COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-87

On Appeal from Boyd Circuit Court,
Division 1, Civil Action No. 02-CI-01131

BARBARA D. BONAR, ET AL — **APPELLANTS**

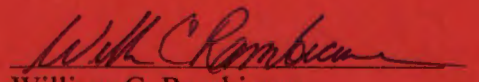
v.

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A., ET AL — **APPELLEES**

BRIEF ON BEHALF OF APPELLANTS, BARBARA D. BONAR AND B. DAHLENBURG BONAR, P.S.C.

I hereby certify that, on this the 15th day of March, 2011, I served this Brief by mailing a true and correct copy of the foregoing to the following: Hon. Robert W. McGinnis, Judge, 18th Judicial Circuit, Harrison County Justice Center, 115 Court Street, Suite 5, Cynthiana, KY 41031; Hon. James M. Gary, WEBER & ROSE, P.S.C., 471 West Main Street, Suite 400, Louisville, Kentucky 40202, Counsel for Appellees; Hon. Thomas E. Clay, THOMAS E. CLAY, PSC, 462 S. Fourth Street, Suite 1730, Louisville, KY 40202 and Hon. Stephen D. Wolnitzek, WOLNITZEK & ROWEKAMP, PSC, 502 Greenup Street, PO Box 352, Covington, KY 41012-0352, Co-Counsel for Appellants; and Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and by hand-delivering ten copies to Hon. Susan Stokley Clary, Clerk, Court Administrator and General Counsel, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601.

Respectfully submitted,



William C. Rambicure
Christopher B. Rambicure
RAMBICURE LAW GROUP, P.S.C.
219 East High Street
P.O. Box 34188
Lexington, Kentucky 40588-4188
Telephone: (859) 253-6713
Facsimile: (859) 233-7565

ATTORNEYS FOR APPELLANTS.

INTRODUCTION

This Court has accepted discretionary review of this case, which involves an attorney fee dispute between Appellants, Barbara D. Bonar, Esq. (hereinafter "Bonar") and her law firm, B.Dahlenburg Bonar, P.S.C., and Appellees, Stanley M. Chesley ("Chesley"), his law firm, Waite, Schneider, Bayless & Chesley Co., L.P.A ("WSBC") and his associate, Robert A. Steinberg, Esq. ("Steinberg") with respect to whether Appellants were entitled to a portion of the approximate $18 million in attorneys fees awarded by the Boone Circuit Court in the underlying class action clergy sex abuse lawsuit styled *Doe v. Roman Catholic Diocese of Covington,* Boone Circuit Court, Civil Action No. 03-CI-00181, and the amount of such fees which should be awarded to Appellants. Following a three day bench trial in which the trial court openly expressed his disdain for Appellants practically *ab initio,* reversed himself on several pre-trial rulings, and prohibited Appellants from introducing critical factual, expert and rebuttal evidence, the trial court found in Appellees' favor, and the Court of Appeals thereafter issued an Opinion Affirming on October 16, 2009.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the complexity of the factual and legal issues involved and the number of arguments being raised on appeal, Appellants believe that oral argument would be helpful to the Court to address the issues in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. Factual Background

i. Relevant Events Preceding The Filing Of The Underlying Class Action

Appellants Barbara D. Bonar ("Bonar") and B. Dahlenburg Bonar, P.S.C. (hereinafter collectively referred to as "Appellants") filed suit against the Diocese of Covington ("Diocese"), on June 21, 2002 in the Kenton Circuit Court styled John DiMuzio, et al v. Roman Catholic Diocese of Covington, Civil Action No. 02-CI-01645. This lawsuit made controversial allegations of a long term cover-up of sexual abuse by diocesan priests. Immediate and extensive media coverage ensued, and other victims of sexual abuse began contacting Appellants regarding representing them in similar claims against the Diocese. (ROA 160-195; 1047-1072; Plaintiffs' Trial Ex. Nos. 5-7).

The Diocese sought dismissal of the DiMuzios' claims on statute of limitations grounds based on Secter v. Diocese of Covington, Ky. App., 966 S.W.2d 286 (1998) and subsequent Kenton Circuit Court rulings in the Dickman v. Diocese of Covington case and D.E.H. v. Diocese of Covington dismissing clergy sex abuse cases on similar grounds. In Secter, a case of first impression in Kentucky, the Court of Appeals affirmed the trial court's ruling that the one year statute of limitations had been tolled by the Diocese's failure to report Fr. Bierman's sexual abuse in violation of KRS 520.030, which constituted fraudulent concealment of the abuse. However, later rulings in Dickman and D.E.H. concluded that those plaintiffs' claims were barred by the statute of limitations as they had not been filed within one year from the mid-November 1992 time period when extensive publicity concerning Fr. Bierman's sexual abuse began. (5-11-07

VT, 10:53:20-11:45:00; Pls' Trial Ex's. 1- 2).

After the rulings in the Secter, Dickman and D.E.H. cases, very few plaintiffs' attorneys were willing to even consider taking such cases on, due to the huge risks of statutes of limitation defenses. Before agreeing to represent the Dimuzios, Appellants knew that statute of limitations would be a significant issue, and that evidence of additional acts of continuing concealment had to be presented. Unlike other claimants, however, the Dimuzios had knowledge of facts confirming this active and continuing concealment by the Diocese. By early December 2002, Appellants had obtained rulings in DiMuzio denying the Diocese's motion to dismiss due to evidence demonstrating continuing concealment by the Diocese post-*Secter*. Appellants hired an additional associate attorney to assist in handling the increasing workload associated with the mounting number of these priest sex abuse cases. By mid-December 2002, Appellants had been contacted by a minimum of 15 separate clients to represent them in asserting similar sex abuse claims against the Diocese, and had spoken to at least a dozen other individuals about the possibility of asserting claims on their behalf. (5-8-07 VT, 10:17:40-10:26:00; 5-11-07 VT, 11:37:00-11:48:00; ROA 160, 202; Plaintiffs' Trial Exhibits Nos. 8, 9, 10, 208).

ii. Appellees Solicit Appellants To Join Forces To File Class Action

On December 18, 2002, Bonar was contacted by attorney Michael O'Hara ("O'Hara'), calling on behalf of Appellees, Stanley M. Chesley ("Chesley") and his firm, Waite, Schneider, Bayless & Chesley Co., L.PA ("WSBC"), renowned class action and mass tort attorneys. O'Hara proposed that he, Chesley and WSBC assist Bonar in the

joint pursuit of a class action sex abuse and cover-up lawsuit against the Diocese. Bonar initially saw no benefit either to her firm or her clients in joining forces with Appellees, and expressed that to O'Hara. O'Hara was one of a number of people Bonar had consulted with about DiMuzio throughout the summer of 2002, as she knew O'Hara had been lead counsel in Secter and knew that statute of limitations defenses would be very significant issues in DiMuzio.[1] O'Hara urged Bonar to at least discuss this further with Chesley. Bonar agreed. (5-8-07 VT, 10:18:00-10:24:50; 10:27:40-10:32:55).

Unknown by Bonar at the time, O'Hara, Chesley and WSBC had been retained in the June 2002 time frame to investigate a similar clergy sex abuse case for Mark Fischer, and were exploring the possibility of filing a class action suit against the Diocese of Covington.[2] From the time Appellees were first engaged by Mr. Fischer, they were concerned about the significant problems presented by statute of limitations defenses. Consequently, O'Hara, Chesley and WSBC carefully monitored the proceedings in Dimuzio. According to appellee and WSBC associate Robert Steinberg, this was because Appellees were concerned that an unfavorable precedent might come out of DiMuzio on

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[1] Indeed, Mr. O'Hara, who was the lead trial attorney in the *Secter* case, told Bonar that he felt it would be impossible to overcome the statute of limitations defenses long before he ever contacted Bonar in December 2002 about joining forces with Chesley and his firm in pursuing a class action claim against the Diocese. Bonar disagreed, as she had evidence no one else had of continuing concealment by the Diocese post-*Secter*. Moreover, as O'Hara admitted, the only evidence he and Appellees had with respect to fraudulent concealment was evidence previously uncovered in the *Secter* case decided 5 years earlier, evidence that was by this point stale and of no use. (5-8-07 VT, 10:24:00-10:27:40; 5-11-07 VT, 11:59:45-12:30:00).

[2] However, Appellees had determined that their one and only client, Mark Fischer, would not be an adequate class representative plaintiff for any such contemplated class action, and therefore needed access to something only Appellants could then provide, other clients who might be able to serve as adequate class representative plaintiffs. By this time, another lawsuit had been filed in the Fayette Circuit Court as a class action suit against the Diocese of Lexington and the Diocese of Covington, but had not yet been certified as a class action suit. (5-9-07 VT, 1:25:00-1:26:00; 1:39:30-1:40:30; 5-11-07 VT, 11:59:45-12:09:05).

this statute of limitations issue. After Appellees and O'Hara became aware that Appellants had successfully overcome the Diocese's motion to dismiss DiMuzio on limitations grounds that Appellees and O'Hara filed an individual suit for Mr. Fischer against the Diocese on December 20, 2002, and stepped up their efforts to recruit Appellants to join Appellees in a class action lawsuit. (5-8-07 VT, 10:24:05-10:30:55; 5-9-07 VT, 1:17:00-1:19:00; 5-11-07 VT, 11:47:20-11:49:50; Pls' Trial Ex.11).

Shortly thereafter, Chesley called Bonar to urge her to join forces with him in a class action lawsuit against the Diocese. Bonar informed Chesley that she already had some discussions with some of her individual clients about a potential class action suit and that many of her individual clients had no interest in same. Chesley asked Bonar how many clients she had, and, upon learning that she already had numerous clients signed up, basically told her his plan. First, they would take two or three of Bonar's clients and file a class action in their name. Second, Bonar could continue to represent her other clients in their individual claims against the Diocese, which clients could either join in the class action as class members or could opt out of the class action and continue to be represented by Bonar and her firm in their individual claims. Chesley made it clear that his intention was to partner with Bonar in order to obtain the benefit of her in-depth and inside knowledge of the Diocese and the extensive discovery she had already collected, and to attain access to the numerous clients Bonar had already amassed. Chesley told Bonar he would make it worth her while to "partner" with him on this class action, that it would be the very first class action of its kind in the country, and that Chesley wanted Bonar on his side in what he described as a case of nationwide prominence. Chesley

represented that his firm, WSBC, would "take over" the entire case development and discovery, and would essentially conduct all the legal work on the class action; that WSBC would carry all the expenses associated with prosecuting the class action; that Bonar could also have an active and ongoing role in the case and work closely with the victims; that Bonar would be on the case management team for the class action suit and participate fully in strategic decisions if she wished; and that Bonar and WSBC would be equal partners and would have an equal share in the legal fees and notoriety, since they would "be in this together." (5-8-07 VT, 10:32:00-10:43:00, 10:54:55-10:55:40; ROA 160-195, 202-237).

Chesley emphasized that Bonar should be sure to inform her existing clients not to worry about the class action suit, because any such individual client who wanted to opt out would be entitled to do so and could then still pursue their claims individually with Bonar as their lawyers or whomever else they might choose to represent them. Chesley was emphatic that they needed to move quickly because other victims currently represented by other attorneys might beat them to the courthouse and file their own class action suit against the Diocese. [3] Ms. Bonar testified unequivocally to this discussion with Chesley at trial, and her contemporaneous notes of this discussion were introduced into evidence at trial. O'Hara confirmed at trial that he understood that Appellants and Appellees would both be permitted to continue to separately represent any clients who had retained either firm prior to the February 4, 2003 filing of the class action suit in

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[3] At the time of these discussions, Appellees and O'Hara only had one client, Mr. Fischer, signed up and had already filed suit on Mr. Fischer's behalf asserting only individual claims on Mr. Fischer's behalf rather than a class action suit. (5-8-07 VT, 8:24:30-8:27:45; 5-11-07 VT, 12:03:00-12:14:00; Def.'s Ex. No. 1; Pls. Ex. No. 11).

pursuit of their individual claims. Indeed, O'Hara confirmed at trial that it was understood that Bonar had other clients with similar claims before the class action suit was ever filed on February 4, 2003,and that the "deal" with Bonar contemplated that she could and would continue to represent those individual clients in individual claims separate and apart from the class action suit. In fact, O'Hara and Steinberg had researched this issue and concluded that Bonar had an ethical duty to those individual clients, including, but not limited to, the DiMuzios, to represent their interests separate and apart from the class action, just as O'Hara, Chesley and WSBC had similar duties to represent their own individual client, Mark Fischer. Appellees likewise confirmed this in their interrogatory answers. (5-8-07 VT, 10:37:00-10:42:00; 5-11-07 VT, 12:09:05-12:12:50; ROA 163-166, 205-208; Pls.' Trial Ex. Nos. 12, 228, Answer to Interrog. No. 3). [4]

iii. Appellants Agree to Join Forces With Appellees in the Class Action Suit

Based on her discussions with Chesley, Bonar agreed to join forces in pursuing a class action against the Diocese. In late December 2002 and early January 2003, Bonar attorneys met with every one of their sexual abuse clients in order to identify two or more willing candidates to potentially serve as class representatives.Three such clients were identified as good candidates to serve as class representatives due to the strength of their claims and their knowledge of and relationships with a number of other abuse victims who were willing to come forward. Bonar brought these three clients to meet with

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[4] At trial, Chesley testified repeatedly that he had no recollection whatsoever of even having had any dealings or conversations with Bonar at any time, although he would not deny the possibility that the conversations took place. Chesley similarly could not recall what the fee division arrangements were between Appellants, Appellees, and Mr. O'Hara's firm prior to the filing of the class action suit. (5-8-07 VT, 8:15:45-8:48:40)

Chesley at his office in Ohio in early January, 2003, so Chesley and WSBC could assess them as potential representative Class plaintiffs. Appellees concluded that Mr. Harvey and Ms. Cadell could serve as class representatives, and they were, in fact, the named Plaintiffs when the class suit was filed. [5] (5-8-07 VT, 10:55:57-10:57:20; 5-11-07 VT, 12:35:40-12:43:25; Pls.' Ex. No. 14).

iv. Additional Relevant Events Leading To Filing Of The Class Suit

On January 15, 2003, Appellee Robert Steinberg (an associate in Chesley's WSBC law firm) and O'Hara met with Bonar in her office. Bonar and her staff willingly provided factual details they had accumulated on the Diocese, including lists of predator priests, the Catholic Directory history of priest placements in the Diocese, information on categories of victims, and various aspects of discovery that Appellants had already completed to that point. At the end of this meeting, Steinberg suggested to Bonar that Appellees would take the class action case on from that point forward, and that they really did not need substantial assistance on a going forward basis from Bonar or her firm. Bonar was shocked, indicating that this was not her understanding of the "deal" previously reached with Chesley, which contemplated that Bonar and her firm would be more actively involved in the case, and would be equally sharing the fees with Chesley's firm. Immediately after this meeting with Steinberg and O'Hara, Bonar called and left a message for Chesley to return her call, saying she needed to speak with him immediately. Chesley never returned Bonar's call. (5-8-07 VT, 10:45:00-10:54:50)

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[5] In this meeting, Ms. Caddell and Mr. Harvey were similarly informed that, after the class action was filed, if the class action was not certified, Bonar would continue to represent them individually and that they did not have to remain a member of the class and could opt out at any time.

v. The Filing Of The Class Action Suit Against The Diocese

Despite her discussions with Steinberg, and in the now clearly mistaken belief that she had a special partnership "deal" with his boss, Chesley, Bonar and her firm worked diligently in assisting in the preparation of a class action complaint against the Diocese. The class Complaint, styled *Greg S. Harvey and Maria Rebecca Trout Caddell v. Roman Catholic Diocese of Covington*, was filed on February 4, 2003. Appellants, Appellees and O'Hara were designated as Plaintiffs' counsel. The two named Plaintiffs, Harvey and Caddell, had contingent fee contracts with Appellants to represent them in their individual claims. Prior to February 4, 2003, no written fee splitting agreement had been entered into between Appellants, Appellees and O'Hara. (5-8-07 VT, 2:34:00-2:38:00; Pls' Ex. 6, 7).

vi. The "Deal" Changes After The Class Suit Is Filed

After the class action suit was filed, Steinberg sent Bonar a letter on February 6, 2003 relative to the joint representation and fee splitting arrangements as between Appellees and Appellants. Rather than the equal sharing of fees previously discussed and agreed to with Chesley, Steinberg's February 6, 2003 letter stated that "We have agreed that the fees you [i.e., Appellants] will receive will consist of ten percent of the first million dollars in net fees, seven percent of the second million dollars in net fees, and five percent of the remainder of net fees received in this case." It also confirmed that WSBC were responsible for paying the ongoing expenses of this litigation. (Pls' Ex. No. 16).

Thereafter, additional verbal and written communications between Appellees and Appellants ensued concerning the fee split arrangements and the written fee agreements

with Mr. Harvey and Ms. Caddell and other clients that were being signed up by both Appellees and Appellants. Appellees insisted that Mr. Harvey and Ms. Caddell sign new, separate class action fee agreement with WSBC. However, Mr. Harvey and Ms. Caddell had concerns regarding these fee agreements and declined to execute them, since they did not confirm their ability to subsequently opt out as class members and to then be represented in their individual claims by Appellants, nor did they include language making it clear that, should the class action not be certified, they would then be represented only by Appellants in connection with the pursuit of their individual claims. Moreover, Mr. Harvey and Ms. Caddell wanted to know if other individuals had signed up and agreed to become class members. However, efforts to obtain this information from Appellees -- information which Appellees, Mr. Harvey and Ms. Caddell, clearly should have been entitled to-- were continually rebuffed by Appellants. (5-8-07 VT, 2:38:00-2:46:00; Pls.' Trial Ex. Nos. 6,7,18, 19, 20, 24, 26, 28, 32, 33; Def.'s Ex. No. 15).

Appellees thereafter sent revised drafts of their proposed fee agreements directly to Mr. Harvey and Ms. Caddell, but these revised drafts still failed to address Mr. Harvey's and Ms. Caddell's specific concerns and thus were never executed and returned to Appellees by Mr. Harvey or Ms. Cadell. By mid-March 2003, Appellees began threatening to "replace" Mr. Harvey and Ms. Caddell with other individuals "with equally good claims" with whom Appellees had entered into separate fee agreements unless Mr. Harvey and Ms. Caddell executed Appellees' contracts.(5-8-07 VT, 2:51:47-2:53:15; Pls' Trial Ex. Nos 35, 36, 38, 48). [6]

[6] Appellants did, in fact, furnish Appellees with copies of their original individual representation fee contracts with Mr. Harvey and Ms. Cadell and copies of the later executed class action contingent fee

By letter dated March 31, 2003, Bonar sought to clarify the parties' joint representation and fee splitting arrangement. This letter specifically stated that Appellees had agreed that Bonar would provide joint representation in the subject class action suit and was to receive 10% of the first $1,000,000 in fees and 5% of all fees awarded above and beyond $1,000,000. It further confirmed that Bonar's "minimal share of fee is based primarily on my origination of Ms. Cadell and Mr. Harvey as named class members", that WSBC "will contribute the primary time from here forward", and that :

- Mr. Harvey and Ms. Caddell, who were previously Appellants' individual clients, had now become "all of our clients" in the pursuit of the class claim;

- Appellees' client, Mark Fisher, would continue to be represented individually by Appellees on an individual basis rather than joining in the class action as Appellants originally understood was to happen; and

- Both Appellants and Appellees could continue to pursue individual actions for their other clients separate from the class action with the understanding that, at such time as the class action was certified, Appellants' and Appellees' clients may or may not elect to "opt out"of the class action, as would all other potential class members. (Plaintiff's Trial Ex. No. 44).

By reply letter dated April 1, 2003, Appellees confirmed that Bonar was to receive 10% of the first $1 million in net fees, 7.5% of the second $1 million in net fees, and 5% of the remainder of net fees. This same letter explicitly confirmed that (1) Bonar's share of the fee was based on her "origination of the present class representatives, which allowed us to file the class action case promptly...," (2) Bonar and her firm had already fully performed their obligations; (3) nothing further was required of Bonar; and (4) the

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agreements However, Appellees refused to reciprocate by providing Appellees with copies of the fee contracts Appellees reportedly had entered into with other clients with respect to this class action. (5-8-07 VT, 2:27:58-3:00:00; Defs.' Trial Ex. Nos. 26, 27, 30, 49, 50, 51, 52). Appellants were never provided copies of Appellees' fee contracts at any time up through and including trial.

value placed by WSBC on Bonar's origination of the initial class representatives entitled Bonar to the fee percentages set forth in this correspondence. It further implicitly confirmed that both Appellants and Appellees were perfectly free and able to continue to pursue individual actions for their other clients separate from the class action and that all such clients could choose to opt out of the class. By reply letter of April 4, 2003, Appellants confirmed that they were "perfectly fine" with these arrangements. The trial court determined that these four letters constituted the fee split agreement between Appellants and Appellees. (5-8-07 VT, 9:02:10- 9:03:00; Pls.' Ex. Nos. 16, 44, 48, 52).[7] However, the Court of Appeals, while acknowledging that the record contained several letters between Bonar and Steinberg in early 2003 discussing a potential fee arrangement, came to the incredible conclusion that the parties never entered into a formal, written fee contract. (App'x., Tab 1, p. 2).

vii. Events Leading To Certification of The Class and Opt Out Decisions

On July 7, 2003, Appellees filed Plaintiffs' Motion for Class Certification. Immediately after the filing of the Motion, Appellants, Mr. Harvey and Ms. Caddell began to be ostracized and isolated from the other, newer clients of Appellees that had reportedly joined the class action. To this point, Appellees had still not provided Bonar with copies of any of the contingent fee agreements which they had supposedly entered into with clients signed up for this class action suit. Bonar therefore wrote a letter to

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[7] Chesley testified at trial that these four (4) letters really were meaningless because (1) they were only prospective in nature; (2) things change in the course of class action cases; and (3) the trial court would ultimately set the attorneys fees in class action cases. However, Chesley never informed Bonar that these letters were meaningless. (5-8-07 VT, 8:39:00-8:47:00).

Steinberg on August 14, 2003 (Pl. Ex. 61) expressing concerns about these and other questions that Mr. Harvey had raised with her. Mr. Harvey, Ms. Caddell, and Bonar thereafter met with Steinberg at the end of August, 2003 to attempt to address these concerns. At this meeting, Mr. Steinberg made it clear that Mr. Harvey and Ms. Caddell were no longer needed and thus were dispensable to the class action, and that their input into strategy or settlement would not be considered. Steinberg told Bonar he was narrowing her role in the case and that she was "only in this case because you represent Greg Harvey and Becky Caddell." (5-9-07 VT, 1:03:55-1:04:20). He further confirmed at this meeting that Appellees had already rejected a $3 million settlement offer without first consulting with the named class representatives, and that Appellees had already incurred $400,000 in expenses for a trial consultant to assist in getting the suit certified as a class action. Shortly thereafter, Ms. Caddell informed Appellees in writing that she no longer wished to be part of the class action suit and no longer wanted to be represented by Appellees.[8] (5-8-07 VT, 2:54:54-2:56:12; 3:06:35- 3:26:32; 5-11-07 VT, 12:37:40-12:41:40; ROA 170, 180, 212, 222; Plaintiffs' Exhibit Nos. 60 to 63).

After receiving Ms. Caddell's letter, Chesley contacted Bonar and informed her that Ms. Cadell needed to stay in the case and not to engage in individual settlement discussions until after the case was certified as a class action at the scheduled class

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[8] Greg Harvey, later made a similar decision, and sent a letter to Appellees on November 10, 2003 advising that he no longer wanted to be represented by Appellees and no longer wanted to be part of the class action suit. Appellees agreed to this in writing, confirming they had no problem with Mr. Harvey's decision, their understanding that Appellees were representing Mr. Harvey individually and seeking an individual settlement of his claim, and that Appellants and Mr. Harvey "are free to seek an individual settlement if you wish, as you did with Becky Caddell." (Bonar Trial Testimony, p. 113; Plaintiff's Trial Exhibit No. 119, 123, 126, 127, 130, 131, 134, 140).

certification hearing scheduled for October 1, 2003, suggesting that it would hurt the class if Caddell withdrew before that time. Chesley asked Bonar to convince Ms. Caddell to accede to this request. Bonar agreed to attempt to do so in order to avoid hurting the class. Ms. Cadell acceded to Chesley's requests. (5-8-07 VT, 3:23:40-3:28:30; 5-9-07 VT, 8:35:25-8:36:45; Pls.' Ex. Nos. 65, 71, 72, 73).

During this same time period, Appellees began filing motions, pleadings and other papers with the Court with Appellants' names appearing thereon as co-counsel for the class, and *without* first providing same in draft form to Appellants for prior review and approval. This prompted additional concerns on Bonar's part which she attempted to address verbally and in writing with Appellees beginning in mid to late September 2003.(5-9-07 VT, 8:44:10-8:55:05; Pls.' Ex. Nos. 75-77, 80, 129; Defs.' Ex. Nos. 67-71.)

viii. Certification of The Class Action Against The Diocese

The class certification hearing was held by Judge Bamberger on October 1, 2003. At Chesley's suggestion, Bonar did not attend this hearing. Chesley and Steinbeg did, however attend this hearing, as did Mark Modlin, a trial consultant retained by Chesley and an extremely close friend of Judge Bamberger. In what in retrospect was a highly unusual and controversial decision, Judge Bamberger certified the case as a class action in a bench ruling at the October 1, 2003 hearing. (5-_-07 VT, 2:01:00-2:02:00).[9]

[9] Subsequently, Judge Bamberger was charged with acts of judicial misconduct on December 27, 2005 by the Kentucky Judicial Conduct Commission for his role in approving the class action certification and for refusing to disqualify himself in not only this case but also for his role in another class action suit (the now infamous fen-phen class action litigation) in which Chesley and his firm and Mr. Modlin were also involved. Although Judge Bamberger resigned from his office as a Kentucky judge in the wake of these Judicial Conduct Commission proceedings, he nonetheless was ultimately the subject of a unanimous Order of Public Reprimand from Kentucky's Judicial Conduct Commission for his role in both cases. This Order noted that Judge Bamberger's actions shocked the conscience of the Judicial Conduct Commission and that, but for his agreement to resign his position as Senior Status Judge, the Commission would have removed

A conforming Order was thereafter entered by Judge Bamberger on October 21, 2003. Among other things, this Order conditionally certified Messrs. Chesley, Steinberg and O'Hara and Ms. Bonar as Class Counsel, and conditionally certified the class as "all persons who, while still minors, at anytime during the period January 1, 1956 through the present were subjected to acts of sexual abuse and sexual misconduct by priests or members of religious orders who, at the time of such abuse or misconduct, were assigned to or employed by the Diocese of Covington." All those who met the Class definition were deemed to be members of the Class unless they opted out in writing by January 31, 2004, in which event the "opt outs" would not share in any Class recovery, would not be bound by a judgment against the Class, and would not be precluded from otherwise prosecuting a timely individual claim. (Pls.' Trial Ex. No. 104).

ix. Ms. Cadell's and Mr. Harvey's Decision To Opt Out and Settle Their Individual Claims Following Class Action Certification

Following this October 1, 2003 bench ruling certifying the class, Ms. Caddell and Mr. Harvey withdrew from the class action, as they were clearly entitled to do, and Bonar represented them in the successful negotiation of settlements with the Diocese of their individual claims, with no objection whatsoever at the time from Appellees. Indeed, Appellees acknowledged in numerous written communications, both before and after the October 1, 2003 class certification hearing, that Ms. Caddell and Mr. Harvey could withdraw from the class provided that they did so after the certification hearing, that Ms. Caddell and Mr. Harvey were certainly entitled to look out for their own interests, and

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him from office if the violations described in the Order had been proved at a hearing. (Pl's. Tr. Ex. 218).

that Bonar could represent them individually in negotiating settlements on their behalf. In fact, Steinberg thereafter went so far as to state in an October 13, 2003 email to Bonar to "Please feel free to go ahead with Becky's individual settlement as soon as you want to...", and thanked Appellants for their "patience on this to accommodate the class." Steinberg later stated in an October 15, 2003 email that Appellees were "glad we were able to work this out and accommodate Becky [Caddell] without any problem." (5-8-07 VT, 3:39:20-3:39:45; Pls.' Ex. Nos. 65, 67, 69, 71, 72, 73, 82, 83, 84, 86, 88, 90, 92, 93, 94, 95, 96, 99, 100,102, 112, 113).[10]

x. Appellants' Decision To Withdraw as Class Counsel

Counsel for the Diocese filed a Motion on November 12, 2003, seeking the voluntary recusal of Judge Bamberger based upon his close friendship with trial consultant Mark Modlin and Mr. Modlin's involvement in the class action case. Judge Bamberger conducted a hearing on that motion on November 13, 2003, during which he stated the he was offended and personally insulted by the motion and considered it nothing more than forum shopping. As might be expected, Chesley and WSBC strenuously opposed the motion to disqualify Judge Bamberger, who refused to recuse himself. The Diocese subsequently filed additional supporting affidavits in further support of their motion, and took this matter to the Kentucky Supreme Court. (5-8-07 VT, 9:24:40-9:27:06; Plaintiffs' Exhibit Nos. 122, 124, 125, 135, 136, 142).

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[10] In yet another example of unbelievable and improper appellate fact finding, the Court of Appeals ignored the extensive testimony and voluminous confirmatory letters and emails introduced at trial, and somehow came to the clearly erroneous conclusion that, **unbeknownst to other class counsel,** Bonar began negotiations with Diocese counsel Carrie Huff for individual settlements for these two class representatives Bonar initially brought to the class. (App'x. Tab 1 at p. 3).

Following receipt of the motion to disqualify and supporting affidavits from Ms. Huff and Mr. Guilfoyle, Bonar concluded that not only had she and her clients been totally cut out of all strategies and settlement discussions in the class action, but also that the actions taken by Messrs. Chesley and Steinberg, behind Bonar's back and without her permission or consent, gave rise to grave ethical concerns. Appellants wrote letters to Steinberg on September 22, 2003 and again on November 19, 2003 to attempt to address these and other concerns. (Plaintiffs' Exhibit Nos. 76, 129).

By reply letter dated November 20, 2003, Steinberg informed Bonar that in class action suits, class counsels' names go on the pleadings but that lead counsel normally process and file such pleadings. Steinberg further indicated that there was not sufficient time available to send such pleadings out to co-counsel for prior review and approval. Steinberg further suggested in this letter that Bonar should consider withdrawing as class counsel since she was uncomfortable with her name appearing on pleadings and she was not actively working on the case. Bonar responded the very next day in writing to Steinberg's letter, reiterating her concerns that she should first have an opportunity to review pleadings with her name thereon as co-counsel prior to same being filed. Bonar refuted Steinberg's suggestions that she had not been actively working on the case, and reiterated the terms of the parties' fee split agreement under which Bonar had already earned her percentage portion of the fee by providing the initial class representatives, and was not expected to do further work on the case. (Pls.' Exhibit No. 137, 138).

xi. Appellants' Withdrawal As Co-Counsel For The Class And Continued Representation Of Class Opt-Outs

After Judge Bamberger denied the recusal motion, the Diocese filed an original proceeding seeking relief before the Kentucky Supreme Court. Judge Bamberger shortly thereafter announced his retirement, and the Diocese's Motion for Recusal therefore became moot. On January 9, 2004, Appellants filed a Motion to Withdraw as co-class counsel, a supporting affidavit, and a notice of attorneys' fee lien. While the motion and affidavit referenced a conflict of interest created due to recent changes in the composition of class members, Bonar's letter to Appellees that very same date made it very clear that Bonar had no alternative but to withdraw due to Appellees' continual actions designed to force Appellants out, Appellees' apparent reversals of position regarding Appellants' and Appellees' rights to each keep their individual clients, and the difference in treatment between Appellants' clients and those clients who signed contracts with Appellees after the class action was filed. (Pls.' Ex. Nos. 152, 153, 154).

xii. Relevant Rulings By Judge Bamberger's Replacement, Judge Potter

Special Judge John Potter made his first appearance in the underlying class action case at a pretrial conference and hearing on pending motions on February 5, 2004. On that date, Judge Potter granted Bonar's motion to withdraw and acknowledged her attorneys' lien as part of the record. (Pls.' Ex. No. 159). Thereafter, on March 19, 2004, Appellants filed a Motion to Intervene/Motion for Leave to Opt-Out/Motion for Protective Order on behalf of seven (7) individual victims. (Plaintiffs' Ex. No. 169). On March 30, 2004, Appellees filed a 47 page Memorandum in Response to this motion, objecting to the opt-outs as untimely and making many of the same arguments made at the trial of this case, including arguments that (1) Bonar breached her fiduciary duties to the class by

negotiating individual settlements for Mr. Harvey and Ms. Caddell; and (2) Bonar was continuing to breach fiduciary duties to this amorphous class by attempting to represent these seven (7) individuals and should not be permitted to do so. By Order entered on April 30, 2004, Judge Potter granted Appellants' motion for leave to opt out these seven (7) individuals, thus summarily rejecting Appellees' assertions of breach of fiduciary duty and conflict of interest. (Pls.' Ex. No. 174).

Throughout the time Appellants were serving as co-counsel for the Class, they attempted to provide assistance and services for the benefit of the class action. In addition to convincing Mr. Harvey and Ms. Caddell to serve as the initial designated "class representative" Plaintiffs needed in order to initiate the class action and assisting in the drafting of the complaint, Appellants provided information, documentation and other assistance when and as requested by Appellees. Both before **and** after withdrawing as co-counsel for the class, Appellants referred victims to Appellees to represent in the underlying class action. Appellees entered into written fee agreements with many of these victims and generated substantial attorneys fees as a result of their representation of these victims. (5-8-07 VT, 2:44:55-2:46:50; Pls.' Ex. Nos. 25 to 28, 30, 34, 43, 45 to 47, 55 to 58, 64, 82, 88, 118, 181, 183 to 191, 194). [11]

xiii. Appellant's Settlement of Claims Outside The Class

Although the Appellees successfully misled the trial court and the appellate

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[11] Unlike the draft representation agreements Appellees submitted to Ms. Caddell and Mr. Harvey which identified Appellants, Appellees and Mr. O'Hara as the attorneys retained by the clients, the representation agreements utilized by Appellees for these other victims confirmed the victims' agreement to retain only Appellee WSBC to represent their interests as a member of the Class. (See, eg., Pls.' Exhibit Nos. 19, 20, 118, 157, 168).

courts[12] on these critical points, the simple facts of the matter are that (1) the underlying class action suit was not a limited funds case; and (2) the Appellants negotiated individual settlements on behalf of their own individual clients with the full knowledge, consent and blessing of Appellees and did so long before any substantive settlement discussions took place with respect to the underlying class action lawsuit.

By way of example, there was and is absolutely no dispute but that Bonar settled the individual cases of the two (2) initially named nominal class representatives, Greg Harvey and Maria (Becky Cadell), in the fall of 2003, after the underlying class action suit had been certified as a class action but well before the opt-out period had run and long before the class action suit was tentatively in May, 2005. This was, of course, also long before this tentative class action settlement was approved by Judge Potter in January 2006. It is likewise beyond dispute that Bonar not only informed, but also obtained the specific prior consent of Appellees to, the settlement of Mr. Harvey's and Ms. Caddell's individual cases before she ever negotiated the individual settlements on their behalf. Similarly, there can be no dispute but that, after Bonar withdrew as co-counsel for the class but, once again, long before the class action was tentatively settled in May, 2005, Bonar represented a number of other individual claimants who, like Mr. Harvey and Ms. Caddell, decided it was in their best interests to opt out of the class action and pursue individual settlements with the Diocese. There can be likewise no dispute but that Judge

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[12] For example, despite the fact that the trial court here made no specific findings on the record when announcing its rulings from the bench at the end of trial to the effect that the underlying class action was a limited funds case, Appellees' counsel inserted language that the underlying class action was such a limited funds case into the Findings of Fact, Conclusions of Law, Opinion and Judgment said counsel prepared purportedly in conformity with the trial court's findings.

Potter specifically permitted Bonar to do this, despite the vehement objections of Appellees to the effect that Bonar was violating numerous ethical obligations to the class in doing so.

xiv. The Settlement of The Class Action Suit Against The Diocese

It was not until May 17, 2005 that a tentative settlement of all claims asserted in the underlying class action was reached, which was later supplemented by a memorandum of understanding on July 18, 2005. (*See,* Pl. Trial Ex. 207, Order Approving Settlement entered January 31, 2006). Judge Potter conducted a fairness hearing on the proposed settlement on January 9, 2006, and thereafter entered an Order Approving Settlement on January 31, 2006, under which the Class would have approximately $80 to $85 million available for distribution to its members, some of which was to be immediately available and some available later for distribution to the class members, pursuant to a schedule or matrix agreed to by the parties' counsel. In this same January 31, 2006 Order, Judge Potter scheduled a pretrial conference in the case for February 14, 2006 at 10:00 a.m. for a hearing on a motion for attorneys' fees and a hearing immediately thereafter to establish procedures for administering the settlement. (Pls.' Ex. No. 207).

More to the point, and notwithstanding Appellees' affirmative misrepresentations to the contrary, the underlying class action suit did not present a "limited funds" case at all. As set forth in said January 31, 2006 Order, the Diocese itself agreed to contribute $40 million in cash or property to a settlement fund. The remainder of the settlement funds came from two policies provided by the Diocese's insurance carriers, one with

American Insurance Company which contained a limit of $100,000 per claimant but with no limit on aggregate liability, the other with Catholic Mutual Insurance Company. Judge Potter;s Order specifically noted that no evidence of the Diocese's financial condition had been introduced at the fairness hearing. He further noted that, while a representative of Catholic Mutual testified that immediate payment of its full obligation would be financially disadvantageous or otherwise inconvenient, there was no evidence presented that it could not pay promptly or that it could not pay a larger amount. This January 31, 2006 Order specifically stated that "Therefore, the settlement cannot be approved based upon a finding that there was a limited fund available."(id, p. 8).

xv. Proceedings Relating To Appellants' And Appellees' Fee Applications

Consistent with this January 31, 2006 Order, Appellees filed on February 9, 2006 their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Enhancement of Class Representatives' Settlements. This motion, which related solely to the services provided by three law firms [namely WSBC; O'Hara, Ruberg, Taylor, Sloan & Sergent; and Oldfather & Morris] sought an award of 30% of the approximate $85 million in total settlement funds made available to the class members, as well as reimbursement of out of pocket expenses which then totaled $1,068,350.42. Appellees' sought to have their fees determined by a percentage of the common fund approach, rather then the lodestar approach based upon the number of hours expended multiplied by an appropriate hourly rate. Indeed, the motion and supporting affidavits failed to provide any detailed billing statement or time records reflecting the hours expended by any of the three law firms on behalf of class members. Significantly, the motions and affidavits said

nothing whatsoever in terms of any fee splitting agreements as between Class Counsel, nor did they seek court approval of any division or allocation of fees as among these Class Counsel. (Appellants' Trial Ex. No. 208 - 212, 217).

Appellants likewise filed their own separate Petition for Separate Award of Attorneys' Fees and Reimbursement of Expenses on February 9, 2006. (Pls.' Ex. No. 213). Judge Potter conducted the hearing on attorneys fees as scheduled on February 14, 2006. At the very outset of this hearing, Chesley admitted that Bonar was entitled to a fee but wanted to proceed with the gross fee hearing without then getting into a fee dispute on an "intramural" issue. Chesley suggested that Bonar not be permitted to place any evidence into the record that day, so that Chesley could "intramurally resolve" the fee dispute with Bonar, proposing to meet with Bonar and her attorneys to attempt to resolve the intramural fee split with no prejudice to Bonar's claims or right to her fee share. Judge Potter determined that the gross fee hearing would proceed as if the intramural fee dispute did not exist, that this intramural fee dispute issue should first be mediated by the parties and, if not resolved, set for a later hearing. Accordingly, Appellants were prohibited from introducing their evidence at this February 14, 2006 hearing as to their share of the attorneys' fees, and Judge Potter did not resolve this fee dispute at that time. (2-14-06 VT, 10:8:20-10:23:35; Pls. Ex. No. 214).

Subsequently, on February 23, 2006, Appellees filed a Motion to Strike Fee Petition of Barbara D. Bonar and Memorandum in Response to Fee Petition of Barbara Bonar. Significantly, Appellees once again argued, just as they had previously argued unsuccessfully in March 2004, that Bonar suffered from conflicts of interest with class

members and violated her fiduciary duties to the class, and was therefore not entitled to any fee. Bonar thereafter served her Response to Plaintiff's Motion to Strike Fee Petition on March 10, 2006. At the March 14, 2006 hearing, Judge Potter ruled that, in the interest of Chesley's request to resolve the fee dispute "intramurally," that Bonar's fee petition, and all related motions would be remanded with no prejudice to Bonar. (Pls.' Ex. No. 220; ROA 45-46,123-125; 3-14-06 VT, 11:55:00-11:55:55). Efforts were thereafter undertaken to attempt to schedule and conduct a mediation of the intramural fee dispute between Bonar and Class Counsel. Two separate mediations took place, the first on May 5, 2006 and the second on June 20, 2006, but those mediation efforts proved unavailing. (ROA 131-140).

On May 22, 2006, Judge Potter entered an Order Setting Attorneys' Fees, wherein he awarded fees based upon the percentage of common fund of 22% of the recovery to be paid to the class members from funds to be paid at the time the distribution is made to the class member. Assuming that the entire $84 million available in the settlement fund was paid out, the total in attorneys fees would amount to $18,480,000.00. This Order made no provision with respect to the allocation or division of attorneys fees as between the three law firms then serving as Co-Counsel for the Class. Of particular relevance to the issues before this Court, Judge Potter's Order specifically noted that (1) the class settlement "makes $84 million available to satisfy the claims of approximately 350 class members; (2) the class members will share the proceeds of the settlement primarily based upon the nature of the abuse they sustained, with those who sustained more severe abuse receiving greater awards than those who sustained less severe abuse; (3) that it was possible, **but**

not likely, that all of the $84 million will be distributed; and (4) that in that event, the remainder of the $84 million not distributed to the class members will revert to the Diocese or its insurance carrier. (Pls.' Ex. No. 221).

Bonar served her Response to Plaintiff's Motion to Strike Fee Petition on March 10, 2006. Judge Potter then ruled at the March 14, 2006 hearing that, in the interest of Chesley's request to intramurally resolve the fee dispute, Bonar's fee petition and all related motions would be remanded with no prejudice to Bonar. Efforts were thereafter taken to attempt to mediate this intramural fee dispute, but those efforts proved unavailing. (Pls. Ex. 220; ROA 123-125, 131-140; 3-14-06 VT, 11:55:00-11:56:00).

xvi. The Assignment of Judge McGinnis To Complete The Class Case

On September 19, 2006, an order was entered by Chief Justice Lambert assigning this case to Judge Robert A. McGinnis following the completion of Judge Potter's service as Senior Judge. At an October 4, 2006 status conference before Judge McGinnis, the parties agreed to separate Appellants' claims from the underlying class action, to create a new lawsuit, and to open up a new case file with a new case number. It was further agreed that Appellants' initial fee petition and all filed pleadings and documents between these parties relating to that fee petition be transferred from the underlying class action case and made part of the separate case.(10-4-06 VT, 2:44:00-3:08:00).

Significantly, Judge McGinnis made it very clear at this October 4, 2006 status conference that when he takes over a case where another judge had previously been involved, he does not revisit rulings previously made by the prior judge and that whatever had already been ruled on by the previous judges (here, Judges Bamberger and Potter)

would remain the rulings on a going forward basis. (10-4-06 VT, 2:33:30-2:34:00). Unfortunately, that did not prove to be the case, as Judge McGinnis thereafter continually issued bench proclamations and written orders that contradicted prior court orders and rulings by the prior judges, and, even worse, contradicted his own pre-trial rulings, to the substantial detriment and prejudice of Appellants.

ARGUMENT

1. Standard of Review And Preservation Of Issues

[Evidentiary and Discovery Rulings] The standard of review in matters involving rulings on evidentiary issues and discovery disputes is abuse of discretion. Manus, Inc. v. Terry Maxedon Hauling, Inc., 191 S.W.3d 4, 8 (Ky. App. 2006). However, if the trial court bases its factual determinations in reliance on an improper, outside source, the normal CR 52.01 standard of review is not fully applicable. Hamilton Co. v. Louisville & Jeff. Co. Planning & Zoning Comm'n., 287 S.W.2d 434 (Ky. 1955).

[Issues of Law] "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."Community Trust Bancorp., Inc. v. Mussetter, 242 S.W.3d 690, 692 (Ky. App. 2007). Western Kentucky Coca-Cola Bottling Co. v. Revenue Cabinet, 80 S.W.3d 787, 790 (Ky. App. 2001).

[Construction of Contract Issues] A trial court's decision that a contract was ambiguous involves a matter of law, subject to *de novo* review. First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829 (2001).

[Findings of Fact] In a bench trial, "[f]indings of fact shall [generally] not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. However, where the record reflects that the trial judge did not decide the case independently, the credence given to his findings of fact by this rule is not fully applicable. Hamilton Co. v. Louisville & Jefferson Co. Planning & Zoning Com'n., 287 S.W.2d 434, 436 (Ky. 1956)

[Preservation of Issues]: Appellant's objections to the trial court's rulings on pre-trial discovery matters were preserved by timely motions to compel discovery and motions for sanctions. Appellants' objections to the trial courts evidentiary rulings at trial were preserved by contemporaneous objections raised at trial. Their objections to the trial court's findings of fact and conclusions of law and any bench rulings made consistent therewith were preserved by Appellants' timely filing of their Notice of Appeal. Their objections to the Kentucky Court of Appeals Opinion Affirming were preserved by Appellants' timely Motion for Discretionary Review.

2. The Trial Court and the Court of Appeals Erred As A Matter Of Law In Making Rulings Inconsistent With KRCP 23 Regarding Class Members' Rights To "Opt Out" Of Class Actions

At the conclusion of the bench trial on the fee dispute, Judge McGinnis essentially ruled that, notwithstanding the clear terms of a fee split arrangement between Appellants and Appellees, the Appellants were not entitled to any portion of the $18 million in attorneys fees awarded by Judge Potter in the underlying class action lawsuit because Appellants committed numerous and egregious ethical violations. According to Judge McGinnis, exacting fiduciary duties are imposed upon an attorney acting as class counsel. One such duty, at least according

to Judge McGinnis, was that when an attorney acts as class counsel, that attorney's fiduciary duty is owed solely to the amorphous class, to the exclusion of that attorney's individual clients. Judge McGinnis went even further, stating that such an attorney is obligated to inform any of that attorney's individual clients that, once they become class representatives, (1) the client(s) are obligated to remain in the [class action] case [i.e., that they cannot withdraw or opt out of the class action suit and pursue their own individual settlements]; (2) that the [class action] case is likely to take a long time; and (3) in an apparent contradiction, that, if the client(s) choose to opt out of the class action case, that the attorney who theretofore represented the client(s) individually and as class counsel may no longer represent them individually.[13]

Judge McGinnis, who himself had little or no experience in class action litigation, failed to refer or cite to any applicable law in announcing his rulings with respect to these supposedly egregious ethical violations. The Kentucky Court of Appeals, in its' Opinion Affirming rendered October 16, 2009, simply re-stated *in toto* Judge McGinnis's conclusions regarding these ethical violations, and, without any discussion of the facts, much less any analysis of the law or the applicable Rules of Professional Conduct, opined that Judge McGinnis's findings in this regard were based on substantial evidence in the record. However, these rulings regarding ethical violations fly in the face of the very clear provisions to the contrary of the applicable Kentucky Rules of Civil Procedure dealing with class action

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[13] Incredibly, Judge McGinnis made these erroneous conclusions of law despite his own admitted paucity of experience in class action litigation without the benefit of any expert testimony whatsoever, as he refused to permit Appellants to introduce any expert testimony on these critical issues. Even worse, Judge McGinnis totally disregarded the critical testimony of the Diocese's attorney, Carrie Huff, who testified directly contra to Judge McGinnis's findings regarding ethical violations.

litigation and the rights of clients to opt out and to be represented by counsel of their choice. The rulings also wholly disregarded the only evidence presented at trial on these points through the Appellees' own star witness, Carrie Huff, Esq., not to mention the very clear understandings and agreements reached between Appellants and Appellees as detailed in the four (4) letters that comprised the fee-splitting and related agreements between Appellants and Appellees.

Moreover, this court can and should take judicial notice that Mr. Chesley and his firm themselves have engaged in this very same supposedly unethical conduct of opting out and settling individual claims for their own individual clients in connection with other class action cases in which they served as Class Counsel, including the infamous Fen Phen litigation. Under KRE 201, a judicially noticed fact must be one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to resources whose accuracy cannot be reasonably questioned. Courts can properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet. Polley v. Allen, Ky. App., 132 S.W.3d 223 (2004; also, *see* Doe v. Golden & Walters, PLLC, Ky. App., 173 S.W.3d 260 (2005) and Thomas v. Judicial Conduct Commission, Ky., 77 S.W.3d 578 (2002) . That is precisely the case with respect to recent proceedings before the Supreme Court of Kentucky's Inquiry Commission, KBA File 13785. In the Post-Hearing Brief submitted on behalf of Respondent Stanley M. Chesley filed on January 19, 2011, Chesley acknowledged that he had settled the claims of three individual plaintiffs who suffered from PPH, the most severe condition resulting from ingesting the Fen Phen diet drugs, while at the same time serving as co-

counsel for the Fen Phen class. Incredibly, Mr. Chesley and his lawyers attempted to distinguish the facts in his settlement of these Fen Phen plaintiffs' claims from the facts in this case, by misrepresenting the facts in this case to the Kentucky Supreme Court's Inquiry Commission. Chesley claimed that, in this case, Ms. Bonar was settling individual claims subsequent to the class settlement with a fixed, limited amount available to settle the class members' claims. Thus, according to Chesley, each individual settlement reached by Bonar served to necessarily reduce the amount that was available to the rest of the class, and therefore worked to the detriment of the other class members. [14]

Of course, as pointed out in detail above, these assertions by Chesley were and are nothing more than shameless, bald-faced lies, and, if anything, merely serves to underscore the extreme lengths Chesley and his firm are willing to go to in order to attempt to achieve the results they wish to obtain. Bonar negotiated individual settlements of her individual clients' claims in 2003 and 2004, with the express prior knowledge and approval of Chesley's firm and in accordance with the clear understanding and agreement, as set forth in the four (4) letters comprising the joint representation and fee-splitting "agreement" between Appellants and Appellees. Bonar negotiated these individual settlements long before the tentative class settlement was reached in May 2005 and long before Judge Potter approved the class settlement in January 2006. At the time Bonar negotiated these settlements in 2003 and 2004, there was no suggestion, much less any confirmed knowledge,

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[14] Following numerous days of evidentiary hearings, Hon. William L. Graham, the Trial Commissioner appointed by the Supreme Court of Kentucky to hear the charges of professional misconduct against Chesley, issued the Report of Trial Commissioner, recommending the permanent disbarment of Chesley and the disgorgement of $7,555,000 in excess fees paid to Chesley in the Fen Phen imbroglio. See, Appx., Tab Nos. 3 and 4, Report of Trial Commissioner and Respondent Stanley M. Chesley's Post-Hearing Brief, Supreme Court of Kentucky Inquiry Commission, KBA File 13785, p. 30-33).

that this would or might be a "limited funds" case. As previously noted, Judge Potter made it perfectly clear when he approved the class settlement in January 2006 that it is not considered to be a "limited funds" case.

A. Kentucky Rules of Civil Procedure Relating To "Opt Out" Class Actions

As noted above, the underlying class action suit against the Diocese was filed, certified and settled as a KRCP 23.02(c) "opt out" class action. Such an "opt out" class action requires that notice be sent to each putative class member, advising (1) that the court will exclude him from the class if he so requests; (2) the judgment in the class action, whether favorable or unfavorable, will include all members of the class who do not opt out; and (3) any class member who stays in may, if he desires, enter an appearance through an attorney if the member so desires.

Thus, the applicable Kentucky Rules of Civil Procedure specifically protects any and all individuals who desire to opt out of a class action and who instead wish to settle or otherwise pursue their own individual claims outside of the class action setting. These rules apply equally and across the board to any and all real or putative members of a class action, regardless of whether or not such individuals were denominated as "class representatives" or merely as putative class members. Any and all real or putative members of a KRCP 23(c) class action, including those initially denominated as "Plaintiffs" or as "Class Representatives", have an absolute right to "opt out" of the class action, and have the absolute right to decide whether they wish to be separately represented by counsel, and, if so, by counsel of their own choice.

Under horn book class action law, there was and is absolutely nothing improper or

unethical about the notion of a lawyer simultaneously acting as class counsel while at the same time simultaneously representing individual clients (and putative class members) who have exercised their rights to "opt out" and thus exclude themselves from the class, by settlement or otherwise. *See, Conte, Newberg on Class Actions, Forth Ed., § 15.25 and Supplement.* As stated therein, the clear public policy is to specifically allow such representation since "individuals who opt out of class actions should not be penalized for exercising that right." The one and only exception in which a potential conflict could ever occur is where both the individuals and the class are attempting to pursue and settle claims that compete for "a clearly existing limited fund", a situation which did not exist in this case.

B. The Relevant Trial Testimony of Carrie Huff, Esq.

At the trial of this fee dispute case, Appellees called their own star witness, Carrie Huff, Esq., the lead counsel for the Diocese of Covington in the underlying class action lawsuit. Ms. Huff testified that she first had discussions with Bonar regarding the possible settlement of certain of the claims of Bonar's individual clients' (other than Mr. Harvey and Ms. Caddell) against the Diocese in August 2003, and that she settled five of these claims with Bonar prior to the case being certified as a class action. Ms. Huff and the Diocese vigorously opposed the certification of the case as a class action, and were not then interested in trying to settle victims' claims in the context of a class action. Ms. Huff believed at the time, as did Bonar, that the victims would be much better off settling their cases individually with the Diocese because of timing issues, immediate closure, and personal attention considerations. Ms. Huff and the Diocese were pro-actively seeking to reach resolution with the individual sex abuse victims. After the class was certified, Ms. Huff then had settlement

discussions with Bonar with respect to the claims of Mr. Harvey and Ms. Caddell in October and November 2003.[15] Ms. Huff testified that Bonar's motivations in attempting to negotiate individual settlements were based upon Bonar's attempting to give her clients what they wanted. If these clients wanted to go into the class, they could do so. If they wanted individual settlements, they were entitled to go that route. Certain of the funds for the settlement of these claims came from the diocese, while other funds were available through insurance policies. However, at the time Ms. Huff was negotiating these settlements with Bonar, Ms. Huff was not aware that the insurance companies' assets were limited. (5-8-07 TR., 12:25:00 -12:51:00, 1:11:00-1:13:00).

Ms. Huff further confirmed in her trial testimony that in a KRCP 23.03(c) opt out class action, everyone who met the definition of being a member of the class was in the class unless they opted out. In such opt out class actions, by operation of law, Ms. Huff testified that anybody who wished to do so- regardless of whether they were a putative class member, an actual class member, or even one designated as a class representative- had an absolute right to opt out of the class action and to either choose to pursue or not pursue whatever claims they might have. [16] In other words, and contrary to the rulings of Judge McGinnis and the Court of Appeals, class representatives had just as much of a right to ultimately decide whether or not to opt out as a putative or actual class member, and had the absolute right to

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[15] Ms. Huff was absolutely stunned when Judge Bamberger ruled from the bench at the October 2, 2003 hearing to certify the case as a class action. Going into the October 2, 2003 hearing, she had no expectation that any judge anywhere would have certified the case as a class action, from the bench or otherwise, as she believed that this would never be certified as a class action. (Id, 2:02:00-2:03:00

[16] Appellees other witness, O'Hara, likewise confirmed this very same point on cross-examination at trial. (5-11-07 VT, 12:26:00-12:28:00)

select whatever lawyer they wished to represent them in connection with individual settlement discussions or negotiations if that was the route they wished to take, including any of the attorneys acting as Class counsel for the class. This did not, according to Ms. Huff, serve to create any sort of impermissible conflict of interest. Had Ms. Huff believed that Bonar's simultaneous settlement of individual victims' claims while at the same time serving as co-counsel for the class, Ms. Huff would have raised that issue at the time with Bonar. Ms. Huff stated that she felt that Bonar dealt with her on a truthful, straightforward basis and that Bonar was representing her clients to the best of her ability. Moreover, Ms. Huff testified at trial that she understood that both sides- i.e. Appellants and Appellees- had class representatives who ultimately opted out and who were then represented by counsel of their choice in the settlement of their individual claims against the Diocese. (Id, 2:14:00-2:24:00).

C. Conflict Of Interest Rules In The Unique Setting Of Class Action Litigation

Moreover, Judge McGinnis's conclusions with respect to impermissible conflicts of interest were and are based on a formalistic and hyper-technical approach to conflict of interest rules, which is wholly inappropriate in a class action setting. Courts have cautioned that "the traditional [ethical] rules that have developed in the course of attorneys' representation of the interest of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation." In Re: Agent Orange Prod. Liab. Litig., 800 F.2d 14, 19 (2d Cir. 1986). *See also* Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 161 (7th Cir. 1988). ("Recognizing that strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases, the courts insist that a serious

conflict be shown before they will take remedial or disciplinary action."). As the leading class action treatise observes, the inevitability of conflicting interests among members of a large and heterogeneous class and the numerous unresolved legal ambiguities about the nature of the relationship between counsel and absent class members make a formalistic application of conflict principles inappropriate, and belie reliance on clear, bright line rules:

> Categorical application of ethical precepts developed for the individual action, without accommodation of the fundamental goals of the class action rule, dilutes both the ethical standards and the effectiveness of class litigation. Ethical dilemmas involving one or several of the parties or counsel to a class action are often treated inconsistently by the courts. The importance of adequate representation, the lack of clarity in the relationships between the absent class members and their representative and counsel... and the absence of guidance from the Model Rules of Professional Conduct all contribute to judicial discord.
> 5 NEWBERG ON CLASS ACTIONS § 15:1 (4TH ed. 2010) [17]

"Rather, there must be a balancing of the interests of the various groups of class members and of the public and the court in achieving a just and expeditious resolution of the dispute." In Re: Agent Orange, 800 F.2d at 19.[18] The formalistic notion that any conflict among class member clients disqualifies an attorney is simply unworkable, since some conflict among class members is inevitable. An automatic disqualification rule serves nobody's interests, and unduly increases the bargaining leverage of small segments of the

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[17] NEWBERG also cautions against equating questions about proper procedure under the civil rules applicable to class actions with professional misconduct giving rise to disciplinary action: "In the broadest sense, abuse of any rule of civil procedure is a violation of the spirit of the professional ethics code, but class action abuses for the most part do not rise to the level of specific violations of professional ethics. 5 NEWBERG ON CLASS ACTIONS § 15:2 (4TH ed. 2010)

[18] *See also*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590 (3d Cir. 1999); Andrews Farms v. Calcot, Ltd., 2010 WL 3341963 at *8 (E.D. Cal. Aug. 23, 2010) (noting "class actions provide a particular problem with respect to the rules on conflict because 'the potential for conflicts in the course of representing numerous class members is greatly enhanced,', and therefore courts must employ 'a balancing of the interests of the various groups of class members' in considering conflicts) (quoting In re: Joint E. and S. Dist. Asbestos Litigation, 133 F.R.D 425, 431 (S.D.N.Y. 1990).

class who can threaten to derail an entire litigation by raising a conflict and disqualifying class counsel. Thus, questions of conflicting interests in class litigation must be handled pragmatically, balancing the various clients' respective interests, and minimizing overall prejudice. *Id.* No such pragmatic balancing of interests was done by either Judge McGinnis or the Kentucky Court of Appeals.

Regardless of whether a matter involves a suit for multiple clients or involves a class action lawsuit for hundreds or thousands of individuals or entities as opposed to a lawsuit for an individual client or entity, the simple truth of the matter is that lawyers represent clients. Accordingly, lawyers have always owed and continue to owe fiduciary duties to their clients. Of necessity and practicality, attorneys serving as class counsel in class action settings not only represent the class, but also represent their own individual clients in the class action. Such attorneys owe fiduciary duties not only to the class, but also to the individual clients they have signed up and represent in that class action. In fact, if the attorneys did not represent numerous individual clients, they would not be acting as co-counsel for the class. The more individual clients an attorney has, the more "clout" or "power" they have in a class action lawsuit. However, the lawyer's duties to their individual clients are no less important, nor do they simply evaporate, once that attorney becomes an attorney for the class; the duties are concomitant and are not mutually exclusive. The trial court in the underlying fee dispute case misunderstood, and erred as a matter of pure law, not to mention pure equity, in terms of rulings with respect to the duties owed by lawyers to their clients, but even more importantly, with respect to the fundamental rights of clients, as members of a class action lawsuit, to opt out as members of that class action lawsuit and to utilize counsel of their own

choice to represent their individual interests once those clients have determined it is not in their individual best interests to opt out and pursue their own individual settlements outside the class action.

Under the Kentucky Rules of Professional Conduct ("KRPC"), both those in effect during the relevant time period and even today under the most recent revisions adopted effective as July 15, 2009, lawyers are representatives of the clients they represent and are required to abide by the clients' decisions concerning the objectives of the representation. These duties exist both within class actions and outside of class actions. Lawyers in Kentucky have been and still are required by the KRPC to consult with their clients as to the means by which such objectives are to be pursued, but are nonetheless obliged to abide by their clients' decisions with respect to whether to settle a matter or not. SCR 3.130(1.2(a)). The Kentucky Rules of Professional Conduct, then and even now, make no distinction with respect to the duties owed to individual clients, multiple clients, or even class action clients. The commentary to Rule 1.2 confirms that paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by the legal representation, within the limits imposed by law and the lawyer's professional obligations. Thus the decisions specified in KRPC 1.2(a), including decisions as to whether to settle a civil matter, must be made by the client, not the lawyer. Here, the undisputed testimony was that Bonar's clients exercised their ultimate authority to settle, and that Bonar followed these individual clients' directions in negotiating individual settlements on their behalf. Moreover, the settlements Bonar reached for these clients were individual settlements of these clients' individual claims. Thus, unlike the later settlement of the class action negotiated by Chesley and Ms. Huff, these individual

settlements did not constitute any sort of "aggregate settlement of claims contemplated by SCR 3.130 (1.8(g)).

3. The Underlying Class Action Lawsuit Was Never A Limited Funds Case

Notwithstanding the fact that Judge McGinnis made no such rulings from the bench, Appellees' counsel unilaterally injected into the Findings of Fact, Conclusions of Law, Opinion and Judgment which they prepared at the request of Judge McGinnis (and which Judge McGinnis thereafter signed and entered over the objections of Appellants), the following language, to wit:

> "Furthermore, an attorney who has withdrawn as class counsel cannot then represent individual clients who have opted out, **particularly where there is a limited fund available for settlement**, without causing further detriment to her former client." (Emphasis supplied}.

Their reason for doing so is clear. They knew they needed a finding that this was a limited funds case in order to attempt to sustain a finding of any claimed ethical breach. However, the underlying class action case against the Diocese was never considered to be a "limited funds" case. Indeed, when Judge Potter approved the settlement of the underlying class action suit via his Order Approving Settlement of January 31, 2006, he specifically noted that his approval was **not** based upon a finding that it was a limited funds case.

4. Appellants' Settlement of Individual Clients' Claims Was Not Detrimental To Other Class Members

There can be no dispute that, long before the tentative settlement of the underlying class action in May 2005 (much less the subsequent Court approval of the class settlement on January 31, 2006), Appellants not only engaged in settlement negotiations but also actually settled a number of their individual clients' claims against the Diocese. The simple

fact of the matter is that, notwithstanding Appellees' protestations to the contrary, there was and is nothing wrong- whether legally, morally or ethically- with Appellants having done so. Moreover, no credible evidence was presented at trial demonstrating that these individual settlements negotiated by Appellants for these individual clients years before the class action case was settled had any sort of detrimental effect on the other members of the class. Indeed, Carrie Huff testified to the contrary at trial, as did O'Hara, who admitted that Appellees could not identify any single individual victim or claimant that received less money as a result of anything Appellants did. (5-11-07 VT, 12:25:00-12:27:00).

5. Baker v. Shapero Has Nothing Whatsoever to Do With This Case

Prior to trial, Judge McGinnis correctly determined that Baker v. Shapero, Ky., 203 S.W.3d 697 (2006) had nothing to do with the facts or issues in this case, because the arrangements between Appellants and Appellees involved a fee splitting arrangement between attorneys rather than a contingency fee contract between an attorney and client. However, when ruling from the bench at the conclusion of the trial, Judge McGinnis held that Shapero was controlling. According to Judge McGinnis, Shapero stood for three basic principles, i.e. that (1) a lawyer can withdraw from a contingency fee case at any time on her own accord, in which event she forfeits any fee; (2) if a lawyer is discharged for cause, she cannot receive a fee; and (3) if a lawyer is discharged without cause, she is entitled to a fee but not to the contingent fee set forth in her contract but rather to a fee measured by *quantum meruit.* However, Shapero does not stand for these principles at all. In fact, the Kentucky Supreme Court in Shapero held only that when an attorney employed under a contingency fee contract is discharged without cause **before completion of the contract**, he or she is

entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of the contingent contract, overruling LaBach v. Hampton, Ky. App., 585 S.W.2d 434 (1979).

Unlike Shapero, the present case involves a joint representation and fee splitting contract between attorneys rather than a contingent fee agreement between a client and an attorney. Here, Appellants had, in fact, completed their obligations under their fee splitting agreement with Appellees as of the date the class action suit was filed, and were not expected nor required to do anything further. Moreover, and unlike Shapero, this case does not involve an attorney's entitlement to a fee paid by a client, but rather deals with how attorneys in separate firms should share a court ordered award of attorneys' fees.

In the present case, unlike Shapero, Appellants had a joint representation and fee splitting agreement with Appellees that specifically acknowledged that Appellees' relatively small percentages were fully earned by Appellants as of the date the class action suit was filed on February 4, 2003. As stated in Appellees' own correspondence, (1) Appellants' share of the fee was based on their origination of the initial class representatives, which allowed the prompt filing of the class action case; (2) Appellants had already fully performed their obligations, and nothing further was required of the Appellants; and (3) that the value placed by Appellees on Appellants' performance of these obligations were those percentages set forth in this correspondence. In essence, what Appellees told Appellants through this series of correspondence was thank you very much, you have done your part, your fee for having done so will be based on a reduced but agreed upon series of percentages of the ultimate fee awarded in the case, we are now in charge, and we really do not want or need you to do anything further. Thus, the "deal" here certainly did not contemplate or imply that Appellants

would remain in the case until the end, or that they would need to continue to provide any further services. Instead, it contemplated and provided just the opposite.

The Court of Appeals agreed with Judge Mcginnis' assertion that, although perhaps not directly on point, the rationale applied in Shapero would be equally applicable when an attorney voluntarily withdraws from a case. However, the Court of Appeals' misguided efforts to support Judge McGinnis's rulings with respect to Shapero are equally illogical and unpersuasive, and similarly ignore the plain language of the correspondence setting forth the joint representation and fee splitting arrangements between Appellants and Appellees. Bonar's position throughout has been and is quite simple and perfectly logical. A deal is a deal. Courts should enforce clear and unambiguous agreements entered into by and between competent parties, according to their plain terms and meanings. Courts should not add new and inconsistent terms to written agreements, nor should they imply terms to contracts that clearly contemplate and indeed provide for something entirely different. It is only where the language of a contract is ambiguous and uncertain that a court may interfere under well established rules of construction to reach a proper construction and make certain that which in itself is uncertain. Allen v. Lawyers Mut. Ins. Co., Ky. App., 216 S.W.3d 657 (2007). Nationwide Mut. Fire Ins. Co. v. Creech, 431 F.Supp.2d 710 (E.D.Ky. 2006); Crouch v. Crouch, Ky., 201 S.W.3d 463 (2006); Yeager v. McClellan, Ky., 177 S.W.3d 807 (2005); Frear v. P.T.A. Industries, Inc., Ky., 103 S.W.3d 99 (2003).

Moreover, a writing is to be interpreted as a whole, giving effect to all parts and every word in it if possible, and all writings that are a part of the same transaction must be interpreted together. Absent an ambiguity in a contract, the parties' intention must be

discerned from the four corners of the instrument without resort to extrinsic evidence. Cook United, Inc. v. Waits, Ky., 512 S.W.2d 493 (1974); Cantrell Supply, Inc, v. Liberty Mut. Ins. Co., Ky. App., 94 S.W.3d 381 (2002); ABCO-BRAMER, Inc v. Market Ins. Co., Ky. App., 55 S.W.3d 841 (2000), *dis. rev. denied.* Courts are not permitted to create an ambiguity where none exists in the contract, even if doing so would result in an outcome more palatable to the Court. First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829 (2000). Courts similarly are not permitted to make a contract for the parties or to revise the agreement while professing to construe it, as it is not the function of the judiciary to change obligations of contract which parties have seen fit to make nor to add conditions not written into the contract. White v. Winchester Land Development Corp., Ky. App., 584 S.W.2d 56 (1979); O.P. Link Handle Co. v. Wright, Ky. App., 429 S.W.2d 842 (1968); State Farm Mut. Auto. Ins. Co. v. Hobbs, 268 S.W.2d 420 (Ky. 1954)

To hold under the facts of this case, as the trial court and the Court of Appeals have held, that Appellants are only entitled to compensation for the hourly work performed in furtherance of the case because they voluntarily withdrew before the case was concluded, is incredible and outrageous, particularly where the total fees awarded by the court had nothing to do with any of the hours spent on the case by any of the attorneys or firms who worked on it but was instead determined as a percentage of the common fund. It is even more incredible and outrageous that the net effect of these decisions is to reward the actions of Appellees, who operated in bad faith not only towards Appellants but who were also, at a minimum, complicit in unethical conduct which resulted in a scathing rebuke by the Kentucky Judicial Conduct Commission of Judge Bamberger.

While there is no reported Kentucky decision squarely on point with the present case, Movants respectfully submit that the unpublished decision of this Court in Melvin v. Preston, 2003 WL 21829182 (Ky. App. 2003) is instructive on this issue, and may be cited for consideration by this Court in the absence of a published opinion adequately addressing the issues before this Court as per CR 76.28(4)(c). Although there are certainly factual distinctions between it and the present case, Melvin v. Preston demonstrates that there is a difference between contingent fee contracts and fee splitting contracts, and that unambiguous fee split agreements between attorneys such as the one at issue here should be enforced according to their terms.

6. The Trial Court Improperly Limited Appellants' Pretrial Discovery, Permitted Appellees' To Unilaterally Dictate The Scope Of Discovery, Failed To Force Appellees To Comply With Pretrial Discovery Rulings, and Failed To Afford Appellants A Fair Trial

The trial court in this case made numerous pretrial rulings on discovery issues that improperly limited Appellants' access to information and documentation directly relevant to the parties' claims and defenses. For example, although Appellees consistently maintained that Appellants' only contribution to this class action was to provide the two initial class representatives (Mr. Harvey and Ms. Caddell) and that Appellants referred no other victims to the class and essentially provided no further services for the Class, Appellants claimed that they did much more and that they referred another approximate 100 individual victims to Appellees in this class action.

Similarly, Appellees maintained that Appellants breached fiduciary duties to the class by, *inter alia*, "opting out" Mr. Harvey and Ms. Caddell and others to negotiate individual

settlements on their behalf while still acting as Class Co-Counsel, before and after Appellants' withdrawal as co-counsel of record for the class, while Appellants maintained that (1) their initial deal with Appellees – not to mention the verbal deal as between Mr. Harvey and Ms. Caddell and Appellees-- permitted any and all of Appellants' individual clients to withdraw or opt out should the case be certified and to be represented individually by Appellants; (2) that they acted in accord with the parties' agreement and breached no fiduciary duties; and (3) that they were essentially forced out as co-counsel for the Class by Appellees' own actions which created conflicts. [194]

Needless to say, Appellants sought discovery in this case with respect to the foregoing contentions. Appellants served their first set of Interrogatories and Document Requests on August 3, 2006 seeking discovery of clearly relevant matters, including information and documentation relating to (1) the identities of individual victims who provided census forms to Appellees required so as to be included as members of the class; (2) the identities of those individuals who "opted out" of the class; (3) the identities of all members of the class that Appellants referred to Appellees; (4) copies of the fee contracts signed by class members; and (5) copies of any and all written agreements among "class counsel" regarding attorneys fees and costs. Appellees refused to voluntarily produce this information.

[1914] *See,* eg., Petition of Barbara Bonar for Separate Award of Attorneys' Fees filed on February 9, 2006; Plaintiffs' Motion to Strike Fee Petition of Barbara Bonar and Memorandum in Response to Fee Petition of Barbara Bonar served in the underlying class action on February 23, 2006; Affidavit of Barbara D. Bonar in Support of Brief in Opposition to Motion to WSBC's Motion to Strike; and Plaintiffs' Memorandum in Support of Motion for Summary Judgment on The Issue of Barbara Bonar's Petition for Attorneys' Fees. ["Her only contribution to the class action was to provide two clients who acted as class representative." Id, p. 19-20]; and 10-4-06 VT, 2:29:00 - 2:34:00; ROA 23-45; Pls.' Trial Ex. No. 213].

Appellants thereafter moved to compel responses to these discovery requests on September 6, 2006. Before this motion could be heard, Judge Potter left the bench and Judge McGinnis took over. Judge McGinnis initially indicated that Appellants' requests for the productions of individual fee contracts between Appellees and the clients was irrelevant, because the global attorneys fees had already been set in the underlying class action case. [3-9-07 VT, 10:31:40–10:32:05]. Appellees, in apparent reliance upon Judge McGinnis's remarks at the March 9, 2007 hearing, objected and refused to produce this information and documentation on the grounds that it was not discoverable or reasonably calculated to lead to the discovery of relevant evidence. (Pls.' Ex. 228). Appellants' motion to compel followed.

Thereafter, at a hearing conducted on April 17, 2007, Judge McGinnis ruled that the only issue in the case was what was the agreement of the parties and Ms. Bonar regarding fees and how much work was actually done by her and how those should be calculated on a *quantum meruit* basis. At this same April 17, 2007 hearing, Judge McGinnis further ruled that issues pertaining to the reasons Appellants withdrew from the case were relevant and discoverable. He therefore limited discovery to those issues only. Consistent with that premise, the Court indicated that the fee arrangements between Appellees and other co-class counsel were irrelevant, and that information regarding clients taking part in the class and opting out of the case and the fee contracts Appellees had with those clients was **not** relevant. (4-17-07 VT, 3:05:10 – 3:06:25).

After further arguments, Judge McGinnis modified that ruling so as to require Appellants to first furnish a listing of those individuals who made contact with Appellants

and who were then referred by Appellants to Appellees, and directed Appellees to then produce the requested documentation and information only with respect to those people. However, he limited Appellants' discovery to only those individuals Appellants claimed to have referred or brought into the case prior to January 9, 2004, the date Appellants filed their motion to withdraw as co-counsel, because whatever happened after Appellants' withdrawal was wholly irrelevant to the issues in this case.

Of critical importance, Judge McGinnis made it very clear at this April 17, 2007 hearing, three weeks prior to trial, that Appellees likewise could not raise as an issue at trial, nor would he permit evidence to be presented at trial, with respect to actions allegedly taken by Appellants after January 9, 2004. Thus, whatever actions Appellants allegedly engaged in after January 9, 2004 which Appellees asserted to be a breach of fiduciary duty or other reason for determining that Appellants were not entitled to a fee were eliminated from consideration at trial. In other words, Appellees were prohibited by this pre-trial ruling from attempting to introduce any evidence at trial purporting to demonstrate that Appellants supposedly violated any fiduciary duties or ethical violations by, for example, settling individual clients' claims after Appellants withdrew as co-counsel for the Class on January 9, 2004. (Id). Appellants relied upon this ruling in connection with their preparation for trial and presentation of evidence at trial. [205] However, at trial, Judge McGinnis did an abrupt and inexplicable about face, and permitted Appellees to introduce evidence, over Appellants'

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[20] Incredibly, at trial less than one month after this hearing, Judge McGinnis completely changed tune, permitting Appellees to put on substantial proof at trial with respect to actions allegedly taken by Appellants after they withdrew from the class that allegedly constituted a breach of fiduciary duty or other reason for determining that Appellants were not entitled to a fee. Moreover, in his verbal bench ruling and in his subsequent Findings of Fact, Conclusions of Law, Opinion and Order, he made specific findings that Appellants breached fiduciary duties to the class both before and after their withdrawal from the case.

inexplicable about face, and permitted Appellees to introduce evidence, over Appellants' objections, on Appellants' settlement of individual cases after January 9, 2004, which evidence Judge McGinnis then relied upon, albeit erroneously, in determining that Appellants committed numerous and egregious ethical violations.

Even after this hearing, Appellees still refused to provide much of the information and documentation which the Court had ordered them to provide. During the course of Chesley's deposition taken on April 20, 2007, Appellants' counsel interposed numerous improper speaking objections and instructions not to answer questions relating to many of these very same areas which the Court had previously ruled were properly the subject of discovery in this case, necessitating the filing of a Second Motion to Compel And For Sanctions on April 25, 2007, and a subsequent Motion served on April 27, 2007 for Appellees and their Counsel to show cause why they should not be held in contempt for violating the Court's rulings from the April 17, 2007 hearing. Appellants further requested an immediate hearing on this motion because Steinberg's deposition was scheduled to be taken on April 30, 2007 and the trial was scheduled to begin on May 8, 2007.

A hearing was conducted by Judge McGinnis on Thursday, May 3, 2007, at which time Judge McGinnis granted in part and denied in part Appellants' Second Motion to Compel, and partially modified his previous rulings with respect to Appellants' Show Cause motion. Judge McGinnis denied Appellants' efforts to compel answers to questions relating to (1) other class actions Appellants had been involved in prior to the underlying class action; (2) Appellant's practices with respect to written fee splitting agreements with co-counsel prior to the filing of a class action suit; and (3) Appellees' experience in class action cases

in which they were co-counsel for the class and in which they opted class members out of the class and represented them in connection with the settlement of their individual claims. The Court's separate written Orders on Plaintiffs' Second Motion to Compel and on Plaintiffs' Motion to Show Cause were ultimately entered by the Court on June 1, 2007, well after the trial of this case. (Appx., Tab 16, 17).

Judge McGinnis, in so ruling before trial, prevented Appellants from obtaining critical discovery relating to what turned out, albeit unexpectedly, to be the ultimate issues upon which Judge McGinnis ruled against Appellants at trial, i.e., these supposedly egregious and multiple, ethical violations in acting against the interests of the class by settling individual claims for their individual clients both before and after Appellees withdrew as co-counsel for the class. The relevance, discoverability and admissibility of evidence relating to whether or nor Appellees themselves engaged in similar conduct, clearly goes to the credibility of the Appellants and their witnesses and to whether they should have been estopped from even raising such defenses based on their own similar conduct under similar circumstances. Appellants were entitled not only to this critical discovery information before trial, based upon the defenses asserted by Appellees in the pleadings, but should have been entitled to completely explore these issues on cross examination at trial. The trial court here wholly disregarded the claims and defenses asserted by the parties, and denied Appellants' access to critical evidence essential to be able to adequately prepare for trial and cross-examine Appellee's witnesses. At trial, Judge McGinnis refused to permit Appellants' counsel to cross-examine Appellees' witnesses with respect to these very same issues. Because Appellants were forced to try to fight with both hands tied behind their backs

throughout this litigation, they were denied a fair trial.

7. Appellants' Right To A Fair And Impartial Trial Were Violated

During the course of the public trial of this case, Judge McGinnis made improper and highly prejudicial statements on the record relating to a request apparently made to him by the Kentucky Bar Association ("KBA") for all of the records in this case once it was over. He further expressed the belief that, from what he had heard so far, he was going to have to submit it to the KBA anyway because there were ethical problems all over this situation, including the fact that Bonar was settling cases outside the class action. (5-11-07 VT, 12:31:05-12:32:57 and 5-9-07 VT, 10:50:52-10:51:10). These highly inappropriate, highly public comments made by Judge McGinnis on the second day of a three day trial and before he issued his ruling from the bench on Friday, May 11, 2007 were thereafter reported publicly in the press.

Under Section 116 of the Kentucky Constitution, the Kentucky Supreme Court was granted exclusive authority to govern admission to the bar and to discipline members of the bar. Woodard v. Kentucky Bar Association, Ky., 156 S.W.3d 256 (2004). Pursuant to SCR 3.150, all disciplinary proceedings before the KBA are supposed to be confidential prior to a rendition of a finding of a violation of the Kentucky Rules of Professional Conduct by the Trial Commissioner or the KBA's Board of Governors. As a lawyer, a member of the Kentucky Bar Association, and a judicial officer of the Commonwealth of Kentucky, Judge McGinnis knew or reasonably should have known that he was obliged to preserve the confidentiality of whatever disciplinary proceedings may have then been pending and/or being investigated by the KBA Inquiry Commission. Judge McGinnis instead decided to

openly flout the Supreme Court Rules on confidentiality of such matters, in a trial proceeding which he knew was being attended by and closely monitored by members of the press. Prior to the trial in this case, there were no formal or informal bar complaints or disciplinary proceedings then pending with the KBA against Bonar or her firm. However, the very clear implication from Judge McGinnis's comments, before hearing all of the evidence and before issuing his findings and conclusions on the record, was that a disciplinary proceeding against Appellants had been initiated and was then being investigated by the KBA. This was and is highly inapproriate, highly prejudicial and merely served to underscore the apparent contempt and disdain Judge McGinnis held for Bonar and her law firm.

Obviously, Appellants were and are not privy to whatever communications Judge McGinnis may have had with the KBA as this trial was progressing, beyond that which Judge McGinnis volunteered publicly and on the record at trial. We now know, based upon the now public February 22, 2011 Report of Trial Commissioner (William L. Graham) in Kentucky Bar Association v. Stanley M. Chesley , KBA File 13785, that (1) Chesley had been informed in March 2006 that the Inquiry Commission was investigating his conduct in the Fen Phen class action litigation before the very same trial Judge Joseph Bamberger, (2) that in certain instances Chesley's responses to questions from the Inquiry Commission were in some instances misleading, other instances incomplete, and in some instances outright falsehoods; and (3) that the Inquiry Commission thereafter issued a formal Complaint of Misconduct against Chesley on December 4, 2006. We also now know that Judge Graham determined that Chesley violated numerous Rules of Professional Conduct, including Rules 1.5(a), 1.5(c), 1.5(e), 1.8(g), 3.3(a), 8.1(a), former Rule 8.3(c) [now 8.4], and 5.1(c)(1). The

only Rule of Professional Conduct which Commissioner Graham could not find a clear violation of was Rule 1.7, the conflict of interest rules, relating to Chesley's settlement of individual clients' claims while at the same time acting as class counsel, because he could find no evidence that these settlements adversely affected or impacted the later aggregate settlement made for the members of the class.

Chesley was, in essence, fighting for his very professional life and for his continuing right and privilege to practice law at the very same time that this fee dispute lawsuit was in the discovery phase and moving quickly towards trial. Thus, we now know certain facts that were obviously well known by Chesley at the time this fee dispute case went to trial in May, 2007, critical facts which directly related to nearly identical issues in this case and which went to the very heart of Chesley's personal and professional credibility. However, Judge McGinnis, based upon his pre-trial discovery rulings prevented Appellants from knowing anything about these facts, and instead intimated that it was Bonar rather than Chesley whose ethical conduct was either already being or should be investigated by the Kentucky Bar Association. This is surely not the stuff of a fair trial, and cannot be condoned. Judge McGinnis's findings and conclusions must be reversed, and so too should the Court of Appeals Opinion Affirming be reversed.

RAMBICURE LAW GROUP, P.S.C.

BY: 

William C. Rambicure
Co-Counsel for Appellants,
Barbara D. Bonar and B.
Dahlenburg Bonar, P.S.C.