

COMMONWEALTH OF KENTUCKY  
COUNTY OF FRANKLIN CIRCUIT COURT  
CASE NO. 17-CI-1348  
DIVISION ONE

JEFFREY C. MAYBERRY, *et al.*

PLAINTIFFS

v. **PLAINTIFFS' RESPONSE TO DEFENDANTS'  
NOTICE OF SUPPLEMENTAL AUTHORITY**

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

DEFENDANTS

*ELECTRONICALLY FILED*

\* \* \* \* \*

Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Steve Roberts, Teresa M. Stewart, Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the “Mayberry Plaintiffs”)<sup>1</sup> respectfully respond to the “Notice of Supplemental Authority” served by the Prisma Defendants late Friday night (August 21, 2020) as follows:

Just as the Prisma Defendants read too much into the Supreme Court’s mandate to dismiss the complaint, they read too little into the Supreme Court’s order dismissing the appeal of the original writ proceeding.<sup>2</sup> That appeal was dismissed as moot.<sup>3</sup> The

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<sup>1</sup> Mayberry, Brown, Miller, Roberts and Stewart are plaintiffs who brought this action in December 2017 and named plaintiffs in the January 17, 2018 first amended verified complaint, and the proposed amended complaint submitted a year ago, now replaced by the Mayberry Plaintiffs’ July 29, 2020 proposed second amended verified complaint.

<sup>2</sup> See *Overstreet v. Mayberry*, Nos. 2019-SC-000041-TG, *et al.*, slip op., at 36, 2020 Ky. LEXIS 225 (Ky. July 9, 2020).

<sup>3</sup> “In an Opinion issued today in *Randy Overstreet, et al. v. Jeffrey C. Mayberry, et al.*, 2019-SC-000041-TG; and *Brent Aldridge, et al. v. Jeffrey C. Mayberry, et al.*, 2019-SC-000042-TG, the Supreme Court directed the circuit court to dismiss the complaint in the underlying action for lack of standing, making this appeal moot.” *Mayberry v. Shepherd*, No. 2019-SC-000232-MR, Order Dismissing Appeal, at 2 (Ky. July 9, 2020).

effect of that order was to dismiss the entire original writ proceeding in the Court of Appeals. That is because mootness is a justiciability doctrine, and as such, it governs *cases* – not procedures.

The “[m]ootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination.” CHARLES ALLAN WRIGHT, *ET AL.*, 13B FED. PRAC. & PROC. CIV. § 3533 (3d ed. 2015). “The U.S. Supreme Court has identified five major justiciability doctrines: (1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, and (5) the political-question doctrine.” *Commonwealth v. Sexton*, 566 S.W.3d 185, 193 (Ky. 2018). “As our courts have long recognized, a ‘moot case’ is one which seeks to get a judgment ... upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy.” *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014). “Among the circumstances that create mootness are rulings in other adjudicatory proceedings, including rulings by the same court in the same or companion proceeding.” 13C FED. PRAC. & PROC. CIV. § 3533.10.

Here, the Court of Appeals granted a writ of the first class, ruling narrowly and only on *precisely the same issue* the Supreme Court took up in the companion cases, *i.e.*, constitutional standing.<sup>4</sup> While the Supreme Court reached the same result as the Court of Appeals on this issue, the reasoning of the two courts differed. In any event, once the Supreme Court took up and ruled on the constitutional standing issue, its ruling was binding and preclusive; it occupied the field. There was no need for a separate decision

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<sup>4</sup> The Court of Appeals declined to grant a writ of the second class. *Prisma Capital Partners, LP v. Shepherd*, No. 2019-CA- 00043-OA, Order at 8 (Ky. Ct. App. Apr. 23, 2019).

by the Court of Appeals on precisely the same subject, and no room for different reasoning. Nor was there any space for the writ issued by the Court of Appeals to affect in any way the mandate of the Supreme Court.

The decision of the Supreme Court superseded the writ; the decision of the Court of Appeals could not have any “practical legal effect” after the Supreme Court ruled on the same issue. Therefore, the Supreme Court dismissed the entire original writ proceeding as moot. *Cf., Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017) (“We dismiss the appeal [as moot] and remand the case to the circuit court with directions to dismiss the complaint with prejudice.”).

Dated: August 23, 2020

Respectfully submitted,

s/ Michelle Ciccarelli Lerach

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