CASE COMMENTARIES

CONTRACTS—EXERCISING THE OPTION TO PURCHASE

The Tennessee Court of Appeals held that where an agreement provides that transfer of title simultaneously triggers exercise of an option to purchase property, the option is deemed exercised at the time the title is transferred where the transferor expects to receive title to the other property, regardless of whether full payment has occurred. Additionally, the court is constrained by matters of public policy and will not enforce a liquidated damages clause when it is intended to penalize a party in the case of nonpayment. *Keck v. Meek*, No. E201701465COAR3CV, 2018 WL 3199220 (Tenn. Ct. App. June 28, 2018).

Robert Fritsche

In 2013, Shawn and Marcella Keck (the "Kecks") sought out E.G. Meek ("Mr. Meek"), a licensed real estate agent, for the dual purposes of selling the Kecks property, First Street Property, and purchasing a new home. During negotiations between the Kecks and Mr. and Mrs. Meek (the "Meeks"), the parties executed four documents: a lease agreement, a real estate sales contract, an addendum, and a sale contract (collectively the "Lease Option Agreement"). After executing these documents, the Kecks rented the Walnut Breeze Property. On January 6th, 2014, the Kecks meet with Mr. Meek and executed a warranty deed conveying title of the First Street Property to the Meeks. However, Mr. Meek did not convey the title to the Walnut Breeze Property to the Kecks despite promising to do so. In 2015, the Kecks abandoned the Walnut Breeze Property and stopped paying rent, commencing this action as they had yet to receive the deed for the Walnut Breeze Property, despite losing their interest in the First Street Property.

The first issue that the court discussed on appeal was whether the award of equity by the trial court was appropriate. The Meeks appealed the trial court's award, arguing that it was improperly granted as the Kecks were the first party to breach and there was no effective acceptance of the option contract. The court dispensed with both of the Meeks' objections, determining that the award of equity was properly granted by the trial court.

Both parties argued that the other party was the first one to breach the contract. The Meeks argued that the Kecks committed the first material breach as they failed to pay rent for three months in 2015.[1] Alternatively, the Kecks contended that the Meeks breached the contract first on January 6th, 2014 when they failed to convey title to the Walnut Breeze Property. However, the court sidestepped the issue of breach as it held that the award was not an award of damages under a breach of contract claim, but rather a return of equity to the Kecks in the First Street Property following the Kecks' acceptance of an option to purchase the Walnut Breeze Property.

As the award hinged on the return of equity, the determinative question was whether the Kecks had exercised their option to purchase because if they had not, there could be no equity to return. The Meeks contended there was no proper acceptance of the lease option contract and declared that the Kecks did not exercise their option to purchase. However, the court rejected the Meeks' interpretation after it determined that several sections of the Lease Option Contract were ambiguous. Notably, there was no singular document that the parties identified when discussing the Lease Option Contract. Instead, the parties collectively referred to the four separate agreements entered into during their initial negotiations. The court collectively interpreted these documents together as "integral parts of the same transaction" that formed the Lease Option Contract. *Id.* at *9 (quoting *Graber v. Graber*, No. W2003-01180-COA-R3-CV, 2003 WL 23099689, at *3 (Tenn. Ct. App. Dec. 31, 2003)). When reviewing the terms within the four separate documents, the court agreed with the trial court's determination that the Lease Option Contract was ambiguous as it was "without any terms specifically outlining that contract".[2] As there were no clear terms detailing what was to take place

[1] *See* Madden Phillips Constr., Inc. v. GGAT Dev. Corp., 315 S.W.3d 800, 812 (Tenn. Ct. App. 2009) ("[A] party who commits the first material breach of contract may not recover damages for the other party's material breach.").

[2] The Addendum incorporates a "lease option contract," which it states, "shall be a preliminary contract as part of this sales contract," but it does not describe the details of any lease option contract. The Addendum later refers to "payments made under the lease/option contract," which creates an ambiguity as to whether there exists a lease separate from an option contract or whether the two are identical as a "lease option contract." Keck, 2018 WL 3199220, at *9.

in the January 6 transaction or what would constitute effective acceptance of that transaction, the court held that the document was clearly ambiguous as "its meaning is uncertain and…it can be fairly construed in more than one way." *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). Therefore, the court found that it was necessary to resolve the ambiguity.

Despite the ambiguous nature of the contract, the Meeks argued against the trial court's use of parol evidence by citing to a Tennessee Court of Appeals case, *GRW Enters. v. Davis*. 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990). In *GRW*, the Tennessee Court of Appeals held that parol evidence may not be used to alter, vary, or qualify the plain meaning of the contract. However, the appellate court in *Keck* identified numerous ambiguities on the face of the Lease Option Contract that could not be resolved from the contract's plain meaning. Specifically, the court noted that the terms did not explain what constituted acceptance, identify the owner that would finance the deal, or provide when title would be conveyed. Notably, Mr. Meek drafted the agreements himself, and in Tennessee "it is well settled that 'ambiguities in a contract are to be construed against the party drafting it.'" *Frank Rudy Heirs Assocs. v. Moore & Assocs., Inc.*, 919 S.W.2d 609, 613 (Tenn. Ct. App. 1995). Mr. Meek had the opportunity to clarify these terms when drafting these documents but failed to do so.

Prior to January 6, the Kecks were leaseholders of the Walnut Breeze Property. On January 6, the Kecks transferred title of the First Street Property, believing they were exercising their option to purchase the Walnut Breeze Property. The Kecks contended their conveyance of title was effective acceptance of the Lease Option Contract, while the Meeks rejected that the transfer was effective acceptance and instead argued that it was a credit. The appellate court rejected the Meeks' contention that full payment was a condition of effective acceptance, and instead agreed with the Kecks' interpretation that the parties agreed the Kecks would sign over the deed to the First Street Property and that transfer would simultaneously exercise the option to purchase the Walnut Breeze Property. Additionally, the Kecks would use their equity in the First Street Property as a down payment to purchase the Walnut Breeze Property.

The appellate court also noted that there was equity in the Walnut Breeze Property created by the monthly payments made by the Kecks under the Lease Option Agreement that was not included in the trial court's award. The parties indicated that payments made by the Kecks under the lease agreements would be applied directly toward the Walnut Breeze Property mortgage. However, the appellate court noted that this issue was not raised by either party during trial or on appeal. As the issue was not raised, the appellate court made no further determination on what equity had accrued. The appellate court's reasoning demonstrated that it was not in the business of bailing out plaintiffs who failed to plead with specificity, and thus a party seeking an award should raise it.

The appellate court affirmed the trial court's finding that the Kecks exercised their option to purchase the Walnut Breeze Property pursuant to the "Lease Option Contract" and the award to return the equity in the Walnut Breeze Property. The appellate court found the award was consistent with the Keck's alternative claims for a return of the First Street Property, as the court had previously held that the "defaulting vendee in a real estate transaction may recover the amounts paid on the purchase price in excess of the damages caused by the vendee's breach." *Pickett v. Pickett*, No. 01-A-01-9503-CH-0011, 1995 WL 517492, at *1 (Tenn. Ct. App. 1995) (citing *Monts v. Campbell*, No. 83-205-II (Tenn. Ct. App. Apr. 6, 1984)).

The Meeks also argued that the liquidated damages provision in the Lease Option Contract should be applicable as the Kecks had "fail(ed) to perform the covenant herein contained." *Keck*, 2018 WL 3199220, at *15. Due to the Kecks' failure to pay rent, the Meeks argued the clause provided that they should receive "as liquidated damages all sums which have therefore been paid." *Id.* However, the appellate court concluded that the trial court did not err in declining to award the Meeks the original equity in the First Street Property as liquidated damages.

The appellate court referenced the Tennessee Supreme Court's holding that competing interests of the court allow parties to freely contract while constraining certain agreements due to public policy considerations. *Chapman Drug Co. v. Chapman*, 341 S.W.2d 392, 398 (Tenn. 1960). The Tennessee Supreme Court also recognized that liquidated damages provide certainty, allow parties to resolve defaults and other related disputes efficiently, and that the clauses are effective when those damages reflect a reasonable estimate of potential damages. *V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd.,* 595 S.W.2d 474, 484 (Tenn. 1980).

However, the Supreme Court of Tennessee also determined that liquidated damages would be unenforceable against public policy if the provision and circumstances "indicates that the parties intended merely to penalize for a break of contract." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 99-

100 (Tenn. 1999). The appellate court found that the liquidated damages provision proposed by the Meeks exemplified a primarily punitive effect and was therefore unenforceable under public policy considerations.[3]

Additionally, the appellate court held that the trial court erred on the issue of attorney's fees. The trial court declined to award attorney's fees pursuant to the applicable provisions in the Lease Option Agreement when pursuing certain claims such as unpaid rent.[4] After the appellate court determined that the Lease Option Agreement provided for attorney's fees, the appellate court held the trial court was bound to award the fees as the trial court only had discretionary powers to determine if the fees were reasonable, not whether or not they should be applied. As the parties contracted for attorney's fees in their agreement, there was no ambiguity to be resolved by the court. Therefore, the trial court did not have the discretion to set aside attorney's fees as included in the parties' agreement.

However, as the appellate court was bound to enforce the terms of the overarching contract, the court did not grant attorney's fees solely for the Meeks as the moving party as the court found it was possible that the Kecks were also entitled to attorney's fees. Therefore, the court reversed the trial court's denial of attorney's fees and remanded for an evidentiary hearing to determine the reasonable amount of attorney's fees due to each party under the contract. Finally, as neither party requested attorney's fees on appeal, the court declined to grant any fees to either party.[5]

This case demonstrates that the court is not in the business of rewriting contracts, but they will resolve ambiguities in contracts. This case

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[3] Considering whether the liquidated damages clause at hand would serve primarily as a penalty, the Court stated that the Court's prior position and analysis in *Harmon v. Eggers* was directly on point for this case. In *Harmon*, the court reviewed a similar liquidated damages provision that was centered around a lease option payment plan which called for any breach by nonpayment to result in a forfeiture of all prior payments. The court in *Harmon* determined that the liquidated damages provision of the contract was punitive and did not reflect a reasonable measure of damages.

[4] The Court noted that Tennessee generally adheres to the "American Rule" for recovery of attorney's fees, citing Cracker Barrel. Cracker Barrel, 284 S.W.3d at 309 (attorneys' fees are not recoverable in the absence of a statute or contract *specifically* providing for such recovery …) (quoting Pullman Standard, Inc. v. Abex Corp., 693 S.W.2d 336, 338 (Tenn. 1985)).

[5]*See* Killingsworth v. Ted Russell Ford, Inc., 205 S.W.3d 406, 411 (Tenn. 2006) ("An award of attorney's fees generated in pursuing the appeal is a form of relief; the rule requires it to be stated.") (citing Tenn. R. App. 27(a)).

additionally provides insight for transactional attorneys on the importance of clearly drafting contracts and ensuring the language is not ambiguous. It also serves as a cautionary tale for parties to raise issues on appeal to preserve the court's resolution of the issue. It is important to note that the parties in this case relied on verbal discussions rather than the written contract that the transaction was based on. The Lease Option Contract was spread across four contracts, written at different points of time, and left out key pieces of information. The court was willing to enforce clauses that were clear on their face, like the attorney's fee clause, as the court wants to allow parties to freely contract. However, the court is still constrained by matters of public policy, and so it refused to enforce the liquidated damages clause as it was not created to return a reasonable estimation of damages in the case of a breach but was made to penalize the Kecks in the case of nonpayment.

CONTRACTS—INTENT AND MERGER AGREEMENTS

Under Tennessee law, an agreement to a "merger proposal" is not sufficient to demonstrate mutual assent to be bound by a contract when some terms of the agreement remain unaddressed and the parties' subsequent actions do not objectively manifest an intention to be bound by the agreement; however, the parties' intent to reduce the agreement to a memorandum of understanding is not itself enough to render an otherwise valid contract unenforceable. *Am. Bd. of Craniofacial Pain v. Am. Bd. of Orofacial Pain*, No. M201801696COAR3CV, 2020 WL 7213230 (Tenn. Ct. App. Dec. 7, 2020).

Laws M. Bouldin

In *American Board of Craniofacial Pain v. American Board of Orofacial Pain*, the Tennessee Court of Appeals addressed whether a binding agreement was formed between two professional associations that had been engaged in merger discussions. The Plaintiff, American Board of Craniofacial Pain ("ABCP"), sought specific performance of the contract which it claimed was formed by the exchange of emails. The Defendant, American Board of Orofacial Pain ("ABOP"), refuted the existence of a binding contract by showing that the parties intended to execute a memorandum of understanding.

ABCP and ABOP are professional organizations which primarily conduct examinations and issue certifications in the fields of Craniofacial and Orofacial pain, respectively. In the spring of 2014, the organizations entered into merger discussions in hopes that unification would increase the chances of recognition by the American Board of Dental Specialties.

The organizations formed a joint merger committee which included Dr. Clifton Simmons, the president of ABCP, and Dr. Dale Ehrlich, the president of ABOP. In June, the committee met via teleconference and discussed a draft memorandum of understanding ("MOU") which had been prepared by Dr. Simmons.

Following that meeting, the ABOP Board of Directors drafted its own merger document. Dr. Ehrlich attached the two-page document to an email sent to Dr. Simmons on July 14, 2014 with the subject line "Merger Proposal." The body of the email stated in relevant part, "we respectfully submit the attachment which is a merger proposal for your discussion and consideration prior to our [next] teleconference." *Id.* at *1.

On July 23, 2014, Dr. Simmons sent an email to the joint merger committee, indicating that ABCP had "voted to accept" the merger proposal sent by Dr. Ehrlich. In the email, Dr. Simmons also stated: "I suppose that a Memorandum of Understanding or other document needs to be constructed to consummate this merger." Dr. Ehrlich responded with an indication that he would begin work on the MOU. *Id.*

In August, Dr. Ehrlich sent an email to the committee outlining the remaining requirements to complete the merger including apparent "roadblocks." Dr. Ehrlich expressed concern that the merger would not meet the set deadline and requested necessary information from ABCP and Dr. Simmons. Soon after, at least part of the requested information was sent to Dr. Ehrlich. Dr. Simmons also expressed his hope that the MOU would soon be completed so that attorneys from each organization could review the document.

Days after the email from Dr. Simmons, Dr. Ehrlich responded indicating that ABOP no longer intended to pursue the merger. The email cited the incompatibility of the two certification and exam processes as part of the reason for the reversal. The email also stated the merger would actually undermine ABOP's own independent attempt to seek recognition by the American Board of Dental Specialties.

ABCP sued, arguing that a binding contract resulted from its acceptance of the July 14 merger proposal email. ABCP claimed that ABOP had breached the merger contract by independently seeking recognition from the American Board of Dental Specialties and requested specific performance of the merger.

The parties filed cross-motions for summary judgement. ABOP made two arguments supporting its allegation that there was no binding contract. First, it argued there was an express understanding that the agreement was to be reduced in writing in the form of an MOU prepared and reviewed by attorneys. Second, it claimed that even if a final MOU was not necessary, there was never an agreement as to all material elements of the merger so there could be no meeting of the minds. The chancery court granted ABOP's motion, finding that a binding contract could not have been formed due to a lack of mutual assent.

On appeal, the trial court's decision was affirmed. The appellate court concluded that the parties had intended for the merger contract to be binding only after an MOU was finalized based on (1) the extent to which an express agreement had been reach on all terms to be included in the final merger document, and (2) the parties' conduct following the purported merger agreement.

The appellate court began by discussing the objective test to determine mutual assent as established by *T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC*, 93 S.W.3d 861, 866 (Tenn. Ct. App. 2002). A party can be bound by a contract by objectively manifesting assent to its terms. So, in determining whether there is mutual assent the court must look to the parties' behavior. However, their behavior is considered in light of the surrounding circumstances, including the terms of the purported agreement.

The appellate court then turned to whether the terms of the agreement were sufficiently definite, which would support a finding that there was mutual assent and therefore a binding contract. In making this determination the court looked to *EnGenius Entm't, Inc. v. Herenton*, 971 S.W.2d 12, 17 (Tenn. Ct. App. 1997), which emphasizes that *all* essential terms which are to be reduced to writing must be agreed to for a binding contract to be formed.

Applying *EnGenius*, the appellate court found that the July 14th email and subsequent communications between the parties failed to address material terms necessary to form a binding contract. Specifically, the court pointed out that there was no clear indication of which organization was to be the surviving entity in the merger. Even assuming that such a determination had been made, there would still remain the issue of how each organization's assets would be distributed. The ABOP proposal addressed one group of assets, but left others unaddressed.

The appellate court also addressed the parties' conduct following the July 14th email. First, it looked to Dr. Simmons' email in which he stated that ABCP had voted in favor of the merger proposal, but went on to say, "a memorandum of understanding or other document need[ed] to be constructed to consummate this merger." *Id.* at *1. This coupled with Dr. Ehrlich's subsequent email discussing "roadblocks" to the merger and describing the memorandum of understanding as "essential" to the merger, were sufficient to demonstrate ABCP knew that the MOU was necessary to form a binding agreement.

The appellate court concluded that no enforceable contract was formed between ABOP and ABCP and therefore specific performance was not a remedy available to ABCP. The court reached its conclusion by applying the objective test for mutual assent. A significant part of the appellate court's analysis relied on the finding that there were material elements of the agreement which had not been addressed at the time the purported contract was formed.

The appellate court's conclusion seems to align with its previous decisions. However, it does little to clarify its view of "mutual assent." The appellate court does make clear that the parties' objective manifestations of assent are inextricably intertwined with the definitiveness of agreed-upon terms. Thus, the somewhat convoluted use of these factors in determining mutual assent may reflect an understandable reluctance of the court to find an enforceable contract for the merger without a complete and comprehensive written contract.

FEDERAL INCOME TAX—STATUTE OF LIMITATIONS ON ASSESSMENTS

The United States Tax Court held that the statute of limitations period for assessments was triggered when a taxpayer submitted an income tax return although the submission was rejected by the Internal Revenue Service's e-filing system. *Fowler v. Comm'r*, No. 12810-18, 2020 U.S. Tax Ct. LEXIS 24 (T.C. Sept. 9, 2020).

Shane Carey

The United States Tax Court considered which of a taxpayer's tax return submissions triggered the running of the three-year limitations period under I.R.C. § 6501(a). The taxpayer filed a motion for summary judgment on the grounds that the notice of deficiency from the Internal Revenue Service ("IRS") was outside of the limitations period for assessments, and thus not timely issued. The IRS took the position that the taxpayer's initial tax return submission was not valid because it did not contain an Identity Protection Personal Identification Number ("IP PIN"). Therefore, the IRS argued the statute of limitations did not begin to run until the taxpayer updated the return to include the IP PIN. However, the court disagreed and ultimately granted the taxpayer's motion for summary judgment.

On or before April 15, 2014, Robin J. Fowler ("Petitioner") filed Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return. The Extension was timely filed, thus extending the due date of Petitioner's 2013 Form 1040 to October 15, 2014. Petitioner engaged Bennett Thrasher, LLP ("Bennett Thrasher"), a public accounting firm, to file the completed 2013 Form 1040. Petitioner e-signed Form 8879, IRS e-file Signature Authorization, which authorized Bennett Thrasher to file the return on Petitioner's behalf as an electronic return originator ("ERO"). On October 15, 2014 ("October 15 submission"), a partner at Bennett Thrasher e-signed Petitioner's 2013 Form 1040 with a Practitioner Personal Identification Number ("Practitioner PIN") and transmitted the return to the IRS. After transmitting the return, Bennett Thrasher received a Submission ID for the transmitted return. On the same day, the IRS's software received the transmitted return but subsequently sent Bennett Thrasher a rejection notice. The rejection notice cited code "IND-181," which corresponds to a failure to provide a valid IP PIN with the return.

Petitioner submitted another 2013 Form 1040 on October 28, 2014 ("October 28 submission"). With this submission, Bennett Thrasher prepared a paper copy of 2013 Form 1040 with the same information used on the October 15 submission. Bennett Thrasher mailed the October 28 submission to the IRS Service Center in Austin, Texas, via U.S. Postal Service Certified Mail with Return Receipt. The return was delivered to the IRS on October 30, 2014, as confirmed by the return receipt. In December 2014, Petitioner received a letter from the IRS notifying him that the IRS had not yet received his 2013 Form 1040.

Prior to April 30, 2015, Bennett Thrasher obtained Petitioner's IP PIN from the IRS. Bennett Thrasher then used this IP PIN on a new version of the 2013 Form 1040 and e-filed the return with the IRS on April 30, 2015. Other than the inclusion of Petitioner's IP PIN, the tax information on the third submission was identical to the information submitted to the IRS on the first two submissions. The IRS's software reviewed and accepted this third submission on April 30, 2015. The IRS issued a notice of deficiency for the 2013 tax year to Petitioner on April 5, 2018. Following receipt of the notice, Petitioner filed a petition in the United States Tax Court challenging the notice of deficiency on the grounds that the statute of limitations for tax assessments had lapsed.

Internal Revenue Code Section 6501(a) imposes a three-year limitations period for tax assessments. The third submission of the 2013 Form 1040 by Petitioner on April 30, 2015 fell within the three-year period prior to the issuance of the notice of deficiency from the IRS on April 5, 2018. Accordingly, if only the third submission satisfied the requirements for a valid tax return filing, then the notice of deficiency from the IRS would be considered timely issued. Therefore, the United States Tax Court considered whether either of the *first two* submissions triggered the running of the three-year limitations period under I.R.C. § 6501(a).

Generally, I.R.C. § 6501(a) requires that the IRS assess tax within three years after the taxpayer files a tax return. If the return is timely filed, the three-year period begins on the due date of the return. However, if the return is filed late, the three-year period begins on the actual filing date. The Supreme Court of the United States previously stated that this three-year limitation period is "an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 301 (1946). Moreover, it gives taxpayers who file honest returns assurance that their tax liabilities will not be reopened after that period. *Mabel Elevator Co. v. Comm'r*, 2 B.T.A 517, 519 (1925).

More specifically, the limitations period imposed by I.R.C. § 6501(a) begins when a return is filed if (1) the document that the taxpayer submitted was a required return and (2) the taxpayer properly filed the return. *Appleton v. Comm'r*, 140 T.C. 273, 284 (2013). Therefore, the Tax Court first considered what constitutes a required return. I.R.C. § 6501(a) states that "the term 'return' means the return required to be filed by the taxpayer." Neither this statute, nor the regulations thereunder, give more detail beyond this description as to the meaning. Thus, the Tax Court generally relies on the test established in *Beard v. Commissioner* to determine whether a document is considered to be a return. 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). First, the *Beard* test requires that the document purport to be a return and provide sufficient data to calculate a tax liability. *Id.* It also requires that the taxpayer make an "honest and reasonable" attempt to satisfy the requirements of tax law. *Id.* Lastly, under *Beard*, the taxpayer must execute the document under penalties of perjury. *Id.*

As to the first element, the IRS prefers submissions be made on the forms that the IRS has prescribed. *Hulett v. Comm'r*, 150 T.C. 60, 89 (2018). As such, the Tax Court found that the October 15 submission purported to be a return since Petitioner filed a 2013 Form 1040. Additionally, neither Petitioner nor the IRS disputed that the October 15 submission reported gross income, deductions, and credits, thereby resulting in taxable income.

Next, the Tax Court considered whether Petitioner made an "honest and reasonable" attempt to satisfy the requirements of tax law. *Hulett* distinguished a tax protester zero return, in which individuals may file a document containing only zeros on the relevant lines, from a return that shows an attempt to accurately report both income and deductions. *Id.* at 90. Interestingly enough, this means that even a fraudulent return may satisfy this requirement so long as the return appears genuine on its face. *Badaracco v. Comm'r*, 464 U.S. 386, 396–97 (1984). Here, Petitioner's submission included information regarding his income, deductions, exemptions, and credits. The only difference between the rejected October 15 submission and the April 30 submission, which the IRS accepted, was that the October 15 submission did not include the IP PIN. The omission of the IP PIN alone is not enough to categorize this as a protester return. The Tax Court also criticized the IRS for automatically rejecting e-filed returns that do not contain an IP PIN yet failing to automatically reject paper filed returns for the same reason. Therefore, the Tax Court found that Petitioner's October 15 submission was sufficient to satisfy the second element under *Beard*.

The final *Beard* requirement states that the taxpayer must execute the document under penalties of perjury. This was the primary dispute between Petitioner and the IRS. In I.R.C. § 6061(a), Congress granted the Secretary authority to prescribe forms or regulations defining the signature method for any return. It also granted the authority to develop procedures for the acceptance of signatures in digital or other electronic form. The IRS argued that Petitioner's October 15 submission failed to satisfy the signature requirement since it did not contain an IP PIN. However, the IP PIN is separate from the signature guidance previously issued by the Secretary. Besides I.R.C. § 6061, there is not much guidance on what constitutes a valid signature. Section 1.6695-1(b)(2) instructs a signing tax return preparer to sign the return electronically in the manner that is prescribed by the Commissioner in forms, instructions, or other appropriate guidance. Accordingly, the instructions to the 2013 Form 1040 state that the taxpayer must sign the return electronically using a PIN, which can be either a Self-Select PIN or a Practitioner PIN.

Bennett Thrasher signed the return using a Practitioner PIN in accordance with the instructions. Although the IRS then argued that the IP PIN was part of the signature requirement, the Tax Court found no IRS guidance characterizing an IP PIN as a signature. The Tax Court went on to state that the IRS could not ignore its own instructions to accommodate a particular litigation stance. The IRS cited the Internal Revenue Manual, which provides that if a return is electronically filed with an incorrect or omitted IP PIN, the software will reject the return. However, an IP PIN does not become part of the signature requirement simply because the IRS's software will reject a return without it. In fact, there are numerous occasions in which the IRS's software may reject a return that still meets the *Beard* requirements. Consequently, the Tax Court held that an IP PIN is not required to start the limitations period under I.R.C. § 6501(a). Therefore, the October 15 submission fully satisfies the *Beard* test and constitutes a "return" for statute of limitations purposes.

As previously mentioned, a "return" alone does not trigger the statute of limitations on assessments. Rather, the return must also be properly filed. A question of proper filing consists of determining whether the taxpayer's mode of filing complied with the prescribed filing requirements. In general, a return is "filed" when it has been physically delivered to the correct IRS office. The Tax Court held in *Blount v. Commissioner* that a document which qualifies as a return under *Beard* is considered filed upon delivery regardless of whether the IRS accepts or processes the document. 86 T.C. 383, 387–88 (1986).

There was no genuine dispute that the October 15 submission was delivered to the IRS. Petitioner was able to provide a transmission log from Bennett Thrasher which contained the 20-digit Submission ID given to an ERO after submitting a return. The IRS further acknowledged the submission when its counsel stated that Petitioner first attempted to e-file his 2013 income tax return on October 15, 2014, but the attempt was unsuccessful due to the missing IP PIN. The IRS did not raise an objection to how Petitioner delivered the October 15 submission, but instead only had an issue with the content of the return. Accordingly, the Tax Court found that the return was delivered to the IRS and that Petitioner properly filed the return.

Because the taxpayer's October 15 submission was considered a required return and was properly filed, the statute of limitations period was triggered on October 15, 2014. As previously stated, I.R.C. § 6501(a) requires that the IRS assess a tax within three years after the taxpayer files a return. Therefore, the statute of limitations on assessments under I.R.C. § 6501(a) lapsed in October 2017. The IRS did not issue the notice of deficiency until April 5, 2018. As such, the Tax Court concluded that the limitations period expired before the IRS issued the notice of deficiency and ultimately granted Petitioner's motion for summary judgment.

Tax practitioners should be cognizant of the precedent set by the United States Tax Court. It is commonplace to have tax return submissions rejected by the IRS's e-filing system for a multitude of reasons. Most notably, returns can be rejected for issues such as a social security number for a dependent child matching another return already accepted by the IRS or certain schema errors with the IRS's e-file system. Even though these returns are rejected by the e-file system, they may still be valid returns under the *Beard* analysis. Therefore, the statute of limitations period for assessments may well be triggered even if the IRS has not formally accepted the return. For the 2020 tax year, and likely based on the unfavorable outcome the IRS received in *Fowler*, the IRS has updated the requirements for an electronic return to clarify that if an IP PIN has been issued to a taxpayer, it must be included on the submission for the signature to be considered valid. However, the instructions for tax years prior to 2020 only require that the return be signed using a Self-Select

PIN or Practitioner PIN. If a taxpayer's return was previously rejected by the IRS's e-file system for any reason, tax practitioners should be diligent in determining the date in which the statute of limitations was actually triggered and respond accordingly if a notice of deficiency is issued.

REAL ESTATE—UNILATERAL MISTAKE AND ENFORCEABILITY OF DEEDS OF TRUST

The Tennessee Court of Appeals held that a deed of trust was unenforceable and not eligible for reformation after determining the plaintiff made a unilateral mistake when it altered the deed after execution and subsequently recorded the document. *Tennessee State Bank v. Mashek*, No. E2019-00591-COA-R3-CV, 2020 WL 2569835, 2020 Tenn. App. LEXIS 228 (Tenn. Ct. App. May 21, 2020).

Hannah-Claire Boggess

In *Tennessee State Bank v. Mashek*, the Tennessee Court of Appeals considered whether alterations to an executed deed of trust (the "deed") made prior to recording were mistakes that barred reformation and rendered the deed unenforceable.[1] The Court concluded that because Tennessee State Bank (the "Bank") acted with gross negligence in altering the date of the document and failed to demonstrate mutual mistake or fraud as required, the Bank committed "a material, unilateral mistake" which barred the deed from being reformed and rendered it unenforceable. *Id.* at *21, *24.

In late 2003, the defendant, Mr. Mashek, sought and obtained a home equity line of credit ("HELOC") via a promissory note (the "Note") from the Bank. The Note was secured by a deed of trust attached to Mr. Mashek's property in Powell, Tennessee. In order to secure the HELOC, Mr. Mashek executed the Note, the deed, a notice of right of recission, and a sweep authorization form. Mr. Mashek's wife, Mrs. Mashek, also executed the deed but was not obligated to the debt. All of the documents were fully executed by December 22, 2003 in Minnesota.

[1] The Court cited to *Sikora v. Vanderploeg*, 212 S.W.3d 277 (Tenn. Ct. App. 2006) as binding precedent requiring plaintiffs seeking reformation to establish that the material differences between the agreements were not the result of gross negligence by the plaintiffs and that there was a mutual mistake or fraud by the defendant.

When the balance on the HELOC was at or close to zero, Mr. Mashek contacted the Bank in order to close the line of credit. When Mr. Mashek was informed that there would be a fee for the service under the terms of the note, he decided to leave the line open and made additional draws from the HELOC. Mr. Mashek was contacted in 2011 by the Bank following an apparent failure to make the required payments. After his request for the original loan documents was refused by the Bank, Mr. Mashek stopped making any additional payments. In response, the Bank commenced foreclosure proceedings in 2012 on the property, which prompted Mr. Mashek to inform the Bank that the documents he signed in December 2003 were altered. Mr. Mashek opposed the foreclosure of his property based on the alterations to the loan documents.

After discovering the alterations in the loan documents, the Bank filed a complaint in the Chancery Court for Knox County on March 8, 2012. The complaint named as defendants Mr. and Mrs. Mashek (the "Masheks") and the title company hired to prepare the HELOC documents. The Bank asked the trial court for a declaratory judgment that the recorded deed was valid and enforceable, thereby allowing the Bank to continue with foreclosure proceedings. Alternatively, the Bank requested that the court reform the recorded deed. The Bank also sought to obtain a monetary judgment against Mr. Mashek for the amount owed on the HELOC, plus interest, and reasonable attorney's fees and expenses. The Masheks responded to the Bank's complaint by filing a motion to dismiss, asserting that the trial court lacked subject matter jurisdiction.[2] The trial court denied the Masheks' motion.

The Bank filed a motion for default judgment against Mr. Mashek in January 2013. Mr. Mashek responded with a counterclaim against the Bank, asserting that the recorded deed of trust was unenforceable because of the Bank's alterations. Mr. Mashek further alleged the Bank engaged in criminal forgery. Mr. Mashek attached to his counterclaim "a copy of the deed of trust he claimed to have executed and then sent a copy of by Abstract Title, the first page of which had been 'Exhibit C' to the Bank's complaint." *Id.* at *4. The deed executed by the Masheks contained four errors: (1) the deed secured the obligation of Breaking Bread Inc., an entity not known to either party, instead of the Masheks; (2) the deed's notary

[2] Attached to the motion was an affidavit from a forensic document expert which stated that the face page of the recorded deed of trust had been replaced and that the purported initials of Mr. and Mrs. Mashek on one of the documents was not made by their hand.

acknowledgment stated the document was executed in Knox County, Tennessee, when it was executed and notarized in Minnesota; (3) the date on the notice of right of recission was changed to seven days earlier; and (4) the "Open Ended Mortgage" box was checked on the executed deed but not on the recorded deed. Mr. Mashek denied that he owed money to the Bank based on his argument that the recorded deed of trust was unenforceable due to the changes between the instruments. In response, the Bank agreed there were differences between the recorded deed and executed deed but argued that any changes were made by the title company.

The Bank filed a motion for partial summary judgment on June 5, 2017 requesting that Mr. Mashek's counterclaims be dismissed, a judgment of the amount owned on the line of credit plus interest be entered against Mr. Mashek, and the trial court reform the deed of trust.[3]

On July 13, 2017, the trial court granted partial summary judgment to the Bank.[4] The trial court held that the executed deed of trust would be reformed and enforceable, allowing the Bank to continue foreclosure proceedings. The Bank subsequently filed a motion to alter or amend requesting the trial court address the Bank's claim for a monetary judgment against Mr. Mashek and "seeking to have the court enter an order specifically reforming the Executed Deed of Trust to conform to the Recorded Deed of Trust." *Id.* at *6. The Bank further requested that the trial court specifically state that the changes to the documents were not fraudulent. The trial court granted the Bank's request for a monetary judgment against Mr. Mashek in the amount of the loan, plus interest, and directed the executed deed be reformed to conform with the recorded

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[3] The Bank attached an expert opinion to its motion which stated that the mistakes between the agreements were scrivener's errors which could be corrected to reflect the intent of the parties. The Bank also attached an affidavit of Ms. Spurgeon, a bank employee, which provided the outstanding balance, plus interest, of Mr. Mashek's loan. The Masheks filed a motion in opposition.

[4] The trial court determined that the changes made to the executed deed of trust as reflected in the recorded deed were scrivener's errors and that the Masheks had benefitted from their agreement with the Bank. Although the trial court found that the methods used to correct the mistakes in the documents were "deplorable," the court ultimately concluded that the methods were not taken in bad faith and that the changes were neither material nor to the disadvantage of the Masheks.

deed and changed the recorded deed to check the open-end mortgage box.[5]

The Masheks' appeal presented issues regarding the trial court's grant of partial summary judgment in favor of the Bank, the grant for reformation, the award of the loan amount and interest, the grant of attorney's fees, the failure to dismiss the Bank's complaint, and the dismissal of their own counterclaims.[6] The Bank raised additional issues regarding the trial court's denial of the Bank's request to state the changes to the loan documents were not fraudulent and whether the trial court should have awarded the Bank's entire requested amount of attorney's fees.

The court of appeals reviewed the trial court's grant of partial summary judgment and conclusions of law *de novo* with no presumption of correctness. The court of appeals reviewed the decision regarding attorney's fees for an abuse of discretion.

The court of appeals focused on the trial court's grant of partial summary judgment based on its "finding that the Bank was entitled to reform the Executed Deed of Trust to conform to the Recorded Deed of Trust with the addition of the check mark indicating an open-ended mortgage." *Id.* at *12. Courts have the power to reform the terms of written agreements when the error is based on a mistake in expression "where one or both parties to a written contract erroneously believes that the contract embodies the agreement that both parties intended it to express." *Id.* (quoting *Sikora*, 212 S.W.3d at 287). But for a court to grant reformation based on a mistake in expression, the party seeking reformation must show by clear and convincing evidence that: "(1) the parties reached a prior agreement regarding some aspect of the bargain; (2) they intended the prior agreement to be included in the written contract; (3) the written contract materially differs from the prior agreement; and (4) the variation between the prior agreement and the written contract is not the result of gross negligence on the part of the party seeking reformation." *Id.* (quoting *Sikora*, 212 S.W.3d at 287–88).

The trial court concluded that the first two alterations, the naming of Breaking Bread Inc. instead of the Masheks in the deed and the notary acknowledgment in Knox County, Tennessee instead of Minnesota,

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[5] The trial court also granted attorney's fees to the Bank in an amount that would ordinarily be expected in a foreclosure action. The trial court did not specifically state that the changes to the document were not fraudulent.

[6] The court of appeals noted that the Masheks were proceeding *pro se*. *Id.* at *9.

constituted mistakes that did not evidence the intended bargain of the parties. The Masheks argued that Tenn. Code Ann. § 66-5-107 was a total barrier to enforcement of the executed deed, but the court of appeals concluded the purpose of the statute was to allow for correction that reflects the intent of the parties. The court of appeals further agreed with the trial court that the first two changes were corrections to mistakes in expression, shared by both parties, that could be reformed under *Sikora*.

With respect to the difference between the executed deed and the recorded deed involving the changed date of acknowledgement, the trial court could not determine the reason for the change but found it to be a unilateral alteration by the Bank. The notice was signed by the Masheks on December 22, 2003, but the date was later changed to December 15, 2003. The trial court granted reformation of the executed deed to December 22, 2003, and the court of appeals agreed that the change by the Bank affected neither the parties' agreement nor the validity of the deed. However, the court of appeals recognized "that the Masheks' central issue with regard to the Recission Notice is not the alteration of the date by their signatures but the manner in which the change was made" by the use of the Masheks' initials in another's hand. *Id.* at *21. The Masheks argued that the change amounted to forgery, which estopped the Bank from enforcing the agreement. Although a forged signature invalidates a deed, there must also be intent to defraud. Because the court of appeals could not find any evidence of the Bank's intent that rose to the level of criminal forgery, the entire agreement was not invalidated. Turning to the *Sikora* analysis the court of appeals concluded:

We determine that the manner in which the change was made exhibited gross negligence on the part of the Bank or its agent(s) in that the act of affixing the Masheks' initials over the altered date without authorization or notice constituted a failure to act in good faith and in accordance with reasonable standards of fair dealing. *Id.* at *22 (citing *Sikora*, 212 S.W.3d at 290). Therefore, although the deed was not affected by the change and the act was not forgery which invalidated the entire agreement, the court of appeals held that the trial court erred in granting the Bank's request for reformation of the recission notice because the alteration was the result of gross negligence.

In considering the failure to check the "Open Ended Mortgage" box on the recorded deed, the trial court ordered that both the executed deed and the recorded deed be reformed because "the effect of the October 2017 order would be that an entirely new document would be recorded."

Id. The court of appeals first noted that the trial court erred in its conclusion that the failure to check the box was a mistake because the alteration did not evidence the parties' original agreement. The trial court concluded the treatment of the error as a mistake "ultimately proved erroneous in the trial court's analysis." *Id.* at *13. However, the court of appeals found a "fatal flaw" in the trial court's ruling granting reformation because the difference was not known to Mr. Mashek at the time the change was made. *Id.* at *22. Because the error "was not the result of mutual mistake in expression," it was a unilateral mistake by the Bank. *Id.* at *23. The court of appeals further determined that the mistake was material because there are specific and unique rights available to holders of open-end mortgages.[7] The court of appeals concluded that the Bank made a material, unilateral mistake unknown to the Masheks when it failed to check the open-end mortgage box on the recorded deed. Therefore, "the Bank could not prove the essential reformation element of mutual mistake or fraud at the time of the agreement's execution." *Id.* at *24 (citing *Sikor*a, 212 S.W.3d at 288). The court of appeals reversed the trial court's grant of partial summary judgment and declared the executed deed and the recorded deed unenforceable.

In explaining that the unenforceability of the deeds did not affect the enforceability of the note, the court of appeals summarized the relationship between the executed deed and the note as "a deed of trust is an instrument which secures with real property the payment of a debt, typically evidenced by a promissory note . . . Promissory notes secured by deeds of trusts are generally considered negotiable instruments." *Id.* at *11. Because the alterations were to the executed deed and the recission notice, but not to the note itself, "the Note would remain a negotiable instrument, albeit an unsecured one, representing the agreement entered into by the parties for the repayment of the principal." *Id.* at *12. The court of appeals therefore affirmed the trial court's granting of partial summary judgment by awarding the Bank the outstanding amount of the HELOC plus interest under the terms of the note.

The court of appeals vacated the trial court's granting of the Bank's request for attorney's fees and expenses "incurred in attempting to enforce the Executed Deed of trust and the Recorded Deed of Trust." Because

[7] "A conspicuous notice concerning an open-end mortgage and the borrower's right, as displayed on the Executed Deed of Trust, is required to be on an open-end mortgage document pursuant to Tennessee Code Annotated § 47-28-104(a) (2013)." *Id.* at *24.

the court of appeals determined the deeds were unenforceable, the proper award of attorney's fees should have been awarded solely under the provisions regarding attorney's fees in the note. The court of appeals further found no abuse of discretion in the trial court's finding regarding the Bank's alterations to the loan documents but clarified that there was no finding of intent rising to the level of criminal forgery.

Any transactional attorney who prefers to not have his or her name or his or her client's name associated with an opinion that notes actions taken were "procedurally questionable and even perhaps fraudulent" and further "shock[ed] the conscience of the Court" should take great care in drafting, reviewing, and making changes to legal documents. *Id.* at *18, *22. Although it is conceivable that the Bank or title company considered the changes made to the loan documents to be scrivener's errors, due diligence demanded, at minimum, notice to the Masheks of the changes. Assuming, arguendo, that the changes to the documents were made by the title company and not the Bank, the Bank or its agents should still have reviewed the documents before and after execution. Following *Mashek*, transactional attorneys should exercise caution in passing legal documents on to third parties and allowing such documents to be recorded; Tennessee courts may have turned the page on a broad view of fixable mistakes in expression.

REAL ESTATE—DUE DILIGENCE AND REFORMATION

The Tennessee Supreme Court held that a quitclaim deed issued by single spouse could not be equitably reformed to include the wife despite a mistake when doing so would have deprived an innocent third party of properly recorded interests. *Trent v. Mt. Commerce Bank*, 606 S.W.3d 258 (Tenn. 2020).

Walker Lewis

In *Trent v. Mt. Commerce Bank*, the Tennessee Supreme Court affirmed the holding of the lower courts, but came to the decision on different, clearer grounds in determining whether a quitclaim deed should be equitably reformed when reformation would benefit parties with constructive notice of a title defect and harm the rights of creditors with recorded judgment liens.

In 2010, Adren and Pamela Greene (the "Greenes") defaulted on real estate development loans from Mountain Commerce Bank. Because of the looming possibility of foreclosure and deficiency actions, the couple sought to transfer property that they owned to limited partnerships in which they had an interest. An attorney prepared six quitclaim deeds that transferred ten parcels of property to these limited partnerships. The Greenes did not review the quitclaim deeds, but signed them on March 10, 2010.

One of the properties that was transferred to the limited partnerships was a piece of property in Morristown that the couple owned as tenants by the entirety.[1] However, when the attorney had prepared the quitclaim deed for this property, he omitted Mrs. Greene as a grantor, and as such, she did not sign the deed. This quitclaim deed, signed only by Mr. Greene, was subsequently recorded on March 18, 2010.

Subsequently, both Mountain Commerce Bank and People's Community Bank foreclosed on development property that the Greenes owned and sued to collect deficiency balances. In January of 2012, a judgment was entered against the Greenes in favor of Mountain Commerce Bank. The judgment was recorded in October 2013. In August 2012, a judgment was entered against the Greenes in favor of People's Community Bank. The judgment was recorded in March 2013.

In 2016, Scott and Ted Trent (the "Trents") purchased the Morristown property from the Greenes' limited partnership with financing from Civis Bank. In 2017, the Trents and Civis Bank learned that Mrs. Greene still had an interest in the Morristown property.[2] On March 22, 2017, both of the Greenes signed a "corrected" quitclaim deed which explained the original erroneous omission. *Id.* at 261. This updated deed was recorded one week later on March 29, 2017.

The Trents then petitioned the Chancery Court for a declaratory judgment establishing that the corrected 2017 quitclaim deed reformed the original 2010 quitclaim deed due to mutual mistake of the parties. The Trents' petition sought to have the quitclaim deed reformed to vest Real

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[1] Tenancy by the entirety is available only to married couples. This concept maintains that married couples are not individual people, but one entity, or person.

[2] Because it was a tenancy by the entirety, Mr. Greene was unable to unilaterally transfer the entire interest in the property. Instead, Mrs. Greene still retained her survivorship interest. *See* Bryant v. Bryant, 522 S.W.3d 392, 400 (Tenn. 2017); Robinson v. Trousdale Cnty., 516 S.W.2d 626, 632 (Tenn. 1974) ("[a]ny unilateral attempt [to transfer the entire property] will be wholly . . . void at the instance of the [other spouse] and any prospective purchaser, transferee, lessee, mortgagee and the like will act at his peril").

Estate Holdings—the Greene's limited partnership—with full ownership of the Property as of March 10, 2010, and free from the Banks' recorded judgment liens.[3] However, the trial court declined to reform the original deed, as it reasoned that there was no mutual mistake since Mrs. Greene was not even a party to the original quitclaim deed. The Court of Appeals affirmed. The Supreme Court also affirmed, but on different grounds.

Tennessee is rife[4] with case law addressing the equitable remedy of contract reformation. Generally, Tennessee courts have the ability to reform written instruments to accurately reflect the parties' agreement. It is an equitable remedy "by which courts may correct a mistake in a writing so that it fully and accurately reflects the agreement of the parties." *Id.* at 263 (citing Lane v. Spriggs, 71 S.W.3d 286, 289 (Tenn. Ct. App. 2001)). To remedy a mistake, the mistake must be mutual, meaning a mistake common to all of the parties to the written contract. The party seeking reformation must make a showing of clear and convincing evidence that:

> the parties reached a prior agreement regarding some aspect of the bargain;
> they intended the prior agreement to be included in the written contract;
> the written contract materially differs from the prior agreement; and
> the variation between the prior agreement and the written contract is not the result of gross negligence on the part of the party seeking reformation.

Id. at 263 (citing *Sikora v. Vanderploeg*, 212 S.W.3d 277, 287–88). The Tennessee Supreme Court noted that the lower court's reasoning regarding this analysis put the metaphorical cart before the horse. Specifically, the court stated that it need not even concern itself with whether a missing grantor may be added to a deed through reformation, because even if

[3] There was no issue of material fact in this case. The order of priority for lienholders is purely a question of law. Pursuant to Tenn. Code Ann. § 25-5-101(b)(1) (2017) and Tenn. Code Ann. § 66-26-101(2015), the Trents were low on the priority ladder, falling behind Mrs. Greene's interest and the recorded interests of both Mountain Commerce Bank and People's Community Bank.

[4] *See, e.g.*, Battle v. Claiborne, 180 S.W. 584, 587 (Tenn. 1915); Sikora v. Vanderploeg, 212 S.W.3d 277, 287 (Tenn. Ct. App. 2006) (citing Greer v. J.T. Fargason Grocer Co, 77 S.W.2d 443, 443–44 (Tenn. 1935); Tenn. Valley Iron & R.R. Co. v. Patterson, 14 S.W.2d 726, 727 (Tenn. 1929).

reformation was available as a remedy, it does not take into account the equities of the parties.

The court reasoned that since reformation is an equitable remedy, the equities of *all* parties must be considered. The court found that it should not reform a contract when the rights of innocent third parties would be adversely and unfairly affected. As the court noted, this "almost universal rule of equity" prevents the remedy of reformation when parties who acquired interests in the property between the time of the execution of the original instrument and the execution of the reforming instrument would have their rights adversely affected.[5] *Id.* at 264.

As the court had previously established, both Mountain Commercial Bank and People's Community Bank had acquired judgment liens and recorded those liens between the time of the first quitclaim deed and the corrected quitclaim deed. Both banks protected their interests and priority through such recording at the county's Register of Deeds office. The Tennessee Supreme Court further justified this rationale through a survey of case law from other states coming to the same conclusion. *Id.* at 264–65.

The court additionally dismissed Trents' argument invoking the case *Holiday Hospitality*, finding that it involved a deed of trust that had been mistakenly released, and thus dealt with a standard of canceling that deed of trust rather than the reformation of a deed at issue in the *Trent* case. *Id.* at 265 (citing *Holiday Hospitality Franchising, Inc. v. States Res., Inc.*, 232 S.W.3d 41, 47 (Tenn. Ct. App. 2006)).

Finally, the court curtly noted the Trents' own failure to conduct due diligence. The court emphasized that while both banks recorded their interests, the Trents did not, and bought the property with constructive notice of a defect in title. Thus, this constructive notice did not give them protection as bona fide purchasers for value. In Tennessee, pursuant to Tenn. Code Ann. § 66-26-102, any recorded instrument serves as notice to other parties. Here, both banks had recorded their interests several years before the Trents purchased the property. Thus, the court held that equity does not allow the court to correct a mistake—which would be detrimental to both banks—when the Trents could have avoided the issue with a simple records search.

[5] The court noted lienholders, bona fide purchasers, and others without notice who acquired intervening or vested rights.

This decision highlights the importance of due diligence. The issue and related legal expenses included in this case could have—and should have—been avoided by a simple records search.

REMEDIES—CONTRACT LICENSING AND STATUTE INTERPRETATION

The Tennessee Court of Appeals held that T.C.A. § 62-6-103(b) did not create a new, separate cause of action for an unlicensed subcontractor's suit against a contractor. The language of the statute is clear: the General Assembly only meant to limit the unlicensed subcontractor's remedy to damages that can be shown by clear and convincing proof. *Sifuentes v. D.E.C., LLC*, No. M2018-02183-COA-R3-CV, 2020 WL 4760329 (Tenn. Ct. App. Aug. 17, 2020).

Samuel Rule

In *Sifuentes v. D.E.C., LLC*, the Tennessee Court of Appeals addressed whether T.C.A. § 62-6-103(b) abrogates the common law remedy available to an unlicensed subcontractor in a dispute with another professional. The unlicensed subcontractor argued that his claims are not precluded because the General Assembly had no intention of abolishing an unlicensed contractor's remedy at common law. However, the general contractor argued that the statute eliminates common law claims, and that the claims at bar should be dismissed because the plaintiff did not strictly comply with the statutory remedy. Upon review, the Court of Appeals concluded that the trial court improperly granted summary judgement in favor of the defendants.

In 2011, D.E.C., LLC ("D.E.C") was hired by a commercial tenant to construct a bowling alley. D.E.C. subcontracted with Mr. Sifuentes, owner and operator of a sole proprietorship known as Jose's Electric. Mr. Sifuentes was hired "to install electrical wiring and lighting and bowling alley equipment and/or machinery" for a specified hourly rate. *Sifuentes*, 2020 WL 4760329, at *1. After Mr. Sifuentes and his employees began working, D.E.C. informed him that the deadline for completion was October 31, 2011. Mr. Sifuentes explained that he needed to hire additional employees and needed a higher hourly rate to complete the job in time. D.E.C. ultimately agreed and Mr. Sifuentes hired additional employees.

D.E.C. ceased paying Mr. Sifuentes' weekly invoices on September 7, 2011. Mr. Sifuentes asked D.E.C. about the outstanding invoices and was told that "he needed to complete the work in order for D.E.C. to receive payment from the general contractor." *Id.* National Resources Company ("NRC") was the general contractor. Mr. Sifuentes already had an existing contract with NRC for work elsewhere in the same building. Mr. Sifuentes informed NRC that he could not continue working on the bowling alley because D.E.C. ceased payments. NRC gave Mr. Sifuentes $33,000 to continue working and warned him that if his work on the bowling alley ceased, NRC would end their relationship. The $33,000 was not enough to continue paying Mr. Sifuentes' employees, so Mr. Sifuentes liquidated his retirement and savings accounts to complete the project. Mr. Sifuentes completed the bowling alley project by the stated deadline but was never paid by D.E.C. for any work performed after August 27, 2011. Mr. Sifuentes' unpaid invoices totaled $134,002.88.

Mr. Sifuentes brought claims of breach of contract, promissory estoppel, promissory fraud, and quantum meruit, seeking compensatory and punitive damages. D.E.C. moved to dismiss the claim pursuant to Tenn. R. Civ. P. 12.02(6), claiming that Mr. Sifuentes or Jose's Electric was an unlicensed contractor and could not recover under common law claims pursuant to T.C.A. § 62-6-103(b). The statute provides:

Any contractor required to be licensed under this part who is in violation of this part or the rules and regulations promulgated by the board shall not be permitted to recover any damages in any court other than actual documented expenses that can be shown by clear and convincing proof. TENN. CODE ANN. § 62-6-103(b).

The trial court found that Mr. Sifuentes was an unlicensed contractor within the meaning of the statute, even though he was assured by D.E.C. that it would not be a problem because he would be "operating under a licensed contractor" and to not "worry about securing a permit." *Sifuentes*, 2020 WL 4760329, at *2. As such, the trial court held that the only available cause of action was a statutory one. The trial court reasoned that the statute "eliminated all other causes of action with respect to claims by an unlicensed contractor" and dismissed Mr. Sifuentes' claims with prejudice. *Id.*

On appeal, the Tennessee Court of Appeals disagreed in pertinent part and reversed the trial court's decision. Although the matter came before the court as a Rule 12.02(6) motion to dismiss, the Court's standard of review was not under the typical Rule 12.02(6) standard of appellate review. Rule 12.02(6) states that "if. . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgement." *Id.* (citing Tenn. R. Civ. P. 12.02)). In making its determination, the trial court did not confine its review to the pleadings. Instead, the trial court looked at the entire record using extrinsic evidence, so the motion was treated as a motion for summary judgement. Thus, the appellate court's standard of review in this case was de novo and the trial court's decision was not presumed to be correct.

To determine whether Mr. Sifuentes' claims are allowed, the court had to interpret the statute at issue, T.C.A. § 62-6-103(b). The goal of statutory interpretation is to understand the General Assembly's intent. When the intent is unclear, the court looks to the plain language of the statute. Using the basic rules of statutory interpretation, the court concluded that the statute does not abrogate the common law remedy available to an unlicensed contractor in a dispute with another professional. The statute states that an unlicensed contractor "shall not be permitted to recover damages in any court other than actual documented expenses that can be shown by clear and convincing proof." *Id.* at *4. Relying on the plain meaning of the statute, the court ruled that the statute does not create a new, separate cause of action. The legislature only intended to limit the remedy available for contractors who failed to obtain a license. The Court said that "the statute is consistent with the measure of damages allowed at common law." *Id.* at *4. The trial judge read a separate cause of action into the statute, and then improperly granted summary judgement for the defendants when the plaintiff did not strictly comply with the statutory requirements of this new, separate cause of action.

The Court of Appeals ruled that there is no separate, statutory cause of action. However, Mr. Sifuentes' recovery is still limited by the statute, because he was unlicensed. As such, Mr. Sifuentes could only recover "actual documented expenses established by clear and convincing evidence." *Id.* Therefore, the Court of Appeals affirmed the dismissal of his breach of contract, promissory estoppel, promissory fraud, consequential, and punitive damage claims, because Mr. Sifuentes could not show "actual documented" damages. *Id.* However, the court reversed the trial court's decision to dismiss the quantum meruit claim because the submitted invoices are actual documented damages that comply with T.C.A. § 62-6-103(b).

The holding of this case is only relevant to unlicensed contractors and subcontractors who are dealing with other professionals, not property owners or private citizens. The holding is relevant to practicing attorneys who represent contractors or attorneys who often deal with contractors not licensed under T.C.A. § 62-6-103. It is also a cautionary tale for contractors who choose to remain unlicensed in Tennessee. Although the court allowed potential recovery of the unpaid invoices, the court dismissed all other causes of action. Thus, it is important to be licensed.

For attorneys who represent clients that are knowingly unlicensed or clients who may not comply with the strict licensing requirements, a document-retention plan is of utmost importance, particularly after this holding. If contractors miss out on work due to an issue with another professional, they should get documentation of what they would have made elsewhere. T.C.A. § 62-6-103(b) requires expenses be shown by "clear and convincing proof," so there is a chance that a court could expand this to include broader damages than just unpaid invoices. Unlicensed contractors can bring common law claims against another professional so long as they have the necessary proof of damages. Transactional attorneys need to advise contractors to get bids in writing so there is additional proof of damages if the client were to miss out on a job due to a legal claim against another professional.