RENDERED: June 1, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000558-MR

JAMES F. KNOTT, JR.;
JAMES F. KNOTT MANAGEMENT
CORPORATION, PARTNERS
D/B/A LUCKY LADY PARTNERSHIP;
AND LUCKY LADY PARTNERSHIP — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 92-CI-01440

HILARY J. BOONE, JR.
D/B/A WIMBLEDON FARM (SUCCESSOR
IN INTEREST TO WIMBLEDON FARM, LTD. — APPELLEE

OPINION
AFFIRMING IN PART - REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. James F. Knott, James F. Knott Management Corporation, Partners, d/b/a Lucky Lady Partnership, and Lucky Lady Partnership (LLP) (collectively Knott) appeal from a final judgment entered by the Fayette Circuit Court on January 19, 2000, which awarded $415,480.79 plus interest to Hilary J. Boone, Jr. d/b/a Wimbledon Farm (Boone). We affirm in part and reverse and remand in part.

FACTS

This matter involving LLP's ownership of several shares in two stallion syndicates is now before this Court for the second time. Unfortunately the facts have become no less convoluted, and a full recitation of the history of the syndicates and LLP's involvement with them is required. We will address each syndicate separately, and then detail LLP's involvement with each.

A. THE RELAUNCH SYNDICATE

On April 9, 1980, Boone and Leonard Lavin, co-owners of a thoroughbred stallion named Relaunch, entered into a syndicate agreement in which ownership of the horse was divided into forty equal shares. Boone received shares 21-40 under the terms of the agreement, and was given the right to sell, transfer or otherwise dispose of the shares. The agreement stated that each share was "subject to all of the terms and conditions of this Agreement," and further provided in pertinent part:

> THIRD: From and after date of delivery of the Stallion to the Syndicate Manager, the Stallion shall stand at Wimbledon Farm, Lexington, Kentucky, under the care, promotion and general management of Hilary J. Boone, Jr., the Syndicate Manager, including without limitation the supervision of all breeding activities. Wimbledon Farm shall be paid quarterly the prevailing rate for stallion keep in the area. As full compensation for his services, Hilary J. Boone, Jr., so long as he remains the Syndicate Manager, shall receive four (4) free nominations to the Stallion in each breeding season[.]
>
> . . . .

FOURTH: Each co-owner, in each breeding season, beginning in 1981, shall be entitled to one (1) free nomination to the Stallion for each share owned by him[.]

. . . .

NINTH: Each co-owner shall pay such proportion of all charges, costs and expenses incurred after the Effective Date in connection with the maintenance, care and promotion of the Stallion as the number of shares owned by him shall bear to the total number of shares.

Notwithstanding the provisions of Paragraph FOURTH, no co-owner who is in default in the payment of his share of the expenses as provided herein, or in the payment of the deferred installments of the purchase price, shall be permitted to breed a mare to the Stallion until his obligation has been satisfied.

TENTH: Separate books and records of account shall be kept by the Syndicate Manager which shall accurately reflect all income and disbursements for and on behalf of the co-owners, which shall be subject to inspection by them at reasonable times during business hours. The Syndicate Manager shall furnish each co-owner, each year, beginning with the year 1981, with a statement showing the results of the breeding season and the receipts and expenditures for the year and such other information as the Syndicate Manager may deem pertinent.

B. THE DANZIG CONNECTION SYNDICATE

In December 1986, Kennelot Stables, Ltd., and Wimbledon Farms, Ltd. (WFL),[1] co-owners of a thoroughbred stallion named

[1]WFL was dissolved during the course of this litigation and (continued...)

Danzig Connection, entered into a syndicate agreement where ownership of the horse was divided into forty equal shares. WFL received shares 21-40 under the agreement, and was given the authority to sell its shares. The agreement stated that all of the shares were "subject to all of the terms and conditions of this Agreement," and further provided in pertinent part:

> Third: From and after the effective date of this Syndicate Agreement, the Stallion shall stand at stud at Wimbledon Farm . . . under the care, promotion and general management of Wimbledon Farm, Ltd. as the Syndicate Manager.
>
> . . . .
>
> Fourth: From and after the effective date of this Agreement, the Syndicate Manager shall have the general supervision and management of the Stallion, including the supervision and management of all breeding activities of the Stallion without limitation. As full compensation for its services in each breeding season the Stallion stands under its supervision and management, the Syndicate Manager shall receive four (4) free nominations to the Stallion[.]
>
> . . . .
>
> The farm at which the Stallion is kept . . . shall be paid quarterly the prevailing rate for Stallion keep in the area and shall be reimbursed for its out of pocket expenses incurred in the keeping and standing of the Stallion, including veterinary, farrier, transportation and promotion expenses.

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[1](...continued)
Boone became its successor in interest.

. . . .

FIFTH: Each co-owner, in each breeding season, commencing with the first breeding season the Stallion stands at stud, shall be entitled to one (1) free nomination to the Stallion for each Fractional interest owned[.]

. . . .

ELEVENTH: Each co-owner shall pay such proportion of the expenses of the syndicate, inclusive of all costs and charges incurred in connection with the maintenance, care and promotion of the Stallion, including advertising and like expenses, and charges and expenses incurred by the Syndicate Manager in the administration of the syndicate, as the number of Fractional Interest owned by such co-owner shall bear to the total number of Fractional Interests. All such obligations of the co-owners shall be paid to the Syndicate Manager within ten (10) days from billing therefor. A service charge of two percent (2%) per month may be made by the Syndicate Manager on all past due accounts.

Notwithstanding all other provisions of this Agreement, a co-owner who is in default in the payment of his pro rata share of the expenses of the syndicate, shall not be permitted to breed a mare to the Stallion until his obligation has been satisfied in full, nor shall a mare be bred to the Stallion on any nomination attributable to the Fractional Interest of such co-owner, if the nomination has been transferred to a third party, until such obligation has been satisfied in full. The Syndicate Manager may withhold stallion service certificates until the co-owner of the Fractional Interest on which

the breeding has occurred has cured any default in the payment of his pro rata share of syndicate expenses.

. . . .

Twelfth: Books and records of account shall be kept by the Syndicate Manager which shall accurately reflect all receipts and disbursement for and on behalf of the syndicate. The Syndicate Manager shall furnish to each co-owner prior to December 15 of each year after retirement of the Stallion, a statement showing the results of the breeding season. The Syndicate Manager shall further furnish to the co-owners prior to March 15 of each year, a statement showing the receipts and expenditures on behalf of the co-owners in the previous calendar year.

C. LLP'S PURCHASE OF SYNDICATE SHARES

At some point in the 1980s, Knott and Richard A. Brooks (Brooks) organized LLP. On January 26, 1987, WFL and "For Lucky Lady PTR. R.A. Brooks Trading as Sun Farm" entered into two separate purchase and sale agreements for Shares 29 and 30 in the Danzig Connection Syndicate. Each agreement provided that the shares were subject to the terms and conditions of the Danzig Connection Syndicate Agreement, a copy of which was attached. The purchase price for each share was $200,000. Brooks made a $20,000 down payment on each share, and the remaining $180,000 balances were secured by two separate promissory notes. Each note provided for four separate payments of $45,000 payable on or before September 1 1987-1990, "together with interest on the unpaid principal balance from time to time remaining at the rate equal to the "prime rate" being charged by First National Bank &

Trust Company of Louisville, Kentucky, plus one (1%) percent." WFL set up Account 540 to track income and expenses attributable to the Danzig Connection shares owned by LLP.

On February 1, 1987, "R.A. Brooks Trading as Sun Farm for Lucky Lady PTR" purchased share 33 in the Relaunch Syndicate from Boone. The purchase price for the share was $175,000. Brooks made a down payment of $20,000, and the remaining balance was secured by a promissory note calling for three separate payments of $51,666.67 payable on or before February 1 for the years 1988-1990. The interest rate contained in the note was identical to the one contained in the Danzig Connection notes. The bill of sale between Boone and Brooks provided that the share was subject to the terms of the Relaunch Syndicate Agreement, a copy of which was attached. In addition, Paragraph 7(a) of the bill of sale set forth certain events of default which would trigger Boone's right to declare the entire unpaid balance immediately due and owing. Included among the events of default were (1) the Buyer's failure to perform or breach of any term or provision of the Relaunch Syndicate Agreement; and (2) default in the payment of any installment of principal and interest. Paragraph 7(b) stated in pertinent part:

> Upon the happening of one or more of the Events of Default specified in subparagraph (1) above...(iii) interest on the Note shall accrue and be due and payable at the rate of fourteen (15%) per annum from the date of the occurrence of the first of the Events of Default to occur instead of at the rate provided in that Note.

Boone established Account 816 to track income and expenses attributable to the Relaunch share owned by LLP.

Aside from the LLP shares, Brooks also purchased share 31 in the Danzig Connection Syndicate for an unrelated entity known as Allan Thoroughbreds and share 32 in the Danzig Connection Syndicate for himself. Boone established Accounts 505 and 511, respectively, for these shares.

D. BROOKS' MANAGEMENT OF PARTNERSHIP FUNDS

Brooks was responsible for the day to day management of LLP. Knott would forward money to Brooks with the expectation that it would be used to make payments to Boone for syndicate expenses and installment payments. Unbeknownst to Knott, however, Boone failed to keep the LLP Accounts current. As a result of Brooks' mismanagement, both LLP Accounts as well as Accounts 505 and 511 fell into arrears.

In July 1988, Brooks asked Boone to combine his four accounts into one. Boone agreed, and established Account 109 on July 31, 1988. Brooks did not have Knott's permission to transfer the LLP Accounts to Account 109. Upon the creation of Account 109, the outstanding balances of the LLP Accounts and Accounts 505 and 511 were zeroed out and commingled into Account 109. Promissory note payments and syndicate expenses which came due after July 31, 1988, were charged back to the original LLP Accounts.

Boone mailed monthly invoices to LLP at Sun Farm for Account 540. Each statement indicated on its face that a 1.5% "late fee" was charged monthly on past-due accounts. The statement for August 31, 1988, showed the transfer of the outstanding balance to Account 109 and the addition of a charge

of $117,12.38 to Account 540 for the principal and interest payment due on September 1, 1988. The statement for the period ending September 30, 1988, shows the previous balance of $117,126.38 and syndicate expenses for the month of $1,129.06. The statement reflects two cash receipts totaling $88,000, which were subtracted from the outstanding balance, leaving $29,126.38. A late charge of $436.90 ($29,126.38 x 1.5%) was added, and the statement indicated that a total of $30,692.34 was due. A review of the balance of the invoices contained in the record for Account 540 shows that the 1.5% late fee was routinely applied to past due balances attributable to both the syndicate expenses and principal and interest installments.

Boone mailed quarterly statements to LLP at Sun Farm for Account 816. Statements which contained past-due balances indicated that a 1.5% "late fee" was charged monthly on past-due balances. Like the statements for Account 540, these statements reflect the transfer to Account 109, and that the 1.5% late fee was routinely applied to past-due balances attributable to both syndicate expenses and principal and interest installments,

As a result of the imposition of the monthly late fee, the yearly interest on both LLP Accounts was 18%, both before and after the creation of Account 109. The outstanding balances contained in Account 109 accrued interest at a yearly rate of 12%, which we assume comes from the imposition of a 1% monthly late fee.

Further problems developed with Account 109 when Brooks instructed Boone to apply income received by the LLP shares from

the sale of breeding seasons to the balance of Account 109 as opposed to the individual LLP Accounts. Knott had no knowledge of the creation of Account 109, nor had he given permission for partnership credits to be applied to the commingled balance of Account 109. Had the credits been applied to the individual Accounts, Account 816 would have received credits totaling $97,500.84 and Account 540 would have received a $20,000 credit.[2]

Brooks' misappropriation of partnership funds came to Knott's attention in the summer of 1990. Knott retained an accountant to investigate Brooks' activities. On September 26, 1990, Knott's attorney informed Boone of Brooks' removal as administrative general partner of LLP in writing, and further indicated that Brooks was no longer authorized to act on behalf of LLP. The letter further stated:

> All decisions regarding the stallion shares and authorizations will come solely from Mr. Knott. In your absence last week, I spoke with your secretary, Ms. Ann Oliver. She informed me that there were liens against the shares. Mr. Knott was unaware of the existence of any such liens. He had sent his payments to Mr. Brooks and been led to believe that his payments, along with Mr. Brooks's share, had been paid over to Wimbledon Farm. If you would please provide us with a breakdown of the expenses and payments, as well as the amount of the claimed liens, Mr. Knott can talk to Mr. Brooks about this issue.

Either in response to Knott's letter or at the request of Knott's accountant, Boone faxed Knott copies of the accounting ledgers for the LLP Accounts on October 9, 1990. The ledger for

[2]There is, however, a dispute as to whether the $20,000 credit should go to LLP or Allan Thoroughbreds.

Account 540 showed the transfer of the account balance to Account 109 on July 31, 1988. The ledger for Account 816 appears to be missing a page and does not reflect the transfer to Account 109. The last entry on both of these ledgers occurred on October 30, 1990. Neither of the ledgers showed any of the five disputed credits. The ledger for Account 540 showed a balance due of $193,128.81, the ledger for Account 816 showed a balance due of $97,467.98.

Boone faxed another set of ledger sheets to Knott's accountant on January 22, 1991. These ledgers were identical to the ones previously sent, with the exception that the last entry on both accounts occurred on June 30, 1990. When Knott's accountant asked for an updated ledger of the LLP Accounts in November 1991, he was given a completely different set of ledger sheets which contained more transactions than the ones previously provided and revealed all of the five disputed credits. It appears that Knott's accountant advised him on December 31, 1991, that $152,198.54 was owed on the LLP Accounts.

Knott began liquidating his thoroughbred interests in the Fall of 1990. He sold all of his shares with the exception of the ones currently at issue. Knott finally sold the Danzig Connection shares for $7,000 per share. Relaunch died before Knott could sell his shares.

On March 13, 1991, Boone wrote a letter to Knott stating:

> Pursuant to the terms of the Promissory Notes for the release of DANZIG CONNECTION Shares No. 29 and 30 and RELAUNCH Share No. 33 Lucky Lady Partnership is in default.

> This letter constitutes notice of such default. In the event that said default is not immediately cured we will have no other alternative but to seek all appropriate remedies.
>
> We have previously provided you with the accounting detail with respect to the funds which are due and owing.

E. PROCEDURAL HISTORY

On April 24, 1992, Knott filed suit seeking an accounting of what was due under each separate account. Knott also sought compensatory and punitive damages from Boone for breach of fiduciary duty and for interference with Knott's efforts to sell the shares, along with disgorgement of the fees paid to Boone and/or Wimbledon Farms, Ltd. in their capacity as syndicate manager.

On January 9, 1995, the trial court entered summary judgment in favor of Boone, finding that Boone was not aware that Brooks was acting without authority until September 1990, that the credits in dispute were applied to Account 109 in the ordinary course of business, and that LLP was bound by Brooks' actions. On May 3, 1996, this Court entered an opinion reversing the grant of summary judgment, stating:

> Evidence in this case establishes facts from which a jury could find that Wimbledon Farm had knowledge that Brooks was acting against the interest of the partnership, and benefitting non-partnership entities without any consideration in return. This evidence raises a question of fact as to whether Wimbledon Farm had knowledge of facts that in the circumstances showed bad faith. If a jury found that Wimbledon Farm had such knowledge, then Lucky Lady Partnership would not be bound by Brooks' actions and should be properly credited.

. . . .

> Because we reverse the summary judgment, all of appellant's claims are revived, including the claims for breach of fiduciary duties.

. . . .

> Once a jury has determined the factual issues . . . then an award for interest can be made, if any is justified. If an award of interest is made, it must be at the legal rate or at a rate agreed to by the parties.

At trial, Knott presented expert testimony establishing that the Relaunch share would have been worth $200,000 - $225,000 and the Danzig Connection shares would have been worth $100,000 - $125,000 per share if they could have been sold within a reasonable period of time after October 1990.

Prior to submitting the matter to the jury, the trial court entered a directed verdict in favor of Boone on Knott's claim for wrongful interference with the sale of the shares. The trial court refused to tender a jury instruction on that issue and also refused to allow the jury to decide whether Knott was entitled to a $20,000 credit for the sale of the 1990 breeding season on Danzig Connection share 29.[3]

Following the presentation of evidence, the jury responded "No" to the following special interrogatories:

> Do you believe from the evidence that the invoices from the Defendant, Wimbledon, to Lucky Lady Partnership correctly stated the syndicate account of Plaintiff, Lucky Lady Partnership, for Relaunch throughout the period of time beginning with the date of

[3]This was one of the five credits which were applied to Account 109 instead of the separate LLP Accounts.

> purchase of the share in Relaunch until December 1994?
>
> Do you believe from the evidence that the invoices from the Defendant, Wimbledon, to Lucky Lady Partnership correctly stated the syndicate account of Plaintiff, Lucky Lady Partnership, for Danzig Connection throughout the period of time beginning with the date of purchase of the share in Danzig Connection until December 1994?
>
> Do you believe from the evidence that the acts of Dick Brooks in asking that the accounts be combined and the interest rate lowered were acts for apparently carrying on in the usual way the business of the Lucky Lady Partnership?
>
> Do you believe from the evidence that Dick Brooks had authority (either express or implied) to ask that the accounts be combined and the interest rate lowered?
>
> If you believe from the evidence that Dick Brooks was not authorized to ask on behalf of Lucky Lady Partnership that the accounts be combined and the interest rate lowered, do you also further believe from the evidence that Wimbledon Farm had knowledge of Dick Brooks' lack of authority?

Following receipt of the jury's findings, the trial court began the process of "unwinding" Account 109 and bringing the LLP Accounts forward to determine what Boone was owed. Each party submitted reports prepared by certified public accountants outlining what they believe was owed. According to the report submitted by Boone, Knott owed $415,480.79. A review of Boone's report showed that instead of tracking the ledgers as prepared by Boone, Boone's accountant recalculated the amounts due using the 2% late fee provided under the Danzig Connection Syndicate Agreement and the 14% default interest rate provided under the terms of paragraph 7(b) of the bill of sale and security

agreement for the Relaunch share. It is clear that this constituted the first use by Boone of the late fee and default interest rate which were agreed to by Knott in writing. Aside from submitting his own accounting report, Knott argued that Boone could not recover interest on either account because the late fees Boone sought to collect constituted usurious interest pursuant to KRS 360.010.

On December 13, 1999, the trial court entered an order finding:

> The issue concerning the unwinding of Account 109, necessitated by the jury verdict, requires this Court to find whether the "late charges" are to be calculated as interest. If the "late charges" are interest, it would create a [sic] usurious interest claimed by the Defendants, and non-collectable under KRS 360.020. The Court finds that the one and one-half percent change [sic], designated as a "late fee" is just that. It is not interest and not subject to any claim of "usury".
>
> It is also incumbent upon this Court to make a determination as of March 31, 1999 what the balances would be if there were to be an unwinding of Account 109. This Court finds that the Twenty Thousand Dollar payment by Dick Brooks . . . should be credited to Allen Thoroughbreds (Danzig Connection Share 31, Account No. 505). The proof is undisputed as to the source of and application to be made of these monies. This Court is of the opinion it is uncontroverted as to Mr. Brook's [sic] payment and the purpose of which it was intended (the jury verdict nor the proof contradicts this finding).
>
> This Court finds that the special verdict of the jury requires that the balances as of March 31, 1999 should be, as calculated by the Defendant's [sic], in the amount of Four Hundred and Fifteen Thousand, Four Hundred and Eighty Dollars and Seventy-Nine Cents ($415,480.79.)

> Post judgment interest at the statutory rate of twelve percent per annum will run on the $415,480.79 until the judgment is satisfied.
>
> The Court also finds that the judgment should include and be entered in favor of the Defendant on all other claims including the claimed breach of fiduciary duty. This Court finds the applicable law as to that claim to be Thomas v. Hodge, 897 F.Supp. 980 (W.D.Ky. 1995).
>
> The judgment should not go further, because this Court in this opinion finds that while the distinction may be minor, it is significant, in that the inaccuracy of the invoices was the application of the credits. With the unwinding of the accounts and the adjustments set forth as above, it is this Court's opinion, as a matter of law, there was not a breach of fiduciary duty. This is also predicated upon the jury's finding that Wimbledon Farm was not aware of Dick Brooks [sic] lack of authority; therefore, there could not be a contrary finding.
>
> Plaintiffs wish to revisit the claim for interference with the potential sale of its shares. The Court has previously ruled and nothing has changed. The Court's previous ruling is REAFFIRMED.

On January 19, 2000, the trial court entered final judgment in favor of Boone in the amount of $415,480.79. Knott's motion to alter, amend or vacate was denied by order entered February 29, 2000, and this appeal followed.

I. DID THE TRIAL COURT ERR IN PERMITTING BOONE TO RECOVER LATE CHARGES ON THE PARTNERSHIP ACCOUNTS?

As we noted, Boone's accountant calculated the late fees allegedly owned on the LLP Accounts based on (a) the 2% late fee allowed under the terms of the Danzig Connection Syndicate Agreement; and (b) the 14% default interest rate allowed under paragraph 7(b) of the bill of sale and security agreement for the Relaunch share. The trial court held that these late fees were recoverable by Boone and that the late fees were not interest. Knott argues that regardless of the fact that Boone's accountant calculated the late fees based on what was agreed to under the terms of the various written agreements, no interest is recoverable on any of the notes because Boone imposed a 1.5% late fee on both LLP Accounts against both past-due syndicate expenses and past-due payments of principal and interest. We agree.

KRS 360.010 sets forth the legal rate of interest as follows:

> The legal rate of interest is eight percent (8%) per annum, but <u>any party may agree, in writing, for the payment of interest in excess of that rate as follows</u>: . . . (b) at any rate on money due or to become due upon any contract or other obligation <u>in writing</u> where the original principal amount is in excess of fifteen thousand dollars[.]

KRS 360.010(1)(b) (emphasis added). As we have noted, the interest rate stated in all three notes was "the rate equal to the "prime rate" being charged . . . plus one (1%) percent[.]" In regard to the Danzig Connection shares, the parties agreed that Boone could charge a 2% service charge on any past due payment of syndicate expenses. In regard to the Relaunch share, the parties

agreed that a default interest rate of 14% could be applied to the principal of the note "from the date of occurrence of the first of the Events of Default to occur instead of at the rate provided in the Note." Although there is nothing in any document setting forth the rights and responsibilities of the parties which allowed Boone to levy a 1.5% monthly late fee on past-due syndicate expenses and past-due payments of principal and interest, that is exactly what he did. We believe this constitutes usurious interest under KRS 360.010. The fact that Boone referred to the extra charge as a late fee makes no difference. "Courts will not tolerate the collection of usury through the use of any trick, device, or subterfuge." Schultz v. Provident Loan Ass'n., Ky., 157 S.W.2d 736, 738 (1941).

From the language in the trial court's opinion, it appears that the trial court may have believed that the late charges calculated in the report prepared by Boone's accountant did not constitute interest, usurious or otherwise, because the report calculated late fees based on what the parties agreed to under the terms of the various written agreements. However, a creditor cannot "retroactively purge the account of the taint of usury by dropping the added charges" at a later date. Bunn v. Weyerhauser Company, 598 S.W.2d 54, 56 (Ark. 1980). Under KRS 360.020(1), all Boone had to do to trigger the interest forfeiture penalty of that statute was knowingly take, receive, reserve, or merely charge "a rate of interest greater than is allowed by KRS 360.010." Nor can Boone argue that the application of the 1.5% late fee was not knowingly done as he has

admitted that it was charged as evidenced by the statements prepared for the LLP Accounts and there is no claim that the charge was levied as a result of mistake or mathematical error.

We are not persuaded by Boone's argument that "late charges or late fees do not constitute interest [if] the debtor can avoid them simply by paying the obligation on time." The fact that Knott could have avoided a late charge by paying it on time does not remove Boone's responsibility to charge an interest rate in accordance with what the parties have agreed to in the event that a default occurs.

The trial court erred in holding that the late charges were not interest, thus this matter must be remanded to the trial court with instructions to apply the penalty provisions set forth in KRS 360.020. Because we find that Boone is not entitled to recover interest under the notes, we need not address Knott's argument concerning the compounding of interest under the award.

II. DID THE TRIAL COURT ERR IN FINDING NO BREACH OF FIDUCIARY DUTY ON BEHALF OF WIMBLEDON AND/OR BOONE AND IN REFUSING TO SUBMIT THIS ISSUE TO THE JURY?

Under the terms of the Relaunch Syndicate Agreement, Boone was designated syndicate manager. Boone's duties as such were set forth as follows:

> Separate books and records of account shall be kept by the Syndicate Manager which shall accurately reflect all income and disbursements for and on behalf of the co-owners, which shall be subject to inspection by them at reasonable times during business hours. The Syndicate Manager shall furnish each co-owner, each year, beginning with the year 1981, with a statement showing the results of the breeding season and the receipts and expenditures for the year and

> such other information as the Syndicate Manager may deem pertinent.

As payment for his services, Boone was entitled to "four (4) free nominations to the Stallion in each breeding season." Under the terms of the Danzig Connection Syndicate Agreement, WFL was designated syndicate manager. As successor in interest to WFL, Boone took over its duties as syndicate manager. Boone's duties as syndicate manager in the Danzig Connection Syndicate were set forth as follows:

> Books and records of account shall be kept by the Syndicate Manager which shall accurately reflect all receipts and disbursements for and on behalf of the Syndicate. The Syndicate Manager shall furnish to each co-owner prior to December 15 of each year after retirement of the Stallion, a statement showing the results of the breeding season. The Syndicate Manager shall further furnish to the co-owners prior to March 15 of each year, a statement showing the receipts and expenditures on behalf of the co-owners in the previous calendar year.

As payment for his services, Boone was entitled to "four (4) free nominations to the Stallion" per breeding season. Based on the foregoing, Knott maintains that the trial court erred in deciding that there was no breach of fiduciary duty. We agree.

There can be no doubt that under the terms of the two syndicate agreements, Boone, as syndicate manager, was responsible for accurate accountings of the shares for both syndicates. Based on the evidence contained in the record, specifically in regard to the creation of Account 109, the misapplication of credits due to LLP Accounts to Account 109, and the failure of the ledgers to accurately reflect what was owed, there was more than enough evidence to create a question of fact

for the jury to decide whether Boone breached the fiduciary duty he owed as syndicate manager.

Thomas v. Hodge, 898 F.Supp. 980 (W.D.Ky. 1995), has no applicability to this case. If Boone had merely sold the shares to Knott and then submitted periodic invoices to Knott for Syndicate services, the reasoning in Thomas would apply as in that scenario Boone would merely be a vendor of services. However, as syndicate manager there is no denying the fact that Boone undertook responsibility for providing accurate accounts to the share owners. Boone cannot escape this responsibility by relying solely on his position as vendor of the shares and services. The trial court erred in holding that there was no breach of fiduciary duty and in refusing to submit this issue to the jury.

III. DID THE TRIAL COURT ERR IN DISMISSING KNOTT'S CLAIM FOR INTERFERENCE WITH THE SALE OF THE SHARES?

Based on expert testimony as to the decrease in the value of the shares, Knott alleges that he has shown intentional interference with a prospective contractual relationship and that the trial court erred in not submitting this claim to the jury. We disagree.

The Kentucky Supreme Court adopted the tort of intentional interference as set forth in the Restatement, Second, of Torts, § 767 in National Collegiate Athletic Association v. Hornung, Ky., 754 S.W.2d 855 (1988). One of the elements to be considered in deciding whether the tort has occurred is whether

there was a valid business relationship or the expectation thereof which was interfered with.

Aside from merely expressing an interest in selling the shares, it is clear that Knott took no active steps to do so. As Boone illustrates in his brief on appeal, Knott admitted that he had never received or sought an offer to sell the shares. In the absence of anything beyond a mere desire to sell the shares, there can be no intentional interference.

IV. DID THE TRIAL COURT ERR IN FAILING TO GIVE LLP THE DISPUTED $20,000 CREDIT?

Knott alleges that the $20,000 payment in question was made by Brooks to release a stallion certificate for breeding on one of the Danzig Connection shares. Boone contends that the $20,000 came from a check written on Brooks' personal account, and that Brooks instructed Boone to apply it to the debt of Allan Thoroughbreds in Account 505. The trial court refused to submit this issue to the jury. We believe that the refusal of the trial court to submit this issue to the jury was erroneous as there was obviously a factual dispute as to which account the $20,000 should have been applied to.

CONCLUSION

The final judgment of the Fayette Circuit Court is reversed to the extent that it awarded interest on the notes and refused to submit issues to the jury regarding breach of fiduciary duty and application of the disputed $20,000 credit. This matter is remanded with instructions to (a) submit the issues involving breach of fiduciary duty and application of the $20,000 credit to the jury; and (b) apply the penalty provisions

of KRS 360.020 for the charging of usurious interest. To the extent that the trial court dismissed Knott's claim for intentional interference, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
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ORAL ARGUMENT FOR APPELLANTS:	ORAL ARGUMENT FOR APPELLEE:
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