Supreme Court of Kentucky

CASE NO. 2010-SC-00087-D

ON APPEAL FROM BOONE CIRCUIT COURT
NO. 03-CI-00181
and
KENTUCKY COURT OF APPEALS
NO. 2007-CA-001374

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

v.

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

BRIEF FOR APPELLEES

Respectfully submitted,

Sheryl G. Snyder
Griffin Terry Sumner
J. Kendrick Wells IV
Frost Brown Todd LLC
400 W. Market Street, 32nd Floor
Louisville, KY 40202
Counsel for Appellee, Stanley M. Chesley

James M. Gary
Weber & Rose, P.S.C.
471 W. Main Street, Suite 400
Louisville, KY 40202
Counsel for Appellees, Waite, Schneider, Bayless & Chesley Co., L.P.A. and Robert A. Steinberg and co-counsel for Stanley M. Chesley

CERTIFICATE OF SERVICE

It is hereby certified that copies of this Brief for Appellees were served by U.S. Mail this 16th day of May, 2011, to: Wm. C. Rambicure, Christopher B. Rambicure, Rambicure Law Group, P.S.C., 219 E. High St., P.O. Box 34188, Lexington, KY 40588-4188; Thomas E. Clay, Clay Frederick Adams PLC, 101 Meidinger Tower, 462 S. Fourth St., Louisville, KY 40202; Stephen D. Wolnitzek, Wolnitzek & Rowekamp, 502 Greenup, Covington, KY 41011; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; and Hon. Anthony W. Frohlich, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Ln., Rm. 141, Burlington, KY 41005.

Counsel for Appellees

INTRODUCTION

Appellant Bonar voluntarily withdrew from representing the class because the class's claims against the Diocese conflicted with the interests of officials of the Diocese whom Bonar was simultaneously representing. The Special Circuit Judge held that Bonar's voluntary withdrawal as co-counsel for the class, and her representation of interests in conflict with the interests of the class, barred her claim to share in the attorneys' fees awarded to class counsel. The Court of Appeals affirmed.

STATEMENT CONCERNING ORAL ARGUMENT

While Appellees believe that the legal issues before the Court are straightforward and the relevant authority clearly supports the results reached by the Boone Circuit Court and the Kentucky Court of Appeals, in light of Appellants' efforts to misdirect the Court's attention from the controlling facts, Appellees believe that oral argument may be useful to the Court's decision making process in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellants, attorney Barbara D. Bonar and her law firm, B. Dahlenburg Bonar, P.S.C. (collectively "Bonar" or "Appellants"), seek an award of a portion of the attorneys' fees allocated to class counsel by the Boone Circuit Court in *Doe v. Roman Catholic Diocese of Covington*, a child sexual abuse class action lawsuit. Appellees, Waite, Schneider, Bayless & Chesley Co., L.P.A. ("WSBC") and two of its lawyers, Stanley M. Chesley and Robert A. Steinberg (collectively "Appellees"), were lead counsel for the class in *Doe*.[1]

Following a three day trial on this fee dispute between Bonar and Appellees, Special Judge Robert W. McGinnis ruled that Bonar was not entitled to any fee in connection with the *Doe* case. A unanimous panel of the Kentucky Court of Appeals affirmed.

This Court should also affirm.

Bonar's conflicts of interest and withdrawal as class counsel.

Chief among the reasons that Judge McGinnis denied Bonar's fee request was the fact that Bonar voluntarily withdrew from the *Doe* case less than a year after it was filed, due to her representation of interests in conflict with the interests of the class.[2]

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[1] Ann B. Oldfather and Michael O'Hara were co-counsel for the class with Appellees. Bonar did not sue attorneys Oldfather and O'Hara in connection with Bonar's claim for fees from the *Doe* settlement. Bonar attempted to assert claims against attorneys Chesley and Steinberg individually, but the parties subsequently entered into an agreed pre-trial order specifying that WSBC was the sole proper defendant and Bonar filed an amended complaint naming WSBC as the sole defendant. Bonar nonetheless argued to the Court of Appeals that the trial court forced her to dismiss her claims against Chesley and Steinberg, but the Court of Appeals found "no merit" in that argument. *Bonar v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 2007-CA-001374-MR (Ky. App., Oct. 16, 2009) ("Ct. App. Op.") at 10, copy attached as Appendix A. Bonar has not raised those issues in this appeal.

[2] RA 1424-30: Findings of Fact, Conclusions of Law, Opinion and Judgment ("Cir. Ct. Op."), 6/1/07, at 3, copy attached as Appendix B.

In connection with their motion for class certification, class counsel filed a brief containing evidence that the Diocese continued to allow sexual predators to remain in positions that involved contact with children.[3] Bonar's name was on the brief as co-counsel for the class.

Bonar promptly wrote a letter to Appellee Steinberg, stating that the brief put her "in an extremely uncomfortable position with many of my clients and peers...."[4] Bonar wrote that her "primary concern" was the "apparent attacks on existing school programs in the diocese."[5] As Bonar went on to explain, she was "uncomfortable" because of her deep personal and professional ties to the Diocese: "I am a supporter, volunteer, and member of many of these programs, and ***my law practice involves clients, witnesses, and other persons who are administrators, board members, and personnel in many of the current Diocese of Covington school programs.***"[6] As a specific example, she mentioned one of her clients who was a Board member at the Covington Latin School (which is run by the Diocese): "The example I gave you this morning... is my client who is a present Board member at the Covington Latin School. He was clearly involved in making the decision to place Fr. Arbogast [an alleged abuser] on the faculty at Latin School."[7]

Bonar had not previously reported this conflict of interests to Appellees.[8]

Two days later Bonar wrote to Steinberg: "***[T]he client base I have built over the past twenty (20) years is largely from the Catholic community***, and any implication of

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[3] Def. Trial Ex. 67 at 7-10. Copies of Bonar's relevant correspondence are attached as a collective Appendix C.

[4] Def. Trial Ex. 68 (VR 5/9/07; 02:34:12-48).

[5] *Id.* (emphasis in original).

[6] *Id.* (emphasis added).

[7] *Id.*

[8] VR 5/9/07; 11:08:30.

wrongdoing toward a **current** Catholic school program has the risk of placing me in a conflict."[9] Bonar explained: "Because the brief itself indicates a position which could be interpreted as ***contrary to some of my clients' interests***, I need to separate myself from the filing. .... I must request that my name not be placed on any further filings without my specific consent."[10]

Bonar publicly disavowed any connection with class counsel's brief, contemporaneously filing with the court a "Notice to Clarify the Record" in which Bonar stated that "although she is named as attorney of record in this case, she did not participate in the drafting, reviewing, or filing of [class counsel's memorandum] and its attachments."[11]

A few months after class certification was granted,[12] Bonar filed a motion to withdraw as counsel for the class in *Doe*, because continuing as class counsel conflicted with the interests of her many Diocese-related clients.[13] In the affidavit she filed with her motion, Bonar stated: "recent changes in the composition of the class members have created ***a conflict of interest for Affiant***, prohibiting Affiant from continuing as class counsel."[14] Despite Bonar's euphemistic reference to "recent changes in the composition of the class members," Bonar did not state any reason for her withdrawal other than the previously admitted conflicting interests of the class and her Diocese-related clients.

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[9] Def. Trial Ex. 70 (italicized emphasis added; bolded emphasis in original).

[10] *Id.* (emphasis added).

[11] Def. Trial Ex. 71.

[12] VR 5/8/07; 01:13:25.

[13] Motion to Withdraw, included in Def. Trial Ex. 108.

[14] Bonar Affidavit, attached to Motion to Withdraw, included in Def. Trial Ex. 108 (emphasis added). A copy is attached as Appendix D.

Despite having withdrawn on the basis of her conflicts, Bonar suggests in her brief to this Court that she had "no alternative but to withdraw" because Appellees tried to force her out of the case and were treating Bonar's clients differently than other class members. Appellants' Brief at 17. Judge McGinnis did not find this assertion to be credible and he specifically ruled: "***Ms. Bonar was not forced out of the action***, her withdrawal as clients' counsel was voluntary and not caused by the action of WSBC...."[15] The trial testimony and sworn affidavit filed by lead counsel for the Diocese, Carrie Huff,[16] completely refutes Bonar's contrived, after-the-fact effort to rewrite history: "Ms. Bonar claims that soon after the *Doe* class was certified, 'WSBC swiftly and intentionally forced Ms. Bonar's class representatives from the class, replacing them with their own clients.... [and] used such client replacement to then force her to withdraw from the class action.' .... ***This characterization of events is significantly at odds with what she told me at the time.***"[17] Huff further stated: "I saw no evidence whatsoever that Ms. Bonar was being unwillingly excluded from representation of the class. To the contrary, ***she appeared to be trying to curry favor with the Diocese and with me by distancing herself from the Class Action.***"[18] In fact, Huff testified she specifically told Bonar that if she wanted to settle individual cases, she should distance herself from class counsel.[19]

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[15] VR 5/11/07; 13:52:06 (emphasis added); Opinion, 6/1/07, at 2. Bonar also asserted at trial that she withdrew because she was uncomfortable with what she perceived as improprieties in connection with Judge Bamberger's class certification ruling. Judge McGinnis rejected that assertion as well, describing it as a "smoke screen." VR 5/11/07; 13:46:57.

[16] Mayer, Brown, Rowe & Maw LLP, Chicago, admitted *pro hac vice* in the *Doe* case in September 2003.

[17] Huff Affidavit, Def. Trial Ex. 126. at ¶ 12 (emphasis added). A copy is attached as Appendix E.

[18] *Id.*

[19] VR 5/8/07; 12:30:30.

Bonar's outright attacks against the class action after she withdrew.

The obvious conflict between the interests of the class and the interests of Bonar's Diocese-related clients was sufficient to disqualify her from representing the class had she not voluntarily withdrawn, and make it clear that she was ethically precluded from serving as class counsel in the first place. But Bonar's conduct went far beyond these significant conflicts of interest. The evidence shows that she was openly hostile toward the class action and actively strove to undermine the interests of the class – a position not coincidentally consistent with the Diocese's efforts to fight class certification and settle with the victims individually.[20]

For example, in an e-mail to Diocese counsel Carrie Huff, Bonar wrote: "I'm doing my best to get these cases settled ***in accordance with the plan the Diocese has set forth***...."[21] In another e-mail to Huff, Bonar wrote: "[M]ost of my clients are getting restless. The news stories [about the class action] caused my clients who did not settle to be more anxious, and to ask more questions. I get questions daily about the class now. .... ***I am continuing to assure them they are much better off in settling individually as opposed to opting with the class.***"[22] Urging Huff to promptly finalize an individual settlement with an opt-out she represented, Bonar wrote to Huff: "I'm telling you, there are victims pulling out of the class, and you really need to execute on that, and send the message to others that that's okay."[23]

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[20] The Diocese fought against the certification of the *Doe* class and stated publicly that it would only settle with individual victims, not with the class. VR 5/8/07; 01:32:59.

[21] Def. Trial Ex. 7 (emphasis added). Copies of Bonar's relevant e-mails to Huff are attached as a collective Appendix F.

[22] Def. Trial Ex. 6 (emphasis added).

[23] Def. Trial Ex. 9.

In other e-mails to Huff, Bonar revealed her related concern about losing clients – and fees – to the class action: "As you know, [one of the claimants] is gone to the class. [Another claimant] is on his way out the door, and I'm concerned that a couple more will follow. .... It's discouraging to keep losing my clients, and reducing my fees on the few that remain, when I know how insistent Stan [Chesley] will be that he get a premium for his fees for every client."[24] In that same e-mail, regarding another claimant, Bonar stated: "he's been pumped up about the class assurances, but I've talked to him and his parents for 3-4 hours yesterday, and I'll continue to talk tomorrow."[25] In yet another e-mail to Huff, Bonar stated: "I still have concerns I will lose my clients to the class. The reality is that the class action is what manages to get the press, no matter what. I hope you can reconfirm that the Diocese is committed to settling these individual claims."[26] Huff testified that her perception at the time was that Appellees were still trying to "beef the class up."[27] Huff testified that WSBC was fighting hard to retain class members in order to keep class numbers up, and that Bonar therefore wanted to be relieved of her class counsel role.[28]

In addition to secretly colluding with the Diocese, Bonar was also fighting the class action in the press. The publicity over Bonar's opt out settlements – in the news media and by word of mouth – was intended to encourage other class members to opt out

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[24] Def. Trial Ex. 8. In reality, the reverse is true. Bonar's records verify that she performed little to no work and incurred few, if any, expenses in settling the 25 individual cases, while charging contingency fees up to 40%. Plntff. Trial Ex. 234. By contrast, class counsel in *Doe* spent over 20,000 hours on the case, fronted expenses of over $1 million, and were awarded fees of 22%, which were not received until each claimant was paid, beginning in 2006. VR 5/9/07; 10:27:20-48; 01:16:00; 1:24:10; 11:58:00.

[25] Def. Trial Ex. 8.

[26] Def. Trial Ex. 5.

[27] VR 5/8/07; 1:26:23.

[28] VR 5/8/07; 01:17:46; 01:07:00; 01:25:44.

of the class, which could ultimately have threatened the continued viability of the class action.[29]

The evidence also demonstrates that Bonar was actively courting the media to attack the class action, even while she was still class counsel of record. On October 20, 2003 – before filing her motion to withdraw – Bonar wrote to Huff: "I'M FIGHTING OUTSIDE FORCES NOW, AND AM LOSING CONTROL OVER MY CLIENTS EVERYTIME A NEW STORY ON THE CLASS TAKES PLACE! I did put in a call to the Post, by the way, and left a voice mail for Kakie based just on what we talked about. .... Stan [Chesley] knows how to charm and enamor, and it's a tough battle to fight."[30]

A December 5, 2003 article in *The Kentucky Enquirer* about one of Bonar's individual settlements ran with the headline: "Accuser settles with diocese; Lead plaintiff gets out of class-action lawsuit."[31] The client was quoted, anonymously, as stating: "I personally am extremely relieved to no longer be a named class member in the... lawsuit against the Diocese of Covington."[32] A contemporaneous article ran in *The Kentucky Post* with the headline: "Diocese settles 4 more claims."[33] Bonar provided quotes for the article:

> The eight victims in the other cases that were settled were represented by Covington attorney Barbara Bonar, who also is involved in the class-action lawsuit. She said several of her clients specifically have told her they want to go alone. "It's just such a personal thing," she said. "I just

[29] Judge McGinnis specifically noted this in his final opinion: "[Bonar] engaged in negative publicity about the class (which may have resulted in the withdrawal of innumerable class members)...." Cir. Ct. Op. at 6.

[30] Def. Trial Ex. 7 (all caps in original).

[31] Def. Trial Ex. 105.

[32] *Id.*

[33] Def. Trial Ex. 106.

> sat with another client in my office today who hasn't settled, and he just sat there and cried."[34]

Bonar's intended message to other class members was clear: if you want to settle your claims, avoid the class action – and hire me.

Even after she withdrew as co-counsel in *Doe*, Bonar continued to act against the interests of the class, her former client. Bonar urged Huff to get the class decertified.[35] In Huff's words: "On several occasions ***she excoriated me for failing to seek decertification of the class*** from the Judge appointed to replace Judge Bamberger[36] and for not standing up vigorously enough to class counsel or the judge."[37] Huff further stated that she "never once heard [Bonar] advocate for or even speak favorably of the class. In fact, she frequently dismissed the victims who actively participated in the class as an irreversibly hostile remnant who were being manipulated by her co-counsel and who ultimately wanted to destroy the Diocese."[38]

Bonar's settlement of individual claims against the Diocese.

Meanwhile, Bonar settled the individual claims of twenty-five sexual abuse victims, with the Diocese paying a total of more than $4.7 million – an average of nearly $190,000 per claimant.[39] The trial court's *in camera* review of Bonar's records confirmed that she collected more than $1.3 million in fees from the Diocese in those settlements.[40]

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[34] *Id.*

[35] VR 5/8/07; 01:29:13.

[36] Special Judge Potter

[37] Def. Trial Ex. 126 at ¶ 17 (emphasis added); *and see* VR 5/8/07 01:30:10.

[38] Def. Trial Ex. 126 at ¶ 17.

[39] Def. Trial Ex. 126. at ¶¶ 5, 10.

[40] RA 1424-30: Cir. Ct. Op. at 3, Appendix B.

The testimony of Diocese counsel Huff refutes Bonar's attempts to portray these as hard fought settlements. Huff stated in her affidavit: "We made it clear to her that we were absolutely committed to settling the claims – the only question was an appropriate settlement amount. Calculated at an hourly rate, the compensation Ms. Bonar received for negotiating virtually risk-free settlements on behalf of all but a few of those 25 claimants is simply staggering."[41]

Moreover, these were not merely settlements on behalf of clients Bonar represented before the class action was commenced. The Diocese ***directly referred*** a number of the victims to Bonar – including the three most serious abuse cases Bonar settled, for $450,000 each – specifically ***because*** the Diocese was prepared to settle their claims.[42] As Huff acknowledged at trial, the funds for the individual settlements and the class settlement "came out of the same pot, basically."[43]

The *Doe* settlement.

The *Doe* class settled with the Diocese in May 2005.[44] Senior Judge Potter entered his order approving the settlement on January 31, 2006.

The settlement contemplated approximately $80-85 million would be available to the class. If the total amount was not sufficient to satisfy the claims of all class members, all claims would be "ratcheted down."[45] Judge Potter specifically noted in his order that

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[41] Def. Trial Ex. 126 at ¶ 11.

[42] *Id.*

[43] VR 5/8/07; 01:11:30.

[44] VR 5/8/07; 01:27:10.

[45] Order approving settlement in *Doe v. Roman Catholic Diocese of Covington*, Plntff. Trial Ex. 207, at 7.

he expected the claims would, in fact, need to be ratcheted down to accommodate all claims within the settlement amount.[46]

Upon Appellees' motion, Judge Potter appointed two Special Masters to administer the settlement fund: (1) Judge Thomas Lambros, retired Chief Judge of the U.S. District Court for the Northern District of Ohio and a former state court judge with extensive experience in managing national class action litigation, and (2) William Burleigh, a nationally known businessman who was the Chairman of Scripps, Inc. and a former member of the National Review Board for the U.S. Conference of Catholic Bishops, where he co-authored a report on the Church sexual abuse crisis prepared by the Board for the Protection of Children and Young People.[47] Using an established four-tier schedule that placed each class member into one of four categories based solely upon the nature and severity of the abuse endured, the Masters allocated the fund among the class members. If a class member wished to challenge his or her settlement amount under the schedule, he or she was permitted to appeal to an Appeals Special Master, Judge Robert Duncan, a former justice of the Supreme Court of Ohio who also served on the United States Military Court of Appeals and as a U.S. District Court Judge for the Southern District of Ohio.

The fee dispute and proceedings below.

At the outset, Steinberg and Bonar negotiated her share of the attorneys' fees for class counsel in the *Doe* case.[48] Bonar initially requested that she receive 10% of the

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[46] *Id.* at 10.

[47] *See* VR 5/11/07; 11:25:50.

[48] VR 5/9/07; 1:37:50; 1:51:40.

total attorneys' fees awarded.[49] In a letter to Bonar dated February 6, 2003, Steinberg wrote: "This letter will confirm our agreement that you will participate as co-counsel in this case. We have agreed that the fees you 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 the net fees received in the case."[50] On February 10, 2003, Bonar responded by e-mail, stating: "I received your 'co-counsel' letter, ***and it looks fine***...."[51]

Shortly after he approved the *Doe* settlement, Special Judge Potter considered the issue of attorneys' fees for class counsel. At that time – three years after she confirmed in writing to Steinberg that his letters accurately stated their agreement that she would receive 10%-7%-5% of the fees awarded to class counsel – Bonar filed a petition for an award of attorneys' fees directly to her, separate from the petition by the lawyers who had continued to be class counsel through the mediation and settlement.[52]

Unabashed at having withdrawn as co-counsel for the class due to her conflicts of interests, Bonar requested that she be awarded a fee equal to ***15% of the entire class settlement fund – approximately $12.5 million.***[53] She requested that she be paid 7.5% for her work as class counsel prior to her withdrawal. And – amazingly, given her conflicts of interest which she had told the trial court prohibited her from representing the

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[49] VR 5/9/07; 01:37:55.

[50] Def. Trial Ex. 7.

[51] Def. Trial Ex. 9 (emphasis added). The fee negotiations are further documented in Def. Trial Ex. 6; Def. Trial Ex. 10; Def. Trial Ex. 16; Def. Trial Ex. 19; Def. Trial Ex. 20; Def. Trial Ex. 23; Def. Trial Ex. 24; Def. Trial Ex. 26; Def. Trial Ex. 27; Def. Trial Ex. 29; Def. Trial Ex. 30.

[52] RA 23-45: Fee Petition. At the Court's suggestion, and the parties' agreement, a separate case was created to address the attorney fee dispute. VR 3/9/07; 10:35:31-10:38:40. Bonar then filed a complaint. *See also* RA 627-40: Complaint.

[53] RA 23-45: Fee Petition.

class[54] – she asked to be appointed as Special Counsel to administer the allocation of the settlement fund and to be paid another 7.5% of the entire settlement fund for her anticipated work as settlement administrator.[55]

Special Judge Potter refused to appoint Bonar as the settlement administrator and refused to consider her separate application for a 7.5% fee ostensibly for her representation of the class prior to her voluntary withdrawal as co-counsel for the class. Instead, the issue of Bonar's entitlement, if any, to a portion of the fees awarded to class counsel was deferred while Judge Potter decided the aggregate attorneys' fees to be awarded to class counsel.

Having been denied her request for 15% of the $84 million settlement fund, Bonar then changed her position and asserted that Mr. Chesley had verbally agreed four years earlier to give Bonar 50% of the attorneys' fees received by his law firm, WSBC. Even though she conceded that this purported 50/50 agreement preceded the 10/7/5% agreement she negotiated with Mr. Steinberg, Bonar persisted in making a claim to 50% of WSBC's share of the fees awarded to class counsel.

Judge McGinnis found as a fact that Bonar's story was simply not credible: "That's pie in the sky. It's obvious that Bonar and Chesley were not even in the same room participating in the discussion on the same phone line, because that's impossible, you could not get that kind of fee."[56] He continued: "Why in the world would a large

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[54] *Id.*

[55] *Id.* In an effort to explain to the trial court why she should get over $12 million in fees, Bonar asserted that she was "the primary counsel initiating, developing, prosecuting and settling this class action...." *Id.* at 10. That contention was absolutely refuted by every other attorney involved in the settlement, including the Diocese's lead counsel, Carrie Huff, who testified: "Barbara was not involved at all, in any way, in the class settlement negotiations. .... Barbara was nowhere to be seen." VR 5/8/07; 01:28:01; 01:28:26.

[56] VR 5/11/07; 13:38:57; *and see* RA 1424-30: Cir. Ct. Op. at 4, Appendix B.

firm dealing with [a] class action that's going to pick up the tab, and has all the experience in the case, give up more than half the fee? It's impossible."[57]

In her brief to this Court, Bonar pretends that the fee dispute has always been about the 10/7/5% agreement, totally ignoring her application for a fee equal to 15% of the entire settlement fund, and totally ignoring her claim in the trial court to 50% of the fees received by WSBC.

The lower courts' decisions.

The parties agreed to create a separate case for the fee dispute and signed an agreed pre-trial order that outlined the issues to be tried by the Circuit Court: "(a) whether Plaintiffs are entitled to any attorney fee, and if so (b) the amount of said attorney fee, for services performed in *John Doe v. Roman Catholic Diocese of Covington*."[58]

The case was tried before Special Judge McGinnis on May 8, 9, and 11, 2007. After the close of evidence, Judge McGinnis announced his decision in favor of WSBC, determining that Bonar was not entitled to any portion of the fee awarded to class counsel in the *Doe* settlement.[59] The trial court's formal Findings of Fact, Conclusions of Law, Opinion and Judgment were entered on June 1, 2007.[60] The trial court held:

- A lawyer can withdraw from a contingency fee case at any time on her own accord. If she does so, she forfeits her fee.
    - Bonar's withdrawal as class counsel was voluntary and she was not forced out by WSBC. She withdrew due to her conflict of interest.

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[57] *Id.*

[58] RA 1076-80: Order, 4/24/2007.

[59] VR 5/11/07; 13:33:43-13:55:42. For ease of reference, an unofficial transcript of the Court's ruling from the bench, transcribed by a court reporter from the videotape of the proceedings, is attached as Appendix G.

[60] *See* RA 1424-30: Cir. Ct. Op., Appendix B.

- Because Bonar voluntarily withdrew, she is not entitled to a fee.

- If a lawyer is discharged for cause, she cannot receive a fee.
  - Bonar's numerous ethical violations contrary to the interests of the class constituted grounds for her removal as class counsel and thus she cannot receive a fee.

- A lawyer who is discharged without cause in a contingency fee case may be equitably entitled to fee measured by *quantum meruit* – not the fee set forth in her contract.
  - Even if the trial court had found that Bonar was forced to withdraw and had not acted against the interests of the class, she would not be equitably entitled to a share of the fees received by WSBC because the $1.3 million in fees that she actually received in the settlement of the individual claims of class members exceeded the amount to which she might be entitled in *quantum meruit*.

These rulings are fully supported by the law and the evidence.

Bonar appealed from the judgment and the Kentucky Court of Appeals unanimously affirmed Judge McGinnis' rulings on all counts.[61]

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Kentucky Court of Appeals on any one of these three, independently sufficient grounds for affirmance.

Bonar voluntarily withdrew as class counsel well before the settlement was negotiated, and is not entitled to receive a fee. It is black letter law that a lawyer in a contingency fee case who voluntarily withdraws from representing the class before the case is over does not receive any portion of the fees awarded to class counsel. Bonar

[61] *See* Ct. App. Op., attached as Appendix A. During the course of the appeal, a decision was delayed by Bonar's attempts at various procedural maneuvers, including multiple belated motions for a new trial (almost two years after the judgment), motions to recuse the trial judge (after denial of an untimely new trial motion), and motions to reconsider various rulings in both the trial and appellate court. All were denied. *See, e.g.*, Order of September 17, 2009 (Boone Cir. Ct.) (recounting the convoluted procedural history and denying last motion to reconsider), included in Court of Appeals record in this appeal and attached as Appendix H. Those rulings are the subject of another appeal (No. 2009-CA-1819-MR), currently held in abeyance pending resolution of this appeal.

voluntarily withdrew from this case based on admitted conflicts of interest between the class and her Diocese-related clients. In her sworn affidavit in support of her motion to withdraw, Bonar stated that these conflicts prohibited her from continuing to represent the class. Therefore, she does not receive a fee.

Even if Bonar had not voluntarily withdrawn, her breach of duties owed to the class would have justified her removal and thus she is not entitled to a fee. A lawyer discharged by her client for cause is not entitled to a fee. If she had not voluntarily withdrawn, Bonar should have been disqualified from representing the class, the equivalent of being discharged for cause. Bonar violated her ethical responsibilities by accepting a representation that, from the beginning, was riddled with professional and personal conflicts of interests due to her deep connections with the Covington Diocese, and her concurrent representation of Diocese officials. But this was not a passive conflict: Bonar aggressively acted against the interests of the class by actively encouraging claimants to opt out of the class and by attacking the class publicly, in the media, and privately, in communications with the Diocese's lead counsel. Had Bonar not withdrawn from the case, she would have been disqualified, and she is there not entitled to any fee.

Judge McGinnis decided in his equitable discretion that Bonar was not entitled to any fees in *quantum meruit* in addition to the $1.3 million she had already received. When a client discharges a lawyer without cause, the lawyer's fee is measured by *quantum meruit* and not by the contract. Thus, even if it were believable that Bonar was forced to withdraw, she would not be entitled to the contractual 10/7/5% pursuant to the letter agreement. The ***most*** that Bonar could be entitled to would be a fee based in

quantum meruit. But *quantum meruit* is an equitable remedy and Special Judge McGinnis exercised his equitable discretion and denied Bonar any additional fees because she had already received more than $1.3 million in attorney's fees from the Diocese by settling individual claims outside of the class action. He determined that $1.3 million exceeds any fee to which she would be equitably entitled for her minimal work for the class.

As the Court of Appeals concluded, Judge McGinnis' rulings on each of these issues is consistent with the law and completely supported by the evidence in the record.

Judge McGinnis' discovery rulings do not entitle Bonar to a new trial. By limiting discovery to issues directly relevant to the dispositive question whether Bonar was entitled to a fee, and by limiting or prohibiting discovery into collateral issues and irrelevant matters concerning Appellees' conduct in unrelated cases, Judge McGinnis did not abuse his discretion.

Finally, Bonar claims that she was denied a fair trial because of Judge McGinnis' comments during trial regarding the Kentucky Bar Association's request for the case file. But this was a bench trial, and Judge McGinnis could not possibly prejudice himself by his own statements. Moreover, Bonar never raised the issue with Judge McGinnis nor moved for his recusal, and thus she has waived the issue for purposes of the appeal.

Accordingly, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. Bonar was properly denied an attorney's fee in the *Doe* class action settlement because she voluntarily withdrew as class counsel long before the end of the case.

A. Bonar voluntarily withdrew as class counsel and therefore she is not entitled to receive an attorney's fee.

It is black letter law that ***an attorney in a contingency fee case who voluntarily withdraws from representing a client before the case is over does not get a fee.*** Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* vol. 1, § 8.22 (3rd ed., Aspen 2010) ("If... the representation has proceeded notwithstanding a serious conflict of interests that the lawyer should have avoided, the lawyer not only will not be entitled to payment of accrued fees, but also may forfeit them."); 7A C.J.S. *Attorney & Client* § 360 (2011) ("[A]n attorney who voluntarily withdraws from a case without good cause forfeits recovery of compensation for services performed, and he or she may not recover either on the contract or on quantum meruit."); *Restatement (Third) of the Law Governing Lawyers* § 37, cmts. c, d, § 40, cmt. e (2000); *and see, e.g., Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile)*, 76 F.3d 658, 662 (5th Cir. 1996); *Estate of Falco*, 188 Cal.App.3d 1004, 1014 (1987); *Joyce v. Elliott*, 857 P.2d 549, 553 (Colo. App. 1993); *Faro v. Romani*, 641 So.2d 69, 71 (Fla. 1994); *Bell & Marra, pllc v. Sullivan*, 6 P.3d 965, 970 (Mont. 2000); *Ausler v. Ramsey*, 868 P.2d 877, 882 (Wash. App. 1994).

Accordingly, **this Court does not have to decide whether Bonar acted unethically.** The undisputed fact that Bonar withdrew as class counsel prior to the class settlement is, standing alone, sufficient grounds on which to affirm the Court of Appeals.

Bonar contends that she did not withdraw voluntarily, claiming that she was forced out of the representation by Appellees. Appellants' Br. at 17. But Judge McGinnis specifically rejected that assertion as contrary to the evidence: "***Ms. Bonar was not forced out of the action***, her withdrawal as clients' counsel was voluntary and not caused by the action of WSBC...."[62]

Indeed, the evidence in this record demonstrates that it was never ethically appropriate for Bonar to represent this class. Bonar's role as class counsel was marred from the very beginning due to her professional and personal loyalties to clients and friends affiliated with the Covington Diocese. From the time the class action was commenced, she was concurrently representing officials of the Diocese.[63] In fact, she said the Diocese was her referral base and source of most of her clients.[64] Thus, when class counsel argued that the Diocese had continued to cover-up the sexual abuse and had continued to assign predator priests to positions in which they were in contact with children, Bonar filed a pleading distancing herself from that argument by class counsel.[65]

Instead of withdrawing then, Bonar stayed on as class counsel for another four months, during which time she actively encouraged claimants to opt out of the class.[66] She engaged the media in an attempt to convince claimants that they were better off settling their claims outside of the class.[67] And she exhorted the Diocese's counsel to seek decertification of the class and to "send the message" to potential claimants that it

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[62] VR 5/11/07; 13:52:06 (emphasis added); RA 1424-30: Cir. Ct. Op. at 2.

[63] Def. Trial Ex. 68.

[64] Def. Trial Ex. 70.

[65] Def. Trial Ex. 71.

[66] Def. Trial Ex. 6; Def. Trial Ex. 7; Def. Trial Ex. 8; Def. Trial Ex. 9.

[67] Def. Trial Ex. 7; Def. Trial Ex. 105; Def. Trial Ex. 106.

was okay to opt out of the class.[68] Moreover, during the time she was co-counsel of record for the class, Bonar was telling the Diocese's lead counsel that she was doing her best to settle individual cases "***in accordance with the plan the Diocese has set forth....***"[69]

When she did withdraw, she cited only her conflicts of interests as the reason for her withdrawal.

In Judge McGinnis' words: "Ms. Bonar was essentially serving three masters: her original two clients, the class, and the church. Her actions demonstrate a pattern of subordinating the interests of the class to those of her individual clients, and to her own interests in obtaining substantial attorney's fees."[70]

A trial judge's findings of fact in the bench trial are "entitled to the same weight as the verdict of a properly instructed jury" and the appellate court "is not authorized to disturb his findings unless they are flagrantly against the weight of the evidence." *Lassiter Auto Sales v. Nance Bros.*, 245 S.W.2d 938, 939 (Ky. 1952). Bonar's attempts to argue credibility issues in this appeal are inconsequential as judgment of the credibility of the witnesses is within the trial court's province. CR 52.01 ("Findings of fact shall not be set aside unless clearly erroneous, ***and due regard shall be given to the opportunity of the trial judge to judge the credibility of the witnesses***") (emphasis added); *e.g.*, *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

Judge McGinnis' findings of fact that Bonar withdrew voluntarily because of the conflict between the interests of the class and the interests of her Diocese-related clients,

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[68] Def. Trial Ex. 126 at ¶ 17; Def. Trial Ex. 9; *and see* VR 5/8/07; 01:30:10.

[69] Def. Trial Ex. 7.

[70] Cir. Ct. Op. 6.

and because she was acting in complicity with the litigation strategy of the Diocese, are not clearly erroneous. Accordingly, the decision of the Court of Appeals must be affirmed.

B. The terms of the alleged fee sharing agreement are irrelevant in light of Bonar's voluntary withdrawal from the case and her actions against the class both before and after she withdrew.

Bonar protests that the rules articulated by Judge McGinnis and by the Kentucky Court of Appeals apply only to a contract with the client, and do not apply to her fee splitting agreement with her former co-counsel. But a fee sharing agreement with co-counsel does not exempt Bonar from the rule that an attorney who voluntarily abandons a representation or is discharged with cause is not entitled to a fee. An illustrative precedent is *Hofreiter v. Leigh*, 465 N.E.2d 110 (Ill. App. 1984). In that case, a discharged attorney argued that he was entitled to a share of a contingent fee according to the terms of a fee sharing agreement with co-counsel instead of on a *quantum meruit* basis. The Illinois Court of Appeals rejected that argument:

> Plaintiff seeks to engraft an exception to this rule by insisting that it applies only to an action between attorney and client, not to a contract action between two attorneys. We do not agree. Any effort to enforce a contract involving the division of a contingent fee would of necessity involve a dispute between two or more attorneys, and we hold that the rule concerning compensation of a discharged attorney applies regardless of the remedy used to assert the claim for fees. In other words, ***the rule of law is the same whether the claim is asserted in a proceeding to enforce an attorney's lien or whether, as here, in a breach of contract action against former co-counsel.***

465 N.E.2d at 112. As another court explained, "the client's right to discharge an attorney is greater than the attorney's claim of right to an interest in an agreement with another attorney." *Risjord v. Lewis*, 987 S.W.2d 403, 406 (Mo. App. 1999) (refusing to enforce a fee sharing agreement in favor of an attorney who had been discharged).

Bonar further contends that her pre-settlement withdrawal does not affect her right to collect fees under the fee sharing agreement because the attorneys contemplated that Bonar would have limited active involvement in the class action beyond her initial referral of the original class representatives. The Court of Appeals noted the "absurd result" of this reasoning, which would require enforcement of a fee agreement "even when an attorney voluntarily withdraws in the initial stages of the case."[71] Op. at 19-20. As Judge McGinnis observed, it was at least an implied condition of the fee splitting arrangement that Bonar would remain in the case to its conclusion: "It was implicit in this arrangement, however, that Ms. Bonar would remain in the case until its conclusion. Her withdrawal from the case, for whatever reason, thus negated the agreement between the parties."[72] By exiting the case early, Bonar waived any right to enforce the fee sharing agreement.

In light of Rule 23's requirement that class counsel be able to "fairly and adequately represent the interests of the class," it was also necessarily an implied condition of the fee sharing agreement that Bonar would be ethically able – and willing – to zealously represent the class.[73] *See* CR 23.07(4). Bonar never met that condition, given her extensive professional and personal ties to the Diocese. As Judge McGinnis

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[71] In the words of Henry Ward Beecher, "It is not the going out of port, but the coming in, that determines the success of the voyage." *Proverbs From Plymouth Pulpit* (1887).

[72] RA 1424-30: Cir. Ct. Op. at 4, Appendix B. And as Judge McGinnis ruled from the bench: "I believe there was a contract between counsel... implied therein is that [Bonar] remains with the case. So if she got out of the case, no matter what the reason, that contract is negated." VR 5/11/07; 13:38:22.

[73] While Judge McGinnis did not explicitly couch his ruling in these terms, this Court may do so in affirming the decision. *E.g., Com. Natural Resources and Environmental Protection Cabinet v. Neace*, 14 S.W.3d 15, 20 (Ky. 2000) ("An appellate court may affirm a trial court under an alternate theory not relied upon by the trial court"); *Revenue Cabinet v. Joy Technologies, Inc.*, 838 S.W.2d 406, 410 (Ky. App. 1992)("a correct decision by a trial court is to be upheld on review, notwithstanding it was reached by improper route or reasoning"); *Old Republic Ins. Co. v. Ashley*, 722 S.W.2d 55, 58 (Ky. App. 1986) (Court of Appeals may affirm the judgment "if the record on appeal discloses any ground on which the decision could properly have been made").

II. Bonar is not entitled to any fee in the *Doe* case because she breached her fiduciary duty of undivided loyalty to the class and, had she not voluntarily withdrawn as class counsel, she could have been removed for cause.

Even if Bonar had not voluntarily withdrawn, she should have been disqualified due to her concurrent representation of interests conflicting with the interests of the class. Accordingly, even if Bonar's withdrawal was not voluntary, she breached her fiduciary duty of undivided loyalty to the class, and thus forfeited her right to collect a fee from the class-wide settlement fund.

If a lawyer is discharged by her client for cause, she is not entitled to a fee. *Henry v. Vance*, 63 S.W.273, 276 (Ky. 1901). Likewise, when a lawyer in a class action violates her duty of loyalty to the class, she can properly be denied a fee, even if she performed services that benefitted the class. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999). Judge McGinnis correctly held that Bonar was not entitled to a fee for the independent reason that her "numerous ethical violations in detriment to the class" constituted grounds for her removal as class counsel.[77] *Cf. Newberg on Class Actions* vol. 8, § 24:37 ("When a conflict of interest precludes vigorous prosecution by counsel, the court may… allow appointment or substitution of new counsel.").

A. Bonar owed a fiduciary duty to the class as a whole.

Lawyers owe to their clients the utmost duty of undivided loyalty. *Associated Ins. Service, Inc. v. Garcia*, 307 S.W.3d 58, 63 (Ky. 2010)[78]; SCR 3.130(1.7), cmt. (1) ("Loyalty and independent judgment are essential elements in a lawyer's relationship to a client."). A lawyer who agrees to represent a plaintiff class in a class action also assumes

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[77] RA 1424-30: Cir. Ct. Op. at 3, Appendix B.

[78] Differentiating professional negligence claims against insurance brokers from legal malpractice claims and explaining that "attorneys are fiduciaries owing the utmost duty of undivided loyalty."

the duty to "fairly and adequately represent the interests of the class." CR 23.07(4); *and see* Fed. R. Civ. P. 23(g)(4). Courts frequently observe that class counsel owes a fiduciary duty to the members of the class. *E.g., Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009). As one court states: "in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court." *Greenfield*, 483 F.2d at 832.

Black's defines "fiduciary duty" as: "A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another)." *Black's Law Dictionary* (9th ed. 2009). As one court explains: "The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit." *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982). Even before the class is certified, class counsel owes a duty to protect the interests of the putative class members. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 801 (3rd Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed"); *and see* William B. Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* vol. 4, § 11:29 (4th ed. 2010).

Without question, class counsel must put the interests of the class above counsel's own interest and may not profit at the expense of the class. *See Premium Inv. Corp. v. Green*, 324 S.E.2d 72, 76 (S.C. App. 1984) ("If the class representative or class counsel breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class. .... Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary.").

Bonar argues at length that her duties to her individual clients were totally independent of, and unaffected by, her duties to the class. Appellants' Brief at 35-36. That argument vividly illustrates that Bonar ***still*** misunderstands the nature of the responsibility she undertook when she agreed to act as class counsel. The law states that class counsel's duty to the class is paramount. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 964 (3rd Cir. 1983); *Parker*, 667 F.2d at 1211; *Thomas v. Albright*, 77 F. Supp. 2d 114, 122 (D.D.C. 1999). When the interests of individual clients conflict with the interests of the class as a whole, class counsel is required to act in the best interests of the class. *Id.* Class counsel "is responsible for protecting the interests of the class, 'even in circumstances where the class representatives – their direct clients – take a position that counsel consider contrary to those interests.'" *Thomas*, 77 F. Supp. 2d at 122 (quoting *Manual for Complex Litigation* (Third) § 30.43). Indeed, courts have recognized that "[c]lass counsel's duty to the class as a whole frequently diverges from the opinion of either the named plaintiff or other objectors." *Walsh*, 726 F.2d at 964. But "the duty owed by class counsel is to the entire class and is not dependent on the special desires of the named plaintiffs." *Parker*, 667

F.2d at 1211; *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494, 496 (S.D.N.Y. 1994) (quoting *Parker*), *aff'd*, 67 F.3d 1072 (2nd Cir. 1995).

Bonar also apparently misunderstands that her withdrawal as class counsel did not free her to attack the class action. A lawyer may not abandon one client and continue representing the other client adverse to the interests of the abandoned client. *See Restatement (Third) of the Law Governing Lawyers* § 213, cmt. c. Under Rule 1.7, a lawyer is conflicted out on both sides if two concurrent clients have conflicting interests. SCR 1.130(1.7).[79] An attorney "may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them." *Strategem Development Corp. v. Heron Intern. N.V.*, 756 F. Supp. 789, 794 (S.D.N.Y. 1991); *and see Picker Intern., Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) (a lawyer "may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."). Thus, Bonar still owed a continuing duty of loyalty to the class after she withdrew. Just because she decided she could not ethically represent the class did not mean she could ethically act ***against*** its interests. In Judge McGinnis' words: "[I]f your client fired you for no reason, you can't then work to the detriment of your former client. The rules are very clear on that. You still can't work against your client. You can't talk against your client. .... You are stuck. It's still like they're your client."[80]

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[79] Rule 1.7 prohibits a lawyer from representing a client if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." SCR 3.130(1.7)(a).

[80] VR 5/11/07; 13:49:38.

Bonar's conduct was nothing short of a direct attack on the *Doe* class – the group that Bonar was duty-bound to protect. And much of that attack came at the worst possible time: while Appellees and other class counsel were battling the Diocese over class certification. Her conflicts of interest alone disqualified her from representing the class and her activities to undermine the class would have been ample grounds to discharge her "for cause." In that situation, the controlling law is clear: she gets no fee.

B. Bonar's settlement of individual claims outside of the class was also problematic in this case because there was a limited fund available for settlement of all claims.

Bonar focuses a significant portion of her brief defending her settlement of individual claims by claiming that Mr. Chesley engaged in precisely the same conduct in the fen-phen case. **But the Court need not even address this sub-issue** – which Bonar tries to make the whole case – because Bonar's voluntary withdrawal as class counsel and her attempts to undermine the class are sufficient, independent reasons to affirm the judgment denying her a fee. To the extent the Court believes this issue to be material, however, Judge McGinnis correctly ruled on the issue, as well.

Judge McGinnis determined that Bonar's conduct in connection with her settlement of individual opt out claims was detrimental to the class, her former client. He held that "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."[81]

The issue is not – as Bonar states – whether the final settlement plan approved by the trial court in 2006 was a "limited funds settlement," but whether there were limited

[81] RA 1424-30: Cir. Ct. Op. at 5 (emphasis added), Appendix B.

funds ***available*** for settlement in 2003 and 2004 when Bonar was negotiating the individual settlements.[82] When the funds available for settlement might not be sufficient to fully compensate all members of the class, every dollar in settlement to an individual claimant reduces the funds available to settle the class claims and creates a risk that the class members will not receive the full value of their claims.

Such was the case here. And as a Diocese insider who had built her law practice largely through clients and contacts in the Catholic community, it would have been obvious to Bonar in 2003 and 2004 that the Diocese had limited resources. The terms of the class settlement simply proved what Bonar should have known all along: that the Diocese's funds were so limited that it did not even seem likely that all of the class claims would be paid in full. The settlement agreement provided that the Diocese would contribute $40 million in cash or property to the fund.[83] In fact, $40 million was the maximum the Diocese could contribute, even after selling church properties. The Diocese's insurance carriers eventually agreed to contribute $44 million, for a total settlement fund of approximately $84 million.[84]

It is indisputable that the settlement of the class members' claims was limited to that $84 million fund. Special Judge Potter specifically held that the amounts paid to the respective class members would be "ratcheted down" if, in the aggregate, they exceeded the $84 million limited settlement fund.[85] Judge Potter further noted he ***expected*** that the

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[82] As Judge McGinnis stated in his order denying Bonar's much belated, post-appeal motion for a new trial, his trial decision "involved events that occurred during 2003 and 2004..." – not 2006, when the *Doe* settlement was approved. Order, 4/3/09. A copy is attached as Appendix I.

[83] Order Approving Settlement in *Doe v. Roman Catholic Diocese of Covington*, Plntff. Trial Ex. 207, at 5.

[84] *See id.* at 6-7.

[85] *Id.* at 7.

amount of the fund would not be enough to pay all class members the full amounts of their claims.[86]

In approving $84 million as a reasonable settlement amount, Judge Potter was not asked to find that the Diocese and its insurers could not pay more. Thus, he was not asked to approve the settlement amount as reasonable because the defendants' resources were "limited." Instead, he was asked to approve the amount of the settlement as providing reasonable redress for the class members' claims against the Diocese, in line with Rule 23's requirement that class action settlements be "fair, reasonable, and adequate." CR. 23.05(2). Judge Potter therefore predicated his finding of reasonableness upon several other factors, including the legal hurdles the plaintiffs would need to overcome to obtain a judgment on their claims,[87] the amounts allocated to class members in comparison to the amounts of the Diocese's settlements with other abuse victims,[88] and the proposed schedule for payments to class members.[89]

Accordingly, when Special Judge Potter noted that evidence of the Diocese's financial condition had not been introduced and, "[t]herefore, the settlement cannot be approved based upon a finding that there was a limited fund available",[90] he was not finding that the actual settlement fund was unlimited nor that the Diocese's resources were unlimited. He was simply recounting that he had not been asked to approve the reasonableness of the settlement on the basis that the Diocese's resources were limited.

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[86] *Id.* at 10.

[87] This included the Diocese's statute of limitations defense, which Judge Potter described as "formidable" and further noted "would justify a very substantial reduction in the settlement value of [the class members'] claims." *Id.* at 9.

[88] *Id.* at 9.

[89] *Id.* at 8-10.

[90] *Id.* at 8.

Bonar nevertheless seizes upon this language to justify her settling the individual claims of opt outs to the detriment of the class. Bonar's reasoning is flawed in several respects:

First, Bonar's exhaustive defense of her conduct in settling individual claims and thereby depleting the pot of available settlement funds is a concerted effort to distract the Court's attention from the real issue: Bonar's actions representing those individual claimants was openly antagonistic to the class itself. Bonar did not merely settle individual claims outside of the class; she aggressively sought to undermine the class to her own pecuniary benefit and, presumably, to the benefit of her other clients and friends associated with the Diocese.

Second, Bonar quotes Judge Potter out of context. As noted above, Judge Potter's "limited fund" comment was merely a reference to the procedural fact that he was not approving the settlement on the grounds that it was the maximum amount the Diocese could possibly pay – as he noted, he did not have the financial information necessary to make that determination. But not only did Judge Potter note that the payouts to all class members would be "ratcheted down" if the settlement was not sufficient to cover the full amounts of their claims, he explicitly stated that was his expectation: "[E]ven if payments made under the schedule are 'ratcheted down,' ***as the Court believes they will be***, the settlement would still be adequate [based on other factors]."[91]

Third, Bonar emphasizes that she settled the individual claims ***before*** the class settlement was negotiated and ***long before*** Judge Potter's approval of the class settlement. Appellants' Br. at 37-38. But given Bonar's close involvement with the Diocese, she should have known – and it turned out to be true – that the Diocese had

[91] *Id.* at 10 (emphasis added).

limited funds. And if it had become necessary to "ratchet down" the class claims, Bonar's settlements of individual claims – and the $1.3 million in fees she collected from those settlements – would have directly reduced the funds available to settle the class claims. As Huff acknowledged at trial, the funds for the individual settlements and the class settlement "came out of the same pot, basically."[92]

C. Bonar's conflicts were not alleviated by her agreement with Appellees or the Diocese's willingness to negotiate individual settlements.

As she did at trial, Bonar repeatedly refers to her belief that Appellees, at one time or another, agreed or "implicitly confirmed" that she could opt her clients out and settle individual claims as she saw fit. *See* Appellants' Brief at 4-5, 11, 27-28. While Appellees take issue with Bonar's version of the facts, her argument misses the point. In this case, Bonar's client was the class, to which she owed a duty of the highest loyalty – a duty that could not have been altered by any agreement Bonar claims she had with Appellees. As Judge McGinnis noted in his ruling: "Just because you agreed to it, doesn't make it ethical."[93]

Bonar oddly attempts to rely on the testimony of Diocese counsel Huff to absolve Bonar of her conflicts, emphasizing that Huff would have alerted Bonar had she perceived a serious conflict of interest. Appellants' Brief at 33. But Bonar cannot delegate her responsibility to comply with her ethical duties to opposing counsel. It was ***Bonar's*** obligation – not Huff's – to determine whether Bonar had a conflict of interest and whether she was breaching her duties to the class. Huff's interests were to protect her client, the Diocese. Huff pointed out at trial that, as defense counsel, she was not really

[92] VR 5/8/07; 01:11:30.

[93] VR 5/11/07; 13:48:37.

in a good position to evaluate whether Bonar had a conflict of interest with respect to the class, especially considering that Huff and the Diocese ***vigorously opposed*** class certification.[94] The fact that Huff was comfortable negotiating with Bonar on individual settlements of claims by abuse victims – which was the Diocese's preferred mode of resolution at the time – suggests nothing as to the propriety of Bonar's conduct adverse to the interests of the class.

Judge McGinnis' findings of fact that Bonar breached her fiduciary duty of loyalty to the class are not clearly erroneous. On that basis alone, his decision to deny her claim for a portion of the fees awarded to class counsel should be affirmed.

III. Bonar is not equitably entitled to recover in *quantum meruit* because the $1.3 million in fees she received from settling the individual cases exceeds any amount she could reasonably claim for the minimal work she performed while she was co-counsel of record for the *Doe* class.

Bonar's voluntary withdrawal due to her conflicts of interests and her actions directly against the class are independent and sufficient bases upon which to deny Bonar an attorney's fee. But Judge McGinnis also appropriately exercised his equitable discretion in holding that Bonar would not be entitled to a fee determined in *quantum meruit*.

Quantum meruit – literally, "as much as she has deserved" – is an equitable remedy that grants, to a person who has rendered services under circumstances where she should reasonably expect payment, the value of those services. *See Cherry v. Augustus*, 245 S.W.3d 766, 779 (Ky. App. 2006); *Black's Law Dictionary* (9th ed. 2009).[95] In

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[94] VR 5/8/07; 01:14:35.

[95] Equitable remedies are within the trial court's discretion and thus are only reviewable for an abuse of that discretion. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004); *W.T. Grant Co. v. Indian Trail Trading Post, Inc.*, 438 S.W.2d 91, 92 (Ky. 1968); *Western Casualty &*

Baker v. Shapero, this Court held that when an attorney in a contingency fee case is discharged without cause before the end of the case, "he or she is entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of the contract." 203 S.W.3d 697, 699 (Ky. 2006).[96] Even assuming – for argument's sake and contrary to the trial court's factual findings – that Bonar was forced, by circumstances beyond her control, to withdraw as class counsel and thus effectively discharged without cause, she would be limited to a *quantum meruit* recovery.

In this case, Judge McGinnis held that Bonar was not equitably entitled to any fees from the *Doe* settlement in *quantum meruit* because the $1.3 million in fees she received from the Diocese for settling the individual claims exceeded any fee to which she might be entitled in *quantum meruit* for her minimal involvement when she was co-counsel of record for the class:

> Even if Ms. Bonar had not voluntarily withdrawn and had not acted against the interests of the class, she would have been entitled to no fees. Had the Court found that she had been forced to withdraw, Plaintiffs' total fees, measured by *quantum meruit*, would amount to $540,290.00 (assuming that the hours provided on her timesheet were all attributable to the class). .... During the trial, however, Ms. Bonar submitted fee information to the Court, demonstrating that she had received $1,326,383.00 in the settlement of the individual claims of prospective class members, more than she would have received under either of the above calculations. When this amount is set off against the claimed fees, nothing is owed to her; the amount she has already received is compensation for work done prior to joining the class and for bringing in two clients as class representatives.[97]

Surety Co. v. Meyer, 192 S.W.2d 388, 391 (Ky. 1946). Here, Judge McGinnis' equitable decision was based on his express factual findings, which are not clearly erroneous.

[96] The fact that this case involves a fee sharing agreement and *Baker* did not, does not alter the rule. *See Hofreiter v. Leigh*, 465 N.E.2d 110, 112 (Ill. App. 1984); *See also* Argument Section I.B, *supra*.

[97] RA 1424-30: Cir. Ct. Op. at 3, Appendix B.

Judge McGinnis' reasoning is compelling. Bonar signed on with Appellees to represent a class consisting of "***[a]ll persons***" who were subjected to acts of sexual abuse and sexual misconduct by priests or employees associated with the Diocese or any of its parishes or institutions.[98] While the class action was pending, Bonar settled the claims of more than twenty-five such persons – including the original class representatives – on an individual basis and separate from the class.[99] Those individual settlements totaled approximately $4.7 million and Bonar admittedly received over $1.3 million in contingent fees – fees that she kept and did not share with other class counsel. Moreover, by settling the individual claims in the shadow of the looming class action, Bonar and the individual claimants for whom she negotiated the settlements benefitted from the class and the efforts of Appellees without contributing to any of the expenses ultimately deducted from the class members' settlements.[100]

Judge McGinnis' calculations were actually quite conservative considering that Bonar's sole contribution to the class action was her referral of two clients to serve as the original class representatives.[101] As Judge McGinnis observed, "she didn't do much

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[98] *See* Order Approving Settlement in *Doe v. Roman Catholic Diocese of Covington*, Plntff. Trial Ex. 207, at 4.

[99] RA 23-45: Fee Petition at 19.

[100] Class counsel's out-of-pocket expenses at the time of settlement totaled over $1 million. VR 5/8/07; 01:11:00-01:12:27; VR 5/11/07; 11:29:03; 12:26:07.

[101] VR 5/9/07; 02:08:40. The trial testimony establishes that Bonar did not provide any significant evidence to Appellees for use in *Doe*. VR 5/9/07; 1:33:57; 1:35:27; VR 5/11/07; 12:00:25. She did not interview a single victim for the class, nor did she refer anyone to be interviewed. VR 5/9/07; 2:08:30. In fact, Bonar virtually insisted that she perform no work on the case. Def. Trial Ex. 23; Def. Trial Ex. 24; VR 5/9/07; 1:59:05. In a March 31, 2003 letter to Steinberg, Bonar confirmed her minimal role: "[M]y minimal share of [the] fee is based primarily upon my origination of Caddell and Harvey as named class members. In fact, your firm will contribute the primary time from here forward." Def. Trial Ex. 23.

work thereafter that benefitted the class. She did work that benefitted her own personal clients."[102]

Through the fees she received from the individual settlements, Bonar received as much as she deserved and more. As Diocese counsel Huff put it: "Ms. Bonar has already been very well-compensated for the work she did on behalf of individual victims who were not comfortable as part of a class. ***Charging the class for that same work*** under the theory that her work on behalf of individual clients also benefitted the class ***is the functional equivalent of billing two clients for the same research memo or brief, rather than splitting the cost between them.***"[103] She has no right to additional compensation for her representation, such as it was, of the class.

In sum, Judge McGinnis exercised his equitable discretion to deny Bonar any relief in the nature of *quantum meruit*, finding as a fact that she had been more than adequately compensated for her work on behalf of members of the class. This Court may affirm the denial of legal fees to Bonar on this alternative basis, standing alone.

IV. The Trial Court's discovery rulings were reasonable and not an abuse of discretion.

While Bonar refers generally to "numerous pretrial rulings on discovery issues" with which she takes issue, all of her objections boil down to the fact that she was not permitted full discovery concerning Appellees' dealings with other co-counsel, with plaintiffs in *Doe* and in other class actions. *See* Appellants' Brief at 42-47. Such information is clearly irrelevant to the issue of whether Bonar was entitled to receive a

[102] VR 5/11/07; 13:54:38.

[103] Def. Trial Ex. 126 at ¶ 16 (emphasis added).

fee in connection with the *Doe* settlement. It also has no possible bearing on the "credibility" of Appellees or their witnesses, as Bonar suggests. *Id.* at 47.

Bonar refers to these matters in an effort to distract the Court from the real issues in this appeal. Bonar's voluntary withdrawal as class counsel, her direct attacks against the class and her former co-counsel, and the setoff of her substantial fees from individual settlements against any fee she could claim in *quantum meruit* are each an independent and sufficient reason for this Court to affirm. There is no need for the Court to decide whether Bonar's individual settlements were ethical. Putting aside the numerous factual distinctions that thwart Bonar's desired comparison between Appellees' conduct and her own, the bottom line is that what other lawyers have done in other cases is absolutely irrelevant to Bonar's fee request.[104]

A trial court has "broad discretion" in resolving discovery matters and discovery rulings are not to be overturned on appeal absent an abuse of that discretion. *Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov't.*, 317 S.W.3d 23, 39 (Ky. 2010). There was no abuse here. As the Court of Appeals observed after reviewing all of the recorded hearings at which discovery matters were addressed, "the trial court herein went to great lengths to simplify and clarify its rulings."[105] Appellants' arguments concerning the conduct of other lawyers in other cases are irrelevant, and Judge McGinnis appropriately refused to permit discovery on such matters.

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[104] Bonar labors mightily to compare her settlement of individual claims in this case, in which the Diocese had such limited resources that it sold church property to raise less than one-half of the total settlement fund, with Mr. Chesley's settlement of individual claims in the fen-phen case, in which AHP spent billions of dollars to settle the national MDL class as well as to settle several class actions around the country. The $200 million that AHP provided to settle the Kentucky fen-phen case was a drop in the bucket of the amounts AHP expended to settle all the fen-phen class actions. Counsel who represented AHP at the mediation that resulted in the Kentucky settlement testified unequivocally that the individual claims settled by Mr. Chesley did not affect the amount of money available to settle the Kentucky class action by one cent.

[105] Ct. App. Op. at 11.

Bonar nevertheless attempts to forcibly inject those issues into this appeal by asking the Court to take judicial notice of Appellee Chesley's conduct based on documents filed in collateral matters. Appellants' Brief at 28-29; *and see* Appellees' Motion to Strike Appellants' Brief. Given their absolute irrelevance to the issues presently before the Court, Appellees will not dignify any of those assertions by addressing them here.[106] Suffice it to say that the trial court did not waste its time on such matters and neither should this Court.

V. Judge McGinnis' references at trial to the KBA did not constitute reversible error.

In addition to Bonar's contention that she was denied adequate discovery, she claims that Judge McGinnis violated her right to a fair and impartial trial when he stated, on the record, that the Kentucky Bar Association requested all records in the case once it was resolved and that he would have submitted the case file to the KBA anyway due to ethical problems apparent in the case. *See* Appellants' Brief at 48. To be clear, Judge McGinnis was referring to ethical violations by Bonar – not Appellees.[107] In his ruling from the bench, Judge McGinnis stated:

> [I]t would take me all afternoon to propound on the things that bother me about what happened with this case, so I'm going to pick a few of them.... And it is something, again, the Bar may have to deal with. I find ethical violations occurred in this case, that are Ms. Bonar's, and they were, in my opinion, egregious.[108]

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[106] Appellees previously filed a Motion to Strike Appellants' Brief, based on Appellants' references to irrelevant collateral matters involving Appellees. That Motion is currently pending before the Court. If the Court denies the Motion, Appellees will request leave to file a supplemental brief to address those matters, which are outside of the record in this case and are the subject of pending proceedings.

[107] Bonar also refers to a pending KBA proceeding involving Appellee Chesley arising out of a totally unrelated case. Those references are the subject of Appellees' Motion to Strike pending with the Court. The Exhibits to that Motion further confirm that Judge McGinnis referred his findings regarding Bonar's ethical violations to the Bar and that his comments on the record were directed solely at Bonar, not at Chesley.

[108] VR 5/11/07; 13:47:35; *and see* VR 5/9/07; 10:50:52.

As the Court of Appeals pointed out, Bonar's argument that she did not receive a fair trial is "nonsensical."[109] This was a bench trial. There was no jury to be prejudiced; and Judge McGinnis could not be improperly influenced by his own comments.[110]

To the extent that Bonar is now suggesting that the comments reveal some judicial bias against her, she has not preserved that argument on appeal. The remedy for a party who believes she is aggrieved by a judge's personal bias or prejudice against her is to file a motion to recuse. *Taylor v. Carter*, 333 S.W.3d 437, 445-46 (Ky. App. 2010) (holding that party waived its recusal argument where it did not object at the time the trial judge made the statements in question and did not raise the issue prior to filing post-judgment CR 60.02 motion). As the Court of Appeals stated in *Taylor*, "it is [the] well-established law of this Commonwealth that recusal is waived if not asserted at the first instance a party learns of the grounds for recusal." *Id.*

Had Bonar made such a motion – which she did not – it would have been properly denied because there is not a trace of evidence of personal bias against Bonar in the record. In the course of reviewing the evidence, Judge McGinnis found several ethical violations committed by Bonar and those findings were relevant to his holding in the case. In the context of those findings, his comments regarding the KBA's potential involvement constitute no evidence of prejudice. Judge McGinnis merely stated a fact – that the KBA had requested the case files – and a conclusion – that he would have

[109] Ct. App. Op. at 16.

[110] *Id.*

submitted the records to the Bar on his own[111] – neither of which should have come as a surprise to anyone in the case.

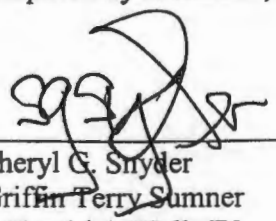
CONCLUSION

As Judge McGinnis correctly held, Bonar was serving three masters: her original clients, the class, and the church. When those conflicts of interests percolated to the surface, she voluntarily withdrew from representing the class citing those conflicts. But she continued representing the interests that conflicted with the interests of the class, including supporting Diocese's litigation strategy of fighting the class action while settling with class members individually.

Her subsequent claim for attorneys' fees from the settlement fund was a moving target. First she sought 15% of the entire settlement fund, $12.5 million. Then she sought 50% of the fees received by WSBC. In this Court, she seeks the 10/7/5% negotiated in the letter agreement. But her voluntary withdrawal as class counsel, as well as her ethical infractions, deprive her of any contractual or other claim to attorneys' fees; and she is not equitably entitled to fees in excess of the $1.3 million she has already received in *quantum meruit*. Accordingly, Judge McGinnis and the Kentucky Court of Appeals properly denied her claims against Appellees; and Appellees respectfully request that this Court affirm that judgment.

[111] SCR 3.130(8.3) ***requires*** a lawyer who knows that another lawyer has committed an ethical violation that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other aspects..." to inform the KBA's Bar Counsel.

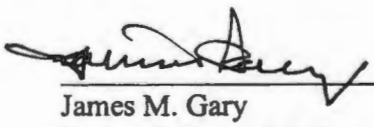
Respectfully submitted,



Sheryl G. Snyder
Griffin Terry Sumner
J. Kendrick Wells IV
Frost Brown Todd LLC
400 W. Market Street, 32nd Floor
Louisville, KY 40202-3363
(502) 589-5400
(502) 581-1087

Counsel for Appellee, Stanley M. Chesley

-- and --



James M. Gary
Weber & Rose, P.S.C.
471 W. Main Street, Suite 400
Louisville, KY 40202

Counsel for Appellees, Waite, Schneider, Bayless & Chesley Co., L.P.A. and Robert A. Steinberg and co-counsel for Stanley M. Chesley