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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2011-SC-000291-DG
(2007-CA-1971-MR; 2007-CA-1981-MR; 2007-CA-2173-MR; 2007-CA-2174-MR)

MILDRED ABBOTT, et al. **APPELLANTS**

v. **APPEAL FROM BOONE CIRCUIT COURT**
CIVIL ACTION NO. 2005-CI-00436

MELBOURNE MILLS, JR., et al. **APPELLEES**

BRIEF OF APPELLEES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellants was served on April 13, 2012, by hand-delivery of ten (10) copies to the office of the Clerk, Susan Stokley Clary, Room 235 Capital Bldg., 700 Capitol Ave., Frankfort, KY 40601-3415 and to Hon. Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and by mailing true copies Hon. Geoffrey Morris, Special Judge, Boone Circuit Court, 700 West Jefferson, Judicial Center, Suite 200, Louisville, KY 40202; James A. Shuffett, 217 West Short Street, Suite 400, Lexington, KY 40507; Frank Benton, IV, Benton, Benton & Luedeke, P.O. Box 72218, Newport, KY 41072; Sheryl G. Snyder, Griffin Terry Sumner, and J. Kendrick Wells, IV, Frost Brown Todd, 400 West Market Street, 32nd Floor, Louisville, KY 40202; James M. Gary, Weber & Rose, PSC, 471 West Main St., Suite 400, Louisville, KY 40202; and Angela M. Ford, Esq., Chevy Chase Plaza, 836 Euclid Ave., Suite 311, Lexington, KY 40502. The undersigned also certifies that the record on appeal was not withdrawn by counsel for Appellants.

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INTRODUCTION

The Kentucky Court of Appeals properly reversed the trial court's improper grant of Summary Judgment in this case on March 8, 2006 based on the numerous genuine issues of material fact that existed on that date. In order for this Court to reverse the Court of Appeals holding it will have to overturn years of jurisprudence and look at a record that did not even exist when summary judgment was incorrectly granted by Judge Wehr in the first instance. Furthermore, the Appellants are taking the position that there are no genuine issues of material fact yet one federal trial resulted in a 10-2 hung jury to acquit and the second federal trial court decision is on appeal to the 6th Circuit for various issues, including the introduction into the record of the Disbarment Opinion that the Appellants want this Court to use to overturn the Court of Appeals.[1] The Kentucky Supreme Court is not the venue to resolve genuine issues of material fact as the Appellants are attempting to do here. Nor is the Supreme Court the venue to weigh discovery and other information that came into existence after the decision to grant summary judgment was made, and in particular information that has come into existence after the appeal was filed.

This reply addresses only the issues on appeal directly related to Gallion and Cunningham, which are (1) what is the standard for summary judgment and (2) what is the applicable record for reviewing summary judgment.

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[1] In addition, Judge Wehr did not have in front of him at the time of his decision the Fairness Values of the Plaintiff Appellants claims in the National Settlement Agreement in the multi-district litigation in the Philadelphia U.S. District Court or the Chart comparing it to the payments made to the Plaintiff Appellants, which was admitted the first federal trial but excluded in the second.

COUNTERSTATEMENT CONERNING ORAL ARGUMENT

Appellees Gallion and Cunningham believe that oral argument would not assist the Court in addressing the simple issues presented in this appeal concerning the proper summary judgment standard in Kentucky.

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COUNTERSTATEMENT OF THE CASE

On February 4, 2011, the Kentucky Court of Appeals properly reversed Judge Wehr's grant of Partial Summary Judgment to the Plaintiff Appellants. Tab A, Appellants Brief. This reversal was not based on the development of the record in the underlying case over the last 6 years, both in state court and federal court, but rather, was properly based on the record that existed on March 8, 2006, the date that the Summary Judgment motion was granted.

This appeal, as it relates to Gallion and Cunningham, is based on a record that did not even exist on the date Partial Summary Judgment was granted by the trial court. The Plaintiff Appellants are relying on an agreed to Supreme Court Disciplinary Opinion of Disbarment previously entered by this Court, the supposed "recanting" of Kenneth Feinberg's affidavit in a confidential KBA hearing to which Gallion and Cunningham were not parties, and judicial notice of a non-final, appealed decision of the U.S. District Court (which followed a 10-2 split decision to acquit). All of these issues were brought to the attention of the Court of Appeals and disregarded as not persuasive.

This Court needs to look no further than the mischaracterization of this Court's opinion in Gallion v. Kentucky Bar Ass'n, 266 S.W.3d 802 (Ky. 2008) and Cunningham v. Kentucky Bar Ass'n, 266 S.W.3d 808 (Ky. 2008). The Plaintiff Appellants there state that this Court disbarred Gallion and Cunningham. The fact is that this Court allowed Gallion and Cunningham to withdraw from the Kentucky Bar Association.

There is no new information in front of this Court that was not in front of the Court of Appeals when it issued its well reasoned opinion, and later denial of rehearing, on the summary judgment standard in Kentucky. The Court of Appeals, citing Steelvest

v. Scansteel, 807 S.W. 2d at 480-482 (Ky. 1991) and Charlothorn v. Meade, 15 S.W.3d 391 (Ky.App. 1999) properly reversed the partial summary judgment of the trial court on the basis of the existence of genuine issues of material fact that existed in the record at the time of the grant of summary judgment.

The Appellant's brief contains fifteen pages of facts which were substantially introduced into the record after the Order of Partial Summary Judgment was entered on March 8, 2006. This demonstrates numerous issues of genuine fact in this case, which were more fully developed in two federal trials and a 6th Circuit appeal that is pending. The one place that the Appellees have not had a trial is in the Kentucky circuit court.

The Appellants are asking this Court to upend years of jurisprudence on the standard for summary judgment, as articulated by the Court of Appeals. This would result in uncertainty and result in cases actually being litigated in the Court of Appeals and Supreme Court, as is being done in this instance.

The Appellants have also briefed issues not included in the Motion for Discretionary Review. As it pertains to Gallion and Cunningham, these issues are the finding of joint and several liability. The issues before this Court are properly limited to the issues separately identified in the Motion for Discretionary Review. Herrick v. Wills, 333 S.W.2d 275 (Ky.App. 1959). The failure to raise the issue on appeal waives it. Id. This issue is still discussed in the brief but Gallion and Cunningham do request that the Court disregard this as waived.

In addition the Court of Appeals did not address additional issues, both factual and legal, after vacating the summary judgment because they were rendered moot. These

issues, which were not ruled on and would have to be by the Court of Appeals if this Court reinstated the partial summary judgment, include:

1. the award of the $42 million in baseline compensatory damages;
2. the award of allegedly unproven damages;
3. the application of joint and several liability;
4. the lack of proof of damages by the individual plaintiffs; and
5. the denial of due process.

(Court of Appeals Decision at 29; Tab A, Appellants Brief).

I. THE UNDERLYING CASE

In 2001, the case of Darla Guard v. American Home Products, Boone Circuit Court Civil Action No. 98-CI-795 was settled by Gallion, Cunningham, Mills and Chesley for $200,000,000 on behalf of a class of persons allegedly injured by the diet drug combination commonly known as phen-fen. (Order signed May 16, 2001, attached as Exhibit E to Response of Defendants to Motion for Partial Summary Judgment, T.R. Volume #9, Packet #2, and Tab 2 of Court of Appeals Brief of Gallion and Cunningham(COA Brief GC))[1]. At the time of the settlement Abbot and the other 400 Appellants were members of a class action suit. Gallion and Cunningham have maintained that the settlement potentially covered many more persons than the named Plaintiff Appellants and monies had to be withheld in the event that additional claimants came forward after the settlement. (Tab 2 of COA Brief GC at 15) The Appellees made two distributions to the Appellants from the settlement proceeds. (Id. at 17 and 19).

[1] The Court of Appeals Brief of Gallion and Cunningham contained numerous attachments. Rather than reproduce this all for this Court references are made to the attachments herein. Likewise, references are made to the attachments of the Appellants.

After the two distributions were made there were remaining settlement proceeds and the sitting Judge approved the creation of a *cy pres* trust, the Kentucky Fund for Healthy Living, to be funded with the remaining funds. (Id. at Exhibit J.) Numerous orders were entered in the Guard action by then Judge Bamberger.

On December 30, 2004, Honorable Angela Ford, on behalf of 34 Claimants in the Guard Action, filed a Class Action Complaint in Fayette Circuit Court against the Appellees William J. Gallion, Shirley A. Cunningham and Melbourne Mills, Jr. and Stanley Chesley and the Kentucky Fund for Healthy Living, Inc. ("the Kentucky Fund") arising from these Attorney's representation of the Claimants in the Guard Action (T.R. Volume #1, Packet #1). The Plaintiff Appellants demanded an Accounting, a Declaratory Judgment, Disgorgement, a Constructive Trust and damages for Breach of Fiduciary Duty and Fraudulent Misrepresentation. (Id.) The case was transferred from Fayette Circuit Court to Boone Circuit Court by Order dated March 1, 2005 and the Judge William Wehr was appointed to preside over the matter (T.R. 196 – 197).

On December 6, 2005, the Plaintiff Appellants filed a Motion for Partial Summary Judgment and Supporting Memorandum requesting partial summary judgment as to Appellees Cunningham and Gallion, Defendant Mills, and Defendant Chesley on counts of Breach of Fiduciary Duty, Declaratory Judgment, Disgorgement, and Constructive Trust (T.R. 1218-1244). The Appellants also demanded Summary Judgment as to the fifth Defendant, The Kentucky Fund, as to Counts of Declaratory Judgment and Constructive Trust.

In opposition to the Plaintiff Appellants' Motion for Partial Summary Judgment, the Appellants, with Mr. Mills, filed a Response (T.R. Volume #9, Packet #2, and Tab 2

of Court of Appeals Brief of Gallion and Cunningham(COA Brief GC)) setting forth numerous disputes of material fact and the Kentucky Fund likewise filed a Response to Plaintiff Appellants' Motion (T.R. Volume #9, Packet #2) detailing the material facts in dispute yet to be tried. Attached to the Kentucky Fund's Response was the Affidavit of Defendant Gallion and the Affidavit of Kenneth Feinberg[2] (T.R. Volume #9, Packet #2). Both Affidavits are attached hereto as Exhibits 1 and 2.

Despite the genuine issues of material fact raised by the filed Responses to the Motion for Summary Judgment, Judge Wehr entered an Order on March 8, 2006 of Partial Summary Judgment on Plaintiff Appellants' Counts of Breach of Fiduciary Duties, Declaratory Judgment and Constructive Trust against these Appellants and Defendant Mills[3] (T.R. 1464-1470). (Tab I, Appellants Brief).

On March 17, 2006, Gallion, Cunningham, and Mills timely filed a Motion to Alter, Amend or Vacate the Court's March 8, 2006 Order of Partial Summary Judgment (T.R. 1502-1510) setting forth yet again their position that Judge Bamburger had the jurisdiction and the authority to enter the Orders that he did, that significant issues of material fact were in dispute, and incorporated reliance on the Affidavits of Gallion and Feinberg (T.R. 1502, 1505, 1506). Judge Wehr overruled the Appellant's Motion by Order dated May 19, 2006 (T.R. 1717 – 1719).

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[2] On January 17, 2006, and updated and revised version of the Affidavit from Mr. Feinberg was filed and replaced the previous Affidavit that had been attached to the Kentucky Fund's Response to the Summary Judgment Motion.

[3] The trial court, by and through its March 8, 2006 Order, also entered Summary Judgment against the Kentucky Fund on Counts of Declaratory Judgment and Constructive Trust finding that "the claims by the Plaintiffs against this Defendant are totally dependant upon the outcome of the claims of the individual Defendants Cunningham, Gallion, and Mills."

At the time that the trial court entered its Order of Partial Summary Judgment no depositions had been taken. In fact, the first deposition was not taken until September 2006, six months later. (Mills Depo. R. at Packet #7)

On August 27, 2007 the trial court entered an Order making the Partial Grant of Summary Judgment final and appealable. (T.R. 4177-4179; Tab J, Appellants Brief). The Appellees filed a Motion to Vacate the Court's order of August 27, 2007 (T.R. 4236-4244; Tab 10, COA Brief GC) which Judge Wehr overruled by Order dated September 24, 2007 (T.R. 4292-4295; Tab K, Appellants Brief).

II. THE COURT OF APPEALS DECISION

The Court of Appeals reversed the trial court's grant of summary judgment against Gallion, Cunningham and Mills on February 4, 2011. In reversing the judgment the Court of Appeals relied on the affidavit of Kenneth Feinberg, a practicing attorney and an expert in mass tort litigation, stating that submission of Feinberg's affidavit was sufficient to create genuine issues of material fact. (Court of Appeals Opinion at 28)

The Appellants filed a Petition for Rehearing that was denied. Appellants then filed a Motion for Discretionary Review that was granted.

ARGUMENT

I. THE KENTUCKY COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S IMPROPER GRANT OF SUMMARY JUDGMENT IN THIS CASE AGAINST DEFENDANT'S GALLION, CUNNINGHAM, AND MILLS

A. Summary Judgments are entitled to *De Novo* Review

A review of summary judgment presents issue of law, so the general standard of review is *de novo*. Cantrell Supply, Inc. v. Liberty Mut. Ins. Co. 94 S.W.3d 381 (Ky. App.2002); First Commonwealth Bank of Prestonburg v.West, 55 S.W.3d 829 (Ky. App. 2000). The specific standard of review in this instance was stated by the Court of Appeals (p. 27 of Court of Appeal Opinion), based on York v. Petzel, Inc., 353 S.W.3d 349 (Ky. App. 2010):

> When a trial court grants a motion for summary judgment, the relevant standard of review 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)(quoting Scrifes v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996)). The party opposing summary judgment must present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Lewis, 56 S.W.3d at 436 (quoting Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky.1991)). The trial court must "view the evidence in the light most favorable to the nonmoving party[.]" Id. (quoting Steelvest, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, "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.

B. The Court of Appeals has properly stated the issues of fact existing when the trial court incorrectly granted summary judgment

The Court of Appeals reversed the trial court's grant of summary judgment against Gallion, Cunningham and Mills on February 4, 2011. In reversing the judgment the Court of Appeals relied on the affidavit of Kenneth Feinberg, a practicing attorney and an expert in mass tort litigation, which concluded:

> the settlement entered in the Guard action was "reasonable" and the "side letter" agreement supported the conclusion that the $200,000,000 paid by AHP was not intended to compensate only the 431 plaintiffs, but was also intended to "provide for other payments, including potential claims or (sic) other Phen-Fen (sic) users, subrogation claim holders, and other unforeseen claims." (Court of Appeal Opinion at 28)

The Court of Appeals then stated that submission of Feinberg's affidavit was sufficient to create genuine issues of material fact such as:

1. Whether the entire settlement, minus fees and expense, was to be split between the 431 settling claimants;

2. Whether the settling claimants were fairly and adequately compensated;

3. Whether the Kentucky Fund for Healthy (KFHL) was funded with money that should have been distributed to the settling claimants or was funded with excess funds for which the plaintiff's consent to its ultimate use was not required; and

4. Whether Gallion, Mills, Cunningham, and Chesley were obligated to indemnify AHP for additional claimants who might come forward after the settlement had been disbursed. (Court of Appeals Opinion at 29)

Feinberg's affidavit was based on his review of the record. (Feinburg Affidavit at ¶ 6 and ¶ 9; Settlement Agreement, Appellants Brief Tab D, R. at Packet #8).

The March 8, 2006 Order for Partial Summary Judgment does not even address the Affidavits of Gallion and Feinberg. The trial court did address the Affidavit of Feinberg in its order of September 24, 2007 (T.R. 4292 -4295) but just simply discounted them. In doing this the trial court inappropriately made a determination of fact.

Since the Appellees demanded a jury trial, it was not the prerogative of the trial court to invade the province of the jury and made a determination of credibility (or lack thereof) as to a witness. This is especially true in the context of a Motion for Summary Judgment, where the Appellees were only required to show in their Response that the Plaintiff Appellants had failed to prove that it would be impossible for the Appellees to provide evidence supporting their denials of the Plaintiff Appellants' allegations. See

Bank One, Kentucky, N.A. v. Murphy, 52 S.W.3d 540, 545 (Ky.2001) stating that "This Court has long applied a stringent standard to motions for summary judgment; stating that the motion should not be granted unless it appears 'impossible' for the non-moving party to prevail at trial."

Judges are not free to speculate about facts or evidence to be proferred at a later date. Judges are not free to imagine whether their findings will be borne out by the testimony of the parties and witnesses. Any such speculation or imagination negates the very heart of a Summary Judgment as proper only "... no genuine issues as to any material fact and that moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779 (Ky. App. 1996) at 781.

Judge Wehr's own opinion on the reliability of the Affidavit of Kenneth Feinburg, in and of itself, creates a genuine issue of material fact that should have been presented to and decided by a jury. At a minimum it should have precluded the trial court granting Summary Judgment. Judge Wehr, by dismissing the submitted affidavit of Feinburg, is making a determination of fact. That is not his role in a evaluation of summary judgment motion. If the court should decide that there are factual issues to be tried then a summary judgment is not appropriate. Young v. White, 551 S.W.2d 12 (Ky. App. 1977) says that the summary judgment rule should be cautiously invoked; it does not authorize the adjudication of factual issues, but only authorizes the Court to discover and determine whether there is an issue of fact to be tried. Poe v. Rice, 706 S.W.2d 5 (Ky. App. 1986) held that summary judgment is to cautiously applied, all doubts are to be resolved in the non-movants' favor. Steelvest, Inc. v. Scansteel Cerv. Ctr. Inc., 807 S.W.2d 476 (Ky. 1991) remains the legal authority in summary judgment cases and is a

precedent that is routinely followed. The Court stated that summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. The Court went on to say that it was vital that litigants not be severed from their right to trial if they do in fact have valid issues to try and that summary judgment should never be used for the sake of efficiency and expediency.

1. The Court must rule on the record that existed at the time of the Motion for Summary Judgment

Plaintiff Appellants have asked this Court to rely on numerous documents, statements, and affidavits that came into existence after the trial court granted summary judgment to support the trial court's decision. As of March 30, 2012 there are 1590 documents in the record. The Order of Partial Summary Judgment was entered as Document 82 and the Denial of the Motion to Set Aside is Document 100. This should be the limitation of the record for this appeal. If this Court accepts citing to a record that did not exist when summary judgment was entered then it will create a new and indefinite standard for summary judgment to be used in the future.

Kentucky case law is beyond clear on this issue. In Triplett v. Commonwealth, the Court of Appeals stated : "This is not a court of original jurisdiction. New material not considered by the trial court is not admissible and should not be considered by us." Triplett v. Commonwealth, 439 S.W.2d 944, 945 (Ky. App. 1969). See also Hatton v. Commonwealth, 172 S.W.2d 564 (1943), Brodgen v. Commonwealth, 476 S.W.2d 192 (1972). First Nat. Bank of Louisville v. First Nat. Bank, Prestonsburg, 567 S.W.2d 316 (Ky. App. 1978). The Court in Triplett, goes on to state that the only situation in which

the civil rules allow the record on appeal to be supplemented is when it is material that has been offered as evidence upon a hearing in the trial court and inadvertently omitted from the record. Id. New evidence that was not a part of the record of the trial court should be stricken from the record in the Court of Appeals and the case should be reviewed only upon the material considered by the trial court. Id.

In United Fuel Gas Co. v. Preece, the trial court entered an order granting summary judgment. After the order was appealed, the appellants filed a copy of an alleged discovery deposition that was taken before the order was entered. The Court of Appeals granted the motion to strike the deposition under CR 75.08 as only the evidence in front of the trial court may be considered by the Court of Appeals. United Fuel Gas Co. v. Preece, 465 S.W.2d 924 (Ky. App. 1970).

It is clear that in the case at hand, new evidence cannot be presented in front of the Supreme Court that was not considered and presented in front of the trial court. That means that everything after the Order Granting Partial Summary Judgment is immaterial to the appeal.

2. The depositions relied on by the Appellants in their brief did not even exist at the time the Trial Court granted the Motion for Summary Judgment

As previously stated, the depositions relied on the Plaintiff Appellants throughout their brief did not even exist at the time the Order of Summary Judgment was granted so it was impossible for them to have been considered by Judge Wehr. The first deposition of a Defendant was taken of Mills in September 2006, six months after partial summary judgment was granted. Therefore, this Court should not rely on them. Furthermore, the

depositions have not been read into the record or submitted at a bench trial so they are not properly in the record. Lucas v. Lucas, 720 S.W.2d 352 (Ky.App. 1986).

3. Kenneth Feinberg has not recanted his affidavit, and the Court should not take judicial notice of an unpublished non-final hearing

Plaintiff Appellants have stated that Kenneth Feinberg has "recanted" his affidavit during the KBA disciplinary hearing involving Stan Chesley. However, the fact is that Feinburg has not "recanted" his affidavit. Feinburg has taken no action in the underlying Boone Circuit Court to withdraw or strike his affidavit. He certainly talked around his affidavit during friendly questioning the attorney for Stan Chesley, his friend of 25 years. However, during the cross-examination from Ms. Gosnell, KBA General Counsel, he specifically stated that he personally reviewed the documents in the underlying case that he relied on to make his affidavit [Feinberg Affidavit, Exhibit 2, ¶ 6 (listing the documents that he personally reviewed); KBA Transcript, 1091:3 and 1096:13, Tab M, Appellants Brief] and that he actually wrote the affidavit [KBA Transcript, 1104:19, Tab M, Appellants Brief]. Feinberg specifically states that Appellants case was based on a naïve understanding of the language of the settlement letter, not what he was told by Gallion. Feinberg Affidavit, Exhibit 2, ¶ 9.

Feinberg has never stated that he committed perjury in his original affidavit. Some of the major points that Feinberg does not disavow are:

1. Where he stated that the Court maintains complete control over the fees in a class action, notwithstanding the contractual agreements with the clients (KBA Transcript 1081:4-18);

2. His statement that the Court controls the fees situation even in aggregate claims cases, where there is not technical class (KBA Transcript 1086 – 1087); and

3. His opinion that even after the decertification of a class the Court still maintains control over attorney fees and benefits to the aggregate group. (KBA Transcript 1089:10-24).

This Court should also recognize that Gallion and Cunningham were not parties to the Chesley hearing and were not represented by counsel at the hearing. Gallion and Cunningham did not have the opportunity to cross-exam Feinberg. To use the KBA transcript would be a violation of their due process and the right to confront witnesses.

The Appellants are attempting to resolve genuine issues of material fact raised by Feinberg's affidavit by merely casting it aside. This is the same thing that Judge Wehr did in his trial court opinion. However, as the Court of Appeals has correctly pointed out, it is not the role of the trial court to adjudicate the factual issues raised by the affidavit.

Kentucky law has long disfavored recanted testimony and placed little credence upon it. Taylor v. Commonwealth, 175 S.W.3d 68, 71 (Ky. 2005). "Affidavits in which witnesses recant their testimony are quite naturally regarded with great distrust and usually given very little weight." Hensley v. Commonwealth, 488 S.W.2d 388, 339 (Ky. 1972). Generally, recanted testimony alone does not warrant a new trial. Thacker v. Commonwealth, 453 S.W.2d 566, 568 (Ky. 1970). Only in unusual and extraordinary circumstances and only where the trial court is satisfied with the reliability of the recantation does it warrant a new trial. Id. Based upon its ability to observe the recanting witness, other witnesses, and thoroughly review the evidence, the trial court is in the best

position to determine the reliability of the recantation. Id. Therefore, we will not disturb the trial court's decision absent an abuse of discretion. Taylor, 175 S.W.3d at 71.

This supposed "recanting" was at an evidential hearing related to Stan Chesley, not a hearing pertaining to Gallion or Cunningham, so it, if even allowable, cannot be noticed. Johnson v. Com., 12 S.W.3d 258 (Ky.1999) ("The Supreme Court cannot adopt by judicial notice the evidence introduced in a similar case for the purpose of proving a similar proposition in another case."). Feinberg has seemingly created a prior inconsistent statement which requires a hearing and cross examination by Gallion and Cunningham for possible impeachment purposes. See Jett v. Commonwealth, 436 S.W.2d 788 (Ky.1969). This Court should also note that Feinberg did not testify in either of the criminal trials related to this case.

4. The disbarment opinions are not proper to consider in this Appeal

The Court of Appeals specifically noted on page 3, footnote 2, or its opinion that it recognized the fact that Gallion and Cunningham moved this Court to allow them to withdraw their membership in the Kentucky Bar Association under the terms of a permanent disbarment. There was no hearing in the disbarment actions.[4] The Court of Appeals, obviously having knowledge of the opinion of this Court on disbarment, did not find them persuasive to the issues presented on appeal, which were related to the record in front of Judge Wehr at the time the motion for summary judgment was granted, not facts later created.

[4] The reading of this Court's Disbarment Opinion to the jury in the criminal trial has been appealed to the Sixth Circuit since there was no hearing related to the Opinion.

The voluntary withdrawal of Gallion and Cunningham were both pursuant to SCR 3.480(2) which allows for the consensual resolution of a disciplinary action. The Kentucky Bar Association Board of Governors does not participate in this action. It is not a contested pleading. The Court granted the motion based on the motion and response.

Furthermore, as stated in SCR 3.995, the rules related to ethics violations are "...duties owed to the Supreme Court, not to any other person or entity. Nothing in these rules shall be construed as creating any cause of action or right of suit against any person or entity."

It would be improper for the Court to rely on its disbarment opinion to overturn the Court of Appeals based on the standard stated in SCR 3.480(2) and the fact that this disbarment opinion, if it were to have any persuasive value, did not exist at the time of the entry of the Order of Partial Summary Judgment. Appellees do note however that the Opinion does state that the case was settled as a class action which directly contradicts that opinion of Wehr. See Gallion v. Kentucky Bar Ass'n, 266 S.W.3d 802 (Ky.2008) and Cunningham v. Kentucky Bar Ass'n, 266 S.W.3d 808 (Ky.2008).

5. Judicial Notice of the Federal Cases or the KBA Hearing Transcript is not appropriate

The Federal Court decisions that the Plaintiff Appellants are requesting this Court take notice of are not final decisions, as an appeal is pending before the Sixth Circuit Court of Appeals.[5] Res Judicata requires a final decision on the merits.

[5] United States Court of Appeals for the Sixth Circuit Case No. 09-5998. Issues whether relevant evidence was excluded during the trial and if the rulings by Judge Reeves denied Gallion and Cunningham a fair trial.

RESTATEMENT (SECOND) OF JUDGMENTS §§ 24, 25. Collateral estoppel also requires a final decision on the merits. Therefore Judicial Notice is not appropriate.

Before the adoption of Kentucky Rule of Evidence 201, Kentucky had taken a conservative approach as to judicial notice of court records. Lawson, The Kentucky Evidence Law Handbook §1.00 at 8 (3rd ed. 1993). The general rule in Kentucky was that a court may take judicial notice of a record in the same court if the case involved the same parties and same issues, but not of other cases or courts. Maynard v. Allen, 124 S.W.2d 765 (1993). However, the adoption of KRE 201(f), which reads: (f) *Time of taking notice.* Judicial notice may be taken at any state of the proceeding, seems to recognize the authority of an appellate body to take judicial notice of a fact. Newberg v. Jent, 867 S.W.2d 207, 210 (1993). See also Lawson §1.00 at 12-13. Lawson goes on to note that the drafters of the rules suggested that notice should be used minimally on appeal in cases where the party did not make a request for judicial notice in front of the trial court in order to preserve the rules concerning preservation of error. Lawson §1.00 at 13.

In Doe v. Golden & Walters, PLLC, 173 S.W.3d 260 (Ky. App. 2005) the class members in a civil rights action that was filed in federal court brought a suit against attorneys who had represented them in federal court for legal malpractice, breach of fiduciary duty and fraudulent misrepresentation. The trial court granted summary judgment in favor of the defendants and the plaintiffs appealed. The claims raised in the state court suit were based on the representation and the outcome of the federal court suit. However, the federal case was on appeal at the time the state court summary judgment action was entered. The appellants requested that the appellate court take judicial notice

of the action in federal court, including the docket sheets. The Court in Doe discussed at length KRE 201 and Lawson's interpretation referenced above and stated that Lawson provided helpful guidance as to how KRE 201 should be interpreted with respect to court records. *Lawson* writes that the inquiry is focused not "upon the general noticeability of court records" but "upon the noticeability of indisputable facts that happen to be verified by the court records." Lawson at §1.00(4)(b) at 15. Lawson elaborates:

> The propriety of taking notice in a given situation would depend first of all upon whether the fact in question is indisputable and secondly upon whether the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It is not critical that that fact is contained in a court record, but rather that it is capable of verification by resort to a readily available and accurate source of information (Which just happens to be court records).
>
> Id. (parentheses in original).

The court in Doe chose to take judicial notice of the federal clerk's docket sheets. The dates of filing, the nature of the events and the case status of each of the federal cases was clearly contained in the docket sheets. These issues were all not in dispute and were easily determined. The court also took judicial notice of the opinion issued by the Sixth Circuit Court of Appeals in the federal case. The court took notice of that opinion because the parties had no opportunity to include it in the record since it was decided after the summary judgments had been granted in the state case. Furthermore, the court took judicial notice of that opinion, even though it was not yet final as of the date that the court wrote this opinion in the state case. Doe at 265. The court clearly states:

> Ordinarily this would preclude us from citing this opinion. Nevertheless, we take judicial notice of it to consider whether its effect or potential effect on the four underlying federal class actions has any bearing on the ripeness of the claims in the instant case and the question of whether the trial court has subject matter jurisdiction over the instant case.

> We do not seek to take notice of the propriety or correctness of the Sixth Circuit's decision, but rather, to take notice of the court's judicial act. *Id.*

It is clear that the court took judicial notice of the federal court decision just for the purpose of determining ripeness and subject matter jurisdiction. It did not take judicial notice of the outcome of the Sixth Circuit's decision, and makes it clear that it could not do so as it was not final as of the date that the state appellate court wrote the decision.

Kentucky case law citing to Doe recognizes that "While judicial notice may be taken at any stage of the proceedings, KRE 201(f), it is to be used "cautiously" by appellate courts." Commonwealth of Kentucky, Cabinet for Health and Family Services v. Ivy, 353 S.W.3d 324, 335 (Ky. 2011). In Com., Cabinet for Health and Family Services, Ivy had fallen behind in her child support payments and the Cabinet for Health and Family services had asked the McCracken Family Court to hold her in contempt unless she could show cause for her failure to pay. Ivy presented evidence that her sole source of income was a federal benefit under the SSI program. The McCracken Family Court reduced her payment and held her in contempt for failing to pay past due amounts and Ivy appealed the order. The Court of Appeals reversed stating that based on the evidence presented, it was clear Ivy could not meet her obligations. The Cabinet filed a motion for discretionary review to the Supreme Court and it was granted. At the Supreme Court level, the Cabinet asked the Court to take judicial notice of a Payment Ledger reflecting payments that Ivy had made after the family court order was entered, which showed her ability to pay her child support, and should therefore reinforce the order of contempt. However, the Supreme Court found that judicial notice was inappropriate because the Payment Ledger related to facts occurring after the entry of the

family court's order. Id at 335. "A trial court must determine whether contempt sanctions are justified on the evidence before it and then make findings supporting its ruling, a ruling which will be reviewed for an abuse of discretion." Id at 336. This is analogous to a summary judgment order, where the court must determine whether a genuine issue of material fact exists at the time the summary judgment order was entered, not evidence that may have come to light at a later date.

KRE 201(f) allows for judicial notice to be taken at any stage of the proceedings, but judicial notice should be used cautiously by appellate courts and is not appropriate when a decision is not final, except in rare situations where it is used to determine procedural and jurisdictional matters. In the instant case, judicial notice of the federal case is not appropriate because that case is on appeal and therefore not final. The Appellants are not seeking judicial notice for any procedural or jurisdictional purpose and therefore cannot use judicial notice to get into the court record convictions that are not final in other courts.

This litany of cases have all been premised on Judge Wehr's initial faulty ruling that has now been overturned by the Court of Appeals. The criminal case has been built on the civil case which in turn is relying on the criminal case. The Court here should only focus on the record that was before Judge Wehr at the time he issued his opinion and should uphold the Court of Appeals.

II. THE ORDER OF THE COURT FINDING THE DEFENDANTS JOINTLY AND SEVERALLY LIABLE WAS CONTRARY TO KENTUCKY LAW

Judge Wehr's August 1, 2007 Order (T.R. 4064 at 3) awarding a "baseline compensatory award" found Gallion, Cunningham, and Mills "...jointly and severally

liable for all compensatory damages, notwithstanding KRS 411.182" and cited Steelvest in support of this finding.

KRS 411.182 unambiguously states that apportionment must be applied in all tort actions involving the fault of more than one person, regardless of how those actions are characterized. An action for breach of fiduciary duty is fundamentally a tort action, not a contract action and it is well settled that an attorney's fiduciary duty exists independent of any contract. See Ingram v. Cates, 74 S.W.2d 383 (Ky. App. 2002) wherein an action against an attorney for violation of fiduciary duty is not an action on contract and therefore not barred by contract statute of limitations.

In Degener v. Hall, 27 S.W.3d 775, 779 (Ky. 2000) decided nine years after Steelvest, supra), the Court summarized the status of joint and several liability:

> As summarized in Dix, liability among joint tortfeasors in negligence cases is not longer joint and several, but is several only, and because the liability is several as to each joint tortfeasor, it is necessary to apportion a specific share of the total liability to each of them, whether joined in the original complaint or by third-party complaint, and the several liability of each joint torfeasor with respect to the judgment is limited by the extent of his/her fault. Degener at 779.

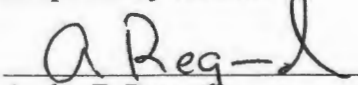
The conclusion set forth in Degener has been reaffirmed on several occasions. See Kentucky Farm Bureau v. Ryan, 177 S.W.3d 797, 803 (Ky. 2005) wherein the Court stated "In 1988, Kentucky codified certain procedural aspects of our comparative fault system with the passage of KRS 411.183, thus representing the legislature's intent to eliminate, once and for all, joint and several liability and to protect plaintiffs and defendants alike from being penalized for the fault of the other."

The Trial Court erred in finding joint and several liability and this Court should set that decision aside.

CONCLUSION

The Court of Appeals was correct in overturning the grant of partial summary judgment in this case. This Court should affirm the Court of Appeals and grant the Appellees any other relief that they may be entitled.

Respectfully submitted,



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