COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2009-SC-000159
CASE NO. 2009-SC-000391

TIM DAVIS and TIM DAVIS & ASSOCIATES, INC. — APPELLANTS/ CROSS APPELLEES

v. **APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT**
CASE NO. 05-CI-00800

COURT OF APPEALS
2007-CA-002279

JOHN J. SCOTT and WHITLOW & SCOTT — APPELLEES/ CROSS APPELLANTS

REPLY BRIEF FOR APPELLANTS and RESPONSE BRIEF FOR CROSS APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 19th day of February 2010, a true and correct copy of Reply Brief for Appellants and Response Brief for Cross Appellees was served via U.S. First Class Mail to the following: Matthew W. Breetz, Demetrius O. Holloway, Stites & Harbison, 400 West Market Street, 1800 Aegon Center, Louisville, Kentucky 40202; Hardin Circuit Court Clerk, Hardin County Courthouse, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Hon. Robert A. Miller, Meade County Courthouse, 516 Hillcrest Drive, Brandenburg, Kentucky 40108; five copies to Hon. Sam Givens, Jr. Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the original and ten copies Via U.S. Registered Mail to: Susan Stokley Clary, *Clerk Kentucky Supreme Court*, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415.

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STATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION

Tim Davis responds to Appellee/Cross-Appellant's appeal arising from the August 24, 2007 Order dismissing Tim Davis's legal malpractice claim against Appellees/Cross Appellants and the subsequent Court of Appeals opinion affirming the dismissal. Reversal and remand of the trial court Order and Court of Appeals opinion is required because the trial court and Court of Appeals erroneously determined that an partial assignment of proceeds in a legal malpractice suit was void as against public policy, and that no Kentucky court had jurisdiction over the settlement agreement. In addition, Appellant is forced to respond to Appellees/Cross Appellants appeal of the trial court's rulings on several motions contained within the court's "**Factual Background, Conclusions of Law, Judgment and Order**."

II. ARGUMENT

A. The Court of Appeals Erred In Affirming Summary Judgment.

While the issue of assignability of legal malpractice proceeds is clearly before this Court, jurisdiction over the settlement agreement clouded the focus of the trial court and the Court of Appeals. Both courts failed to filter out the extraneous issues and realize that there is only one central question that need be answered in this case. Is a partial assignment of proceeds invalid as against public policy in Kentucky? While there are two possible answers to this question, both have the same result. If this Court finds that the partial assignment of legal malpractice proceeds is valid in Kentucky, then this case is remanded to the trial court and Tim Davis proceeds with his claim. If this Court finds the partial assignment of proceeds violates public policy in Kentucky, then the settlement agreement is void *ab initio* and this case must be remanded to the trial court and Tim Davis to proceed with his claim.

In neither situation does the trial court need jurisdiction over the settlement agreement in order to allow the Real-Party-In-Interest, Davis, to proceed with his suit against Scott.

1. A partial assignment of proceeds does not violate public policy and is valid under Kentucky law.

Appellant/Cross Appellee Davis discusses the issue of assignability extensively in his initial brief to this Court and will not rehash the case law here. In summary, fourteen states have directly addressed the partial assignment issue. Thirteen would allow Davis' suit against Scott to proceed. These states resolve the issue in one of two ways. (1) assignments of proceeds are permissible, or (2) assignments of proceeds are not permissible, but the assignment does not prevent the assignor from maintaining the legal

malpractice lawsuit in his own name. Five states allow an outright assignment of the proceeds. Eight states hold an assignment of proceeds is against public policy but still allow the real party in interest to bring the claim. *See* Appellant/Cross Appellee Brief p. 6-22; Case Law Chart Tab 1. This Court should not make Kentucky a legal island unto itself and should allow partial assignments or, at the very least, allow the real party in interest to pursue the claim in his own name.

2. *The Trial Court Does Not Need To Invalidate the Settlement Agreement to Allow Davis to Proceed.*

The Court of Appeals erroneously affirmed the trial court's ruling on the issue of jurisdiction over the settlement. It held, "the settlement agreement herein is the product of the federal litigation and thus, is not within the purview of the trial court's jurisdiction." (Ct. App. Opinion, p. 16). Further, Scott argues that no court in Kentucky can touch any issue in this case because of the Tennessee settlement agreement. Scott is wrong. If this Court determines that the settlement agreement entered into by Tim Davis and Global Risk Management (GRM) in Tennessee violates Kentucky public policy, then the settlement agreement is void *ab initio* and this case should be remanded to the trial court so that Tim Davis may proceed with his claim.

In Kentucky, contracts and agreements that violate public policy are void *ab initio*. *Commonwealth v. Whitworth,* 74 S.W.3d 695, 700 (Ky. 2002). BLACK'S LAW DICTIONARY defines this term of art as follows, "**Void *ab initio.*** Contract is null from the beginning if it seriously offends law or public policy in contrast to a contract which is merely voidable at the election of one of the parties to the contract." BLACK'S LAW DICTIONARY 1574 (6th ed.1990) If a contract is deemed void *ab initio* due to a public policy violation, it is as if the contract never existed. The court does not need to

invalidate the agreement because, in essence, there is no agreement. The Kentucky Court of Appeals stated as much in *Whitaker v. Smith*, 255 Ky. 339 (Ky. App. 1934). Discussing void contracts, the court held,

> The almost universal rule regarding such contracts is that they are void and may not be enforced, not only as between the original parties thereto, but likewise they are prohibited from enforcement by one who may become the holder of them in due course, and which is upon the ground that being void *they never had any obligatory force* and are no more binding upon the maker than if he had never executed them.

Id. (emphasis added)

An example of a contract being void *ab initio* would be a bigamous marriage. If a man marries in Kentucky, then drives to Tennessee and marries a second woman, the marriage contract entered into in Tennessee would be void *ab initio* in Kentucky and it would be as if the second marriage never occurred. The fact that it took place in Tennessee is irrelevant. A court would not have to analyze whether it had jurisdiction over the Tennessee marriage to grant a divorce because it would simply be as if the second marriage never took place. It would be void *ab initio*. If this Court finds the settlement agreement assigning a portion of the proceeds of Tim Davis's legal malpractice claim to be against public policy, then, like the second marriage, it will be void *ab initio* and it will be as if the settlement agreement never existed. It will have no binding effect on Tim Davis or his claim against Scott. This means he was, is, and will continue to be the real party in interest.

As a result, if this Court finds that the settlement agreement is void as against public policy, then Appellant Davis respectfully requests the case be remanded to the trial court so that he may continue his claim against John Scott.

B. Appellee Raises Numerous Disputed Material Issues of Fact to Support His Collusion Argument

The trial court correctly ruled there was no evidence to support Defendant's collusion argument. Because there is no evidence, Scott raises numerous disputed issues of fact in an attempt to support his position.

1. Davis' Failure to Sue Other Attorneys is Not Relevant.

First, Scott argues that because Davis spoke with other attorneys and did not sue them, he must be colluding with GRM. Davis' decision not to sue these attorneys is irrelevant; but Davis' reasons for not suing them are based on the facts, not collusion.

Paul Musselwhite and Kimiko Orosz have been deposed and testified they never entered into an attorney-client relationship with Tim Davis. (Dep. of Paul Musselwhite at pp. 4-7; Dep. of Kimiko Orosz at pp. 6-8) [Tab 2] Attorney Paul Musselwhite also testified he does not practice in this area, nor did he see any of the documents involved in the underlying case. (Dep. of Paul Musselwhite at pp. 5-6). He has further testified that it is not likely he gave an opinion about the enforceability of the non-solicitation agreement but, rather, would have referred Davis back to Scott. (Dep. of Paul Musselwhite at p. 7). Likewise, Kimiko Orosz testified that, at the time, she was not an attorney licensed to practice law in Kentucky and would likely not have given an opinion on the enforceability of the non-solicitation agreement. (Dep. of Kimiko Orosz at p. 7).

Regardless, any advice given by these two individuals is simply not relevant in this legal malpractice action and it is certainly not evidence of collusion. The only issue for the jury to consider here is whether Scott violated the standard of care and whether Davis/TD&A was injured as a result.

2. Davis' Continued Employment of Scott is not Relevant

Scott's next "fact" in support of his collusion argument is that Davis continued to have Scott work on legal matters and did not initially want to sue Scott. This is also irrelevant. Davis is not an attorney. Whether or not he knew, felt, or believed that Scott committed malpractice is not relevant to whether it actually occurred. Whether Davis initially wanted to sue his former attorney is also not relevant in determining if Scott malpracticed. The only relevant and undisputed fact here is that once the issue of Scott's malpractice was brought to Davis' attention, he ***did*** file a lawsuit against Scott on behalf of himself and TD&A.

3. The Amount of the Settlement Does Not Support Collusion

Even though Davis' potential exposure in the underlying case was in excess of $2,000,000, Scott argues the $300,000 settlement was collusive. Scott offers no evidence of this and, instead, offers his personal opinion that there is no basis for the plaintiff's payment of $300,000 to settle the case.

The reasonableness of the $300,000 payment is a question for the jury to determine after hearing testimony. The jury will hear evidence that Davis was sued personally and that his personal assets were at risk in the Tennessee litigation. The jury will hear evidence that Tennessee has a treble damages statute which would have allowed the Tennessee jury to award triple the amount of compensatory damages for the statutory violation. **Testimony from Scott's own legal expert, Anne Martin, about the potential damages in the underlying matter clearly places this issue in the "material issue of fact" realm:**

Q. So there is a possibility that the ultimate exposure to Tim Davis could have been in excess of $300,000?
A. If Global had had everything cut their way, yes.

Q. And, in fact, there is exposure -- to Tim Davis and Tim Davis & Associates, there is exposure in excess of $2 million?
A. Yes.

Q. Those are all considerations that you would discuss with your client in determining whether a settlement -- any particular settlement was reasonable, correct?
A. Correct.

Q. And short of taking the case through conclusion to a jury verdict, there's no way to know whether a jury would have believed Tim Davis' expert or whether the jury would have believed GRM's expert, correct?
A. I can make some -- I can give you an educated opinion about that, but I can't tell you to a degree of absolutely certainty. Nobody knows what's going to happen until it happens.

Martin dep. p. 161, l. 4-p. 162, l. 4

Davis did not collude with GRM. Davis had independent counsel, to whom he had already paid $300,000, advising him on whether he should settle or proceed with continued expensive and protracted litigation. Doing the latter would expose him to unknown legal fees to his own attorneys and losing at trial would expose him to damages in excess of $2,000,000. [R. at 3; Compl.] The facts are far more supportive of a reasonable settlement than collusion.

C. Scott Waived "Collusion" as Defense by Failing to Affirmatively Plead it in his Answer.

Finally, Scott waived the defense of collusion when he failed to affirmatively plead this defense in his answer. "Collusion," as alleged by Scott, is "fraud," "or another matter constituting an avoidance or affirmative defense" that is waived if not pled.[1] *See*, CR 8.01,[2] CR 9.02,[3] and CR 12.02. If an affirmative defense is not raised in a responsive pleading or a motion to dismiss, it is waived. *Underwood v. Underwood*, 999 S.W.2d 716, 720 (Ky. App. 1999).

Here, Scott pled several affirmative defenses; however fraud and collusion are not among them and were certainly not "stated with particularity." [*See Def's Answer* at Third Defense, Fourth Defense, Fifth Defense, Sixth Defense, Seventh Defense, Eighth Defense, and Ninth Defense] [Tab 3] Although there has been no collusion, Scott has waived his right to defend on that basis by failing to affirmatively plead this defense.

D. It Was Error to Dismiss Davis' Claim to Recover Attorney's Fees Incurred in the Malpractice Action

The trial court erroneously ruled, and Scott erroneously argues, that because KRS § 411.165 does not expressly provide for attorney's fees and expenses, they are not available to plaintiffs in legal malpractice actions. (R. at 1549; Tab 4).

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[1] "Collusion - an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." BLACK'S LAW DICTIONARY (5th ed. 1979)

[2] CR 8.01 states, in pertinent part: In pleading to a preceding pleading, a party shall set forth affirmatively ...fraud...and another matter constituting an avoidance or affirmative defense.

[3] CR 9.02 (Pleading Special Matters) requires that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake **shall be stated with particularity**."

The Superior Court of New Jersey, in *Bailey v. Pocaro & Pocaro* recently held that plaintiffs may recover the cost of prosecuting a legal malpractice action as consequential damages. In *Bailey,* the plaintiff sued his attorney for malpractice. The attorney was found liable but the plaintiff was not awarded attorney's fees for pursuing the action. On appeal, the Superior Court determined that the plaintiff was entitled to attorney's fees. The court held:

> At the time that the trial judge denied Plaintiffs' timely request to include litigation expenses incurred in pursuit of their malpractice claim, the Supreme Court had not yet decided *Saffer v. Willoughby (*citation omitted). There, the Court ruled that a client may recover for losses which are proximately caused by the attorney's negligence or malpractice. "The purpose of a legal malpractice claim is 'to put a plaintiff in as good a position as he [or she] would have been had the [attorney] kept his [or her] contract.'" (citation omitted) The court in *Saffer* went on to say, A negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action. Those are consequential damages that are proximately related to the malpractice. In the typical case, unless the negligent attorney's fee is determined to be part of the damages recoverable by a plaintiff, the plaintiff would incur the legal fees and expenses associated with prosecuting the legal malpractice suit....The court unmistakably concluded that the expenses incurred by a plaintiff may be consequential damages recoverable in order to make it whole in a successful malpractice prosecution.

Bailey v. Pocaro & Pocaro, 305 N.J.Super 1, 5 (N.J.Super.A.D., 1997)

Davis' cost in bringing this legal malpractice action is proximally related to Scott's malpractice. The attorney's fees Davis will have to pay should be considered consequential damages as they arise out of the Defendant's negligence. But for Scott's negligence, Davis would not be here today incurring legal fees and expenses. In order to make the Plaintiff "whole" and put him in as good a position as he would have been had

the Defendant not negligently represented him, it is essential that the attorney's fees incurred in pursuing this action be recoverable as consequential damages.

Furthermore, the American Rule states attorney's fees are recoverable if provided for by statute or contract. Kentucky has a statute specifically pertaining to liability of attorneys for professional negligence which provides for recovery of "all damages." KRS § 411.165 states:

> (1) If any attorney employed to attend to professional business neglects to attend to the business, after being paid anything for his services, or attends to the business negligently, he shall be liable to the client for all damages and costs sustained by reason thereof.

When interpreting a statute, the Court must assume that the legislature intended to accomplish something with the act and was not intended to be meaningless. *Grieb v. National Bond & Inv. Co.*, 94 S.W.2d 612, 617 (Ky. 1936). Using this guideline, KRS § 411.165 only has meaning if interpreted to hold defendants in legal malpractice actions liable for more damages than they would be liable for absent the statute. It would be pointless for the legislature to enact a statute giving a plaintiff the same remedies as are already available to them at common law. To read the statute in such a way would render it meaningless.

The legislature did not limit damages under the statute to specific losses. The statute is simple. "All damages and costs" must mean exactly that, **all damages and costs.** If the legislature wanted to exclude attorney's fees, it certainly could have. It chose not to. The trial court and Scott argue that because KRS § 411.165 does not specifically state "attorney fees," this logically means they are not recoverable. (R. at 1549). This makes little sense as KRS § 411.165 does not specifically mention any type

of damages. Using the trial court's and Scott's line of thinking, victims of legal malpractice are not entitled to any damages and costs because none are specifically mentioned.

Because it was error to rule Davis is not entitled to recover attorney's fees in the malpractice action, Appellant/Cross Appellee requests this Court reverse the trial court.

E. The Trial Court Correctly Ruled That Davis Can Recover Emotional Distress Damages

Scott argues Davis' claim for emotional distress damages should be dismissed because there was no "physical impact." This argument ignores the fact the Kentucky legislature and courts have created an exception to the "physical impact" rule in cases against attorneys for legal malpractice or malicious prosecution.

Scott relies on *Morgan v. Hightower's Admx.*, 163 S.W.2d 942 (Ky. App. 1942) and *Hetrick v. Willis*, 439 S.W.2d 942 (Ky. App. 1969); however, both of these cases involve claims for personal injuries, not claims against an attorney for malpractice or malicious prosecution. Further, Scott's reliance on *Sparks v. Craft*, 1994 U.S. Dist LEXIS 21303, * 10 (E.D. Ky. 1994) is misplaced as that case was subsequently overruled, as pointed out by the trial court. (TR 1526 at 25-26). Scott also cites the recent unpublished opinion, *Donna Yeager, Executrix of the Estate of Stacey Clise v. Taliferro, Shirooni, Carren & Keys, PLLC, e. al.*, No. 2008-CA-000126-MR (Ky. App. 2009)(unpublished, Discr. Rev. den'd) for the proposition that emotional distress damages in this case are barred by the impact rule. However, the court in *Yeager* dismissed the *cause of action* for negligent infliction of emotional distress for lack of impact. *Yeager* does not address, as does this case, emotional distress damages as a component of damages under a cause of action of legal malpractice. Under the legal

malpractice cause of action, KRS 411.165 states *all* damages are available. This necessarily includes emotional distress damages.

Scott's argument completely ignores the fact that KRS 411.165 allows for recovery of "all damages and costs" when an attorney is negligent. The legislature did not limit the damage to economic loss, and it certainly did not require the plaintiff to prove any impact. The statute is simple. "All damages and costs" means exactly that, **all damages and costs.** If the legislature had wanted to exclude pain and suffering or emotional distress, it certainly could have. It chose not to. The legislature's logic is compelling when one considers that there will likely never be any "impact" arising out of most attorney-client relationships yet there could certainly be emotional distress associated with the attorney's malpractice

Instead of giving deference to the specific statute pertaining to attorney negligence, Scott advocates for a pure "economic loss" rule. The inequity of such a rule is readily evident when one considers that not every attorney-client engagement gives rise to an "economic" loss. Removing emotional distress as an element of recovery would grant "virtual immunity" to any malpractice committed when the lawyer was retained for non-economic purposes such as drafting a living will, handling a contested child custody matter, or performing criminal defense work. In such situations, there may be no economic loss—despite the fact that severe mental and emotional distress resulting from the loss of custody of a child or wrongful incarceration is readily foreseeable.

In fact, Kentucky courts have allowed a plaintiff, who was wrongfully convicted of arson, to sue his criminal defense attorney for legal malpractice and recover $500,000 in emotional distress damages. *See, Kaplan v. Puckett,* 96-CI-6279 (Jefferson Cir. Ct.)

[Verdict at Tab 5][4] More recently, there was an award of $125,000 for past and future emotional distress in a legal malpractice bench trial. *See, Moss v. Beale,* (Jefferson Circuit Ct. 2006) [Verdict at Tab 6]. Even more recently, a Jefferson Circuit Court jury awarded $250,000 in mental anguish associated with legal malpractice. *Osborne v. Keeney* (Jefferson Circuit Court, 2007) [Summary at Tab 7][5]

Similarly, the right to recover emotional distress damages against an attorney is not limited to claims against lawyers for legal malpractice and has long been allowed in wrongful institution of civil proceedings and malicious prosecution[6] actions against lawyers, despite the lack of physical impact. *See Raine v. Drasin,* 621 S.W.2d 895, 901 (Ky. 1981).

In *Raine*, a jury returned a verdict of $5,000 for pain and suffering, and $5,000 for humiliation, mortification and loss of reputation to two doctors as compensatory damages in a malicious prosecution case. It is important to note, "neither doctor proved any special, or out-of-pocket damages or impact. The jury's award of compensatory damages was limited to pain and suffering, mortification and loss of reputation." *Id.* at 900

In affirming the jury's pain and suffering award to the doctors arising out of the lawsuits against them, the court recognized that "impact" is not required in a claim

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[4] This case is currently on appeal to the Kentucky Supreme Court on other issues.

[5] The jury also awarded $500,000 in pain and suffering related to the underlying case. This case is currently on appeal to the Kentucky Court of Appeals.

[6] In general, "malicious prosecution" properly refers only to wrongful prosecution in criminal cases, and the tort of wrongfully bringing a civil action is properly designated as "wrongful use of civil proceedings" *Prewitt v. Sexton,* 777 S.W.2d 891 (Ky. 1989). Regardless, the terms are often used interchangeably as the "[s]ix basic elements necessary to maintain action for malicious prosecution, in response to both criminal and civil actions, are institution or continuation of original judicial proceedings, or of administrative or disciplinary proceedings, by, or at instance of, plaintiff, termination of such proceedings in defendant's favor, malice in institution of such proceeding, want or lack of probable cause for proceeding, and suffering of damage as result of proceeding." *Raine v. Drasin*, 621 S.W.2d 895 (1981)

against a lawyer by holding, "The accusation of negligence in the exercise of one's profession certainly can produce mortification, humiliation, injury to the reputation, character and health, mental suffering, and general impairment of social and mercantile standing, all of which are elements of damage in a malicious prosecution action." *Raine v. Drasin*, (citing *H.S. Leyman Co. v. Short*, Ky., 283 S.W. 96 (1926)); *See also, Massey v. McKinley*, 690 S.W.2d 131 (Ky. App. 1985) (affirming $12,500 emotional distress award against attorney for plaintiff being forced to spend one night in jail).

Clearly, Kentucky courts recognize that the actions of lawyers, when performed negligently or maliciously, can and do result in compensable emotional damages. In those situations, they have recognized that the plaintiff should be entitled to recover for those damages in spite of the lack of a physical impact. To hold otherwise would result in lawyers avoiding the full measure of injury caused by their actions.

As a result of Scott's advice, Davis was sued. A significant award would have resulted in Davis losing his business, his personal assets, and suffering irreparable harm to his reputation. The likelihood of this happening caused significant emotional distress to Davis.

The trial court did not err in deciding that Davis is entitled to emotional distress damages and Davis respectfully requests this court affirm that ruling.

F. The Trial Court Correctly Ruled Attorney's Fees Incurred in Defending the Underlying Litigation are Recoverable

As a result of Scott's incorrect advice, Davis was forced to retain attorneys at Frost Brown Todd to defend him in litigation with GRM. [R. at 3; Compl.] Davis expended a great deal of time and money on completely avoidable litigation. Mallen states, "The cost of avoidable litigation or unnecessary legal services ultimately may be

chargeable to the attorney as damages." 3 R. Mallen & J. Smith, LEGAL MALPRACTICE § 20:6 (2007 ed.) Numerous state courts have similar holdings.

Scott argues that the attorney's fees paid to Frost Brown Todd to defend Davis in the underlying litigation are not recoverable as damages. This argument is incorrect. While no Kentucky case has specifically addressed the issue, numerous other states courts have held that plaintiffs in a legal malpractice action are allowed to recover attorney's fees incurred as a direct result of an attorney's negligence.

The New Mexico Court of Appeals addressed the issue in *First Nat'l Bank of Clovis v. Diane, Inc.* In *First Nat'l*, a loan broker sued his attorney for malpractice after being sued over an unreasonable brokerage fee. The broker consulted with her attorney regarding the reasonableness of the fee and was advised she could legally charge the amount without breaking New Mexico law. The court subsequently found the attorney negligent in failing to advise the plaintiff of the potential liability of charging such a fee. The court awarded the plaintiff the attorney's fees expended in defending herself as a result of the attorney's negligent advice. The negligent attorney objected to this award. The court stated,

> Had the plaintiff been forced to hire an accountant to repair the damage caused by the defendant's conduct, she would undoubtedly have been able to recover the accountant's fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant's neglect. In holding the defendant liable for the plaintiff's losses, we are not violating the policy against "penalizing" a litigant for defending a lawsuit. We are simply following the general rule of requiring a wrongdoer to bear the consequences of his misconduct.

First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5, 12 (N.M.App., 1985)

The facts in this case are very similar to *First Nat'l.* An attorney negligently renders advice to a client who is subsequently forced to expend a great deal of money defending a lawsuit. Davis spent over $300,000 in attorney's fees because of Scott's negligent advice. (Dep. of Tim Davis, June 13, 2007, pp.13) The New Mexico Court of Appeals ruling, while not controlling, is persuasive in its analysis. If Davis had been forced to hire an accountant, or any other type of professional, to clean up the mess caused by the Defendant, the fee paid to that professional would be recoverable as damages.

The Alabama Supreme Court has rules similar to our own regarding attorney's fees. It follows, as do Kentucky and New Mexico, the American Rule which allows attorney's fees to be awarded only if provided for by statute or contract. In *Ex Parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C.*, New Mexico clarified its position that a plaintiff is able to recover the attorney's fees from the underlying litigation. In *Burnham*, an attorney negligently allowed claims brought against his client to not be settled and the client was required to pay another attorney to defend her at trial. The court held she was entitled to attorney's fees and stated,

> In Alabama and most other jurisdictions, the general rule is that attorney's fees and expenses of litigation are not recoverable as damages, in [the] absence of a contractual or statutory duty, other than by a few recognized.....equity principles.....However, it is generally recognized that where the natural and proximate consequences of the defendant's wrongful act [cause] the plaintiff to become involved in litigation with a third person, attorney's fees and other expenses incurred in such litigation may be recovered as damages."

Ex Parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C., 674 So.2d 1287, 1290 (Ala. 1995) *citing, Highlands Underwriters Ins. Co. v. Elegante Inns, Inc.*, 361 So.2d 1060, 1065-66 (Ala.1978)

Again, the facts here are very similar. An attorney's negligence results in his client being forced to hire another attorney to clean up the mess. Here, as in *Burnham*, the proximate and natural result of Scott's negligence was Davis being sued by GRM and being forced to expend a great deal of money defending not only his business, but his personal assets as well. Tim Davis should be able to recover what he expended as a result of Scott's negligence.

In making its decision, the trial court relied on *John Kohl & Company, P.C. V. Dearborn & Ewing,* in which a law firm's former clients sued in response to negligently rendered legal advice. The Supreme Court of Tennessee stated,

> Turning to the issues of legal fees, we note that there are three categories of attorney's fees that may constitute damages resulting from legal malpractice: (1) "initial fees" a plaintiff pays or agrees to pay an attorney for legal services that were negligently performed, (2) "corrective fees" incurred by the plaintiff for work performed to correct the problem caused by the negligent lawyer, and (3) "litigation fees," which are legal fees paid by the plaintiff to prosecute the malpractice action against the offending lawyer. The trial court in this case correctly held that corrective fees were recoverable, and this ruling was not appealed. The trial court's ruling that initial fees were not recoverable was appealed and the Court of Appeals properly reversed.

John Kohl & Company, P.C. V. Dearborn & Ewing., 977 S.W.2D 528, 534 (Tenn., 1998)

In this case, the "corrective fees" incurred by Davis were the attorney's fees paid to Frost Brown Todd. It is generally accepted that attorney's fees incurred in defending

oneself as a result of legal malpractice are recoverable as damages. As a result, the Plaintiff respectfully requests this Court affirm the trial court.

G. The Trial Court Correctly Ruled That Minor Disagreements Between Davis' Expert Witnesses Presents Question of Fact for the Jury.

Scott argues that summary judgment was required because the expert witnesses retained by Davis differ in their opinions. The trial court correctly denied Scott's motion for summary judgment on this issue. (TR 1526)

The issue of expert differences in opinion was addressed in *Commonwealth, Department of Highways v. McQuown,* 396 S.W.2d 586 (Ky. 1965). In *Commonwealth,* the highway department built a road through the appellee's farm. *Id.* A jury awarded the appellee $10,000 and the Commonwealth appealed the jury's award. *Id.* The Commonwealth argued that because the appellee's two expert witnesses could not agree upon the best use for the property, their testimony was confusing to the jury and should disqualify them. *Id.* The court held, "it seems entirely feasible to us that evaluation witnesses may logically differ in their opinions as to the highest and best use of property. The fact that one expert differs with another does not disqualify either as a witness." *Id.* at 587.

Howard v. Kingmont Oil Company also addressed the issue of conflicting experts. 729 S.W.2d 183 (Ky. App.1987). In *Howard,* the court was attempting to determine a boundary for drilling encroachments. *Id.* The court was faced with the testimony of two experts who gave differing opinions as to what method should be used in determining the boundary. *Id.* The court held, "Where expert testimony is conflicting, the issue becomes a question to be determined by the finder of fact, in this case the trial court." *Id.* at 186.

Another case with similar facts is *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62 (Ky. 1970). In that case, a coal miner appealed a ruling by the Workmen's Compensation Board dismissing his claim. *Id.* The issue was whether the court should have allowed the testimony of two board experts, who read the same X-ray differently. *Id.* Dr. Anderson read the appellant's X-ray and felt it showed no pneumoconiosis while Dr. Gernert read the same X-ray and could not reach a conclusion. *Id.* at 63. The plaintiff felt that these two doctors should nullify each other because they reached different conclusions; however, the court held that they may have had different readings but they both ultimately had the same result. *Id.* at 64. The court stated,

> The claimant's exasperation at the spectacle of one great and distinguished physician unable to find what another has no difficulty observing in the same X-ray films is quite understandable. This court has become inured to it through frequent exposure to the same phenomenon. We cannot concede, however, his argument to the apparent effect that it cancels out both, leaving Dr. Hambley's testimony in complete dominion of the field. **It is our opinion that even though Drs. Anderson and Gernert differ, the testimony of either is enough to warrant the board's inability to accept Dr. Hambley's judgment.** *Id.*

Scott relies on *Mudano v. Philadelphia Rapid Transit Co.*, 289 Pa. 51 (Pa. 1927). In *Mudano*, two doctors disagreed over the cause of a man's foot injury. *Id.* One of the plaintiff's experts believed the injury was the result of an accident on the job and the other plaintiff's expert stated it was the result of an ill-fitting shoe. *Id.* at 53. The court held that the two experts' testimony neutralized each other and, as a result, the plaintiff failed to make his case. *Id.* at 108. Here, there is no disagreement over the cause of Davis' injury. Both experts agree it was Scott's malpractice. As a result, *Mudano* is inapplicable.

Scott also relies upon *Catalytic Construction Company v. Ogburn,* 441 S.W.2d 399 (Ky. 1969). The facts in *Catalytic* are actually quite similar to the facts in this action. In a workman's compensation claim, two doctors testified a man was injured, but they did not agree upon the extent of his injuries. *Id.* at 401. The court in that case **"declined to adopt or reject the full rationale of *Mudano.*"** *Id.* The court allowed both doctors to testify.

Here, Davis retained two expert witnesses, Retired Judge Michael O. McDonald and attorney Dennis Murrell. Both of Davis' experts agree Scott violated the standard of care. The only difference is Judge McDonald believes Scott violated the standard after PICA was sold in February and after he received the cease and desist letter in April. (McDonald Dep., pp. 167-211.) Mr. Murrell is only prepared to testify that Mr. Scott violated the standard after receiving the cease and desist letter in April. (Murrell Dep., pp 46-52.) The minor difference in their opinion goes to the weight to be afforded their testimony, not its admissibility. It is the responsibility of the jury to listen to both experts' testimony, decide what standard they believe is appropriate, and determine to what degree Scott violated that standard. This is the quintessential question of fact and as such falls within the purview of the jury's duties. As a result, the Defendant's motion must fail and the trial court's ruling should be affirmed.

H. Testimony from Legal Experts Regarding Violations of the Supreme Court Rules is Permissible as Evidence of Negligence.

The trial court failed to rule on this issue, instead reserving it for this Court. (TR 1526, pp. 30-34.) Procedurally, the trial court's failure to rule on this issue means it has not been preserved for review by this Court. *See* CR 52.04; *see also, Jewell v. City of Bardstown,* 2008 WL 298953 (Ky. App. 2008)(unpublished) (holding "we only review

decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible. This is why we require that an appellant not only present an issue to the lower court on the record but also to make reasonable efforts to obtain a ruling from the court on the record concerning that issue."); *Williams v. Williams*, 554 S.W.2d 880, 882 (Ky.App.1977) (failure to obtain a ruling constitutes waiver)); *Abuzant v. Shelter Ins. Co.* 977 S.W.2d 259 (Ky.App.,1998) (holding the failure to obtain a ruling by the lower court is a waiver and Court of Appeals cannot consider the competency of the evidence on appeal.); *Benefit Ass'n of Ry. Employees v. Secrest*, 239 Ky. 400, 39 S.W.2d 682 (Ky.App. 1931)

If the Court does consider this issue, it should follow existing Kentucky precedent and allow the use of legal expert testimony. Scott's argument completely fails to recognize the holding in *Raine supra.*, 621 S.W.2d 895 (Ky.1981). One of the issues in *Raine* was whether the testimony of an expert concerning the attorney's possible violation of the ethics code was properly admitted. *Id.* at 900-901. The Kentucky Supreme Court framed the issue and held as follows:

> **Was the Testimony of an Expert Concerning the Attorneys Possible Violation of Ethical Code Properly Admitted?**
>
> The deposition of Professor David Leibson, a member of the Ethics Committee of the Louisville Bar Association, was apparently read to the jury. Professor Leibson stated that, in his opinion, the actions of both Raine and Highfield did not comply with the standard of care of ordinary prudent lawyers. Raine complains that the admission was improper. We believe that such evidence was properly introduced to show one of the key ingredients of a malicious prosecution action; viz., lack of probable cause. *Id.*

The Kentucky Supreme Court acknowledged that expert testimony on legal standards of care as well as violations of the ethics code is admissible and relevant because it assists the trier of fact in making its decision.

Davis agrees with Scott that the violation of a rule of professional conduct does not, in and of itself, constitute negligence. With few exceptions, courts agree that the violation of an ethics rule, with nothing more, does not create liability for legal malpractice. Ronald E. Mallen, Jeffrey M. Smith, LEGAL MALPRACTICE, (ed. 2007 § 19:7, p.1208) In fact, "The common judicial application is that an ethics rule may be relevant as 'evidence' of the standard bearing on negligence or fiduciary misconduct." Mallen, *supra* at p. 1218.

In disagreeing with this general judicial application, Scott cites an unpublished opinion, *Dean v. Bondurant*, 2005 WL 2467768 *6 (Ky. App. 2005); however, *Dean* is not applicable because it dealt with claims of legal malpractice based solely on the violation of a rule, as opposed to using the rule as "evidence of negligence." The same is true of the *Hill v. Willmott* case relied on by Scott. 561 S.W.2d 331, 334 (Ky. App. 1978). It too dealt with a claim brought solely based on the violation of the rule. As such, none of Scott's Kentucky citations support excluding evidence of a rules violation when offered as "evidence of negligence."

Scott next cites the Washington state case of *Hizey v. Carpenter*, 830 P.2d 646, (Wash. 1992), in which the court held that experts in legal malpractice cases should not mention ethics rules to the jury. Scott fails to mention that the Washington Supreme Court is in the minority on this issue. One example is the South Carolina Supreme Court case of *Smith v. Haynsworth, Marion, McKay & Geurard,* 472 S.E.2d 612 (S.C. 1996).

In *Smith,* a client filed a legal malpractice action against his attorney following representation in a real estate development scheme. *Id.* at 613. The trial court found for the law firm and the case was ultimately appealed to the South Carolina Supreme Court. The court examined the issue of whether experts may testify regarding violations of rules of professional conduct (RPC).

In holding the use of the professional rules of conduct are admissible, the South Carolina Supreme Court held "We concur with the majority of jurisdictions and hold that, in appropriate cases, the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action." *Id.* at 437. *See, generally,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 52(2). *See e.g. Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (1986)(violation is not actionable but provides "some evidence" of the standard of care); *RTC Mortgage Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp.2d 503 (D.N.J. 1999)(evidence of malpractice); *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.,* 607 N.E.2d 1173 (1992)(testimony should have been permitted concerning disciplinary rules).

The use of ethics rules as evidence of negligence in legal malpractice actions is also consistent with the 2002 amendments to the Scope of the American Bar Association's Model Rules: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." ABA Model Rules of Professional Conduct, *Scope* (2002).

Typically, when the violation of the rule is used as evidence of negligence, it necessarily requires "testimony by an expert witness, who refers to ethics standards as a consideration in opining about whether the lawyer's conduct comported with the standard of care or conduct." Mallen at p. 1219.

Here, former circuit and appellate Judge Michael O. McDonald will testify that Defendant Scott violated SCR 3.130(1.1) Competence. A similar ethics rule violation was at issue in *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176 (1992). In *Mayol*, the trial court not only allowed the ethics rule to be used as evidence of negligence, it actually incorporated the ethics rule regarding competency into the jury instructions.[7] *See also, Mainor v. Nault,* 101 P.3d 308 (Nev. 2004) (adopting the majority rule and approving an instruction with caveat that "violation of a rule of professional misconduct does not establish an act of legal malpractice. It is merely evidence that you may consider in your determination of whether the defendants committed legal malpractice."); *Mirabito v. Liccardo*, 5 Cal. Rptr.2d 571, 574 (1992) (allowing jury instruction based on the ethics rule regarding breach of fiduciary duty.)

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[7] "There was in force in the State of Illinois at the time of the occurrence in question a certain Supreme Court Rule which provided that:

A lawyer shall not

(1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it;

(2) handle a legal matter without preparation adequate in the circumstances; or

(3) neglect a legal matter entrusted to him.

If you decide that a defendant violated the Supreme Court Rule on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, the defendant was negligent or willful, wanton or reckless at the time of the occurrence."

The majority of courts across the nation permit plaintiffs to present evidence, through expert testimony, that the defendant violated a rule of professional conduct. This testimony is not used to hold the defendant liable because of the violation, it is simply more evidence for the jury to assist them in determining whether the defendant was negligent. As a result, if this Court addresses this issue, Judge McDonald should be allowed to testify regarding Scott's violations of the rules of professional conduct.

III. CONCLUSION

Tim Davis and TD&A respectfully requests this Court vacate the August 24, 2007 Factual Background, Conclusions of Law, Judgment and Order, reverse the Court of Appeals, and remand the case for a trial on the merits. Additionally, this Court should issue the following rulings:

1. Summary Judgment was improperly granted because Davis is the Real Party in Interest and: a) an assignment of proceeds is not against public policy, or b) an invalid assignment is void *ab initio* (reversing trial court),

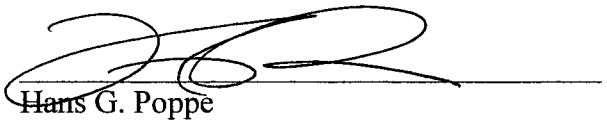
2. Davis is entitled to claim "all damages and costs," including "underlying corrective fees" (affirming trial court) and "malpractice litigation fees" (reversing trial court);

3. Davis is entitled to claim emotional distress damages (affirming trial court);

4 Expert disagreement does not warrant summary judgment (affirming trial court); and

5. Testimony from legal experts on standard of care and violations of Supreme Court Rules is admissible (no ruling from trial court).

Respectfully submitted,



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