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**

VS.

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

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

BRIEF FOR APPELLEE, MELBOURNE MILLS, JR.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellee, Melbourne Mills, Jr. was served on April 3, 2012, by hand delivery of ten (10) copies to the office of the Clerk, Susan Stokley Clary, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601, and to Hon. Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and by mailing true copies to Hon. Geoffrey Morris, Special Judge, Boone Circuit Court, 700 West Jefferson, Judicial Center, Suite 200, Louisville, Kentucky 40202; Hon. Angela Ford, Chevy Chase Plaza, 836 Euclid Avenue, Suite 311, Lexington, Kentucky 40502; Hon. Frank Benton IV, Benton, Benton & Luedeke, P.O. Box 72218, Newport, Kentucky 41072; Hon. Sheryl G. Snyder, Hon. Griffin Terry Sumner and Hon. J. Kendrick Wells IV, Frost, Brown, Todd, 400 West Market Street, 32nd Floor, Louisville, Kentucky 40202; Hon. James M. Gary, Weber & Rose, PSC, 471 West Main Street, Suite 400, Louisville, Kentucky 40202; and Hon. Andre F. Regard, 269 West Main Street, Suite 600, Lexington, Kentucky 40507.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Melbourne Mills, Jr., submits that oral argument will not be particularly helpful to the Court in reaching the correct decision herein.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This Counterstatement of the Case is being made to supplement the Statement of the Case contained in the Plaintiffs'[1] brief and to correct a portion of that Statement.

At page 29 of the Kentucky Court of Appeals Slip Opinion rendered February 4, 2011, the Court identified several material issues of fact. Those include:

a. Whether the entire settlement, minus fees and expenses, was to be split between the 431 settling Claimants;

b. Whether the settling Complainants were fairly and adequately compensated;

c. Whether KFHL was funded with money that should have been distributed to the settling Claimants or was funded with excess funds for which the Plaintiff's consent to its ultimate use was not required; and

d. Whether GMC and Chesley were obligated to indemnify HP for additional Claimants who might come forward after the settlement had been dispersed.

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1. The parties are identified as originally styled in the trial court as Plaintiffs and Defendants, rather than Appellants and Appellees.

As authority, the Court of Appeals cited *Steelvest v. Scansteel*, 807 S.W.2d at 480-82 (Ky. 1991) and also *Chalothorn v. Meade*, 15 S.W.3d 391 (Ky. App. 1999).

In addition, at page 29 of the Slip Opinion, the Court of Appeals identified additional issues, both factual and legal, which were the subject of the Appeal, that would be mooted because of the vacating of the Summary Judgment. They include:

(a) the award of 42 million dollars in baseline compensatory damages;

(b) the award of allegedly unproven damages;

(c) the application of joint and several liability;

(d) the lack of proof of damages by the individual plaintiffs; and

(e) the denial of due process.

At the top of page 14 of Plaintiffs' brief, Plaintiffs make the following statement: "The documents clearly show that was not the case with respect to the May 1, 2001 agreement because all settlement funds were allocated to Plaintiffs," and citing Plaintiffs' Appendix at Tab D, at paragraph 3. The implication that anyone ever agreed to an allocation of funds to each Plaintiff other than the individual agreements by the Plaintiffs is incorrect.

If one goes to Exhibit 3 to the Settlement Agreement, which is contained in the Plaintiffs' Appendix at Tab D, and observes the document titled Exhibit 3, Part One to Groups 2(a) and 2(b) and Exhibit 3, Part Two Section 1 and Section 2, one can see that the dollar figures allocated between the various clients were estimates only. In addition, the blacked out portion of the documents at the top each contain the words "estimated" allocation. In other words, the Exhibit 3 attached to the Settlement Agreement in Tab D of Plaintiffs' Brief herein is not the document envisioned by paragraph 5(B) of the Settlement Agreement. Further, this came to light in the first criminal trial in Federal Court and the document was found by Judge Bertelsman to be "obviously" a preliminary document and entitled to little or no weight in any of the issues before the Court.

The record further reveals that the Order granting a 42 million dollar Judgment against the Defendants made no allocation of the 42 million dollars among the some 400 Plaintiffs (see Exhibit G to Plaintiffs' Appendix herein), and denied an allocation of fault among the Defendants notwithstanding KRS 411.182.

In addition, the record shows that Defendant Mills did not himself receive in excess of 30% on his contracts for his 311 clients (Record at

1651-1664 and 2863-2891). There are further no crossclaims existing between the 3 Defendants.

ARGUMENT

I. PARTIAL SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BY THE TRIAL COURT.

A. Standard of Review

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Lewis v. B & R Corporation*, Ky., 56 S.W.3d 432, 436 (2001). In examining this issue, the appellate court reviews the issue *de novo*, looking at it a second time to determine whether it would be impossible for the Appellant to produce evidence at trial warranting a judgment in his favor. Id. The *Lewis* court interpreted this standard consistent with its ancestor case of *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky., 1991), reconciling the two cases as follows:

> The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden **shifts** to the party opposing summary judgment to present 'at

> least some affirmative evidence showing that there is a genuine issue of material fact for trial"…. While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense'. Id., citing first *Steelvest*, 807 S.W.2d at 482 and then *Perkins v. Hausladen*, Ky., 828 S.W.2d 652, 654 (1992) (Emphasis added).

In the instant case, summary judgment was granted by the trial court despite multiple issues of material fact.

B. Granting summary judgment against the Defendants on the breach of fiduciary duty claim, and the refusal to vacate the summary, ignored clear issues of fact and were contrary to long-standing Kentucky law.

On March 8, 2006 the trial court entered partial summary judgment holding that this Defendant, as well as the Defendants Gallion and Cunningham, had breached their fiduciary duty to their clients.

At the time of entry of the judgment the parties had only conducted written discovery. In finding that no genuine issue of material fact existed with respect to the question of whether or not these Defendants had breached their fiduciary duty to the Plaintiffs, the Trial Court apparently relied exclusively upon two exhibits attached to the Plaintiffs' Reply to the Defendants' Response to Motion for Summary Judgment and apparently produced in written discovery. The first, identified as Exhibit 1 to the Plaintiff's reply, are copies of exemplar fee contracts for the Defendants

with the Plaintiffs. (Record at 1388-1392). The second, identified as Exhibit 2 to the Plaintiffs' reply, is a schedule of deposits and disbursements made from the escrow account established to handle the settlement funds. (Record at 1394-1401).

In finding that these documents were determinative of the question of breach of fiduciary duty, the Court made an implicit finding that the $200 million settlement was intended only for the 431 to 440 Plaintiffs (at the time of the original settlement agreement there were 431 named class members in the case below, however between the time of settlement and the time of the initial distribution nine (9) additional class members came forward and received payment), named in the underlying case. However, discovery has demonstrated that genuine issues of material fact exist with respect to this finding. As a result, reversal of the Court's previous judgment is required.

The Defendants have been consistent in their defense from the inception of this case. Their position, primarily articulated by Defendants Gallion and Cunningham in their later discovery depositions, is that the settlement in the underlying case was for the entire class, as defined by the presiding Judge, and not simply for the 431 or 440 Plaintiffs. (Gallion deposition, pp. 180-185, 222-225, 254-255; Cunningham deposition, pp.

64-67, 69-76.) They believed they had the obligation to indemnify AHP in the event class members other than the 431 to 440 came forward following the settlement to present claims. Certainly the arrival of nine (9) additional class members during the period between settlement and the initial distribution gave them every reason to expect this to occur. The Plaintiffs obviously contest this position. However, if true, (and summary judgment law in Kentucky requires that the facts be viewed in the light most favorable to the non-moving party,) it certainly creates an issue of fact which precludes the summary judgment issued by the trial court. If the Defendants are indeed correct that the settlement was not limited to the 440 Plaintiffs, an obvious question of fact exists as to whether or not the attorneys received payments in excess of that to which they were entitled.

As was argued at the time, it is the position of the Defendant Mills that the trial court's grant of summary judgment on the issue of breach of fiduciary duty was simply premature. Since entry of that Judgment significant discovery has taken place, much of it directed to the issue for whom the settlement was negotiated. The following is just a partial list of facts, revealed by discovery, which, if taken as true, would preclude summary judgment on the fiduciary duty issue:

1. By deposition, Defendants Gallion, Cunningham, and Chesley have testified that they believed both the Plaintiffs and they as attorneys, had an obligation to indemnify AHP if additional claimants came forward after the settlement. (Gallion deposition, pp. 180-185, 222-225, 254-255; Cunningham deposition, pp. 64-67, 69-76.) Those potential claims included Kentucky members of the national class action in the event the national class settlement failed and numbered in the thousands; other Kentuckians falling within the Boone Circuit class definition but not included in the 440; those encompassed by the side letter agreement discussed below, (i.e. Duff patients, also numbering in the many thousands); and parties with subrogation interests.

2. The settlement agreement itself expressly recognizes that claims other than those of the 440 were included within the settlement. (Record at 2167-2173; Paragraph 3(A) states as follows:

> The "Settling Claimants" are those clients of the Settling Attorneys identified in Exhibit 1 hereto, which exhibit you represent includes *all* clients represented by the Settling Attorneys who have opted out of the class action settlement pursuant to section IV(D) of the Nationwide Class Action Settlement With American Home Products Corporation ("the Agreement") **or who have Diet Drug Claims that are not covered by the Agreement or otherwise have Diet Drug Claims and are represented by the Settling attorneys** (Emphasis added)

(Record at 2168). All of the attorneys have testified that the highlighted language applied to an unknown number of individuals. As a result it was necessary to hold back some funds from the original disbursements.

3. The side letter of May 30, 2002, which was incorporated into and became a part of the settlement agreement, clearly imposes an obligation of indemnity against the settlement proceeds for any claims that might arise from patients who received the drugs from Dr. Duff. (Record at 2178-2176). One of AHP's two lead negotiators at the mediation, Helene Madonick, acknowledged that AHP considered the obligation imposed on the settling Plaintiffs and Defendants went beyond the 440. (Madonick deposition, p. 130).

4. The $7.5 million hold-back required by the side letter clearly made payment of $200 million to the 440 impossible. In other words, it creates an issue of fact as to whether or not it was AHP's intention that $200 million be distributed to the 440 Plaintiffs.

5. Stanley Chesley has testified that Attorney Vardaman, the other negotiator for AHP at the mediation, wanted a "walk-away" from Kentucky and that Vardaman understood that would require a much greater fund of money than the claims of the 440 were actually worth for settlement purposes. (Chesley deposition pp. 203-206, 218-221).

6. The Defendants have testified that at least one of the mediators, (Weinstein), expressed the opinion that the claims of the named Plaintiffs were not worth more than $30-$50 million, which would suggest that AHP understood it was settling the class in Kentucky and not just the claims of the 440 named Plaintiffs; (Gallion deposition, pp. 61-62; Cunningham deposition, p. 75).

7. Multiple Orders were entered by the presiding Judge containing language that he had reviewed and approved the distribution of settlement funds to Plaintiffs and attorney fees; (Record at 16-34).

8. Although Helene Madonick testified that she believed the settlement was only for the 440 Plaintiffs she conceded she had no idea what obligation the Defendant lawyers believed they had undertaken. (Madonick deposition, p. 110).

9. As evidenced by videotapes of hearings before the presiding Judge and the testimony of Helene Madonick, (Madonick deposition, p. 36), everyone was aware there were 70-100 people, at a minimum, in addition the 440 in Kentucky that met the class definition.

In addition to these obvious issues of material fact, there is considerable law standing for the proposition that once a class is certified in a class action proceeding, contingency fee contracts are no longer

controlling on the question of attorney fees and that the presiding judge has absolute discretion with respect to the amount of fees to be allowed.

> It is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before [it]... The district court's award of attorney fees . . . need only be reasonable under the circumstances.

Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993). It was Judge Bamberger's role to assess and ultimately approve the settlement. The Defendants had every right to rely on Judge Bamberger's ultimate ruling.

However, even ignoring the facts above, Judge Wehr's findings contradict the already twisted logic of his orders. (Record at 1464-1470 and 3469-3472). The three Defendants were either attorneys representing a class or attorneys representing individual clients. Judge Wehr's order appears to attempt to blend the two concepts stating that the attorneys are "bound to the individual contracts of the others." First and foremost, it is clear that the Judge took it upon himself to determine the factual issue of whether the *Guard* case was settled as a class action or as individual Plaintiffs' cases. However, his "logic" fails either way. If the case is viewed as a class action settlement, the fee award is clearly in the discretion of the presiding judge. If it is on the other hand, as Judge Wehr implies from his interpretation of

the facts, a settlement of the individual claims of the 431-440 Plaintiffs, then each of the Defendant attorneys can only be held liable to those clients that they personally represented and the fees they received can only be properly assessed under the fee agreements entered into between each attorney and his respective clients.

It is clear from the record that each of the three attorneys represented differing numbers of clients under different terms as spelled out by the individual fee agreements entered into. Without conceding that those agreements are the proper measure of the fees the Defendants were entitled to, it is clear that even if this were true, Judge Wehr missed the ball. Even under the facts as arrived at by Judge Wehr, no honest evaluation of the issue regarding the fees can be made by means of a simple mathematical equation that merely takes one third of the total settlement proceeds and sets it as a threshold for total attorney compensation. Taking the factual determinations of Judge Wehr as true each of these Defendants would still be entitled to a determination regarding whether there was a breach of duty to their individual clients regarding the fees received for representation of those clients. This Defendant made the argument on multiple occasions that the total fees he received (calculated as a thirty percent (30%) contingency

fee as his contracts stated for his 311 clients) was not in excess of that to which he was contractually entitled. (Record at 1651-1664 and 2863-2891).

Further, the Plaintiffs' request for class certification in the trial court, (See Plaintiffs' Fourth Amended Complaint), is tantamount to an admission that the settlement was intended for the entire class as defined by the class certification definition. In fact, Plaintiffs Fourth Amended Complaint states just that. Paragraph 86 of the Fourth Amended Complaint states that "This action is brought pursuant to CR 23 on behalf of **all individuals** who are members of the Settlement Class Action styled *Johnetta Moore, et al v. A. H. Robins, et al*, 98-CI-795. (Emphasis added). Paragraph 87 of the Fourth Amended Complaint goes on to state that "the members of the Class are so numerous that joinder is impractical as it would involve ***over 440 individual litigants."*** (Emphasis added) Plaintiffs' Motion to file a fourth amended complaint appears in the Record at 2562-2564, however the Amended Complaint itself is conspicuously missing from the record.

Finally, Defendant Mills had previously submitted evidence, by way of the affidavit of Rebecca Phipps, establishing that Mills did not receive fees beyond the amount that a 30% contingency arrangement would have produced. Mills also testified that he did not receive any fee in excess of that to which he was entitled. Mills deposition, at 137-38. Leaving aside the

questions of whether or not the settlement was intended for more than the 431 to 440 Plaintiffs, and whether the Defendant lawyers assumed any obligation to indemnify AHP for claims that might have surfaced following the settlement, Phipps' affidavit and Mills' testimony certainly create an issue of fact as to whether or not he received fees in excess of that to which his contingency fee contracts would have generated.

The Defendant Mills will not burden the Court with another recitation of the law as it relates to the imposition of summary judgment in Kentucky other than to state the obvious point that all evidence must be viewed in the light most favorable to the non-moving party and that summary judgment is appropriate only where it is virtually "impossible" for the non-moving party to produce evidence to support its position at trial. See *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). Obviously, Plaintiffs believe that the settlement was intended for only the 440 named Plaintiffs. The trial court obviously believed that as well. However, when considering whether or not summary judgment is appropriate the question is not what the Court believes but whether or not there is any genuine issue of fact which precludes the entry of summary judgment. This Defendant respectfully submits that there are many genuine issues of fact that require that the

Court's Order of Summary Judgment entered March 8, 2006 be overturned. The issue of Defendant Mills' liability should be submitted to the jury.

C. The attempted disavowal of the Affidavit of Expert Witness Kenneth Feinberg is Misplaced.

An analysis of the Feinberg testimony shows that he is no doubt very angry that only $10,000.00 of his $50,000.00 fee for preparation of the Affidavit has been paid. He attempted to disavow his own Affidavit in this testimony, but he did not state that he had committed perjury in the original Affidavit. Some of the major points that he did not disavowal were (a) at page 1081, where he stated that the Court maintains complete control over the fees in a class action, notwithstanding contractual agreements with the clients; (b) at pages 1086-1087 he notes that the Court controls these fee situations even in aggregate claims cases, where there is no technical class; and (c) at page 1089, even after de-certification of a class he opines that the Court still maintains control over attorney fees and benefits to the aggregate group.

Any reliance by the Plaintiffs upon Mr. Feinberg's attempted disavowal to avoid the evidentiary value of his previous Affidavit is misplaced. Since *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969), Kentucky has treated prior inconsistent statements to impeach a witness as

substantive evidence. Thus, his Affidavit will come into evidence, one way or another, for substantive purposes if he testifies at a subsequent trial of this action.

D. The Decisions Disbarring the Various Attorneys Should Not be Considered in this Litigation.

First, the Cunningham and Gallion disbarment procedures were by negotiated agreements with the Bar Association and adopted by the Supreme Court. The disbarment of Mills was contested through hearing before the Board of Governors but no appeal was taken to the Supreme Court and their rulings were later adopted by the Supreme Court.[2]

Two of the Rules of the Supreme Court also preclude the use of these disciplinary proceedings for the purposes suggested by the Plaintiffs. SCR 3.130 XXI provides as follows:

> XXI. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a

[2] Mills was unable to post the surety bond in excess of $35,000.00 as the rule at that time required. Mills was thereby denied a full and fair opportunity to litigate these issues.

> lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of Rule may be evidence of breach of the applicable standard of conduct.

Further, SCR 3.995 provides as follows:

> The duties imposed by these Rules are duties owed to the Supreme Court, not to any other person or entity. Nothing in these Rules shall be construed as creating any cause of action or right of suit against any person or entity.

II. THE ORDER OF THE COURT FINDING THE DEFENDANTS JOINTLY AND SEVERALLY LIABLE WAS CONTRARY TO KENTUCKY LAW.

A. Joint liability in tort no longer exists in Kentucky.

Apportionment is required in all tort cases involving the fault of multiple parties in the Commonwealth of Kentucky. KRS 411.182. Kentucky's apportionment statute could not be any clearer on this issue. It unambiguously states that apportionment must be applied in all tort actions involving the fault of more than one party, regardless of how those actions are characterized. Plaintiffs dispute that an action for breach of fiduciary duty is fundamentally a tort action, not a breach of contract. It is well settled that an attorney's fiduciary duty to his clients exists independent of any contract. See *Ingram v. Cates*, 74 S.W.2d 383 (Ky. App. 2002) (Action

against attorney for violation of fiduciary duty not action on contract and therefore not barred by contract statute of limitations)). Surely, Plaintiffs do not believe that Mills could disclaim his fundamental fiduciary duties to them simply by drafting certain contractual language. A breach of fiduciary duty is fundamentally a tort, not a breach of contract, and therefore falls under the ambit of KRS 411.182.

Similarly, Plaintiffs cannot contest that this action involves the fault of more than one party. Throughout this litigation, Plaintiffs have strenuously asserted that all of the Defendants bear liability for their own actions in this case. The whole point of the apportionment statute is to allow the jury to look at the individual conduct of each Defendant and decide whose conduct played a greater role in causing Plaintiffs' damages. Plaintiffs fail to make any coherent argument and the Trial Court entered no finding as to why that should not have occurred here.

More fundamentally, the Trial Court failed to recognize that Kentucky has abolished the ancient and outmoded doctrine of joint and several liability. Although Plaintiffs cited *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (KY. 1991) for the proposition that joint and several liability still exists, that case is no longer good law on this issue. In *Degener v. Hall*, 27 S.W.3d 775 (Ky. 2000), decided nine years after *Steelvest*, the

Kentucky Supreme Court made it clear that joint liability in tort is a thing of the past:

> **As summarized in *Dix*, liability among joint tortfeasors in negligence cases is no longer joint and several, but is several only; and because the liability is several as to each joint tortfeasor, it is necessary to apportion a specific share of the total liability to each of them,** whether joined in the original complaint or by third-party complaint, and the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his/her fault.

Degener, at 779 (Emphasis added).

Degener's conclusion that tort liability in Kentucky is now several only has been reaffirmed on several occasions. See *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998) (holding that apportionment between priest and diocese was appropriate in sexual abuse case, even though diocese's failure to supervise was negligent and priest's misconduct was intentional); *Kentucky Farm Bureau v. Ryan*, 177 S.W.3d 797, 803 (Ky. 2005) ("In 1988, Kentucky codified certain procedural aspects of our comparative fault system with the passage of KRS 411.182, thus representing the legislature's intent to eliminate, once and for all, joint and several liability and to protect Plaintiffs and Defendants alike from being penalized for the fault of another.")

Additionally, the Court of Appeals (in an unpublished Opinion) has expressly held that damages for breach of fiduciary duty must be

apportioned. *James Medical Equipment, Inc. v. Allen*, 2006 Ky. App. Unpub. LEXIS 402 (Ky. App. 2006). In *Allen*, Appellant claimed that the law required joint and several liability for parties involved in a conspiracy to breach their fiduciary duties. The trial court disagreed and apportioned liability, and this decision was upheld by the Court of Appeals. The Court primarily relied upon the apportionment statute itself in making its decision. *Allen* at 6-7. The *Allen* court correctly ruled that apportionment is mandated by law in all tort cases regardless of how they are characterized and decisively rejected the argument advanced by Plaintiffs herein.

Other jurisdictions have spoken on this question and have also rejected those arguments. *Coty v. Steigerwald*, 692 N.Y.S.2d 946 (N.Y.A.D. 1999) (comparative fault principles may be applied to a causes of action for breach of fiduciary duty); *Engstrom v. Mayfield,* 159 Fed.Appx. 697 (6th Cir. 2005) (unpublished) (applying comparative fault principles to breach of fiduciary duty case).

B. The trial Court has not ruled that Defendants are liable as aiders and abettors, nor has it found that Defendants engaged in any conspiracy.

Contrary to Plaintiffs' assertions below, the Trial Court never found that Defendant Mills was liable as an accessory for aiding and abetting another's breach of fiduciary duty. Rather, the Court has found that Mills

and the other Defendants were liable for violations of **their own** fiduciary duties to their clients, which were, of course, non-delegable (Record at 1466).

Mills' potential liability in this case has nothing to do with the liability of the other Defendants and is not based on his alleged knowing participation in their alleged "schemes". If liable at all, Mills' liability is as a principal, not an accomplice, and his liability can only be based on his alleged failure to carry out his own fiduciary duties to his clients. While the trial Court did make a factual determination that each of the attorneys violated their fiduciary duties, it originally ruled that the Partial Summary Judgment "was against three (3) attorneys individually, not joint and several (as precluded by KRS 411.182). (Record at 1465). Shortly thereafter however the Trial Court, contrary to all evidence in the case and solely of its own volition reversed that ruling entering a finding that "[t]he Defendants Cunningham, Gallion and Mills operated in concert with one another and are jointly and severally liable for all compensatory damages, notwithstanding KRS 411.182 [cite omitted],(Record at 4066). This was yet another factual determination Judge Wehr made without regard to the record that was clearly before him. In fact, Defendant Mills expressly states in his deposition that he had little knowledge of what the other Defendants were

doing in this case. This testimony has been corroborated by that of multiple additional witnesses now that discovery has actually been allowed to proceed. His role in the underlying litigation was essentially confined to signing up the clients and gathering and organizing their medical records – he did not actively participate in the litigation or settlement of the cases. (*See* Mills deposition, at 31, 50-51, 53, 57-58, 61, 112-113, 134, 140-141, 144, 146-147, 176, 178, 192, 210-211). If his testimony is believed, (which it must be for purposes of summary judgment), he may be liable as a principal for his own breach of fiduciary duties, but he would not be liable as an aider or abettor because he had no knowledge of or responsibility for any acts committed by the other Defendants and did not participate in same. Furthermore, early on in this litigation, Mills submitted the affidavit of Rebecca Phipps, his legal assistant, which established that Mills did not receive any fees beyond those he was entitled to. (See Phipps affidavit, originally attached as Exhibit "A" to Appellant Mills' Response to Plaintiff's Motion to Fix Damages, but also missing from the Record). Further, this Court should take judicial notice that this issue is the one matter that has been presented to a jury for deliberation. In *United States of America v. William J. Gallion, et al*, Docket No. CR-07-39, in the United States District Court for the Eastern District of Kentucky, Covington

Division, these same Defendants were tried for conspiracy. While the Jury was unable to reach a verdict regarding Defendants Cunningham and Gallion, they unanimously acquitted Defendant Mills. This can leave no doubt that not only there were material issues of fact which not only would preclude Judge Wehr's findings, but such facts existed as would ultimately prove substantial enough to lead a jury to find precisely the opposite of Judge Wehr's decision.

The Defendant Mills is entitled to have a jury hear testimony about the exact role each attorney played in this matter, and have that jury decide the relative culpability, if any, of each in causing Plaintiffs' alleged damages. That is how apportionment is supposed to work, and there is absolutely no argument why it should not be allowed to work in this case. It is clear under Kentucky law that apportionment is necessary in this case, as it is a tort case involving the actions of more than one party. Under such circumstances, the application of KRS 411.182 is not optional and does not turn on how Plaintiffs choose to characterize the action. Moreover, it is clear under the relevant Kentucky case law that joint and several liability in tort no longer exists in Kentucky. Tort liability is instead several only, with each tortfeasor liable only to the extent of his fault. Given these realities,

Mills is entitled to an apportionment and the trial Court's finding of joint and several liability must be overturned.

CONCLUSION

For all the foregoing reasons, the Defendant Mills requests that this Court affirm the decision of the Kentucky Court of Appeals and remand this action to the Circuit Court for further proceedings.

RESPECTFULLY SUBMITTED,

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