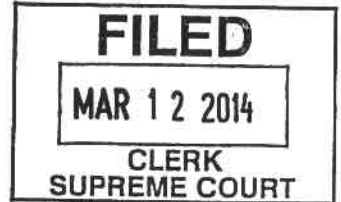


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2013-SC-000228 and 2013-SC-000682



JOHN J. SCOTT and  
WHITLOW & SCOTT

MOVANTS/  
CROSS-RESPONDENTS

v. **FROM CASE NO. 2011-CA-431 and 2011-CA-000592  
(HARDIN CIRCUIT COURT CASE NO. 05-CI-00800)**

TIM DAVIS and  
TIM DAVIS & ASSOCIATES, INC.

RESPONDENTS/  
CROSS-MOVANTS

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**COMBINED BRIEF ON BEHALF OF RESPONDENTS/CROSS-MOVANTS**

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Respectfully submitted,

A handwritten signature in dark ink, appearing to be "Hans G. Poppe", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

It is hereby certified that on the 11<sup>th</sup> day of March 2014, a true and correct copy of Respondents/Cross-Movants' Combined Brief was served via U.S. First Class Mail to the following: Matthew W. Breetz, Bethany A. 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. A. Bailey Taylor, 186 East Wood Trail, Mt. Washington, KY 40047; 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.

A handwritten signature in dark ink, appearing to be "Hans G. Poppe", written over a horizontal line.

Hans G. Poppe  
Warner T. Wheat

## I. INTRODUCTION

Respondent/Cross-Movant Tim Davis and Tim Davis & Associates (collectively “Davis”) responds in opposition to Movant John Scott and Whitlow and Scott’s appeal from the Court of Appeals’ reversal and remand of the trial court’s denial of Davis’ CR 59.05 and 60.02 motions. Further, Davis appeals the trial court’s dismissal of his 2010 Complaint.

Davis requests this Court affirm the portion of the Court of Appeals’ ruling allowing him to reassert his 2005 suit or, in the alternative, to reverse the portion of the Court of Appeals’ ruling which held dismissal of the 2010 suit was proper.

## **II. STATEMENT CONCERNING ORAL ARGUMENT**

Pursuant to Rule 76.12(4)(ii) of the Kentucky Rules of Civil Procedure, the Respondents/Cross-Movants, Tim Davis and Tim Davis & Associates, by counsel, respectfully request the opportunity to present an oral argument on behalf of his position. The issues involved can be clearly explained if Respondents/Cross-Movants are allowed oral argument in this case.

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### III. STATEMENT OF CASE

#### A. Summary

This appeal arises out of a legal malpractice case originally dismissed by the trial court for an improper assignment of malpractice proceeds. On review by this Court, the trial court's dismissal with prejudice was reversed and the trial court was instructed to allow Davis to "reassert" his claim once he proved he was the real party in interest. This case has once again made its way to the Supreme Court of Kentucky. At issue now is whether the Court of Appeals properly applied this Court's mandate in the prior Supreme Court of Kentucky case of *Davis v. Scott*. The Court of Appeals held this Court's prior opinion allows, and intended to allow, Davis to continue his legal malpractice claim.

In 2011 this Court held "Davis has not forfeited his claim" and remanded the case so Tim Davis could "reassert" his claim once the invalid assignment was removed. On remand to the trial court, Davis filed a motion to set aside the dismissal and also file a new, identical lawsuit. This gave the trial court two options to allow the claim to be reasserted. The trial court failed to follow this Court's direction and refused to allow Tim Davis and Tim Davis & Associates to reassert his claims in the 2005 or 2010 suits.

On appeal, the Court of Appeals held the trial court erred by not following this Courts' ruling to allow Davis to reassert his claim. The Court of Appeals ruled the trial correctly dismissed the 2010 lawsuit, but the Court of Appeal's also ruled the trial court erred by not setting aside its prior Order dismissing the original 2005 suit.

Davis requests this court affirm the portion of the Court of Appeals ruling allowing him to reassert his 2005 suit or, in the alternative, to reverse the portion of the Court of Appeals ruling which held dismissal of the 2010 suit was proper.

## **B. Factual Background**

### **1. Underlying Lawsuit**

In 2005, Tim Davis and Tim Davis and Associates (collectively “Davis”) file a legal malpractice claim against John Scott and Whitlow & Scott (collectively “Scott”). The legal malpractice claim arises from advice given by Scott to Davis regarding the enforceability of a non-solicitation agreement. Relying on Scott’s incorrect advice, Davis solicits business from a client list of a business he once sought to purchase, but is ultimately acquired by another company, Global Risk Management. Due to Scott’s malpractice, Davis is sued in federal court in Tennessee and spends over \$300,000 in legal fees, ultimately settling with Global Risk Management for \$300,000 and an assignment of 80% of the proceeds of any legal malpractice action against Scott. Davis’ action against Scott is assigned to Special Judge Hon. Robert A. Miller in Hardin Circuit Court.

During the litigation, Scott argues the case should be dismissed because Davis assigned a portion of the legal malpractice proceeds to his former adversary in the underlying litigation, Global Risk Management. Scott argues an assignment of proceeds from a legal malpractice action is invalid in Kentucky and requires the trial court to dismiss the case in its entirety.

Davis argues an assignment of proceeds (as opposed to an assignment of the action) is not invalid in Kentucky but, even if it is, the action should not be dismissed because the real-party-in-interest filed the lawsuit (as opposed to the third-party beneficiary).

Shortly before trial, Judge Miller grants Scott’s Motion for Summary Judgment by holding a partial assignment of proceeds is against public policy in Kentucky. Davis appeals.

## **2. First Appeal**

On February 13, 2009, a panel of the Kentucky Court of Appeals affirms the trial court. The panel holds the Settlement Agreement is void as against public policy due to the partial assignment of proceeds. The panel further holds Davis is precluded from continuing the legal malpractice suit as the real party in interest because the trial court does not have jurisdiction to invalidate the Settlement Agreement. Davis requests Discretionary Review from this Court, which is granted.

## **3. Supreme Court of Kentucky Decision**

This Court hears oral argument and renders an Opinion on August 26, 2010. *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) [Tab 1]. This Court affirms in part and reverses in part by holding: “we agree that Davis has not forfeited his claim, [but] we also cannot ignore the fact that the present suit was born of the invalid assignment and is, therefore, tainted in some respect.” *Id.* at 92. The Court holds the trial court’s order dismissing with prejudice is in error and remands the case “with directions to dismiss Davis’ complaint without prejudice” so Davis can “reassert his claim against Scott” and pursue it as the real party in interest. *Id.* (emphasis added).

This Court states in its August 26, 2010 Opinion that while Davis’ current claim cannot continue due to the invalid assignment, Davis is not forfeiting his claim. This Court notes “the general rule is that an invalid assignment has no effect on the validity of the underlying action.” *Id.* at 91. Further, this Court cites case law from multiple jurisdictions across the country holding the underlying malpractice claim survives the invalid assignment.<sup>1</sup> *Id.* at 92. This Court also cites secondary sources stating the assignor still

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<sup>1</sup> See *Weiss v. Leatherberry*, 863 So. 2d 368, 373 (Fla. Dist. Ct. App. 2003) (remanding matter to trial court because “invalidity of the agreement [to assign] has no effect on the underlying cause of

maintains his or her claim, “If an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name.” 6 Am. Jur. 2d *Assignments* § 122 (2010); *Id.* at 91-92.

This Court even outright states its intent for Davis’ claim, holding “Davis has not forfeited his claim” and then reiterating the point on the very next page by stating “though Davis **has not forfeited his malpractice claim**, the current suit born of the improper assignment cannot be permitted to continue” *Id.* (emphasis added). This Court instructs the trial court to dismiss the 2005 suit without prejudice so that the invalid assignment may be removed. *Id.*

#### 4. Trial Court on Remand

On November 12, 2010, Judge Miller, consistent with the instructions from this Court, enters an Order Dismissing Without Prejudice. [R. at 1698] [2005 Case Record] [Order at Tab 2]

Davis then sets out to satisfy this Court’s requirement to prove he is the real party in interest so he can continue his suit. Davis returns to federal court in Tennessee because it has jurisdiction over the underlying Settlement Agreement. On November 17, 2010, the Hon. William J. Haynes, Jr., United States District Court, Middle District of Tennessee (Nashville) enters an “Agreed Order Severing Assignment Clause and Finalizing Discharge of Settlement Obligations.”

Specifically, Judge Haynes’ Order recites:

**WHEREFORE**, this Court does hereby order and adjudge § 1(e) of the Settlement Agreement and General Release executed by and between Global Risk Management, Inc., and Tim Davis & Associates, Inc., and Timothy R. Davis, Individually, has been determined to be unenforceable under

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action for legal malpractice”) *See also Botma v. Huser*, 39 P.3d 538, 542 (Ariz. Ct. App. 2002); *Weston v. Dowty*, 414 N.W.2d 165, 167 (Mich. Ct. App. 1987); *Tate v. Goins, et al.*, 24 S.W.3d 627, 635 (Tex. App. 2000).

Kentucky law and is hereby severed from the Agreement and TD & A and Davis are released from any further compliance with § 1(e).

**IT IS FURTHER ORDERED** that the Court finds that Tim Davis & Associates, Inc., and Timothy R. Davis, Individually, have substantially complied with all other material terms of the Settlement Agreement and General Release, and that Tim Davis & Associates, Inc., and Timothy R. Davis, Individually, have satisfied all enforceable provisions of the Settlement Agreement and General Release. This Court further finds Tim Davis & Associates, Inc., and Timothy R. Davis, Individually, have fulfilled their obligations under the Settlement Agreement and General Release; and this Court hereby finalizes the Settlement and concludes this matter. It is so ORDERED.

[Agreed Order Severing Assignment Clause and Finalizing Discharge of Settlement Obligations at Tab 3] [R. at 22] [2010 Case Record].

Having satisfied the Supreme Court's requirement that the improper assignment be eliminated from his lawsuit, Davis begins exercising what he feels are the best procedural options per this Court's opinion to continue his suit against Scott as the real party in interest.

First, on November 19, 2010, Davis files a motion to alter, amend or vacate the order dismissing without prejudice pursuant to CR 59.05, or, in the alternative, to set aside the order dismissing without prejudice pursuant to CR 60.02(e) and (f). [R. at 1699] [2005 Case Record].

Second, on November 22, 2010, Davis files an identical second Complaint against Scott setting forth the exact same allegations as the 2005 complaint. [R. at 2] [2010 Case Record].

Scott objects to Davis' CR 59.05 and 60.02 motions and makes a motion to dismiss the 2010 Complaint based on the statute of limitations. [R. at 29] [2010 Case Record].

Despite the Supreme Court's ruling that Davis' claim should proceed once the invalid assignment is stricken, the trial court denies both of the options Davis offers the court. The trial court, on February 21, 2011 denies Davis' CR 59.05 and 60.02 motions to set aside the order dismissing the 2005 suit [R. at 1875] [2005 Case Record] and also grants Scott's motion to dismiss the 2010 Complaint. [R. at 96] [2010 Case Record]. Davis appeals both Orders.

### **5. Second Appeal**

On March 8, 2013 the Kentucky Court of Appeals issues its opinion agreeing with Davis by holding the trial court abused its discretion by denying Davis' CR 59.05 and 60.02 motions. The Court of Appeals directed the trial court to allow the 2005 suit to continue upon a showing Davis is the real party in interest; however, the Court of Appeals also affirms the trial court's dismissal of the 2010 Complaint. [Court of Appeals Opinion, Tab 4 at p. 7] The Appellate Court bases its holding on its reading of this Court's Opinion in this case and its understanding that "the Supreme Court's intention is that Davis should be permitted to pursue the first action by showing the assignment no longer exists and he is the real party in interest." *Id.*

## **VI. ARGUMENT**

*If an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name. Thus it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff.*

*Davis* at 91-92.

The issues in this appeal revolve around interpretation of the language and intent of this Court as set forth in its August 26, 2010 Opinion. This Court's Opinion makes clear its intent was for Davis to be able to pursue his claim against Scott once the invalid assignment

was removed. This Court notes in its Opinion that a number of other states addressing this issue have ruled that once any invalid assignment has been set aside, the real-party-in-interest is permitted to continue the previously invalid lawsuit. *Davis* at 91-92. This Court made it clear, and specifically states, that Davis did not forfeit his claim and, as the real-party-in-interest, may maintain his claim once the invalid assignment is removed. *Id.* The trial court ignored this Court's clear mandate and instead took every step possible to ensure, that regardless of Davis's compliance with the instructions of this Court, he would never have his day in court.

**A. The Trial Court Ignored This Court's Mandate and Violated The Law of the Case by Denying Davis' CR 59.05 and 60.02 Motions and Dismissing Davis' 2010 Complaint**

"Davis can pursue his malpractice claim as the real party in interest"  
*Davis* at 92.

"Davis has not forfeited his claim"  
*Id.*

"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."  
*Id.*

This Court could not have been any clearer in its intent and its mandate to the trial court. Time and again in its Order this Court states that Tim Davis has not forfeited his claim, the invalid assignment does not affect his suit, and all he needs to do in order to pursue his claim is show the trial court the invalid assignment is no longer in place.

The Court of Appeals had no trouble understanding this Court's Opinion and intent. It held, based on the clear language above, this Court intended that Davis should be allowed to pursue his claim against Scott once the invalid assignment issue was resolved and he



could show he was truly the real party in interest, stating, “Our best understanding of the Supreme Court’s intention is that Davis should be permitted to pursue the first action by showing the assignment no longer exists and he is the real party in interest.” [Tab 4 at p. 7].

The trial court, however, despite being presented with a number of different ways to adhere to, and achieve, this Court’s mandate and ultimate resolution, decided to ignore this Court and deny Davis’ motions to revive his 2005 case or pursue his identical 2010 Complaint. By doing so, the trial court violated this Court’s mandate, the law of the case doctrine, and abused its discretion.

After an appeal, jurisdiction enters in the trial court when the appellate court finishes its work and returns the case to the trial court with its decision. *Hutson v. Commonwealth*, 215 S.W.3d 708 (Ky. App. 2006). The scope of a lower court’s authority on remand of a case is measured by the direction or discretion contained in the appellate court’s mandate. *Id.* *Hutson* discusses the concept of the appellate court’s “mandate,” which is the instruction an appellate court gives to the trial court. Here, the Supreme Court reversed “for proceedings consistent with the opinion.” *Davis* at 92. The *Hutson* Court defined that phrase as follows,

The trial court may take such action, not inconsistent with the decision of the appellate court, as in its judgment law and justice require, where the case has been remanded generally without directions, or for further proceedings, or for further proceedings in accordance, or not inconsistent, with the opinion. [citations omitted]

*Hutson* at 714.

As set forth above, this Court’s mandate and intent as set forth in its 2011 Opinion is clear. This Court held,

As both parties acknowledge, the general rule is that an invalid assignment has no effect on the validity of the underlying action. “[I]f an assignment is invalid or incomplete, the



assignor may still maintain a suit in his or her name." 6 Am. Jur. 2d *Assignments* § 122 (2010). **Thus, it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff.** Indeed, several other jurisdictions considering similar circumstances have acknowledged that the underlying legal malpractice claim survives an invalid assignment.

*Davis* at 91-92 (emphasis added).

This Court went on to specifically state, **"Davis has not forfeited his claim."** *Id.* at 92 (emphasis added). Further, this Court held, **"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." *Id.* (emphasis added).

In fact, the Court even points out in determining that Davis has not forfeited his claim, it is siding with numerous courts around the country which hold similarly. The Court cites the Texas Court of Appeals which was faced with a situation very similar to that faced in this case. *Tate v. Goins, Underkofler, et al.*, 24 S.W.3d 627 (Tex. App.-Dallas 2000) In *Tate*, a Texas court was confronted with a situation where there was a partial assignment of proceeds to an adversary.

Even though the *Tate* court determined the Tate/SIDCO assignment of legal malpractice proceeds was invalid, it went on to hold that the invalid assignment had no effect on Tate's right to pursue his legal malpractice claim.

Tate asserts the trial court erred in granting summary judgment for Goins because Tate's right to bring the legal malpractice claim in his own name would not be affected by any invalid assignment of his malpractice claim to SIDCO. **Tate emphasizes he sued in his own name and, therefore, summary judgment was improper because it completely**

**abrogated his right to bring a malpractice claim. In this respect, Tate is correct.** In *Mallios*, the Texas Supreme Court held that when there is a purported partial assignment of a legal malpractice claim, the plaintiff's right to bring his own cause of action for malpractice is not vitiated by the invalid assignment." [citation omitted] "While expressing no opinion on the validity of the underlying 'arrangement' between the plaintiff and a third party, the court found summary judgment was improper and the plaintiff could continue his malpractice suit against his attorney and law firm." [citation omitted] "We find the holding in *Mallios* controlling on this issue and sustain Tate's fourth point of error."

*Id* at 634 (emphasis added).

This Court also cites the Arizona Court of Appeals which also addressed this issue and held that an invalid assignment of a legal malpractice action or its proceeds does not prohibit the real-party-in-interest from bringing the legal malpractice claim and dismissal because an invalid assignment is reversible error. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). (emphasis added)

Regardless of the invalidity of the assignment, the court held: "Although neither Botma's malpractice claim nor its proceeds are assignable, his malpractice claim does survive the invalid assignment." *Id.* at 542 (citing *Monthofer Invs. Ltd. P'ship v. Allen*, 943 P.2d 782, 785 (Ariz. Ct. App. 1997). The court explained "the fact that Botma entered into a settlement agreement that is in part contrary to Arizona law and unenforceable does not prevent him from suing Appellees for legal malpractice." *Id.*

This Court further cited a Florida district court which held, "The invalidity of the agreement has no effect on the underlying cause of action for legal malpractice, assuming the claim is asserted by proper person." *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003).

In addition, this Court cited a Michigan appeals court, which, in a situation very similar to this case, held, “We note that, even if there had been an invalid assignment, this would not warrant dismissal of the lawsuit. Instead, the assignment would be void, but the underlying action would survive.” *Weston v. Dowty*, 163 Mich. App. 238, 243, 414 N.W.2d 165, 167 (1987)

If Davis is not allowed to pursue his claim, as this Court and the Court of Appeals found to be appropriate, Kentucky will be a minority of one on this issue. That was not the intent of this Court who repeatedly stated that Davis had not forfeited his claim. Through its language and citation to numerous other courts and secondary sources this Court made itself clear. The Court of Appeals recognized the mandate and intent of this Court when it held, “the Supreme Court’s intention is that Davis should be permitted to pursue the first action by showing the assignment no longer exists and he is the real party in interest.” [Tab 4 at p. 7]. However, the trial court refused to vacate the dismissal or allow a new action once the invalid assignment had been eliminated. The trial court only *partially complied* with this Court’s mandate and, in so doing, acted contrary to the Opinion. The Opinion specifically allows the case to proceed once the invalid assignment is removed. Davis complied with the Opinion, yet the trial court refused to allow the case to proceed pursuant to this Court’s directive.

The trial court’s orders also violate the law-of-the-case doctrine. The law-of-the-case doctrine describes a principle which requires obedience to appellate court decisions in all subsequent stages of the litigation. *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982). Further, on remand, a trial court must strictly follow the mandate given by an appellate court in that case. *Williamson v. Com.*, 767 S.W. 2d 323 (Ky. 1989) (citing *City of Lexington v. Garner*,

329 S.W.2d 54 (Ky. 1959) and *E'Town Shopping Center, Inc., v. Holbert*, 452 S.W.2d 396 (Ky. 1970)). “The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision.” *Williamson*, 767 S.W. 2d at 325. Here, the trial court refused to adopt this Court’s Opinion completely and in doing so treated the action as if there had been no appeal at all. This, the trial court had no power to do.

Scott argues this Court did not intend for Davis to ever have his day in court. Despite this Court’s opinion emphatically stating over and over that Davis has not forfeited his claim and that he may pursue his claim once the assignment impediment is removed, Scott argues this Court never intended for Davis to be able to pursue the case to the trial court with instructions to allow Davis to “reassert” his claim. Scott argues this Court knew it was in effect killing each and every avenue to pursue any claim available to Davis when it ordered the 2005 suit dismissed with prejudice. When read in conjunction with the clear language this Court used in its 2011 Order, Scott’s arguments fail. This Court’s intent and mandate is clear.

Scott’s tortured argument is merely an attempt to twist this Court’s intent and muddy the waters in order to absolve the trial court of responsibility for failing to follow the law of the case and this Court’s mandate and to absolve Scott of his malpractice. Kentucky’s highest court has held, “It is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.” *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)

Here, when this Court states over and over that Davis has not forfeited his claim and that he may in fact pursue his claim, it surely meant it. When this Court states that Davis may “reassert” his claim, it surely did not mean that he may reassert his claim just so the trial court could dismiss it. This would make little sense and would be patently unjust. This Court held “interpreting court orders differs from that of statutes and contracts only to the extent that instead of construing the intent of the legislature or the intent of the parties, we must determine the intent of the ordering court.” *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006). Further, this Court held “where the order is ambiguous and open to interpretation, we will endeavor to construe and effectuate the intent” of the ordering court. *Id.* at 465-66. The intent of this Court’s holding in *Davis* is obvious—to allow Davis to cure any defect in his case and reassert it at the trial court. However, the trial court ignored the obvious intent of this Court and denied Davis the ability to reassert his claim.

As a result, it is clear the trial court, when it dismissed Davis’ reasserted 2010 Complaint, and when it denied Davis’ motions to alter, amend, or vacate or set aside the Order dismissing his 2005 complaint, violated the clear intent and mandate of this Court and violated the law of the case doctrine.

**B. The Court of Appeals Correctly Held Trial Court Abused its Discretion by Denying the Appellant’s Post Judgment Motions**

**1. Standard of Review**

When an appellate court reviews a trial court’s denial of a motion to alter, amend, or vacate, or set aside or vacate an order, an abuse of discretion standard is applied. Appellate courts should review a trial court’s judgment to determine “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

**2. The Court of Appeals Correctly Held the Trial Court Abused its Discretion in Denying Davis' Motions to Alter Amend or Vacate and/or Set Aside the Order Dismissing the 2005 Suit**

*a. Trial Court Abused its Discretion by Denying Davis' CR 59.05 Motion to Alter, Amend or Vacate.*

Kentucky Rule of Civil Procedure 59.05 gives the trial court the unlimited power to alter, amend, or vacate its judgment at its discretion. As the Court of Appeals correctly held, granting Davis' motion for relief under CR 59.05 was required in order to comply with the intent of this Court's Opinion, maintain the continuity of Davis' action, eliminate any statute of limitation issue, and allow Davis to continue with his claim. Instead, the trial court abused its discretion and denied Davis' CR 59.05 motion stating it did not meet any of the requirements for such a motion under the civil rule.

The rule states, "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than ten days after entry of the final judgment." Ky. CR 59.05. This Court has interpreted the state civil rule to require one of the four grounds set forth under decisions interpreting the similar federal rule. This Court has held,

Unlike CR 60.02, CR 59.05 does not set forth the grounds for the motion. But because "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly," the federal courts, in construing CR 59.05's federal counterpart, Federal Rule of Civil Procedure 59(e), have limited the grounds:

There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. **Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice.** Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

*Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005)

The Court of Appeals in this case recognized Davis met the requirements of the rule and the trial court abused its discretion when it failed to grant Davis' motion for relief under 59.05. While the Court of Appeals did not set forth which ground they felt Davis met, Davis' motion should have been granted both because new evidence was discovered that was previously unavailable and to prevent manifest injustice.

The elimination of Davis' improper assignment is "new evidence" in this case the trial court ignored when rendering its decision denying Davis' CR 59.05 motion. Following dismissal, Davis promptly complied with this Court's holding and had the assignment extinguished in a Tennessee federal court [Tab 3]. Davis then moved for the order dismissing his claim to be vacated, citing his compliance with this Court's order by having the assignment extinguished and providing the Order of the Tennessee Court to the Hardin Circuit Court. However, the trial court ignored this new evidence and denied Davis' motion. A party may invoke CR 59.05 and introduce new evidence unless that evidence "could and should have been presented during the proceedings *before* entry of the judgment." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997) (emphasis added). Here, the federal court order extinguishing the assignment *after* without prejudice was entered. Therefore the termination of the assignment is new evidence properly cited by Davis in his motion to alter, amend, or vacate the Order dismissing the 2005 lawsuit.

Additionally, the trial court should have granted Davis' motion to alter, amend, or vacate the dismissal of the 2005 lawsuit because it is "manifestly unjust" to dismiss Davis' claim after he had complied with this Court's command to establish he is the real-party-in-interest and then reassert his claim. Manifest injustice is defined as "A direct, obvious, and observable error in a trial court." BLACK'S LAW DICTIONARY (9th ed. 2009). Here, it was



obviously unjust for the trial court to refuse to set aside its dismissal of Davis' 2005 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.

*b. The Trial Court Abused Its Discretion by Denying Davis' CR 60.02 Motion to Reconsider*

The Court of Appeals correctly held the trial court also abused its discretion by denying Davis' motion for relief under Kentucky Civil Rule 60.02. Setting aside the Order of Dismissal under 60.02 would have complied with the intent of this Court's Opinion, maintained the continuity of this action, eliminated any statute of limitation issue, and allowed the real-party-in-interest to continue with his claim.

CR 60.02 states in part,

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

CR 60.02(e) allows a court to set aside a judgment if "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, **or it is no longer equitable that the judgment should have prospective application.**" (emphasis added). Civil Rule 60.02(f) provides a judgment or order may be set aside for "any other reason of an extraordinary nature justifying relief." Here, the clear stated intent of this Court was to allow the real-party-in-interest to continue



with a claim he had already litigated to the Kentucky Supreme Court and back. This Court specifically stated, even relying upon secondary sources, that

As both parties acknowledge, the general rule is that an invalid assignment has no effect on the validity of the underlying action. "[I]f an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name." 6 Am. Jur. 2d *Assignments* § 122 (2010). Thus, it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff. Indeed, several other jurisdictions considering similar circumstances have acknowledged that the underlying legal malpractice claim survives an invalid assignment."

*Davis* at 92.

Davis' extraordinary efforts to bring his claim, combined with the holding of this Court provided the extraordinary reason for relief. This Court clearly expressed what it felt was the equitable path for Davis to take, he met the Court's requirements and was entitled to relief from the order of dismissal as a result.

The trial court ignored this Court's repeated assertions that "Davis has not forfeited his malpractice claim" and "as stated above, Davis has not forfeited his malpractice claim," and, instead, refused to allow to reassert his 2005 claim after establishing he was the real-party-in-interest. Additionally, the trial Court interpreted this Court's ruling to mean Davis must file a brand-new lawsuit to maintain his claim, a lawsuit it dismissed the same day it denied Davis' motion to "alter, amend, or vacate or in the alternative set aside" the Order of Dismissal.

Again, Scott argues the "double dismissal" ensuring Davis' claims would never be heard was the real intent of this Court all along, despite the Court's repeated statements to the contrary. Scott's argument implies that this Court, despite saying that Davis had not forfeited his claim, never *really* wanted Davis to have his day in court and set up the

procedural hurdles to ensure he never would. According to Scott, the trial court correctly read between the lines of the clear language used by this Court and denied Davis' 60.02 motion to set aside the dismissal because that is the result this Court intended, even if this Court did not state it specifically. However, this argument makes little sense when one reads this Court's opinion and looks at the cases relied upon by this Court.

Davis provided the court with several different alternatives which were procedurally and legally viable and would have allowed the trial court to comply with the Supreme Court of Kentucky's directive. Instead, the trial court chose to disregard those options. The court ensured the real-party-in-interest would never be able to bring his claim, an outcome which this Court and courts outside the Commonwealth hold to be improper.

This decision was clearly an abuse of discretion as it was not based on sound legal principles, and was arbitrary, unreasonable, and unfair. The trial court's ruling a) did not comply with the intent of this Court; b) required Davis to file a separate action, which it knew it was going to dismiss; c) created the potential for a needless statute of limitations issue; and d) effectively predetermined the real-party-in-interest had forfeited his claim, despite this Court ruling the opposite. The trial court knew this would be the result of its decision to deny the Plaintiff's motions and stated as much when it acknowledged Davis "may be barred by the statute of limitations if he is required to file a new action." [R. at 1878] [2005 Case Record] The trial court used the word "may"; however, it already knew Davis' 2010 claim would be barred by the statute of limitations because it issued the Order granting Scott's motion to dismiss the 2010 complaint as time barred the same day it denied Davis' motions to "alter, amend, or vacate or set aside." [R. at 96] [2010 Case Record] As a result, the trial court knew that by denying these motions, it was not adhering to the holding

and intent of this Court because by denying these motions it was preventing the real-party-in-interest from bringing his claim, which this Court specifically held Davis could do.

The Court of Appeals correctly held the trial abused its discretion as the rulings of the trial court do not comply with the clearly expressed intent of the this Court, and because the rulings are not based on sound legal principles but are instead arbitrary, unreasonable, and unfair to Davis. The Court of Appeals correctly reversed and remanded the trial court's denial of Davis' motion to alter, amend, or vacate the Order Dismissing Without Prejudice under Kentucky Rule of Civil Procedure 59 and Davis' motion to have the court set aside its previous Order Dismissing Without Prejudice under CR 60.02(e) and/or (f) and Davis respectfully requests this Court affirm that ruling.

**C. The Court of Appeals Incorrectly Affirmed the Trial Court's Dismissal of the 2010 Complaint**

**1. Standard of Review.**

When an appellate court reviews a trial court's dismissal for failure to meet the statute of limitation, a de novo standard is applied. The Appeals Court should review the trial court's judgment without granting any deference to it, as there is no requirement for deference to the trial court when only legal findings are at issue. *W. Ky. Coca-Cola Bottling Co., Inc v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

**2. Davis' 2010 Complaint was not time barred.**

This Court made it clear in its August 26, 2010 Opinion that it intended for Davis to be able to proceed with his claim once the invalid assignment was removed. It states, "we agree Davis has not forfeited his claim" and Davis should be allowed to "reassert his claim against Scott...upon showing that the attempted assignment is no longer in place...." [*Davis Supra.* at 92] The trial court, instead of focusing on the intent of the Court, determined that

because the Supreme Court chose to use the word “reassert,” it intended for Davis to file a brand-new lawsuit and the 2005 claim, even though the impediment of the invalid assignment has been removed, must remain dismissed. The trial court knew that by holding that Davis must file a new lawsuit it was ensuring Davis would be unable to bring his claim. It knew this because Davis, out of an abundance of caution, had already filed a new lawsuit and the trial court dismissed that suit in a separate Order issued the same day as the Order denying Davis’ motions to alter, amend, or vacate or in the alternative set aside the Order of Dismissal.

The trial court’s ruling does not comport with the stated intent of this Court, which held that Davis should be permitted to reassert his claim once the invalid assignment was removed. Here, **Davis did reassert his claim** in a Complaint that is *identical* in every way, except case number, to the Complaint filed in 2005. The parties are the same, the issues are the same, the cause of action is the same, and the damages sought are the same. For all intents and purposes, the 2010 Complaint is the exact same case with just a different case number.

This Court has held, “Statutes of limitation are designed to bar stale claims arising out of transactions or occurrences which took place in distant past.” *Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. 1971). Further, “The primary purpose of any limitations statute is to require timely notification to a party that a claim is being brought against him.” *Revenue Cabinet v. GTE South, Inc.*, 238 S.W.3d 655 (Ky. 2007).

Here, Tim Davis did not assert a stale claim. He diligently pursued his legal malpractice claim against John Scott, even going so far as to take it to the Kentucky Supreme Court. Tim Davis did not sit on this claim, nor did he let it linger and grow stale.

Scott has been on notice of this claim since 2005. His attorneys have diligently defended this claim from the Hardin Circuit Court to the Kentucky Supreme Court and back down to the Hardin Circuit Court. Scott is not being surprised with any new claims or causes of action. As a result, the Court of Appeals' affirmation of the trial court's dismissal based on the statute of limitations was inappropriate, inequitable, and did not comply with the clear stated intent of this Court holding that "we agree Davis has not forfeited his claim" and that Davis would be allowed to "reassert his claim against Scott...upon showing that the attempted assignment is no longer in place...." [*Davis Supra.* at 92].

### 3. Trial Court Should Have Related The 2010 Complaint Back to 2005 Complaint Pursuant to CR 15

In substance, if not form, the 2010 Complaint is an amended complaint. This Court required certain actions be taken before the real party in interest, Tim Davis, could reassert his claim. Those actions were taken and Davis asserted the same claim as in 2005 only to have it dismissed by the trial court as time barred!

CR 15.03(1) which states, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

This Court has held,

Civil Rule 15.03(2) provides for the amendment of an original pleading to relate back to the date of the original proceeding. The important consideration is not whether the amended pleading presents a new claim or defense, **but whether the amendment relates to the general factual situation which is the basis of the original controversy.** *Perkins v. Read*, Ky., 616 S.W.2d 495 (1981). (emphasis added)

*Underhill v. Stephenson*, 756 S.W.2d 459, 460 (Ky. 1988)

The 2010 Complaint is, for all intents and purposes, the continuation of a claim that has been in litigation all the way to this Court and back. Once the trial court denied Davis' motion to alter amend or vacate, or in the alternative set aside the Order Dismissing the 2005 suit, the most appropriate and equitable response would have been for the trial court to relate the 2010 Complaint back to the 2005 Complaint. This would have adhered to the language and intent of this Court; however, the trial court disregarded this option, just as it disregarded the other option Davis provided.

This Court clearly did not intend for Tim Davis to forfeit his claim. Yet, if the trial court's interpretation of this Court's Opinion is correct, that is what the Opinion required. In order for the trial court to reach the conclusion that it had no choice but to dismiss the 2010 Complaint, it had to completely ignore, or misinterpret the intent of the Supreme Court of Kentucky, and apply a hyper-technical application of the rules. Such an interpretation and application is inappropriate in this situation and should be reversed.

## **V. CONCLUSION**

The trial court ignored this Court's intent and mandate, abused its discretion, and violated the law of the case doctrine by dismissing Tim Davis and Tim Davis & Assoc. 2010 Complaint. Further, as the Court of Appeals correctly held, the trial court abused its discretion when it denied Tim Davis and Tim Davis & Assoc. attempts to reassert his 2005 Complaint by denying his motions to alter amend or vacate or reverse.

As a result, Tim Davis and Tim Davis & Associates now asks this Court to affirm the Court of Appeals ruling reversing and remanding the trial court's denial of Davis' CR 59.05 and 60.02 motions or, in the alternative, reverse and remand the dismissal of Davis' 2010 Complaint so that he may reassert his claim.

*As to Combined Brief on behalf of  
Respondents/Cross-Movants*

Respectfully submitted,



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