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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000680-MR

BRATSCHI D. CAMPBELL;
BRATSCHI C. JOHNSTON; AND
CREWS JOHNSTON III — APPELLANTS

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CI-00262

WILLIAM B. DRESCHER AND
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC — APPELLEES

AND NO. 2010-CA-000681-MR

COVENANT STORAGE, INC. — APPELLANT

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AND NO. 2010-CA-000682-MR

BRATSCHI D. CAMPBELL;
BRATSCHI C. JOHNSTON;
CREWS JOHNSTON, III CROSS-APPELLANTS

CROSS-APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CI-00262

COVENANT STORAGE, INC. CROSS-APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: Covenant Storage, Inc. (Covenant) appeals from the trial court's summary judgment finding that Bratschi D. Campbell (Bratschi), Bratschi C. Johnston (Johnston), and her husband, Crews Johnston, III (Crews) (collectively, the Campbells) were entitled to proceeds from an avigation easement over real property they sold to Covenant. The Campbells cross-appeal the court's denial of their motion for prejudgment interest and/or "delay damages." The Campbells also appeal from the trial court's summary judgment in their legal malpractice claim against William B. Drescher (Drescher) and his law firm, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. (Baker Donelson). For the following reasons, we reverse and remand.

FACTS

The facts, generally, are not in dispute. Bratschi and Johnston, who are mother and daughter respectively, owned several tracts of land near Ft. Campbell in Christian County, Kentucky. Bratschi owned some tracts individually and the two owned at least one tract jointly.

In 2003, the Army Corps of Engineers, on behalf of the federal government (the United States), advised those who owned land near Ft. Campbell that the United States would be acquiring avigation easements, either by agreement or through eminent domain, over certain tracts. The easements were necessary so that planes could take off and land and would, in pertinent part, restrict development on the encumbered tracts. The Campbells received notice that five of their tracts would be subject to the proposed easements. Thereafter, Bratschi contacted attorney Dan Kemp (Kemp), who had helped her with a state condemnation action, and asked him to assist her in negotiations with the United States.

In the fall of 2004, Covenant, which builds and operates storage facilities, began looking for land in the Ft. Campbell area. A commercial realtor who represented Bratschi showed Covenant's owner, Henry Hicks (Hicks), a number of tracts of land, including a tract of more than fifty acres owned by Bratschi. On behalf of Covenant, Hicks offered $250,000 to purchase twenty-five acres from that tract. Bratschi consulted with Drescher, an attorney who had advised her regarding previous land sales. Ultimately Bratschi accepted Hicks's offer. In early December 2004, the parties executed a purchase agreement that

gave Hicks until March 15, 2005, to investigate whether the proposed avigation easements would impede Covenant's ability to use the property as intended.[1]

The purchase agreement specifically mentioned the proposed easements. However, it did not specifically address whether Bratschi would retain the avigation rights if she closed with Covenant before completing negotiations and closing with the United States. Furthermore, the agreement did not address which party would be entitled to any proceeds from the grant of easements to the United States.

During the course of the investigation period, the configuration of the twenty-five-acre tract changed, and Covenant's surveyor determined that the reconfigured tract included part of a tract jointly owned by Bratschi and Johnston. Furthermore, although Hicks obtained information regarding specific provisions related to the proposed easements, Covenant had not been able to timely complete a topographical survey to determine if its proposed building would violate height restrictions. Therefore, Hicks sought to amend the agreement to add Johnston and Crews, apparently based on his interest in the property as Johnston's husband, as sellers, and to extend the investigation period by thirty days.

In late February or early March 2005, Bratschi received an offer in excess of one million dollars from the United States for avigation easements over all five tracts, including the twenty-five-acre tract under contract with Covenant.

[1] We note that Hicks executed the agreement on November 30, 2004; however, Bratschi did not execute it until December 5, 2004. Therefore, the agreement was not fully executed until December 5, 2004.

On March 9, 2005, Drescher and Bratschi discussed Covenant's proposed amendments to the purchase agreement. During their conversation, Bratschi advised Drescher that she had entered into the purchase agreement with Covenant with the expectation that she would receive all proceeds related to the avigation easements across the twenty-five acres. She told Drescher to verify that Hicks was willing to waive any rights Covenant might have to those proceeds, even if she closed with the United States after she closed with Covenant. Bratschi also agreed to amend the purchase agreement.

The next day, Drescher spoke by telephone with Covenant's attorney, David L. Cotthoff (Cotthoff). Drescher and Cotthoff both testified that they discussed and agreed to amend the purchase agreement to add Johnston and Crews as sellers and to give Hicks an additional thirty days to conduct his investigation.

There are two somewhat divergent versions of the remainder of that conversation. Drescher testified that he told Cotthoff that Bratschi wanted to be certain that she would receive the proceeds from the sale of the easements. According to Drescher, Cotthoff stated that Covenant was not interested in the proceeds and that Drescher should send a "waiver" or other appropriate documents, which Cotthoff would send to Hicks for signature. As proof of his version of the conversation, Drescher offered a memo he prepared shortly after the conversation. That memo summarizes Drescher's version of the conversation regarding the proceeds for the easement, and states that he and Bratschi have "treated this as an easement in place - a done deal - even though nothing has been put to record." As

further proof, Drescher offered a copy of a March 11, 2005, e-mail he sent to Kemp, who was negotiating with the United States on behalf of the Campbells, stating that Covenant had no interest in the proceeds.

Cotthoff testified that Drescher stated that Bratschi had not reached an agreement with the United States regarding the easements. However, Cotthoff did not remember saying that Covenant had no interest in the proceeds. Cotthoff did tell Drescher that, if he had concerns about the easement, he should prepare whatever documents he thought would be necessary to protect Bratschi's interests. Finally, Cotthoff testified that he told Drescher he would forward any documents Drescher sent to Hicks for his signature, if appropriate.

Several days later, Drescher sent Cotthoff an amendment to the purchase agreement adding Johnston and Crews as sellers and giving Covenant an additional thirty days to investigate. However, Drescher did not prepare any documents specifically addressing which party would be entitled to proceeds from the easements. Covenant and the Campbells then closed on April 25, 2005.[2] As with the purchase agreement, the deed does not specifically state which party is to receive the proceeds from the easements.

Approximately six months later, the Campbells and the United States reached an agreement regarding the purchase price for the easements over all five tracts, including the twenty-five-acre tract in question. Based on his understanding that Covenant had no interest in the proceeds, Drescher forwarded a quitclaim deed

[2] We note that the closing took place by mail, with the Campbells executing the deed on April 19, 2005, and Covenant executing it on April 25, 2005.

to Cotthoff for Hicks's signature. Cotthoff forwarded the deed, but Hicks refused to sign it. Drescher then prepared a "grant of easement" for Hicks's signature, which Hicks also refused to sign.

In the meantime, the Campbells and the Unites States closed on the easements for three of the five tracts. However, the United States refused to close on the remaining two tracts without Hicks's signature. Therefore, in March 2006, the Campbells filed suit against Covenant. In their complaint, the Campbells alleged that the deed clearly reserved the right to the easement proceeds to them; that Covenant breached its agreement to waive the easement proceeds; and that Covenant fraudulently or negligently stated that it would waive any claim to the proceeds.

Approximately two years later, the Campbells amended their complaint to add legal malpractice claims against Drescher and Baker Donelson. In the amended complaint, the Campbells alleged that Drescher negligently failed to protect their interest in the proceeds from the sale of the easements.

After Covenant filed its answer to the complaint, the parties entered into additional negotiations with the United States to determine the value of the easements that would burden the twenty-five acres. They ultimately reached a resolution and closed on the remaining two tracts with the United States paying the proceeds into court.

During the course of discovery, the parties deposed each other, Cotthoff, Drescher, and the realtor. They also identified and deposed three expert

witnesses. At various points in time, the parties filed competing motions for summary judgment. On January 25, 2010, the trial court, in a four-paragraph order, granted Drescher's motion for summary judgment finding that he "represented his client in a manner consistent with the standard of care applicable to attorneys." The court also granted the Campbells' motion, stating as follows:

> Having determined that Mr. Drescher was not negligent, it follows that the deed he prepared was not ambiguous. Based on the record in this case, it is my belief that the parties concluded what was necessary to settle their initial real estate transaction. They did so in an unambiguous fashion. Any details concerning the avigation easement and compensation for it remained to be resolved in the second transaction. Covenant's refusal to sign that instrument resulted in this litigation. Consistent with this ruling, Covenant is ordered to execute the second agreement.
>
> The "Campbell parties" are awarded the funds on deposit with the clerk, including all accumulated interest and costs . . . .

The Campbells then filed a motion to alter or amend arguing that the court should have awarded prejudgment interest. The court denied that motion and these appeals and cross-appeal followed. We set forth additional facts as necessary below.

STANDARD OF REVIEW

Our general "standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of

law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). We set forth additional standards of review as necessary below.

ANALYSIS OF COVENANT'S APPEAL

With regard to Covenant's appeal, the parties raise two primary and interrelated issues: 1) whether the Campbells did anything to reserve the rights to the easements and/or the proceeds; and 2) at what point in time the United States obtained the easements over the twenty-five-acre tract.

In order to understand the various arguments about these issues, we first look to the deed. The parties point to a passage in the deed and to a passage contained in two exhibits to the deed as being key to this issue. In pertinent part, the deed states that the Campbells grant to Covenant:

> TO HAVE AND TO HOLD the premises in fee simple, together with all appurtenances, easements and privileges thereunto belonging and any improvements on the Premises, to Grantee and Grantee's successors and assigns forever. This conveyance is subject to the following: (i) real estate taxes and assessments, both general and special, for the current year and subsequent years; (ii) all easements, overflight rights, and restrictions that may be imposed from time to time by the United States of America, or any agency or department acting therefore in connection with flight activities involving Fort Campbell and its runways . . . .

The exhibits both state that the property is "subject to restrictions as set forth by the U.S. Army Corps of Engineers (Plat Tide 'Runway 23 approach and Tacan Copter approach 235 Campbell Army Airfield, Ky')." The plats contain lines ostensibly designating what portions of the property will be affected by the

restrictions; however, while the plats specifically identify a utility easement, they do not specifically identify any avigation or other easements.

With the preceding in mind, we look to the first issue listed above. The court found, without analysis, that the deed was not ambiguous and, at least by implication, that it reserved to the Campbells the right to the proceeds from the easements. Because the interpretation of a deed is a matter of law, we review the trial court's findings *de novo*. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 600 (Ky. App. 2006).

The Campbells argue that the above cited passages from the deed and its exhibits create an ambiguity and, thus, the court should look to parol evidence to interpret the deed. According to the Campbells:

> a reasonable person could conclude that the only logical reason for including in the deed language relating to avigation easements to be imposed in the future is to evidence Covenant's acknowledgment that (i) the federal government's acquisition of the avigation easements was in progress, but not yet complete; (ii) the parties were treating the easements as if they were already in place; and (iii) Covenant would not be entitled to the proceeds to be paid by the federal government for those easements.

The deed does refer to easements to be placed in the future; therefore, a reasonable person could conclude that the United States had not yet acquired the easements. However, a reasonable person could not conclude from the language in the deed that the parties were acting as if easements "to be imposed from time to time" were already in place. Reading the language from the deed and the language from the exhibits together, a reasonable person could conclude that the

parties believed any restrictions reflected in the plats would likely be imposed in the future. However, that is the most that could be inferred. Furthermore, we discern nothing in the deed or the exhibits that could be construed to act as a waiver by Covenant to proceeds from easements not yet in place. Therefore, we agree with the trial court that the deed is not ambiguous. However, because the deed does nothing to reserve to the Campbells the rights to the easements or to the proceeds, we disagree with the trial court's implied finding that the deed requires disposition of the proceeds to the Campbells.

The preceding, however, does not dispose of this portion of the appeal. We must now address when the Unites States acquired the easements. In the event the United States acquired the easements while the Campbells owned the property, then they would be entitled to the proceeds. Likewise, if the United States acquired the easements when Covenant owned the property, Covenant would be entitled to the proceeds.

The parties offer different theories regarding this issue. Covenant argues that, under the equitable title theory, as soon as the Campbells and Covenant entered into the purchase agreement, Covenant received equitable title to the property, leaving the Campbells only legal title. Under this theory, the right to encumber the property and to any related proceeds passed to Covenant in December 2004, when the parties signed the purchase agreement. Applying this theory, the Campbells would have no claim to the proceeds.

This theory arises from the Supreme Court of Kentucky's holding in *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979). As noted by Covenant, the Supreme Court held that equitable title to property passes to the purchaser when a contract of purchase is executed. *Id.* at 382. However, that rule only applies to executory contracts, wherein the purchaser makes installment payments to the seller and the seller does not transfer the deed until all payments have been made. That is not what transpired in this case. In this case, Covenant paid the entire amount due and the Campbells contemporaneously transferred the deed. Therefore, the equitable title theory has no application herein.

Wayne F. Collier, Esq. (Collier), Drescher's expert witness, espoused what we call "the plat theory." According to this theory, the Campbells dedicated the easements to public use when they signed and recorded the plats,[3] thereby irrevocably granting the easements to the United States at that time. Applying the plat theory, Drescher argues that the grant of the easements occurred before the Campbells and Covenant closed, therefore entitling the Campbells to the proceeds. Furthermore, under this theory, even though the Campbells transferred title to the property to Covenant, they retained the right to continue negotiating with the United States.

In support of this theory, Collier cited to the owners' certificates on the plats which state:

[3] We note that Collier testified that dedication was effective upon signing. However, Drescher argues before us that both signing and recordation were necessary to accomplish an irreversible dedication to public use. Therefore, we address that argument.

> I/We do hereby certify that I/we are the only owner(s) of record of the property platted hereon. Said property being recorded in deed (plat) book ___, page ___ in the Christian County Clerk's office, and do hereby adopt this as my/our record plat for this property and hereby dedicate the streets and other space so indicated to public use.

He also cited to a number of cases that indicate that a dedication for public use, once filed, is irrevocable. We are not persuaded by the language on the plats or the case law.

The language on the plat states that Bratschi and Johnston were dedicating "streets and other space so indicated to public use." As noted above, there is no indication on the plat that anything is being dedicated to public use. Therefore, we believe that reliance on that language is misplaced.

We agree the case law states that:

> When a subdivision is made and mapped and the map filed for public record or exhibited to members of the public in consummating the sale of lots, it amounts to a dedication of all the lands shown thereon for public use, whether for streets, parks, or other public purposes, and the dedication is irrevocable even though no formal acceptance by the public authorities has been made . . . .

Newland v. Schriver, 230 Ky. 304, 19 S.W.2d 963, 963 (1929). However, *Newland* and the other cases cited for this proposition are not controlling for three reasons. First, the cited cases deal with plats that appear to have contained specific dedications to public use and, as noted above, the plats in question herein do not specifically designate any areas for public use. Second, the cases cited address disputes regarding roadways dedicated for use by the public for ingress, egress,

and travel in general. *Newland v. Schriver*, 230 Ky. 304, 19 S.W.2d 963 (1929); *Martin v. Hampton Grocery Co.,* 256 Ky. 401, 76 S.W.2d 32 (1934); *Shurtleff v. City of Pikeville*, 309 Ky. 420, 421, 217 S.W.2d 976 (1949); and *Potter v. Citation Coal Corp*., 445 S.W.2d 128 (Ky. 1969). The easements in question herein are not roadways and are not open to public use. The easements are for the benefit of the United States military, which certainly benefits the public; however, they are not for public ingress, egress, or other use. Once in place, the rights associated with the easements belong to the military, not to the public. Third, the deed was executed and the transfer of ownership was complete on April 25, 2005. *See Smith v. Feltner,* 256 Ky. 325, 76 S.W.2d 25 (1934). The plats were not recorded until April 27, 2005. Therefore, even if signing and recording of the plats acted to transfer the easements to the United States, that transfer was not complete until after ownership of the property passed to Covenant. Therefore, we are not persuaded that the Campbells retained the right to the easements and/or the proceeds under the plat theory.

The final theory, which we believe is correct, is that the United States did not obtain the easements until the deed of easement was executed and delivered. An easement can be created by implication, by necessity, or by express grant. The easement in this case was created by express grant. Such an easement can only be created by "[a] written grant consistent with the formalities of a deed . . . ." *Loid v. Kell*, 844 S.W.2d 428, 429-30 (Ky. App. 1992). Therefore, no easement existed

until the deed of easement was signed and delivered, which occurred several years after the Campbells granted the property to Covenant.

Based on the preceding, we conclude that the United States did not own the easement until 2009. Because Covenant owned the property at that time, it is entitled to the proceeds.

Finally, as to this portion of the appeal, we address three other arguments by the Campbells: that the deed should be rescinded because they did not receive the full consideration for which they bargained; that Covenant will be unjustly enriched if it receives the proceeds; and that the deed should be rescinded because of a unilateral mistake regarding the disposition of the easement proceeds.

The Campbells argue that the sale of the property to Covenant was contingent upon their receipt of the proceeds from the easements. We are not persuaded by this argument for three reasons. First, Bratschi testified that she accepted $10,000 per acre because of the restrictions that the United States wanted to impose on the property. She argues that this testimony indicates that she accepted that offer because she anticipated receiving the easement proceeds. However, it appears just as likely that she accepted that offer because the development potential and attendant value of the property were seriously diminished by the proposed restrictions. Second, Bratschi did not receive an offer from the United States until more than two months after she entered into the purchase agreement. Therefore, her argument that the sale price was contingent on what she anticipated receiving from the United States is less than convincing.

Third, the Campbells affirmed that the total consideration for the property was $250,000 when they signed the deed to the property. Kentucky Revised Statutes (KRS) 382.135 requires all deeds to contain a statement of the full consideration paid or a statement of the fair cash value of the property. We would be violating the spirit of KRS 382.135 and creating bad law if we were to reward the Campbells for underreporting the consideration they believed they were due by nearly $300,000.00.

We are equally unimpressed by the Campbells' unjust enrichment argument. As correctly noted by the Campbells, to successfully claim unjust enrichment, they must show that a benefit was conferred on Covenant at the Campbells' expense; that the benefit resulted in an appreciation by Covenant; and that acceptance of the benefit by Covenant would be inequitable. *Guarantee Elec. Co. v. Big Rivers Elec. Corp.*, 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987) (internal citations omitted). However, as correctly noted by Covenant, "the doctrine of unjust enrichment has no application in a situation where there has been an explicit contract which has been performed." *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.,* 898 F. Supp. 1198, 1206 (W.D. Ky. 1995); *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 165 (Ky. App. 1977). Because there was an explicit contract, and the parties performed that contract according to its terms, the doctrine of unjust enrichment has no application herein.

Finally, the Campbells argue that the deed should be rescinded because of a unilateral mistake regarding the disposition of the easement proceeds. In support

of this argument, the Campbells state that they always intended to receive the proceeds from the easements; Covenant had expressed no interest in those proceeds before the sale; and the Campbells were justified in their mistaken belief that Covenant had waived any claim to the proceeds.

> To rescind a contract for a unilateral mistake, the consequences of the mistake must be so grave that the enforcement of the contract would be unconscionable, the mistake must relate to a material feature of the contract, the mistaken party must have exercised ordinary diligence, and the rescission must be possible without serious prejudice to either party.

Jones v. White Sulphur Springs Farm, Inc., 605 S.W.2d 38, 42-43 (Ky. App. 1980). As noted by Covenant, the purchase agreement, the amended purchase agreement, and the deed are silent as to the disposition of the proceeds. By the exercise of ordinary diligence, the Campbells could have specified in any of those documents that they were entitled to the proceeds from the easements. Because the Campbells failed to do so, they cannot now avail themselves of unilateral mistake to excuse their failure to exercise that diligence.

In summary, we reverse the trial court's summary judgment in so far as it awarded the proceeds from the easements across the twenty-five-acre tract to the Campbells. Furthermore, we remand to the trial court for entry of summary judgment in favor of Covenant on the issue of entitlement to those proceeds.

ANALYSIS OF THE CAMPBELLS' APPEAL

The Campbells appeal the trial court's summary judgment in favor of Drescher on their legal malpractice claim. On appeal, the Campbells argue that:

Drescher failed to adequately secure their rights to the proceeds; the trial court inappropriately granted summary judgment to Drescher; and the trial court inappropriately denied their motion for partial summary judgment on the malpractice issue. According to the Campbells, Drescher committed malpractice because he failed "to take reasonable steps before closing to establish and protect the Campbell Parties' right to the avigation easement payment, including his failure to make any effort to obtain a written agreement with Covenant that recognized the Campbell Parties' right to those funds."

In support of their motion for partial summary judgment on the issue of Drescher's alleged malpractice, the Campbells offered the affidavit and, subsequently, the deposition of attorney George E. Long (Long). In pertinent part, Long stated that Drescher

> had ample opportunity to protect the Sellers' interests by drafting clear and specific written contract terms providing that the Sellers would receive all of the proceeds for the avigation easement and that Covenant would execute all documents necessary to grant the easement, even after the closing. He could have drafted terms to that effect that clearly protected the Sellers' interests in the initial agreement, the amendment to the agreement, or Special Warranty Deed to Covenant, but he did not do so. In my opinion, Mr. Drescher's failure to memorialize these terms in writing did not protect the Sellers' interest in the avigation easement and did not comply [with] the minimum standard of care for an attorney representing the Sellers in the real estate transaction with Covenant. Further, in my opinion, Mr. Drescher's failure to comply with the standard of care has caused substantial damage to the Sellers, who were required to file suit against Covenant in order to secure the rights and benefits that Mr. Drescher could and

> should have clearly stated in the written transaction documents.

We note that, when rendering this opinion, Long assumed that "Mr. Cotthoff had agreed that Covenant would sign the necessary documents for granting the avigation easement, would waive any right to compensation for the easement, and would sign a written waiver to that effect." Faced with Long's testimony, and viewing that testimony in the light most favorable to the Campbells, the trial court could not have reached the conclusion that Drescher "represented his client in a manner consistent with the standard of care applicable to attorneys." Therefore, the court's grant of summary judgment in favor of Drescher was inappropriate, and we reverse that judgment. However, we cannot, as the Campbells urge, hold that, as a matter of law, Drescher committed legal malpractice. That issue is for the finder of fact, so we remand to the trial court for additional proceedings on this issue.

THE CAMPBELLS' CROSS-APPEAL

For their cross-appeal, the Campbells argue that the trial court inappropriately denied their motion to alter or amend the summary judgment. In that motion and on appeal, the Campbells argue that the court should have awarded them "prejudgment interest/delay damages." Because we have determined that the trial court incorrectly awarded the proceeds to the Campbells, their request for prejudgment interest/delay damages related to those proceeds is moot. Therefore, we will not address it.

CONCLUSION

Based on our review of the record, the parties' briefs, and the arguments of counsel, we: 1) reverse the trial court's summary judgment awarding the Campbells the proceeds from the avigation easements; 2) remand for entry of an order awarding those proceeds to Covenant; 3) reverse the trial court's summary judgment finding that Drescher did not violate the standard of care; and 4) remand the issue regarding Drescher's alleged legal malpractice to the trial court for additional proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANTS/ CROSS-APPELLANTS BRATSCHI D. CAMPBELL, BRATSCHI C. JOHNSTON, AND CREWS JOHNSTON III:

Charles E. English
E. Kenly Ames
Bowling Green, Kentucky

Kenneth R. Jones, Jr.
Nashville, Tennessee

ORAL ARGUMENTS FOR APPELLANTS/CROSS APPELLANTS:

Charles E. English
Bowling Green, Kentucky

Kenneth R. Jones
Nashville, Tennessee

BRIEFS FOR APPELLEES WILLIAM B. DRESCHER AND BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC:

Darrell G. Townsend
Nashville, Tennessee

W. Timothy Harvey
Clarksville, Tennessee

ORAL ARGUMENTS FOR APPELLEES:

Darrell G. Townsend
Nashville, Tennessee

BRIEFS FOR APPELLANT/CROSS-APPELLEE COVENANT STORAGE, INC.:

Lee T. White
Hopkinsville, Kentucky

John Flanders Kennedy
Macon, Georgia

ORAL ARGUMENTS FOR APPELLANT/ CROSS-APPELLEE:

John Flanders Kennedy
Hopkinsville, Kentucky