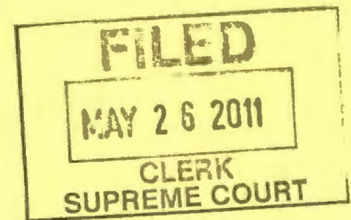

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-87

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**

REPLY BRIEF ON BEHALF OF APPELLANTS

I hereby certify that, on this the 26th day of May, 2011, I served this Brief by mailing a true and correct copy of the foregoing to the following: Hon. Robert W. McGinnis, Judge, Harrison County Justice Center, 115 Court Street, Suite 5, Cynthiana, KY 41031; Hon. Sheryl G. Snyder, Griffin Terry Sumner, and J. Kendrick Wells, FROST BROWN TODD, LLC, 400 W. Market St., 32nd Floor, Louisville, KY 40202, Counsel for Appellee Stanley M. Chesley; 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,

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STATEMENT OF POINTS AND AUTHORITIES

PAGE #

STATEMENT OF POINTS AND AUTHORITIES i

INTRODUCTION 1

ARGUMENT 2

A. **The Underlying Class Action Was Never a Limited Funds Case.** 2

FRCP 23(b)(1)(B) 2

Ortiz v. Fireboard Corp., 527 U.S. 815 (1999) 2

KRCP 23.02(a)(ii) 2

B. **Bonar's Withdrawal Did Not Negate The Parties' Written Agreement** 3

C. **Appellees' Current Spin On Fiduciary Duties And Conflicts Mischaracterizes Appellants' Arguments, And Contradicts Other Positions Taken By Appellees** 7

Melvin v. Preston, 2003 WL 21829182 (Ky. App., August 8, 2003) 8

D. **There Was And Is No Factual Basis Supporting The Conclusion That Bonar's Actions Harmed the Class In Any Way** 9

CONCLUSION 10

INTRODUCTION

Oh, what a tangled web we weave, when first we practice to deceive.[1]

From the moment Appellants initiated their claim of attorneys' fees, Appellees claimed - and convinced the trial court and Court of Appeals - that Appellants acted unethically by "settling individual cases" while still class counsel in the underlying class action. At the same time, Appellees were taking the exact opposite position in a KBA disciplinary proceeding with respect to Appellee Stan Chesley's own conduct. Because the trial court improperly restricted Appellants' discovery, Appellants only recently learned, from publication of the KBA proceedings, that the argument Appellees presented to the trial court and the Court of Appeals, and upon which the trial court and Court of Appeals ultimately relied, was false and misleading.

Now that the primary issue on which the trial court based its opinion has been proven, by the arguments raised in Chesley's own disciplinary case pleadings, to be wrong as a matter of law, Appellees have the unmitigated gall to suggest this court need not even address this immaterial "sub-issue". Instead, Appellees have shifted tactics and present a new set of revisionist theories which they claim support the decisions of the trial court and the Court of Appeals. Appellants will address these arguments below but respectfully state that each of these arguments misrepresents the facts of the case and the governing law.

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[1] Sir Walter Scott, Lochinvar, St. 7

ARGUMENT

A. The Underlying Class Action Was Never a Limited Funds Case.

In their response brief, Chesley, a self-proclaimed preeminent class action and mass tort lawyer, and the other Appellees herein misrepresent the nature of the underlying class action as a "limited funds" case, just as they did in the trial court and before the Court of Appeals. This is not and never was a limited funds case.

Appellees intentionally fail to define the term "limited funds" case in their brief, in the hope that this Court will buy off on their false and misleading argument that it should have been obvious to Bonar in 2003 or 2004 that the Diocese had "limited funds". A limited fund class action has been defined by the U.S. Supreme Court as a suit "aggregating 'claims ... made by numerous persons against a fund insufficient to satisfy all claims'" and has been recognized as one of a variety of suits encompassed by FRCP 23(b)(1)(B). Ortiz v. Fireboard Corp., 527 U.S. 815, 834-35 (1999). Class actions brought pursuant to FRCP 23(b)(1)(B) (an analog to KRCP 23.02(a)(ii)) have been described as "mandatory" class actions because the rule does not provide for absent class members to receive notice and to exclude themselves ("opt out") from class membership as a matter of right. Id. at 834, n.13.

Lest there be any further misunderstandings, the underlying class action sex abuse lawsuit against the Diocese of Covington was ***not*** a mandatory, non-opt out case, much less a "limited funds" case. The Class Action Complaint (Pls. Ex. 14) made no such assertion, nor did Appellees' Motion for Class Certification (Pls. Ex. 60). It was not certified in 2003 by then sitting Judge Bamberger as a "limited funds" case, and Judge Potter's 2006 Order Approving Settlement of the class action ***made it clear*** that he was

not approving the class action as a "limited funds" case.

Appellees presented no evidence at trial showing that any member of the certified class even might have received a dime less than what they would have otherwise been entitled to recover because of Appellants' individual settlements. Appellees' co-counsel, Mike O'Hara readily admitted this in his testimony. (5-11-07 VT, 12:25:00 - 12:27:00). Indeed, Appellants' trial witnesses, Chesley, Steinberg, O'Hara, and Ms. Huff, confirmed there was no way of knowing in the 2003 to 2004 time frame how much money or other assets the Diocese and its' insurers had available, much less how many class members there might be. Nobody, particularly Bonar,[2] had reason to suspect this was a limited funds case in 2003 or 2004.

Moreover, the pleadings filed in the underlying class action suit *subsequent* to this fee dispute unequivocally demonstrate that this was ***not a limited funds case***. All class members who presented valid claims received the sums to which they were entitled, and some funds were returned to the Diocese. This Court can and should take judicial notice of Judge McGinnis' Final Order of Dismissal and the other pleadings based on which it was entered. (Appx. Tab Nos. 1, 2, 3, 4, 5, and 6). Simply put, the underlying class action never was a limited funds case.

B. Bonar's Withdrawal Did Not Negate The Parties' Written Agreement

In a stunning about face from their previous briefs, Appellees suggest this Court need not consider whether Bonar acted unethically, since she voluntarily withdrew from

[2] Although Appellees make continual references that Bonar was an "insider" of the Diocese, there is simply no evidence in the record that Bonar was either an "insider" of the Diocese or that she "represented Officials of the Diocese". This is yet another "fact" fabricated by the Appellees.

the class prior to settlement. According to Appellees, this fact alone affords sufficient grounds for this Court to affirm the Court of Appeals' Opinion and the trial court's Findings of Fact, Conclusions of Law, Judgment and Order - which, as is now clear, erroneously held that Bonar *acted unethically in settling individual claims while serving as class counsel.*.

The simple fact of the matter is that Appellants withdrew from the class due to their concerns regarding Appellees' conduct in the class action. Beginning in mid-2003, Appellants observed Appellees' mistreatment of putative class members Appellants had brought to the class, including the named class representatives. In September, 2003, Bonar raised concerns because Appellees filed pleadings without giving Appellants notice or opportunity to review them. Bonar expressed concerns partially because of potential conflicts created by these pleadings, but, more importantly, because she knew that some of the assertions therein were not legally sound or factually correct. Bonar made this precise point in her letter of September 22, 2003 to Steinberg[3] and also explained the detail and basis for her concerns to Stan Chesley, who reassured her by phone the next day that she did **not** have a conflict and should not withdraw. (5-9-07 VT, 8:54:22 - 8:55:45).[4]

Appellees selectively paraphrase Bonar's September 22, 2003 letter to paint a misleading picture of what happened. They also fail to reference Mr. Steinberg's own reply letter where he states, "We understand you are in an uncomfortable position ...but

[3] Pls. Trial Ex. 76.

[4] Mr. Chesley, in this situation, as in almost all situations pertaining to this entire case, simply professes to

we cannot see that you have any ethical conflict". (Pls. Ex. No. 77). The evidence shows that Bonar raised concerns regarding a potential "conflict" in 2003, but that these concerns were resolved based on Appellees representations to her. Bonar even confirms the resolution of this conflict in her September 24th reply letter to Steinberg. (Pls. Ex No 80).

In short, and as has been their practice throughout this litigation, Appellees utilize their own peculiar brand of purely revisionist history to present extremely limited excerpts from documents in an attempt to portray Bonar, *ex post facto*, as an unethical and impossibly conflicted lawyer, when the truth is that Bonar attempted to do exactly what any ethical attorney would and should do under the circumstances - raise her ethical concerns with her co-counsel of record. In response, the Appellees told her she had no ethical conflict and could continue serving as co-counsel for the class. Appellees' efforts to now convince the Court that this resolved conflict was Appellants' grounds for exiting the case months later would be laughable, were it not so repugnant and contemptuous.

Additional issues continued to arise shortly after the October 1, 2003 class certification hearing which ultimately led to Bonar's decision to so withdraw.[5] For example, after the October 1, 2003 certification hearing, Appellees continued to file

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having "no recollection" of any such conversation with Bonar. (5-8-07 VT, 8:15:45 - 8:48:40).

[5] Of course, once the case was certified as a class action, Appellees clearly had no further need or use for Appellants. Appellees were now in the driver's seat as lead counsel for this now certified class action. Appellees reportedly had been signing up numerous victims to participate in the class action, but refused to provide Appellants with any information regarding these clients and refused to provide Appellants with copies of the agreements Appellees had entered into with these clients. Presumably, this was because Appellees representation agreements with these clients constituted an individual fee agreement between WSBC and the individual clients, as opposed to a contract between all Class Counsel and those clients. See, e.g, Pl. Ex. 118

additional pleadings and papers with the Court without first giving Bonar the opportunity to review and approve same. Some of these pleadings and papers related directly to the Defendants' Motion to Recuse filed on November 12, 2003, wherein the Diocese sought the voluntary recusal or disqualification of Judge Bamberger, in large part because of his close personal relationship to trial consultant Mark Modlin.(Pl. Ex. No. 122). Bonar once again did what one would expect an honest and ethical attorney to do; she immediately and directly raised her concerns with her co-counsel of record. (See, e.g. Pl. Ex. No. 122).

During this same time period, Bonar and Steinberg exchanged other letters relating to Greg Harvey's desire to opt out of the class action and to pursue his individual claims with Bonar as his attorney and to address other concerns. Steinberg's response to Bonar's concerns was telling. Steinberg complained that Bonar's letters were "a tremendous distraction at a time when I am trying to complete a brief in this case to the Kentucky Supreme Court. At your request, I have left your name off the briefs relating to disqualification of Judge Bamberger." (Pls. Ex. No. 140).

Appellees also conveniently ignore the contemporaneous transmittal letter Bonar sent to Appellees as she filed her Motion to Withdraw with the Court, clearly identifying her precise reasons for withdrawing. These reasons included Appellees' continued actions designed to force her resignation; Appellees' changed position regarding representation of individual clients; Appellees' differing and hostile treatment of Appellants' clients in comparison to clients who signed contracts with Appellees; and Appellees' most recent derogatory statements directed towards original class representative Greg Harvey in Appellees' Motion for Leave to Amend Complaint, all of

which left Bonar no choice but to withdraw as class counsel. (See, January 9, 2004 letter from Bonar to Chesley and Steinberg, Pls. Ex. No. 152, and Amended Motion For Leave to Amend Complaint, Pls. Ex. No. 151).

C. Appellees' Current Spin On Fiduciary Duties And Conflicts Mischaracterizes Appellants' Arguments, And Contradicts Other Positions Taken By Appellees

Appellees maintain that, even if Bonar had not voluntarily withdrawn, she was disqualified due to her "conflicts" in representing individuals while remaining class counsel. In doing so, Appellees first mischaracterize Bonar's legal arguments in order to create the "straw man" argument that Bonar still misunderstands the nature of the responsibility she undertook when she agreed to act as class counsel. Contrary to what Appellees would like this Court to believe, Bonar has never argued, nor does she argue here, that her duties to her individual clients were totally independent of, and unaffected by, her duties to the class. What Bonar has argued, and continues to maintain, is that her duties to her individual clients were no less important, nor did they simply evaporate, once she became attorney for the class, and that her duties to her individual clients were concomitant with and not mutually exclusive of her duties to the class.

It should be noted once again that the parties' written fee splitting agreement expressly recognized and provided that both parties would be permitted to continue to represent their individual clients separate and apart from the class action, and that, if certified, these individual clients could still elect to "opt out" and pursue their individual claims using Appellants, Appellees or other counsel of their choice. For Appellants to now argue that this "deal", which they primarily negotiated and drafted, was unethical

when it was made, is patently absurd. This is particularly so where Stan Chesley has argued the opposite in his discipline case, and where Appellees own witnesses at this trial, Steinberg and O'Hara, testified that they had researched this precise conflict issue *ab initio* and concluded just the opposite, i.e. that Appellants and Appellees both owed fiduciary duties to their individual clients and therefore not only ethically could but should continue representing their own individual clients outside the class action. (5-9-07 VT, 02:04:05 - 02:05:11; 5-11-07 VT, 12:11:24 - 12:12:47).[6]

Lastly, Appellees' contention that Bonar negotiated individual settlements for individual clients "behind appellees' backs" is yet another falsehood. The clear and incontrovertible evidence, consisting of a plethora of emails and letters exchanged between Appellees and Appellants, demonstrated beyond all doubt that Appellees absolutely knew that Bonar was settling individual claims for individual clients (including the two initial class representatives, Greg Harvey and Maria Caddell) and authorized her to do so.[7] Numerous trial exhibits also went directly to this point.[8]

As already stated, Appellees' arguments of "irreconcilable conflicts" regarding individual settlements, cannot be squared logically or legally with the positions taken by Appellee Chesley in his own bar disciplinary proceedings. What these arguments do support is Appellants longstanding position that the trial court improperly restricted pre-

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[6] The unpublished opinion in Melvin v. Preston, 2003 WL 21829182 (Ky. App., August 8, 2003) is particularly instructive here. Appellees should not now be permitted to argue the precise opposite of the ethical position they took when they entered into the fee splitting agreement with Bonar in the first place.

[7] As just one example, Appellee Steinberg informed Bonar in a Nov. 26, 2003 letter (Pls. Ex. 140) that, "Greg [Harvey] can remain a class member or he can settle individually represented by yourself. As I have told you before, there is nothing preventing him from settling his case if he wishes to do so".

[8] See, e.g., Pls. Trial Exhibit Nos. 61, 62, 63, 65, 66, 69-73, 81-88.

trial discovery and trial evidence on a highly material issue.

D. There Was And Is No Factual Basis Supporting The Conclusion That Bonar's Actions Harmed the Class In Any Way

Appellees also argue, again without any supporting proof, that Bonar's private e-mail and verbal communications with Diocese counsel Carrie Huff relating to the possible settlement of Bonar's individual clients' claims, and Bonar's alleged participation in press releases relating to settlement of some of these individual clients' claims, prove that Bonar somehow "harmed the class".

The communications between Bonar and Huff in question were just that - private and confidential communications relating to a possible settlement of clients' claims. None of these communications were intended to be, nor were they, shared with the public. Nothing contained in these purely private settlement-related communications between Bonar and Ms. Huff, even when completely taken out of context, as Appellees have done, could have possibly harmed the class in any way.

As Ms. Huff admitted at trial, at such time in the class action, she constantly aired her personal concerns and even hostilities toward Appellees for what she considered to be extremely unprofessional and even unethical actions by them. Her e-mail communications were no exception. Although there was mutual frustration between Appellees and Appellants, evidenced by private communications during that same time period, there was also outward antagonism between Appellees and Diocese counsel, played out daily in the press. The Appellees in return made strong and extremely antagonistic public statements in an obvious effort to dissuade individual claimants from

opting out and pursuing settlement of their individual claims with the Diocese.

As to Bonar's statements, although the private communications are evidence of mutual frustration between the attorneys, ***there is absolutely no evidence that Bonar or her firm took any act at any time to harm any member of the class action.***

With respect to the arguments regarding Bonar participating in adverse publicity, Appellants would simply ask that this Court actually review the various news articles themselves in their entirety. Appellants respectfully submit that there is nothing contained in any of these articles properly attributed to Bonar that can possibly be said to have in any way damaged the class. (Pls. Ex. Nos. 89, 93, 94, 101, 146, 147, 148, 156-157, copies of which have been appended hereto at Appx. Tab 7 for the Court's convenience).

CONCLUSION

The trial court's rulings were clear error and must be reversed and remanded.

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