COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2011-SC-000291-DG
(2007-CA-1971-MR; 2007-CA-1981-MR; 2007-CA-2173-MR; 2007-CA-2174-MR)

MILDRED ABBOTT, *et al.* **APPELLANTS**

v. **APPEAL FROM BOONE CIRCUIT COURT**
CIVIL ACTION NO. 2005-CI-00436

MELBOURNE MILLS, JR., *et al.* **APPELLEES**

REPLY BRIEF OF APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellants was served on April 27, 2012, by mailing ten true (10) copies to the office of the Clerk, Susan Stokley Clary, Room 235 Capitol Bldg., 700 Capitol Ave., Frankfort, KY 40601-3415 and one (1) copy to Hon. Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Geoffrey Morris, Special Judge, Boone Circuit Court, 700 West Jefferson, Judicial Center, Suite 200, Louisville, KY 40202; James A. Shuffett, 217 West Short Street, Suite 400, Lexington, KY 40507; Calvin R. Fulkerson and J. Christian Lewis, Fulkerson, Nichols & Kinkel, PLLC, 239 North Broadway, Lexington, KY 40507; Frank Benton, IV, Benton, Benton & Luedeke, P.O. Box 72218, Newport, KY 41072; Sheryl G. Snyder, Griffin Terry Sumner, and J. Kendrick Wells, IV, Frost Brown Todd, 400 West Market Street, 32nd Floor, Louisville, KY 40202; James M. Gary, Weber & Rose, PSC, 471 West Main St., Suite 400, Louisville, KY 40202; and Andre F. Regard, 269 West Main Street, Suite 600, Lexington, KY 40507.

By: _____

Angela M. Ford, Esq.
Chevy Chase Plaza
836 Euclid Avenue, Suite 311
Lexington, Kentucky 40502
(859) 268-2923
Email: amford@windstream.net
Counsel for Appellants

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. THIS COURT MAY CONSIDER ALL EVIDENCE OF RECORD IN THE TRIAL COURT AND IS NOT LIMITED TO CONSIDERATION OF EVIDENCE FILED PRIOR TO MARCH 8, 2006.

Defendants Gallion and Cunningham have made the novel argument that this Court may not consider evidence of record that was filed with the trial court well in advance of the trial court entering its final judgment against them.[1] However, the cases they cite for that proposition do not support their position. The cases they cite pertain to supplementing the record on appeal or after final judgment was entered. See Gallion and Cunningham Brief at 10-11 and cases cited therein. One of the cases they cite has absolutely nothing to do with the record on appeal. Hatton v. Commonwealth, 294 Ky. 740, 172 S.W.2d 564 (1943).

They also cite Lucas v. Lucas, 720 S.W.2d 352 (Ky. Ct. App. 1986), for the preposterous position that the depositions taken in this matter are not properly in the record because they were not read into the record or submitted at a bench trial. Lucas was a divorce case that proceeded to a bench trial. When a case proceeds to trial a deposition would obviously have to be admitted at a trial to be in the record. This case was decided on summary judgment, in which the trial court considers "the pleadings, **depositions**, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any." CR 56.03 (emphasis supplied). For Defendants Gallion and Cunningham to suggest that this Court cannot consider depositions on a summary judgment motion directly contradicts CR 56.03.

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[1] For clarity, Plaintiffs will continue to refer to the parties by their designations in the trial court.

Plaintiffs have not attempted to supplement the record on appeal aside from requesting that the Court take judicial notice of Mr. Feinberg's subsequent testimony about the matters set forth in his affidavit. Defendants Gallion and Cunningham provide no support for the proposition that this Court may not consider the entire record below, at least insofar as it was designated for inclusion by the parties. The record in the trial court is properly before this Court.

II. THE UNDISPUTED MATERIAL FACTS SHOW THAT DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES OWED TO PLAINTIFFS AS A MATTER OF LAW.

Plaintiffs have set forth the undisputed material facts that support the trial court's grant of summary judgment in this case in their opening brief and they will not repeat those facts in this reply brief. However, Defendants have raised some issues which must be addressed.

A. Defendants Gallion, Cunningham and Mills are Collaterally Estopped from Disputing Facts Found Against Them in Opinions of this Court.

Defendants Gallion, Cunningham and Mills suggest that they are not bound by this Court's opinions disbarring them for the very conduct at issue in this case. First, Defendant Gallion and Cunningham's suggestion that this Court's opinions do not bind them because they were not disbarred until after summary judgment was granted misses the point. While they were disbarred after summary judgment was granted, the conduct all occurred prior to the grant of summary judgment. Plaintiffs merely posit that Defendants Gallion, Cunningham and Mills are estopped from denying that this Court found that they engaged in the conduct at issue. The fact that this Court disbarred them after the trial court granted summary judgment is irrelevant. To the extent that these Defendants suggest that Plaintiffs are attempting to base a cause of action upon their

violation of this Court's disciplinary rules, they are simply incorrect. There can be no question that conduct that violates this Court's rules may also form the basis of a civil cause of action (and a criminal charge, as in this case).[2]

Defendant Mills claims that he is not bound because he did not appeal the decision to this Court because he was unable to post the required surety bond. Collateral estoppel requires a "full and fair **opportunity** to litigate" the issue. Moore v. Commonwealth of Ky., Cabinet for Human Resources, 954 S.W.2d 317, 319 (Ky. 1997) (emphasis supplied). Defendant Mills had a full and fair opportunity to litigate his disbarment to this Court. His decision not to take that opportunity for his own reasons does not allow him to escape the consequences of the decision against him.

B. Kenneth Feinberg's Affidavit Does Not Create a Genuine Issue as to any Material Fact.

This Court should disregard Mr. Feinberg's affidavit for the reasons set out in Plaintiffs' initial brief. See Pls' Brief at 12, 18-19. However, even if that affidavit is considered, it simply does not create a genuine issue as to any material fact. Defendants Gallion, Cunningham and Mills continue to ignore the evidence in the record to try to claim that they were entitled to steal millions of dollars from their clients because they claim that the case was a class action and that they were subject to "contingent liabilities." Plaintiffs addressed these claims in their opening brief and the indisputable facts show that these are not questions of fact at all. Id. at 13-15, 23-26. Despite

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[2] This Court recently recognized that collateral estoppel applies in this Court's disciplinary proceedings, as least insofar as the Court will utilize it against an attorney to impose discipline based upon another court's findings. See Kentucky Bar Ass'n v. Schilling, 2011-SC-000657-KB, 2012 Ky. LEXIS 16, at *13 (Ky. Feb. 23, 2012) (released for publication Mar. 6, 2012) (copy attached). The court in A to Z Assocs. v. Cooper, 613 N.Y.S.2d 512, 517 (N.Y. Sup. Ct. 1993), held that "administrative disciplinary findings against an attorney can be used, to the extent the findings are applicable, as dispositive of those issues in a civil action."

Defendants' blind adherence to their claims, it is undisputed that the underlying litigation was decertified as an express condition of the settlement. (Order, May 16, 2001 (Appendix at Tab E); Settlement Agreement (Appendix at Tab D);[3] see also Pls' Brief at 13. It is further undisputed that there was no obligation for Defendants to indemnify any potential claimants. See Pls' Brief at 14. Defendants, with Defendant Chesley taking the lead, discussed the other putative class members in detail and recommended that they be dismissed from the action. Transcript of May 9, 2001 (R. at Packet # 11) (Appendix at Tab F). Indeed, as this Court found, there were no "contingent liabilities." Gallion v. Kentucky Bar Ass'n, 266 S.W.3d 802, 804 (Ky. 2008); Cunningham v. Kentucky Bar Ass'n, 266 S.W.3d 808, 809 (Ky. 2008). Defendants did not give notice to any individual or entity of a right to submit a claim, no claims were made and Defendants were not required to indemnify AHP. Despite their self-serving claims contrary to the evidence that they had "contingent liabilities," Defendants do not deny that it is undisputed that they never paid a single claim for any other person and that they never indemnified AHP for any claim. Yet they inexplicably and without support in the law or on the record claim that they were allowed to put that money in their own pockets. The "questions of fact" identified by the Court of Appeals simply are not disputed questions of fact.

Plaintiffs must also address Defendants Mills' continued claims that the more than $20 million that he took was no more than the amount represented by the contingent fee agreements of "his" clients, *i.e.*, the clients that he signed up for Defendants' joint venture. Defendant Mills continues to ignore the fact that he entered into a fee sharing

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[3] Citations to the Appendix are to the Appendix Plaintiffs filed with their opening brief with this Court.

agreement with the other Defendants in which they all agreed to represent the Plaintiffs and share the fees as set forth in the agreement. See Appendix at Tab C. Incredibly, when Defendant Mills is trying to escape joint and several liability, he then claims that he did nothing more than sign people up and gather medical records. In other words, although he claims to have done almost no legal work, he claims he is entitled to most of the fees.

Defendants Gallion and Cunningham now claim that Mr. Feinberg did not disavow his statements in his affidavit related to a court's control over attorney's fees in a class action and in an aggregate claims case. Gallion and Cunningham Brief at 12-13. Those statements are perfect examples of opinions on the law, which are inadmissible. Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604, 623-24 (Ky. Ct. App. 2003). The trial court properly ignored any such testimony in Mr. Feinberg's affidavit.

This attempt to rely on Mr. Feinberg to improperly offer opinions on the law are related to Defendants' continued suggestion that former Judge Bamberger approved fees vastly in excess of their fees agreements. There is a body of case law supporting the proposition that a court has the power to monitor contingency fee contracts. See, e.g., Dunn v. H.K. Porter Co., 602 F.2d 1105 (3rd Cir. 1979). However, that power exists for the protection of clients to ensure that the agreement does not yield an unreasonable fee. Id. at 1108-09; see also Ky. S. Ct. R. 3.130(1.5(c)) (requiring that a contingent fee must be reasonable). Defendants did not cite a single case in which a court approved attorney's fees in excess of their fee contracts with their clients. Defendants did not at any time disclose the terms of the fees contracts to former Judge Bamberger. (Depo. W. Gallion, Vol. I, at 20-21 (R. at Packet #4)). Moreover, Defendants sought court

"approval" of their theft of the settlement funds from their clients 10 months after the settlement (Depo. Bamberger at 36-37 (R. at Packet #7)). Defendants' own Schedule of Disbursements and Deposits show that all settlement funds had already been paid out by the time they requested approval for their fees. R. at 1394-1401; (Resp. Def. Mills Mot. Vacate (detailing the payment and disbursement of funds) (Feb 2, 2007) (R. at Packet # 11)).

C. The Undisputed Facts Show that Defendant Chesley Breached his Fiduciary Duties Owed to Plaintiffs as a Matter of Law.

Defendant Chesley has not seriously contested the fact that he owed Plaintiffs a fiduciary duty as their attorney in the underlying litigation. He continues to try to claim that he was "engaged" "for the limited purpose of negotiating a settlement," even though the undisputed facts wholly contradict any such claim. See Pls' Brief at 3-8, 29-36. Moreover, case law is clear that attorneys who undertake representation do not get to "limit" themselves in their duties to their clients. See Huber v. Taylor, 469 F.3d 67, 81-82 (3rd Cir. 2006); Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 234 (2nd Cir. 1977); Hawkins v. Fulton County, 96 F.R.D. 416, 420-21 (N.D. Ga. 1982).

Defendant Chesley argues essentially that he had no role in the scheme to defraud. While Plaintiffs will not repeat all of the facts set forth in their brief that establish Defendant Chesley's involvement in pre- and post-settlement activity, Defendant Chesley has specifically denied involvement in the fraud in 2002. While he continues to deny an ability to recall whether or not he attended the meeting in 2002 on fees, he now states that Gallion's testimony is unclear. The testimony cited by the Plaintiffs is quite clear. Judge Bamberger's testimony on the issue is clear, as is Mark Modlin's testimony on the issue of Chesley's recommendation to the Court on cy pres funds. Dep. M. Modlin at 91-94

(R. at Packet #6). Three of four people in attendance have a clear recollection of Defendant Chesley's attendance and participation. Defendant Chesley does not recall the meeting but now disputes the recollection of others. Defendant Chesley also states that Judge Bamberger relied on a legal opinion from Pierce Hamblin in approving the use of settlement funds, as cy pres funds, in creating the Kentucky Fund for Healthy Living, Inc. That may be true but it does not change Judge Bamberger's testimony on Defendant Chesley's involvement in the improper use of settlement funds. And, unlike Mr. Hamblin, Defendant Chesley knew the terms of the settlement agreement. Mr. Hamblin was not provided with any meaningful facts to support his general opinion. R. at 3107-3113 (Pls' Suppl. Reply Def. Chesley's Resp. and Am. Resp. Pls Mot. for Partial Summ. J., Attaching Aff. of Pierce Hamblin, Feb. 12, 2007). Moreover, David Helmers' Affidavit on Defendant Chesley's other involvement in 2002 may be "untested" by Defendant Chesley but it is testimony he chose not to test.

Mr. Modlin's testimony that he remembered Defendant Chesley advising the court on the cy pres doctrine was clear. Dep. M. Modlin at 91-94 (R. at Packet # 6). Moreover, Mr. Modlin testified that Defendant Chesley advised the court that cy pres was appropriate in this case.[4]

Mr. Modlin also testified that once Defendant Chesley became co-counsel, he became actively involved in the case. Id. at 56. Mr. Modlin spoke to Defendant Chesley

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[4] The *cy pres* doctrine originated under trust law, but is sometimes utilized in the class action context "to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to judgment) to the class members." See, e.g., Mirfahisi v. Fleet Mortgage Corp., 356 F.3d 781, 784 (7th Cir. 2004); see also Mace v. Van Ru Credit Corp., 109 F.3d 338, 345 (7th Cir 1997) (holding that there is no reason to utilize *cy pres* recovery when the injured parties can be identified). As discussed earlier, the class action in the underlying fen-phen litigation was decertified as a condition of the settlement. Moreover, distribution of the funds to Plaintiffs was undeniably feasible. Plaintiffs were identified and distributing the funds to them would have been a simple matter.

on an average weekly basis. Id. at 57. Defendant Chesley was involved to the extent that Mr. Modlin got to know him well enough to work with him on three or four subsequent cases, even though he had not known him before this case. Id. at 56, 170. Mr. Modlin is not aware of Defendant Chesley taking the position that his role as counsel in the litigation was limited in any way. Id. at 56.

Defendant Chesley continues to argue he owed no duties to Plaintiffs despite negotiating and settling their cases, recommending decertification of the action to the court and dismissal of all putative class member cases, providing research on cy pres law that was given to the court, attending an ex parte meeting to discuss fees 10 months after the execution of an aggregate settlement and providing direction to an associate attorney in 2002 on how to handle a second distribution.

The claim against Defendant Chesley consists of a question of law only. The trial court very clearly found based on undisputed proof that Defendant Chesley received more money than that to which he was due under the fee agreement. R. at 3472 (Appendix at Tab L). Defendant Chesley has not disputed that fact, nor could he. The only question is one of law – whether that constituted a breach of the fiduciary duty he owed to Plaintiffs as their attorney. It unquestionably does as a matter of law. Where there is no genuine issue of material fact and the only question is whether the movant is entitled to judgment as a matter of law, review on appeal is proper. Gumm v. Combs, 302 S.W.2d 616, 617 (Ky. 1957).

In Gumm the plaintiff's son was hit by a car driven by the defendant. The plaintiff signed a general release, but then sued the defendant for his son's damages for pain and suffering. Id. at 616. The defendant sought reversal of the plaintiff's jury

verdict "on the ground that the motion for summary judgment should have been sustained." Id. This Court recognized that an order denying summary judgment is not ordinarily appealable and is not ordinarily reviewable on appeal from a final order of judgment where the question is whether there is a genuine issue of material fact. Id. at 616-17. However, in Gumm there was no question of fact as there was no evidence of fraud by the defendant in obtaining the release. Id. at 617. Accordingly, this Court reversed and directed the trial court to enter a judgment in accordance with the Court's opinion. Id.

Similarly, in this case, the undisputed facts show that Defendant Chesley was Plaintiffs' attorney in the underlying litigation and that he breached his fiduciary duty by receiving and keeping vastly more money than he was entitled to under his fee agreement with the other Defendants. When there are no questions of fact, this Court can rule and has ruled on the question of law. That is all Plaintiffs are asking this Court to do.

Applying this Court's exception to the general rule that denials of summary judgments are not appealable serves the purpose of a summary judgment, which "is to expedite disposition of civil cases and to avoid unnecessary trials." Transportation Cabinet v. Leneave, 751 S.W.2d 36, 37 (Ky. Ct. App. 1988). As this Court has noted, the basis for the exception is that where the facts are not in dispute and the only question is a matter of law, the issue may not be again presented in the proceedings. Gumm, 302 S.W.2d at 617. This Court applies the exception so as not to allow the technicality of the usually interlocutory nature of the denial of summary judgment take precedence over the substance of the case – that there is no genuine issue of material fact and the only question is one of law.

This case illustrates the purpose of the exception. Given the undisputed nature of the facts in this case, to send this case back to the trial court for a trial against Defendant Chesley would be a waste of judicial resources. Defendant Chesley makes a number of conclusory allegations that there issues of fact as to him, but he does not cite to the record in support of those allegations. Moreover, he does not address the undisputed facts set forth by Plaintiffs in their brief. The facts set forth by Plaintiffs in their initial brief and in this brief (and which are supported by citations to the record) are undisputed and support judgment in favor of Plaintiffs as a matter of law.

III. DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE AS A MATTER OF LAW.

The trial court's finding that Defendants Gallion, Cunningham and Mills acted in concert in breaching their fiduciary duties to Plaintiffs means that they are jointly and severally liable to Plaintiffs, notwithstanding KRS 411.182. Moreover, the undisputed facts show that not only was the trial court correct with respect to Defendants Gallion, Cunningham and Mills, but that Defendant Chesley is also jointly and severally liable as a matter of law.

A. Apportionment Does Not Apply When Defendants Act in Concert with One Another.

Contrary to Defendants' claims, KRS 411.182 simply does not apply when defendants engaged in concerted action. Indeed, this Court has specifically stated that pursuant to Restatement (Second) of Torts § 876, those who act in concert with a tortfeasor "are liable for any damages." Vitale v. Henchey, 24 S.W.3d 651, 659 & n.33 (Ky. 2000).[5] Defendants have criticized Plaintiffs' citation to this Court's opinion in

[5] Defendant Chesley cites to the August 4, 2009 opinion in Gundaker/Jordan Am. Holdings, Inc. v. Clark, for the proposition that apportionment applies in every tort action. However, that opinion and all of

Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476, 485-86 (Ky. 1991), for its holding that one who knowingly aids, abets or joins a fiduciary in the breach of his duty in order to make a profit becomes jointly liable for such profits because the events in Steelvest occurred prior to the enactment of KRS 411.182. However, this Court has never held that the statute overruled that holding in Steelvest. Moreover, Plaintiffs would note that the events in Vitale occurred in 1993, after the enactment of KRS 411.182, and this Court still noted the applicability of Restatement § 876. See also Pls' Brief at 37-41 (discussing the applicability of joint and several liability when defendants act in concert with one another). Defendants' reliance on Degener v. Hall, 27 S.W.3d 775 (Ky. 2000), is misplaced. Degener had nothing to do with Restatement § 876, and merely held that a defendant that was found to be secondarily negligent has a right of indemnity against a defendant who was primarily negligent. The trial court properly held that Defendants Gallion, Cunningham and Mills could be held jointly and severally liable because they acted in concert with one another.

B. Joint and Several Liability was Appropriately Applied to Defendants Gallion, Cunningham and Mills.

Defendants Gallion, Cunningham and Mills have not generally addressed the undisputed facts supporting the trial court's conclusion that they acted in concert with one another. Defendants Gallion and Cunningham argue only that apportionment applies and Defendant Mills makes a superficial argument that he did not do any work in this litigation or settlement of the case. However, he does not address the undisputed facts raised in Plaintiffs' brief supporting the trial court's ruling. Moreover, Defendant Mills claimed that he was not aware of what Defendants Gallion and Cunningham were doing,

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the Defendants ignore this Court's recognition in Vitale that those who act in concert with a tortfeasor are liable with him and its citation of § 876 for support of that proposition.

but he admits that he "knew generally after the second distribution the total that was paid to attorneys and the total that was paid to clients. (Mills Depo. Vol. II, at 183 (R. at Packet # 7)). He additionally admits that they operated as a "consortium" or "association" with respect to the underlying litigation. See Mem. Supp. Compensatory Damages and Disgorgement at Ex. 1 (R. at 2709) (Mills' Feb. 17, 2004 Depo. at 66); (Mills Depo. Vol. I at 32-33 (R. at Packet # 7)). Defendant Mills further described a meeting in July or August of 2001 with Defendants Gallion and Cunningham in which they tore up and burned notes related to settlement funds paid to clients and fees paid to the attorneys. (Mills Depo. Vol. II at 180-81 (R. at Packet # 7)).

C. Defendant Chesley Should be Held Jointly and Severally Liable with the Other Defendants.

Defendant Chesley also did not address the undisputed facts supporting a holding that he is jointly and severally liable with the other Defendants. This Court can and should address the question of law based upon the undisputed facts. See supra at 8-10. Accordingly, the Court should hold him jointly and severally liable for the reasons set forth in Plaintiffs' brief and in this reply brief.

IV. THE TRIAL COURT IMPROPERLY SUBTRACTED UNDOCUMENTED EXPENSES FROM DEFENDANT MILLS FROM ITS DAMAGES AWARD.

Defendants Gallion, Cunningham and Mills did not address Plaintiffs' argument that the trial court improperly deducted undocumented expenses provided by Defendant Mills from its damages award in this case. Accordingly, they have conceded that argument and those expenses of $1.5 million should be added back to the damages award for a total damages award of $43.5 million. See Pls' Brief at 9-10 & n.9, 46-47.

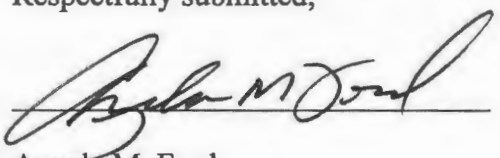
V. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO TRANSFER VENUE TO FAYETTE CIRCUIT COURT.

Defendants did not address Plaintiffs' argument that the trial court erred in denying their motion to transfer venue to Fayette County Circuit Court. Accordingly, they have conceded that argument and this Court should order that venue be transferred to Fayette County Circuit Court. See Pls' Brief at 47-49.

CONCLUSION

For the foregoing reasons and for the reasons set forth in their opening brief, Plaintiffs/Appellants respectfully request that this Court reverse the decision of the Court of Appeals and reinstate the trial court's judgment against Defendants/Appellees Gallion, Cunningham and Mills and its judgment finding them jointly and severally liable for $42 million in damages. Plaintiffs/Appellants further request that this Court reverse the decisions of the Court of Appeals and trial court and enter judgment against Defendant/Appellee Chesley on Plaintiffs' breach of fiduciary duty claim and hold him jointly and severally liable for the $42 million in damages found by the trial court based on the undisputed proof for the reasons stated in this Brief and in Plaintiffs' initial brief. Plaintiffs/Appellants further request that this Court increase the damages to $43.5 million by reversing the trial court's decision to allow $1.5 million in undocumented and unsupported expenses from Defendant/Appellee Mills. Finally, Plaintiffs/Appellants request that this Court reverse the decisions of the Court of Appeals and trial court regarding Plaintiffs/Appellants motion to transfer venue and order that this case be transferred to Fayette County Circuit Court for all matters remaining to be tried.

Respectfully submitted,



Angela M. Ford
KBA No. 81510
Chevy Chase Plaza
836 Euclid Avenue, Suite 311
Lexington, Kentucky 40502
(859) 268-2923

Email: amford@windstream.net