees engaged in libelous conduct by asserting in their verified complaints that appellants failed to pay, and conspired to deprive, Odessa of certain rents and royalties due under a lease. Martin asserts that because he is an attorney, he is entitled to relief pursuant to Massengale v. Lester, Ky., 403 S.W.2d 701, 702 (1966), cert. denied, 385 U.S. 1019 (1967), which states that "[a] publication falsely charging an attorney at law with unprofessional conduct is libelous per se, and unless it is privileged both malice and damage are presumed." However, Massengale clearly provides no support here, as the allegations were made against Martin in his personal capacity rather than in his capacity as an attorney. Moreover, statements made in pleadings filed in a judicial proceeding, even if allegedly false or malicious, are absolutely privileged if they are material, relevant, or pertinent to the issues involved in that proceeding. Id. See also Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281 (1942). Since the statements in question clearly were pertinent to appellants' alleged failure to pay or conspiracy to deprive appellees of rents and royalties due under a lease, those statements clearly were material, relevant, or pertinent to the action, and therefore were absolutely privileged. Hence, the trial court did not err by dismissing the counterclaim.

For the reasons stated herein, Appeal No. 1997-CA-002564-MR is hereby ORDERED DISMISSED in its entirety. Moreover, Appeal No. 1997-CA-002546-MR is hereby ORDERED

DISMISSED insofar as it pertains to the finding of liability under the lease agreement, but otherwise is affirmed in all respects.

ALL CONCUR.

ENTERED: 7-2-99

/s/ Paul D. Gudgel  
CHIEF JUDGE, COURT OF APPEALS

BRIEF FOR DEL KERWYN MARTIN:

Del Kerwyn Martin  
Hindman, KY

BRIEF FOR LAUREL KNUCKLES  
SEATON:

Pierce Butler Whites  
Louisa, KY

BRIEF FOR ROY CRAWFORD III,  
Individually and in his  
Capacities with ODESSA  
CORPORATION; ODESSA  
CORPORATION, a Kentucky  
Corporation; and DKM COAL  
CORPORATION, INC., a Kentucky  
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Richard E. Fitzpatrick  
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