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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001155-MR
AND
NO. 2008-CA-001345-MR

1400 WILLOW COUNCIL OF CO-OWNERS, INC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE[1]
ACTION NO. 03-CI-010346

PATRICIA W. BALLARD APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Following a nine-day jury trial, 1400 Willow Council of Co-Owners, Inc. (Council), a condominium association in Louisville, Kentucky, appeals from a trial order and final judgment entered by the Jefferson Circuit Court on November 5, 2007, and an order entered on May 12, 2008, denying its motion

[1] The late Judge Kathleen Voor Montano presided at trial. Upon her death, Judge Ann O'Malley Shake issued post-trial rulings.

for a judgment notwithstanding the verdict (JNOV). Upon reviewing the record, the briefs and the law, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In light of our holding, we set forth a truncated history of this litigation which has consumed well over a decade. This case involves a dispute between the Council and one of its co-owners, Patricia Ballard. In 1989, Ballard purchased one of four penthouse condominiums occupying the 20th and 21st floors of the 1400 Willow building. As early as July 6, 1990, she noticed water at an interior wall between the fireplace and a window. She never saw water leak *from her windows*, nor did she see water on the floor directly under her windows.[2] Instead, especially during driving rainstorms, it appeared as though water was *coming through the walls*. Over the next decade, Ballard repeatedly reported to management that water was intruding into her unit. In response, the Council routinely sent a window washer and window contractor to assess the situation. Thereafter, the Council would pay to have Ballard's windows caulked. Ballard's water problems continued until late 1999/2000 when the Council had the exterior masonry waterproofed.[3] By that point, Ballard's walls, floors, draperies, and

[2] In her second amended complaint, Ballard alleged problems with the exterior masonry were discovered immediately upon completion of construction of the building, which was completed in 1980.

[3] In the summer of 1998, the co-owner of another penthouse unit began experiencing water leaks. A prompt investigation by the Council's general manager revealed water was penetrating through exterior brick and mortar joints. It was after this investigation that the exterior masonry of the entire building was waterproofed and the leaks stopped.

several framed items had sustained visible moisture damage. After the waterproofing, Ballard's walls no longer leaked.

This litigation began as a disagreement over the need to replace a two-story wall of windows in Ballard's unit and who should bear the cost of replacement. Independent contractors advised the Council that glass could fall from Ballard's rotting windows and they had to be replaced. The Council contends co-owners, such as Ballard, own the windows in their units and are personally responsible for replacement costs. In contrast, Ballard was advised by a professor at the University of Louisville that her windows were sound and could withstand fifty-year- and one-hundred-year winds. She contends that had the Council properly maintained the exterior of the building, as was its responsibility under the Master Deed,[4] water would not have intruded into her unit and her windows would not have been compromised. Ballard argues that her windows did not need to be replaced, but if they did, the Council was responsible for the replacement cost pursuant to the Master Deed because the windows are a "common element" of the structure. After expiration of a temporary restraining order, during which Ballard moved to a new home, an independent contractor replaced the windows in March and April of 2004 at a cost to the Council of nearly $65,000.00.

[4] The Amended and Restated Master Deed for 1400 Willow Council of Co-Owners, Inc. sets forth the scope of the condominium project and specifies the responsibilities of the Council and its co-owners. The document was drafted in 1980 and amended in 1985 and again in 2003. The 1400 Willow project was developed under Kentucky's Horizontal Property Law, Kentucky Revised Statutes (KRS) 381.805 – 381.910, and the deed was recorded with the Jefferson County Court Clerk.

Ballard filed this action on November 24, 2003. Initially she sought only injunctive and declaratory relief. The purpose of the injunction was to prevent the Council and its agents from entering her unit and moving/removing her property to repair/replace her windows. The declaration of rights was sought to determine who was financially responsible for fixing the windows and to determine whether a September 2003 amendment to the building's Master Deed was void and unenforceable because it discriminated against Ballard. She maintains her windows were damaged by the Council's negligent maintenance of both her windows and the building's exterior. Ballard contends the Council knew as early as 1985 that structural deficiencies in the building were causing water leaks.

On December 4, 2003, the Council filed an answer and counterclaim with the Jefferson Circuit Court Clerk. The next day, the Council recorded in the office of the Jefferson County Court Clerk a lien against Ballard's unit as authorized by the Master Deed. A *lis pendens* notice, consistent with the requirements of KRS 382.440(1), was filed with both the circuit and county court clerks.[5] Count I of the counterclaim sought to recover the cost of replacing Ballard's wall of twenty-one windows. Count II of the counterclaim sought

[5] Out of an abundance of caution, on January 24, 2005, the Council filed a document with the Jefferson County Clerk styled "Statement of Claim for Lien Pursuant to Master Deed." The purpose and intended effect of this document is unclear as it was simply another means of giving notice to all that it was asserting a lien against Ballard's unit for "costs, including attorneys' fees, incurred by the 1400 Willow Council in repairing and replacing certain windows located on the Real Estate. Under the terms of the Master Deed, these costs, including attorneys' fees, are the responsibility of the co-owner of the Real Estate, Patricia Ballard."

enforcement of the lien for the cost of the window replacement as well as costs and reasonable attorneys' fees incurred in collecting and enforcing the lien.

Ballard amended her complaint in June of 2004, adding claims for damages to the windows, drapes, framed items and hardwood flooring in her unit. She moved to amend her complaint again in March of 2006 to assert a slander of title claim emanating from the Council's filing of the *lis pendens* notice and the lien statement. Coupled with the slander of title claim was an action to quiet title to her unit. Ballard claimed the filing of the lien diminished the fair market value of her unit, rendered her unit unmarketable, and caused the loss of two sales.

The Council sought partial summary judgment on its counterclaim that Ballard had breached the Master Deed by failing to repair/replace her windows upon receiving notice to do so. It also moved for summary judgment on the slander of title and property damage claims. The court granted summary judgment only on the property damage claim because it was filed outside the two-year statute of limitations. The court also ruled that Ballard could not recover losses suffered as a result of selling stock at a depressed price to pay expenses and attorneys' fees.

A jury trial on Ballard's claims for breach of duty, slander of title and an action to quiet title on her unit, as well as the Council's counterclaim alleging Ballard had breached the Master Deed and seeking enforcement of its lien for the cost of window replacement, commenced on September 4, 2007. Trial concluded on September 14, 2007, with jurors finding: Ballard's windows needed to be replaced; replacement was necessary because the Council had failed to exercise

reasonable care in maintaining the exterior of the building; the Council failed to exercise "good faith and loyalty" to all co-owners, including Ballard; said failure "was a substantial factor in causing loss to Patricia Ballard"; $54,000.00 would compensate Ballard for the monthly condominium maintenance fees she paid while attempting to sell her unit; the Council "knowingly and maliciously communicated, orally or in writing, a false statement which had the effect of disparaging Patricia Ballard's title" to her unit by either decreasing its fair market value or causing a lost sale; $75,000.00 would compensate Ballard for the damages she incurred as a result of the Council slandering her title; the need to replace Ballard's windows did not result from Ballard's willful or negligent acts or omissions; and punitive damages should not be awarded to Ballard.

On November 5, 2007, the trial court entered an order that: 1) awarded judgment to Ballard in the amount of $129,000.00 and bearing interest at twelve percent per annum; 2) gave the Council ten days to release its *lis pendens* notice and lien from Ballard's unit; 3) authorized Ballard to recover taxable court costs from the Council; and, 4) consistent with a stipulation entered by the parties, reserved for an evidentiary hearing all claims for attorneys' fees under the Master Deed. The order contained finality language even though the Council had argued

the issue of attorneys' fees could not be fully addressed until the JRP[6] 404 hearing was concluded.

On November 15, 2007, the Council moved for a JNOV on Ballard's claims of breach of fiduciary duty and slander of title. Simultaneously it moved the court to alter or amend the judgment to correct some items and to reserve the award of costs until one party had been declared the "prevailing party." The Council did not challenge the jury's finding that it was responsible for the cost of the window replacement. The Council argued Ballard filed her slander of title claim outside the applicable one-year statute of limitations, and the *lis pendens* notice and lien on which the slander of title claim was based were authorized by the Master Deed and protected by judicial privilege because they were associated with the Council's counterclaim. Regarding the breach of fiduciary duty claim, which was based on a lost sale, the Council argued it approved John McDermott's sales contract for the purchase of Ballard's unit, a requirement for sale under the

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[6] Jefferson Circuit Court Rules of Practice and Procedure. JRP 404, titled "Motions for Attorney's Fees" specifies:

> [a]ll motions for attorney's fees shall be accompanied by an affidavit of counsel setting forth in detail the dates of the services rendered, the exact nature of the service rendered on each date, the names of the persons rendering the service (if paralegal or other counsel of record), and the number of hours (or fractions thereof) rendered by each person. The number of hours shall be totaled, and a suggested reasonable amount of compensation per hour shall be set forth. The affidavit must also disclose the statute or other authority supporting the requested award of an attorney's fee. If the applicable statute is KRS 411.195, then the affidavit must also contain a showing that the required attorney's fee was actually paid, or was agreed to be paid, by the party enforcing the written obligation. When a party seeking an award of an attorney's fee relies upon a writing to establish entitlement to the fee, a copy of the writing shall be attached with the applicable portion highlighted.

Master Deed, and did nothing to frustrate the sale; so it was inappropriate for the jury to award damages to Ballard based solely on McDermott's failure to purchase her unit. The trial court denied the Council's motion for JNOV.

Thereafter, the Council moved the trial court to award attorneys' fees to neither party under the terms of the Master Deed. Ballard opposed the motion stating she was the prevailing party because jurors had found in her favor on virtually all claims and had awarded damages to her. Without holding the JRP 404 hearing, and with no itemized bill for costs incurred, services rendered or hours worked being filed in the record, the court declared Ballard the prevailing party and entered an order entitling her to recover fees and costs. The court stated it felt compelled to award fees and costs to the prevailing party based upon language in the Master Deed authorizing the prevailing party to recover fees and costs. This appeal followed. For the following reasons, we reverse and remand.

LEGAL ANALYSIS

The first of three issues raised by the Council is whether the trial court should have granted summary judgment or a directed verdict in its favor on Ballard's slander of title claim. We agree with the Council.

We begin our analysis of this issue by setting forth the positions of both parties and the ruling of the trial court. In her second amended complaint, submitted to the court in March of 2006, Ballard alleged for the first time that the lien and *lis pendens* notice filed and recorded by the Council in December 2003 were based on the false statement that she was responsible for the replacement cost

of her windows and were, therefore, invalid. Ballard maintained she was not responsible for the replacement cost because the damage to her windows was caused by the Council's negligent maintenance of the building's common elements and the Council knew this when it filed the lien and the *lis pendens* notice. According to Ballard, the filing of the lien and notice caused the loss of at least two sales of her unit, deflated the market price of her unit which would otherwise have exceeded $1,125,00.00,[7] and made her unit unmarketable. Ballard maintained she learned of her unit's deflated fair market value and unmarketability within one month of seeking leave to file her second amended complaint and specifically alleged, "[t]he Council maliciously filed its lien and *lis pendens* against Ms. Ballard's condominium in an attempt to compel Ms. Ballard to pay for the replacement of a window that was damaged by its negligence."

In response, the Council argued leave to file the second amended complaint should be denied on four grounds: 1) the slander of title claim was time-barred by a one-year statute of limitations; 2) the complaint failed to state a claim as a matter of law; 3) the filing was unreasonably delayed; and, 4) if filed, the Council would suffer undue prejudice. Specifically, the Council argued the *lis pendens* notice and lien were based on lien rights created under Section 3.3 of the Master Deed which reads:

> **LIABILITY OF CO-OWNERS FOR WILLFUL AND NEGLIGENT ACTS.** Notwithstanding anything contained in Sections 3.1 and 3.2 hereof, a Co-Owner

[7] John McDermott offered to purchase Ballard's unit for $625,000.00 cash in 2000.

> shall be liable for the entire expense of any maintenance, repair or replacement of any part of the condominium project, whether part of a unit or part of the general or limited common elements (including, but not limited to, those portions of a unit described in Section 3.1 [a] and [b] hereof), if such maintenance, repair or replacement is rendered necessary by willful or negligent act or omission or [sic] the Co-Owner, any member of his family, their guests, employees, agents or lessees. *If any Co-Owner fails to undertake any such maintenance, repair or replacement within ten (10) days after the Board of Directors notifies the Co-Owner in writing that it has determined that such maintenance, repair or replacement is the responsibility of such Co-Owner under this section, the Board of Directors may undertake such maintenance, repair or replacement, and the cost thereof shall be a lien on the unit of such Co-Owner until paid by the Co-Owner, and such lien shall be subject to the remedies provided in Section 4.4 hereof.*

(Emphasis added). Section 4.4 states:

> **LIEN FOR ASSESSMENTS.** Except as provided in Section 4.6 hereof, *any unpaid common expenses and any unpaid directly allocable assessments assessed to a Co-Owner shall constitute a lien against the unit of such Co-Owner and against such Co-Owner's interest in the condominium project* as provided in the Condominium Act. Such lien shall be subordinate to the lien of the mortgagee of the first mortgage of record on such unit. In addition to any other remedies or liens provided by law, if any Co-Owner is in default in the payment of any common expenses assessed to him for thirty (30) days, the Board of Directors, on behalf of the council, may bring suit for and on behalf of the Council to enforce collection or [sic] the assessment and to foreclose the aforesaid lien. The lien for unpaid assessments shall also secure legal interest and reasonable attorneys' fees incurred by the board of Directors on behalf of the Council incident to the collection of such assessment or enforcement of such lien.

(Emphasis added). According to the Council, it filed the lien and *lis pendens* notice as authorized by the Master Deed and Ballard was aware of the lien and notice for two years before trying to assert the claim.

"[T]o maintain a slander of title action in [Kentucky], the plaintiff must plead and prove that the defendant has knowingly and maliciously communicated, orally or in writing, a false statement which has the effect of disparaging the plaintiff's title to property; he must also plead and prove that he has incurred special damage as a result." *Bonnie Braes Farms, Inc. v. Robinson* 598 S.W.2d 765, 766 (Ky. App. 1980) (citing *Ideal Savings Loan & Building Ass'n v. Blumberg*, 295 Ky. 858, 175 S.W.2d 1015 (1943), and *Hardin Oil Co. v. Spencer*, 205 Ky. 842, 266 S.W. 654 (1924)). Slander of title actions are governed by a one-year statute of limitations that begins to run "when the instrument was filed for public record." *Montgomery v. Milam,* 910 S.W.2d 237, 240 (Ky. 1995); KRS 413.140(1)(c). Thus, under the facts of this case, Ballard had to file her claim on or before December 4, 2004. Because she did not attempt to assert the claim until March 30, 2006, the allegation was time-barred. Had Ballard included the claim in her first amended complaint, filed in June of 2004, she would have been timely. The trial court erred in finding the slander of title claim "related back" under CR[8] 15.03(1) to the filing of Ballard's original complaint in November of 2003. That cannot be accurate because at that point, neither a lien nor a *lis pendens* notice had been filed. Moreover, the original complaint, seeking only

[8] Kentucky Rules of Civil Procedure

injunctive and declaratory relief, was wholly separate from the filing of the lien and the *lis pendens* notice.

Despite the claim being time-barred, an even more compelling reason for us to hold in the Council's favor is the fact that the lien was provided for by §4.4 of the Master Deed, previously set forth in its entirety in this Opinion. The Council's filing of the lien on December 4, 2003, did nothing but formalize Ballard's debt. Like a tax lien, the Council's *inchoate* lien against Ballard's unit for any unpaid assessment was created and reserved within the Master Deed and it was formally asserted and published to the world when Ballard failed to pay for the window replacement and its associated costs as required by the Master Deed.

In addition to the lien being authorized by the Master Deed, KRS 382.440(1) specifies the protocol to be followed in filing a *lis pendens* notice. That provision reads:

> No action, cross-action, counterclaim, or any other proceeding, except actions for forcible detainer or forcible entry or detainer, commenced or filed in any court of this state, in which the title to, or the possession or use of, or any lien, tax, assessment or charge on real property, or any interest therein, is in any manner affected or involved, nor any order nor judgment therein, nor any sale or other proceeding, nor any proceeding in, nor judgment or decree rendered, in a district court of the United States, shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, or encumbrancer of such real property, or interest for value and without notice thereof, except from the time there is filed, in the office of the county clerk of the county in which such real property or the greater part thereof lies, a memorandum stating:

> (a) The number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced, or is pending;
>
> (b) The name of the person whose right, title, interest in, or claim to, real property is involved or affected; and
>
> (c) A description of the real property in the county thereby affected.

The Council's lien and *lis pendens* notice comported with the statutory requirements.

Lest there be confusion about the purpose and effect of a *lis pendens* notice, it is defined as:

> "[a] notice, recorded in the chain of title to real property, . . . to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY 943 (7th ed. 1999). A lis pendens notice is appropriate in situations where the title to property is at stake (actions for partition, quiet title, and will contests, for example), and it serves as notice that the purchaser takes the title subject to the same restrictions as would apply to the seller.

Greene v. McFarland, 43 S.W.3d 258, 260 (Ky. 2001). KRS 382.440 "does not purport to create any additional rights that a party might have in the property. The lis pendens filed by the [Council] did no more than give notice of its claim against [Ballard's unit]. It did not, independently, create a lien against said property." *Leonard v. Farmers & Traders Bank, Shelbyville*, 605 S.W.2d 770, 772 (Ky. App. 1980).

Finally, the document styled by the Council, "Statement of Claim for Lien Pursuant to Master Deed," and filed on January 24, 2005, was unnecessary as it merely reiterated information already published in the 2003 *lis pendens* notice and did not constitute a new publication date giving rise to another yearlong limitations period in which Ballard could file the slander of title claim. Because of our resolution of this issue we need not address the Council's arguments regarding undue prejudice and unreasonable delay.

As a matter of law, the Council was entitled to summary judgment, or a directed verdict once trial was underway, on the slander of title claim. Submitting the issue to the jury constituted error. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). Thus, we reverse and remand to the trial court with direction that summary judgment be granted to the Council on the slander of title claim.

The second issue we address is whether the trial court erred in denying the Council's motion for summary judgment, and subsequently a directed verdict, on its alleged breach of its fiduciary duty, or alternatively, the soundness of the instruction submitted to jurors on the Council's alleged breach.

Ballard alleged in her first amended complaint that the Council had breached its fiduciary duty by: 1) failing to disclose the source of water leaks to the co-owners; 2) not disclosing to Ballard that it had ceased performing basic exterior maintenance on her windows even though it continued maintaining the windows of other co-owners; and, 3) wrongly amending the 1985 Master Deed in

September of 2003 to make her financially responsible for the cost of replacing her windows.[9] The Council responded that Ballard's claims were barred by a two-year statute of limitations and denied that it had breached any legal or contractual obligation.

At trial, Ballard alleged a board member, Ron Cook, was financing the purchase of Ballard's unit by John McDermott in 2000 for $625,000.00. However, when Cook withdrew his financing in 2004, the sale fell apart. Ballard was not anxious to close the deal since she was renovating a home and continued living in the unit while her new home was being prepared. The Council argued Cook's role in the incomplete sale was strictly in his individual capacity and did not involve the Council. The Council had actually approved the sale, a requirement for a purchase under the Master Deed, and argued it did nothing to thwart the sale. The Council argued it should not be held responsible for a contract to which it was not a party. Additionally, while the $625,000.00 sales price agreed upon by Ballard and McDermott may have been less than half the figure at which Ballard valued her unit, it was on par with the sale of a comparable unit for the same price just six months earlier.

We hold there were genuine issues of material fact justifying the trial court's denial of summary judgment on the question of the Council's alleged

[9] As early as 1996, Jay Helms, the building's general manager, corresponded with Ballard telling her, "you own the windows," and, "[t]he council has no responsibility to repair or maintain either the interior or exterior of the windows. . . . Window replacement would never be paid for by the Council at any time as the windows are the responsibility of the respective owners of the residence as described in Article 3.1, item b, section II, of the Master Deed."

breach of its fiduciary duty. *Steelvest*. We will not address whether sufficient evidence was developed to overcome the Council's directed verdict motion because the matter must be reversed and remanded for a new trial due to an erroneous jury instruction.

KRS 273.215 specifies the standards to be followed by directors of a nonprofit corporation. Of particular relevance to this case is KRS 273.215(1) which states:

> A director of a nonprofit corporation subject to the provisions of KRS 273.161 to 273.387 shall discharge his duties as a director, including his duties as a member of a committee:
>
> (a) In good faith;
>
> (b) On an informed basis; and
>
> (c) In a manner he honestly believes to be in the best interests of the *corporation*.

(Emphasis added).

> In some states a condominium board of managers has a fiduciary duty to the unit owners, and a failure to act in a manner reasonably related to the exercise of that duty results in liability for the board and also for its individual members. The officers and members of a condominium association must fulfill the fiduciary duties owed to the unit owners with reasonable care, diligence, good faith, and judgment. A condominium board's proper exercise of its iduciary [sic] duty requires strict compliance with the condominium declaration and bylaws. However, the duties owed by a condominium association and the developer to the unit owners may be limited to those duties included in the bylaws and condominium act, making the common law duty of care inapplicable. . . .

> In other instances, a condominium association has been held to owe no general fiduciary duty to its members. A condominium association would not be deemed to be analogous to a landlord for the purpose of determining whether a duty of ordinary care was owed to unit owners. In certain situations a condominium association has been found not to owe a duty to an individual unit owner, such as where an owner was assaulted by an intruder who had entered through a window, as the association owed no duty to provide bars on the windows of a unit, since the owners could have installed bars at their own modest expense, and the owners chose not to follow a procedure under which bars would have been provided by the association for all condominium owners upon affirmative vote of the owners.

15A Am. Jur. 2d *Condominiums, Etc*. §58 (2010). We read KRS 273.215(1) to mean directors in Kentucky owe their allegiance to the corporation (or in this case, the Council) as a whole, and not to individual members/shareholders (or in this case, co-owners like Ballard). This is a reasonable interpretation since co-owners could have competing agendas, none of which may be in the best interests of the Council. We saw nothing in the Master Deed creating a duty by the Council to individual co-owners.

Having concluded that Council members owe their duty to the Council as a whole, we consider Instruction No. 4 which was submitted to jurors on the breach of fiduciary duty claim. It read:

> It is the Duty of the Council, acting through its Board of Directors, to exercise good faith and loyalty in conducting the business of the Council which includes an obligation to exercise good faith and loyalty in making decisions with respect to all co-owners, including co-

> owner, Patricia Ballard. If you find, from the evidence, that the Council, acting through its Board of Directors, failed to comply with this duty and that such failure was a substantial factor in causing loss to Patricia Ballard, you shall find for Patricia Ballad. Otherwise, you shall find for the Council.

Nine jurors found the Council, through its Board, failed to satisfy the duty as it was stated in the foregoing instruction and awarded Ballard $54,000.00 in damages.

The soundness of a jury instruction is a question of law we review *de novo*. *Reece v. Dixie Warehouse and Cartage Co*., 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Instructions are meant to guide jurors during their deliberations and assist them in reaching the correct verdict. "If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948).

The breach of fiduciary instruction did not accurately state Kentucky law. Therefore, reversal is mandated. On retrial, the instruction must conform with KRS 273.215(1).

The last issue we address is attorneys' fees. This issue is prematurely before this Court but will be discussed because the case is being reversed and remanded for retrial. This claim arose via a motion filed by the Council urging the

trial court to award attorneys' fees to neither party. That motion was filed before either party had submitted a bill for legal services.

In her trial order and final judgment, Judge Montano allowed Ballard to recover taxable court costs from the Council under CR 54.04. She then stated,

> in accordance with the parties [sic] stipulation at trial, any claim for attorney fees under the Amended and Restated Master Deed is bifurcated from the underlying trial and all issues relating to attorneys [sic] fees due the prevailing party are reserved for evidentiary hearing and judgment by the Court, without a jury, in accordance with the procedures set forth in JRP 404. The court shall retain jurisdiction of this issue after entry of this judgment.
>
> This Judgment is final and appealable, there being no just cause for delay.

After Judge Montano's death, Judge Shake ruled on the Council's motion that neither party be awarded attorneys' fees. Judge Shake denied the Council's motion and awarded fees and costs to Ballard upon finding her to be the prevailing party because the jury found in her favor on the Council's failure to carry out its duties under the Master Deed and awarded her damages. Based on §10.2[10] of the Master Deed, which entitles the *prevailing party* to recover costs and attorneys' fees, as well as KRS 453.040 and CR 54.04, Judge Shake concluded she was authorized to award costs to the "successful litigant." Due to the trial court's inclusion of

[10] "**COSTS AND ATTORNEYS' FEES.** In any proceeding arising because of an alleged failure of a Co-Owner or the Council to comply with the terms of the Amended and Restated Master Deed, the Amended and Restated By-laws or the Rules and Regulations adopted pursuant to them, and the documents and Rules and Regulations as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees as may be awarded by the court."

finality language in its opinion and order, the Council raised the issue on appeal to protect its rights.

We will not predict who will be the prevailing party on retrial. However, prior to any award of attorneys' fees, an itemized bill for services along with a suggested fee should be filed in the record and the evidentiary hearing mandated by JRP 404 convened. The trial court's final order should identify the prevailing party supported by appropriate findings of fact and specify the amount of costs and attorneys' fees, if any, to be recovered.

For the foregoing reasons, the trial order and final judgment of the Jefferson Circuit Court, as well as its order denying JNOV, are reversed and remanded for a new trial. We further direct that summary judgment be granted to the Council on the slander of title claim.

ALL CONCUR.

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