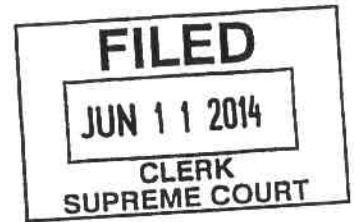


SUPREME COURT OF KENTUCKY

No. 2013-SC-228 and 2013-SC-682



JOHN J. SCOTT AND WHITLOW & SCOTT

APPELLANTS/CROSS-APPELLEES

v.

FROM KENTUCKY COURT OF APPEALS
No. 2011-CA-431 AND 2011-CA-592

FROM HARDIN CIRCUIT COURT
No. 05-CI-800 AND 10-CI-2530

TIM DAVIS AND
TIM DAVIS & ASSOCIATES, INC.

APPELLEES/CROSS-APPELLANTS

COMBINED REPLY/RESPONSE BRIEF FOR APPELLANTS/CROSS-APPELLEES

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Certificate of Service

I hereby certify that a copy of the foregoing was sent by first-class mail June 11, 2014, to:
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Hon. Douglas M. George, Washington County Judicial Center, 100 E. Main St., Suite
200, Springfield, KY 40069, and Sam Givens, Clerk of Kentucky Court of Appeals, 360
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I. Davis cannot meet the requirements for post-judgment relief, and the trial court did not abuse its discretion in denying Davis's motion for relief.

An assignment prohibited by Kentucky law gave birth to Davis filing the 2005 legal malpractice action. Because that suit was tainted by the illegal assignment, this Court ordered it to be dismissed without prejudice, which it was. This Court did not direct that the order dismissing the 2005 suit should be vacated or that the tainted suit could continue if the assignment was eliminated. Rather, “the current [2005] suit, born of the improper assignment, cannot be permitted to continue.” 320 S.W.3d at 92. The trial court did not abuse its discretion by doing what this Court ordered – dismissing the 2005 tainted suit without prejudice – and denying the motion to vacate the very order that this Court ordered to be entered, particularly when Davis failed to demonstrate any of the requirements for post-judgment relief.

The parties do not dispute that the only mechanism by which the trial court could have allowed Davis's 2005 lawsuit to continue was to grant Davis's motion for post-judgment relief under Rule 59.05 or 60.02, which are each subject to specific legal requirements and to review for abuse of discretion. (Scott Brief at 13-14; unrefuted in Davis's brief.) The Court of Appeals failed to mention either rule, let alone explain the requirements for those rules, how Davis's motion for post-judgment relief met those requirements, or how the trial court abused its discretion in denying Davis's motion.¹ (*Id.*) This lack is, likely, because Davis's motion for post-judgment relief failed to satisfy the requirements of either rule.

¹ Although Davis's brief asserts, without citation to a specific page of the Court of Appeals' opinion, that the Court of Appeals held that the “trial court abused its discretion” in denying his motion for CR 59.05 and 60.02 relief (Davis Brief at 6, 13, 14, 19), the Court of Appeals never mentions the standard of review or any form of the phrase “abused its discretion.”

A. Davis did not and cannot meet the CR 59.05 requirements.

Davis's CR 59.05 motion did not present any of the four situations upon which a motion to alter, amend, or vacate may be granted, and the Court of Appeals did not even mention CR 59.05. (TR 1699; Ct. App. Opinion.) Instead Davis simply claimed in the trial court that this is "one of" those "certain situations" requiring CR 59.05 relief. (TR 1699 at pp. 4-5.) In the Court of Appeals, Davis claimed that the "only requirement" was that the CR 59.05 motion be "timely." (Davis Brief to Ct. App. at 7.) Now Davis claims that his CR 59.05 motion "should have been granted both because new evidence was discovered that was previously unavailable and to prevent manifest injustice." (Davis Brief at 15.) Davis is wrong.

The "new evidence" upon which Davis relies is "the elimination of Davis'[s] improper assignment." (*Id.*) The elimination of the prohibited assignment is not, however, "new evidence"; rather, the belated elimination of the prohibited assignment is a new fact created long after entry of the judgment. Unfortunately for Davis, "[a]lthough a trial court may grant a CR 59.05 motion if the movant presents newly discovered evidence that was not available at the time of trial, 'newly discovered evidence' must be of facts existing at the time of trial." *Gullion v. Gullion*, 163 S.W.3d 888, 894 (Ky. 2005) (footnotes and citations omitted). If facts occurring subsequent to the judgment were grounds for a CR 59.05 motion, "'litigation would never come to an end.' Thus, it is improper for a trial court to rely upon evidence of events that occurred subsequent to the trial in ruling on a CR 59.05 motion." *Id.* (citation omitted). Here, the elimination of the illegal assignment was not a fact existing at the time of judgment. Elimination of the assignment long after summary judgment was granted and the case was ordered to be dismissed is not grounds for a CR 59.05 motion.

Nor was it “manifestly unjust” to dismiss Davis’s 2005 lawsuit and refuse to set aside that dismissal as Davis now argues. (Davis Brief at 15-16, emphasis altered, contending that “it was obviously unjust for the trial court to refuse to set aside its dismissal of Davis’[s] 2005 [lawsuit] when this Court had emphatically stated that Davis had not forfeited his **suit** and could **continue to pursue** his claim once the assignment was removed.”) But this Court did not state, emphatically or otherwise, that Davis had not forfeited his “**suit**” or that he could “**continue to pursue** his claim once the assignment was removed.” Rather, this Court held that, while Davis had “not forfeited his malpractice **claim**,” “the current **suit** . . . cannot be permitted to continue” and that the “most appropriate solution” was “to remand the matter . . . with directions to dismiss Davis’s **complaint** without prejudice.” *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010). Thus, this Court ordered that, although the malpractice claim was not forfeited simply because it had been assigned, the 2005 lawsuit brought pursuant to that prohibited assignment was to be dismissed, which is what the trial court did. This Court then said that, “[s]hould Davis wish to **reassert** his **claim**,” a prerequisite was to eliminate the attempted assignment. *Id.* This Court did not say anything about the ultimate viability or merits of his claim or Davis’s ability to “pursue” his claim once he “reasserted” it; nor did this court state that Davis could reassert or reinstate his tainted 2005 **lawsuit**.

The trial court did not err, let alone abuse its discretion by dismissing Davis’s 2005 complaint – as this Court told it to do – and then refusing to vacate that dismissal because Davis succeeded in obtaining an agreement from a company that allegedly no longer existed (*see* Scott Brief at 9) to eliminate an illegal assignment that Davis had entered into over five years earlier. Davis has failed to demonstrate any manifest

injustice by the dismissal without prejudice of a lawsuit brought due to an assignment that is prohibited in Kentucky.

B. Davis did not and cannot meet the CR 60.02 requirements.

In his brief to this Court, Davis appears to assert that he meets the requirements of 60.02(e) and (f): “it is no longer equitable that the judgment should have prospective application” and he has “other reason of an extraordinary nature justifying relief.” (Davis Brief at 16-17, relying on and quoting portion of *Davis v. Scott* where this Court set forth other states’ “general rule,” not the actual holding of the case or this Court’s specific directions about what was to be done on remand.) Davis claims that this Court expressed what it felt was the “equitable path” for Davis to take and contends that his “extraordinary efforts to bring his claim, combined with the holding of this Court provided the extraordinary reason for relief.” (Davis Brief at 17.) Davis is mistaken.

Regarding Rule 60.02(e), when this Court ordered that the 2005 complaint be dismissed without prejudice, this Court obviously anticipated – in fact, required – that its order have “prospective application.” The trial court could not enter an order specifically required by this Court (dismissal of the complaint without prejudice) and then, within weeks, “relieve” Davis from the order without violating the law of the case doctrine (set forth in detail in Section II). Moreover, equity does not protect a “tainted lawsuit” brought with unclean hands pursuant to an illegal assignment. *Norsworthy v. Ky. Bd. of Med. Licensure*, 330 S.W.3d 58, 64 (Ky. 2009) (“Unclean hands are an absolute bar to equitable relief”). This is not the type of situation where equity prevents prospective application of a judgment. *Contra, e.g. Crowder v. Commonwealth*, 745 S.W.2d 149 (Ky. App. 1988) (where putative father discovered after entry of default paternity judgment that mother had admitted putative father was not the actual father, the trial

court properly exercised discretion under 60.02(e) in ordering blood tests because it was no longer equitable for the default paternity judgment to have prospective application).

Davis fails to explain how his “efforts to bring his claim” could be considered “extraordinary” (Davis Brief at 17), perhaps because they are not extraordinary (at least in a good way). Rather, Davis began this lawsuit pursuant to a prohibited assignment. Instead of eliminating that assignment years ago, Davis continued to claim, despite all evidence to the contrary and the ruling of all eleven judges and justices who looked at the matter, that it was only a partial assignment of proceeds rather than an assignment of the malpractice claim.² Nor can it be considered “extraordinary” that the case was appealed and ultimately remanded to the trial court, an event which happens with some frequency. Davis has failed to make the “very substantial showing” necessary to merit relief under the provisions of Rule 60.02. *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970). Finally, a party may not use Rule 60.02 “as a means to extend a statutory period,” *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003), as Davis is attempting here.

II. The law of the case doctrine supports the trial court’s orders.

As explained in detail in Scott’s opening brief, the law of the case doctrine only applies to legal questions actually addressed by the appellate court. (Scott Brief at 19-21.) Here, that doctrine prohibits the Court of Appeals from directing that the 2005 lawsuit could continue on remand. (*Id.* at 22-25.) In his response brief, Davis makes general statements regarding the law of the case doctrine (*id.* at 11-12) and erroneous assertions about this Court’s purported intent.³ (*Id.* at 6-13.) He does not dispute that the

² Davis continues to refer to his prohibited assignment of the malpractice claim as a “partial assignment of proceeds.” (Davis Brief at 1, 2, 3.)

³ Davis uses a form of the word “intent” over forty times in his brief, without ever discussing the specific legal questions actually addressed by this Court. (*Id.* at 1-22.)

law of the case doctrine applies to legal questions that an appellate court has actually determined and passed on and that the doctrine does not apply to legal questions not determined by the appellate court. *Fischer v. Fischer*, 348 S.W.3d 582, 593 (Ky. 2011), quoting *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). A review of what this Court actually said, and the legal questions actually addressed, is in order.

A. The legal issues previously ruled on by this Court do not include the legal issues raised in Davis’s post-judgment motion.

In *Davis v. Scott*, after setting forth the factual background and standard of review, this Court first addressed the “primary issue in this matter,” whether the assignment at issue was prohibited by Kentucky law. 320 S.W.3d at 90-91. Davis had argued that the assignment was merely a partial assignment of the proceeds of the malpractice claim, while Scott had claimed that it was an assignment of the malpractice claim itself. *Id.* at 90. The Court’s first and primary holding was that, Davis’s assertions to the contrary notwithstanding, “what has occurred is an assignment not merely of the proceeds of the claim against Scott, but of the entire claim itself. Kentucky law does not permit the assignment of a legal malpractice claim.” *Id.* at 91. This paragraph sets forth the law of the case that the assignment was prohibited by Kentucky law.

The second issue this Court addressed was the effect of the improper assignment of the malpractice claim. *Id.* at 91-92. First, the opinion contains one paragraph setting forth the general rule from other states regarding the effect of such prohibited assignments. *Id.* That paragraph provides background for the legal analysis, but it does not pass on any legal questions in this case.

Next, the Court set forth its concerns with other states’ general rule – while Davis had “not forfeited his claim” by virtue of the assignment, the Court could not “ignore the

fact that the present suit was born of the invalid assignment and is, therefore, tainted in some respect.” *Id.* at 92. This Court agreed with the Court of Appeals of Arizona that, “to allow Davis to proceed on the present claim would be ‘to wink at the rule against assignment of legal malpractice claims.’” (*Id.* quoting *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. Ct. App. 2002).)

The Court then rejected Davis’s position that the settlement agreement was void *ab initio* by virtue of the assignment (which would have allowed Davis to continue the 2005 suit as the real party in interest). *Id.* The Court also did not, “necessarily,” accept Scott’s position the that agreement could only be modified by the federal district court that approved it. *Id.* Instead, this Court held that the agreement “may only be modified with the approval of both Global and Davis.” *Id.*

Next, the penultimate paragraph of the opinion sets forth this Court’s specific directions regarding the outcome of the second issue, the effect of the improper assignment:

We believe the most appropriate solution under these circumstances is to remand the matter to the circuit court with directions to dismiss Davis’s complaint without prejudice. As stated above, though Davis has not forfeited his malpractice claim, the current suit, born of the improper assignment, cannot be permitted to continue. Should Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest

Thus, this Court made seven specific rulings. (1) The assignment at issue was an improper assignment of the malpractice claim, not simply a partial assignment of proceeds. (2) Davis did not forfeit his malpractice claim simply due to the fact that it was assigned. (3) The settlement agreement was not void by virtue of the assignment. (4) The settlement agreement containing the assignment could only be modified if both

Davis and Global (the parties to the settlement agreement) agreed. (5) The “present [2005] suit,” which was “born of the improper assignment” is “tainted,” and allowing Davis to proceed on it “would be ‘to wink at the rule against assignment of legal malpractice claims.’” (6) The “current suit, born of the improper assignment, cannot be permitted to continue,” and it must be dismissed “without prejudice” on remand. (7) “Should Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest.”

This Court did not rule on the substance of or any defenses to any potential reasserted claim. This Court did not hold that Davis “should proceed” with his 2005 lawsuit or that he would be able to “pursue” his malpractice claim past his reassertion of that claim.⁴ This Court did not rule on any potential future Rule 59.05 or 60.02 motions by Davis.

B. Davis reargues an issue he lost on his first appeal.

Davis could not and cannot demonstrate that the trial court’s order dismissing the 2005 complaint without prejudice and denying Davis’s post-judgment motion contravenes any legal question determined by this Court. Instead, Davis reargues the cases he previously argued for the proposition that the prohibited assignment had no effect on the underlying case and did not warrant dismissal of the complaint.

⁴ Davis’s brief repeatedly mischaracterizes this Court’s opinion as ruling that he should be allowed to “pursue,” “maintain,” “continue,” or “proceed” with his “claim” or his “case.” *See, e.g.*, Brief at 1, 3, 6, 7, 8, 11, 13, 14, 16, 17, 19. This Court actually ruled that the “current [2005] suit” cannot be permitted to continue and must be dismissed, but that Davis could “**reassert** his claim” only upon a showing that the attempted assignment is no longer in place.

Davis spent the largest section of his brief to the Court of Appeals in his second appeal (regarding the denial of the post-judgment motions) arguing that the trial court's ruling "does not comport with case law from around the nation" that supports "the right of [a] real-party in interest to bring a claim despite [an] invalid assignment" and that the ruling makes Kentucky an "island unto its own." (Davis Brief in 2011-CA-431 at 11-16.) Davis continues those arguments in a slightly different and shorter form in his current brief to this Court. (Davis Brief at 9-11, now claiming that "Kentucky will be a minority of one" instead of an "island unto its own.") Those arguments, including the cases upon which Davis relies, are, however, the same arguments (somewhat truncated) that Davis made in the trial court, the Court of Appeals, and this Court in his first appeal where he asserted that, regardless of the invalidity of the assignment, he should be permitted to continue the action as the real party in interest and that, to do otherwise, would make Kentucky an "island unto its own." (2005-CI-800, TR 1350 at pp. 2-13; Davis Brief in 2007-CA-2279 at 6-9, 11-18; Davis Brief 2009-SC-159 at 6-29.) Davis previously lost that argument at every level, most importantly, before this Court.

Davis also erroneously claims that in *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002), the Arizona Court of Appeals held that the invalid assignment of a legal malpractice action "does not prohibit the real-party-in-interest from bringing the legal malpractice claim and [that] dismissal because of an invalid assignment is reversible error." (Davis Brief at 10.) This is precisely what Davis erroneously argued to this Court on his first appeal. (Davis Brief in 2009-SC-159 at 20.) But, in settling the underlying action in *Botma*, Botma (the defendant there) assigned the proceeds from his malpractice claim to the plaintiff. Botma also permitted the underlying plaintiff to control the case, which was filed in Botma's name. *Id.* at 540. The trial court dismissed the lawsuit,

which dismissal the appellate court **affirmed**. Although the Arizona Court of Appeals found that the malpractice suit survived the invalid assignment (in other words, as this Court held, the malpractice claim was not forfeited simply by virtue of the assignment), it went on to affirm the trial court's dismissal: "To allow the present lawsuit, which was born out of that [invalid] assignment agreement, to proceed in Botma's name would be to wink at the rule against assignment of legal malpractice claims." *Id.* at 543. This Court agreed with *Botma* in ordering that Davis's 2005 suit be dismissed on remand. *Davis v. Scott*, 320 S.W.3d at 92.

Davis's argument in this second round of appeals is a slightly revised repeat of his losing argument in his first round of appeals. Such an argument should not form the basis for ruling that the trial court somehow abused its discretion in denying Davis's motion for post-judgment relief.

C. The Court of Appeals misapplied the law of the case doctrine.

The Court of Appeals, following the "general rule" with which this Court only partially agreed, 392 S.W.3d at 92, erroneously held that the 2005 "lawsuit should continue" if Davis could show that the various factors previously establishing that he was not the real party in interest were "no longer present." (Opinion at 7.) The question according to the Court of Appeals was "how can Davis successfully show that he is now the real party in interest." (Opinion at 7.) The parties did not disagree, however, regarding whether the assignment had been eliminated and, thus, whether Davis had finally become the real party in interest. The dispute was whether the elimination of the prohibited assignment was grounds for a CR 59.05 or 60.02 motion to vacate a dismissal order that this Court had ordered to be entered. The Court of Appeals failed to mention the actual issue decided by the trial court, upon which this Court had not ruled.

Instead, of ruling on the issue before it – whether the trial court abused its discretion in denying relief under CR 59.05 or 60.02 – the Court of Appeals ruled directly contrary to this Court’s specific direction that “the current [2005] suit, born out of the improper assignment, cannot be permitted to continue.” 392 S.W.3d at 92. Davis’s brief fails to explain the inexplicable – how the Court of Appeals’ holding does not, itself, violate the law of the case doctrine.

III. The 2010 complaint was time barred.

A. KRS 413.245 bars Davis’s claims.

Kentucky law requires that a claim for legal malpractice, whether in contract or tort, be brought within one year from the date of the occurrence or from when the cause of action was, or reasonably should have been, discovered by the injured party. KRS 413.245. This statute of limitations encompasses both Davis’s negligence and breach of fiduciary duty claims in his 2010 complaint. (2010-CI-2530, TR 2.)

Davis’s cause of action accrued, at the latest, in 2004, when he settled the federal lawsuit in Tennessee that he claimed resulted from the allegedly improper illegal advice. Thus, there can be no dispute that the statute of limitations on the 2010 complaint began to run approximately six years before it was filed – significantly longer than the one-year statute of limitations. Accordingly, the trial court properly dismissed the 2010 complaint as barred by the statute of limitations (2010-CI-2530, TR 96), and the Court of Appeals properly affirmed that dismissal.

B. Application of the statute of limitations is not inequitable.

Rather than disputing the indisputable – that the 2010 complaint concerns events that occurred more than six years before it was filed, well outside the applicable statutes of limitations – Davis first claims that dismissal based on statutes of limitation that apply

to the rest of Kentucky was “inappropriate” and “inequitable” here because he “diligently pursued” his claim against Scott and because this Court intended otherwise. (Davis Brief at 17.) Davis is wrong.

Davis ignores the fact that he “diligently pursued” his claim while operating under an assignment of a legal malpractice claim that is prohibited in Kentucky while vehemently protesting at every level that the assignment was not prohibited. He, apparently, did not diligently review Kentucky law concerning assignments of malpractice claims and the assignment at issue here. Had Davis done so, he would have seen what every judge who has reviewed this case (the trial judge, the unanimous three-judge Court of Appeals panel, and the unanimous seven justices on the Kentucky Supreme Court) has seen – regardless of Davis’s repeated protestations, if it looks like a duck, walks like a duck, and quacks like a duck, it is a duck. The assignment in the settlement agreement that Davis freely entered into and pursuant to which he brought his original lawsuit was illegal. Pursuit of claims brought pursuant to an illegal agreement does not, under any legal rule or theory, toll the statute of limitations.

Nor do any equitable principles provide Davis with a mechanism to toll the statute of limitations. Kentucky law unambiguously demonstrates that equitable tolling of the statute of limitations is unavailable to Davis. Statutory equitable tolling is found in KRS 413.190(2), which states that, “[w]hen a cause of action . . . accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of this action,” the statute of limitations is tolled during the time of the defendant’s absence or obstruction. “[A]ny other indirect means’ has been interpreted to mean some affirmative act or conduct which misleads or deceives the plaintiff and obstructs or prevents him from instituting a suit during a period of time in

which he may lawfully do so.” *Commonwealth of Kentucky, Labor Cabinet v. Hasken*, 265 S.W.3d 215, 226 (Ky. App. 2007) (citing *Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952)). Here, Scott took no actions of any sort to mislead or prevent Davis from instituting suit within the applicable statute of limitations. Indeed, Davis did timely institute suit; he did so, however, pursuant to an assignment of the type that has been illegal in Kentucky for decades.

Nor does equitable estoppel toll the statute of limitations for Davis. “Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party.” *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 62 (Ky. 2010). Once again, Davis’s second lawsuit is untimely not because of any reliance by him on representations by Scott, but because of Davis’s entry into an assignment of a legal malpractice claim that was prohibited in Kentucky from before the time Davis entered into the assignment to the present date.

Nor would Davis satisfy the requirements for equitable tolling in a criminal context. “[T]he critical inquiry remains whether the circumstances preventing a [post-conviction] petitioner from making a timely filing were both beyond the petitioner’s control and unavoidable despite due diligence.” *Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005); *Robertson v. Commonwealth*, 177 S.W.3d 789, 792 (Ky. 2005). Here, while Davis initially made a timely filing, he did so pursuant to an illegal assignment that he entered into of his own control and own volition – an assignment that was certainly not “unavoidable despite due diligence.” That Davis’s complaint after the elimination of the illegal assignment was untimely was neither beyond his control nor unavoidable.

Finally, this Court simply stated that, “[s]hould Davis wish to reassert his claim against Scott,” he could do so only after showing that the assignment was no longer in place. 320 S.W.3d at 92. Davis “reasserted” his claim by filing a new complaint in 2010, after eliminating the prohibited assignment, which is what this Court’s opinion said he could do. This Court said nothing about (and provided no indication of its “intent,” if any) regarding the merits of or any defenses to the claim once it was reasserted. As the trial court correctly recognized, “[t]he reassertion of the lawsuit in this [2010] action must be judged on its merits and all defenses would apply. This statute of limitations would prevent this action from proceeding further.” (2010-CI-2530, TR 96.)

C. The 2010 complaint is not an amended complaint and does not relate back to the 2005 complaint.

While admitting that his 2010 complaint is not an actual amended complaint under CR 15.01, Davis asks this Court to treat the 2010 complaint as if it were an amended complaint for purposes of relating the 2010 lawsuit back to the 2005 lawsuit. (Davis Brief at 21-22.) As Davis acknowledges, however, CR 15.03(1) only allows **amended** pleadings to relate back to the original pleadings; it does not allow a second lawsuit filed six years after the original lawsuit to relate back. (Davis Brief at 21; CR 15.03(1).)

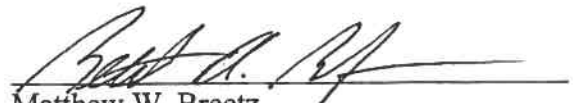
Davis fails to cite a single statute, rule, legal principle, or case that would allow his 2010 lawsuit to relate back to his 2005 lawsuit. (The two cases Davis cites in his brief, *Perkins v. Read*, 616 S.W.2d 495 (Ky. 1981) and *Underhill v. Stephenson*, 756 S.W.2d 459, 460 (Ky. 1988), both concern amended complaints, not complaints filed in two separate lawsuits.) Scott, likewise, has been unable to find any such support. The

trial court was correct in not acceding to Davis's request, and the Court of Appeals was correct in affirming the dismissal of the 2010 lawsuit due to the statute of limitations.

CONCLUSION

This case is similar to a situation where, for example, a plaintiff files a wrongful death suit within the statute of limitations, but fails to be appointed personal representative until after the statute of limitations runs on the wrongful death claim. *See, e.g., Everley v. Wright*, 872 S.W.2d 95 (Ky. App. 1993). The problem for the personal representative in such situations is that he or she waited too long before being qualified. Similarly, here, Davis waited too long to be qualified to file in his name.

But not only did Davis wait too long to be qualified to file in his own name, the reason he waited too long was that he violated Kentucky law prohibiting assignments of legal malpractice claims. While the simple fact of entering into the prohibited assignment did not mean that he lost his claim, entering into that assignment did not give him an extended period of time to bring his claim as the real party in interest. This Court should not give Davis or any other litigant an extended period of limitations solely because the litigant tried to "game" the system by entering into an illegal assignment.



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