COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ONE

CASE NO. 17-CI-1348
Electronically Filed

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

KKR & CO., L.P., *et al.* DEFENDANTS

OBJECTION BY THE BLACKSTONE DEFENDANTS
TO THE TIER 3 MOVANTS' MOTION TO INTERVENE

Defendants The Blackstone Group Inc., Stephen A. Schwarzman, and J. Tomilson Hill (the "Blackstone Defendants") submit this Objection to the Tier 3 Movants' motion to intervene ("Mot.").[1] The Blackstone Defendants request that the Circuit Court deny the motion.

PRELIMINARY STATEMENT

This motion to intervene represents the latest installment in the ongoing strategic misuse of the Kentucky court system by the Tier 3 Movants and their counsel. It should be rejected because it is grossly untimely; because it fails to satisfy the applicable standards for permissive or mandatory intervention; and because the claims are devoid of merit as a matter of law, rendering intervention improper and futile.

For 36 months, the first set of plaintiffs, eight members of KRS's Tier 1 and Tier 2 plans (the "Original Plaintiffs"), sought in vain to pursue purported derivative claims on behalf

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[1] While named in the proposed complaint in intervention, Blackstone Alternative Asset Management L.P. ("BAAM") is not presently a party in this suit. The Blackstone Defendants make this filing without waiver of, and expressly preserve, all defenses, including those based on lack of personal jurisdiction, and reserve all rights to seek dismissal of the Tier 3 Movants' complaint in intervention, should its filing be permitted.

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of both KRS and the Commonwealth. The Original Plaintiffs were held last year by the Kentucky Supreme Court to lack constitutional standing to bring those claims. Their claims have now been dismissed from the case with prejudice.

This was not a sudden or unexpected development. Indeed, the Original Plaintiffs' standing was in doubt from the very outset. While Defendants' original motions to dismiss (which argued lack of standing) were pending, the Kentucky Supreme Court decided *Commonwealth Cabinet for Health & Family Services* v. *Sexton*, 566 S.W.3d 185 (Ky. 2018). *Sexton* made plain that the Original Plaintiffs lacked constitutional standing. But rather than intervene then—or at any subsequent point as the case wound its way through the appellate courts—the Tier 3 Movants waited on the sidelines.

Surely, it is not because the Tier 3 Movants' counsel were unaware of the Tier 3 Movants' claims. At every turn, counsel boast of their expertise, and the vast resources they expended "developing the case concept," including "close to a thousand hours creating the original complaint" in this action. Mot. for Entry of Pretrial Order No. 1 at 15 (Feb. 15, 2021). The Tier 3 plan is no secret; it was created through the legislative process, enshrined in statute, and of course thus a matter of public record. And not just that, it is discussed extensively within the very KRS documents the Original Plaintiffs cited in their first complaint.

So there can be no doubt that counsel kept the Tier 3 Movants on the bench, as the reserve squad, in the event the appellate courts rejected the Original Plaintiffs' standing. And only after all ten appellate judges in Kentucky to consider the issue rejected the Original Plaintiffs' standing did the Tier 3 Movants' coach seek to put them into the game. But the law does not countenance gamesmanship. The law requires timely, diligent efforts to intervene.

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Now, because their first series of plays failed, the Tier 3 Movants would have Defendants and this Court engage in a do-over. They would have the parties re-litigate a host of questions anew, including constitutional and derivative standing, when those issues could have been addressed as to the Tier 3 Movants together with the Original Plaintiffs years ago. The Court and the parties should not bear the prejudice resulting from the burden of a wholly unnecessary and unfair replay.

Untimeliness and lack of diligence aside, the Tier 3 Movants' motion should be rejected because they fail to meet the Civil Rules' standards for both intervention as of right and permissive intervention.

As to intervention as of right, neither of the two criteria is satisfied. *First*, no statute gives the Tier 3 Movants the right to intervene. It is black letter law that statutes must expressly provide for a right to intervene—separate and apart from a right to sue—and the Tier 3 Movants identify no such statutory authorization, nor could they, because it does not exist in the Kentucky Revised Statutes. *Second*, the Tier 3 Movants have no right to intervene to protect any purported interests, because their interests are already being fully represented by the Kentucky Attorney General, who is seeking a recovery on behalf of the Commonwealth and KRS.

Where a private non-party seeks to intervene alongside an existing government party, the non-party must make a "very compelling" showing that the state does not adequately represent its citizens. The Tier 3 Movants have not met that high bar. Only after their unprecedented theory of taxpayer standing was conclusively jettisoned by the Kentucky Supreme Court did they attempt to portray the Attorney General as "conflicted," and unable to represent both KRS and the Commonwealth, because of a purported conflict as to where any recovery might go. This is a bold claim indeed, given that the Original Plaintiffs *for years* sought to

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represent both the Commonwealth *and* KRS, expressly disclaiming any conflict and arguing that they "in this forum, and under this Court's control, can redress the harm caused to KRS *and* Kentucky taxpayers." Opp'n to Mot. to Defer Ruling at 21–22 (Nov. 26, 2018) (emphasis added). The manufactured conflict is as meritless as it is bold. Nothing prevents KRS from participating in any recovery simply because that recovery flows through the general fisc, which, in any case, is also how any recovery obtained by the Tier 3 Movants would be handled pursuant to the Model Procurement Code. The very statute the Tier 3 Movants point to for the supposed conflict in fact provides the Court with discretion to award a portion—or all—of any judgment *to KRS* as appropriate. There is simply no showing made, much less a very compelling one, as to why the Attorney General cannot represent the interests of all KRS members in this case.

Permissive intervention is not warranted here, either. Indeed, because the Tier 3 Movants' interests are already fully represented by the Attorney General, allowing them to intervene would not only serve no purpose, it would be counterproductive because it would introduce confusion and delay into the case. It would inject needless litigation about standing and other legal issues when the Attorney General—who can achieve a complete remedy on behalf of KRS, if one were merited—has standing that is unquestioned. And the squabbling and distraction involving the Tier 3 Movants' counsel and other Original Plaintiffs' counsel (which the Tier 3 Movants predict could well recur) has been substantial. Moreover, intervention would in fact *decrease* the adequacy of the representation of KRS's interests by *increasing* the contingency fee that would be taken out of any recovery awarded by the Court to KRS.

The Tier 3 Movants' motion to intervene should also be rejected because their claims are so fundamentally flawed as to render intervention futile. This is so for at least three reasons. *First*, like the Original Plaintiffs before them, the Tier 3 Movants lack constitutional

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standing to assert their purported claims. KRS's Tier 3 plan is fundamentally akin to a defined-benefit retirement plan. The same rationales animating the Supreme Court's holding that the Original Plaintiffs lacked standing will apply to the Tier 3 Movants as well.

Second, the Tier 3 Movants also lack standing to assert derivative claims on KRS's behalf. Given the absence of any clear legislative statement allowing derivative suits on behalf of KRS, permitting three beneficiaries and their counsel to interfere with the considered judgment of accountable government decision-makers, including the Attorney General (who is prosecuting this case) and KRS (which is currently conducting an investigation of the claims asserted in this case), raises substantial separation-of-powers concerns. Nor can the Tier 3 Movants assert derivative claims without presenting a proper demand to the KRS Board—which is *not* the same board now as it was in 2017 when the Original Plaintiffs initiated this action, and which has publicly walked away from the Joint Notice filed with the Original Plaintiffs in 2018.

Third, and finally, the Tier 3 Movants' claims are time-barred. Their proposed complaint in intervention relates to conduct that allegedly occurred in 2011, over nine years ago. There is no basis to toll the applicable statutes of limitations, which bar all of their claims.

For any and all of these reasons, the Court should deny the Tier 3 Movants' motion to intervene.

BACKGROUND

This lawsuit has been vigorously litigated for approximately 38 months at every level of the Kentucky court system. It was commenced in December 2017 by the Original Plaintiffs, as a purported derivative action on behalf of KRS and the Commonwealth. In January 2018, the Original Plaintiffs filed a First Amended Complaint ("FAC"). By that time, the KRS Tier 3 plan had been operating for over four years, and KRS's Tier 3 beneficiaries had already

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received three years' worth of "upside sharing" interest based on KRS's returns. But the eight Original Plaintiffs included only Tier 1 and Tier 2 participants.

In February 2018, the numerous Defendants filed 24 separate motions to dismiss the FAC, including a consolidated motion to dismiss on the grounds that the Original Plaintiffs lacked standing to sue on behalf of KRS and the Commonwealth. Over nine months, in addition to voluminous briefing on the motions to dismiss, the parties engaged in substantial additional motion practice, including motions to strike, motions for open proceedings, motions to stay discovery, and applications for various other relief. Defendants also made initial discovery productions totaling many thousands of pages.

Just over a month after this Court held oral argument on the motions to dismiss, on September 27, 2018, the Kentucky Supreme Court decided *Sexton*. The parties then engaged in additional briefing on whether the Original Plaintiffs had standing in light of that decision. As Defendants argued in supplemental submissions in November 2018, *Sexton* confirmed that the Original Plaintiffs lacked standing to sue because they had not alleged a concrete or particularized injury to themselves or their benefits, but rather sought to sue based exclusively on purported harm to KRS and the Commonwealth. Defendants' submissions cited numerous decisions from federal courts of appeals, including the Sixth Circuit, holding that defined-benefit plan beneficiaries had no standing to sue on behalf of their pension plans absent an alleged injury to their individual benefits. *See, e.g.*, BAAM's Mot. to Defer Ruling at 6–10 (Nov. 13, 2018).

Although the Tier 3 program had been up and running for years by that point, and was a matter of public record, the Original Plaintiffs did not respond by moving for leave to amend their pleadings, including by adding or substituting new "Tier 3" plaintiffs, to try to cure the standing defects that Defendants had identified. Consistent with their position at the time

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that *Sexton* "d[id] not affect Plaintiffs' constitutional standing," and that Defendants' standing challenge was "destined to fail," Opp'n to Mot. to Defer Ruling at 1, 3, the Original Plaintiffs did not seek leave to add new allegations or new plaintiffs. Instead, they made a tactical choice to argue, as a matter of law, that the alleged injuries to KRS and the Commonwealth sufficed to confer standing upon them because "[t]hat is what Kentucky law requires to establish constitutional standing, and it is all that is required." *Id.* at 3. They then continued to press that position in both levels of the appellate process. They argued throughout those appeals that they were "not required to plead an injury to themselves to satisfy *Sexton*'s constitutional standing requirement," and rejected the notion that *Sexton* changed the law on standing in Kentucky as "nonsense." Response to Blackstone Defendants' Writ at 33, 36 (Ky. App. Jan. 31, 2019); *see also* Appellants' Brief in the Writ Appeal at 17–18 (Ky. May 28, 2019).

On November 30, 2018, this Court denied the motions to dismiss. In the proceedings that followed in the Court of Appeals and Supreme Court, the parties filed a combined 47 submissions, totaling over 4,400 pages, largely focused on the issue of constitutional and taxpayer standing. In October 2019, the Supreme Court held over two hours of argument on the consolidated appeals. Approximately nine months later, after additional motion practice, on July 9, 2020, the Supreme Court issued a unanimous 33-page decision ruling that the Original Plaintiffs lacked standing and directing this Court to dismiss the complaint. *Overstreet* v. *Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020).

On July 20, 2020, the Attorney General moved to intervene, seeking to assert the same claims against largely the same set of Defendants. Nine days later, the Original Plaintiffs moved to amend their now-dismissed complaint, seeking to file a Second Amended Complaint

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that would add three new plaintiffs, Ashley Hall-Naqy, Tia Taylor, and Bobby Estes, all members of KRS's Tier 3 plan.

On December 28, 2020, this Court denied the Original Plaintiffs' motion to amend. It held that the "ruling in *Overstreet* demonstrates that the Supreme Court intended to terminate the complaint brought by the Original Plaintiffs." Dec. 28, 2020 Order at 8. The Court rejected the Original Plaintiffs' efforts to raise new theories of standing based on their COLA benefits and insurance benefits lacking contractual protection, as "[t]hese harms existed when this suit was brought" and could have been asserted "at the start of this suit." *Id.* at 10.

The Court also granted the Attorney General's motion to intervene. The Court noted that the Attorney General is empowered by statute "to represent the Commonwealth in cases in which the Commonwealth is the real party in interest" and has "broad discretion . . . to determine whether a particular claim should be brought" on behalf of the Commonwealth and its citizens. *Id.* at 11 (internal quotation marks omitted). It held that the "Attorney General must be allowed to take over this case and pursue these claims." *Id.* at 17. The Attorney General's complaint in intervention has been filed, and is the operative complaint before the Court. The Attorney General is preparing an amended complaint, which the Court has ordered be filed by April 12, 2021, at which point the results of an independent investigation into these claims, ordered by a new KRS Board, are expected to have been publicly reported.

Despite the Attorney General's intervention asserting the same claims, on February 1, 2021, the Tier 3 Movants filed their motion to intervene as derivative plaintiffs.

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ARGUMENT

As Defendants have previously argued, this Court lacks jurisdiction to hear the Tier 3 Movants' motion.[2] But even if it had jurisdiction, the Court should deny the motion.

Kentucky law authorizes two types of intervention: intervention as of right and permissive intervention. *See* CR 24.01, 24.02. Either type of intervention is allowed only "[u]pon timely application." *Id.*; *see also Ambassador Coll.* v. *Combs*, 636 S.W.2d 305, 306–07 (Ky. 1982). Neither is warranted here.

I. The Tier 3 Movants' Motion Is Untimely

As a threshold matter, although the Tier 3 Movants bear the burden to establish that their motion is timely no matter the type of intervention, *see Farmers & Traders Bank* v. *Ashbrook*, No. 2010-CA-002213, 2012 WL 996687, at *1 (Ky. App. Mar. 23, 2012), they do not argue that it is. Nor could they even hope to meet that burden. Each of the five timeliness

[2] The Supreme Court issued an unambiguous directive to the Court to dismiss this case, stating that "we dismiss this case" and "[w]e remand this case to the circuit court with direction to dismiss the complaint." *Overstreet*, 603 S.W.3d at 251, 266. We respectfully submit, as previously argued in Defendants' Motion to Enforce the Mandate, that this direction means that the Court is without jurisdiction to do anything else, and that these Tier 3 Movants, if they seek to pursue their claims, must do so through an independent action and not through intervention in a case over which subject matter jurisdiction was never present. We acknowledge, however, that in granting the Attorney General's motion to intervene, the Court rejected this position, and we respectfully repeat it here for purposes of preserving it. It bears mention that the Tier 3 Movants argue that this black-letter jurisdictional rule is different in a derivative case, *see* Mot. at 31–35, but it is not. In a derivative case as in any other, the court lacks subject matter jurisdiction if the original derivative plaintiffs are found to lack constitutional standing, and intervention by a putative set of new plaintiffs cannot cure that lack of jurisdiction. *See Unión de Empleados de Muelles de P.R. PRSSA Welfare Plan* v. *UBS Fin. Servs. Inc. of P.R.*, No. 10 Civ. 1141, 2013 WL 12237669, at *4–7 (D.P.R. July 9, 2013) (in derivative action, denying motion to intervene by non-parties seeking to intervene as plaintiffs and dismissing the case because original plaintiffs lost constitutional standing, which "depriv[ed] the Court of its jurisdiction").

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factors Kentucky courts consider when evaluating a motion to intervene weighs against granting the Tier 3 Movants' motion. Those factors are:

> (1) The point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Hazel Enters., LLC v. *Cmty. Fin. Servs. Bank*, 382 S.W.3d 65, 68 (Ky. App. 2012) (alteration and citation omitted).

But the Tier 3 Movants' burden is even higher than this, because final judgment was entered on the Original Plaintiffs' claims, and a "party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness." *Arnold* v. *Commonwealth ex rel. Chandler*, 62 S.W.3d 366, 369 (Ky. 2001). This renders their silence on the timeliness factors all the more notable. Where, as here, it is "difficult to believe" that a proposed intervenor was unaware of earlier proceedings, permitting intervention "at this late date would only serve to encourage parties to wait to see what the [court's] ruling might be and then seek to intervene only after an unfavorable ruling." *Louisville Metro Police Dep't* v. *Baker*, Nos. 2012-CA-1109 & 2012-CA-1134, 2016 WL 837366, at *4 (Ky. App. Mar. 4, 2016) (Van Meter, J.). And that is precisely what the Tier 3 Movants attempt to do—they sat back for three years of litigation on behalf of Tier 1 and Tier 2 members, and only after its failure did they seek to assert their same claims. The post-judgment nature of this motion and the lack of justification for that timing (none exists) are, alone, sufficient to warrant denial of the motion. Analysis of the relevant factors only buttresses that conclusion:

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A. This Litigation Is Over Three Years Old and Involved Years of Contesting the Key Issue of Constitutional Standing

Because this case has progressed for more than three years, before every level of the Kentucky courts, the first timeliness factor, which is "[t]he point to which the suit has progressed," *Hazel Enters.*, 382 S.W.3d at 68, supports denial of the motion. An even "more critical factor" to the timeliness inquiry "is what steps occurred along the litigation continuum *during* that period of time." *Johnson* v. *City of Memphis*, 73 F. App'x 123, 132 (6th Cir. 2003) (emphasis added). Since the Original Plaintiffs filed their FAC in January 2018, (1) motions to dismiss have been filed and decided; (2) Defendants have produced thousands of documents in initial discovery; (3) the parties have litigated numerous discovery issues; (4) the parties have litigated two writ petitions and two interlocutory appeals, resulting in the Supreme Court's holding that the Original Plaintiffs lacked standing; (5) the Original Plaintiffs have been dismissed; and (6) the Attorney General has intervened and taken control of all of the claims once asserted by the Original Plaintiffs.

Because the Tier 3 Movants could have sought to intervene, whether in this Court or on appeal, *at any point* along that continuum, but did not, their request is far too late. *See Kirsch* v. *Dean*, 733 F. App'x 268, 275 (6th Cir. 2018) (affirming denial of motion to intervene where "the district court had already been asked to decide dispositive motions as to several of the parties' claims and counterclaims"); *Blount-Hill* v. *Zelman*, 636 F.3d 278, 285 (6th Cir. 2011) (affirming denial of motion to intervene where "extensive progress ha[d] been made in th[e] litigation," including a decision on the defendants' first motion to dismiss, discovery, and the filing of an amended complaint).

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B. The Tier 3 Movants Seek to Intervene for an Improper Purpose

The second timeliness factor is "the purpose for which intervention is sought." *Hazel Enters.*, 382 S.W.3d at 68. The purpose of the Attorney General's intervention in this case, as this Court has emphasized, is to serve the public interest of the Commonwealth and its citizens. *See* Dec. 28, 2020 Order at 11–12. The Tier 3 Movants and their counsel seek to intervene for an entirely different purpose: having lost their strategic bet to pursue their derivative claims with only the Original Plaintiffs—a decision made with the knowledge that the Original Plaintiffs' standing was doubtful and in dispute—the Tier 3 Movants' counsel seek a "do over" with a new set of plaintiffs. That the Tier 3 Movants' counsel made a strategic choice to press the Original Plaintiffs' theories of standing and lost is not a reason to allow the Tier 3 Movants' intervention now. "CR 24.01 does not function as a means for interested parties to idly await a lawsuit's conclusion in an attempt to predetermine the advantages of intervention." *South Cent. Bank of Barren Cnty., Inc.* v. *Commonwealth Bank & Tr. Co.*, No. 2011-CA-1785, 2013 WL 462267, at *2 (Ky. App. Feb. 8, 2013); *see also Pearman* v. *Schlaak*, 575 S.W.2d 462, 463–64 (Ky. 1978) (holding that trial court correctly denied motion to intervene where non-parties did not move to intervene at their earliest opportunity and instead "were seeking a free ride on the train of the [original defendant], and were left at the station" when the defendant lost). And the Tier 3 counsel's evident motivation for insisting on their duplicative presence in this suit—to pursue a presumably massive, though undisclosed, contingency fee—is certainly not recognized in the law as a proper purpose for intervention.

C. The Tier 3 Movants Knew or Should Have Known About Their Claims Since Before This Case Was Filed

The third timeliness factor is "the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the

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case." *Hazel Enters.*, 382 S.W.3d at 68. If the boasts of the Tier 3 Movants' counsel about the depth and expense of their pre-suit investigation are to be believed—including the "*thousand* hours" they spent developing the original complaint[3]—then it is impossible that they did not know about the existence of the Tier 3 program.

To be clear, the claims on behalf of the Tier 3 Movants *are exactly the same* as those pursued for years on behalf of the Original Plaintiffs, who were Tier 1 and Tier 2 members. That is not subject to dispute, because the Tier 3 Movants freely admit it: they state that their "substantive claims and the relief sought are indeed the same" as the claims and relief sought by the now-dismissed Original Plaintiffs. Mot. for Entry of Pretrial Order No. 1 at 10 n.8. The alleged wrongdoing by the Blackstone Defendants is the same. The only difference is that the same lawyers (less the Kentucky counsel with whom they had a bitter public split) now pursue the same claims, against the same parties, for a smaller group of KRS members.

But this is no secret class of KRS members unknowable to counsel for the Tier 3 Movants—counsel who profess to be uniquely qualified to pursue the case. The Tier 3 plan is established in Kentucky's statutes. It was created by enactment on July 1, 2013,[4] and applied to new participants beginning on January 1, 2014,[5] and the first set of "upside sharing interest" proceeds was credited to Tier 3 participants' accounts by June 2015.[6] The results were published

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3 *See* Mot. for Entry of Pretrial Order No. 1 at 15.

4 An Act Relating to Retirement, ch. 120, §§ 8–9, 2013 Kentucky Acts 615-16 (SB 2).

5 *See* Ky. Rev. Stat. §§ 61.597(1), § 16.583(1).

6 *See* KRS, *2015 Comprehensive Annual Financial Report* at 69 (2015) [hereinafter *2015 KRS Annual Report*], https://kyret.ky.gov/Publications/Books/2015%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf.

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annually in annual reports.[7]

It is of course possible that the Tier 3 Movants' counsel had simply never heard of the Tier 3 plan. Colloquy at the Kentucky Supreme Court certainly suggests it. Ms. Lerach, responding to a question from the Court about the Tier 3 plan, stated incorrectly that "we obviously didn't know about this *forthcoming* statutory change when we filed the lawsuit" in 2017. Ex. A (*Overstreet* v. *Mayberry*, Oct. 24, 2019 Tr. at 34:21–36:11 (emphasis added)). But if in fact—despite the volumes of public information about the Tier 3 plan, including in many of the documents cited in the original complaint—counsel for the Tier 3 Movants were unable to identify one of KRS's three plans during their thousand hours of pre-suit investigation, that simply reflects a lack of diligence that should not be rewarded by allowing intervention now.

In short, the Tier 3 Movants' and their counsel's lack of diligence in asserting their claims *alone* should preclude intervention. Instead of moving to intervene when they "knew or reasonably should have known of [their] interest in the case," *Hazel Enters.*, 382 S.W.3d at 68, which plainly existed in December 2017, the Tier 3 Movants waited over three years, which disqualifies their motion. *See Arnold*, 62 S.W.3d at 369 (in case brought by the Attorney General on the Commonwealth's behalf, private parties' motion to intervene was properly denied where they waited until after settlement, even though "significant media coverage occurred prior to and following the settlement" and the settlement's "terms were widely known"); *Am. Sav. Bank, FSB* v. *Citizens Nat'l Bank*, No. 2011-CA-325, 2012 WL 5829788, at *4 (Ky. App. Nov. 16, 2012) (affirming denial of intervention in foreclosure action

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[7] *See, e.g.*, *2015 KRS Annual Report* at 69; KRS, *2016 Comprehensive Annual Financial Report* at 43 (2016) [hereinafter *2016 KRS Annual Report*], https://kyret.ky.gov/Publications/Books/2016%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf.

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where appellant was "made fully aware of the foreclosure action and judicial sale yet took no action whatsoever to protect its interest until more than a year later").

Nor can Tier 3 Movants justify their delay by pointing to the supposed clarification of standing rules following the Supreme Court's September 2018 decision in *Sexton*.[8] *Sexton* was issued before the motions to dismiss were resolved. Defendants, who had first raised the Original Plaintiffs' lack of standing in their February 2018 motions to dismiss, filed multiple supplemental submissions arguing expressly that *Sexton* further confirmed that lack of standing. In response, the Tier 3 Movants' counsel did not seek to add new plaintiffs, but instead vociferously argued in the Circuit Court and throughout the appeals that *Sexton* was irrelevant and did not affect the Original Plaintiffs' derivative or taxpayer standing. *See generally* Opp'n to Mot. to Defer; Response to Blackstone Defendants' Writ at 34–37. That argument was soundly rejected by every Kentucky appellate judge to consider it.

The Tier 3 Movants and their counsel thus chose not to intervene when the Original Plaintiffs' standing was called into question years ago. These are not hapless plaintiffs' counsel who deserve accommodation because they were victimized by an unforeseen change in the law; they took a calculated approach to advance two unprecedented legal theories of standing, each of which were rejected. That stratagem should not entitle them to a do-over; to the contrary, their behavior should foreclose it. *See In re Bank of N.Y. Derivative Litig.*, 173 F. Supp. 2d 193, 200–01 (S.D.N.Y. 2001) (denying intervention in derivative action in which the

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[8] The U.S. Supreme Court's June 2020 decision in *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), also does not justify the Tier 3 Movants' delay. *Thole* merely applied "ordinary Article III standing analysis," *id.* at 1622, and approved the consensus view of many federal courts of appeals about the lack of standing of beneficiaries of defined-benefit plans. *See, e.g.*, *Duncan* v. *Muzyn*, 885 F.3d 422, 428 (6th Cir. 2018). Notably, the Tier 3 Movants do not attempt to justify their delay by reference to *Sexton*, *Thole*, or otherwise. In their motion, they avoid any discussion of timeliness at all.

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court found the original plaintiff lacked standing because, among other things, the "lawsuit ha[d] been pending for more than two years, and has garnered no small amount of media attention," and the movant "had notice of this action for some time"), *aff'd*, 320 F.3d 291 (2d Cir. 2003); *In re Bos. Sci. Corp. ERISA Litig.*, 254 F.R.D. 24, 35 (D. Mass. 2008) (denying intervention in ERISA action where "Plaintiffs should have foreseen that [uninjured representatives] potentially posed problems of standing that [other representative] did not present").

D. Allowing the Tier 3 Movants to Intervene Now, After Their Long Delay in Moving, Would Greatly Prejudice the Existing Parties

The fourth timeliness factor is "the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention." *Hazel Enters.*, 382 S.W.3d at 68. Here, the prejudice is manifest. Put simply, all of the issues related to the Tier 3 Movants' standing could have been litigated together with the standing of the Tier 1 and 2 members. Allowing them to intervene now—over three years later—would prejudice the existing parties by injecting a needless, duplicative and expensive "do-over" into the case. These issues could have been briefed and resolved in one step, in a single set of motions directed at plaintiffs representing KRS's Tier 1, 2, *and* 3 plans. Appeals could have been taken from this Court's decisions at one time, and considered by appellate courts in a single undertaking.

This unnecessary delay and complication from the wholly redundant do-over, which is entirely due to the Tier 3 Movants counsel's failure (whether deliberate or negligent) to advance claims on behalf of Tier 3 participants, would greatly prejudice the Court and the existing parties. *See Hazel Enters.*, 382 S.W.3d at 68 (denial of intervention appropriate where it would have "prejudiced the parties where the circuit court had already made a final determination with respect to the rights of all parties involved"); *Mason* v. *Rockcastle Cnty.*

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Fiscal Ct., No. 2012-CA-1552, 2015 WL 2358484, at *2 (Ky. App. May 15, 2015) (affirming denial of intervention where "[i]t would have required the trial court to reopen matters that it had already put to rest and would have unduly delayed the appeal of th[e] matter"); *Kirsch*, 733 F. App'x at 278 ("By sitting on the sidelines until after [the existing parties] had engaged in a months-long motions practice, including several dispositive motions, [non-party] increased the disruption associated with its proposed intervention."); *Blount-Hill*, 636 F.3d at 286–87 (affirming denial of intervention because it "would cause prejudice in the form of undue delay" and would "require a duplication of effort," and noting that, as here, "Plaintiffs, Defendants, and the public have an interest in the expeditious and efficient disposition of th[e] action").

E. The Tier 3 Movants Are Represented by the Same Counsel as the Original Plaintiffs, Which Weighs Against Their Motion

The fifth timeliness factor is "the existence of unusual circumstances militating against or in favor of intervention." *Hazel Enters.*, 382 S.W.3d at 68. It could not be clearer that such circumstances are present here. The Tier 3 Movants are represented by *the same counsel* as the Original Plaintiffs. Even though any alleged injuries to the Tier 3 Movants all existed and accrued well before this suit was commenced, "experienced" Original Plaintiffs' counsel never even *explored* whether to add these Tier 3 participants as plaintiffs, conceding before the Supreme Court that, even in the face of years-long challenges to the Original Plaintiffs' standing, they "had not had occasion" to consider the relevance of the Tier 3 plan in this case. *See* Ex. A (*Overstreet* v. *Mayberry*, Oct. 24, 2019 Tr. at 34:21–36:11). Where the original plaintiff's ability to prosecute an action has been called into doubt, as it clearly has here, counsel's lack of diligence in timely locating and presenting a substitute plaintiff is a special weight against intervention. *See Harris* v. *Vector Mktg. Corp.*, No. 8 Civ. 5198, 2010 WL 3743532, at *3–6 (N.D. Cal. Sept. 17, 2010) ("[T]he diligence of counsel for the proposed intervenors, even before

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the proposed intervenors learned of the lawsuit, should be taken into consideration because counsel for the proposed intervenors ha[d] represented [the original plaintiff] from the inception of th[e] case."); *see also Randall* v. *Rolls-Royce Corp.*, 637 F.3d 818, 827 (7th Cir. 2011) ("Intervention shouldn't be allowed just to give class action lawyers multiple bites at the certification apple, when they have chosen, as should have been obvious from the start, patently inappropriate candidates to be the class representatives.").

II. The Tier 3 Movants Cannot Intervene as of Right

Intervention as of right is justified in only two situations:

> (a) [W]hen a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1). The Tier 3 Movants do not meet either of those requirements. They have no statutory right to intervene under CR 24.01(1)(a), and no right to intervene under CR 24.01(1)(b) because their interests in this litigation are adequately represented by the Attorney General.[9]

A. The Tier 3 Movants Do Not Have a Statutory Right to Intervene

The Tier 3 Movants' claim that Ky. Rev. Stat. § 61.645(15) grants them a statutory right to intervene in this action under CR 24.01(1)(a), Mot. at 28, has not a shred of support in the statute they invoke. In its Order denying Defendants' original motions to dismiss, this Court stated that Ky. Rev. Stat. § 61.645(15) gave the Original Plaintiffs a cause of action to

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[9] Nor do the Tier 3 Movants have "a protected property interest in the retirement funds administered by KRS." Mot. at 29 n.16 (quoting Nov. 30, 2018 Opinion & Order at 10). The Court of Appeals and the Supreme Court have squarely rejected this proposition with respect to KRS's Tier 1 and Tier 2 members. *See* Apr. 23, 2019 Order Granting Petitions for Writ of Prohibition at 15–16 (Ky. App.); *Overstreet*, 603 S.W.3d at 262 & n. 79. As discussed *infra*, the same reasoning applies to KRS's Tier 3 plan.

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sue on KRS's behalf. *See* Nov. 30, 2018 Opinion & Order at 8–9. Even assuming that reasoning still applies in light of intervening law, *see infra*, a statutory right to *sue* is not the same as a statutory right to *intervene*. *See, e.g.*, *Allen Calculator* v. *Nat'l Cash Register Co.*, 322 U.S. 137, 140–41 (1944) (holding that Clayton Act's "section merely authoriz[ing] private parties to sue for relief" does not "confer[] an unconditional right of intervention"). The two rights are distinct, and it is beyond question that a statutory right to intervene must be *expressly* provided for by statute. *See Commonwealth Cabinet for Health & Family Servs.* v. *L.J.P.*, 316 S.W.3d 871, 876 (Ky. 2010) (grandparents had no statutory right to intervene in termination proceeding because "nowhere in the termination statutes is intervention mentioned"); *Carter* v. *Smith*, 170 S.W.3d 402, 406 (Ky. App. 2004) (non-party had no right to intervene in an action under Kentucky's Open Meetings Act because "nothing in that statute grants anyone any unconditional right to intervene"). The statutes governing KRS do not even *mention* intervention, let alone confer that right upon anyone.

B. The Attorney General Adequately Represents KRS's Interests

The second circumstance permitting intervention as of right is not present here, either. When an existing party adequately represents a non-party's interests, the non-party has no right to intervene. *See Roberts* v. *Estate of Bramble*, 2010 WL 3927793, at *2 (Ky. App. Oct. 8, 2010) (non-party members of LLC had no right to intervene where their "interests in the underlying lawsuit . . . [were] the same as those of [the LLC, an existing party], and therefore [the LLC] could adequately represent Appellants' interests"); *Friends of Nashville Road, Inc.* v. *Williams*, No. 2007-CA-2577, 2009 WL 1160269, at *4–5 (Ky. App. May 1, 2009) (non-profit group opposing application for development had no right to intervene where an existing party, the planning commission, had denied the application and was defending the denial on appeal).

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Here, there is already an existing plaintiff who adequately represents the Tier 3 Movants' interests: the Attorney General. The Attorney General is "the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions." Ky. Rev. Stat. § 15.020. The Attorney General is statutorily authorized to represent KRS as its legal advisor and attorney. Ky. Rev. Stat. § 61.645(11). The General Assembly has also provided that the Attorney General "shall exercise all common law duties and authorities pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment," and shall "enter his appearance in all cases, hearings, and proceedings . . . in which the Commonwealth has an interest." Ky. Rev. Stat. § 15.020. At common law, the Attorney General has "the power to institute, conduct[,] and maintain suits and proceedings for . . . the protection of public rights," and has "broad powers to initiate and defend actions on behalf of the people of the Commonwealth." *Overstreet*, 603 S.W.3d at 265 (quoting *Commonwealth ex rel. Conway* v. *Thompson*, 300 S.W.3d 152, 173 (Ky. 2009)).

The Attorney General frequently represents the interests of the Commonwealth *and* its agencies in litigation—including KRS, "a statutorily-created agency of Kentucky's executive branch." *Ky. Emps. Ret. Sys.* v. *Seven Cntys. Servs., Inc.*, 580 S.W.3d 530, 534 (Ky. 2019); *see, e.g.*, *EEOC* v. *Ky. State Police Dep't*, No. 84-62, 1986 WL 68540 (E.D. Ky. Dec. 17, 1986) (representing the Commonwealth, KRS, and other state departments and officers in an employment discrimination action), *rev'd*, 860 F.3d 665 (6th Cir. 1988); *Ky. Region Eight* v. *Commonwealth*, 507 S.W.2d 489 (Ky. 1974) (representing the Commonwealth and KRS in a suit brought by health providers seeking to opt out of participation in KRS).[10]

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[10] *See also Ebert* v. *Durant*, No. 2010-CA-741, 2013 WL 4779759 (Ky. App. Sept. 6, 2013) (representing the Kentucky Board of Medical Licensure); *Greene* v. *Ky. Bd. of Dentistry*, No. 2009-CA1533, 2011 WL 832329 (Ky. App. Feb. 25, 2011) (representing the

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In this litigation, the Attorney General represents the interests of both the Commonwealth and KRS. Dec. 28, 2020 Order at 3. The Attorney General has expressly asked the Court to provide relief not only to the Commonwealth, but *also* to KRS. *See* AG Compl. at 134–35, Prayer for Relief ¶ 6 (seeking damages for the Commonwealth as well as use of the "court's equity power to fashion such relief as is justified and necessary to benefit KRS and/or restore to KRS that to which it is entitled"). And here, the Attorney General has asserted the same claims that the Tier 3 Movants aim to assert in intervention, *compare* AG Compl. ¶¶ 249–78, *with* Tier 3 Compl. in Intervention ¶¶ 350–80, and seeks overlapping relief for alleged harms to KRS:

(1) "[D]amages for the losses incurred by KRS as a result of breaches of fiduciary and other duties, including unsuitable investments, the loss of trust assets, the loss of prudent investment opportunities and the loss of positive investment returns." *Compare* AG Compl. ¶ 248, with Tier 3 Compl. in Intervention ¶ 353.

(2) "[D]isgorgement of fees from appropriate Defendants which each received from the sale of, the continued holding of, and the management of, unsuitable hedge fund products, and the providing of certification of fiduciary standards." *Id.*

Moreover, where, as here, a *private* non-party seeks to intervene in an action controlled by a *government* party, "[i]n the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1086 (9th Cir.) (internal quotation marks and citation omitted), *cert. denied*, 540 U.S. 1017 (2003).[11]

Kentucky Board of Dentistry); *Thomason* v. *Bd. of Trs.*, 11 S.W.3d 596 (Ky. App. 2000) (representing the Kentucky Judicial Form Retirement System).

[11] *See also Stuart* v. *Huff*, 706 F.3d 345, 351 (4th Cir. 2013) (holding that private non-parties seeking to intervene failed to make a "very strong showing" that North Carolina Attorney General would not adequately represent their interests in defending the legality of a state statute, as "it is among the most elementary functions of a government to serve in a representative capacity on behalf of its people"); *Blount-Hill* v. *Zelman*, No. 4 Civ. 197, 2009 WL 10679607, at *3 (S.D. Ohio June 30, 2009) ("[I]n cases involving the

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The Tier 3 Movants have not made that showing. Instead, as is typical of their court filings, they fabricate purported "conflicts" between the Commonwealth and KRS by asserting inflammatory attacks at the Attorney General, most Defendants (and, in some instances, their counsel), and even the Commonwealth itself. Mot. at 35–39, 52–55; Mot. for Entry of Pretrial Order No. 1 at 13–23. Putting aside the histrionics, it would dignify the "conflicts" that the Tier 3 Movants describe to call them illusory. The Tier 3 Movants have put forward not a *shred* of actual evidence that the Attorney General is disabled from performing his constitutionally mandated duties in this case.

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1. There is No Conflict Between the Commonwealth's and KRS's Interests

It is rich indeed that the principal thrust of the Tier 3 Movants' attack on the Attorney General's ability to represent the interests of KRS in this case is that he also represents the interests of the Commonwealth (as if there is a meaningful distinction). Earlier in this litigation, the Original Plaintiffs took the ***exact opposite position***, arguing that they had standing to assert both derivative claims on behalf of KRS *and* taxpayer claims on behalf of the Commonwealth because "they [were] doubly harmed—and doubly motivated to maximize a recovery." Opp'n to Defs.' Mot. to Dismiss at 70 (Apr. 26, 2018). They asserted that their recovery would be "for the benefit of the Trust Funds of KRS and for the Commonwealth," and sought damages for *both* KRS and the Commonwealth. FAC ¶ 59 n.11, Prayer for Relief ¶ 4. The Tier 3 Movants' counsel saw no "conflict" then in their simultaneous representation of the Commonwealth's and KRS's interests, yet now argue that the Attorney General—the statutorily

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government . . . 'a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee . . . .'" (quoting *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976))), *aff'd*, 636 F.3d 278.

designated and duly elected "chief legal officer" of both the Commonwealth and KRS—somehow cannot do the same. They cannot have it both ways. What has plainly happened is that the rejection of their unprecedented taxpayer standing theory has caused the Tier 3 Movants' counsel to make a complete about-face—and an illogical one, at that.

By arguing that the Commonwealth and KRS have "a common interest in creating as big a pot as possible, but have conflicting interests as to how to divide that pot," Mot. at 38, the Tier 3 Movants essentially claim that the Commonwealth has no interest in securing a recovery to replenish KRS's trust assets, and is interested solely in increasing the "pot" of the Commonwealth's general fund. Not only is that argument baseless and self-serving, it is belied by the fact that the Attorney General's complaint *expressly* seeks recoveries for both the Commonwealth and KRS. *See* AG Compl. Prayer for Relief ¶ 6. And, because KRS is a state agency, the Commonwealth necessarily shares its interest in recovering any damages it has allegedly absorbed and in maximizing its assets. *See Commonwealth* v. *KRS*, 396 S.W.3d 833, 840 (Ky. 2013) (noting the Commonwealth's and KRS's shared interest in "the administration of state pensions"); *id.* at 837 (KRS is an "arm, branch, or alter ego of the state" (internal quotation marks omitted)); *see also* AG Compl. ¶¶ 236, 239 (describing KRS as a "public body" and "a component unit of the Commonwealth"). As a public pension system, KRS is "an integral part of state government." *Commonwealth* v. *KRS*, 396 S.W.3d at 837.[12] Indeed, even in the legislators' amicus brief the Tier 3 Movants submitted as an exhibit to their motion, members of the Kentucky Senate and House represented to the Supreme Court that "the Commonwealth has

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[12] KRS often describes itself as "an agency, arm, or alter ego of the Commonwealth," as have Kentucky courts. *See, e.g.*, KRS's Mot. to Remand, ECF No. 4 at 10–11, *Ky. Ret. Sys.* v. *BHEP GP I*, No. 18 Civ. 27 (W.D. Ky. June 14, 2018) (collecting cases).

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a vital interest in ensuring the financial health and viability of its public pension plans." Mot. Ex. A at 1.[13]

Nevertheless, the Tier 3 Movants try to create a conflict where none exists by arguing that KRS suffered losses distinct from those incurred by the Commonwealth and which cannot be redressed by the Commonwealth. *See* Mot. at 35–39. Of course, there were no such "losses." As the public record establishes, the Blackstone Defendants returned over $150 million in profits, net of fees, to KRS. But even if there had been losses, the Attorney General shares and represents *all* of the Commonwealth's interests—including KRS's interest in replenishing its plan assets. *See Office of the Governor*, 498 S.W.3d at 363, 382 (rejecting the argument that "the Attorney General's authority and standing to bring suit in the public interest should be limited to only those cases where there are no identifiable parties with particularized injuries," and holding that the Attorney General had standing to challenge the legality of a budget reduction that would be borne by nine state universities). The Attorney General is therefore aligned in seeking recoveries for alleged losses to the Commonwealth's fisc *and* alleged losses to KRS's trust assets, to the extent the latter set of losses are not indemnified by the Commonwealth.

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[13] The Commonwealth's and KRS's shared interest in ensuring that KRS is well-funded and well-operated is public in nature. *See KRS*, 396 S.W.3d at 837 (KRS "perform[s] [an] integral state function through the administration of the various retirement systems [within it], which is essential to the personnel function of state government and the state's political subdivisions"); *Seven Cntys. Servs.*, 580 S.W.3d at 534 ("The goal of KERS is to provide a secure means of retirement savings for the employees of the Commonwealth, its departments, agencies and instrumentalities."). As the statutorily appointed legal representative of the Commonwealth and its citizens, the Attorney General is the right person to represent that public interest. *See Commonwealth ex rel. Beshear* v. *Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016) (noting that "the Attorney General was empowered under the common law to bring any action thought necessary to protect the public interest" (internal quotation marks omitted)); *Hancock* v. *Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973) ("The Attorney General, as chief law officer of this Commonwealth, [is] charged with the duty of protecting the interest of all the people . . . .")

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Finally, it is irrelevant that the Tier 3 Movants' counsel believe themselves to have tremendous "expertise and experience," have supposedly retained "experts who have done substantial work," and intend to "vigorously pursue a no-holds-barred prosecution." Mot. at 7, 53. Putting aside the nonsensical suggestion that the Attorney General is insufficiently experienced or aggressive to fulfill his Constitutional obligations, differences among counsel in expertise or anticipated litigation strategies are irrelevant for purposes of intervention. "Representation is not inadequate simply because 'the applicant would insist on more elaborate . . . pre-settlement procedures or press for more drastic relief,' or where the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy." *United States* v. *City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (ellipsis in original) (quoting *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)). The Tier 3 Movants' suggestion that the Attorney General would "settle quickly and (relatively) cheaply," Mot. for Pretrial Order No. 1 at 11—again grounded only in speculation—is also irrelevant: "[T]he mere possibility that a party may at some future time enter into a settlement cannot alone show inadequate representation." *Kearns* v. *Cuomo*, No. 19 Civ. 902, 2019 WL 5060623, at *3 (W.D.N.Y. Oct. 9, 2019).

2. The Attorney General Can Recover for Losses to Both the Commonwealth Generally and KRS Specifically

The Tier 3 Movants assert that the Attorney General cannot adequately represent KRS's interests because, under Kentucky's "treasury statute," Ky. Rev. Stat. § 48.005, any recovery he obtains *must* be directed solely into the Commonwealth's general fund to be spent as the General Assembly sees fit. Mot. at 5, 36–37. Even if this were true, it would not help the Tier 3 Movants' case for intervention, as, under the dictates of the Model Procurement Code, any recovery obtained on KRS's behalf by the Tier 3 Movants' contingency-fee counsel must be

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handled in *exactly the same way* as recoveries obtained by the Attorney General on the Commonwealth's behalf. *See* Ky. Rev. Stat. § 45A.717(5); Ky. Rev. Stat. § 15.020.

More fundamentally, the Tier 3 Movants badly misread the treasury statute. In fact, both Ky. Rev. Stat. § 48.005 and Kentucky common law give Kentucky courts substantial flexibility to direct monetary relief to specific parties as appropriate when the Attorney General obtains a recovery on the Commonwealth's behalf.

In relevant part, the treasury statute provides that, when the Attorney General obtains a recovery on the Commonwealth's behalf by judgment or settlement:

> The Office of Attorney General may first recover its reasonable costs of litigation, as determined by the court and approved by the secretary of the Finance and Administration Cabinet. After recovering the reasonable costs of litigation, any required consumer restitution or payments shall be made. All remaining funds shall be deposited in the general fund surplus account.

Id. § 48.005(4). This Court has the authority under that provision to structure and apportion any monetary recovery so that, if appropriate, part or all is distributed directly to KRS and any remainder distributed to the Commonwealth's general fund. By its terms, the treasury statute sets out a simple, three-step procedure for the processing of a monetary recovery obtained by the Attorney General on the Commonwealth's behalf: (1) the Attorney General's reasonable litigation costs are paid out; (2) "any required consumer restitution or payments" are paid out; (3) the remainder is deposited into the Commonwealth's general fund. *Id.* The Court has ample discretion in this regard.

Again, the Court need not take our word for it—it can rely on Ms. Lerach's argument to the Kentucky Supreme Court, again at a time when the Tier 3 Movants' counsel was seeking to advance a case on behalf of both the Commonwealth *and* KRS (free from any conflicts). Ms. Lerach explained:

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> Questions have been raised about where the money goes if any money is recovered. Again, that is something -- we prayed in our complaint for a special fiduciary to oversee any recoveries returned in the litigation. And as to how and what manner the judge -- whether or not utilizing such a special fiduciary how and in what manner he places those funds. And how that distribution occurs is a matter for another day. It occurs to me that ***the trier [of] fact and the judge both are certainly capable of -- of putting whatever recovery may occur in this lawsuit into the proper hands as is determined by the judge and the fiduciary at that time.***

Ex. A (*Overstreet* v. *Mayberry*, Oct. 24, 2019 Tr. at 36:23–37:13 (emphasis added). Having lost the ability to represent the Commonwealth, counsel has apparently also lost their prior confidence in the Court to allocate any recovery appropriately using the Court's discretion under the statutes.[14]

Notably, the Tier 3 Movants fail to identify a *single* authority that would restrict the Court's ability to use the procedure under the treasury statute to apportion any recovery in this case between KRS and the Commonwealth as justice may require. Instead, they focus exclusively on the last step of the procedure, while ignoring the steps that happen before. *See* Mot. at 36, 39. But they do not dispute that the Court's ability to award appropriate "payments" under the treasury statute is wide-ranging (nor could they, in light of their argument to the Kentucky Supreme Court). In several instances, Kentucky courts, including this Court, have approved settlements between the Commonwealth (represented by the Attorney General) and private companies that either required certain payments to be made to specific funds before the remaining recovery was deposited into the Commonwealth's general fund or designated the

[14] Similarly, the Original Plaintiffs' complaint asserted that the Court had apportioning authority—they specifically requested that any recovery be placed under the control of a fiduciary appointed by the Court "so that any recovery on the taxpayer claims for the Commonwealth is used exclusively to reduce KRS['s] funding deficit." FAC ¶ 194.

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entire settlement amount to specific funds, leaving no remainder for the general fund.[15] In this case, the Court could similarly direct that "required payments" be made to KRS from any recovery obtained by the Attorney General, to account for any alleged losses borne directly by KRS, with the remainder to be paid into the Commonwealth's general fund to account for any distinct alleged losses borne by the taxpayers at large (if any).

And, even if the Court were to direct the Attorney General's *entire* recovery in this litigation into the Commonwealth's general fund, the Court would *still* have the power to designate which portions of that recovery belong specifically to KRS, and KRS would have the ability to collect those monies from the general fund. Monies that enter into the general fund are to be appropriated by the General Assembly, *see* Ky. Rev. Stat. § 48.700(8), unless they are the property of another person or entity. *See Ross* v. *Gross*, 188 S.W.2d 475, 477 (Ky. 1945) (judgment requiring payments from the State Treasury to Harlan County and county officials did not require an authorizing appropriation by the General Assembly because "the money belonged to the [officials] or the County" and "its payment into the State Treasury did not vest the State with title thereto or a right to its custody"); *see also* Ky. Rev. Stat. § 44.010 ("All claims upon the State Treasury that are authorized by law shall be paid when due by the State Treasurer to the person entitled to the amount claimed."). Thus, KRS would be entitled to whatever part of the Attorney General's recovery the Court specifically designates to KRS, whether or not those funds pass through the Commonwealth's general fund.

[15] *See* Ex. C at 10 (2019 settlement between the Commonwealth and Bayer); Ex. D at 2 (2015 settlement between the Commonwealth and Perdue Pharma); Ex. E at 12 (2015 settlement between the Commonwealth and Janssen Pharmaceutical).

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3. Allowing the Tier 3 Movants to Intervene Would Compromise, Rather than Enhance, the Adequacy of Representation of KRS's Interests

The Attorney General is far better positioned than the Tier 3 Movants to represent the interests of all KRS beneficiaries because he is subject to oversight mechanisms that do not apply to private counsel purporting to represent derivative plaintiffs—and any recovery he obtains is not subject to a contingency fee. The Attorney General is electorally accountable to the People of the Commonwealth. And if he were to enlist the help of outside counsel, the Attorney General would have to comply with a precise statutory procurement framework designed to increase public accountability and prevent counsel from taking self-interested actions that are not, in fact, in the best interest of the Commonwealth. *See* Ky. Rev. Stat. § 45A.695 (describing the requirements of the state bidding process); *Landrum* v. *Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 787–92 (Ky. 2019) (governmental entities, including the Attorney General, who enter into contingency-fee arrangements with private counsel are subject to the Model Procurement Code); Ky. Rev. Stat. § 45A.020 (stating that Model Procurement "code shall apply to every expenditure of public funds by this Commonwealth and *every payment by contingency fee* under any contract or like business agreement" (emphasis added)).

As multiple Justices stressed at oral argument in this case, when questioning the authority of the Tier 3 Movants' counsel to assert derivative claims without a state contract, the Supreme Court has "unanimously held that the elected attorney general, the highest law enforcement officer in this state, cannot enter into a contingency fee contract with private counsel without going through the hoops of the Model Procurement Code and going before the contract review committee." Ex. B (*Mayberry* v. *Shepherd*, Oct. 24, 2019 Tr. at 15:5–16:9 (Justice Hughes)); *see also* Ex. A (*Overstreet* v. *Mayberry*, Oct. 24, 2019 Tr. at 23:4–10 (Justice Hughes), 27:9–25 (Justice Keller)).

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As part of that process, the Attorney General would be required to host a competition among law firms seeking to secure the government contract, *Landrum*, 599 S.W.3d at 795, which would make it more likely that the Commonwealth secure the best and most able counsel to represent it. And a contract subject to the Model Procurement Code might not include an uncapped contingency fee, designed to reward counsel first and foremost. *Id.* (failure to place cap on fees obtained by outside counsel is relevant factor in deciding whether a contingency-fee contract should be cancelled); *see* Ex. B (*Mayberry* v. *Shepherd*, Oct. 24, 2019 Tr. at 15:18–23 (Justice Hughes: "And one of the complaints that was raised in [*Landrum*] was the contingency fee structure that had been negotiated, the absence of a cap, whether any eventual recovery -- going back to what Justice Keller is talking about, where does it go? Does it go initially to the -- to the lawyers? Who does it go to?").

The Tier 3 Movants seem to suggest—without any evidence whatsoever—that the Attorney General is a sop. That the fix is in with this case. That Defendants have some secret sweetheart deal, or will get one soon. But the Tier 3 Movants miss a critical point: even if they had evidence for any of those absurd and offensive assertions—which they do not—the Attorney General is accountable. He will stand election and rise and fall based on his conduct. By contrast, no Kentucky citizen or KRS beneficiary has elected these three Tier 3 Movants to act on their behalf. The Tier 3 Movants' private counsel are accountable to no one.[16] They neither participated in a competitive bidding process, nor were vetted through the process contemplated

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[16] For that reason, BAAM has sued the KRS Board in the Eastern District of Kentucky for violating BAAM's due process rights by permitting the continued use of contingency-fee counsel to pursue claims on behalf of a state agency without the state's supervision and proper safeguards to protect the public interest. That action has been stayed as this Court addresses whether private plaintiffs will continue to prosecute claims on behalf of KRS, but BAAM anticipates proceeding with the suit should the Tier 3 Movants enter this case.

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by the Model Procurement Code. Not even KRS has expressed its support for the Tier 3 Movants' proposed claims-in-intervention. To the contrary, KRS opposes the Tier 3 Movants' intervention, and disclaims any continued reliance on the "now-inoperable" "Joint Notice" it had filed with the Original Plaintiffs. KRS's Response to Mot. at 5 (March 2, 2021).

Put simply, the Tier 3 Movants' counsel are unsupervised, contingency-fee lawyers who try to justify their exorbitant fee arrangement by passing off wasteful, improper antics as zealous representation. Apparently, the Tier 3 Movants' counsel may stand to collect a contingency fee of *25%* of any recovery, with no cap whatsoever. As compared to the Attorney General, allowing the Tier 3 Movants to prosecute the case on behalf of KRS beneficiaries will only result in confusion, infighting, and further delay, while substantially *reducing* the recovery available to those very same absent beneficiaries the Tier 3 Movants purport to represent.

III. The Court Should Exercise Its Discretion to Deny Permissive Intervention

Permissive intervention is justified in only two situations:

> (a) [W]hen a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CR 24.02. The Tier 3 Movants do not meet the requirements for permissive intervention. They have no conditional statutory right to intervene, and their intervention would serve no purpose and greatly delay and prejudice the advancement of the case.[17]

[17] The Tier 3 Movants have no conditional statutory right to intervene for the reasons stated in section II.A, *supra*. No statute confers a right to intervene on the Tier 3 Movants, and we therefore do not discuss this portion of the test again.

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A. Allowing the Tier 3 Movants to Intervene Would Result in Undue Delay and Prejudice to the Parties

Intervention by the Tier 3 Movants would absolutely "unduly delay or prejudice the adjudication of the rights of the original parties," and should be denied for that reason alone. CR 24.02. As discussed in Section I.D, Defendants would be greatly prejudiced if the Tier 3 Movants were allowed to intervene now because of the extraordinary amount of party and judicial resources that Defendants have already expended in this lawsuit and the duplicative briefing of many already-litigated issues that will be required (and could have been avoided).

The Tier 3 Movants' involvement in the lawsuit would also unduly delay and hinder the prosecution of the claims by the Attorney General—especially in light of the divisive and vexatious tactics of the Tier 3 Movants' counsel. Federal courts have consistently ruled that the identity of plaintiffs' counsel is a relevant consideration in "determining the adequacy of representation by plaintiffs in a derivative suit." *Guenther* v. *Pac. Telecom, Inc.*, 123 F.R.D. 341, 346 (D. Or. 1987). That inquiry requires an evaluation of whether counsel is "qualified, experienced and generally able to conduct the litigation." *Id.* (internal quotation marks and citation omitted). Regrettably, the Tier 3 Movants' counsel have already demonstrated through acts and representations, time and again, that they are not suited for their representative role.[18]

[18] Examples of the Tier 3 Movants' counsel flouting the rules of the Court abound, well before their flurry of February filings in defiance of the Court's schedule and without leave of Court. They have repeatedly sought to improperly enlarge the record before the Court: from filing their "Companion Memorandum" to secure supplemental briefing that neither the rules nor this Court had authorized; to using a set of demonstratives during this Court's hearing on Motion to Dismiss that not only exclusively relied on extrinsic facts outside the record, but also contained little more than inflammatory rhetoric, innuendo, and hyperbole. *See* Resp. of BAAM to Pls.' Demonstratives Used at Hearing on Defs.' Mot. to Dismiss at 1–2, 8–9, 11–12 (Sept. 4, 2018). The Original Plaintiffs continued to lodge unauthorized filings with this Court during the pendency of the appellate proceedings, while this Court lacked jurisdiction. *See* Defs.' Obj. to Jurisdiction (Sept. 19, 2019); Sept. 25, 2019 Order. And they unsuccessfully tried the same approach to prolong briefing at the Kentucky Supreme Court. *See* Pls.- Appellants'

Most recently, they have repeatedly asserted, without an iota of factual evidence, that the Attorney General may be conflicted because he has supposedly received funds from "dark money" donors. *See* Mot. at 54–55. And they further baselessly try to link those donations to Defendants by asserting that Mr. Schwarzman is "among the largest donors to Republican causes and candidates in the country" and speculating that he has "possibly" donated to "dark money" groups. *Id*. The Tier 3 Movants' counsel acknowledge they do not actually know "whether Mr. Schwarzman or any of the other defendants were involved" in such donations, but press their smear regardless. *Id.* at 55. Their latest filings cast an even broader conspiratorial web, attacking the integrity of defense counsel, KRS leadership, the firm KRS retained to conduct its internal investigation, and all of Kentucky government. *See* Mot. for Entry of Pretrial Order No. 1 at 9–10, 14, 18, 20 n.15. The Tier 3 Movants' counsel's willingness to lodge unfounded accusations of impropriety against anyone with any link to this case illustrates that they are ill-suited to represent the interests of KRS.

This Court need not take Defendants' characterization as proof that the Tier 3 Movants' counsel are ill-suited for their proposed role: They have themselves previously acknowledged that their ability to conduct the litigation was marred by "infighting and dysfunction" which "have overtaken the prosecution of the [original] plaintiffs' case." Mot. for Appointment of Lead Counsel at 1 (Sept. 9, 2019).[19] A subset of the Original Plaintiffs, who are

Mot. to Submit New Authorities (June 2, 2020); Pls.-Appellants' Mot. for Leave to Submit a Reply (July 6, 2020); Kentucky Supreme Court Order (July 9, 2020) (denying Original Plaintiffs' motions seeking to file unauthorized submissions).

[19] *See also* Reply in Further Support of Mot. for Appointment of Lead Counsel, Brown Decl. ¶ 14 (Aug. 13, 2020) ("The power struggle resulted in repeated fights among plaintiffs' counsel that raged on for months, consuming large amounts of time – costing money needed to fund the prosecution of the case, and diverting Michelle, Bill and Jamie Baskin from the job of actually prosecuting the case.").

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also members of KRS, apparently continue to be concerned that the Tier 3 Movants and their counsel do not adequately represent their interests. *See* Reply to Resp. from Lerach Group to Mot. to Defer Rulings at 4–5 (Sept. 23, 2019). Courts have expressed concern about adequacy of representation in situations where "not all similarly situated shareholders" may have the opportunity to evaluate the adequacy of the legal representation offered and sign off on the tactical decisions of counsel chosen by the derivative plaintiffs. *Guenther*, 123 F.R.D. at 347. The prospect of future infighting about the adequacy of counsel's representation of thousands of KRS participants that would distract attention and resources from this case is thus not theoretical. Indeed, the Tier 3 Movants' counsel themselves predict that other counsel and a subset of the Original Plaintiffs "may continue their efforts to seize control of the case or disrupt its vigorous prosecution." Mot. for Appointment of Lead Counsel at 1.

For all of these reasons, the Tier 3 Movants are not adequate representatives of the interests of KRS participants, who would be better served by having the elected, accountable Attorney General as the advocate for their interests. *See Env't Def. Fund, Inc.* v. *Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) ("[A] state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.").

B. There Are No Unique Defenses at Issue That Militate in Favor of Permitting Intervention

The Tier 3 Movants also posit that intervention should be allowed because Defendants have "unique defenses" against the Attorney General that are not available against the Tier 3 Movants. Mot. at 40–52. The Tier 3 Movants cite no authority to suggest that the Court should engage in a "merits analysis" of the claims and defenses of the existing party in deciding whether to allow intervention by a non-party. In any case, the Tier 3 Movants' assertion is factually incorrect: each of the defenses they describe as "special" to the Attorney

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General is not. The Blackstone Defendants will advance each of those defenses against the Tier 3 Movants too, if the Tier 3 Movants are allowed to intervene. In particular, the Blackstone Defendants will argue—as they did with the Original Plaintiffs—that they owed no duties to KRS outside of the governing investment agreements, and that there has been no breach of those agreements. *See* BAAM's Mot. to Dismiss at 11–17 (Feb. 23, 2018). The Blackstone Defendants will argue that the Tier 3 Movants can only speculate as to any damages they may have suffered from an investment comprising 3% of KRS's overall portfolio, and that in any event the public record establishes that the investment generated substantial profits for KRS, net of fees, well in excess of KRS's agreed-upon return targets. As for the *in pari delicto* doctrine, if the Blackstone Defendants assert arguments based on that doctrine against either the Commonwealth or the Tier 3 Movants suing derivatively on KRS's behalf, both sets of plaintiffs are likely to argue that the alleged wrongdoing by Defendants should not be "imputed" to them. These defenses are not "unique" and will be asserted against the Tier 3 Movants should they proceed in this case, too.

IV. Intervention Should Be Denied Because the Tier 3 Movants Lack Constitutional Standing to Bring Their Purported Claims

While the Tier 3 Movants insist on dismissing all of standing doctrine as a "legal technicality," Mot. at 8, in fact the standing requirement of Section 112(5) of the Kentucky Constitution is a jurisdictional minimum without which the Tier 3 Movants cannot proceed with their claims. *Sexton*, 566 S.W.3d at 196. Like their predecessors, the Tier 3 Movants lack constitutional standing, and therefore should not be permitted to intervene in the Attorney General's action.[20] They have not alleged facts that would confer upon them a proprietary right

[20] The Tier 3 Movants apparently seek to intervene on behalf of all of KRS's "pension plans and insurance trusts," including the Tier 1 and Tier 2 plans. Mot. at 4. Their efforts to sue on behalf of the Tier 1 and Tier 2 plans, even after the Supreme Court has already

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in anything but the contractually promised income stream of their benefits (including the upside sharing interest). Nor have they pleaded a "certainly impending," non-speculative injury or threat to those promised benefits. *Overstreet*, 603 S.W.3d at 252, 254–55, 262. As with their predecessors, none of the so-called injuries to which they point would materialize unless KRS's plans were at impending risk of default and the Commonwealth declined to provide additional funding, *id.* at 253–54, 256, both conditions that the Tier 3 Movants still come nowhere close to alleging. *See also Thole*, 140 S. Ct. at 1622 ("[A] bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."). For this reason alone, as well as other independent reasons identified below, each of the Tier 3 Movants' "new" theories of how they were harmed has either already been rejected by the Kentucky Supreme Court in *Overstreet* or fails under the reasoning of that decision.

A. The Tier 3 Movants Are Not Part of a Defined-Contribution Plan

To escape the inevitable conclusion that they, too, lack standing, the Tier 3 Movants work hard to paint the hybrid cash-balance plan in which they participate as so distinct from the defined-benefit plans at issue in *Overstreet* that they are not governed by the normal rules of standing explained therein, or in *Thole*, and are instead bound only by case law addressing defined-contribution plans. The Tier 3 Movants go so far as to coin a new term—"contributory pension plan," Mot. at 9—to avoid the clear reality that the Tier 3 plans are *not* defined-contribution plans. But that made-up term does not change the fact that the Tier 3 Movants—unlike true defined-contribution beneficiaries—do not bear any downside risk for

held in this case that *Tier 1 and 2 beneficiaries themselves* could not sue on behalf of the Tier 1 and 2 plans, is both illogical and reflects a brazen disregard of the Supreme Court's *Overstreet* decision.

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potential losses to KRS's investments so long as their benefits are paid, and therefore have no individual property interest in KRS's plan assets.

KRS itself refers to the Tier 3 plan as a "defined benefits plan[]." *2016 KRS Annual Report* at 14. KRS states in its Tier 3 materials that the Tier 3 plan "resembles a defined contribution plan" only in that "it determines the value of benefits for each participant based on individual accounts," rather than a participant's final compensation. Tier 3 Compl. in Intervention ¶ 83. The dispositive feature of true defined-contribution plans, however, is not that the participants have individual accounts, but that those participants always capture upside gains *and*, crucially, bear downside risks of any investment—just as a trust beneficiary, shareholder, or investor would. *See Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439–40 (1999). As the U.S. Supreme Court explained in *Hughes*, defined-contribution plans are known by that name precisely because "the employer's contribution is fixed" and will not increase to make up for any investment losses experienced by beneficiaries. *Id.* at 439 (internal quotation marks omitted).

That is *not* the Tier 3 Movants' situation. A Tier 3 participant's "Accumulated Account Balance" is equal to the sum of "Employee Contributions + Employer Pay Credits + Base Interest + Upside Sharing (if applicable)." Tier 3 Compl. in Intervention ¶ 83. They never realize any losses to their account balances and are *guaranteed* an annual interest return of 4% on their individual contributions and their employer's contributions—that is, they would receive that 4% interest even in years when KRS's returns were negative. *Id.* Unlike defined-contribution plan beneficiaries, the Tier 3 Movants do not make or lose money at their own risk, as property owners would. KRS bears all of the investment risk by assuming "an obligation to make up any shortfall" in order to precisely match a Tier 3 beneficiary's account balance, whether or not the investments have lost money. *Hughes*, 525 U.S. at 440. Thus, at the time of retirement a Tier 3

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participant can expect to be paid based on his expected account balance—whether or not KRS has recorded losses on the investments that the participant's "account" participated in—because KRS must make up the difference, if any, from the general pool of assets. Under such circumstances, as the U.S. Supreme Court explained in *Hughes*, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.*

That the Tier 3 Movants receive an "upside sharing interest" when KRS's investment performance exceeds a given threshold does not make the Tier 3 plan more similar to a defined-contribution plan than a defined-benefit plan. As the proposed complaint in intervention *concedes*, the Tier 3 plan "resembles a defined benefit plan since it uses a specific formula to determine benefits." Tier 3 Compl. in Intervention ¶ 83. That formula includes a contractually agreed-upon "boost" under which, if the "Geometric Average Net Investment Return" of the entire KRS portfolio over the prior five years exceeds 4%, Tier 3 participants are entitled to receive an interest credit equivalent to 75% of the difference between that 5-year average return and the 4% benchmark rate. *Id.* But that interest credit is still a contractually promised benefit, just like the contractually promised benefits that constitute "the essence of KRS beneficiaries' right" in the traditional defined-benefit plans. *Overstreet*, 603 S.W.3d at 262 n.79; *see also Jones* v. *Bd. of Trs. of KRS*, 910 S.W.2d 710, 715 (Ky. 1995). The fact that Tier 3 participants are not entitled to the full *variable* upside, but rather *guaranteed* to receive 75% of the difference between a multi-year portfolio-wide average and a benchmark, proves that they are much more like defined-benefit beneficiaries who receive a fixed level of formula-defined benefits than they are like defined-contribution beneficiaries who bear investment risk. This conclusion is fully consistent with KRS's description of its "three different pension benefit tiers," including the Tier 3 plan, as "defined benefits plans." *2016 KRS Annual Report* at 14.

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It is also consistent with the treatment of cash-balance plans like the Tier 3 plan under ERISA, which classifies such hybrid plans as defined-benefit plans.[21] The Tier 3 Movants excerpt at length a number of federal ERISA cases that they claim support their theories of individual standing. But each of those cases involve pure defined-contribution plans. *See, e.g.*, *Boley* v. *Universal Health Servs., Inc.*, 2020 WL 6381395 (E.D. Pa. Oct. 30, 2020); *Falberg* v. *Goldman Sachs Grp.*, 2020 WL 3893285 (S.D.N.Y. July 9, 2020). If the Tier 3 plan were governed by ERISA, it would be classified as a defined-benefit plan. The classification matters. Plan participants in defined-contribution plans are able to assert plan-wide injury to demonstrate standing because, as the U.S. Supreme Court has observed, they possess a proprietary interest in segregated plan assets whose value may be affected by plan-wide conduct. *See Hughes*, 525 U.S. at 440. But here, the Tier 3 Movants still have only a contractual entitlement to a certain level of benefits from a larger asset pool, which they do not control and which—by contract—may include an upside sharing boost. Accordingly, the reasoning of *Overstreet, Sexton*, and *Thole* fully applies here, and the Tier 3 Movants cannot show individual injury absent alleging that they have received less than their contractually promised benefits. That they cannot, and do not, do.

B. The Tier 3 Movants' Theory That They Have Constitutional Standing Due to Injury to Their Upside Sharing Interest Is Unavailing

Even if considered through a defined-contribution beneficiary lens, the Tier 3 Movants' theories of standing fail. The Tier 3 Movants allege that they have suffered harm based on their supposedly diminished "upside sharing interest," Mot. at 13, but that theory is far

[21] *See* U.S. Department of Labor: Employee Benefits Security Administration, *Cash Balance Pension Plans* 2 (2014), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cash-balance-pension-plans-consumer.pdf.

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too speculative and unrealized to establish injury-in-fact. *See Overstreet*, 603 S.W.3d at 252. As the Tier 3 Movants concede, no single investment's returns determine whether a KRS beneficiary is entitled to upside sharing interest in addition to the guaranteed 4% annual interest that all Tier 3 participants receive. *See* Tier 3 Compl. in Intervention ¶ 83; *see also* Tier 3 Movants' Mot. to Amend the Compl. at 6 & n.11 (Dec. 31, 2020). In fact, receipt of this contractually agreed-upon boost to earnings is contingent on the "Geometric Average Net Investment Return" of the entire KRS portfolio over the prior five years. *See id.* Only when such average returns exceed 4% are Tier 3 participants entitled to upside sharing interest. *See* Tier 3 Compl. in Intervention ¶ 83. Yet the Tier 3 Movants nowhere allege—because they cannot—that but for KRS's investment in BAAM's Henry Clay Fund, KRS's 5-year average net return would have been higher and yielded a larger upside sharing interest rate.

Instead, the Tier 3 Movants make only conclusory allegations, unsupported by facts or numbers, that hedge-fund returns *generally* "were a drag" on KRS returns. Tier 3 Compl. in Intervention ¶ 96; Mot. at 13. The Tier 3 Movants do not allege how the Clay Fund returns—which, at 6.5% net of fees,[22] exceeded the 4% threshold for Tier 3 members to receive upside sharing—compared to the rest of KRS's portfolio, which contained many hedge fund investments and which had invested only ***3%*** of total assets in the Clay Fund. Nor do the Tier 3 Movants state where and how the relevant funds would have been invested if not the Clay Fund. They therefore do not adequately plead (and cannot ever prove) that Tier 3 upside sharing interests were actually diminished whatsoever as a result of KRS's investment with BAAM. *See Hill* v. *Vanderbilt Cap. Advisors, LLC*, 834 F. Supp. 2d 1228, 1260 (D.N.M. 2011) (denying

[22] *See* RVK, *Kentucky Retirement Systems Investment Performance Analysis: Period Ended July 31, 2016* at 7, 15 (2016) (Ex. B to BAAM's Mot. to Dismiss).

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amendment as futile where "[t]he Plaintiffs [could not] make their allegations of underfunding causation anything less than speculative or conjectural, because of the multi-faceted nature of the Fund, the economic climate in which the [challenged] investment took place, and the relatively modest percentage of the total portfolio that the [challenged] investment represents").

For similar reasons, the Tier 3 Movants' new theory of standing independently fails because they have not pleaded that the "reduced upside sharing interest" harms of which they complain are traceable to the Blackstone Defendants' conduct, rather than the performance of the many dozens of other investments in KRS's portfolio. *Hill*, 834 F. Supp. 2d at 1257.

C. The Tier 3 Movants' Other Theories of Standing, Which Track Already-Rejected Theories Once Asserted by the Original Plaintiffs, Also Fail

Lack of Inviolable-Contract Protection. The Tier 3 Movants argue that they can establish injury because their pension benefits are "guaranteed by no one." Mot. at 10 & n.11. But even if that assertion were accurate (and it is not), the lack of an inviolable-contract guarantee, without more, does not constitute a constitutionally sufficient "certainly impending" injury for at least two reasons. *Overstreet*, 603 S.W.3d at 255. Inviolable-contract protection is a backstop that only comes into play in the event of plan default. Allegations about the failure to fund a guarantee that pays benefits only upon default are simply "too speculative" to support standing on their own because the plan beneficiary "would only be harmed by [the guarantee's] absence if there were to be a default." *Krauter* v. *Siemens Corp.*, 725 F. App'x 102, 108 (3d Cir. 2018). Here, the Tier 3 Movants have not alleged that a default is "certainly impending," let alone that it has taken place. *See Overstreet*, 603 S.W.3d at 255 (noting that "[w]ithout credibly alleging impending plan termination and an inability of the employer to cover the shortfall" the Original Plaintiffs had only alleged an increased risk that the Commonwealth would have to cover such a shortfall, which does not suffice for standing). As the Supreme Court noted in

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Overstreet, "even mismanagement that results in severe underfunding still requires the realization of several additional risks beyond plan termination before beneficiaries are denied their benefits," and such a remote chain of possibilities cannot support standing because it does not establish "imminent risk of default by the plan, such that the participant's benefits are adversely affected." *Id.* at 254–55 (internal quotation marks omitted); *see also Duncan*, 885 F.3d at 428 (concluding that an injury is too speculative to confer standing where "Plaintiffs will only be harmed if the Plan runs out of money and if the TVA refuses to make up the shortfall while Plaintiffs are still receiving benefits from the Plan"). Under the Supreme Court's reasoning, the Tier 3 Movants cannot assert standing to sue based on the double-conjecture that KRS may one day default on their benefits, and that the Commonwealth may elect not to fund the deficit if that occurs. *See* KRS, *2020 Comprehensive Annual Financial Report* at 7 (2020) (stating that KRS's current actuarial projections "indicate that all benefits will be secure going forward").[23]

The Tier 3 Movants also greatly exaggerate the lack of protection of their expected benefits. Their claim that their benefits are "guaranteed by no one," Mot. at 10, is refuted by the statute on which they rely. Kentucky law only empowers the General Assembly to amend, suspend, or reduce Tier 3 benefits *prospectively* if the welfare of the Commonwealth so requires. Ky. Rev. Stat. §§ 61.692(2)(a), 78.852(2)(a), 16.652(2)(a). If the General Assembly were to reduce prospective benefits, the Tier 3 Movants' "accumulated account balance" accrued up to that point would be undisturbed. *Id.* §§ 61.692(2)(b), 78.852(2)(b), 16.652(2)(b). Although the Tier 3 Movants assert that "none" of the "Tier 3 benefits are protected," Tier 3 Compl. in Intervention ¶ 84, the complaint in intervention reproduces materials from KRS that

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[23] *See* https://kyret.ky.gov/Publications/Books/2020%20CAFR%20(Comprehensive%20 Annual%20Financial%20Report).pdf

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clearly state that "[a]ccrued benefits" for Tier 3 participants "would remain protected." *See id.* ¶ 83 ("Are my benefits protected? Accrued benefits are protected . . . ."). As a result, the General Assembly could not renege on covering already accrued benefits, even if KRS defaulted.

<u>*Insurance Benefits.*</u> The Tier 3 Movants also contend they are injured because "[t]heir unguaranteed insurance benefits are at risk of reduction or elimination by the legislature" because they are not covered by an inviolable contract. Mot. at 9. But, just as with their supposedly unprotected pension benefits, the supposed lack of inviolable-contract protection is too speculative an injury now, because it would only impact the Tier 3 Movants' entitlement to benefits if the insurance plans fail in the future. *See Krauter*, 725 F. App'x at 108. The Tier 3 Movants, however, have not pleaded that the default of the insurance plans is "certainly impending," as the Supreme Court requires. *Overstreet*, 603 S.W.3d at 252.

<u>*Individual Contributions.*</u> The Tier 3 Movants also reassert the already-debunked notion that their contributions of personal funds into the KRS plans confer standing. Tier 3 Compl. in Intervention ¶ 94; *see also* Mot. at 12. But the Supreme Court already ruled that such contributions do not create a property interest in the KRS funds because the "essence of KRS beneficiaries' right is receipt of promised pension benefits." *Overstreet*, 603 S.W.3d at 262 n.79; *see also Jones*, 910 S.W.2d at 715. Unlike in situations where beneficiaries may possess a proprietary interest, the assets that fund the Tier 3 Movants' benefits are held in one undivided asset pool and are not segregated into individual accounts, and KRS entirely bears the downside risk associated with the Tier 3 Movants' investments. No matter what, the Tier 3 Movants' personal contributions are not at risk. Thus, the personal contributions of the Tier 3 Movants do not confer upon them a property interest in KRS's assets. *See Hughes*, 525 U.S. at 440.

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V. The Tier 3 Movants Also Lack Derivative Standing to Sue on KRS's Behalf, and Recognizing Such a Right of Action Would Violate Separation of Powers

The Tier 3 Movants lack derivative standing because no statute grants them the right to sue third parties for damages on KRS's behalf. *See* Ky. Rev. Stat. § 61.645(15)(e)–(f) (conferring right to sue *the Board* only under limited circumstances); Ky. Rev. Stat. § 61.645(16) (directing "a member, retired member, or recipient" to administrative remedies).

To the extent that this Court held otherwise in its November 2018 Order & Opinion, Defendants respectfully submit that the intervening Supreme Court decision in *Landrum* undermines the Court's prior conclusion that contingency-fee counsel may step in to litigate on behalf of state agencies and the Commonwealth without complying with the Model Procurement Code. Creating a "derivative action" escape hatch for counsel to circumvent the Supreme Court's guidelines on who may represent the interests of the Commonwealth in *Landrum* would render the oversight policies in the Model Procurement Code entirely futile. *See* 599 S.W.3d at 790 ("Allowing any governmental entity to avoid the MPC's process for the procurement of a government contract by structuring its contract on some sort of contingency basis could effectively nullify application of the MPC."). If the General Assembly had intended such an outlier result, it surely would have expressed its intent via a clear and unambiguous statement authorizing private derivative suits against third parties, rather than speaking generally about suits against the Board in the provisions that this Court relied upon in its earlier decision. *See* Nov. 30, 2018 Opinion & Order at 8; *see also Landrum*, 599 S.W.3d at 791 ("If the General Assembly truly wished to allow the OAG completely to escape the regulatory mechanism of the MPC, it would have explicitly so indicated in the particular statutes that more specifically govern this situation.").

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Indeed, permitting the Tier 3 Movants to pursue claims on behalf of KRS absent a clear legislative statement would violate Kentucky's separation of powers. *See* KY Const. §§ 27, 28; *Prater* v. *Commonwealth*, 82 S.W.3d 898, 907 (Ky. 2002) ("[A] constitutional violation of separation of powers occurs when . . . one branch of government exercises power properly belonging to another branch."). Courts refrain from implying private rights of action that the legislature has not expressly provided. *See Grzyb* v. *Evans*, 700 S.W.2d 399, 401 (Ky. 1985). This rule is cognizant of the "concern, grounded in separation of powers, that [the legislative department] rather than the courts controls the availability of remedies for violations of statutes." *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990).

Such concerns are paramount here, where granting the Tier 3 Movants free rein to sue derivatively without state supervision, while the KRS Board conducts its own investigation and the Attorney General pursues *the same exact claims on behalf of KRS*, would interfere with the considered judgment of accountable decision-makers at state agencies, including the Commonwealth's chief legal officer. Had it intended a few KRS beneficiaries to be able to encroach so directly on the authority of the executive branch, the General Assembly would surely have expressly provided for such a right rather than legislating *sub silentio*. *See* KY Const. §§ 27, 28; *see also Prater*, 82 S.W.3d at 909 (statute permitting "the judiciary to exercise the purely executive function of granting parole" was unconstitutional).

VI. Intervention Should Also Be Denied Because the Tier 3 Movants Have Failed to Present a Proper Demand to the KRS Board

The Tier 3 Movants cannot sue derivatively on behalf of KRS, and should not be permitted to intervene to do so, for the additional reason that they failed to make a proper demand on the KRS Board. Delaware law, which Kentucky courts look to on questions of

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derivative standing,[24] requires a new demand on a board of directors for any claims that are not "already validly in litigation" if the composition of the board has changed by the time such claims are brought. *Braddock* v. *Zimmerman*, 906 A.2d 776, 786 (Del. 2006). The claims asserted by the Original Plaintiffs, and now pressed anew by the Tier 3 Movants, were never validly in litigation and thus cannot shield the Tier 3 Movants from the demand requirement. *Braddock*—which the Tier 3 Movants misread in their Reply in Further Support of their Motion to Amend—shows why:

> A complaint that is dismissed without prejudice but with express leave to amend is nevertheless a dismissed complaint. . . . ***Following such a dismissal, . . . the complaint is not validly in litigation***. Consequently, . . . the . . . demand inquiry must be assessed by reference to the board in place at the time when the amended complaint is filed.

906 A.2d at 786 (emphasis added).

That is precisely the situation the Tier 3 Movants are now in, except the complaint upon which they rely to argue that demand is excused—the Original Plaintiffs' complaint—was dismissed *with prejudice* and *without leave to amend*. Indeed, the rule that a dismissed complaint presents claims that were not validly in litigation should apply with even more force where the Court, as here, *never* had jurisdiction over the original complaint because the initiating parties lacked standing. *Overstreet*, 603 S.W.3d at 266; *Sexton*, 566 S.W.3d at 196. Thus, the Tier 3 Movants must make a new demand on the KRS Board because none of their claims were validly in litigation following the dismissal of the previous pleading—or, indeed, ever. *See, e.g.*, *In re Nyfix, Inc. Derivative Litig.*, 567 F. Supp. 2d 306, 311 (D. Conn. 2008) (demand required

[24] *See Allied Ready Mix Co. ex rel. Mattingly* v. *Allen*, 994 S.W.2d 4, 8 (Ky. App. 1998); *Smith* v. *Tarter*, 305 F. Supp. 3d 733, 741–42 (E.D. Ky. 2018).

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because claims were not validly in litigation where plaintiffs lacked standing when prior pleading was filed).

The Tier 3 Movants have argued that this Court's previous decision on the issue of the demand requirement as to the Original Plaintiffs precludes it from enforcing that requirement against them now. Mot. for Entry of Pretrial Order No. 1 at 10 n.8. But this Court's decision rested, at least in part, on the finding that the Original Plaintiffs had the right to sue on behalf of KRS as trust beneficiaries. Since then, the Kentucky Supreme Court has held that they did not. *Overstreet*, 603 S.W.3d at 261.

With respect to the second ground upon which the Court's decision rested—its conclusion that Ky. Rev. Stat. § 271B.7-400(2) does not apply to KRS—the Blackstone Defendants respectfully submit that the Court's original decision should be reconsidered. As explained above in Section V, allowing contingency-fee counsel to circumvent the processes outlined in the Model Procurement Code by purporting to bring "derivative" actions would run counter to the policy objectives the Supreme Court reaffirmed in *Landrum*. And more generally, allowing the Tier 3 Movants to intervene without making demand on the current KRS Board would usurp the Board's authority to make considered decisions in the best interest of the agency and taking into account all factors, including exposure to Defendants' breach of contract claims based on the agreements governing these investments.

Importantly, there has been *no* showing that such a demand would be futile. The Tier 3 Movants plead no "particularized allegations" sufficient to demonstrate that *any* of KRS's current Board members would be unable to act independently or disinterestedly if the Tier 3 Movants demanded action of them, much less a majority of the Board, as required. *See White* v. *Lunsford*, No. 2005-CA-001775, 2006 WL 2787469, at *4 (Ky. App. Sept. 29, 2006). Their

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efforts to paint KRS's Executive Director David Eager as a "corrupting influence," Mot. for Entry of Pretrial Order No. 1 at 18, are both unsupported by any factual allegations and irrelevant, as he is not a member of the KRS Board.

Indeed, while the Court indicated previously that KRS's "Joint Notice" supporting the Original Plaintiffs' claims might have met the demand requirement, the KRS Board in the Joint Notice expressly considered the possibility that the Original Plaintiffs would be adjudged to lack standing, and reserved all rights available to it in those circumstances. Apr. 19, 2018 Joint Notice to the Court and Parties at 4. Now that the Original Plaintiffs' claims have been dismissed, KRS has made clear that its prior Joint Notice is "no longer operable" and the Tier 3 Movants' reliance on it is "misplaced." KRS's Response to Mot. at 3, 5. KRS is conducting an investigation into the claims, presumably to determine how best to proceed on behalf of its beneficiaries. Under settled corporate law, "[a] decision whether to bring a lawsuit or refrain from litigation on behalf of a corporation is a decision concerning the management of a corporation," and "part of the responsibility of a board of directors." *Allied Ready Mix Co.*, 994 S.W.2d at 8. As the authority of the KRS Board is "predominant" over any right of any purported derivative plaintiff to act on behalf of KRS, the Tier 3 Movants "should not be permitted to intermeddle or act coextensively with the independent arm of the board of directors" while it investigates these claims. *Pompeo* v. *Hefner*, 1983 WL 20284, at *2 (Del. Ch. Mar. 23, 1983). The Tier 3 Movants' claims thus *cannot* proceed while that investigation is ongoing—as KRS notes, "intervention by the Tier 3 Individuals at this time, with the investigation ongoing, would be premature and would run contrary to the procedures in place for derivative actions." KRS's Response to Mot. at 7; *see In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1211

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(Del. Ch. 2002) (recognizing the court's "duty to stay derivative actions at the instance of a special litigation committee, 'pending the investigation and report of the Committee'").

Because KRS is a state agency whose Board members are elected and appointed by elected officials, however, the stakes are far greater than in an ordinary derivative suit—permitting the Tier 3 Movants, and ultimately this Court, to intervene and undermine the KRS Board's decision-making authority without requiring the Tier 3 Movants to issue any sort of demand on the Board, or allege why such a demand would be futile, would raise substantial separation-of-powers concerns and intrude on KRS's prerogative to decide in the first instance what is in the best interest of its constituents. *See Appalachian Racing, LLC.* v. *Commonwealth*, 504 S.W.3d 1, 6 (Ky. 2016) (Floyd Circuit violated separation-of-powers doctrine by issuing order prohibiting Horse Racing Commission from considering license application because there was no role for judicial review until license was issued).

VII. Intervention Should Be Denied Because the Tier 3 Movants' Claims Are Time-Barred and Therefore Could Not Withstand a Motion to Dismiss

Even if the Tier 3 Movants met the requirements of intervention, which they do not, "the[ir] motion must be denied as futile if the applicable statute of limitations bars the claim." *Cervetto* v. *Powell*, No. 1:14-CV-00075, 2016 WL 3211983, at *2 (W.D. Ky. June 9, 2016). It does here. The complaint in intervention alleges no new conduct by or involving the Blackstone Defendants. All of the claims asserted by the Tier 3 Movants are based on conduct that allegedly occurred prior to August 2011, *over nine years ago*. It is evident from the face of the complaint in intervention that the Tier 3 Movants' breach-of-fiduciary-duty claims accrued at the time of the purported breach, in 2011. *Middleton* v. *Sampey*, 522 S.W.3d 875, 878 (Ky. App. 2017). They are thus barred by the five-year statute of limitations applicable to such claims. Ky. Rev. Stat. § 413.120(6). The Tier 3 Movants also cannot take advantage of the relation-back

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doctrine because the Original Plaintiffs lacked standing at the outset. *See Zurich Ins. Co.* v. *Logitrans, Inc.*, 297 F.3d 528, 531–32 (6th Cir. 2002).

Similarly, the Tier 3 Movants' claim for civil conspiracy is governed by a one-year statute of limitations. *See* Ky. Rev. Stat. § 413.140(1)(c). The limitations period has run from the time that the "last overt act performed in compliance with the objective of the conspiracy has been accomplished." *Fisk* v. *Toyota Motor Mfg. Ky., Inc.*, No. 2014-CA-001262, 2017 WL 244087, at *6 (Ky. App. Jan. 20, 2017) (internal quotation marks omitted). The complaint in intervention does not allege any act whatsoever taken by the Blackstone Defendants in the last year, nor could it. It is a matter of public record that KRS decided to wind down its investment with BAAM as of February 2016—five years ago last month—and the complaint in intervention alleges no conflicts of interest or any other misconduct by the Blackstone Defendants after that date.

CONCLUSION

For the reasons set forth herein, the Blackstone Defendants respectfully request the Court deny the Tier 3 Movants' motion to intervene.

Respectfully submitted,

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EXHIBIT A

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AUDIO TRANSCRIPTION OF ARGUMENTS HEARD

ON OCTOBER 24, 2019

IN THE CASE OF

RANDY OVERSTREET, ET AL., VS.

JEFFREY C. MAYBERRY, ET AL.

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1 action, other types of derivative actions where the
2 Kentucky statutes specifically recognize it. So how do
3 we get to that here?
4 MS. LERACH: Well, I would say -- and just
5 as is identified in the briefs of the Amicus that we
6 attached to our omnibus brief, the standing is common
7 law. It's trust beneficiary. It's also in the
8 statutory scheme which adopts the common law. They
9 didn't aggregate the common law with the adoption of
10 61.645. If they wanted to do so, the legislature is
11 required to specifically and directly do so. They did
12 not here.
13 So there is derivative standing for a trust
14 beneficiary or a defined benefit plan beneficiary to
15 bring this kind of lawsuit. And typically what happens
16 in the context of a derivative lawsuit, a corporate
17 derivative lawsuit, is the plaintiff makes a demand on
18 the entity, and depending on how that entity
19 responds -- or they argue demand futility. None of
20 that has happened here. None of that is provided for
21 in the statute.
22 But what did happen here is something
23 unprecedented in the law. The derivative entity, KRS,
24 came in and affirmatively supported this law, which
25 they said they could not bring on their own for

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1 manpower, for resources, for expertise, for a variety
2 of reasons. They made an independent analysis of the
3 lawsuit --
4 JUSTICE HUGHES: I guess, again, I go back
5 to -- I'm having trouble getting past Landrum versus
6 Beshear where we've told the duly elected attorney
7 general of the state that he can't enter into a
8 contingency fee contract to recover on behalf of the
9 state unless he goes through the Model Procurement Code
10 and gets the blessing of the contract review committee.
11 And so I'm bothered by that missing piece
12 of the puzzle, and I'm -- I continue to be bothered by
13 this -- I'll say it again -- four of us make a
14 decision, and two of us get sued. Explain that to me.
15 I've never seen it before.
16 I've participated as an attorney on both
17 sides of corporate litigation, and when you sue the
18 board or where you represent the board, it's everybody.
19 They were all in on it. They either all breached or
20 they all didn't, unless you've got somebody taking a
21 bribe or doing something on the side.
22 So that's -- that's a real question to me.
23 If -- if this is going to go forward, it seems to me
24 that everybody who is responsible as a trustee should
25 be named, and not just a select few.

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1 MS. LERACH: Thank you. Specifically,
2 we -- we spent a long time investigating the facts and
3 to determine which individuals at the fund we believe
4 were most culpable, most responsible. Who was there
5 for each of the critical decisions that we say were
6 violations? Who was there with historical knowledge?
7 Who was there in 2006 when -- when the board rejected
8 hedge funds as too risky? Who was there in 2019 when
9 they were warned to do due diligence? Who was there in
10 2010 when they received the bombshell that said "don't
11 go risky"? And who was there in 2010/'11 when they did
12 just that?
13 Contrary to all the warnings they were
14 provided and their actual experience in the Arrowhawk
15 and Camelot adventures, they did the very thing they
16 were warned not to, so we looked at those who were
17 there. You know, I -- with respect, if we had named
18 everybody who was there for the entire time, then we
19 would be accused of overnaming. We looked at the
20 individuals who we believed were there and had made the
21 decisions that were critical.
22 JUSTICE: (Inaudible) decisions by
23 themselves, you'll acknowledge that?
24 MS. LERACH: I will acknowledge they're
25 part of a board, but certain people had more knowledge.

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1 Certain people were more engaged, made -- made
2 representations at meetings. And there were conflicts.
3 Certain individuals were conflicted. These conflicts
4 were identified in staff documents but never cleared at
5 the board level. Those who know about the conflict
6 versus those who may not know, there's a difference in
7 the culpability, and we're just at the pleading phase.
8 JUSTICE KELLER: But that's my point, too.
9 Before any discovery, because I think these are all out
10 on 12(B), you're certain about who the culpable
11 characters are? I mean, to me, I did a lot of complex
12 tort litigation and, you know, during discovery is when
13 you actually find out what really happened. Sometimes
14 people get brought in; sometimes others get let out.
15 How is it that you're so certain right now
16 about who is culpable in this scheme?
17 MS. LERACH: That is an excellent question.
18 You're absolutely right. We know -- those who were
19 named in the complaint were those who, based on our
20 preliminary investigation, were those we believe to be
21 culpable.
22 Of course, we have yet to even begin
23 discovery in earnest. So, yes, that will change. And,
24 in fact, documents that we recovered and uncovered in
25 the interim period have already altered that process.

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1 We may add -- if we find out someone truly has done
2 nothing wrong, of course we're going to do the right
3 thing. But we are at the front end, and this is based
4 on the investigation that we did prior to the filing of
5 this complaint. So, yes, it may change as we proceed
6 forward, just like I hope the facts will be developed
7 and established, as they should be.
8 Quite frankly, you know, this is the kind
9 of motion that's typically heard in interlocutory
10 appeal on immunity after the facts have been developed,
11 after a summary judgment has been denied, for example.
12 We don't have all of the facts yet, and the case will
13 continue to unfold as we develop and discover those
14 facts, and consistent with the facts that we discover.
15 We do know quite a lot, and what we alleged
16 at the front end has been confirmed throughout the
17 process in limited documentation that we have acquired
18 in the interim. So we feel confident, very confident
19 about the allegations. And I would remind you that the
20 allegations are not just the -- the subject of the net
21 worth of months of investigation, but they are also
22 verified by a former captain of the state police who
23 led public corruption and financial fraud
24 investigations and a sitting state court judge, and
25 they are confirmed by some of the highest elected

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1 officials in the state who repeat that which we alleged
2 in our complaint.
3 And, as I said before, in what to me has
4 never -- to my knowledge has never before occurred in
5 the context of a derivative action, the derivative
6 entity, KRS, came in and affirmatively supported the
7 plaintiffs, this lawsuit, and our bringing of this
8 lawsuit.
9 JUSTICE KELLER: And let me ask you about
10 that, to follow up on Justice Hughes' problem, because
11 I have the same one, about Landrum v. Beshear. I don't
12 want to use the word hypocrisy, so maybe I'll use
13 inconsistency.
14 Some of the very parties that argued so
15 strenuously for the Model Procurement Act as oversight
16 for the attorney general's office are here arguing that
17 this is a correct vehicle for KRS to move forward
18 through. I find that inconsistent, at best.
19 I mean, some of the same thing that you
20 just argued on behalf of -- "KRS can't bring this, lack
21 of funds, lack of ability, need more expertise," I
22 think we heard that in Landrum v. Beshear, and you know
23 how this court came down in that case.
24 Please distinguish for us why it's okay now
25 when it wasn't okay then.

1 MS. LERACH: That case is really about the
2 amount of oversight with respect to fees decided upon
3 in a contract by the attorney general. So I would say,
4 firstly, we weren't hired by KRS or the attorney
5 general. We acted on behalf of the plan
6 beneficiaries --
7 JUSTICE KELLER: But you're telling us that
8 KRS is the real party.
9 MS. LERACH: That's right.
10 JUSTICE KELLER: I mean, you've said it at
11 least 30 times here today between and you Ms.
12 Oldfather. So we've got to move beyond that.
13 MS. LERACH: It's not --
14 JUSTICE KELLER: I mean, this is where the
15 rubber meets the road.
16 MS. LERACH: It's not clear to me, with
17 respect, how that case and that procurement code would
18 affect this case and this litigation, but I would
19 repeat what Ms. Oldfather said, that in a derivative
20 action, it is the judge who stands in a matter in the
21 equity and oversees every aspect in this case to a much
22 greater degree than a judge does in another kind of
23 case.
24 For example, it isn't just settlement
25 amounts that must be approved by the Court. Regardless

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1 general will bring this action, they have common law
2 rights, they have trust beneficiary rights, there is a
3 statutory scheme that says a person may bring, and then
4 there is the joint notice.
5 And, moreover, again, that's the derivative
6 standing -- the prudential standing analysis, which
7 isn't quite clear as part of this trustee and officer
8 interlocutory appeal, but on the constitutional
9 analysis, they are the true plaintiff. The true
10 plaintiff is KRS, and it's analyzed from their
11 perspective.
12 JUSTICE VANMETER: Is there a range of time
13 over which the actions occurred, or is it limited to a
14 discrete point of time, or was it 2009 until 2016 or --
15 does your complaint delineate that?
16 MS. LERACH: The actions really begin in
17 2009 forward. And let me give you four examples of
18 what we say in the complaint the trustees did wrong.
19 First of all, in 2010, they were, in fact,
20 trapped in an actuarial and demographic vice. This was
21 true of many public pension funds. Many had lost money
22 in the great financial crisis. But this didn't have to
23 happen. KRS wasn't alone. It's the decisions that the
24 trustees made in response to that reality that made the
25 difference between -- at that time and since then that

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1 made the difference between where they were then and
2 where they are now.
3 Other public pension funds who had dropped
4 as low as 50 and 60 percent, and after that crisis are
5 now back up at 80 and 90 percent. But these trustees
6 were in that same vice, and they were facing the
7 reality of investment losses, more retirees, fewer new
8 employees.
9 And then they get a report, and that report
10 tells them "Do not increase your risk. Do not take
11 more risk." And they get a lurid warning that the
12 funding faces an appreciable risk of running out of
13 assets over the next several years and that adoption of
14 a significantly more aggressive investment strategy
15 substantially increases the chances of a catastrophic
16 event of running out of assets.
17 And they ignored those warnings. They took
18 the very risky step of then going into the hedge funds,
19 which were extremely risky based on what the hedge fund
20 seller said.
21 JUSTICE VANMETER: (Inaudible) I think it's
22 2014 they -- or 2013 they enacted the hybrid cash plan.
23 So in the hybrid cash plan, those returns of their --
24 the benefit is actually tied exactly to the returns.
25 So that's what I'm asking, is that over a

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1 course of period that would have extended to the hybrid
2 cash plan beneficiaries?
3 MS. LERACH: I'm not sure I understand your
4 question, Justice VanMeter. Sorry.
5 JUSTICE VANMETER: Did the course of
6 conduct that you're alleging these trustees did, did it
7 extend past 2014, 2015 --
8 MS. LERACH: It did.
9 JUSTICE VANMETER: -- and 2016?
10 MS. LERACH: It went through 2016. Yes.
11 JUSTICE VANMETER: Okay. That's my
12 question.
13 MS. LERACH: So, again, the first -- the
14 first step is truly ignoring a series of very serious
15 warnings, taking a very risky step, and then, most
16 importantly, not telling the truth about that risky
17 step.
18 JUSTICE HUGHES: Let's go back to Justice
19 VanMeter's question for a minute because there is that
20 nuance in the sense that there are people who have a
21 defined benefit, and then there are people after '13,
22 or whatever the year is.
23 Are any of those people part of this case?
24 MS. LERACH: You know --
25 JUSTICE HUGHES: Because the descriptions

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1 that I've read of the Mayberry 5 -- I don't know that
2 I've seen any of the other three, but all of -- some of
3 those people are already in retirement, and they're all
4 people whose employment, as I recall, predate 2013.
5 MS. LERACH: Yes.
6 JUSTICE HUGHES: So they would be under the
7 defined benefit plan.
8 MS. LERACH: Yes. That's correct.
9 First of all, we obviously didn't know
10 about this forthcoming statutory change when we -- when
11 we filed the -- excuse me.
12 When we filed the lawsuit, we didn't -- the
13 plaintiffs that we brought the lawsuit on behalf of
14 were all defined benefit. None of them had changed
15 and/or altered. They were not new employees. They
16 were longstanding employees and/or retired employees.
17 That is correct.
18 We have not had occasion yet to look at how
19 and in what manner that might change the case, the
20 litigation, and/or on whose behalf any recovery would
21 be. So that is something for us to look at down the
22 road.
23 I do want to address some concerns that
24 were raised in the prior argument about what happens
25 down the road. Questions have been raised about where

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1 the money goes if any money is recovered.
2 Again, that is something -- we prayed in
3 our complaint for a special fiduciary to oversee any
4 recoveries returned in the litigation. And as to how
5 and what manner the judge -- whether or not utilizing
6 such a special fiduciary how and in what manner he
7 places those funds. And how that distribution occurs
8 is a matter for another day.
9 It occurs to me that the trier fact and the
10 judge both are certainly capable of -- of putting
11 whatever recovery may occur in this lawsuit into the
12 proper hands as is determined by the judge and the
13 fiduciary at that time.
14 JUSTICE LAMBERT: Counsel, I have a
15 question about -- I think it was a joint agreement, a
16 joint notice to the Court and parties that was entered
17 into by counsel for KRS and plaintiffs' counsel, and
18 I -- I see that here.
19 Is there anything in writing from the
20 attorney generals about the plaintiffs' counsel here
21 representing the members on behalf of the attorney
22 general?
23 MS. LERACH: I can't recall if the -- if
24 the letter -- we did receive a letter from the attorney
25 general. I am not certain whether we attached it to

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1 the complaint. But the letter simply said that the
2 attorney general was unable to bring the claims for a
3 variety of reasons, and I believe -- and again, I'm
4 going off the top of my head. I wasn't prepared,
5 necessarily, for this today -- but that -- that from
6 his perspective, counsel with expertise and securities
7 in derivative litigation was important to bringing the
8 lawsuit. That's a paraphrase, and a rough one. Please
9 don't hold me if I've gotten that not entirely right.
10 Yes, but is that -- that's the question?
11 The joint notice was truly remarkable. Again, it
12 doesn't -- the joint notice can't confer Article III
13 standing, but I believe a proper analysis under Sexton
14 as to who the true plaintiff is takes care of that
15 question.
16 On this side of the equation, we're simply
17 talking about derivative standing, essentially. We
18 have -- as Ms. Oldfather said, there are many quivers,
19 and we believe we have standing under each and every --
20 and remember, at the end of the day, what these
21 defendants are saying: Well, there can be no claim
22 because neither KRS nor the AG wanted to bring one.
23 There's no right to bring such an action under common
24 law, trust law, the statutory scheme, or the joint
25 notice, and any remedy is a little bit confusing as to

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EXHIBIT B

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AUDIO TRANSCRIPTION OF ARGUMENTS HEARD
ON OCTOBER 24, 2019
IN THE CASE OF
JEFFREY C. MAYBERRY, ET AL., VS.
HON. PHILLIP J. SHEPHERD, ET AL.

SOERGEL ABELL ARNOLD & DAVIS, LLC
COURT REPORTERS AND VIDEO SERVICE
2950 BRECKENRIDGE LANE, SUITE 11-A
LOUISVILLE, KENTUCKY 40220
(502) 459-4000 (800) 330-4098
FAX: (502) 459-4003 EMAIL: INFO@KYDEPO.NET
WEB: KYDEPO.NET

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1 have a -- have a position that's orders of magnitude
2 higher than a beneficiary. They're a defined benefit
3 recipient, and they have, right under the statute, an
4 inviolable contract.
5 So they have a contractual right. They're
6 not like a beneficiary whose interest is going to rise
7 and fall as the corpus of the trust expands or
8 contracts or as the income ebbs and flows. They're
9 promised, under an inviolable contract, a defined
10 benefit.
11 So I'm kind of mystified about the idea
12 that we would give them beneficiary status, and
13 especially because of the sixth circuit, fifth circuit,
14 and other circuits across the country that have
15 recognized in other states that a defined benefit
16 recipient is not a common law beneficiary because they
17 don't have an equitable interest in the trust.
18 MS. OLDFATHER: Thank you for bringing that
19 up, your Honor. Those are ERISA cases. Those are all
20 ERISA cases.
21 JUSTICE HUGHES: Not all, but okay.
22 MS. OLDFATHER: Well, I'm sorry if I'm
23 misstating it. I'm not doing it intentionally. I wish
24 I could sit down right now and pull out one that
25 wasn't. But they are not Kentucky cases, and -- and

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1 most of them are ERISA classes. In fact, most are
2 class actions.
3 But what we have, first of all, is we've
4 got elements of the benefit that are not part of an
5 inviolable contract. We have COLA. The Court can take
6 judicial notice of that. You've certainly heard plenty
7 of cases on that. Cost of living increases, health
8 insurance, those things rise and fall with the amount
9 of money that is in the fund.
10 We have alleged in our complaint, which is
11 to be taken at truth -- as true at this point, that the
12 trust funds have been impaired by the actions of all of
13 the defendants. So for the reasons that you
14 enumerated, Justice Hughes, and using your own words,
15 that they are a class or level above beneficiaries,
16 that is enough for the review that's here today, the
17 review that's here today of constitutional standing.
18 Now, the fine points, how this cake bakes
19 up, is another appeal on another day, hopefully after
20 we've gotten a nice, big verdict for the commonwealth.
21 But right now we are looking at the question of what
22 was alleged, and we have alleged that the funds have
23 been damaged by the actions of the defendants. I would
24 also like to make a quick allusion to the observation
25 of both Justice VanMeter and you, Justice Hughes, that

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1 61.645(15)(f) only applies to the trustees. We don't
2 quarrel with that. It does.
3 We have an aiding and abetting claim
4 against these defendants in the 232 appeal, which I'm
5 here addressing, that they aided and abetted those
6 trustees in violations of the -- in violation of those
7 duties, and under Steelvest there is no doubt that an
8 aider and abetter stands in exactly the same position
9 of liability as the entity whom it aided and abetted.
10 Yes, Justice Keller?
11 JUSTICE KELLER: You mentioned a nice, big
12 verdict, so I'm going to jump ahead a little bit
13 because this is probably too simplistic, but it just
14 escaped me why KRS isn't a party. We have a lot of
15 fine lawyers arguing constitutional and statutory
16 standing, but, you know, at the end of the day, I think
17 I read they are a nominal defendant. Is that correct?
18 MS. OLDFATHER: They are literally a
19 defendant.
20 JUSTICE KELLER: Okay. So -- so if -- if
21 we find you have standing, it goes back, it moves
22 forward, we go to jury trial, KRS remains a defendant,
23 we have comparative negligence in the commonwealth. I
24 mean, are we talking about a scenario where KRS didn't
25 bring this claim on behalf of the fund and then

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1 possibly could even be assigned liability, at the end
2 of the day, in a comparative fault analysis? Is that
3 correct?
4 I mean, I -- there's a lot we've had to
5 read here, so I'm trying to drill down. I don't want
6 to be too simple, but --
7 MS. OLDFATHER: I don't think it is
8 correct, your Honor. But the one thing I didn't come
9 here prepared to argue is directed verdict, and that's
10 kind of a directed verdict instructions question.
11 JUSTICE: Well, it's not really, though. I
12 mean, the question to me is, you know, we have a
13 pension crisis in the commonwealth. It needs to be
14 solved. We're spending a lot of resources arguing
15 standing, and why isn't KRS a plaintiff?
16 That's escaped me after the dozens and
17 dozens and dozens of things I've read. And not only
18 are they not a plaintiff, they're a defendant, which
19 further imperils, perhaps, the pension fund or the
20 commonwealth. And if you do get a verdict, it's going
21 to the general fund, is it not, not to your clients?
22 I mean, I'm unclear about that. So I think
23 you can't -- I understand that we've got to get past
24 standing. But if we get past standing and we're the
25 body that does that, we have to see where that takes

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1 us, and I guess I'm asking a question about where that
2 takes us.
3 MS. OLDFATHER: So, your Honor, may I
4 participate in the conversation with the same off the
5 top of my head that you might expect this to be, but
6 this is the way that I thought about it and the way I
7 look at it.
8 KRS can only act through its trustees and
9 officers. So the trustees and officers are named
10 actively defendants. You're going to hear about that
11 in 41 and 42. And if the trustees and officers of an
12 entity are neglectful, then the entity is responsible.
13 So you could imagine a verdict that comes
14 out that somehow ends up assigning some percentage of
15 responsibility to KRS. I do not think it should be
16 like that, but you could imagine that. And then that
17 part would not be collected.
18 So it's not as if KRS owes that money to
19 the plaintiffs because the plaintiffs are bringing the
20 action for the benefit of KRS and the commonwealth and
21 have committed, all of the plaintiffs, that every penny
22 we collect is going to go to KRS.
23 JUSTICE KELLER: But KRS is a named
24 defendant.
25 MS. OLDFATHER: They are a named defendant.

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1 In derivative litigation, it's always that -- the
2 entity on behalf of whom the stakeholders or the
3 shareholders or the members are suing is always a named
4 defendant.
5 JUSTICE HUGHES: Counsel, just --
6 JUSTICE KELLER: Perhaps in a corporate
7 derivative shareholder action.
8 MS. OLDFATHER: Yes.
9 JUSTICE KELLER: This is a horse of a
10 different color, if you will.
11 MS. OLDFATHER: Even if we go back to those
12 equitable remedy cases in 1903 and 1913, you will see
13 that the entity on whose behalf the claim is being
14 brought is put on that side of the V.
15 So sorry, I apologize, Justice Hughes.
16 JUSTICE HUGHES: You talked with Justice
17 Keller -- because I'm following her line of reasoning,
18 even if -- I understand what your concern is, that's
19 not really why we're here today, but it is part of the
20 bigger picture, which is important, that we can't
21 overlook.
22 First of all, the fact that some, but not
23 all, of the trustees and officers were sued is kind of
24 amazing to me. I don't understand that concept,
25 because in a derivative action, unless you've got

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1 individual activity and you can say "John Doe did
2 this," if it's an action of an entire board of
3 trustees, you sue all of them. You don't pick and
4 choose.
5 So there's that. But here's my second
6 question, and I don't know that it surfaced in all of
7 this, but in the last 60 days, I think, or thereabouts,
8 we rendered a decision in a case called Landrum vs.
9 Beshear, and in that case we unanimously held -- even
10 though we had perhaps some misgivings about how the
11 contract review committee had handled the contract, but
12 we unanimously held that the elected attorney general,
13 the highest law enforcement officer in this state,
14 cannot enter into a contingency fee contract with
15 private counsel without going through the hoops of the
16 Model Procurement Code and going before the contract
17 review committee.
18 And one of the complaints that was raised
19 in that case was the contingency fee structure that had
20 been negotiated, the absence of a cap, whether any
21 eventual recovery -- going back to what Justice Keller
22 is talking about, where does it go? Does it go
23 initially to the -- to the lawyers? Who does it go to?
24 All of those issues were raised, and that's
25 for the attorney general of the commonwealth of

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1 Kentucky. And it seems to me, as Justice Keller is
2 saying, we've got down the road, but we also have bound
3 up in all of this standing the idea that we have now
4 two separate groups of plaintiffs who have negotiated
5 contingency fee contracts with private attorneys, and
6 that process that Landrum vs. Beshear said that the
7 attorney general had to go through is nowhere in sight
8 because we don't have a state official anywhere in this
9 except, as Justice Keller pointed out, as defendants.
10 MS. OLDFATHER: You do, though, your Honor.
11 Let me answer the questions in reverse order, your
12 first one being the question of not suing all of the
13 trustees and officers, and your last one being this
14 question here of how does the state maintain control of
15 these crazy contingency fee lawyers who, my God, now
16 are in two groups, but, I mean, I gave her a hug when I
17 got here because --
18 JUSTICE HUGHES: That's not the point.
19 It's not limited -- it's not limited to you-all. Under
20 what you're asking us to adopt as standing could be the
21 two of you and three or four people all over the
22 state --
23 MS. OLDFATHER: Or it could be --
24 JUSTICE HUGHES: -- could grab their own
25 lawyer and run into court and say that they're

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1 representing Kentucky Retirement Systems.
2 MS. OLDFATHER: And it could be one,
3 Judge -- Justice Hughes, and I think the whole analysis
4 is still the same. So, yes, there is a public
5 official. It is Judge Phil Shepherd. Every single
6 element of settlement in this case is going to be
7 submitted to Judge Shepherd, and we already --
8 JUSTICE HUGHES: (Inaudible) prosecting the
9 case. The whole point of standing are the people who
10 are in the case litigating it, not the ultimate neutral
11 arbiter, the judge. It's the people involved in the
12 actual framing up of the issues. One of you cited
13 that, that that's the purpose of standing, to make sure
14 the issues are framed up and the proper questions of
15 law are addressed by the Court. And that comes from
16 the counsel, not from the parties.
17 MS. OLDFATHER: So, your Honor, then I
18 would -- what I would suggest is that we all look back
19 to the last eight years and we ask "Why didn't one of
20 our attorneys general bring this claim?" Why didn't
21 they?
22 JUSTICE KELLER: I think that's the
23 question I was asking, why -- why is not KRS bringing
24 the claim --
25 MS. OLDFATHER: Yes.

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EXHIBIT C

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement and Release Agreement (the "Agreement") is entered into this 22nd day of October, 2019 (the "Effective Date"), by and between the Commonwealth of Kentucky, acting by and through Attorney General Andy Beshear (the "Commonwealth" or "Plaintiff"), and Bayer Corporation ("Bayer" or "Defendant"). At times, Plaintiff and Defendant are collectively referred to in this Agreement as the "Parties"

I. RECITALS

1.1 **WHEREAS,** on or about January 31, 2014, the Commonwealth filed an Amended Complaint in the case styled *In the Matter of Bayer Corporation*, Franklin Circuit Court, Division I, Civil Action No. 07-CI-00148;

1.2 **WHEREAS,** Plaintiff's allegations are set forth in the Amended Complaint and upon those allegations Plaintiff sought statutory damages under K.R.S. 367.990(1) and (2) as well as civil contempt damages;

1.3 **WHEREAS,** on or about May 24, 2019, the Commonwealth filed a Supplement to the Amended Complaint also in Civil Action No. 07-CI-000148;

1.4 **WHEREAS,** Plaintiff's further allegations are set forth in the Supplement to Amended Complaint and upon those allegations, Plaintiff sought an injunction against Bayer under K.R.S. 367.190 and other law, and that Bayer be compelled to comply with the Consent Judgment entered in 2007 and as modified in 2009 by the Agreed Order Modifying Consent Judgment; and

1.5 **WHEREAS,** in lieu of proceeding to trial in Civil Action No. 07-CI-00148, Plaintiff the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, and Defendant Bayer Corporation seek to resolve all civil claims, causes of action, damages, restitution, fines,

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costs, and penalties that the Commonwealth asserted in the Amended Complaint or the Supplement to Amended Complaint.

NOW, THEREFORE, in consideration of the above premises, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound thereby, the Parties hereby agree as follows:

II. CONSIDERATION

2.1 In full payment, settlement, satisfaction and release of all existing and potential claims, causes of actions and disputes between the Parties as more fully described in Paragraph 3.1 below, Bayer will pay to Plaintiff the total amount of Seventeen Million U.S. Dollars and no cents ($17,000,000.00) (the "Settlement Amount"), in one single payment, within twenty-one (21) business days after the Effective Date.

III. RELEASE

3.1. Subject to and expressly conditioned upon payment of the Settlement Amount, Plaintiff, on behalf of the Commonwealth of Kentucky, including by and through its Attorney General, hereby releases and forever discharges the Defendant, including its respective former, present, and future subsidiaries, affiliates, officers, directors, agents, employees, representatives, predecessors, successors, assigns, divisions, suppliers of materials and components and services used in the manufacture of Yasmin and YAZ, distributors and sellers of Yasmin and YAZ, and all entities related to or alleged to be related to Bayer regarding Yasmin and YAZ including but not limited to Schering AG, Berlex, Inc., Berlex Laboratories, Inc., and Berlex International Laboratories, Inc. (inclusively, the "Released Parties") from the following: all civil claims, causes of action, damages, restitution, fines, costs, civil contempt, and penalties arising out of the claims

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and allegations that the Attorney General asserted or could have asserted regarding Yaz and Yasmin in Civil Action No. 07-CI-00148, including without limitation those set forth in the Amended Complaint and Supplement to Amended Complaint filed therein.

3.2. Notwithstanding any term of this Order, the Commonwealth specifically reserves and excludes from the Release set forth in Paragraph 3.1, as to any entity or person, including the Released Parties, potential claims for any and all of the following:

i. Any criminal liability that any person or entity, has or may have;

ii. Any civil or administrative liability that any person or entity, has or may have under any statute, regulation or rule not expressly covered by the Release in Paragraph 3.1 above, including, but not limited to, any and all of the following claims:

1. State or federal antitrust violations;

2. Reporting practices, including "best price", "average wholesale price" or "wholesale acquisition cost";

3. Medicaid violations, including federal Medicaid drug rebate statute violations, Medicaid fraud or abuse, and/or kickback violations related to any State's Medicaid program;

4. State false claims violations; and,

5. Claims to enforce the terms and conditions of this Settlement Agreement.

iii. Any liability under the Kentucky Consumer Protection Act which any person or entity may have to individual consumers or state program payors.

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IV. NO ADMISSION OF LIABILITY

4.1 This Agreement is entered into to avoid the uncertainty, time, trouble and expense of further litigation. This Agreement does not constitute an admission by Bayer for any purpose, of any fact or of a violation of any state or federal law, rule, or regulation, nor does this Agreement constitute evidence of any liability, fault, or wrongdoing, including but not limited to liability, fault, or wrongdoing under the Consent Judgment, including as modified under the Agreed Order Modifying Consent Judgment. Bayer enters into this Agreement for the purpose of resolving the concerns of the Commonwealth of Kentucky regarding the allegations set forth in Civil Action No. 07-CI-00148. Bayer does not admit to any violation of the Kentucky Consumer Protection Act, and does not admit any wrongdoing that was alleged or could have been alleged by the Kentucky Attorney General in that civil action.

4.2 This Agreement shall not be construed or used as a waiver or any limitation of any defense otherwise available to Bayer under the Consent Judgment, including as modified by the Agreed Order Modifying Consent Judgment. This Agreement is made without trial or adjudication of any issue of fact or law or finding of liability of any kind. Nothing in this Agreement, including this paragraph, shall be construed to limit or to restrict Bayer's right to use the Consent Judgment, including as modified by the Agreed Order Modifying Consent Judgment, to assert and maintain the defenses of res judicata, collateral estoppel, payment, compromise and settlement, accord and satisfaction, or any other legal or equitable defenses in any pending or future legal or administrative action or proceeding.

V. ADDITIONAL PROVISIONS

5.1. **FILING OF AGREED ORDER DISMISSING CIVIL ACTION NO. 07-CI-00148 WITH PREJUDICE.** The Commonwealth and Bayer agree to submit the attached Agreed

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Order to Judge Shepherd at the Franklin Circuit Court, Division I, within 5 business days of execution of the Effective Date, dismissing Civil Action No. 07-CI-00148 with prejudice, expressly including dismissal with prejudice of both the Amended Complaint and the Supplement to Amended Complaint as set forth in the Release above.

5.2. **HEADINGS**. The headings used in this Agreement are intended solely for convenience purposes and do not in any manner amplify, limit, modify, or otherwise affect the interpretation of any of the provisions of this Agreement.

5.3. **SEVERABILITY**. The provisions of this Agreement are severable. If any clause, provision or section of this Agreement shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the validity or enforceability of any other clause, provision or section of this Agreement, and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable clause, provision or section had not been contained herein.

5.4. **CHANGES ONLY BY EXECUTED WRITING**. No waiver, modification, or amendment of the terms of this Agreement shall be valid or binding unless made in writing, signed by the Commonwealth and Defendant, and then only to the extent specifically set forth in such writing.

5.5. **TIME IS OF THE ESSENCE**. Time shall be of the essence with respect to each provision of this Agreement that requires action to be taken by the Commonwealth or Defendants within a stated time period.

5.6. **NO WAIVER OF SOVEREIGN IMMUNITY**. Nothing in this Agreement shall be construed to waive any claims of sovereign immunity the Commonwealth may otherwise have in any action or proceeding.

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5.7. **ENTIRE AGREEMENT**. This Agreement sets forth the entire agreement between the Commonwealth and Defendant, and there are no representations, agreements, arrangements, or understanding, oral or written, between the Commonwealth and Defendant relating to the subject matter of this Agreement which are not fully expressed hereto or attached hereto.

5.8. **COUNTERPARTS/FACSIMILE**. This Agreement may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same Agreement. A facsimile-transmitted or scanned signature transmitted by electronic transmission is deemed as effective as if it were an original signature. One or more counterparts of this Agreement may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

5.9. **SPECIFIC PERFORMANCE**. Any failure by any party to this Agreement to insist upon the strict performance by any other party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions of this Agreement, and such party, notwithstanding such failure, shall have the right thereafter to seek both specific performance of any and all of the provisions of this Agreement and all other available relief.

5.10. **GOVERNING LAW/CHOICE OF FORUM**. By consent of the Parties, the Court shall retain jurisdiction over Civil Action No. 07-CI-00148 and the Parties hereto for the purpose of enforcing this Agreement, and venue as to all matters between the Parties relating hereto or arising out of this Agreement and Agreed Order shall be in the Franklin Circuit Court, Frankfort, Kentucky.

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5.11 **AUTHORITY**. The Bayer signatory warrants and represents that he is duly authorized to execute this Agreement and that such signature binds Bayer to the terms and conditions of this Agreement.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, and for the mutual consideration set forth above, hereby agree to the above terms and conditions and execute this Agreement as of the Effective Date set forth above.

[SIGNATURE PAGE FOLLOWS]

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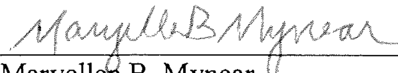
ANDY BESHEAR, ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY



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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

IN THE MATTER OF **BAYER CORPORATION**	:	**CIVIL ACTION NO. 07-CI-00148**

AGREED ORDER

Plaintiff, the Commonwealth of Kentucky (the "Commonwealth"), acting by and through Attorney General Andy Beshear (the "Attorney General"), and Defendant Bayer Corporation ("Defendant") (collectively, the "Parties"), having reached an agreement for the resolution of the Commonwealth's Amended Complaint and Supplement to Amended Complaint, and the Court being otherwise sufficiently advised, **THE COURT HEREBY FINDS, ORDERS AND ADJUDGES as follows:**

1. Civil Action No. 07-CI-00148, including the Amended Complaint filed January 31, 2014, and the Supplement to Amended Complaint filed on May 24, 2019, are hereby dismissed with prejudice as set forth in the attached Parties' Settlement Agreement and Release.
2. All counterclaims are dismissed with prejudice.
3. All parties shall bear their own costs and attorneys' fees.
4. This Court shall retain jurisdiction over the Parties hereto for the purpose of enforcing their Settlement Agreement and Release, and pursuant to KRS 367.990(1) with regard to the Consent Judgment entered in 2007, as modified in 2009 by the Agreed Order Modifying Consent Judgment, which remains in full force and effect.

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5. IT IS FURTHER ORDERED that upon receipt of the Settlement Amount due under the Settlement Agreement and Release, the funds shall be disbursed as follows:

   a. The Commonwealth's Outside Counsel shall receive a contingency fee and reimbursement of advanced litigation fees and expenses from the Settlement Amount as set forth in Personal Service Contract PON2 040 1300001371, and renewed effective July 1, 2018 through June 30, 2020;

   b. $680,000 of the Settlement Amount shall be paid to the Multi-District Litigation ("MDL") Common Benefit Fund as established by the MDL Plaintiff Steering Committee for the Commonwealth's access to discovery materials in that litigation.

   c. The Office of the Attorney General shall receive $3,400,000 of the Settlement Amount as its reasonable costs of investigation and litigation per KRS 48.005; and

   d. Any and all remaining amounts of the Settlement Amount after each payment of subsections a., b., and c. above shall be paid to the Commonwealth's General Fund.

SO ORDERED, ADJUDGED AND DECREED this _____ day of ________________, 2019:

____
Honorable Philip Shepherd
Franklin Circuit Court

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HAVING SEEN AND AGREED, SO STIPULATED AND ACKNOWLEDGED THIS 22 DAY OF October, 2019

ANDY BESHEAR, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

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EXHIBIT D

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Healthcare Compl. Rep. P 490005 (C.C.H.), 2015 WL 13723459

Health Care Compliance Reporter

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Office of Inspector GeneralMiscellaneous Settlement AgreementsRuling: Guideline

December 18, 2015

¶ 490,005 SETTLEMENT AGREEMENT BETWEEN COMMONWEALTH OF KENTUCKY V. PERDUE PHARMA LP

Settlement Agreement between Commonwealth of Kentucky v. Perdue Pharma LP

Settlement Agreement, December 18, 2015.

COMMONWEALTH OF KENTUCKY PIKE CIRCUIT COURT DIVISION II
CIVIL ACTION NO. 07-CI-01303

COMMONWEALTH OF KENTUCKY, *ex rel.* JACK CONWAY, ATTORNEY GENERAL PLAINTIFF v. PURDUE PHARMA L.P., PURDUE PHARMA, INC., THE PURDUE FREDERICK COMPANY, INC., d/b/a THE PURDUE FREDERICK COMPANY, PURDUE PHARMACEUTICALS, L.P., THE P.F. LABORATORIES, INC., ABBOTT LABORATORIES, and ABBOTT LABORATORIES, INC. DEFENDANTS

AGREED JUDGMENT AND STIPULATION OF DISMISSAL WITH PREJUDICE
Plaintiff, Commonwealth of Kentucky, acting by and through Attorney General Jack Conway ("the Commonwealth"), and Defendants Purdue Pharma L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals L.P., The P.F. Laboratories, Inc. (hereinafter collectively "Purdue"), have reached an agreement for the resolution of all claims the Commonwealth asserted, or could have asserted in this lawsuit against Purdue and Abbott Laboratories and Abbott Laboratories, Inc. (hereinafter collectively "Abbott"). Accordingly, the Commonwealth, Purdue and Abbott now jointly ask the Court to enter this Agreed Judgment:

Having been sufficiently advised,

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THE COURT HEREBY FINDS, ORDERS AND ADJUDGES as follows:

1. This action was commenced in 2007 by the Commonwealth filing a lawsuit styled *Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General, and Pike County, Kentucky v. Purdue Pharma L.P., et at.*, Civil Action No. 07-CI-1303 (Pike Circuit Court) (the "Action).

2. The Commonwealth and Purdue have resolved all claims arising from the Action as evidenced by this Agreed Judgment and by the document entitled the "SETTLEMENT AGREEMENT AND GENERAL RELEASE" (the "Agreement"), attached hereto.

3. The Agreement is incorporated herein by reference for all purposes as if fully set forth herein.

4. The Commonwealth and Purdue arc hereby ordered and required to comply with all obligations in the Agreement. The terms of this Agreed Judgment shall be governed by the laws of the Commonwealth of Kentucky. This Court retains jurisdiction of this Judgment and the Parties hereto for the purpose of enforcing this Judgment.

5. By entry of this Agreed Judgment, this Action is dismissed in its entirety with prejudice as against all of the Defendants as set forth in the Agreement.

6. All parties shall bear their own costs and attorneys' fees.

7. Based on the agreement of the parties in paragraph 20 of the Agreement, the Requests for Admission to Purdue that were deemed admitted by Purdue under orders by the Pike Circuit Court dated April 1, 2013 and September 25, 2013, arc hereby withdrawn pursuant to CR 36.02, and Purdue's April 12, 2013 responses are accepted in the record as the proper responses to the Commonwealth's October 4, 2007 Requests for Admission.

8. Upon receipt of the settlement payments, the Attorney General shall direct the payment in a manner consistent with the terms of this Agreed Judgment. Apart from payment of attorneys' fees and expenses and keeping the reasonable cost of litigation pursuant to KRS 48.005, any funds shall be placed in a restricted fund within the Commonwealth of Kentucky for the General Assembly to appropriate for the use of public health initiatives, educational or public safety campaigns, reimbursement or financing of health care services and infrastructure related to addiction prevention and treatment.

SO ORDERED, ADJUDGED AND DECREED this *22* day of December, 2015:

Honorable Johnny Ray Marris

Sitting by Designation in the Pike County Circuit Court

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HAVING SEEN AND AGREED, SO STIPULATED AND ACKNOWLEDGED THIS th DAY OF DECEMBER, 2015.

For the Commonwealth of Kentucky:

Mitchel Denham

For the Purdue Defendants:

Daniel E. Danford

For the Abbott Defendants:

Susan J. Pope

COMMONWEALTH OF KENTUCKY PIKE CIRCUIT COURT DIVISION II
CIVIL ACTION NO. 07-CI-01303

COMMONWEALTH OF KENTUCKY, *ex rel.* JACK CONWAY, ATTORNEY GENERAL PLAINTIFF v. PURDUE PHARMA L.P., PURDUE PHARMA, INC., THE PURDUE FREDERICK COMPANY, INC., d/b/a THE PURDUE FREDERICK COMPANY, PURDUE PHARMACEUTICALS, L.P., THE P.F. LABORATORIES, INC., ABBOTT LABORATORIES, and ABBOTT LABORATORIES, INC. DEFENDANTS

SETTLEMENT AGREEMENT AND GENERAL RELEASE
This Settlement Agreement and General Release (the "Agreement") is made this 18th day of December, 2015, by and between the Plaintiff, Commonwealth of Kentucky, acting by and through Attorney General Jack Conway (hereinafter the "Commonwealth"), and Defendants Purdue Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals L.P., The P.F. Laboratories, Inc. (hereinafter collectively "Purdue"), in the case styled *Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General, and Pike County, Kentucky v. Purdue Pharma L.P., et al.*, Civil Action No. 07-CI-01303 (Pike Circuit Court), in order to settle all claims that were or could have been brought in the Action against Purdue, or Abbott Laboratories and Abbott Laboratories, Inc. (hereinafter collectively "Abbott") (Purdue and Abbott are hereinafter collectively "Defendants"), in this action, or any other action regarding the Covered Conduct, and consent to the entry of an Agreed Judgment with Stipulation of Dismissal with Prejudice ("Agreed Judgment"), for the purposes of settlement only, without the Agreed Judgment constituting evidence against or any admission by any party, and without trial of any issue of fact or law.

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IN CONSIDERATION of the mutual promises, covenants and agreements hereafter set forth and the exchange of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

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I. DEFINITIONS

1. The following definitions shall be used in construing this Agreement. Terms used in the singular shall include the plural and vice versa.

A. The " **Action**" means the proceeding pending in the Pike Circuit Court, Commonwealth of Kentucky entitled, *Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General, and Pike County, Kentucky v. Purdue Pharma L.P., et al.*, Civil Action No. 07-CI-01303 (Pike Circuit Court).

B. " **Affiliated Company**" of Purdue or Abbott means any person, firm, trust, partnership, corporation, company or other entity or combination thereof, which directly or indirectly controls or is controlled by or is under common control with Purdue or Abbott, respectively, The terms "control" and "controlled" means ownership of fifty percent (50%) or more, including ownership by one or more trusts with substantially the same beneficial interests, of the voting or equity rights of such person, firm, trust, partnership, corporation, company or other entity or combination thereof or the power to direct the management of such person, firm, trust, partnership, corporation, company or other entity or combination thereof.

C. The term " **Releasors**" refers to the Commonwealth of Kentucky, Jack Conway, Attorney General, and his successors, the named Plaintiff in the Action, along with any and all people purporting to act on behalf of the Commonwealth of Kentucky in an official capacity as a representative of the Commonwealth, including the Commonwealth's officials, officers, employees, agents, attorneys, legal representatives, and any and all of its political subdivisions. Releasors shall further refer to any and all of the Commonwealth's counties, cabinets, administrative bodies, boards, bureaus, offices, agencies, divisions, departments, government bodies, and commissions; and any predecessors, successors, heirs, executors, trustees, administrators, and assigns of the foregoing.

D. The term " **Releasees**" means: (i) Purdue Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals L.P., The P.F. Laboratories, Inc., and all Affiliated Companies of the foregoing; (ii) along with their successors, assigns, subsidiaries, and trustees and/or beneficiaries of trusts which have an interest in the above referenced companies, and/or any of their current, past or future owners, directors, officers, employees, consultants, suppliers, distributors, attorneys, outside counsel, insurers, accountants, direct and indirect shareholders, partners, members, or agents as relates to the Covered Conduct; (iii) Abbott Laboratories and Abbott Laboratories, Inc. and all Affiliated Companies of the foregoing; (iv) along with their successors, assigns, subsidiaries, affiliates, and trustees and/or beneficiaries of trusts which have an interest in the above referenced companies, and/or any current, past or future owners, directors, officers, employees, consultants, suppliers,

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distributors, attorneys, outside counsel, insurers, accountants, direct and indirect shareholders, partners, members, or agents as relates to the Covered Conduct.

E. " **Complaint**" means the First Amended Complaint or the Complaint in the Action.

F. " **Covered Conduct**" shall mean all conduct whenever or wherever occurring, whether inside or outside of the Commonwealth of Kentucky, relating to any Purdue Opioid, and including but not limited to all conduct, including but not limited to conduct relating to and/or arising from the purchase, use, misuse, abuse, theft, prescription, marketing, manufacture, distribution, sale, promotion, co-promotion, research, design, development, clinical studies, pediatric studies, formulation, labeling, approval and/or ingestion of any Purdue Opioid, and also including but not limited to the allegations contained in this Action, Covered Conduct shall also include any action by Releasees relating to the treatment of pain, including but not limited to the appropriateness of using Purdue Opioids, and actions or inactions in connection with prescribers, key opinion leaders, researchers, third party organizations that related to promulgating materials or guidelines concerning any aspect of the treatment of pain or dissemination of non-branded content in any format up to the effective date of this Agreement.

G. " **Released Claims**" means any and all claims, demands, actions, suits, debts, sums of money, causes of action, controversies, agreements, promises, damages whenever incurred, and liabilities of any nature whatsoever, including costs, expenses, fines, penalties, injunctive relief, reimbursement, restitution, equitable remedies, punitive and exemplary damages, interest, and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, civil or criminal, that Releasors ever had, now have, or hereafter can, shall, or may have, directly, indirectly, representatively, derivatively, or in any capacity, including in its parens patriae capacity, arising out of Covered Conduct by any of the Releasees, whether alleged or not by the Commonwealth in this action or any other action of any kind whether or not relating to the subject matter of this action. The Released Claims include all claims arising out of or relating to the Covered Conduct and/or any claims that were or could have been alleged in the Action, whether or not the underlying facts were known to the Commonwealth.

H. " **Purdue Opioid**" means: (i) OxyContin®, MS Contin®, Butrans®, Dilaudid®, Palladone®, Ryzolt®, Hysingla®, or Targiniq®; (ii) any generic or authorized generic versions of the foregoing medications, which generic versions are developed, marketed, promoted, designed, distributed, or sold by Purdue; or (iii) immediate release oxycodone hydrochloride, and immediate release combinations of oxycodone hydrocholoride and acetaminophen developed, marketed, promoted, designed, distributed, or sold by Purdue.

II. GENERAL AGREED TERMS

2. The terms of this Agreement shall be governed by the laws of the Commonwealth of Kentucky.

3. The parties shall attach this Agreement to an Agreed Judgment and Stipulation of Dismissal with Prejudice (“hereinafter “Agreed Judgment”) for entry by the Pike Circuit Court, and agree

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that the terms of this Agreement and entry of an Agreed Judgment is in the public interest and reflects a negotiated agreement between the Commonwealth and Purdue.

4. The Commonwealth and Purdue have agreed to resolve the issues raised by and related to the Action, or in any present or future action or proceeding of any kind whatsoever, civil, criminal, or otherwise, before any state, federal, county or other court, administrative agency, regulatory body, or any other body or authority present, by entering into this Agreement. This Agreement, the Agreed Judgment and the negotiations of each between the parties, and all of the terms herein, constitute compromises and offers to compromise covered by Kentucky Rule of Evidence 408 and any similar, comparable, or equivalent law, rule, or statute under federal law or the law of another state.

5. Purdue is entering into this Agreement solely for the purpose of settlement, Purdue expressly denies liability, and nothing contained herein may be taken as or construed to be an admission of liability by Purdue for any violation of any civil or criminal statute, law, rule, or regulation, or of any cause of action raised in the Action. This Agreement and the Agreed Judgment may not be used as evidence of any violation, misconduct, liability, fault, or wrongdoing, or of the truth of any of the claims or allegations contained in any complaint, motion, pleading, or filing, whether in this Action or in any present or future action or proceeding of any kind whatsoever, civil, criminal, or otherwise, before any state, federal, county or other court, administrative agency, regulatory body, or any other body or authority present.

6. This Agreement and the Agreed Judgment may be pleaded as a full and complete defense to any action, suit, investigation, or any other proceeding that has been or may be filed, instituted, prosecuted, or attempted with respect to any of the Released Claims, and may be filed, offered, received into evidence, and otherwise used by Defendants for such defense.

7. No part of this Agreement or Agreed Judgment shall create a cause of action or confer any right to any third-party for violation of any federal, state, or local statute to enforce the terms of this Agreement or Agreed Judgment, or for any other purpose whatsoever, except that either the Defendants or the Commonwealth may file an action to enforce the terms of this Agreement or Agreed Judgment. Subject to the provisions in paragraph 6, it is the intent of the Commonwealth and Purdue that this Agreement and the Agreed Judgment not be admissible in other cases or binding on the Defendants in any respect other than in connection with the enforcement of this Agreement or Agreed Judgment.

III. RELEASE PROVISIONS

8. The Releasors and Purdue have agreed to resolve the issues that were raised or could have been raised in the Action or any other action regarding the Covered Conduct by entering into this Agreement and the Agreed Judgment.

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9. By execution of this Agreement, the Releasors release and forever discharge, to the fullest extent permitted by law, the Releasees from all Released Claims, and expressly waive all claims, causes of action or assertions which arise from the Covered Conduct prior to the date of this Agreement. The Releasors expressly waive and fully, finally, and forever settle and release any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claims without regard to the subsequent discovery or existence of different or additional facts. The Releasors covenant and agree that they shall not hereafter initiate any proceeding or seek to establish liability against any of the Releasees based, in whole or in part, on any of the Released Claims and/or based on or relating to Covered Conduct prior to the date of this Agreement.

10. The Office of the Attorney General of Kentucky represents and warrants as a material term of the settlement that it has the authority under Kentucky law to bind, and has in fact bound, the Commonwealth and each and every of the Releasors, including without limitation each of the counties and other political subdivisions of the Commonwealth and any other Releasor, to the terms of the settlement by virtue of his signature hereto. The Commonwealth hereby binds each of the counties and other political subdivisions of the Commonwealth, and any other Releasor, to the terms of this Agreement and the Agreed Judgment.

11. Nothing in this Agreement or Agreed Judgment is intended to alter the terms of a release in any previously executed settlement, release or agreed judgment.

12. Nothing in this Agreement or Agreed Judgment is intended to alter the terms of the May 8, 2007 Consent Judgment entered into by the Franklin Circuit Court, Division I, in Case No. 07-CI-00740, styled *In the Matter of Purdue Pharma L.P., et at.* and this Order shall not impact in any way Defendants' arguments that the Consent Judgment bars claims under *res judicata* or release. Purdue and the Commonwealth agree that the provisions set forth in paragraphs 2 through 24 of that Consent Judgment shall remain in effect pursuant to the terms of that Consent Judgment, but any of the foregoing paragraphs that contain sunset provisions shall remain in effect until the earlier of either December 31, 2023 or three months after Purdue ceases promotion of OxyContin through sales representatives.

IV. SETTLEMENT PAYMENT

13. Following entry of the Agreed Judgment in the form agreed to by Purdue and the Commonwealth, and pursuant to wire instructions provided by the Attorney General, Purdue shall pay the Commonwealth a total amount of twenty-four million dollars ($24,000,000.00), payable in nine installments as follows.

A. The first installment of twelve million dollars ($12,000,000.00) shall be paid within 30 days of the entry of the Agreed Judgment and shall consist of a payment of: (i) one million, five hundred thousand dollars ($1,500,000,00) as reimbursement and restitution for payments made through state Medicaid and other state medical funding; (ii) nine million, five hundred thousand dollars ($9,500,000,00) to pay for expenses incurred by the Commonwealth of Kentucky and

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any of its agencies; and (iii) the balance in the amount of one million dollars ($1,000,000,00) as an additional payment to the Commonwealth of Kentucky;

B. The second through ninth installments shall each equal one million, five hundred thousand dollars ($1,500,000,00) to pay for expenses incurred or to be incurred by the Commonwealth of Kentucky and any of its agencies. The total payments of the second through ninth installments shall equal twelve million dollars ($12,000,000,00). Each of these installments shall be paid within 30-days of the first through eighth anniversaries of the entry of the Agreed Judgment.

14. The Defendants shall not be otherwise or additionally liable for any of the Commonwealth's and/or any other Releasor's past, present or future expenses related to this Action, including but not limited to the Commonwealth's litigation expenses of this Action, including without limitation attorney's fees, court fees, expert witness and consultant fees and expenses, and expenses associated with discovery, motion practice, hearings, and/or appeals.

15. In the event that the Commonwealth and/or any of its counties or other political subdivisions, or any other Releasor, files or initiates any claim, litigation, or other proceeding against any of the Releasees on behalf of the Commonwealth or any of its counties or other political subdivisions in any forum seeking any form of relief relating to the Covered Conduct released herein based upon any legal, equitable, common law, statutory, constitutional, administrative, or other basis, including but not limited to claims that were or could have been raised against any of the Releasees in the Action with regard to Purdue Opioids, the parties agree that: (a) the Releasees may use or file this Agreement and/or the Agreed Judgment as a total bar to such claim, litigation, or other proceeding, and Releasors and the Office of the Attorney General will not contest such use or filing, or claim that the Agreement or Agreed Judgment is not legally valid or enforceable; (b) any Releasee named in the claim, litigation, or other proceeding may notify the Commonwealth of the claim, litigation, or other proceeding and shall provide the Commonwealth with any written pleadings in the claim, litigation, or other proceeding; (c) upon receipt of notification of such claim, litigation, or other proceeding defined by the Covered Conduct released herein, and at the request of the Releasee, the Commonwealth will cooperate with the Releasee to notify the appropriate Court or agency of this Agreement and the Agreed Judgment and will agree to join in Releasees' motion to dismiss such claims.

16. The Commonwealth represents and warrants as a material term of the settlement that the foregoing payment provisions comport with Kentucky law, including but not limited to KRS 48.005.

17. In the event that the payments set forth in Paragraph 13 are found to be invalid by a Court of competent jurisdiction on account of any legal, regulatory or statutory provision, and subject to all other provisions of this Agreement, Purdue shall fully discharge any future payment obligations by making the foregoing payments on the same time schedule and in the same installment amounts to the Commonwealth of Kentucky to be deposited in the general fund surplus account as per KRS

48.005(4). To the extent Purdue has already made any payments pursuant to this Agreed Judgment, Purdue will not be obligated to make such payments again.

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V. ADDITIONAL PROVISIONS

18. Within 5 business days of the Entry of the Agreed Judgment, Purdue agrees to move to dismiss its Writ appeal pending in the Kentucky Supreme Court in case number 2014-SC-168, and its motion for discretionary review pending in the Kentucky Supreme Court in case number 2015-SC-342 to the extent either appeal has not previously been resolved by the appellate court in which the appeal is pending. The parties agree that this Agreement or Agreed Judgment is not contingent upon whether or not either appellate court renders its ruling during this period, and further agree that the nature or content of any potential ruling by either appellate court has no effect on the settlement terms agreed to in this Agreement or Agreed Judgment.

19. As set forth above, nothing in this Agreement or Agreed Judgment shall be deemed or construed as an admission or concession of liability or as evidence of any violation of any civil or criminal statute or law, of causation of any injury, or of any fault, misconduct, liability or wrongdoing by any of the Releasees, or of the truth of any of the claims or allegations alleged in this Action, or as a waiver of any defenses thereto. The Releasors will not make any public statement stating or implying otherwise.

20. The Commonwealth served Requests for Admissions on the Defendants (the "Requests") on October 4, 2007. The Requests directed to Purdue were deemed admitted by Purdue (the "Deemed Admissions") under orders by the Pike Circuit Court dated April 1, 2013 and September 25, 2013, The Releasors acknowledge that the Deemed Admissions do not reflect Purdue's actual responses to the Requests, and further acknowledge that Purdue's actual responses are those responses Purdue submitted on April 12, 2013. The Releasors further acknowledge that the Deemed Admissions have no effect, that they cannot be used by the Releasors for any purpose, and they cannot be used by any other person or entity against any of the Releasees for any purpose. The Releasors also agree that withdrawal of the Deemed Admissions will not prejudice them in connection with this Agreement of Agreed Judgment, Thus, the parties agree that the Deemed Admissions should be withdrawn as part of the Agreed Judgment pursuant to CR 36.02.

21. The Agreed Qualified Protective Order entered by the Court in this Action on December 4, 2013, shall continue to remain in full force and effect.

22. The parties and their lawyers agree that within 60 days of the date of this Agreement they will either return to the producing party or will completely destroy any and all paper and/or electronic documents received from the producing party, or received by virtue of any subpoena, and any copies made of same. The respective parties agree on that date to present to counsel for the producing parties a written certification of compliance with this term and description of the actions taken to comply.

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23. The Releasors agree that they have not and will not, directly or indirectly, share or direct anyone else to share, the foregoing documents and/or any paper and/or electronic notes, memoranda or other writings that contain information about or from such documents, with any other person or entity, including any person or entity that is investigating or in litigation against Purdue or Abbott, or is contemplating or may be reasonably expected to contemplate an investigation or litigation against Purdue or Abbott.

24. The Releasors agree that none of them, with the exception of any attorney Releasor, will, directly or indirectly, confer with, assist, or share information gathered from a Releasee during the course of investigating or litigating this Action with any other person or entity, including any person or entity that is investigating or in litigation against Purdue or Abbott, or is contemplating or may be reasonably expected to contemplate an investigation or litigation against Purdue or Abbott. Notwithstanding this language, nothing contained in this Agreement is intended to violate Supreme Court Rule 3.130(5.6), which prohibits an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy, or otherwise restrict the practice of law of any lawyer representing the Commonwealth in this Action in connection with their representation of any other client concerning claims against the Releasees related to the Covered Conduct.

25. This Agreement represents the full and complete terms of the settlement entered into by the Commonwealth and Purdue, and shall not be amended except by further written agreement in advance of both the Commonwealth and Purdue. In any action undertaken by either the Releasors or the Releasees, no prior versions of this Agreement, and no prior versions of any of its terms, that were not entered by the Court in the Agreed Judgment, may be introduced for any purpose whatsoever.

26. The Commonwealth and Purdue agree this Agreement is a binding agreement as to the terms set forth herein, and that its terms cannot be modified without the written agreement of the Commonwealth and Purdue. Further, this Agreement shall survive and remain a binding agreement between Releasors and Releasees without regard to the action taken by any court or other tribunal with respect to the tendered Agreed Judgment. Further, if the Pike Circuit Court does not enter the tendered Agreed Judgment in its entirety and without modification, the parties further agree as follows:

(a) At Purdue's request, the parties will cooperate and use their best efforts, through appeal, writ, or other legal or equitable means, or remedies provided by the Kentucky Rules of Civil Procedure, to have the modified judgment entered by the Pike Circuit Court amended to conform to the terms of the tendered Agreed Judgment. Failing such amendment, at Purdue's request the parties will seek to have the modified Agreed Judgment vacated in whole.

(b) In the event the Pike Circuit Court does not enter an Agreed Judgment, the parties will cooperate and use their best efforts, through appeal, writ, or other legal or equitable means, or remedies provided by the Kentucky Rules of Civil Procedure, to have the tendered Agreed Judgment entered by the Pike Circuit Court without modification, and

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(c) Without regard to the result of any action under subsection (a) or (b), the parties will enforce any such modified Agreed Judgment only to the extent it is consistent with the terms of this Agreement.

27. This Agreement may be executed in counterparts, each of which shall be deemed to constitute an original counterpart hereof, and all of which shall together constitute one and the same Agreement. One or more counterparts of this Agreed Judgment may be delivered by facsimile or .PDF signatures, and shall be valid signatures as of the date thereof and shall constitute an original counterpart hereof.

28. The Attorney General of Kentucky, through the undersigned, represents and warrants as a material term of this Agreement and Agreed Judgment that he is a duly authorized and appointed representative of the Commonwealth of Kentucky, and has the full right, power, and authority to execute this Agreement and Agreed Judgment and bind all of the Releasors.

29. The parties represent that they have had the assistance of legal counsel in negotiating, reviewing, and executing this Agreement and Agreed Judgment and that they appreciate and understand the legal significance of each and the legal significance of the dismissal of this Action with prejudice, all of which has been explained to them by their attorneys, The parties represent that they are not under duress or pressure from any source, and they have executed this Agreement and the Agreed Judgment knowledgeably and freely by and with the advice of their attorneys. In the event of ambiguity or otherwise, this Agreement or the Agreed Judgment shall not be construed against or in favor of any of the parties on the grounds that its attorneys drafted any particular part of it.

30. With the exception of the Settlement Payment terms set forth in Section IV, the terms with regard to paragraphs 2 through 24 of the Consent Judgment in paragraph 12, and the terms in paragraph 26 herein, the provisions of this Agreement are severable and should any provision be found to be unenforceable by a final decision of a court of law without the possibility of further review, the balance shall nonetheless remain in full force and effect for the purposes of providing each of the parties with the rights and benefits created herein.

31. This Agreement shall become effective upon execution of this Agreement by each and every one of the signatories for both parties.

32. Each Party agrees to perform any further acts and to execute and deliver any further documents reasonably necessary to carry out this Agreement or Agreed Judgment.

V. DISMISSAL WITH PREJUDICE

33. The parties agree upon full execution of this Agreement to sign and tender the Agreed Judgment which, among other terms, will dismiss this Action in its entirety with prejudice against all of the

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Releasees, with each party bearing full and exclusive responsibility for the costs and attorneys' fees associated with its representation.

WITNESS the execution of this Settlement Agreement and General Release by the signatures of the parties set forth below.

PURDUE PHARMA L.P.; PURDUE PHARMA INC.; PURDUE PHARMACEUTICALS L.P.; THE P.F. LABORATORIES, INC.

By:

Philip C. Strassburger

Vice President, General Counsel

12/18/15

Date

THE PURDUE FREDERICK COMPANY, INC, d/b/a THE PURDUE FREDERICK COMPANY

By:

Robin E. Abrams,

Vice President

12/18/15

Date

COMMONWEALTH OF KENTUCKY, *ex rel* JACK CONWAY, ATTORNEY GENERAL

JACK CONWAY

ATTORNEY GENERAL

COMMONWEALTH OF KENTUCKY

By:

Mitchel T. Denham

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Assistant Deputy Attorney General

Commonwealth of Kentucky

12/18/15

Date

End of Document

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EXHIBIT E

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Healthcare Compl. Rep. P 490004 (C.C.H.), 2015 WL 13723458

Health Care Compliance Reporter

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Office of Inspector GeneralMiscellaneous Settlement AgreementsRuling: Guideline

December 22, 2015

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¶ 490,004 SETTLEMENT AGREEMENT BETWEEN COMMONWEALTH OF KENTUCKY V. JANSSEN PHARMACEUTICAL, INC.

Settlement Agreement between Commonwealth of Kentucky v. Janssen Pharmaceutical, Inc.

Settlement Agreement, December 22, 2015.

NO. 13-CI-002488

JEFFERSON CIRCUIT COURT

DIVISION 3

HON. MITCH PERRY

COMMONWEALTH OF KENTUCKY *ex rel.* JACK CONWAY, ATTORNEY GENERAL PLAINTIFF v. JANSSEN PHARMACEUTICALS, INC. f/k/a ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. f/k/a JANSSEN PHARMACEUTICA, INC. JANSSEN RESEARCH & DEVELOPMENT, LLC f/k/a JOHNSON & JOHNSON PHARMACEUTICAL RESEARCH & DEVELOPMENT, LLC. and JOHNSON & JOHNSON, INC. DEFENDANTS

FINAL JUDGMENT AND CONSENT DECREE
AND NOW, comes the Plaintiff, the Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General, having filed an action pursuant to the Kentucky Consumer Protection Act and the Parties having consented to entry of this Final Judgment and Consent Decree ("Judgment").

NOW THEREFORE, upon the Judgment of the Parties hereto, pursuant to KRS 367.190 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

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PARTIES

1. The Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General, is the plaintiff in this case. The Office of the Attorney General of Kentucky is charged with, among other things, the responsibility of enforcing the Kentucky Consumer Protection Act, KRS 367.110 et seq.

2. Janssen Pharmaceuticals, Inc. ("Janssen"), Janssen Research & Development, LLC ("JR&D"), and Johnson & Johnson ("J&J") are the defendants in this case. Janssen is a subsidiary of J&J. Janssen does business in the Commonwealth of Kentucky. Janssen's executive offices are located at 1125 Trenton Harbourton Road, P.O. Box 200, Titusville, NJ 08560. JR&D is a subsidiary of J&J. JR&D consents to the jurisdiction of the Court solely for the purposes of this Judgment and enforcement thereof. JR&D's executive offices are located at 920 Route 202, Raritan, New Jersey 08869. J&J consents to the jurisdiction of the Court solely for the purposes of this Judgment and enforcement thereof. J&J's executive offices are located at One Johnson & Johnson Plaza, New Brunswick, NJ 08933. At all times relevant hereto, Janssen engaged in trade affecting consumers, within the meaning of the Kentucky Consumer Protection Act, in the Commonwealth of Kentucky, including, but not limited to Jefferson County.

FINDINGS

1. This Court has jurisdiction over the subject matter of this Action and over all Parties.

2. The terms of this Judgment shall be governed by the laws of the Commonwealth of Kentucky.

3. Entry of this Judgment is in the public interest and reflects a negotiated agreement among the Parties.

4. The Parties have agreed to resolve the issues resulting from the Covered Conduct involving Atypical Antipsychotics by entering into this Judgment.

5. Janssen is willing to enter into this Judgment regarding the Covered Conduct solely in order to resolve the Commonwealth of Kentucky's concerns under the Kentucky Consumer Protection Act, KRS 367.110 *et seq.*, as to the matters addressed in this Judgment and thereby avoid unnecessary expense, inconvenience, and uncertainty. Nothing contained herein may be taken as or construed to be an admission or concession of any violation of law or regulation, or of any other matter of fact or law, or of any liability or wrongdoing (including allegations of the Complaint), all of which Defendants expressly deny. Defendants do not admit any violation of law, and do not admit any wrongdoing that was or could have been alleged by the Commonwealth of Kentucky before the date of the Judgment. No part of this Judgment, including its statements and commitments, shall constitute evidence of any liability, fault, or wrongdoing by Defendants. This Judgment is made without trial or adjudication of any issue of fact or law or finding of liability of any kind. It is the intent of the Parties that this Judgment shall not be binding or admissible in any other matter, including, but not limited to, any investigation or litigation, other than in connection with

the enforcement of this Judgment. No part of this Judgment shall create a private cause of action or confer any right to any third party for violation of any federal or state statute except that the Commonwealth of Kentucky may file an action to enforce the terms of this Judgment.

6. Defendants are entering into this Judgment solely for the purpose of settlement of the instant Action. This Judgment does not create a waiver or limit Defendants' legal rights, remedies, or defenses in any other action by the Commonwealth of Kentucky, and does not waive or limit Defendants' right to defend themselves from, or make argument in, any other matter, claim, or suit, including, but not limited to, any investigation or litigation relating to the subject matter or terms of this Judgment. Nothing in this Judgment shall waive, release, or otherwise affect any claims, defenses, or positions Defendants may have in connection with any investigations, claims, or other matters the Commonwealth of Kentucky is not releasing hereunder. Notwithstanding the foregoing, the Commonwealth of Kentucky may file an action to enforce the terms of this Judgment.

7. This Judgment (or any portion thereof) shall in no way prohibit, limit, or restrict Janssen from making representations with respect to an Atypical Antipsychotic that are permitted or authorized under Federal law, the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. (“FDCA”), U.S. Food and Drug Administration (“FDA”) regulations, or FDA Guidances for Industry. Further, the Judgment shall in no way prohibit, limit, or restrict Janssen from making representations with respect to an Atypical Antipsychotic that are required or authorized by, or consistent with, the FDA-approved Labeling or prescribing information for an Atypical Antipsychotic, or by any Investigational New Drug Application for an Atypical Antipsychotic, New Drug Application for an Atypical Antipsychotic, Supplemental New Drug Application for an Atypical Antipsychotic, or Abbreviated New Drug Application for an Atypical Antipsychotic filed with the FDA so long as the representation, taken in its entirety, is not false, misleading or deceptive.

8. Nothing in this Judgment shall require Janssen to:

a. Take any action that is prohibited by the FDCA or any regulation promulgated thereunder, or by the FDA; or

b. Fail to take any action that is required by the FDCA or any regulation promulgated thereunder, or by the FDA.

DEFINITIONS

The following definitions shall be used in construing this Judgment:

1. **“Action”** shall mean the civil action filed by the Commonwealth of Kentucky against Janssen Pharmaceuticals, Inc.; Janssen Research & Development, LLC; and Johnson & Johnson (erroneously named Johnson & Johnson, Inc.) in the Circuit Court of Jefferson County, Kentucky, Division 3, captioned *Commonwealth of Kentucky ex rel. Jack Conway, Attorney*

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General v. Janssen Pharmaceuticals, Inc. f/k/a Ortho-McNeil-Janssen Pharmaceuticals, Inc. f/k/a Janssen Pharmaceutica, Inc.; Janssen Research & Development, LLC f/k/a Johnson & Johnson Pharmaceutical Research & Development, LLC; and Johnson & Johnson, Inc., No. 13-CI-002488.

2. **"Atypical Antipsychotic"** shall mean all of Janssen's products that are FDA-approved drug formulations containing risperidone and/or paliperidone.

3. **"Clinically Relevant Information"** shall mean information that reasonably prudent clinicians would consider relevant when making prescribing decisions regarding an Atypical Antipsychotic.

4. **"Clinical Response"** shall mean a non-Promotional, scientific communication to address Unsolicited Requests for medical information.

5. **"Covered Conduct"** shall mean Janssen's Promotional and marketing practices, sampling practices, dissemination of information and remuneration to HCPs in the United States in connection with Atypical Antipsychotics through the Effective Date of the Judgment.

6. **"Effective Date"** shall mean the date on which a copy of this Judgment, duly executed by Defendants and by the Attorney General, is approved by, and becomes a Judgment of the Court.

7. **"FDA Guidances for Industry"** shall mean final documents issued by the FDA pursuant to 21 U.S.C. § 371(h) that represent the FDA's current thinking on a topic.

8. **"Health Care Professional"** or **"HCP"** shall mean any physician or other health care practitioner who is licensed to provide health care services or to prescribe pharmaceutical products.

9. **"Janssen"** shall mean Janssen Pharmaceuticals, Inc., including all of its subsidiaries, predecessors, successors and assigns doing business in the United States.

10. **"Janssen's Law Department"** shall mean personnel of the Janssen Law Department or its designee providing legal advice to Janssen.

11. **"Janssen Marketing"** shall mean Janssen personnel responsible for marketing Janssen's Atypical Antipsychotics in the U.S.

12. **"Janssen Sales"** shall mean the Janssen sales force responsible for U.S. Atypical Antipsychotic sales, including, but not limited to, Janssen personnel whose employment responsibilities include working with public or private entities in determining whether to include Atypical Antipsychotics on their prescription drug formularies or preferred drug lists.

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13. **"Janssen Scientific Affairs Medical Education Department"** or **"JSA MED"** shall mean the organization within Janssen responsible for oversight of medical education grants, including the acceptance, review, approval, and payment of all medical education grant requests.

14. **"Janssen Scientifically Trained Personnel"** shall mean Janssen personnel who are highly trained experts with specialized scientific and medical knowledge, usually with an advanced scientific degree (e.g., an MD, PhD, or PharmD), whose roles involve the provision of specialized, medical or scientific information, scientific analysis and/or scientific information to HCPs and includes Regional Medical Research Specialists, but excludes anyone performing sales, marketing, promotional ride alongs, or other commercial roles.

15. **"Labeling"** shall mean all labels and other written, printed, or graphic matter (a) upon any article or any of its containers or wrappers, or (b) accompanying such article.

16. **"Off-Label"** shall mean a use not consistent with the indications section of an Atypical Antipsychotic's Labeling approved by the FDA at the time information regarding such use was communicated.

17. **"Parties"** shall mean Janssen Pharmaceuticals, Inc.; Janssen Research & Development, LLC; and Johnson & Johnson and the Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General.

18. **"Promotional," "Promoting,"** or **"Promote"** shall mean representations made to HCPs, patients, consumers, payors and other customers, and other practices intended to increase sales in the United States or that attempt to influence prescribing practices of HCPs in the United States, including direct-to-consumer.

19. **"Promotional Materials"** shall mean any item used to Promote an Atypical Antipsychotic.

20. **"Promotional Media"** shall mean Promotional Materials in any media format for use in speaker programs.

21. **"Promotional Speaker"** shall mean an HCP speaker engaged to Promote an Atypical Antipsychotic in the United States.

22. **"Related Entity"** means any entity by or in which any physician or HCP receiving any payment is employed, has tenure, or has an ownership interest.

23. **"Reprints Containing Off-Label Information"** shall mean articles or reprints from a Scientific or Medical Journal, as defined in 21 C.F.R. 99.3(j), or Reference Publication, as defined in 21 C.F.R. 99.3(i), describing an Off-Label use of an Atypical Antipsychotic.

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24. **“Attorney General”** shall mean the Attorney General of the Commonwealth of Kentucky, or his authorized designee, who has agreed to this Judgment.

25. **“Unsolicited Request”** shall mean a request for information regarding an Atypical Antipsychotic communicated to an agent of Janssen that has not been prompted by Janssen.

COMPLIANCE PROVISIONS

I. *Promotional Activities*

A. Janssen shall not make, or cause to be made, any written or oral claim that is false, misleading or deceptive regarding an Atypical Antipsychotic.

The following subsections of Section I shall be effective until August 30, 2017:

B. Janssen shall not Promote an Atypical Antipsychotic for Off-Label uses.

C. In Promotional Materials for Atypical Antipsychotics, Janssen shall clearly and conspicuously disclose the risks associated with the Atypical Antipsychotic as set forth in the product's boxed warning and shall present information about effectiveness and risk in a balanced manner.

D. Janssen shall not compensate an HCP for merely attending a Promotional activity.

E. Janssen shall not present patient profiles/types based on selected symptoms of the FDA-approved indication(s) when Promoting an Atypical Antipsychotic, unless:

1. The Atypical Antipsychotic's specific FDA-approved indication(s) is stated clearly and conspicuously in the same spread (i.e., on the same page or on a facing page) in any Promotional Materials that refer to selected symptoms;

2. With respect to Promotional Media:

a. Janssen states, clearly and conspicuously, the FDA-approved indication(s) on the same slide or page in which selected symptoms are first presented; and

b. With respect to each subsequent reference to selected symptoms, Janssen states on the same slide or page that the Atypical Antipsychotic is not approved for the selected symptom referenced in the slide or page and includes on the same slide or page a shorthand reference to the FDA-approved indications (e.g., “[Atypical Antipsychotic] is not approved for X selected symptom referenced in this slide. See complete list of FDA-approved indications at p. Y”).

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3. Promotional Materials have a reference indicating that the full constellation of symptoms and the relevant diagnostic criteria should be consulted and are available in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV or current version), where applicable.

F. Janssen shall require that all Promotional Speakers' Promotional Materials and Promotional Media for Atypical Antipsychotics, comply with Janssen's obligations in the above Sections LA.-E.

G. Janssen's systems and controls shall:

1. Be designed to ensure that financial incentives do not motivate Janssen Sales and/or Marketing to engage in improper promotion, sales, and marketing of Atypical Antipsychotics; and

2. Require the review, and modification, if necessary, of call plans of Janssen Sales and Janssen Marketing personnel who Promote an Atypical Antipsychotic to ensure that Janssen Sales and/or Janssen Marketing Promote Atypical Antipsychotics only for FDA-approved uses.

II. *Dissemination and Exchange of Medical Information*

A. General Terms

1. The content of Janssen's communications concerning Off-Label uses of an Atypical Antipsychotic shall not be false, misleading or deceptive.

The following subsections of Section II shall be effective until August 30, 2017:

B. Clinical Responses

1. Janssen, through Janssen Scientifically Trained Personnel, shall have ultimate responsibility for developing and approving all Clinical Responses regarding an Atypical Antipsychotic, including any that may describe Off-Label information. Additional approvals may be provided by Janssen's Law Department. Janssen shall not distribute any such materials unless:

a. Clinically Relevant Information is included in these materials to provide scientific balance;

b. Data in these materials are presented in an unbiased, non-Promotional manner; and

c. These materials are clearly and conspicuously distinguishable from sales aids and other Promotional Materials.

d. Nothing in this subsection II.B shall prohibit Janssen Scientifically Trained Personnel from disseminating materials that are permitted to be distributed under Federal law.

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2. Janssen Sales and Janssen Marketing personnel shall not develop the medical content of Clinical Responses regarding an Atypical Antipsychotic.

3. Clinical Responses regarding an Atypical Antipsychotic may be disseminated only by Janssen Scientifically Trained Personnel to HCPs, and Janssen's Sales and Marketing shall not disseminate these materials to HCPs except in circumstances implicating public health and safety issues. In such circumstances, Janssen's Sales and Marketing may disseminate a Clinical Response directly to HCPs when expressly authorized by the Health Care Compliance Officer, the Vice President of Medical/Scientific Affairs responsible for the Atypical Antipsychotic(s) included in the Clinical Response(s), and Senior Counsel from the Janssen Law Department.

4. Janssen shall not knowingly disseminate any Clinical Response, including one that describes any Off-Label use of an Atypical Antipsychotic, that makes any false, misleading or deceptive representation regarding an Atypical Antipsychotic or any false, misleading or deceptive statement concerning a competing product.

C. Responses to Unsolicited Requests for Off-Label Information

1. In responding to an Unsolicited Request for Off-Label information regarding an Atypical Antipsychotic, including any request for a specific article related to Off-Label uses, Janssen shall:

a. advise the requestor that the request concerns an Off-Label use;

b. and inform the requestor of the drug's FDA-approved indication(s) and dosage, and other relevant Labeling information.

2. If Janssen elects to respond to an Unsolicited Request for Off-Label information regarding an Atypical Antipsychotic, Janssen Scientifically Trained Personnel, shall provide specific, accurate, objective, and scientifically balanced responses. Any such response shall not Promote an Atypical Antipsychotic for any Off-Label use(s).

3. Any written response to an Unsolicited Request for Off-Label information regarding an Atypical Antipsychotic shall include:

a. An existing Clinical Response Letter prepared in accordance with Section II.B;

b. A Clinical Response Letter prepared in response to the request in accordance with Section II.B; or

c. A report containing the results of a reasonable literature search using terms from the request.

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4. Only Janssen Scientifically Trained Personnel may respond in writing to an Unsolicited Request for Off-Label information regarding an Atypical Antipsychotic.

5. Janssen Sales and Janssen Marketing personnel may respond orally to an Unsolicited Request for Off-Label information regarding an Atypical Antipsychotic only by offering to request on behalf of the requester that a Clinical Response Letter prepared in accordance with Section II.B or other information set forth in Section II.C above be sent in follow-up or by offering to put the requester in touch with the scientific exchange call center. Janssen Non-Scientifically Trained Personnel shall not characterize, describe, identify, name, or offer any opinions about or summarize any such Off-Label information.

D. Reprints

1. Janssen shall not disseminate information describing any Off-Label or unapproved use of an Atypical Antipsychotic, unless such information and materials comply with applicable FDA regulations and FDA Guidances for Industry.

2. Janssen Scientifically Trained Personnel shall be responsible for the identification, selection, approval and dissemination of Reprints Containing Off-Label Information regarding Atypical Antipsychotics. Neither Janssen Sales nor Janssen Marketing personnel shall disseminate these materials, unless Janssen has a pending filing with FDA for approval of the new indication described in the Reprint.

3. Requests to proactively disseminate a Reprint Containing Off-Label Information regarding Atypical Antipsychotics shall be submitted to the Promotional Review Committee, which includes representatives from Clinical, Medical Affairs, Janssen's U.S. Compliance Department, Janssen's Law Department, and Promotional Regulatory Affairs, to examine the facts and justification for the request to distribute a Reprint Containing Off-Label Information on a case-by-case basis.

4. Reprints Containing Off-Label Information regarding an Atypical Antipsychotic:

a. shall be accompanied by the FDA-approved Labeling for the product, or a clearly and conspicuously described hyperlink that will provide the reader with such information;

b. shall contain a disclosure that is prominently displayed, which would include the first page or as a cover page where practicable, indicating that the article may discuss Off-Label information; and

c. shall not be referred to or used in a Promotional manner.

5. Nothing in this Judgment shall preclude Janssen from disseminating reprints which have only an incidental reference to Off-Label information. If reprints have an incidental reference to Off-Label information, such reprints shall contain the disclosures required by Section II.D.4.a and II.D.4.b

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in a prominent location, as defined above, and such incidental reference to Off-Label information shall not be referred to or used in a Promotional manner as prohibited by Section II.D.4.c.

III. *Grants*

The following subsections of Section III shall be effective until August 30, 2017:

A. Janssen shall disclose information about medical education grants, including continuing medical education (“CME”) grants, regarding an Atypical Antipsychotic consistent with the current disclosures of the Janssen Scientific Affairs Medical Education Department at www.janssenime.com (hereinafter, “JSA MED website”) and as required by applicable law.

B. Once posted, Janssen shall maintain this information on the JSA MED website for at least two years, or longer if applicable law so requires, and shall maintain the information in a readily accessible format for review by the Commonwealth of Kentucky upon written request for a period of five years.

C. JSA MED shall manage all requests for funding related to medical education grants relating to an Atypical Antipsychotic. Approval decisions shall be made by JSA MED and Janssen Medical, and shall be kept separate from the Janssen Sales and Janssen Marketing organizations.

D. Janssen shall not use medical education grants or any other type of grant to Promote an Atypical Antipsychotic. This provision includes, but is not limited to, the following prohibitions:

1. Janssen Sales and Janssen Marketing personnel shall not initiate, coordinate or implement grant applications on behalf of any customer or HCP;

2. Janssen Sales and Janssen Marketing personnel shall not be involved in selecting grantees or medical education speakers; and

3. Janssen shall not measure or attempt to track in any way the impact of grants or speaking fees on participating HCPs' subsequent prescribing habits, practices or patterns.

E. Janssen shall not condition funding of a medical education program grant request relating to an Atypical Antipsychotic upon the requestor's selection or rejection of particular speakers.

F. Janssen shall not suggest, control, or attempt to influence the specific topic, title, content, speakers or audience for CMEs relating to an Atypical Antipsychotic, consistent with Accreditation Council for Continuing Medical Education (“ACCME”) guidelines.

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G. Janssen Sales and Janssen Marketing personnel shall not approve grant requests regarding an Atypical Antipsychotic, nor attempt to influence the awarding of grants to any customers or HCPs for their prescribing habits, practices or patterns.

H. Janssen shall contractually require each medical education provider to clearly and conspicuously disclose to attendees of a medical education program regarding Atypical Antipsychotics Janssen's financial support of the medical education program and any financial relationship with faculty and speakers at such medical education program.

I. After initial delivery of a CME program regarding an Atypical Antipsychotic, Janssen shall not knowingly fund the same program, nor shall it provide additional funding for re-distribution of the same program, if the program's speakers are Promoting an Atypical Antipsychotic for Off-Label use in that program.

IV. *Payments to Consultants and Speakers*

Until August 30, 2017, Janssen shall be required to file reports with the Office of Inspector General of the Department of Health and Human Services (HHS) consistent with the requirements of Section 6002 of the federal Patient Protection and Affordable Care Act of 2010, and in final regulations by HHS.

V. *Product Samples*

The following subsections of Section V shall be effective until August 30, 2017:

A. Janssen shall provide samples of an Atypical Antipsychotic only to those HCPs whose clinical practice is consistent with the product's FDA-approved Labeling.

B. If an HCP whose clinical practice is inconsistent with an Atypical Antipsychotic's FDA-approved Labeling requests samples of an Atypical Antipsychotic, Janssen personnel shall refer the HCP to Janssen Medical where the practitioner can speak directly with a Janssen Medical representative who will provide answers to the HCP's questions about the Atypical Antipsychotic and may provide him/her with samples only if appropriate (*i.e.*, if the HCP requests the samples for an on-label use).

VI. *Clinical Research Results*

A. Janssen shall report clinical research regarding Atypical Antipsychotics in an accurate, objective and balanced manner, and as required by applicable law. For all Janssen-sponsored clinical trials and to the extent permitted by the National Library of Medicine, Janssen shall register clinical trials and submit clinical trial results to the federal clinical trial registry and results data bank on the publicly accessible NIH website (www.clinicaltrials.gov) as required by the

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FDA Amendments Act of 2007, Public Law No. 110-85, 121 Stat 823, and any accompanying regulations that may be promulgated pursuant to that Act.

B. When presenting information about a clinical study regarding an Atypical Antipsychotic in any Promotional Materials, Janssen shall not do any of the following in a manner that causes the Promotional Materials to be false, misleading, or deceptive:

1. Present favorable information or conclusions from a study that is inadequate in design, scope, or conduct to furnish significant support for such information or conclusions;

2. Use the concept of statistical significance to support a claim that has not been demonstrated to have clinical significance or validity, or fails to reveal the range of variations around the cited average results;

3. Use statistical analyses and techniques on a retrospective basis to discover and cite findings not soundly supported by the study, or to suggest scientific validity and rigor for data from the study the design or protocol of which is not amenable to formal statistical evaluations;

4. Present the information in a way that implies that the study represents larger or more general experience with the drug than it actually does; or

5. Use statistics on numbers of patients, or counts of favorable results or side effects, derived from pooling data from various insignificant or dissimilar studies in a way that suggests either that such statistics are valid if they are not or that they are derived from large or significant studies supporting favorable conclusions when such is not the case. If any results derived from pooling data are presented, Janssen shall disclose the method of pooling.

VII. *Terms Relating to Payment*

No later than 30 days after the Effective Date of this Judgment, Janssen shall pay $15,500,000 to the Commonwealth of Kentucky by wire transfer pursuant to the instructions provided to counsel. Said payment shall be used by the Commonwealth as and for attorneys' fees and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, including future consumer protection enforcement, consumer education, litigation, or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, and may be used to fund or assist in funding programs directed at mental illness treatment, including but not limited to education and outreach or for other uses permitted by state law, at the sole discretion of the Attorney General. The Office of the Attorney General may retain $3,100,000 as its reasonable costs of litigation, pursuant to KRS 48.005 and as determined by the Court. The Parties acknowledge that the payment described herein is not a fine, penalty, or payment in lieu thereof.

VIII. *Release*

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A. By its execution of this Judgment, the Commonwealth of Kentucky releases Defendants and all past and present parents, subsidiaries, affiliates, predecessors, successors, and assigns and each and all of their current and former officers, directors, shareholders, employees, agents, contractors, and attorneys (collectively, the "Released Parties") from the following: all civil claims, *parens patriae* claims, causes of action, damages, restitution, fines, costs, attorneys fees, and penalties that the Kentucky Attorney General has asserted or could have asserted against the Released Parties under the Kentucky Consumer Protection Act or any amendment thereto; common law claims concerning unfair, deceptive, or fraudulent trade practices; and Medicaid claims, including, but not limited to, federal Medicaid drug rebate statute violations, Medicaid fraud, or other abuse (whether common law, statutory, or otherwise), and/or kickback violations related to the Commonwealth of Kentucky's Medicaid program, other than those asserted or that could be asserted under Sections VIII.B.2 and VIII.B.3 below, resulting from the Covered Conduct up to and including the Effective Date (collectively, the "Released Claims").

B. Notwithstanding any term of this Judgment, specifically reserved and excluded from the Released Claims as to any entity or person, including Released Parties, are any and all of the following:

1. Any criminal liability that any person or entity, including Released Parties, has or may have to the Commonwealth of Kentucky;

2. Any civil or administrative liability that any person or entity, including Released Parties, has or may have to the Commonwealth of Kentucky not expressly covered by the release in Section VIII.A above, including but not limited to the following claims:

a. State or federal antitrust violations; and

b. Claims involving "best price," "average wholesale price," or "wholesale acquisition cost," or any practices related to the reporting of prices;

3. Actions on behalf of state program payors of the Commonwealth arising from the purchase of any Atypical Antipsychotic or any other Janssen drug, except for the release of civil penalties under the Kentucky Consumer Protection Act, KRS 367.110 *et seq.* and/or the Kentucky Medicaid Fraud Statute, KRS 205.8451 *et seq.*; and

4. Any claims individual consumers have or may have under the Kentucky Consumer Protection Act or other applicable law against any person and/or entity, including Released Parties.

IX. *Dispute Resolution*

A. For the purposes of resolving disputes with respect to compliance with this Judgment, should the Attorney General have a reasonable basis to believe that Janssen has engaged in a practice that

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violates a provision of this Judgment subsequent to the Effective Date of this Judgment, then the Attorney General shall notify Janssen in writing of the specific objection, identify with particularity the provision of this Judgment that the practice appears to violate, and give Janssen thirty (30) days to respond to the notification; provided, however, that the Attorney General may take any action if the Attorney General concludes that, because of the specific practice, a threat to the health or safety of the public requires immediate action. Upon receipt of written notice, Janssen shall provide a good-faith written response to the Attorney General notification, containing either a statement explaining why Janssen believes it is in compliance with the Judgment, or a detailed explanation of how the alleged violation occurred and a statement explaining how Janssen intends to remedy the alleged breach. Nothing in this section shall be interpreted to limit the state's Civil Investigative Demand ("CID") or investigative subpoena authority and Janssen reserves all of its rights with respect to a CID or investigative subpoena issued pursuant to such authority.

B. Upon giving Janssen thirty (30) days to respond to the notification described above, the Attorney General shall also be permitted reasonable access to inspect and copy relevant, non-privileged, non-work product records and documents in the possession, custody, or control of Janssen that relate to Janssen's compliance with each provision of this Judgment, pursuant to that State's CID or investigative subpoena authority. If the Attorney General makes or requests copies of any documents during the course of that inspection, the Attorney General will provide a list of those documents to Janssen.

C. The Commonwealth of Kentucky may assert any claim that Janssen has violated this Judgment in a separate civil action to enforce compliance with this Judgment, or may seek any other relief afforded by law, but only after providing Janssen an opportunity to respond to the notification described in Paragraph IX.A above; provided, however, that the Attorney General may take any action if the Attorney General concludes that, because of the specific practice, a threat to the health or safety of the public requires immediate action.

X. *General Provisions*

A. Janssen shall not cause third parties acting on its behalf to engage in practices from which Janssen is prohibited by this Judgment.

B. This Judgment represents the full and complete terms of the settlement entered into by the Parties hereto. In any action undertaken by the Parties, neither prior versions of this Judgment nor prior versions of any of its terms that were not entered by the Court in this Judgment may be introduced for any purpose whatsoever.

C. This Court retains jurisdiction of this Judgment and the Parties hereto for the purpose of enforcing and modifying this Judgment and for the purpose of granting such additional relief as may be necessary and appropriate.

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D. This Judgment may be executed in counterparts, and a facsimile or .pdf signature shall be deemed to be, and shall have the same force and effect as, an original signature.

E. The Parties agree that none of them shall be deemed the drafter of this Judgment and that, in construing this Judgment, no provision hereof shall be construed in favor of one party on the ground that such provision was drafted by the other.

F. All Notices under this Order shall be provided to the following address via Overnight Mail:

For the Commonwealth:

Todd Leatherman

Executive Director, Consumer Protection

Office of the Attorney General

1024 Capitol Center Drive

Frankfort, Kentucky 40601

For Janssen Pharmaceuticals, Inc.;

Janssen Research & Development, LLC;

and Johnson & Johnson:

Lisbeth Warren, Esq.

Assistant General Counsel

Johnson & Johnson

Office of General Counsel

One Johnson & Johnson Plaza

New Brunswick, NJ 08933

Dated: *12/22/2015*

Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General

By:

Robyn Bender, Esq.

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Acting Chief Deputy Attorney General

Office of the Attorney General

700 Capital Avenue, Suite 118

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Dated: *12/22/2015*

Janssen Pharmaceuticals, Inc.

By:

Lisbeth Warren, Esq.

Assistant General Counsel

Johnson & Johnson

Office of General Counsel

One Johnson & Johnson Plaza

New Brunswick, NJ 08933

Dated:

Janssen Research & Development, LLC

By:

Lisbeth Warren, Esq.

Assistant General Counsel

Johnson & Johnson

Office of General Counsel

One Johnson & Johnson Plaza

New Brunswick, NJ 08933

Dated: *December 22, 2015*

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Johnson & Johnson

By:

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Agreed to and Submitted by:

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Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL

1024 Capital Center Drive, Suite 200

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Attorneys for Defendants Janssen

Pharmaceuticals, Inc.; Janssen Research & Development, LLC; and Johnson & Johnson

SO ORDERED:

Dated:

JUDGE, JEFFERSON CIRCUIT COURT

12-22-2015

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EXHIBIT F

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2012 WL 996687
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

FARMERS AND TRADERS BANK, Appellant
v.
April ASHBROOK and Richard Ashbrook, Appellees.

No. 2010–CA–002213–MR.
|
March 23, 2012.

Appeal from Wolfe Circuit Court, Action No. 08–CI–00102; Larry Miller, Judge.

Attorneys and Law Firms

David H. Steele, Florence, KY, for appellant.

Melissa C. Howard, Jackson, KY, for appellee April Ashbrook.

Before CLAYTON, MOORE, and NICKELL, Judges.

OPINION

MOORE, Judge.

***1** April and Richard Ashbrook filed this action in Wolfe Family Court on April 17, 2008, to dissolve their marriage. During the pendency of this action, Farmers and Traders Bank filed a motion to intervene in an attempt to assert a lien over all of the Ashbrooks' real, personal, marital and non-marital property. As its basis for intervening, Farmers asserted that it had obtained a judgment against Richard in Powell Circuit Court relating to a loan it had given Richard for the purchase of an airplane and that it anticipated that a sale of its collateral for that loan—the airplane—might not satisfy the entire balance of its judgment. Therefore, Farmers might be entitled to a deficiency judgment and lien against any other property that the Ashbrooks held.

No party contested Farmers' assertion that it had obtained a judgment against Richard in Powell Circuit Court, but Farmers produced nothing below demonstrating the substance, nature, or amount of its judgment. Moreover, the Ashbrooks both argued that Farmers' purported judgment only entitled Farmers to execute a lien against Richard's property in the event that Farmers sold Richard's airplane, credited its judgment against Richard with the proceeds, and filed an affidavit with the Powell Circuit Court reciting the amount of that credit and the remaining balance due. Farmers did not contest the Ashbrooks' argument or indicate that it had complied with those terms.

After considering these arguments, the family court determined that allowing Farmers to intervene would prejudice the interests of the parties. It entered the following order, stating in relevant part:

> Farmers and Traders Bank's motion to intervene is denied. The bank may proceed to sell the airplane pursuant to the order entered in Powell Circuit Court case No. 09–CI–336 to see if it satisfies the lien/judgment.
>
> Thereafter, Farmers timely appealed.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith,* 170 S.W.3d 402, 407 (Ky.App.2004). Our standard of review as to whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409 (citing *Gayner v. Packaging Serv. Corp. of Ky.,* 636 S.W.2d 658, 660 (Ky.App.1982)).

The rule governing intervention as a matter of right is Kentucky Rule of Civil Procedure (CR) 24.01. Subsection (1) of that Rule, which is relevant to the case at bar, states:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

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On appeal, Farmers does not claim that it had a statutory right to intervene in the Ashbrooks' dissolution under subsection (1)(a), but instead claims a right to intervene under subsection (1)(b). In *Carter,* 170 S.W.3d at 407, we noted that CR 24.01(1)(b) requires the petitioner to meet four factors in order to intervene as a matter of right: (1) its motion must be timely; (2) the petitioner must have an interest relating to the subject of the action; (3) the petitioner's ability to protect its interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the petitioner's interests. Importantly, it is the burden of the petitioner to prove each of these requirements. *Id.* at 409.

***2** Here, our analysis begins and ends with the second of these factors. It was Farmers' burden to prove that it had a present and substantial interest relating to the subject of the Ashbrooks' dissolution action. To that effect, it has produced nothing demonstrating the substance, nature, or amount of its judgment against Richard; it does not disagree with or attempt to disprove the Ashbrooks' representation that Farmers' judgment precludes it from asserting any lien over Richard's property unless and until the proceeds realized from a prospective sale of Richard's airplane fail to satisfy its purported judgment; nor, for that matter, does Farmers represent that it has filed an affidavit with the Powell Circuit Court reflecting the outstanding balance of Richard's judgment credited against the value of the airplane. Therefore, Farmers' interest in any of Richard's property is, at best, contingent. And, a petitioner with only a contingent interest in property is not entitled, per CR 24.01(1)(b), to intervene in an action. *See Baker v. Webb,* 127 S.W.3d 622, 624 (Ky.2004) (citing *Gayner,* 636 S.W.2d at 659)). For this reason, the Judgment of the Wolfe Family Court is hereby AFFIRMED.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2012 WL 996687

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2016 WL 837366
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

LOUISVILLE METRO POLICE DEPARTMENT, Appellant
v.
Walter BAKER and Louisville Metro Police Merit Board, Appellees
Louisville Metro Police Merit Board, Appellant
v.
Walter Baker, Appellee

NO. 2012–CA–001109–MR,
NO. 2012–CA–001134–MR
|
MARCH 4, 2016; 10:00 A.M.
|
Discretionary Review Denied by Supreme Court December 8, 2016

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE FREDERIC COWAN, JUDGE, ACTION NO. 11–CI–001161

Attorneys and Law Firms

BRIEFS FOR APPELLANT LOUISVILLE METRO POLICE DEPARTMENT: Kristie Alfred Daugherty, Louisville, Kentucky

BRIEFS FOR APPELLEE WALTER BAKER: Thomas E. Clay, Louisville, Kentucky, Melissa Eyre Yeagle, Louisville, Kentucky

BRIEFS FOR APPELLANT LOUISVILLE METRO POLICE MERIT BOARD: Mark W. Dobbins, Sandra F. Keene, Louisville, Kentucky

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

OPINION

VANMETER, JUDGE:

***1** These consolidated appeals raise three issues: whether the trial court erred in denying the Louisville Metro Police Merit Board's motion to dismiss Walter Baker's administrative appeal for failure to join an indispensable party to the appeal, i.e., the Louisville Metro Police Department; whether the trial court erred in denying the Department's post-judgment motion to intervene; and whether the trial court erred in its decision to reverse the decision of the Board and reinstate Baker. For the reasons hereinafter set forth, we hold that the trial court did not err in its disposition of the first two procedural issues, but that it did err in its decision to order reinstatement of Baker. We therefore vacate the Jefferson Circuit Court's opinion and order, and remand to that court with instructions to affirm the Board's decision.

I. Factual and Procedural Background.

Walter Baker was terminated from his position as an officer with the Department after he illegally rented a house he owned to his mother under the federal Section 8 Housing Choice Voucher Program. [1] Baker took good faith steps to resolve the situation, and ultimately negotiated a diversion agreement with the United States Attorney for the Western District of Kentucky. The first sentence of that agreement recited, "[i]t appear[s] that you have committed an offense against the United States," by completing the housing lease and accompanying forms, "in violation of 18 U.S.C. [2] 1001[.]" [3] The Board found that this language meant that Baker acknowledged a violation of federal law, which constitutes a violation of Department Standard Operating Procedure 5.1.2, and affirmed the Department's decision to terminate Baker on January 18, 2011.

On February 14, 2011, Baker filed a complaint in Jefferson Circuit Court, appealing the Board's decision upholding his termination, claiming denial of due process, estoppel, and insufficient evidence. However, Baker named only the Board as a defendant in the action, not the Department. On February 24, 2012, the Board filed a motion to dismiss Baker's complaint for failure to name an indispensable party, the Department. The Board argued that the Department was a necessary party to the action since it could be affected and controlled by a final decision of the circuit court. On April 20, 2012, the circuit court entered an Opinion and Order denying the Board's motion to dismiss for failure to join an

indispensable party and reversing the decision of the Board upholding the Department's decision to terminate Baker. The circuit court held that KRS [4] 67C.323 requires only that the Board be named as a respondent to the appeal of a Board decision, not the Department.

***2** The Board filed a motion to alter, amend or vacate the circuit court order, and the Department filed a motion to intervene pursuant to CR 24. The circuit court denied both the Board's motion to alter, amend or vacate and the Department's motion to intervene. Subsequently, both the Department and the Board appealed the circuit court's decision, and those appeals were consolidated into the appeal presently before this court.

II. Standard of Review.

A trial court's order denying a motion to intervene as a matter of right pursuant to CR 24.01 is immediately appealable. *Carter v. Smith,* 170 S.W.3d 402, 407 (Ky.2004). An appellate court reviews a denial of a motion to intervene as a matter of right for clear error. *Id.* at 409. With respect to the appeal of a Police Force Merit Board determination, KRS 67C.323(3)(a) provides "[t]he appeal taken to the Circuit Court shall be docketed by the clerk as a civil action with the appropriate judicial review of an administrative action or decision." [5]

The judicial standard of review in administrative appeals is well-settled in the Commonwealth. "An administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *McManus v. Kentucky Ret. Sys.,* 124 S.W.3d 454, 458 (Ky.App.2003) (internal quotation marks and citation omitted). Thus, "[a] reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious." *Id.* at 458.

> In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them.... Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence.... If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

*Bowling v. Nat. Res. & Envtl. Prot. Cabinet,*891 S.W.2d 406, 409 (Ky.App.1994) (internal quotation marks and citation omitted). " 'Substantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky.1998) (citing *Kentucky State Racing Comm'n v. Fuller,* 481 S.W.2d 298, 308 (Ky.1972)). A court reviews an agency's conclusions of law *de novo. See Aubrey v. Office of Attorney General,* 994 S.W.2d 516, 519 (Ky.App.1998). "A court's function in administrative matters is one of review, not reinterpretation." *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621, 624 (Ky.App.2002) (footnote omitted).

III. Issues on Appeal.

A. Motion to Dismiss for Failure to Join an Indispensable Party.

***3** As noted, the Department, through the Chief, terminated Baker's employment. Baker thereafter, in accordance with KRS 67C.323(1), filed his request for review by the Board. This section states, in part:

> If a majority of the members of the board are of the opinion that the action of the chief is unjustified or unsupported by proper evidence, the order of the chief may be set aside and revoked by the board, and the board may impose the penalty or punishment it deems necessary and appropriate, if any; provided however, the board shall

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> not impose a penalty or punishment in excess of the action of the chief.

After the Board affirmed the dismissal, Baker filed his action in Jefferson Circuit Court, which, as noted above, is an administrative appeal. When "an appeal is filed in the circuit court by grant of a statute, as in this case, the parties must strictly comply with the dictates of that statute. An appeal from an administrative decision is a matter of legislative grace[.]" *Spencer Cnty. Pres., Inc. v. Beacon Hill, LLC,* 214 S.W.3d 327, 329 (Ky.App.2007). In other words, the legislature may dictate the parameters of any administrative appeal.

In this case, the legislature set out that in an administrative appeal from a decision of the Board, the Board is to be named as a party. KRS 67C.323(3)(a). Obviously, the party aggrieved, whether the sanctioned officer or the Department, will be the petitioner/plaintiff, and the Board will be the respondent/defendant. While the prevailing party before the Board, as the real party in interest, may desire and is entitled to intervene, *Louisville Metro Police Merit Bd. v. Marlowe,* 2013–CA–000123–MR, 2013–CA–000133–MR, 2014 WL 3887931 (Ky.App., Aug. 8, 2014), we are unable to say, given the provisions of KRS 67C.323(3)(a), that the Department is an indispensable party, and the failure to name it as a party in the circuit court is fatal to the appeal.

B. Denial of Department's Motion's to Intervene

As to the Department's appeal, the trial court denied its post-judgment motion to intervene. In *Marlowe,* we noted that the Department clearly has an interest in the subject of these types of appeals and its ability to protect its interests would obviously be affected by a decision ordering reinstatement of a terminated officer. Accordingly, we reversed the trial court's order in that case denying the Department's motion. The key difference between *Marlowe* and this case, of course, is that the Department in *Marlowe* sought to intervene soon after the appeal was filed in the circuit court.

CR 24.01(1) states:

> Upon **timely** application anyone shall be permitted to intervene in an action ... (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

(emphasis added).

This rule has been interpreted as establishing a four-part test requiring the party seeking to intervene to prove: (1) the motion was timely; (2) the party has an interest in the subject of the action; (3) the party's ability to protect his or her interest may be impaired or impeded; and (4) none of the existing parties can adequately represent his or her interest. *Carter,* 170 S.W.3d at 409–10. While we believe the Department has met three of these requirements, we note that the motion to intervene was not filed until thirty-six days after the circuit court rendered its opinion addressing the merits of Baker's appeal.

***4** A court may consider the following factors to determine whether a motion to intervene was timely:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Id. at 408 (citation omitted).

Although post-judgment intervention is not strictly forbidden, it is widely within the discretion of the circuit judge.

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Timeliness is a question of fact, which generally should be left to the circuit court. A "party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness." *Hazel Enterprises, LLC v. Community Fin. Serv. Bank,* 382 S.W.3d 65, 67 (Ky.App.2012) (internal citations omitted). In this case, we find it difficult to believe that the Department or the Chief was unaware that Baker had filed his appeal. Thus, the first, third and fourth "timeliness" factors weigh against permitting the Department to intervene post-judgment. To permit intervention at this late date would only serve to encourage parties to wait to see what the circuit court ruling might be and then seek to intervene only after an unfavorable ruling. The circuit court did not err in denying the Department's post-judgment motion to intervene.

C. Baker's Termination

Lastly, the Board contends that the circuit court erred by reversing the Board's decision to uphold Baker's termination. We agree. "[J]udicial review of administrative action is concerned with arbitrariness." *Am. Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n,* 379 S.W.2d 450, 456 (Ky.1964). Here, we do not believe the Board's decision was arbitrary. The Board carefully considered the evidence presented at Baker's hearing prior to concluding that Baker violated federal law and acknowledged as much in his diversion agreement.[6] This violation of federal law also constituted a violation of LMPD's Standard Operating Procedure ("SOP") Section 5.1.2, which prohibits members of the department from committing any act that constitutes a violation of any law applicable to their jurisdiction. "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Johnson v. Galen Health Care, Inc.,* 39 S.W.3d 828, 832 (Ky.App.2001) (citation omitted). Baker himself admitted that he violated federal law. Substantial evidence more than supports the Board's conclusion that Baker violated SOP Section 5.1.2, and therefore, the circuit court erred by reversing the Board's decision.

IV. Conclusion

***5** For the foregoing reasons, the order of the Jefferson Circuit Court is reversed and remanded to that court with instructions to reinstate the Board's decision.

DIXON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

All Citations

Not Reported in S.W. Rptr., 2016 WL 837366

Footnotes

1 With the exception for tenants with disabilities, the United States Department of Housing and Urban Development ("HUD") regulations expressly prohibit a landlord from leasing Section 8 housing to an immediate family member. Baker's mother is not disabled.

2 United States Code.

3 The Federal Criminal False Statements Statute.

4 Kentucky Revised Statutes.

5 As an aside, we note that the statutorily imposed "appropriate judicial review of an administrative action or decision[,]" required by KRS 67C.323(3)(a), contrasts with other statutory and case authority, *e.g., Crouch v. Jefferson Cnty., Ky. Police Merit Bd.,* 773 S.W.2d 461, 464 (Ky.1988) (applying KRS 78.455(2)(a) which directs that an "appeal taken to the circuit court shall be docketed by the clerk thereof as a civil action and shall be tried anew, as if no action had been rendered by the board[ ]"), and *Brady v. Pettit,* 586 S.W.2d 29 (Ky.1979) (applying KRS 67A.290, which provides for a trial *de novo* in the circuit court).

6 We note that a criminal conviction is not necessary to an administrative body's consideration of the underlying criminal conduct. *See Louisville Civil Serv. Bd. v. Blair,* 711 S.W.2d 181, 183 (Ky.1986).

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2013 WL 462267
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

SOUTH CENTRAL BANK OF BARREN COUNTY, INC., Appellant
v.
COMMONWEALTH BANK & TRUST CO.; Sanctuary Bluff, LLC; Stephen T. Cox; First Federal Savngs Bank of Elizabethtown, Inc.; and Kentucky Tax Lien Fund, LLC, Appellees.

No. 2011–CA–001785–MR.
|
Feb. 8, 2013.

Appeal from Jefferson Circuit Court, Action No. 10–CI–403590; Brian C. Edwards, Judge.

Attorneys and Law Firms

Charles E. English, David W. Anderson, Bowling Green, KY, for appellant.

Clark C. Johnson, Amy K. Jay, Louisville, KY, for appellee, Commonwealth Bank & Trust Co.

Before ACREE, Chief Judge; CLAYTON and COMBS, Judges.

OPINION AND ORDER

CLAYTON, Judge.

***1** South Central Bank of Barren County, Inc. ("South Central") appeals from the August 30, 2011, order of the Jefferson Circuit Court. That order denied South Central's motion to intervene in the foreclosure action initiated by Commonwealth Bank & Trust Co. ("Commonwealth") against Sanctuary Bluff, LLC ("Sanctuary Bluff"). Because we hold that the trial court did not abuse its discretion when it denied South Central's motion, we affirm. Additionally, we deny Commonwealth's motion to strike South Central's brief and dismiss the appeal.

On July 6, 2007, Commonwealth issued a loan to Sanctuary Bluff for the development of a subdivision. The loan was secured by a personal guarantee and by a first mortgage on the property where the subdivision was to be constructed. Thereafter, on October 1, 2007, Commonwealth and South Central entered into a participation agreement whereby South Central purchased a participation interest in the loan to Sanctuary Bluff. The agreement provided that South Central would recover 34 percent of any amounts collected on the original promissory note between Commonwealth and Sanctuary Bluff, but that Commonwealth would remain the sole enforcer and collector of the note. It was further agreed, in part, that any legal action against Sanctuary Bluff would be pursued in the name of Commonwealth only; that Commonwealth would promptly notify South Central of any default by Sanctuary Bluff; and that Commonwealth would not proceed with any legal action without first consulting with, and obtaining written approval from, South Central. Subsequently, Commonwealth made three additional loans to Sanctuary Bluff. However, after considering the subject of this appeal and the breadth of our review, we do not believe the details of those loans to be relevant herein.

On June 15, 2010, Sanctuary Bluff defaulted on its July 6, 2007, loan. Commonwealth filed its underlying foreclosure action on September 15, 2010. The record reflects that an e-mail was sent from Commonwealth to South Central on September 17, 2010, informing of the foreclosure action and affirming intent to update as to the action's progress. Another email, sent on October 19, 2010, again referenced the lawsuit and notified Commonwealth's attorney, via copy on the e-mail, that a copy of the action should be forwarded to South Central. Thereafter, counsel for Commonwealth sent a copy of the complaint to South Central.

The foreclosure action proceeded and, on June 6, 2011, the trial court entered a Judgment and Order of Sale, set to occur on August 31, 2011. On August 17, 2011, South Central filed a motion to intervene and a motion for leave to file a cross-claim. Following a hearing, the trial court issued an order denying South Central's motion. Therein, the trial court found that South Central was on notice of the underlying action well in advance of the June 6, 2011, judgment and also that South Central had failed to demonstrate irreparable prejudice if its motion to intervene were denied. This appeal followed.

***2** South Central first argues that the trial court's denial of the motion to intervene is appealable. We agree. *See City*

of Henderson v. Todd, 314 S.W.2d 948 (Ky.1958). South Central's main argument, however, is that the trial court abused its discretion when it denied South Central's motion to intervene. It is with this argument that we disagree.

Intervention by right is governed by Kentucky Rules of Civil Procedure ("CR") 24.01, which reads, in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1). Thus, the threshold question a trial court must ask when considering a motion pursuant to CR 24.01 is whether the motion was timely. Because timeliness is an issue of fact, such a determination is typically at the discretion of the trial court. *Ambassador College v. Combs,* 636 S.W.2d 305, 307 (Ky.1982). Thus, we will not reverse a trial court's determination of timeliness absent an abuse of this discretion. *Carter v. Smith,* 170 S.W.3d 402, 408 (Ky.App.2004).

Traditionally, a motion to intervene filed prior to trial or case disposition is presumptively timely. *Government Employees Ins. Co. v. Winsett,* 153 S.W.3d 862 (Ky.App.2004). However, we are herein faced with a situation in which the motion to intervene was filed post-judgment. Under such circumstances, the movant "has a special burden of justifying the apparent lack of timeliness." *Monticello Elec. Plant Bd. v. Board of Ed. of Wayne County,* 310 S.W.2d 272, 274 (Ky.1958). In support of its argument that its motion to intervene was timely, South Central maintains that it did not learn of the contents of the judgment until after its entry, namely, the priority of the three later-made loans over the July 6, 2007, loan; and that Commonwealth breached its duty by failing to comply with the coordination requirements found in the participation agreement between the parties. Consequently, South Central likens itself to the movant in *Carter v. Smith. Carter,* 170 S.W.3d 402.

We do not agree that the situation herein is comparable to that in *Carter*. The movant in *Carter* filed his motion to intervene four months after the filing of the original complaint but, more importantly, only two months after the amended complaint, which first raised the interest which Carter sought to protect. There is no amended complaint in the present action. The Court in *Carter* also placed great emphasis on the fact that the suit was in its early stages, stating "that at the time intervention was sought, no final judgment had been entered and the parties had completed little, if any, discovery." *Carter,* 170 S.W.3d at 409. South Central waited almost a year after the filing of Commonwealth's complaint and more than two months after entry of the trial court's judgment. CR 24.01 does not function as a means for interested parties to idly await a lawsuit's conclusion in an attempt to predetermine the advantages of intervention. Given South Central's concession [1] that they received a copy of the complaint on October 20, 2010, we see no abuse of discretion in the trial court's refusal to permit intervention. South Central's arguments regarding Commonwealth's breach of duty, while relevant for restitution purposes, have no bearing on a finding of timeliness. Commonwealth presented evidence that South Central was aware of the lawsuit and the trial court chose to accept that evidence. Such a conclusion is well within its discretion.

***3** South Central also argues that the trial court erred in finding that South Central would not be prejudiced if it were not allowed to intervene. However, we find this argument to be irrelevant. Because South Central's motion has already been found untimely, there is no purpose in addressing the merits of its motion, including arguments regarding prejudice. Because South Central failed to meet the threshold burden of justifying its untimeliness, any arguments pertaining to its interest in the lawsuit are immaterial. Additionally, any arguments pertaining to a second lawsuit, in which Commonwealth sought a declaration of rights with respect to South Central, are not presently before the Court.

For the foregoing reasons, the August 30, 2011, order of the Jefferson Circuit Court is affirmed. Additionally, Commonwealth's February 15, 2012, motion to strike South Central's brief and dismiss the appeal is denied.

ALL CONCUR.

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All Citations

Not Reported in S.W.3d, 2013 WL 462267

Footnotes

1 South Central conceded this point in its August 14, 2012, motion to file substitute briefs. Although that motion was denied, the Court took notice of South Central's concession.

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2012 WL 5829788
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

AMERICAN SAVINGS BANK, FSB, Appellant
v.
CITIZENS NATIONAL BANK, Appellee.

No. 2011–CA–000325–MR.
|
Nov. 16, 2012.
|
Discretionary Review Denied by Supreme Court Aug. 21, 2013.

Appeal from Greenup Circuit Court, Action No. 09–CI–00028; Robert B. Conley, Judge.

Attorneys and Law Firms

John R. McGinnis, Greenup, KY, for appellant.

Jill Hall Rose, Lexington, KY, for appellee.

Before MOORE and VANMETER, Judges; LAMBERT, [1] Senior Judge.

OPINION

LAMBERT, Senior Judge.

***1** American Savings Bank, FSB ("Appellant") appeals from an order of the Greenup Circuit Court denying its motion to intervene in a foreclosure action in which the subject real property had been sold more than a year earlier. After reviewing the record and the parties' briefs, we conclude that the circuit court did not err in denying Appellant's motion as untimely. Thus, we affirm.

Facts and Procedural History

Citizens National Bank ("Appellee") filed a foreclosure action against David and Linda Sipple on January 15, 2009. Appellee held a first and superior mortgage in the principal sum of $300,000.00 against real property owned by the Sipples. The complaint also listed "American Savings Bank" as a defendant because the title work indicated that this bank held a second mortgage on the property . [2] The specific paragraph naming "American Savings Bank" as a defendant provided, in its entirety, as follows:

> 13. That the Defendant, American Savings Bank, is made a party to this action to assert any interest it may have in the subject real property, and said Defendant should come forth and assert any claim or interest in and to the subject real property that it might have, or forever be barred.

No address for "American Savings Bank" was disclosed. Appellee attempted to serve "American Savings Bank" through the office of the Kentucky Secretary of State via the long-arm statute (KRS 454.210) on February 17, 2009. According to Appellee, a search of the Secretary of State's records revealed a listing for "American Savings Bank" showing that it had a registered agent for service of process at 335 Broadway, New York, New York 10013. [3] A summons was served at that address through the Secretary of State but was returned unopened and marked as undelivered. The reason for this was that the second mortgage was held not by "American Savings Bank" but by American Savings Bank, *FSB*—apparently an entirely different entity. Consequently, service was attempted on the incorrect party, and Appellant had no legal notice of the foreclosure action. [4]

On March 30, 2009, Appellee filed a "Motion for Default Judgment, Summary Judgment and Order of Sale" against several defendants, including Appellant. After receiving no response from Appellant, the circuit court found that Appellee had a first and superior lien and entered a default judgment in Appellee's favor on April 16, 2009. The case was then referred to the Greenup County Master Commissioner for a judicial sale. [5] On June 22, 2009, the Greenup County Master Commissioner sold the property to Appellee for a credit bid of $231,000.00. [6] The sale was confirmed, and the Master Commissioner executed a deed to Appellee on August 28, 2009.

In October or November 2009, Hon. Jill Hall Rose, counsel for Appellee, was made aware of Appellant's concern that it had not been properly served in the foreclosure action and that its interest regarding its second mortgage had not been fully protected as a result. In response to this concern, Rose

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contacted Appellant directly on November 10, 2009, and spoke to Tom Wamsley, whom she understood was an officer at the bank. Wamsley advised Rose that he was familiar with the case and was aware that a foreclosure action had been filed. Wamsley also indicated that the Sipples had not paid their mortgage with Appellant for many months. Wamsley further advised Rose that the bank had retained Hon. John Thatcher, an attorney in Portsmouth, Ohio, to look into the matter.

***2** On November 12, 2009, Rose contacted Thatcher regarding the foreclosure action and the issue of Appellant's mortgage interest. He advised her that he would get back with her about the case. On November 23, 2009, Rose again contacted Thatcher and was told that Appellant was considering paying off the first mortgage and taking deed to the subject property. Thatcher also told Rose that he would get back to her promptly.

However, after not hearing from Thatcher, Rose sent an email on December 4, 2009, asking for a status update. The email specifically provided as follows:

> John
>
> My client is getting upset that I don't have an answer for them on the American Savings Bank mortgage issue. Apparently, they want to sell the property & take their loss.
>
> Can you let me know something asap? Thanks.

Rose followed up with another email explaining that the total payoff on the first mortgage was $348,785.00 but that Appellee was willing to sell the property for $278,000.00, as that amount represented its fair market value. Thatcher replied that he would get back to Rose immediately.

Ultimately, though, neither Thatcher nor anyone else acting on Appellant's behalf followed up on the matter by contacting Rose or by filing any pleadings with the circuit court. Accordingly, on December 10, 2009, Appellee filed a "Motion to Determine Validity of Service or in the Alternative Motion to Set Aside Sale and Void the Deed" based on Appellant's concerns. Appellee asked for an order establishing that service of process upon Appellant was proper under the circumstances because Appellant did not have an agent for service of process in Kentucky and because Appellee was entitled to rely upon the records of the Secretary of State in attempting to effectuate service on an out-of-state party. Appellee additionally contended that Appellant had not been prejudiced in any way because even if the property were resold, there would not be sufficient proceeds from such sale to satisfy Appellee's mortgage, let alone any inferior mortgage. In the alternative, Appellee asked that the sale be set aside and that a warning order attorney be appointed to formally advise Appellant of the action so that the property could be resold. It does not appear that any attempt to serve Appellant with summons was made, and no copy of this motion was mailed to Appellant or anyone purporting to be a representative of the bank.

The circuit court heard the motion on December 17, 2009, and entered an order on January 13, 2010, finding that Appellant had been properly served and that the sale of the subject property should not be set aside. The court specifically found that Appellant had failed to register an agent for service of process in Kentucky and that Appellee consequently had acted appropriately by relying upon the records of the Secretary of State in attempting service. The order was prepared by Rose and reflects that it was mailed to "American Savings Bank" at the incorrect New York address listed above.

***3** On April 16, 2010, Appellee sold the property to what appears to have been an innocent third-party purchaser. Nothing more occurred in the case until December 6, 2010, when Appellant moved to intervene pursuant to Kentucky Rules of Civil Procedure ("CR") 24.01 and to set aside the judicial sale pursuant to CR 60.02 because it had not been properly served in the foreclosure action. Appellant specifically argued that Appellee had attempted to serve the wrong bank since Appellant's actual legal name was "American Savings Bank, FSB." Appellant also noted that its mailing address and physical address were both clearly listed on its mortgage, yet there was no evidence that Appellee had tried to serve the bank at either of these addresses. Appellant further contended that Appellee's reliance upon the records of the Secretary of State was unreasonable since that office's records regarding "American Savings Bank" had not been updated since 1981.

Appellee argued in response that Appellant was not entitled to intervene since it had possessed actual knowledge of the foreclosure action for more than a year and had failed to timely assert its rights. Appellee also noted that Appellant had been aware for more than two years that its mortgage was not being paid. Appellee additionally observed that the face of Appellant's mortgage inconsistently listed both "American Savings Bank" *and* "American Savings Bank, FSB" as the

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name of the bank. Therefore, Appellee contended that it had handled service in an appropriate manner under the circumstances.

On January 20, 2011, the circuit court entered an order denying Appellant's motion to intervene as untimely. The court explained its decision as follows:

> 1. It is undisputed that the Movant American Savings Bank, fsb was aware of this court action and the foreclosure sale in November 2009. Notwithstanding, the Movant and their counsel at the time took no steps to intervene in this case for over a year. The real estate was thereafter sold to an innocent third party purchaser on April 16, 2010.
>
> * * *
>
> 3. Upon review of the undisputed facts of this case, the court finds that the Movant American Savings Bank, fsb did not make a timely application to intervene in this action pursuant to CR 24. The Movant waited over a year after it had actual notice that the property was sold at a foreclosure sale. The Movant has no justification for this delay in asserting its right of intervention.
>
> Further, while the court does not need to address the merits of the Movant's argument regarding service, it is noted that the Movant could have better protected its interest by registering an Agent for Service of Process in the State of Kentucky and by clearly and unambiguously setting forth its proper legal name on the mortgage.

This appeal followed.

Analysis

On appeal, Appellant's brief is primarily devoted to the merits of setting aside the subject judicial sale because of a lack of proper service. However, as correctly noted by Appellee, the focus of this appeal instead must be upon the circuit court's refusal to allow Appellant to intervene in the proceedings. Since Appellant was a nonparty below, the question of whether it should have been allowed to intervene was a threshold determination that had to be satisfied in Appellant's favor before it could directly challenge the sale. *See Arnold v. Com. ex rel. Chandler,* 62 S.W.3d 366, 368 (Ky.2001). The right to intervene is governed exclusively by CR 24. *See Murphy v. Lexington–Fayette County Airport Bd.,* 472 S.W.2d 688, 689–90 (Ky.1971).

***4** KRS 426.006 and 426.690 require a party seeking to foreclose on property to name as defendants all other parties holding a lien on the same property. *See also U.S. Bank, NA v. Hasty,* 232 S.W.3d 536, 541 n. 7 (Ky.App.2007); *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.,* 139 S.W.3d 527, 529 (Ky.App.2003). Therefore, as a mortgage holder with an interest in the property that was the subject of the underlying foreclosure action, Appellant had a right to intervene. CR 24.01(1). This does not appear to be in dispute.

However, even intervention as a matter of right is permitted only upon timely application. *Id.; see also Duncan v. First Nat. Bank of Jasper,* 573 So.2d 270, 274 (Ala.1990). A circuit court's evaluation of the timeliness of a motion to intervene under CR 24.01 is reviewed under an abuse of discretion standard. *Carter v. Smith,* 170 S.W.3d 402, 408 (Ky.App.2004). Ultimately, "[t]imeliness is a question of fact, the determination of which should usually be left to the judge." *Ambassador College v. Combs,* 636 S.W.2d 305, 307 (Ky.1982). In considering whether a motion to intervene was timely, a circuit court may consider the following factors:

> "(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention."

Carter, 170 S.W.3d at 408, *quoting Grubbs v. Norris,* 870 F.2d 343, 345 (6th Cir.1989).

In the case before us, nearly all of these factors support the circuit court's decision to deny Appellant's motion to intervene as untimely. Appellant contends that the circuit court's determination ignored the fact that it had never been served with formal summons in this action and had only

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learned about the lawsuit after the property had been sold in foreclosure. However, even assuming that service was faulty or otherwise unsatisfactory, the record is uncontroverted that Appellant was subsequently made fully aware of the foreclosure action and judicial sale yet took no action whatsoever to protect its interest until more than a year later and after the subject property was again sold to a third party.

In *Monticello Elec. Plant Bd. v. Board of Educ.,* 310 S.W.2d 272 (Ky.1958), the then-Court of Appeals held that a party seeking to intervene in an action after judgment was entered had a "special burden of justifying the apparent lack of timeliness." *Id.* at 274; *see also Arnold,* 62 S.W.3d at 369 (reiterating that "[a] party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness").[7] Notably, the appellant in *Monticello* asserted that it had not received formal notice of the action, but in affirming the denial of the motion to intervene, the Court observed that the appellant "does not claim that it did not have actual notice." *Monticello,* 310 S.W.2d at 274.

***5** In the case at bar, Appellant does not deny that it had actual notice of the foreclosure action and judicial sale well before it moved to intervene, yet it sat on this knowledge and did nothing to protect its interest for more than a year. Moreover, during that time, the subject property was sold to a third party, which would seem to generally militate against intervention in this type of case. Based on these facts, we agree with the circuit court that allowing intervention would have been inequitable and unjustified. We further note that Appellee's mortgage lien indisputably had priority over Appellant's. Given that the subject property was sold for less than the amount needed to pay Appellee's mortgage, it could not reasonably be found that Appellant was prejudiced by the sale, especially in light of its delay in taking action. *See Jones v. Chipps,* 296 Ky. 245, 248, 176 S.W.2d 408, 410 (1943).

In sum, we hold that the Greenup Circuit Court did not abuse its discretion in denying Appellant's motion to intervene as untimely. Therefore, the order of the circuit court to that effect is affirmed.

VANMETER, Judge, Concurs.

MOORE, Judge, Concurs in Result Only.

All Citations

Not Reported in S.W.3d, 2012 WL 5829788

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Footnotes

1 Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

2 The Sipples entered into their mortgage with Appellee on July 12, 2004, and their mortgage with Appellant on July 25, 2005. Therefore, there is no dispute that Appellee's mortgage had first priority.

3 Those records also reflect that "American Savings Bank" is listed as "inactive" and that its last annual report was filed on July 1, 1981.

4 Appellant has no agent for service of process in Kentucky and is not required to maintain such an agent. *See* KRS 286.2–670(1)(a).

5 The judgment was in the amount of $288,107.78 plus interest, costs, and attorneys' fees.

6 The appraised value of the property was $350,000.00.

7 *Arnold* additionally recognized that "[w]hile the rule does not forbid post judgment intervention, it is broadly within the discretion of the trial judge whether to allow a party to intervene at that stage." *Arnold,* 62 S.W.3d at 369.

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Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Gary MASON, Appellant
v.
ROCKCASTLE COUNTY FISCAL COURT and Rockcastle County Recreation and Wellness Taskforce, Appellees

NO. 2012–CA–001552–MR
|
MAY 15, 2015; 10:00 A.M.

APPEAL FROM ROCKCASTLE CIRCUIT COURT, HONORABLE DAVID A. TAPP, JUDGE, ACTION NO. 11–CI–00280

Attorneys and Law Firms

BRIEF FOR APPELLANT: Gary Mason, Pro Se, Mt. Vernon, Kentucky

BRIEF FOR APPELLEE: Adam L. Towe, London, Kentucky

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

OPINION

JONES, JUDGE:

***1** Gary Mason, acting without the assistance of counsel, appeals the Rockcastle Circuit Court's August 15, 2012, order denying his motion to intervene in the above-styled circuit court action. For the reasons more fully explained below, we AFFIRM.

I. Background

On or about October 24, 2011, Michael Sheliga, filed a *pro se* complaint against the Rockcastle County Fiscal Court and the Rockcastle County Recreation and Wellness Task Force (hereinafter collectively referred to as "Rockcastle County"). Sheliga's complaint alleged willful violations of open records and open meetings, violations of Kentucky Employee Retirement Systems standards, and closure of public roads, specifically Eagle Creek Road.

On June 25, 2012, the circuit court entered an order dismissing with prejudice Sheliga's claims regarding the closure of Eagle Creek Road. On July 17, 2012, Mason filed a *pro se* motion seeking to intervene as related to the Eagle Creek Road issue. His motion stated as follows:

> I live near Eagle Creek Road and have been using it since I was young 55 years ago. Alan Cromer and I originally complained to the Rockcastle Fiscal Court about a locked gate being placed across the road about January 2010, shortly after the gate was locked. Plaintiff in the above case is a friend and has indicated that his parents are elderly and that he intends to return to Pennsylvania in the near future to be closer to them. I am willing to pay the filing fee to pursue this matter in Appellate Court. I wish to intervene and/or join in the case in regards to the state law 178.100 relating to the locked gate being allowed to remain across Eagle Creek Road. To my knowledge, I have an "intervention of right" under civil rule 24.01 should the current plaintiff not be able to continue with this matter. Should the current Plaintiff be able to continue with this matter, I request to be able to intervene with discretion of the court under civil rule 24.02. I request to be able to join the suit per civil rules 19 and 20.

Rockcastle County filed a response objecting to the proposed intervention on numerous grounds. By order entered August 15, 2012, the circuit court denied Mason's motion.

This appeal followed.

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II. Standard of Review

We review the trial court's order related to intervention for clear error. *Carter v. Smith,* 170 S.W.3d 402, 409 (Ky.App.2004). However, a court's evaluation of the timeliness of a motion to intervene is reviewed under an abuse of discretion standard. *Id.* at 408.

III. Analysis

Mason sought to intervene both under CR 24.01 and CR 24.02.

CR 24.01 provides:

> 1) Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.
>
> ***2** (2) Anyone possessing a statutory right of intervention under (1)(a) above, may move the court to intervene in a pending action and, on failure of a party to file an objection within ten (10) days to the intervention and a notice of hearing on the objection, have an order allowing the intervention without appearing in court for a hearing.

CR 24.02 provides:

> Upon timely application anyone may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Both intervention as a matter of right, CR 24.01, and permissive intervention, CR 24.02, require *timely* application. Mason's motion to intervene was filed over ten months after Sheliga filed his initial complaint against Rockcastle County. Even more problematic, however, Mason did not move to intervene until after the circuit court had entered summary judgment in favor of Rockcastle County.

“Although post-judgment intervention is not strictly forbidden, it is widely within the discretion of the circuit judge.” *Hazel Enterprises, LLC v. Community Financial Services Bank,* 382 S.W.3d 65, 68 (Ky.App.2012). “Intervention after judgment may be permitted under some circumstances but the attempted intervenor has a special burden of justifying apparent lack of timeliness.” *Kelly v. Marino,* 358 S.W.2d 519, 521 (Ky.1962).

We have closely reviewed the record. We cannot agree with Mason that the trial court abused its discretion or otherwise committed error when it refused to allow him to intervene with respect to the road closure claim. Mason waited until *after* the trial court rendered an order fully disposing of the claim at issue before moving to intervene; yet, he proffered nothing to the trial court to justify his delay. Furthermore, Mason's concerns about Sheliga's inability to pursue appeal were unsubstantiated and indeed unfounded as Sheliga did file an appeal.

Allowing Mason to have intervened in this action would have unduly prejudiced Rockcastle County who had already litigated the issue to termination with respect to Sheliga. It would have required the trial court to reopen matters that it had already put to rest and would have unduly delayed the appeal of this matter. Therefore, we conclude that the trial court acted appropriately when it denied Mason's motion to intervene.

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IV. Conclusion

For the reasons set forth above, we affirm the Rockcastle Circuit Court.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

John ROBERTS, George Mcarthur King, George Michael King, and Joseph Anthony King, Appellants
v.
The ESTATE OF Lahoma Salyer BRAMBLE, Joan Agonese, Anaconda Drilling of KY, LLC, Michael R. Anselm, Bernice Bailey, Netta Lynn Bailey, Lavaria Bedingfield, Henrietta Berry, Ruth Brock, John D. Carty, Beaureda Williams Colley, Community Trust Bank, Country Gas, LLC, Wandda Lee Cox, Amelia Craft, Charles V. Craft, Conroy Craft, Maxine Craft, Opel Sue Craft, Judy Down Crockett, Betty Dobson, Doug Downs, Sandy Downs, Carolyn Dykhuizen, Vanessa W. Eason Equitable Production Company, Estate Of Dorsey Claxton McCarty, Estate of Evalee Blaylock Edwards, Fast Flow Group, LLC, Mary Fifield, Lillian F. Whitaker Floyd, Gwendolyn R. Forge, Maxine French, Pauline Fritts, Mielang Gambele, Jerry B. Gibbs, Melynde Hartman, Ronald Hartwell, Myrtle Howard, Pam Howard, Mayola Humes, Jerry Ingram, Otto Ingram, J.D. Carty Resources, LLC, Jefferson Gas, LLC, Gail Kahley, Linda Krontz, Ky-Az Transmission, LLC, Neva Louise Lovely, Roger Lovely, Harold Lovely, Karen L. Lyon, Lilly May Madison, Cathy Sue Maggard, Mark Manning, Oneda Marchetti, David Martin, James McCarthy, Allen McCarty, Beatrice Mccarty, Betty McCarty, Carolle E. McCarty, Danny McCarty, Kevin McCarty, Randall Mccarty, Raymond MCcarty, Robert McCarty, Robin McCarty, Ronnie McCarty, Kimberly D. McCord, Melanie M. Miller, Minion Energy, LLC (and Northern Coal & Coke), Audrey Minix, Earnestine Minix, Lillian Minix, James Phares, James R. Phares (Jamie), Jason Phares, Cheryl L. Piper, Ina Salyer Pyles, R & R Energy, LLC, Mollie W. Richardson, Wanda Gaye Rokosz, Randall Rudd, Verla M. Salyer Russell, Bill Salyer, Cora Salyer, David R. Salyer, Donna Salyer, Dwayne Salyer, Emory Cain Salyer, Ford Salyer, Gemalia Salyer, Glen Salyer, Happy Salyer, Harry Salyer, James Salyer, Kelly Salyer, Kevin G. Salyer, Lahoma Salyer, Larry Salyer, Larry Keith Salyer, Mark Steven Salyer, Mary E. Salyer, Maxine Salyer, Patchell Salyer, Ramey Salyer, Jr., Randy Salyer, Robert E. Salyer, Rothel Salyer, Roy Salyer, Timothy O'Dell Salyer, Tracey Salyer, Vena Salyer, Wisemond Salyer, Gary Slayer, Lavinia W. Smith, Barbara Stalbaum, Sue Stalbaum, Brenda Stanley, Anna M. Stephnes, Jami M. Taylor, Daniel E. Whitaker, Caryl Lawrence Whitaker, Jack Whitaker, Karen J. Whitaker, Marvin Whitaker, Jamie Whitwort, Darrel G. Williams, Den Delbert Williams, Gary Williams, Geraldine Williams, Glen Albert Williams, Greg Williams, Randall Williams, Karen Wortman, and Sandy G. Zimmerman, Appellees.

No. 2009-CA-001233-MR.
|
Oct. 8, 2010.
|
As Modified Nov. 5, 2010.

Appeal from Magoffin Circuit Court, Action No. 07-CI-00006; Kimberley Childers, Judge.

Attorneys and Law Firms

H. Kent Hendrickson, Harlan, KY, for Appellants.

Michael Dean, Irvine, KY, for Appellees, The Estate of Lahoma Salyer; et al.

Thomas M. Smith, Prestonsburg, KY, Appellees, Betty McCarty, Robert J. McCarty, Ronald McCarty and Randall McCarty.

R. Burl McCoy, Lexington, KY, for Appellee, Equitable Production Company.

Before CLAYTON and KELLER, Judges; BUCKINGHAM, [1] Senior Judge.

OPINION

BUCKINGHAM, Senior Judge.

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***1** Appellants appeal from an order of the Magoffin Circuit Court denying their motion to intervene in an action for trespass to mineral property. We affirm.

Appellees filed suit against J.D. Carty Resources, LLC ("JDCR") and Anaconda Drilling of Kentucky, LLC in the Magoffin Circuit Court for trespass, claiming that the defendants drilled a well and produced natural gas from mineral property owned by Appellees. Appellants, as members of Country Gas, LLC holding four membership interests out of a total of 160 outstanding units, had previously filed suit against J.D. Carty, individually, as well as JDCR and Anaconda in the Harlan Circuit Court for breach of contract and securities fraud. *John D. Roberts, et al. v. J.D. Carty Resources, et al.,* Harlan Circuit Court, Civil Action No. 06-CI-00237. That case remains pending at this time. Appellants filed a *lis pendens* notice of the Harlan County suit with the Magoffin County Court Clerk on March 29, 2007, detailing their claimed interest in the wells in the Country Gas package.

Attorney Gordon Long answered the complaint filed in the Magoffin Circuit Court on behalf of the defendants, defending in part by alleging that the Magoffin plaintiffs had failed to join all indispensable parties, including Country Gas. The allegation was that JDCR had assigned 12 oil and gas leases and 25 gas wells to Country Gas, including the Claxton McCarty Well # 2, which was the primary subject of the trespass action.

Thereafter, the trial court ordered that Appellees file an amended complaint joining Country Gas, and Country Gas was made a defendant by an amended complaint dated July 30, 2007. After having brought Country Gas into the suit, Long answered the First Amended Complaint as the attorney for Country Gas, as well as the attorney for the original defendants, JDCR and Anaconda.

On March 12, 2008, the trial court entered partial summary judgment on liability for trespass against JDCR, Anaconda, and Country Gas, and the matter was set for trial on the issue of damages. However, before trial, the court entered an order and judgment on December 17, 2008, confirming a settlement agreement between the parties and finding that JDCR and Country Gas were to pay $628,000 to the plaintiffs. Appellees subsequently filed several orders of garnishment against banks with which JDCR and Country Gas had accounts, as well as with creditors of JDCR and Country Gas.

On April 1, 2009, Appellants moved to intervene, which motion was denied. This appeal followed.

After the filing of this appeal, Country Gas filed a motion for relief from the court's December 17, 2008 judgment confirming the settlement on July 6, 2009. This motion was filed by Attorneys Stephen W. Switzer and Joseph A. Tarantelli. Additionally, Attorney Susan C. Lawson filed a notice of entry of appearance as counsel for Country Gas on January 7, 2010.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith,* 170 S.W.3d 402, 407 (Ky.App.2004). Our standard of review as to whether intervention should have been granted is a clearly erroneous standard. *Id.* at 409 (citing *Gayner v. Packaging Serv. Corp. of Ky.,* 636 S.W.2d 658, 660 (Ky.App.1982)).

***2** The primary issue in this appeal concerns whether Appellants can intervene pursuant to Kentucky Rules of Civil Procedure (CR) 24.01(1). An applicant must meet a four-prong test before being entitled to intervene in a lawsuit pursuant to CR 24.01(1):(1) the motion must be timely; (2) the applicant must have an interest relating to the subject of the action; (3) the applicant's ability to protect his interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the applicant's interests. CR 24.01(1)(b); *Carter,* 170 S.W.3d at 407. The burden of proof in proving each of these requirements rests with the party desiring to intervene. *Carter,* 170 S.W.3d at 409.

Here, assuming, without deciding, that Appellants have met the first three prongs of the test in CR 24.01, Appellants have failed to meet the fourth prong of the test. Appellants' interests in the underlying lawsuit, which are avoiding or reducing Country Gas's liability for trespass to property, are the same as those of Country Gas, and therefore Country Gas could adequately represent Appellants' interests. *See Donald v. City of Glenview,* 723 S.W.2d 861, 862 (Ky.App.1986) (city's interest adequately represented by resident who contested incorporation).

Appellants argue that they could not be adequately represented because Country Gas has not been adequately defended in this matter thus far. Appellants allege that Country Gas's previous counsel acted adversely to the company's interests and had numerous conflicts of interest. However, the linchpin supporting intervention, namely, the putative conflict of interest resulting from the joint

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representation of Country Gas, J.D. Carty, and JDCR, has now largely abated in light of the entities having separate counsel. Thus, Appellants do not meet all four prongs of the test for intervention as of right under CR 24.01, and the trial court's decision denying Appellants' motion to intervene was not clearly erroneous.

Appellants next argue that they have a right to intervene because they are indispensable parties of record pursuant to CR 19.01 and are necessary parties under the Declaratory Judgment Act under KRS 418.075. We disagree. "[KRS 418.075 and CR 19.01] can be invoked only by parties, not by a person who seeks to become a party." *Murphy v. Lexington-Fayette County Airport Bd.,* 472 S.W.2d 688, 690 (Ky.1971). "Thus, only CR 24.01 governs the determination of the question of [Appellants'] right to intervene." *Id.* at 690.

The order of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2010 WL 3927793

Footnotes

1 Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

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2009 WL 1160269
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

FRIENDS OF NASHVILLE ROAD, INC., Appellant
v.
Robert WILLIAMS; City-County Planning Commission of Warren County, Kentucky, Appellees.

No. 2007-CA-002577-MR.
|
May 1, 2009.

Appeal from Warren Circuit Court, Action No. 07-CI-00648; Steve Alan Wilson, Judge.

Attorneys and Law Firms

Matt McGill, Bowling Green, KY, for Appellant.

David F. Broderick, Bowling Green, KY, for Appellee Robert Williams.

Frank Hampton Moore, Jr., Matthew P. Cook, Bowling Green, KY, for Appellee City-County Planning Commission of Warren County, Kentucky.

Before CLAYTON, KELLER, and LAMBERT, Judges.

OPINION AND ORDER

KELLER, Judge.

***1** Friends of Nashville Road, Inc. (Friends), appeals from the Warren Circuit Court's denial of its motion to intervene and the court's order requiring the City-County Planning Commission of Warren County, Kentucky (the Planning Commission), to approve Robert Williams's (Williams), preliminary subdivision application. In addition to Friends's appeal, we have pending before us the motion filed by the Planning Commission to dismiss it as a party; the motion filed by Williams to dismiss the appeal; the motion filed by Williams to dismiss the amended notice of appeal; and the motion filed by the Planning Commission to strike the amended notice of appeal. For the following reasons, we dismiss.

FACTS

The pertinent facts are not in dispute. In December of 2006, Williams filed an application to subdivide a 1.85 acre tract of land that abuts Nashville Road in Bowling Green, Kentucky. His application came before the Planning Commission at a public hearing on February 1, 2007. At that hearing, the Planning Commission heard from its professional staff (the staff) and Williams. The staff presented a report indicating that the preliminary subdivision plat met the technical requirements of the applicable subdivision regulations and zoning ordinance and recommended approval. Williams testified that he intended to keep the house that was on the property, because it was designed by a renowned Kentucky architect. He also testified that he proposed to develop the lots with houses that would be in keeping with or superior to the houses in the neighborhood. Because there was apparent concern among residents in the area regarding what type of development Williams was proposing, Williams agreed to meet with community members to discuss their concerns. Therefore, the Planning Commission tabled Williams's application. Following the meeting between Williams and the concerned community members, a number of restrictive covenants were submitted for inclusion with the proposed plat.

On February 15, 2007, the Planning Commission held a second public hearing on Williams's application. Williams testified regarding the covenants he agreed to enter into after meeting with the residents. One resident, Diane Howerton (Ms. Howerton), testified regarding a number of petitions that had been gathered opposing the application. Ms. Howerton also testified that she did not believe that the application was in keeping with the comprehensive plan. Dr. Howerton testified that he believed development of the lots would diminish the quality of the Nashville Road corridor. Bill Parsons (Parsons), testified that the development would disturb what is an historic entrance into Bowling Green and that Williams's other development was not consistent with its surroundings. Mike Simpson (Simpson), testified that he was concerned about the safety of children who might be playing near driveways in the proposed development. After hearing that testimony, the Planning Commission again tabled the application until March 1, 2007. On March 1, 2007,

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the Planning Commission met but did not have a quorum; therefore, the application was again tabled.

***2** The Planning Commission held a fourth public hearing on March 15, 2007. At that hearing, the staff again testified that the application met the technical requirements and recommended approval. Friends presented testimony from a number of witnesses. A local attorney (Mr. Johnston), testified that he reviewed the title to the property, and the "spirit" of restrictions that applied to a nearby development should apply to the property. Applying that "restrictive spirit", Mr. Johnston stated that he would recommend that the Planning Commission deny the application. However, attorney Johnston could not give any opinion about whether the application met the technical requirements of the regulations.

Diane Boling (Boling), testified that Nashville Road acts as an entryway into her neighborhood and that the entryway should have a "focal point" plan because of ongoing and planned development. Such focal point plans have been devised pursuant to the comprehensive plan, and Boling recommended denial of the application pending development of a focal point plan.

Simpson testified that the application did not meet the requirements of the comprehensive plan of Warren County, and he asked the Planning Commission to deny the application. Parsons testified that Friends had obtained 915 signatures on petitions opposed to the development. He reiterated the historic nature of the house on the property and summarized the accomplishments of the house's architect.

After hearing testimony, a commission member made a motion to approve the application; however, no one seconded that motion and the commission adjourned without affirmatively approving or denying the application. [1]

On April 16, 2007, Williams filed suit in Warren Circuit Court alleging that the Planning Commission failed to take specific action on the application within ninety days, as required by Kentucky Revised Statutes (KRS) 100.281(1). Williams also alleged that the Planning Commission had "acted arbitrarily, capriciously, and in violation of Kentucky law in failing to perform its statutory duties...." In terms of damages, Williams sought compensatory and punitive damages and an order requiring the Planning Commission to approve the application. We note that Williams also named the City Commission of Bowling Green as a defendant; however, the City was later dismissed. Williams did not name Friends as a defendant.

On May 11, 2007, Friends filed a motion to intervene. In support of its motion, Friends noted that its board members own property in the neighborhood and the proposed development "would adversely affect the use and enjoyment of each Board Member's respective property and, ultimately adversely affect the value of those properties." Furthermore, Friends argued that "the existing parties to this action will not adequately represent those interests" and "that the disposition of the action may impair its ability to protect its interest unless it is permitted to intervene." Finally, Friends argued that its "defenses and counterclaim have questions of law and fact that are common to the main action." In his response, Williams argued that Friends had only a speculative and remote interest, at best, and that any interest it had was contingent on resolution of Williams's interests. Therefore, Friends was precluded from intervening as a matter of right under Rule of Civil Procedure (CR) 24.01. Furthermore, Williams noted that any interest Friends might have would be represented by other parties, and the court could choose to disallow intervention. The court denied Friends's motion to intervene stating the Friends had "failed to demonstrate a direct, substantial and legally protectable interest in this action that would serve as a sufficient basis for intervention and that is not otherwise adequately represented by the existing parties to this action."

***3** The Planning Commission moved for partial summary judgment on the tort claims raised by Williams, arguing immunity. Williams argued that the Planning Commission had potential tort liability because it had failed to perform a ministerial duty and immunity does not apply to the failure to perform such a duty. Friends filed a motion to file an *amicus curiae* brief, which the court granted.

On November 15, 2007, the court entered an order directing the planning commission to approve the subdivision application. In that order, the court noted that the Planning Commission did not take action to either approve or deny Williams's application but simply let the matter die for want of a second. The court deemed that lack of action by the Planning Commission to be, in effect, a denial of the application. Because the Planning Commission had effectively denied the application without stating a reason, the court deemed the Planning Commission's action to be "arbitrary and capricious." The court also held that a planning commission's approval of a subdivision plat is

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a ministerial one and that, absent any indication by the Planning Commission that the application was defective, approval was required. The court then determined that referral of the matter back to the Planning Commission for additional action was unnecessary and it ordered the Planning Commission to approve Williams's application. The court did not rule on the Planning Commission's motion for partial summary judgment, and it did not designate its order as final and appealable. Friends appealed from the court's order on December 13, 2007, and the circuit court granted the Planning Commission's motion for partial summary judgment on December 19, 2007.

STANDARD OF REVIEW

The standards of review for the issues raised by Friends on appeal vary. Therefore, we will set forth each standard as we address each issue.

ANALYSIS

At that outset, we note that the order from which Friends filed its appeal was not final and appealable. Kentucky Rules of Civil Procedure (CR) 54.01 provides that an order or judgment is final when it adjudicates "all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.02 provides that a court may grant final judgment on less than all of the claims or to fewer than all of the parties "upon a determination that there is no just reason for delay." In doing so, the court must designate the order or judgment as final.

> In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

An order or judgment that is not final is not subject to review by the Court of Appeals. *See Wilson v. Russell,* 162 S.W.3d 911, 913 (Ky.2005).

***4** The complaint filed by Williams sought two forms of relief: (1) an order from the circuit court requiring the Planning Commission to approve the preliminary subdivision plan; and (2) monetary damages. The Planning Commission filed a motion for partial summary judgment seeking dismissal of Williams's claim for monetary damages. The circuit court's November 15, 2007, order granted Williams's request for an order requiring the Planning Commission to approve the preliminary subdivision plan. However, it did not address Williams's request for monetary damages, and it did not address the Planning Commission's motion for partial summary judgment. Therefore, the November 15, 2007, order did not dispose of all of the claims by all of the parties and, absent the language required by CR 54.02, it was not final and appealable and this appeal must be dismissed.

We note that the circuit court subsequently addressed and granted the Planning Commission's motion for partial summary judgment. However, it did so after Friends filed its appeal and Friends did not appeal from that order. Therefore, Friends appeal must be dismissed as taken from an order that was not final and appealable. While the preceding effectively disposes of this appeal, we will address the issues raised by the parties for the sake of completeness.

1. Denial of Friends's Motion to Intervene

As noted by Friends, it moved to intervene both as a matter of right under Kentucky Rules of Civil Procedure (CR) 24.01 and for permissive intervention under CR 24.02. In order to intervene under CR 24.01, a movant must show that he has a statutory entitlement to do so or, if not, the motion was timely filed, "that he has an interest relating to the subject of the action, that his ability to protect his interest may be impaired or impeded, and that none of the existing parties could adequately represent his interests." *Carter v. Smith,* 170 S.W.3d 402, 409-10 (Ky.App.2004). "Our standard of review as to whether intervention should have been granted [under CR 24.01] is a clearly erroneous standard." *Id.* at 409.

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Friends meets the first prong of the above test as it filed its motion to intervene less than a month after Williams filed his complaint in circuit court. As to the second prong, Friends argues that it has an interest related to the subject matter of this litigation because its board members all own property adjacent to or in the vicinity of the Williams property. According to Friends, any development by Williams of the property may directly and adversely affect their property. We agree that Friends does have an interest in the litigation.

However, we disagree that the court's denial of Friends's motion to intervene impeded their ability to protect that interest and that no party to the action could adequately protect that interest. The Planning Commission, the named defendant in Williams's complaint essentially voted to deny Williams's application. Therefore, the Planning Commission had an interest in seeing that vote upheld. That interest is the same as Friends's interest and the trial court had no reason to suspect that the Planning Commission would not and could not forward that interest. Therefore, we cannot say that the circuit court's denial of Friends's motion to intervene under CR 24.01 was clearly erroneous.

***5** CR 24.02 provides for intervention by permission of the court "when a statute confers a conditional right to intervene or [ ] when an applicant's claim or defense and the main action have a question of law or fact in common." The trial court has the discretion to permit or deny intervention under CR 24.02; therefore, we review the trial court's denial under an abuse of discretion standard. *See Webster v. Board of Ed. of Walton-Verona Independent School Dist.,* 437 S.W.2d 956, 957 (Ky.1969). Having reviewed the record, we cannot state that the circuit court abused its discretion when it denied Friends's motion to intervene. In doing so, we note that any interest Friends had in the Planning Commission's actions was adequately protected by the Planning Commission. Furthermore, we note that, although the circuit court did not permit Friends to intervene, it did permit Friends to file an *amicus curiae* brief, thus permitting it to be heard. Finally, we note that the circuit court, as evidenced in its order, took into consideration the arguments made by Friends. Therefore, we discern no error in the circuit court's order denying Friends's motion to intervene.

2. Motion to Dismiss Appeal

As noted above, Williams filed a motion to dismiss this appeal. In support of his motion, Williams argues: (1) Friends did not timely file its appeal from the circuit court's denial of its motion to intervene; and (2) because Friends was not a proper party before the trial court; therefore, it is foreclosed from filing an appeal. We will address these arguments in the order presented above.

The circuit court denied Friends's motion to intervene on July 16, 2007. Friends did not file its notice of appeal until December 13, 2007, nearly five months later. Williams argues that Friends should have appealed the circuit court's order denying its motion within thirty days after that order became final. In support of his argument, Williams cites to *Ashland Public Library Bd. of Trustees v. Scott,* 610 S.W.2d 895 (Ky.1981). In *Ashland,* the Court of Appeals summarily dismissed the library board's appeal of the circuit court's denial of its motion to intervene as interlocutory. The Supreme Court, in reversing the Court of Appeals, stated that

> [p]rior to judgment disposing of the whole case, any denial of intervention of right should be regarded as an appealable final order but the appellate court should affirm unless such intervention of right was erroneously denied.
>
> Prior to judgment disposing of the whole case, any denial of permissive intervention should be regarded as interlocutory and not appealable and the appellate court should dismiss out of hand appeals from a denial of permissive intervention.

Id. at 896.

In support of its position that its appeal was timely, Friends cites *City of Henderson v. Todd,* 314 S.W.2d 948 (Ky.1958). In *City of Henderson,* the Court held that

> [w]hile it would appear that the denial of a motion for leave to intervene is interlocutory and not forthwith appealable, unless intervention is a matter of right (*Thompson v. Broadfoot,* 2 Cir., 165 F.2d 744, noted in Clay, CR 24.02) we regard an appeal from an order denying intervention under either rule to be proper after final judgment in the case, even though a forthwith appeal would have been

> proper where intervention was a matter of right under CR 24.01.

***6** *Id.* at 951.

Reading these two cases together, we hold that Friends's appeal of the circuit court's denial of its motion to intervene was timely. We note that the Court's holding in *City of Henderson* preceded its holding in *Ashland.* Furthermore, we note that the Court did not overrule or otherwise denigrate *City of Henderson* in its *Ashland* opinion but cited it as support for its holding. Therefore, we hold that, pursuant to *City of Henderson,* Friends could have filed its appeal within thirty days of the circuit court's order or after the circuit court's judgment became final. Friends chose to wait until the circuit court's judgment became final and filed the notice of appeal within thirty days of that finality. Therefore, it timely filed its appeal.

Based on *City of Henderson* and *Ashland,* Friends clearly had the right to appeal the circuit court's denial of its motion to intervene. However, because Friends was not a party to the action below, it is not entitled to appeal on the merits of the suit. *See White v. England,* 348 S.W.2d 936 (Ky.1961).

Because we have dismissed this appeal on other grounds, Williams's motion to dismiss Friends's appeal is denied as moot.

3. Whether Circuit Court Erred in Ordering the Planning Commission to Approve Williams's Application

Friends argues that the circuit court improperly substituted its judgment for that of the Planning Commission. Judicial review of a zoning action is confined to a determination of whether the action taken was arbitrary, and neither the trial court nor this Court is authorized to conduct a *de novo* review of the decision. *City of Louisville v. McDonald,* 470 S.W.2d 173, 178 (Ky.1971). In its role as a finder of fact, the Planning Commission is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 309 (Ky.1972).

The circuit court reversed the Planning Commission for two reasons: (1) because its decision was not supported by any findings of fact and therefore was arbitrary; and (2) because it violated the precepts of *Snyder v. Owensboro,* 528 S.W.2d 663 (Ky.1975). We will address each issue in turn.

Findings of fact must "contain sufficient adjudicative facts to permit a court to conduct a meaningful review of the proceedings for the purpose of determining the question of whether the action of the Commission has or has not been arbitrary." *Caller v. Ison,* 508 S.W.2d 776, 777 (Ky.1974). Furthermore, as set forth in *Snyder v. Owensboro,* at 664, the Planning Commission was required to provide the reasons for its denial and relate those reasons to "specific provision[s] of the law or the regulations" supporting the denial. As noted by the circuit court, the Planning Commission made no findings of fact to support what amounted to its denial of Williams's application. Therefore, the circuit court appropriately determined that the Planning Commission's action was arbitrary and that it failed to meet the requirements of *Snyder.*

***7** Additionally, the Court in *Snyder* held that the "approval of subdivision plats is a *ministerial* act." *Id.* (Emphasis in original.) Absent some showing of a violation of the subdivision regulations, a subdivision plat should be routinely approved. Because there was no evidence that a subdivision regulation had been violated, the circuit court properly ordered the Planning Commission to approve Williams's application.

Finally, we note Friends's argument that the application met the technical requirements of the subdivision regulations but violated the "spirit" of the comprehensive plan. We are not persuaded by that argument for two reasons. First, KRS 100.281, which sets forth what must be contained in subdivision regulations, states that such regulations "shall be based on the comprehensive plan...." Second, the specific subdivision regulations at issue state that one of their purposes is "[t]o comply with the Comprehensive Plan and the Zoning Ordinance(s) of Warren County, Kentucky...." Therefore, there is a presumption that the subdivision regulations comply with and support the comprehensive plan and Friends had not overcome that presumption.

4. Motions to Dismiss and to Strike Amended Notice of Appeal

Based on the above, the motion to dismiss amended notice of appeal filed by Williams and the motion to strike amended

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notice of appeal filed by the Planning Commission are denied as moot.

CONCLUSION

For the foregoing reasons, Friends's appeal is dismissed.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2009 WL 1160269

Footnotes

1 We note that the Planning Commission conducted other business following the failure to pass the motion to approve the application; however, that business is not relevant to these proceedings.

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2013 WL 4779759
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

John T. EBERT, M.D., Appellant
v.
Susan DURANT; Tad Thomas; Kentucky Board of Medical Licensure; C. William Schmidt; Preston Nunnelley, M.D. and Karen Quinn, Appellees.

No. 2010–CA–000741–MR.
|
Sept. 6, 2013.
|
Rehearing Denied March 31, 2014.

Appeal from Jefferson Circuit Court, Action No. 09–CI–011524; James M. Shake, Judge.

Attorneys and Law Firms

John T. Ebert, M.D., Hopkinsville, KY, pro se.

Jack Conway, Attorney General of Kentucky, Nicole H. Pang, Assistant Attorney General, Frankfort, KY, Leanne K. Diakov, Assistant General Council, Louisville, KY, for appellee.

Before CLAYTON, COMBS, and VANMETER, Judges.

OPINION

VANMETER, Judge.

***1** John Ebert, M.D., appeals *pro se* from an order of the Jefferson Circuit Court dismissing his petition for judicial review of an adverse determination of the Kentucky Board of Medical Licensure ("KBML"). The sole issue before us is whether the circuit court correctly dismissed Ebert's petition because it had not been filed within the 30 days prescribed by statute. Upon review, we hold that the court correctly dismissed the petition as untimely filed and we affirm.

Since 2005, Ebert and Appellees [1] have been involved in protracted litigation concerning Ebert's ability and license to practice medicine. Since then, the KBML has issued numerous complaints against Ebert. On January 27, 2009, a full administrative hearing was held on the KBML's third complaint against Ebert; Ebert failed to appear and the hearing was held in his absence. That proceeding resulted in a final administrative order entered on June 4, 2009 revoking Ebert's license to practice medicine. A copy of this final order was mailed to Ebert that day.

Ebert did not appeal that final order until November 20, 2009, at which time he filed the underlying petition for review in the Jefferson Circuit Court, Case No. 09–CI–11524. In his petition, Ebert alleged that the KBML acted arbitrarily and capriciously by denying him "a fair trial like setting" and denied his due process rights. Ebert admitted to having received the final order on June 5, 2009, and stated that he had "attempted to comply" with the provisions of KRS [2] 13B.140, governing the right to appeal an administrative final order, by mailing documents to a Jefferson Circuit Court judge on July 6, 2009. [3] Appellees moved to dismiss Ebert's appeal as untimely filed. The circuit court granted the motion, finding that Ebert's November 20, 2009 petition for review of the June 4, 2009, order was not filed within 30 days as required under KRS 13B.140(1) and thus the court lacked jurisdiction over the appeal as a matter of law. This appeal followed. [4]

On appeal, Ebert claims that he timely filed a petition for review on July 6, 2009, and the circuit court erred by dismissing his appeal as untimely. He points to his "substantial compliance" with the statutory requirements, as well as the "savings statute," in support of his claim. We do not find merit in either of his arguments and therefore affirm.

KRS 311.593 and KRS13B.140 set forth the requirements and deadline for filing a petition for judicial review of a final order of the KBML. *Gallien v. Kentucky Bd. of Med. Licensure,* 336 S.W.3d 924, 928 (Ky.App.2011).

KRS 311.593(2) provides:

> Any physician who is aggrieved by a final order of the board denying a license or rendering disciplinary action against a licensee may seek judicial review of the order by filing a petition

> with the Circuit Court of the county in which the board's offices are located in accordance with KRS Chapter 13B.

KRS 13B.140(1) states, in relevant part, that "[a] party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, *within thirty (30) days after the final order of the agency is mailed or delivered by personal service.*" (emphasis added). "[T]hese statutes, when read together, impose a 30–day period of limitations for an aggrieved party to challenge a final order of the Board regarding a disciplinary action." *Gallien,* 336 S.W.3d at 928.

***2** Here, the final order was issued and mailed to Ebert on June 4, 2009. On November 20, 2009, over five months later, Ebert filed his petition for review of that order. Ebert maintains that he "attempted to comply" with the statutory requirements by mailing documents to a Jefferson Circuit Court Judge on July 6, 2009, and that jurisdiction was thereby conferred upon the circuit court. However, Kentucky courts have consistently held that "attempted" or "substantial" compliance is insufficient to bestow appellate jurisdiction on the circuit court when the statutory requirements demand "strict compliance." *See Bd. of Adjustments of City of Richmond v. Flood,* 581 S.W.2d 1, 2 (Ky.1978); *Gallien,* 336 S.W.3d at 928; *Spencer County Pres., Inc. v. Beacon Hill, LLC,* 214 S.W.3d 327, 329 (Ky.App.2007); *Ky. Unemployment Ins. Comm'n v. Providian Agency Group, Inc.,* 981 S.W.2d 138, 139–40 (Ky.App.1998); *Taylor v. Duke,* 896 S.W.2d 618, 621 (Ky.App.1995). Indeed, in *Gallien,* this court affirmed a circuit court's dismissal of a petition for judicial review in an analogous case involving the KBML and a physician who filed a belated petition for judicial review. *Gallien,* 336 S.W.3d at 928. Specifically, this court held:

> "[when] an appeal is filed in the circuit court by grant of a statute, as in this case, the parties must strictly comply with the dictates of that statute." This is because "[a]n appeal from an administrative decision is a matter of legislative grace and not a right, and thus the failure to strictly follow statutory guidelines for the appeal is fatal." The circuit court concluded that it lacked jurisdiction to consider Appellant's petition for judicial review because the petition had not been timely filed within the statutory 30–day period; thus, dismissal was merited. This conclusion was the correct one.

Id. (internal citations omitted). Similarly, here, the circuit court correctly concluded that it lacked jurisdiction to entertain Ebert's appeal which was filed outside the 30–day filing deadline contained in KRS 13B.140.

Ebert further asserts that the circuit court erred by dismissing his appeal because he timely "instituted" an action pursuant to the "savings statute" in KRS 413.270, which states:

> (1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.
>
> (2) As used in this section, "court" means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

***3** While KRS 413.270 can apply to judicial review proceedings, it does not apply to this case. In order to invoke KRS 413.270, Ebert must have "commenced" an appeal of the June 4, 2009, final order within the 30–day statutory limitation period. Ebert claims that mailing documents to the circuit court judge on July 6, 2009 was sufficient to "commence" an appeal. Yet he simultaneously concedes that he merely "attempted to comply" with the statutory provisions of KRS 13B.140. Ebert also admits that he did not file his July 6, 2009, petition with the Jefferson Circuit Court Clerk as required. Based on his admissions, no appeal was "commenced" on July 6, 2009 so as to "save" the November 20, 2009 petition. Because no action was filed on July 6, 2009, the November 20, 2009 petition for judicial review stands alone as an appeal filed more than 30 days after the mailing of the final administrative order. As a result, the circuit court properly dismissed Ebert's appeal as untimely filed.

The February 12, 2010, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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All Citations

Not Reported in S.W.3d, 2013 WL 4779759

Footnotes

1 Susan Durant, Tad Thomas, KBML, C. Williams Schmidt, Preston Nunnelley, M.D. and Karen Quinn.

2 Kentucky Revised Statutes.

3 The deadline for Ebert's petition for judicial review fell on July 4, 2009, a federal holiday as well as a Saturday, thus Ebert had until the next business day, July 6, 2009, to file his appeal.

4 Ebert's notice of appeal originally sought review of final orders dating back to February 6, 2006. In a ruling dated February 8, 2012, this court granted Appellees' joint motion to dismiss appeal to the extent that the issue on appeal was to be limited to the circuit court's dismissal of Case No. 09–CI–11524.

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Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Earlene F. GREENE, Appellant
v.
KENTUCKY BOARD OF DENTISTRY, Appellee.

No. 2009–CA–001533–MR.
|
Feb. 25, 2011.

Appeal from Jefferson Circuit Court, Action No. 08–CI–002081; Geoffrey P. Morris, Judge.

Attorneys and Law Firms

J. Fox DeMoisey, Louisville, KY, for appellant.

Jack Conway, Attorney General of Kentucky, Mark Brengelman, Assistant Attorney General, William A. Bausch, Assistant Attorney General, Frankfort, KY, for appellee.

Before KELLER, MOORE, and STUMBO, Judges.

Opinion

KELLER, Judge.

***1** In December 2007, the Kentucky Board of Dentistry (the Board) placed the license of Earlene F. Greene, D.M.D. (Greene) on probation for five years and ordered her to take yearly continuing education courses in recordkeeping and documentation. Greene sought review of the Board's order and a declaratory judgment regarding the constitutionality of KRS 13B.150 from the Jefferson Circuit Court. The court found that the Board's order was supported by substantial evidence and that KRS 13B.150 is constitutional. Greene appeals from the court's opinion and argues before us that: there is not sufficient evidence of substance in the record to support the Board's finding that she is a chronic or persistent alcoholic; there is not sufficient evidence of substance in the record to support the Board's finding that she failed to keep written dental and medical history records sufficient to justify the course of treatment of her patient, Donna Borton (Borton); and KRS 13B.150(2)(c) unconstitutionally deprived her of her due process right to adequate relief on appeal.[1] The Board argues to the contrary. For the following reasons, we affirm.

FACTS

Greene has come before the Board two times for disciplinary proceedings, once in 2006 and again in 2007. Only the 2007 matter is currently before us on appeal; however, because the two proceedings are tangentially related, we first set forth the facts related to the 2006 disciplinary proceeding. We next address the facts related to the 2007 disciplinary proceeding. Finally, we set forth the facts related to the circuit court proceeding.

1. 2006 Disciplinary Proceeding

In March 2006, the Board charged Greene with multiple counts of administering conscious sedation without a valid permit. Prior to a hearing, the Board and Greene entered into a settlement agreement. Pursuant to the terms of the agreement, the Board: issued a reprimand; placed Greene on probation for seven years; fined Greene $3,000.00; required Greene to attend at least six hours of continuing dental education regarding dental anesthesia practice, technique, and safety; and required Greene to submit to monitoring by the Board. The agreement also provided that, after five years of successful compliance, Greene could request termination of the remainder of her probation. Greene complied with the agreement except with regard to payment of the $3,000.00 fine. We note that Greene ultimately paid that fine after the hearing involving the disciplinary action that is the subject of this appeal.

2. The 2007 Disciplinary Action

In this action, the Board brought three charges against Greene, only two of which are pertinent to this appeal. Because the facts surrounding each charge differ, we separately set them forth below.

a. Chronic and Persistent Alcoholism

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In the late 1990s, Greene went through a difficult divorce, had to relocate her practice, and lost a brother to cancer. She testified that she began drinking fairly heavily at that time, and the records indicate that she received two or three driving while intoxicated (DUI) citations and had her driver's license suspended. In December 2000, Greene sought assistance from the Kentucky Dental Association's Well–Being Committee (the Well–Being Committee), a committee designed, in pertinent part, to monitor the recovery process for impaired dentists and dental hygienists. It appears from the record that Greene was referred to the Well–Being Committee because she had written four prescriptions for narcotics to her boyfriend. The Well–Being Committee referred Greene to a psychiatrist, Dr. Elliott, for evaluation.

***2** Greene gave Dr. Elliott a history of alcohol abuse that began approximately six years earlier. According to Dr. Elliott, Greene had received one DUI in 1996 and two DUIs in 1997 and underwent treatment for her alcoholism in 1998. She stopped drinking for eight months, then relapsed. However, Dr. Elliott noted that Greene had begun attending a recovery group and had not had any alcohol for approximately five months before seeing him. Dr. Elliott also noted that Greene reported suffering from longstanding depression and that she had treated with Dr. Cox for that condition for twenty-five years. Based on his evaluation, Dr. Elliott made diagnoses of alcohol dependence in partial remission with recurrent major depression.

In June 2001, Dr. Elliott noted that Greene was not attending any alcoholics anonymous (AA) meetings. Dr. Elliott changed his diagnosis to alcohol dependence in remission, but he expressed serious concerns about Greene's stability because of her failure to attend any AA meetings.

In September 2003, Dr. Elliott noted that Greene had not had any alcohol since 2000 and that she was "recovering." Dr. Elliott last saw Greene on April 19, 2006. At that time, he noted that Greene was under investigation for administering conscious sedation without a valid permit. Greene again reported that she was not attending AA meetings but that she had not had any alcohol since 2000. Dr. Elliott continued his diagnosis of alcohol dependence in remission and opined that Greene could continue to safely practice dentistry.

One month later, on May 26, 2006, Greene's vehicle ran off the road and struck a brick mail box. Greene left the scene of the accident to find a telephone. Officer Miller, who responded to the scene, found Greene sitting on a bench in front of a grocery store near the scene of the accident. He smelled alcohol on Greene's breath but, because she apparently had suffered a head injury, he did not perform any field sobriety tests. Because he smelled alcohol, Officer Miller charged Greene with DUI and with leaving the scene of an accident. Officer Miller asked Greene to submit to either a blood alcohol or breathalyzer test and gave her the opportunity to contact an attorney. Greene was unable to contact an attorney, and she refused to submit to either test. In July 2006, Greene entered an *Alford* plea of guilty to "first offense DUI" in exchange for a recommended fine of $200.00 plus court costs and a forty-five day suspension of her driver's license.

In January 2007, Greene voluntarily entered into a monitoring agreement with the Well–Being Committee. Pursuant to the agreement, Greene was required to attend three AA meetings per week and to provide the committee's director with a log verifying that attendance. Greene was also required to submit to random drug testing and to report any citations or arrests. Greene did not always timely provide the documentation to verify her AA meeting attendance and, in November 2007, she asked to put the agreement into abeyance pending resolution of the foreclosure on her house and various other matters.

b. Failure to Create and Maintain Records

***3** From November 2004 to October 2006, Borton worked for Greene, answering the telephone, scheduling appointments, and handling billing. In July 2005, Greene performed implant surgery on Borton. In order to perform the procedure, Greene administered an injection of a local anesthetic and nitrous oxide. However, when the bill for this treatment was sent to Borton's insurer, it contained a charge of $233.60 for administration of IV sedation. Shortly after leaving Greene's employ, Borton filed a complaint with the Board alleging, in part, that Greene had fraudulently billed her insurer for a procedure, IV sedation, that had not been performed.

c. The 2007 Administrative Proceedings

On March 7, 2007, the Board filed a notice of administrative hearing and show cause order charging, in pertinent part, that Greene: had a wreck in May 2006 while intoxicated; entered into an *Alford* plea of guilty to DUI; failed to submit

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documentation as required by her monitoring agreement with the Well–Being Committee; and failed to keep adequate written dental and medical history records regarding her treatment of Borton.[2] In her response, Greene admitted that she had a problem with alcohol abuse; that she was involved in a motor vehicle accident while under the influence of alcohol; that she left the scene of the accident; and that she entered into an *Alford* plea of guilt to DUI. Greene denied that she failed to create and maintain a complete record regarding her treatment of Borton and she argued that any failure to timely file documentation pursuant to the monitoring agreement should be excused.

On November 27, 2007, a panel consisting of two members of the Board and a hearing officer from the Attorney General's office heard testimony regarding the above charges. Because that testimony is crucial to this appeal, we summarize it in detail below.

Dr. Cox testified that he began treating Greene for depression in 1993. Between 1998 and 2001, his treatment related to both depression and alcohol abuse or dependency. Dr. Cox noted that Greene initially had some difficulty overcoming her alcohol dependence; however, she did so by sometime in 2001. According to Dr. Cox, Greene had no alcohol related problems between then and her DUI in 2006. In fact, based on what Greene told him, Dr. Cox believed that Greene's 2006 accident was not the result of alcohol consumption but wet roads. Throughout his treatment of Greene, Dr. Cox made diagnoses of alcohol dependence in either partial remission or remission. He does not believe that Greene "has chronic alcohol dependency, because she seem[ed] to have gained control of this problem back in 2001[,]" with no evidence of ongoing abuse or dependence since then. Furthermore, Dr. Cox testified that, although Greene is alcohol dependent, that differs from being a "chronic and persistent alcoholic." According to Dr. Cox,

> [c]hronic and persistent alcoholism would be the case where, unlike Doctor Morgan [sic] since 2001, she would have either been drinking continuingly [sic] during this time or have many episodes of alcohol intoxication, multiple interferences in her life due to this—several times a year, typically.... I do not think she's a chronic persistent alcoholic.

***4** However, Dr. Cox also testified that he believed that "once an alcoholic, always an alcoholic," that he agreed with Dr. Elliott's assessment that Greene is a "recovering alcoholic," and that she should avoid drinking alcohol.

Borton testified that Greene had performed implant surgery in July 2005 and had not used IV sedation. However, when she received a statement from her insurer, Borton noted that her insurer had been charged for IV sedation. Although she recognized this was incorrect, Borton did not report this discrepancy to the Board until after she stopped working for Greene in October 2006.

With regard to the alcohol related charges, Borton testified that, in December 2005, Greene came to the office late one day and smelled of alcohol. However, Borton stated this was the only day she thought Greene was impaired while treating patients and she never saw Greene drinking alcohol while at the office.

Dr. Marquita Pointer (Pointer) testified that she is a practicing dentist and investigator for the Board. Pointer reviewed Greene's records related to Borton's July 2005 implant and noted that the record reflected administration of IV sedation, which was not done. Furthermore, although a local anesthetic would have been administered, the record did not contain any reference thereto either.

Brian Fingerson (Fingerson), the director of the Well–Being Committee, testified that he is not a psychiatrist or psychologist. His role with the committee is to refer impaired professionals to a psychiatrist or psychologist for evaluation and treatment. Fingerson then monitors that treatment and the professional's rehabilitation.

Fingerson noted that Greene was involved with the Well–Being Committee when he began working for the committee in 2003. However, he had no personal contact with Greene until December 2006, when she wrote to him saying that "it had been suggested" that she renew her contact with the Well–Being Committee. In January 2007, Greene entered into a monitoring agreement with the Well–Being Committee that required her to attend three AA meetings a week, to submit to random drug screens, and to report any arrests or citations. Fingerson stated that Greene had not completely complied

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with the agreement because she had failed to submit some AA meeting attendance logs and had not timely submitted others.

We note that Fingerson expressed a firm belief that successful treatment of alcoholism requires AA or some other formal support group. Therefore, he questioned Greene's commitment to sobriety because of her apparent failure to attend meetings regularly. Finally, although Fingerson stated that alcoholism is chronic and persistent, he agreed that a person who is not drinking is not a chronic and persistent alcoholic.

Greene testified that she began treating with Dr. Cox for depression after her parents died. In the late 1990's, she had some problems related to alcohol abuse, which she attributed to her divorce, the death of her brother, and having to relocate her practice. Dr. Cox helped her with her alcohol abuse problems as did her family, friends, and church. Greene testified that, with that help, she was able to control her alcohol abuse and that she did not drink alcohol for a period of six years.

***5** Greene admitted that she had not always timely provided the documentation required by her 2007 monitoring agreement. However, she stated that she had a number of concerns—theft by an employee, downsizing of office staff, marital problems, and financial difficulties—that prevented her from timely complying. Furthermore, although Greene recognized that AA can be useful in treating alcohol dependence, she testified that she did not find it to be that helpful. Instead of AA, Greene relies on treatment by Dr. Cox and support from friends and family to help her with sobriety.

As to her May 26, 2006, DUI, Greene testified that she had remarried and her husband had a substance abuse problem, was abusive, and was a habitual criminal. On May 24, two days before her arrest, Greene's husband had been admitted to rehabilitation, and he had left his truck in her office parking lot. She took her husband's truck when she left work and went to her nephew's for dinner. At dinner, in celebration of her husband's admission to rehabilitation, Greene testified that she had a glass to a glass and a half of wine. She stated that she was not impaired when she left her nephew's, that it had been raining, and that she lost control of the truck because she was not used to driving it and it hydroplaned. Because it was late at night and she did not see any lights in nearby houses, she walked to the grocery store looking for a telephone. Greene explained that she was disoriented because she had struck her head on the steering wheel but that she was not drunk. She did not submit to a blood alcohol or breathalyzer test because she was not able to contact her attorney to get advice.

As to the billing, Greene stated that the charge for IV sedation on the statement sent to Borton's insurer was simply a clerical error and that she did not submit the statement to the insurer, Borton did. However, Greene admitted that she did not attempt to correct that error until January 2007, a year and a half after the procedure.

In addition to the preceding, the Board reviewed Dr. Elliott's records and heard testimony from Greene's nephew, who began working for her in the fall of 2006, and three former employees. All four witnesses testified that Greene had not exhibited any evidence of alcohol abuse or impairment while working. Furthermore, Greene's nephew confirmed Greene's testimony that she had only had a glass to a glass and a half of wine the night of her 2006 DUI.

Following the hearing, the panel unanimously found that Greene failed to keep dental and medical history records sufficient to justify a course of treatment. Specifically, the panel found that Greene's records regarding Borton's implant surgery did not contain "what anesthesia was used for several procedures ... the results of radiographs performed for the procedures ... recommendations for post-operative analgesia ... the lot and tracking numbers for the dental implant used ... tracking numbers for bone graft material used ... and consent to surgery." The panel determined that the deficiencies in the records in evidence were sufficient to support the need for Greene to take remedial education and training courses on documentation and record keeping. However, they were not sufficient to support suspension of Greene's license.

***6** The panel also found that Greene suffers from chronic alcoholism. In doing so, the panel noted Greene's: 2006 accident; her *Alford* plea of guilt to DUI; her admission that she had "a couple glasses of wine" the night of her accident; her prior DUIs; Dr. Cox's diagnosis of alcohol dependence in remission; Dr. Elliott's diagnosis of alcohol dependence in partial remission; Greene's participation in the Well–Being Committee program in the late 1990s to early 2000s; her voluntary participation in that program beginning in January 2007; and her failure to comply with the monitoring agreement she signed in January 2007. Finally, the panel stated that Dr. Cox testified that Greene is not "both a chronic *and* persistent alcoholic" (emphasis in original),

implying that Dr. Cox never addressed whether Greene is not a chronic *or* persistent alcoholic.

3. The Circuit Court Proceeding

Greene timely filed an original action in circuit court contesting the Board's findings. Following receipt of memoranda and argument of counsel, the court upheld the Board's decision. In doing so, the court determined that KRS 13B.150 is constitutional, noting that the Supreme Court of Kentucky had recently reiterated the standard to be used in reviewing administrative agency decisions in *Kentucky Retirement Systems v. Bowens,* 281 S.W.3d 776, 779–80 (Ky.2009). Applying that standard of review, the court then found that the Board did not act in excess of its authority and did not deny Greene due process. Furthermore, the court found that Dr. Elliott's records, Dr. Cox's testimony, and Greene's four DUI's were sufficient evidence to support the Board's finding that Greene suffers from chronic alcoholism.

STANDARD OF REVIEW/ANALYSIS

The issues presented require different standards of review and are dependent on different facts. Therefore, we address each issue separately below.

1. Constitutionality

Our standard of review regarding questions of law is *de novo. Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky.App.2001). Therefore, we review Greene's constitutionality arguments using that standard.

Greene raises two issues with regard to constitutionality. The first is that, because "chronic alcoholism" is not defined in KRS 313.130(6), she was deprived of her constitutionally guaranteed rights to due process and equal protection of the law. The second issue is that KRS 13B.150 unconstitutionally deprives a reviewing court of the ability to meaningfully review administrative agency actions. We address each issue in turn.

KRS 313.130 provides that

> [t]he board may, upon complaint or upon its own motion, after a hearing conducted in accordance with KRS Chapter 13B, issue a private admonishment, reprimand, or place on probation, or may revoke, suspend, refuse to renew, or refuse to issue a license to any dentist for any of the following causes:
>
> ...
>
> (6) Chronic or persistent alcoholism.

As admitted by the Board and pointed out by Greene, KRS Chapter 313 does not provide a definition of what constitutes chronic alcoholism. When a statute does not define terms, they are to "be construed according to the common and approved usage of language ..." unless they are "technical words and phrases" or "have acquired a peculiar and appropriate meaning in law." KRS 446.080(4); *see also Alliant Health System v. Kentucky Unemployment Ins. Com'n,* 912 S.W.2d 452, 454 (Ky.App.1995).

***7** Greene's argument on this issue is somewhat confusing. It appears that she is arguing that the panel could not have used a common and approved definition of "chronic alcoholism" because the evidence would not support a finding of that condition if such a definition had been used. That is a substantive evidence argument, not a constitutional one. We address the substantive evidence arguments below. However, assuming that Greene is arguing that the KRS 313.130(6) is constitutionally deficient because the term "chronic alcoholism" is not defined, we will briefly address that argument.

As noted in KRS 446.080(4), words in statutes are to be construed according to their common and approved language. Technical words and phrases, or those with a peculiar meaning in the law, shall be construed according to that meaning. The word alcoholism is a commonly understood word. Furthermore, although Greene argues to the contrary, Dr. Elliott indicated in his December 20, 2000, report that Greene was seeking treatment for her "alcoholism." Dr. Cox testified that he agreed with Dr. Elliott's statement in 2003 that Greene is a "recovering alcoholic," and Greene admitted in her response to the notice of administrative hearing and show cause order that she has a problem with alcohol abuse. Because Greene's own expert witness agreed that she is a recovering alcoholic, there was no need to provide a definition of the term, statutorily or otherwise.

As to the word "chronic," that is not a word that has acquired any peculiar meaning in the law. Therefore, the Board was free to construe it according to its common meaning.

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Even if a definition were required, the one offered by Greene-a disease "of long duration or characterized by slowly progressive symptoms; deep-seated and obstinate, or threatening a long continuance; distinguished from acute"—is not helpful to her cause. Dr. Cox, Greene's expert witness, admitted that he agreed with the statement "once an alcoholic, always an alcoholic." That falls within the definition of a disease of long duration. Furthermore, Greene's history of DUIs, her history of treatment with Dr. Cox for alcohol dependence, her admission that she has a problem with alcohol abuse, and her participation in the Well–Being Committee's program in 2000 and 2006 indicate she has a disease of long duration. Therefore, Greene's argument to the contrary notwithstanding, the evidence supported a finding that Greene's alcoholism is chronic. Based on the preceding, we hold that KRS 313.130(6) is not unconstitutional as applied to Greene.

We next address Greene's argument that KRS 13B.150 is unconstitutional. As we understand her argument, Greene believes that KRS 13B.150 is unconstitutional because it negates the requirement that the Board make findings based on a preponderance of the evidence and it mandates that a reviewing court accept all factual findings by the administrative body. We disagree.

As to Greene's first argument, that KRS 13B.150 alters the burden of proof, it appears that Greene is mixing the proverbial apples and oranges. KRS 13B.090(7) provides that the party with the burden of proof can only meet that burden with a preponderance of the evidence. This refers to the quantity of evidence. KRS 13B.150 provides in pertinent part that a court may only reverse an agency's final order if the court finds the order is "[w]ithout support of substantial evidence on the whole record." This refers to the quality of the evidence. Therefore, KRS 13B.150 does not alter the burden of proof. Furthermore, it does not, as Greene argues, remove from the court the ability to determine if substantial evidence exists, it mandates such a determination.

***8** Greene's second argument, that KRS 13B.150 unconstitutionally requires a court to unquestioningly accept the findings of fact by an agency is equally unpersuasive. KRS 13B.150(2)(d) states that, if an administrative agency's final judgment is "arbitrary, capricious, or characterized by abuse of discretion" we may reverse it. Therefore, a reviewing court can, and must, examine an agency's findings of fact to determine if they are arbitrary, capricious or reveal an abuse of discretion. That is not unquestioned acceptance of an agency's findings and is essentially the same standard a reviewing court applies to a jury determination. *See* *Bierman v. Klapheke,* 967 S.W.2d 16, 18 (Ky.1998). Furthermore, as noted by the circuit court and the Board, the Supreme Court of Kentucky, as recently as 2009, reiterated that the above standards are appropriate for review of administrative agency final orders. *Kentucky Retirement Systems v. Bowens,* 281 S.W.3d 776, 779–780 (Ky.2009). We are bound to follow precedent set by our Supreme Court. SCR 1.030(8)(a). Therefore, even if we were inclined to accept Greene's argument as persuasive, which we are not, we can not diverge from standing precedent.

2. Sufficiency of Evidence for Finding of Chronic Alcoholism

Greene argues that the Board did not have sufficient evidence to support its finding that she suffers from chronic alcoholism. When reviewing a decision of a circuit court upholding a final judgment of an administrative agency, this Court must determine if the circuit court's findings upholding that decision are clearly erroneous. When reviewing the agency's final judgment, the circuit court may not reinterpret or reconsider the merits of the case, nor substitute its judgment for that of the agency as to the weight of the evidence. *Johnson v. Galen Health Care, Inc.,* 39 S.W.3d 828, 833 (Ky.App.2001); *Kentucky Unemployment Insurance Commission v. King,* 657 S.W.2d 250, 251 (Ky.App.1983); and *Kentucky Racing Commission v. Fuller,* 481 S.W.2d 298, 309 (Ky.1972). As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence. *Kentucky Commission on Human Rights v. Fraser,* 625 S.W.2d 852, 856 (Ky.1981). With this standard in mind, we review the record to ascertain if the Board's determination that Greene suffers from chronic alcoholism is supported by substantial evidence.

Greene argues that the Board ignored the expert opinion of Dr. Cox that she does not suffer from chronic alcoholism. However, that is not the case. The Board, through its adoption of the hearing panel's recommended findings, stated that it did consider Dr. Cox's testimony. Furthermore, Greene's argument to the contrary notwithstanding, Dr. Cox testified that he agreed with Dr. Elliott's statement that Greene is a recovering alcoholic and Dr. Cox agreed that alcoholism is not curable. That testimony, in conjunction with Greene's history of multiple DUI's and recurrent contact with the Well–Being

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Committee, is sufficient evidence of substance to support the Board's finding that Greene suffers from chronic alcoholism.

3. Sufficiency of Evidence for Finding that Greene Failed to Keep Adequate Records

***9** Greene argues that the Board's finding that she failed to keep dental and medical history records sufficient to justify a course of treatment is not supported by substantial evidence because it is based on the review of only one record. The standard of review for this issue is the same as for the preceding issue.

In support of her argument, Greene states that Dr. Pointer, the Board's expert witness regarding recordkeeping, agreed that one patient record was not sufficient to determine if a pattern of recordkeeping existed. Greene also argues that Dr. Pointer testified that a review of deficiencies in one patient record is not sufficient to support "a disciplinary action."

During the disciplinary hearing, Dr. Pointer testified regarding the deficiencies she found in Greene's records regarding the implant she performed on Borton. However, she did not state, or even imply, that deficiencies in one patient record were insufficient to justify discipline. Greene's counsel asked Dr. Pointer if "any mistake in a medical record, in a dental record requires discipline," to which Dr. Pointer responded, "That's not my call." Following an objection by counsel for the Board, Greene's counsel asked and Dr. Pointer responded as follows:

> Q. So my question to you is, in turn—is the standard of —for the Board, in terms of you being an investigator and a teacher and those things that you said that you are, any omission from a dental record is by its existence a violation of law and requires discipline, or is there a pattern of omission that raises—that differs—that makes it differ from a mistake to a disciplinary action?
>
> A. In my opinion, the absence of that documentation means that this is not standard for complying with our Dental Practice Act law requiring complete documentation on a patient's treatment. Now, whether—if we looked at many of her records, we could better determine if this is a pattern or if this is the single isolated instance, and we don't have that privilege here. So I couldn't say whether in this particular case, this is a single incident or if this is a pattern for her.

While Dr. Pointer did state that one record does not a pattern make, she did not state that disciplinary action could not or should not be based on deficiencies in one record. Therefore, the record does not support Greene's argument.

Furthermore, we note that 201 KAR 8:430 Section 2(4) provides that "[a] licensee shall be guilty of 'unprofessional conduct' if the licensee: [f]ails to keep written dental records and medical history records that justify the course of treatment of the patient...." The regulation refers to *the patient,* not *patients;* therefore, review of only one patient's record is not outside the purview of the regulation. Additionally, the regulation does not state that discipline is contingent on a finding of a pattern of failure to keep records. Therefore, we discern no error in the Board's finding that Greene failed to keep records sufficient to justify a course of treatment.

CONCLUSION

***10** Having reviewed the record and arguments of counsel, we hold that neither KRS 13B.150 nor KRS 313.130 are facially unconstitutional nor are they unconstitutional as applied to Greene. Furthermore, we agree with the circuit court that the record contains sufficient evidence of substance to support the Board's findings and that the Board did not abuse its discretion. Therefore, we affirm.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2011 WL 832329

Footnotes

1 We note that Greene discusses in her brief and that the parties were questioned during oral argument about a dispute she had with the Board regarding the contents of its notification to the National Practitioner

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Data Bank (the Data Bank). Although this issue is not before us, it appears to us that the report incorrectly indicated that Greene's license had been suspended and that she was "unable to practice safely by reason of alcohol or other substance abuse." Both of these statements appear to be unsupported by the Board's opinion. Greene argued that these misstatements, which it took her more than a year to "correct" have had a devastating impact on her practice. We are concerned by the Board's apparent lack of concern regarding these misstatements and its apparent failure to cooperate with Greene in correcting or explaining them to the Data Bank. However, because this issue is not before us, we can only express our concern.

2 The Board also alleged that Greene fraudulently billed an insurance company for administering IV sedation during Borton's implant procedure. However, the Board ultimately determined that there was insufficient evidence to support this allegation and dismissed the related charge.

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Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

Thomas G. WHITE, Derivatively on Behalf of Vencor, Inc., A Delaware Corporation, And Ventas, Inc., Formerly Vencor, Inc., Appellant.
v.
W. Bruce LUNSFORD; E. Earl Reed, III; Michael R. Barr; Thomas T. Ladt; Jill L. Force; James H. Gillenwarter, Jr; R. Gene Smith; Walter F. Beran; Ulysses L. Bridgeman; Elaine L. Chao; Donna R. Ecton; Greg D. Hudson; and William H. Lomica, Appellees.

No. 2005-CA-001775-MR.
|
Sept. 29, 2006.

Appeal from Jefferson Circuit Court, Action No. 98-CI-003669; Judith E. McDonald-Burkman, Judge.

Attorneys and Law Firms

P. Stephen Gordinier, Louisville, KY, Jeffrey R. Krinsk, Mark L. Knutson, San Diego, CA, for appellant.

David Tachau, John David Dyche, Louisville, KY, for appellees.

Before COMBS, Chief Judge; GUIDUGLI and JOHNSON, Judges.

Opinion

COMBS, Chief Judge.

***1** On behalf of Ventas, Inc., a Delaware corporation, Thomas G. White appeals from an order of the Jefferson Circuit Court dismissing this shareholder derivative action. We have reviewed the substantive requirements of Delaware law along with the arguments of counsel. We agree that the complaint fell short of the threshold requirement that there be a **specific showing** of impropriety on the part of the defendants. Under the relevant law, White bore the burden to demonstrate particularized facts that the defendants were tainted by self interest or that they failed to exercise sound business judgment in conducting the affairs of the corporation. Absent such particularity, relevant principles of corporate law justify dismissal of a complaint. We conclude that the court did not err in dismissing the complaint.

Ventas is a publicly traded real estate investment trust headquartered in Louisville. Prior to a corporate reorganization in 1998, the company was known as Vencor, Inc. It operated a national network of integrated healthcare facilities located on real estate that it owned and managed.

A Wisconsin resident and Ventas shareholder, Thomas White, filed suit in Jefferson Circuit Court in 1998 against ten members of the company's board of directors and three of its non-director officers. (He filed an amended complaint within a few days.) In the name of the interests of the corporation, White alleged that the defendants had violated their fiduciary duties to the company from February 10, 1997, through October 21, 1997. During that period, White alleged that the company's officers conspired to inflate the value of the corporation's stock and that they then dumped substantial portions of their holdings. He alleged that the directors were complicit in making false or misleading statements about the company's operations and its anticipated performance. He also charged that they failed to properly oversee the management of the company, a dereliction that resulted in grave financial harm to Ventas.

In August 1998, the defendants filed a motion to dismiss the action. They relied on a substantive requirement of Delaware's corporate law known as the "demand rule." Under the demand rule, a stockholder can file a derivative action only after he has first made a demand upon the corporation's board of directors to take action in light of his allegation and it has refused to do so. He may be relieved or excused of making a pre-lawsuit demand on the directors only if he can demonstrate that the making of such a demand would be futile because the directors are clearly incapable of making an impartial decision regarding litigation. *Levine v. Smith,* 591 A.2d 194, 200 (Del.1991). When the action is based on the inability of the directors to act, the stockholder's complaint must state **with particularity** why a demand on the directors to assert a claim would have been futile. *Beam v. Stewart,* 845 A.2d 1040 (Del.2004).

In their motion to dismiss, the defendants contended that prior to filing the derivative action, White failed to make a demand of the company to pursue the alleged claims

involving corporate affairs or that he failed to properly plead in his complaint that such a demand would have been futile. They alleged that both omissions were fatal. Before the court could consider the motion of the defendant, the proceedings were stayed for various reasons over a prolonged period of time. At long last, on July 26, 2005, an order was entered dismissing the action.

***2** Twenty-two days after this dismissal, White filed two post-judgment motions. Procedurally, he sought permission of the court to file motions out of time based on an inadvertent mistake of counsel. Substantively, he sought to have the judgment set aside in order that he might file a second amended complaint "more concisely setting forth the facts." On August 24, 2005, the trial court summarily denied White's post-judgment motions. This appeal followed.

White raises two alternative issues for our consideration on appeal. He first argues that the trial court erred in concluding that the complaint was deficient; namely, that it failed to charge that a demand on the company's board of directors would have been futile. In the alternative, White contends that the trial court erred by refusing to permit him to file a second amended complaint. We disagree with both of his arguments.

The parties agree that Delaware law governs the substantive issues on appeal and that the demand rule is dispositive. White acknowledged his failure to demand that the company's board of directors take action against the alleged wrongful conduct. Accordingly, he bore the burden to demonstrate in detail (*i.e.,* with "factual particularity") that any demand on the corporation would have been futile.

Delaware's stringent requirement for factual particularity is based on streamlining and expediting discovery. It is intended to prevent a stockholder from causing a corporation "to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinion or speculation." *Brehm v. Eisner,* 746 A.2d 244, 255 (Del.2000). The requirement for factual specificity means that a complaint must be dismissed-regardless of the strength of the claim as alleged on its merits-if that specificity as to underlying facts has not been established.

In cases where a complaining shareholder alleges that a demand upon a company's board of directors would have been futile, Delaware courts have established two separate (yet overlapping) lines of inquiry. If the shareholder's complaint challenges a specific event or transaction approved by a board of directors, Delaware courts apply a two-prong test set forth by the Delaware Supreme Court in *Aronson v. Lewis,* 473 A.2d 805 (Del.1984) (the *Aronson* test). If no specific action undertaken by the board is challenged, however, Delaware courts apply a single-step inquiry set forth in *Rales v. Blasband,* 634 A.2d 927 (Del.1993) (the *Rales* test). White's complaint implicates both tests.

White alleged numerous facts in his complaint, which the trial court accepted as true in ruling on the motion to dismiss. He claimed that company executives made overly positive and optimistic statements to market analysts and others during a February 1997 conference call. He believed that these statements affected Wall Street's quarterly earnings projections for the company, causing brokerage firms to reiterate their "buy" or "strong buy" recommendations for the stock. He also criticized the corporation's annual report to shareholders (issued in March 1997) for failing to caution against the sector's possibly harmful exposure to proposed Medicare reforms being considered by Congress at that time.

***3** White alleged that management once again misled analysts following the release of its first quarter earnings results in April 1997. He claimed that the favorable, forward-looking statements affected the corporation's stock price, driving it upward to the benefit of its executives and directors. Despite a clear need to warn its stockholders, White believed that management continued to downplay the potential impact of reduced federal healthcare spending, emphasizing instead only robust growth projections.

White alleged that executives misled analysts and stockholders in press releases filed in May 1997 concerning the corporation's acquisition of Transitional Hospital Corporation for $639 million dollars. He charged that management's excessively optimistic predictions concerning this asset continued through early July, causing analysts to reiterate or to enhance their ratings of the stock that resulted in a boost to share prices. White claimed that the company's officers and directors sold more than 118,600 shares of stock at an average price of $42.55 per share at or near this time. One brokerage firm actually had a $51.00 per share price tag on the stock.

At the end of July 1997, the corporation announced its second quarter earnings results, which matched analysts' expectations. According to White, management continued to make rosy, forward-looking projections and to minimize the

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risks associated with changing federal budget demands. On September 5, 1997, R. Gene Smith, a member of the board of directors, sold 16,876 shares of stock.

According to White, the corporation routinely and repeatedly made positive representations about operating trends and growth opportunities at industry conferences, in press releases, and in conference calls. On September 18, 1997, he alleged that Jill L. Force, a senior vice-president and the company's general counsel, sold 39% of her holdings. At the same time, Earl Reed, the company's chief financial officer, sold 28% of his holdings.

On October 22, 1997, the company revised its fourth quarter guidance. Its announcement indicated that earnings per share would fall considerably short of analysts' expectations. The predicted shortfall was attributed by the company to the negative impact of federal budget changes related to Medicare reimbursement. The company's stock price plunged 28% during the trading day, and analysts quickly began to lose confidence in the company's growth prospects.

White alleged that throughout the entire period at issue, the company's officers and directors knew that the corporation was being grossly mismanaged and that federal budget changes would inevitably have a severely negative impact on the company's growth and earnings. Nevertheless, the officers and directors continued to mislead the market analysts and the investing public about the company's performance and prospects. He also claimed that the company had paid too much when it purchased Transitional Hospital Corporation. He believed that it had over-compensated W. Bruce Lunsford, the company's chief executive officer; W. Earl Reed, the chief financial officer; and Michael R. Barr, the chief operating officer. He contended that company insiders sold $9.5 million in stock at artificially inflated prices. Finally, he charged that the managers and directors exposed the company to a multi-million dollar federal securities class action and that they otherwise damaged the company's finances and reputation.

***4** For purposes of our discussion, the numerous allegations contained in White's complaint can be grouped into the following three categories:

1. *The disclosure counts:* the false, irrationally optimistic, and misleading forward-looking statements about the financial condition, good management, and growth opportunities of the company (subject to the *Rales* test);

2. *The waste counts:* the cost of acquiring Transitional Hospital Corporation and the excessive compensation packages of the three top executives (subject to the *Aronson* test);

3. *The insider-trading counts:* insider trading and the proceeds realized from that trading (subject to the *Rales* test).

Only the waste counts appear to challenge specific and direct board action; *i.e.,* board approval for the acquisition of Transitional Hospital Corporation and approval for the compensation packages offered to three executives.

In analyzing the charges contained in the complaint, we apply the Delaware court's two-part *Aronson* test to determine whether White has asserted particularized facts sufficient to demonstrate why a demand upon the board would have been futile as to the waste counts. Since the disclosure counts and insider-trading counts do not challenge specific or direct action undertaken by the board as a whole, they will be analyzed under the *Rales* test. We shall examine the categories individually, beginning our discussion with the waste counts.

The Waste Counts (The *Aronson* Test)

In order to avoid dismissal under the demand rule, *Aronson* requires that a plaintiff's allegations raise a reasonable doubt by satisfying either of two criteria: (1) that a majority of the directors were not disinterested and independent and (2) that the challenged transaction was not the result of a valid exercise of sound business judgment. *Aronson,* 473 A.2d at 814. To assess the requisite disinterestedness and independence of directors, we consider whether the plaintiff has pleaded particularized facts that demonstrate that the directors were motivated by personal interest, domination, or control. If so, their personal interests would have prevented them from objectively evaluating a demand-if made-that the board pursue the best interests of the corporation. *Brehm, supra.* To assess whether the transaction was undertaken as part of the board's exercise of its business judgment, we consider whether the directors were proper persons to conduct litigation on behalf of the corporation.

White named ten of the company's directors as defendants in the derivative action. Of these, six (Beran, Bridgeman, Chao, Ecton, Hudson, and Lomica) were neither officers nor employees of the company. White alleged no particularized

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facts to suggest that any of these "outside directors" would have been unable to act independently or disinterestedly if he had he demanded action of them. Instead, White relied on the second *Aronson* test by claiming that the challenged transactions (*i.e.,* the excessive executive compensation packages and the huge consideration paid by Ventas to acquire Transitional Hospital Corporation)-constituted corporate waste and that they were not the product of a valid exercise of the board's business judgment.

***5** Corporate directors enjoy substantial deference in exercising their business judgment on behalf of a corporation. Delaware law presumes that a corporation's directors make business decisions on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company. *Aronson,* 473 A.2d at 812. This presumption of regularity is commonly referred to as the "business judgment rule."

Under the business judgment rule, directors exercise very broad discretion in making decisions relating to executive compensation. See *Brehm,* 746 A.2d 244. The standard for determining corporate waste is also rigorous and requires proof that directors irrationally squandered or gave away corporate assets. *Id.*

The waste counts of White's complaint essentially consisted of conclusory allegations. He was quite clear in articulating his personal disagreement with the board's judgment as to the value of retaining top executives and of acquiring Transitional Hospital Corporation. However, he did not allege that the board failed to review and to consider available and relevant information concerning either decision. He did not allege an absence of adequate or substantial consideration inuring to Ventas in exchange for the corporate assets paid to compensate the executives and for the asset represented by the acquisition of Transitional Hospital Corporation. On balance, the allegations were insufficient to overcome the presumption of regularity or to raise a reasonable doubt that the directors validly exercised sound business judgment with respect to both issues.

The Disclosure Counts and the Insider-Trading Counts (The *Rales* Test)

We shall next address the disclosure counts and the insider-trading counts of White's complaint. In these counts, White did not complain of any specific transaction or enterprise undertaken by the board as a whole. Nor did he allege that the board members had an affirmative duty to act in a particular manner and that they disregarded that duty. Rather, he claimed in general terms that the board was complicit in the challenged conduct and that it was lax in its management of the affairs of the company. Under these circumstances, the allegations of the complaint are analyzed under the *Rales* standard.

Under *Rales, supra,* a court essentially applies the first prong of the *Aronson* test to determine whether the complaint asserted particularized facts sufficient to create "a reasonable doubt that ... the board of directors could have properly exercised its independent and disinterested business judgment in responding to a stockholder's a demand for action." 634 A.2d at 934. Under this inquiry, the court then asks whether any of the directors was rendered "interested" by the conduct at issue and, if so, whether the disinterested (impartial) directors were nonetheless capable of acting independently from those interested (partial) directors. *Id.* A director is considered "interested" if he or she: (1) received from the challenged conduct or transaction a personal financial benefit that was not equally shared by the other stockholders; (2) might have suffered "a materially detrimental impact" from the proposed legal action; or (3) was "incapable, due to domination and control, of objectively evaluating a demand, if made, that the board assert the corporation's claims." *Rales* 634 A.2d at 936.

***6** Pursuant to subsection (1) of the *Rales* test, White's complaint does not contain factual allegations sufficiently particularized to raise a reasonable doubt as to whether the Ventas board of directors could have-or would have-properly exercised its independent, disinterested business judgment in responding to a demand for action if he had posed such a demand prior to filing suit. White did not allege that the outside directors, who comprised a majority of the board, received any personal benefit (in the sense of self-dealing) from any of the challenged transactions so as to render those directors incapable of properly responding to the concerns of a shareholder.

Additionally, pursuant to subsection (2) of the *Rales* standard, White did not sufficiently plead that any of the outside directors would have been unwilling to act on behalf of the company because they would have been subject to "a substantial likelihood" of liability stemming from legal action.

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The complaint's bare and unsubstantiated allegation that the outside directors participated in the challenged conduct falls far short of meeting the strict pleading requirement. In *Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1055 (Del.Ch.1996), the Delaware court observed that:

> the simple expedient of naming a majority of otherwise disinterested and well-motivated directors as defendants and charging them with laxity or conspiracy etc., will not itself satisfy the standards for permitting a shareholder to be excused from demand.

Finally, pursuant to subsection (3) of the *Rales* rule, we note that White did allege that the outside directors were so motivated by improper influences as to be arguably dominated by-or beholden to-Lundsford, Reed, and Barr (the company's chief executive officer, chief financial officer, and chief operating officer, respectively). However, that bare allegation was insufficient to meet the strict requirement of particularity. The Delaware courts have consistently held that an unsupported, conclusory allegation of "domination" does not excuse demand. *Aronson,* 473 A.2d at 815. Instead, the plaintiff must allege specific facts that would demonstrate that the challenged directors were controlled by the offending directors through personal or other relationships. *Id.* White failed to make such a demonstration.

In addition to falling short of demonstrating bias or self-interest, While also failed to allege facts sufficient to cast doubt as to whether the Ventas board of directors court have properly exercised its independent, disinterested business judgment in responding to a shareholder demand for action. The trial court did not err by concluding that these counts of the complaint were also subject to dismissal under the strict requirements of Delaware's demand rule.

Although he believes that the court erred in dismissing his complaint for insufficiency, White nonetheless argues in the alternative that the trial court erred by failing to permit him leave to amend. We observe that White's post-judgment motion for relief was filed out of time. Regardless of this procedural shortcoming, we would still decline to reverse the court's refusal to permit the second amendment of his complaint.

***7** Kentucky Rule of Civil Procedure (CR) 15.01 provides that a plaintiff may file one amended complaint prior to the filing of a responsive pleading but that "[o]therwise a party may amend his pleading **only by leave of court** or by written consent of the adverse party...." (Emphasis added.) Although leave to amend shall be freely given when justice so requires, that decision remains within the sound discretion of the trial court. *Lambert v. Franklin Real Estate Co.,* Ky.App., 37 S.W.3d 770 (2000).

We shall recapitulate the sequence of procedural events in this case:

July 1998-White filed the complaint (followed within a few days by a first amended complaint);

January 2000-the appellees filed a motion to dismiss;

July 26, 2005-the court dismissed the complaint;

22 days later, White filed two post-judgment motions, including a motion to file the second amended complaint;

August 24, 2005-the court denied the motions.

In their motion to dismiss in January 2000, the appellees cited unmistakably fatal flaws in White's complaint and relied on an established and well developed body of law. More than five years then elapsed until July 26, 2005, when the trial court dismissed White's complaint. During that considerable interval, White did nothing to attempt to remedy or to supplement the deficiencies of which he had been made aware. We cannot conclude that justice required the court to permit White to file an amended complaint more than seven years after the original complaint had been filed. The trial court did not abuse its discretion by refusing to grant White's motion.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

All Citations

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Theodore Lee FISK, Appellant
v.
TOYOTA MOTOR MANUFACTURING KENTUCKY, INC., Appellee

NO. 2014–CA–001262–MR
|
JANUARY 20, 2017; 10:00 A.M.

APPEAL FROM SCOTT CIRCUIT COURT, HONORABLE PAUL F. ISAACS, JUDGE, ACTION NO. 13–CI–00112

Attorneys and Law Firms

BRIEFS FOR APPELLANT: Louis C. Schneider, Cincinnati, Ohio

BRIEF FOR APPELLEE: Craig P. Siegenthaler, Katherine A. Garbarino, Louisville, Kentucky

BEFORE: COMBS, J. LAMBERT, AND VANMETER, [1] JUDGES.

OPINION

LAMBERT, J., JUDGE:

***1** Theodore Lee Fisk has appealed from two orders of the Scott Circuit Court dismissing several of his claims in his action against Toyota Motor Manufacturing Kentucky, Inc. (TMMK), and Life Insurance of North America (LINA), in which he sought damages related to the cessation of his short term disability benefits and his allegedly forced retirement. Having carefully considered the record and the parties' arguments, we affirm.

In January 2010, Fisk worked full-time as a group leader for TMMK. At that time, Fisk became unable to work due to back pain and underwent spinal fusion surgery. He applied for short term disability benefits, a benefit TMMK provided to its employees. TMMK's short term disability plan is administered by LINA, which reviews and administers claims for benefits pursuant to a Claim Consulting Agreement. Section 6 of the agreement provides that "[t]his is not a contract of insurance and Consultant [LINA] shall not underwrite any risk of the Plan." Fisk's application was granted, and he received short term disability benefits pursuant to the plan from January 20 through September 3, 2010. On September 2, 2010, Fisk received a letter from LINA requesting updated medical documentation to support an extension of his benefits. While Fisk provided documentation from his physician from August, LINA determined that this was not sufficient. Fisk appealed the denial of the extension of his short term disability benefits, which LINA denied in October 2010 based on his job being described as light duty. TMMK informed Fisk that either he had to return to work or he would be terminated. While Fisk asked for reasonable accommodations for his back pain and restrictions imposed by his physician, TMMK did not provide this for him. Fisk ultimately retired from TMMK in December 2010 rather than return to work without accommodations or restrictions in place. He filed a lawsuit in federal district court against TMMK and LINA for wrongful termination of his short term disability benefits as well as for long term disability benefits. He also alleged a negligence claim against TMMK for failing to provide an accurate job description that included his actual duties and responsibilities. His claim related to long term disability benefits was dismissed because he had not yet applied for such benefits. [2]

On November 29, 2012, Fisk filed a lawsuit in Grant Circuit Court (Case No. 12–CI–00546), alleging the facts above and claims against TMMK for breach of fiduciary duty as his insurer of short term disability benefits (Claim 1); violations of Kentucky's Unfair Claim Settlement Practices Act, Kentucky Revised Statutes (KRS) 304.12–230 (Claim 2); a violation of KRS 304.12–235 for failing to timely pay his claim for short term disability benefits (Claim 3); bad faith (Claim 4); a violation of Kentucky's Civil Rights Act pursuant to KRS 344.030; wrongful termination; breach of public policy; civil conspiracy with LINA to improperly deprive him of his short term disability benefits and end his employment (Claim 13); and punitive damages based on TMMK's willful, wanton, malicious and/or reckless actions. Against LINA, Fisk alleged causes of action for tortious interference with his disability insurance agreement; breach of fiduciary duty; violations of KRS 304.12–230 and KRS 304.12–235; bad faith; civil conspiracy; and punitive damages. Both TMMK and LINA filed answers to Fisk's complaint. We note that

LINA was dismissed from the present appeal in March 2016 pursuant to a joint motion. Therefore, we shall not discuss in any great detail issues related to LINA and shall not address any arguments in Fisk's briefs related to LINA.[3]

***2** In December 2012, TMMK moved to dismiss the action as barred by a settlement agreement entered into by the parties in November 2012 in the federal action, arguing that Fisk agreed to release TMMK and LINA from all claims of liability for his short term disability benefits. Part II, section 1 of the agreement detailed Fisk's release of claims and provided in relevant part as follows:

> In exchange for the Financial Settlement set forth above, Fisk fully and forever releases, acquits, holds harmless and discharges [TMMK] and LINA ... from any claims of liability for any Short Term Disability benefits, and the negligence and bad faith claims associated with the Short Term Disability Benefits against [TMMK] or LINA in the Civil Action. **Notwithstanding the forgoing, this release agreement will not serve as a release or waiver of any subsequent claims for long term disability benefits. Notwithstanding the forgoing, this release agreement will not serve as a release or waiver of any subsequent claim for negligence or bad faith associated with a claim of wrongful termination, a claim for employment discrimination, a claim for breach of fiduciary duty, any statutory claim under the Americans with Disabilities Act, a claim for interference with Fisk's rights to benefits other than Short Term Disability Benefits, a claim for punitive damages, or any other claim except the claim of negligence specifically raised in Fisk's complaint.** [Emphasis in original.]

An agreed order of dismissal was entered in the federal action on November 21, 2012, the docket sheet noting that "[c]laims of liability for any short Term Disability benefits, and the negligence and bad faith claims associated with the Short Term Disability Benefits against [TMMK] or Lina [sic] in the Civil Action are Settled and Dismissed with prejudice[.]" Alternatively, TMMK moved to transfer the action to Scott County, the proper venue for Fisk's action. Fisk objected to the motion, arguing that summary judgment was not appropriate, that his claims were not barred by the settlement agreement, and that venue was proper because he lived in Grant County. By order entered February 21, 2013, the Grant Circuit Court granted TMMK's alternative motion and transferred the action to Scott Circuit Court for further proceedings.

Once the case was transferred to Scott County, TMMK filed a motion for partial dismissal/partial summary judgment in March 2013. TMMK argued that claims 1, 2, 3, 4, and 13 of Fisk's complaint arose from LINA's partial denial of his short term disability benefits claim in 2010 and were therefore barred by the release in the settlement agreement. TMMK also argued that Fisk's claims were barred because the short term disability benefits plan was not an insurance policy or contract. TMMK also argued that no special relationship existed between it and Fisk that created a fiduciary relationship between them.[4] Fisk objected to TMMK's motion, arguing that his release in the settlement agreement did not bar the claims he raised in the state action. He only released his claims for unpaid short term disability benefits and that TMMK acted negligently or in bad faith by providing the wrong job description to LINA. He also argued that whether TMMK's short term disability plan was an insurance plan should not be decided without discovery. Finally, Fisk argued that TMMK was acting as an insurer to him as the party providing disability insurance, which created a special relationship between them.

***3** On June 13, 2013, the circuit court entered an opinion and order ruling on TMMK's and LINA's respective motions to dismiss or for summary judgment. Addressing TMMK's motion, the court held as follows:

> Defendant TMMK has moved to dismiss claims 1–4, and 13. TMMK argues these claims are barred because of a settlement agreement entered by the parties on November 7, 2012. After viewing Part 2 Section 1 of the settlement agreement, the Court believes the Plaintiff is barred from requesting relief under claims 2–4. The

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> settlement agreement does not bar Plaintiff from seeking relief for an alleged breach of fiduciary duty by TMMK, nor does it bar Plaintiff from alleging a civil conspiracy. However, TMMK has also argued it did not owe Plaintiff a fiduciary duty because the STD benefits are not insurance benefits. Plaintiff argues summary judgment of claims 1 and 13 would be premature since discovery has not been taken. ... Defendant TMMK has produced the contract between TMMK and LINA regarding the administration and dispersal of STD benefits to Toyota employees. The contract is an integrated agreement between TMMK and LINA and any evidence contradicting express terms would be barred under the parol evidence rule. Section 6 of the contract expressly states, "This is not a contract of insurance and Consultant [LINA] shall not underwrite any risk of the Plan." Plaintiff would be barred from presenting any evidence claiming the contract was a contract of insurance. As such, it would be impossible for Plaintiff to produce evidence which would show TMMK owed Plaintiff a fiduciary duty as Plaintiff's insurer. Claim 13 alleges civil conspiracy between TMMK and LINA to deprive Plaintiff of his STD benefits and to unlawfully terminate Plaintiff's employment. The Court believes the settlement agreement bars Plaintiff from pursuing a civil conspiracy claim to deprive STD benefits, but it does not bar Plaintiff from pursuing a civil conspiracy claim regarding wrongful termination. Because there has not been an ample amount of time for discovery, Plaintiff is entitled to move forward on his allegation of civil conspiracy regarding wrongful termination.

The circuit court made a similar ruling with regard to LINA's motion, and it ultimately dismissed claims 1 through 4 (related to TMMK) and claims 8 through 12 (related to LINA).

In late 2013, TMMK and LINA filed a joint motion for partial summary judgment on claim 13, the civil conspiracy claim related to wrongful termination. They argued that this claim was barred by the one-year statute of limitations period set forth in KRS 413.140(1)(c), noting that Fisk's conspiracy claim accrued on the last day of his employment with TMMK in December 2010. His last day of work was the last act in furtherance of the alleged conspiracy. Because Fisk did not file this claim until almost two years later, it was time-barred. Fisk objected to the motion, arguing that he had five years to file his claim pursuant to KRS 413.120(2) of Kentucky's Civil Rights Act. Alternatively, Fisk argued that the discovery rule acted to extend the time he had to file his conspiracy claim. He stated that he did not know of the alleged conspiracy until he received correspondence between TMMK and LINA in April 2012 in which he claimed the two entities conspired to end his employment. In reply, TMMK and LINA argued that Fisk had not brought his conspiracy claim under the Civil Right Act, but rather had pled this cause of action as a common law civil conspiracy claim. In addition, they argued that Fisk's discovery of the alleged conspiracy at a later date could not make his claim timely because any acts in furtherance of the conspiracy would necessarily have occurred prior to his retirement date of December 2, 2010.

***4** On May 16, 2014, the court ruled on the motion for partial summary judgment. The court first held that Fisk had alleged a common law civil conspiracy claim and that the one-year statute of limitations applied. The court then rejected Fisk's discovery rule argument:

> The discovery rule is implicated in cases wherein the fact of injury or instrumentality thereof is not immediately evident or discoverable with the exercise of reasonable diligence; such is often the case in instances of medical malpractice, latent injuries or illnesses. *Fluke Corp. v. Lemaster*, 306 S.W.3d 55, 60 (Ky. 2010). It is certain that the Plaintiff was aware that his employment ended on December 2, 2010 and there is no evidence on record to indicate the Plaintiff's inability to ascertain information relevant to the disability determinations of his employer through reasonable diligence. Consequently, the discovery rule is herein inapplicable as a toll to the governing statute of limitations.
>
> The law clearly indicates that a civil conspiracy claim accrues upon the commission of the last act in furtherance of the conspiracy. *District Union Local 227 v. Fleischaker*, 384 S.W.2d 68 (Ky. Ct. App. 1964). Therefore, the statute of limitations began to run as of December 2, 2010 because it is the date of the Plaintiff's alleged injury. This Court finds that Plaintiff's claim of civil conspiracy against LINA and TMMK is barred by the statute of limitations set forth in KRS 413.140(1)(c).

Accordingly, the court granted the joint motion for partial summary judgment and dismissed claim 13. As a result of this ruling, all claims against LINA were dismissed, and the only remaining claims against TMMK related to Fisk's employment and claims for wrongful termination and disability discrimination.[5] By agreed order entered July 3, 2014, the circuit court made the June 13, 2013, and the May 16, 2014, rulings final and appealable. This appeal now follows.

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Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. “The standard of review on appeal when a trial court grants a motion for 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.’ ” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the orders on appeal.

***5** For his first argument, Fisk contends that the circuit court erred in holding that his breach of fiduciary duty claim against TMMK (Claim 1) was barred by the Claim Consulting Agreement. He argued that TMMK was acting as an insurer under Kentucky law because it was providing disability insurance to him. This constituted a special relationship between Fisk and TMMK, not an ordinary business relationship. Fisk also argued that there was no evidence for the circuit court to consider as to how TMMK treated the short term disability plan or how the plan operated as insurance, meaning the ruling was premature until further discovery could be conducted.

We disagree with Fisk and hold that the circuit court did not err in determining there was no basis for Fisk's fiduciary duty claim because the Claim Consulting Agreement between TMMK and LINA was not a policy of insurance pursuant to the plain and unambiguous terms of that document. Section 6 plainly states that the agreement was not a contract of insurance and LINA was not to underwrite any risk.

The interpretation of a contract is a question of law and thus is subject to *de novo* review. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). “In the absence of ambiguity a written instrument will be strictly enforced according to its terms.” *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). “A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *Cantrell Supply, Inc.*, 94 S.W.3d at 385. In this case, the Claim Consulting Agreement is unambiguous and clear in its terms that it is not a policy of insurance. Therefore, any parol or extrinsic evidence contradicting these express terms would not be reviewable by the circuit court or trier of fact. “Under the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake.” *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009).

Accordingly, we agree with the circuit court that the Claim Consulting Agreement precludes Fisk's claim for breach of fiduciary duty against TMMK, and no evidence, if any existed, could be introduced to prove that the agreement was an insurance policy and that TMMK owed Fisk any fiduciary duty.

Next, Fisk asserts that the circuit court erred in concluding that Claims 2, 3, and 4 were precluded by his settlement agreement in the federal action. He contends that he only released his claims for short term disability benefits and for negligence and bad faith on TMMK's part in the application process for providing an incorrect job description to LINA. The claims he raised in the present action were separate and distinct from the claims he raised and released in the federal action. As with the first argument, this presents a question of law for which our standard of review is *de novo*. *3D Enters. Contracting Corp. v. Louisville & Jefferson Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). Again, we agree with TMMK that the circuit court properly concluded these claims were barred by the settlement agreement in the federal action.

As set forth above, Part II, section 1 of the settlement agreement provides in relevant part as follows:

> In exchange for the Financial Settlement set forth above, Fisk fully and forever releases, acquits, holds harmless and discharges [TMMK] and LINA ... from any claims of liability for any Short Term Disability benefits, and the negligence and bad faith claims associated with the Short Term

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> Disability Benefits against [TMMK] or LINA in the Civil Action.

***6** Our review of the complaint in this action establishes that the three claims at issue all relate directly to Fisk's claim for short term disability benefits. Claim 2 alleges violations of the Unfair Claims Settlement Practices Act and specifically states that TMMK misrepresented facts relating to his short term disability coverage, failed to communicate promptly regarding this coverage, failed to adopt and implement standards for prompt investigation of claims, failed to pay his claim without an investigation, failed to attempt to settle the claim, and failed to promptly settle his claim to influence settlements under other portions of his insurance with TMMK. Claim 3 alleged a violation of KRS 304.12–235 for TMMK's failure to timely pay Fisk's claim for short term disability benefits. And Claim 4 alleged bad faith for TMMK's denial of his claim for short term disability benefits. The agreement plainly and unambiguously released Fisk's claims for liability for any short term disability benefits and any associated negligence and bad faith claims. The agreement did not act to release claims that were not related to his claim for short term disability benefits, including employment discrimination under Kentucky's Civil Rights Act and wrongful termination, among other possible claims. These claims remained viable.

As a matter of law, the terms of the settlement agreement preclude Fisk from bringing Claims 2, 3, and 4 in the present action.

> "An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation." *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). The primary objective is to effectuate the intentions of the parties. *Id.* When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell*, 94 S.W.3d at 385.

3D Enters., 174 S.W.3d at 448. While it may be Fisk's position that he did not intend to release these claims, the plain language of the settlement agreement says exactly that. And Fisk is not permitted to introduce parol evidence to vary the terms of the agreement because it is unambiguous. Accordingly, the circuit court did not commit any error in dismissing Claims 2, 3, and 4.

Finally, Fisk contends that the circuit court erred in holding that his claim for civil conspiracy for wrongful termination [6] against TMMK was barred by the one-year statute of limitations pursuant to KRS 413.140(1)(c). Rather, Fisk argues that he brought his civil conspiracy claim under Kentucky's Civil Rights Act, for which a five-year limitations period applies pursuant to KRS 413.120(2) ("An action upon a liability created by statute, when no other time is fixed by the statute creating the liability."). Our review of Fisk's complaint confirms that he did not plead this cause of action under Kentucky's Civil Rights Act, but rather he pled this claim under common law, for which a one-year statute of limitations applies.

Pursuant to *Dist. Union Local 227 v. Fleischaker*, 384 S.W.2d 68, 72 (Ky. 1964), "a conspiracy which contemplates a series of overt acts is a continuing conspiracy and the statute does not commence to run until the last overt act performed in compliance with the objective of the conspiracy has been accomplished." Therefore, the alleged conspiracy between TMMK and LINA would have been complete upon Fisk's resignation from TMMK on December 2, 2010, meaning he had one year from that date to allege this cause of action. He did not file his complaint until November 29, 2012.

Fisk goes on to argue that the discovery rule applies to extend the limitations period. He contends that he "did not understand the relationship between TMMK's decision to require him to return to work and LINA's decision to end his short term disability benefits until April 2012 when he was presented with the correspondence between TMMK and LINA regarding his short term disability claim and his return to work during the Federal court litigation[.]"

***7** In *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010), the Supreme Court of Kentucky discussed the discovery rule and observed:

> "[u]nder the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) not only that he has been injured, but also that this injury may have been caused by the defendant's conduct." But the discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident

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> or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses. [Footnotes omitted.]

Fisk was certainly aware that his employment had ended on December 2, 2010, because he resigned that day. And he was aware of at least some facts related to the conspiracy claim based upon the language of his complaint in which he detailed the reason for filing his federal lawsuit (“28. Facing the threat of termination and the loss of his benefits appurtenant to his employment with Defendant Toyota, Plaintiff filed a federal lawsuit against Defendant Toyota and Defendant LINA for their wrongful denial of Plaintiff's short term disability benefits.”). Accordingly, we cannot hold that the discovery rule acts to extend the limitations period on Fisk's conspiracy claim, and the circuit court properly dismissed this cause of action.

For the foregoing reasons, the June 13, 2013, and the May 16, 2014, orders of the Scott Circuit Court are affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2017 WL 244087

Footnotes

1 Judge Laurance B. VanMeter concurred in this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

2 It appears from the record that Fisk applied for and received long term disability benefits effective January 2011.

3 Fisk's brief and reply brief, which both contained arguments related to LINA, were tendered months before the joint motion to dismiss LINA was filed and granted. The tendered briefs for Fisk and TMMK were filed on March 8, 2016, the date this Court granted the joint motion to dismiss LINA and denied TMMK's motion to dismiss the appeal.

4 LINA filed a similar motion addressing the claims Fisk alleged against it, to which Fisk objected.

5 We note that TMMK moved for summary judgment on Fisk's remaining claims on June 17, 2014. Our review of the circuit court's docket sheet does not reflect that the court has ruled on the motion. It does reflect that LINA was dismissed from the action by agreed order entered January 19, 2016.

6 Fisk has not contested the circuit court's finding in the June 13, 2013, ruling that his civil conspiracy claim related to his claim for short term disability benefits was barred by the settlement agreement.

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