# Supreme Court of Kentucky

**CASE NO. 2011-SC-291-D**

**KENTUCKY COURT OF APPEALS**
**NOS. 2007-CA-001971-MR, 2007-CA-001981-MR,**
**2007-CA-002173-MR, 2007-CA-002174-MR**

**On Appeal From Boone Circuit Court**
**No. 05-CI-436**

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

**v.**

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

## BRIEF FOR APPELLEE STANLEY M. CHESLEY

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### CERTIFICATE OF SERVICE

It is hereby certified that copies of this Brief for Appellee Stanley M. Chesley were served by U.S. Mail this 12th day of April, 2012, to the following: Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Angela M. Ford, 836 Euclid Ave., Suite 311, Lexington, KY 40502; Calvin R. Fulkerson and J. Christian Lewis, 239 N. Broadway, Lexington, KY 40507; James A. Shuffett, 217 W. Short St., Suite 400, Lexington, KY 40507; Mary E. Meade-McKenzie, 1002 Lexington Rd., Suite 22, Georgetown, KY 40324; Michael L. Gay and Jeffrey J. Harmon, 537 E. Pete Rose Way, Suite 400, Cincinnati, OH 45202; Hon. Geoffrey Morris, Special Judge, Boone Circuit Court, 700 W. Jefferson St., Suite 200, Louisville, KY 40202.

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# INTRODUCTION

After the circuit court recognized genuinely disputed factual issues and thus refused to grant summary judgment against Defendant/Appellee Chesley, the Plaintiffs/Appellants improperly appealed that interlocutory order. The Court of Appeals correctly held that it had no jurisdiction to review the non-final order.

## STATEMENT CONCERNING ORAL ARGUMENT

While Appellee Chesley believes that the legal issues before the Court pertaining to him are straightforward and the relevant authority clearly supports the results reached by the Boone Circuit Court and the Kentucky Court of Appeals, in light of Appellants' efforts to misdirect the Court's attention from the controlling facts, Appellee believes that oral argument may be useful to the Court's decision making process in this case.

## STATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

The circuit court correctly determined that there are genuine issues of material fact precluding entry of summary judgment against Mr. Chesley. Plaintiffs/Appellants (collectively "Abbott")[1] attempted to obtain appellate review of the circuit court's denial of partial summary judgment against Appellee Chesley. The Court of Appeals correctly held that it lacked jurisdiction to review the lower court's interlocutory order.[2] Abbott now asks this Court to not only exercise appellate jurisdiction over the non-final, interlocutory denial of summary judgment, but to decide *de novo* that there are no genuine issues of material fact and – as a matter of law – that Chesley is jointly and severally liable for the $42 million compensatory award against attorneys William J. Gallion, Shirley A. Cunningham, and Melbourne Mills, Jr. (collectively, "G-C-M").

But it is black letter law that an appellate court does not engage in interlocutory review of a trial court's decision that there are genuine factual disputes precluding entry of summary judgment. Quite the contrary, appellate courts are without jurisdiction to review such non-final orders. The decision of the Court of Appeals – as to Mr. Chesley – should be affirmed.

***The Court of Appeals properly declined to review the circuit court's interlocutory order***

The circuit court entered summary judgment against G-C-M, but denied summary judgment as to Mr. Chesley. The judgment against G-C-M was certified for appeal under

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[1] The Appellants are some of the former plaintiffs in the class action litigation concerning the diet drug fen-phen (the "*Guard*" case).

[2] *See Abbott v. Mills*, 2007-CA-001971-MR, 2007-CA-001981-MR, 2007-CA-002173-MR, 2007-CA-2174-MR (Ky. App., Feb. 4, 2011) ("Ct. App. Op."), copy attached as Appendix A. This appeal also involves the Court of Appeals' reversal of the circuit court's final and appealable decision to grant summary judgment against the other defendants, attorneys who – unlike Chesley – admittedly took actions to divert millions of dollars in client funds to their own benefit.

CR 54.02[3], and G-C-M appealed. Abbott cross-appealed the denial of summary judgment against Chesley.

A unanimous panel of the Court of Appeals held that it was without jurisdiction to review the trial court's denial of summary judgment against Chesley because "denial of a motion for summary judgment, being interlocutory is not appealable," under well-settled Kentucky law.[4] The Court of Appeals specifically noted that "there has been no entry of final judgment on any of Abbott's claims against Chesley" and "there were issues of disputed facts remaining in relation to Abbott's claims against Chesley, and discovery was still ongoing."[5]

The Court of Appeals reversed the summary judgment against G-C-M. The Court of Appeals decided there were genuine issues of material fact precluding the summary judgment against G-C-M.[6] Specifically, the Court of Appeals held that the affidavit of Kenneth Feinberg – filed by Gallion, not Chesley – created a genuine issue of material fact.[7] Counsel for Chesley knew that, in Feinberg's testimony in Chesley's disciplinary proceeding, Feinberg recanted significant portions of his affidavit that had been filed with the trial court in *Abbott* because the affidavit was based upon erroneous information supplied by Gallion. Feinberg was called by Chesley as a witness in the discipline case to explain procedures for complex class action and mass tort settlements.

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[3] R.A. 4177-79, Order at 3, 08/27/07. Even if the order denying summary judgment had been certified under CR 54.02, it would not be reviewable on appeal. *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681, 684 (Ky. App. 2009); *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004).

[4] Ct. App. Op. at 38-39.

[5] *Id.*

[6] Consistent with the final judgment rule, the Court of Appeals held that the circuit court's interlocutory order *denying* Gallion's and Cunningham's motions for summary judgment could not be reviewed on appeal. *Id.* at 30-31.

[7] *Id.* at 25-26.

When the Court of Appeals rendered its opinion, Feinberg's testimony in the discipline case was still confidential. Chesley and his counsel felt a duty to the tribunal to disclose that testimony to the Court of Appeals before its February 4, 2011 opinion became final. Counsel for Chesley obtained permission from the Trial Commissioner to disclose Feinberg's testimony to the Court of Appeals, and learned in that meeting that Feinberg's testimony had been filed by Bar Counsel as an exhibit in the then-public KBA proceeding against attorney David L. Helmers and thus it would not violate the confidentiality rules to file the testimony in the Court of Appeals.

Counsel for Chesley thereupon filed the redacted transcript with the Court of Appeals. Counsel for Chesley chose a petition for rehearing pursuant to CR 76.32 as the vehicle for filing the transcript to ensure the Court of Appeals did not lose jurisdiction to consider Feinberg's testimony. Thereafter, Abbott also filed a petition for rehearing predicated upon Feinberg's testimony. The Court of Appeals denied Abbott's petition, stating that the recanting created a credibility issue that should not be resolved at the appellate level, but should be remanded to the trial court to resolve.[8] Abbott then requested and received discretionary review from this Court.

***Abbott's mischaracterization of the circuit court's interlocutory rulings cannot create appellate jurisdiction***

The Special Circuit Judge granted Abbott's request for partial summary judgment against G-C-M and later awarded $42 million in damages for their alleged breaches of fiduciary duty.[9] But recognizing the abundance of disputed factual issues in the evidentiary record, Special Circuit Judge William Wehr denied Abbott's premature

[8] Order Denying Petition for Rehearing (Apr. 21, 2011), copy attached as Appendix B.

[9] R.A. 1464-70, Order at 7, 06/08/2006; R.A. 4064-67, Order at 3, 08/01/2007.

request for a partial summary judgment holding that Chesley had breached fiduciary duties as a matter of law.[10] The circuit court acknowledged that the disputed facts precluded "summary judgment on both the breach of fiduciary duty and fee disgorgement claims."[11] The April 4, 2007 Order denying summary judgment against Chesley was never certified for appeal under CR 54, nor could it have been, as it was not a final judgment.

Contrary to the misstatements in Abbott's brief, the circuit court never found that Chesley was liable for any portion of the $42 million compensatory award against G-C-M.[12] Abbott is distorting the trial court's April 4 and September 24, 2007 Orders in an attempt to create a ruling that does not exist.

In its April 4 Order, the trial court made multiple rulings, including granting in part Abbott's motion for compensatory damages against G-C-M and denying Abbott's motion for partial summary judgment against Chesley.[13] In denying partial summary judgment, the court stated that the rationale of the summary judgment rendered against G-C-M did not apply to Chesley because the "disputed facts preclude summary judgment on *both* the breach of fiduciary duty **and fee disgorgement claims**. These will remain issues for the jury as to him."[14] The trial court thus explicitly stated that based upon the disputed facts in the record, the trial court could not enter summary judgment against Chesley **holding him liable for any repayment of fees** to Abbott.

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[10] R.A. 3470-72, Order at 3, 04/04/07.

[11] *Id.*

[12] Appellants' Brief, p. 11. *Cf.* R.A. 3470-72, Order 04/04/07; R.A. 4294-97, Order 09/24/07.

[13] R.A. 3470-72, Order at 2-3, 04/04/07.

[14] *Id.* at 3 (emphasis added). Notably, the court did not state that Chesley "received too much money" as Abbott claims. Appellants' Brief, p. 11. Instead, the Court noted that Chesley passively "was paid" more money than he should have been, which has quite different connotations than the act of actively receiving money.

In its September 24 Order, the trial court denied G-C-M's motion to vacate the August 27, 2007 Order, which made the order granting partial summary judgment against G-C-M, including the compensatory award of $42 million against G-C-M, final and appealable.[15] The trial court held that G-C-M was responsible for the entire $42 million award, even to the extent the calculation of the award took into account monies that were ultimately paid by G-C-M to Chesley and other individuals who are not parties to this action.[16] Thus, in referring to funds paid to Chesley, the court was simply observing that those funds were a part of the compensatory damages award against G-C-M, for which G-C-M would be responsible. G-C-M's theft of the client funds, and G-C-M's choice on how to disburse those funds, did not – and could not – create liability on behalf of Chesley.[17]

The circuit court's meaning is illustrated by the express finding that "Gallion, Cunningham, and Mills, were the ones who were in complete control of this $200 million, who never disclosed to their clients the true handling of these dollars, and who treated this money as their own long before any alleged Court permission was sought."[18] Because G-C-M were in control of the money, they were responsible for repaying the entire judgment – even if they had disbursed those funds to other persons.

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[15] R.A. 4294-97, Order at 1, 09/24/07; R.A. 4177-79, Order at 3, 08/27/07.

[16] *Id.*

[17] The fact that G-C-M paid Chesley a fee that the circuit court determined was part of a larger unreasonable fee taken by G-C-M does not mean that Chesley breached any fiduciary duty to the *Guard* plaintiffs. This attempt at guilt by association is not tenable because Abbott fails to establish that Chesley was aware at the time of any amount of money converted by Gallion, Mills, and Cunningham, nor is there any reason that he should have been aware.

[18] R.A. 4294-97, Order at 3, 09/24/07.

***Abbott's evidentiary mischaracterizations and omissions cannot create appellate jurisdiction over the circuit court's interlocutory order***

Abbott makes a transparent attempt to distort the record by describing G-C-M's criminal misconduct as actions by the "Defendants." Abbott even goes so far as to misstate that "Chesley's conduct ... was indistinguishable from that of other Appellees."[19] But evidence of G-C-M's actions is not evidence of Chesley's actions.

Abbott's evidentiary mischaracterizations attempt to obfuscate the undisputed fact that Chesley had no role in the scheme by which G-C-M negotiated with their own clients and pocketed the remaining funds. G-C-M engaged Chesley for the limited purpose of negotiating a settlement.[20] He indisputably had no role in the initial allocation of settlement funds in which G-C-M negotiated with their own clients and retained the balance for themselves. The record is devoid of credible evidence that Chesley played any part in obtaining the order from the court approving the second distribution. It is indisputable that he was not involved in the creation or operation of the Kentucky Fund for Healthy Living and he did not receive one cent from the Fund. It is also undisputed that Chesley did not know about – or participate in – G-C-M's theft of the final $7.5 million.

For example, Abbott quotes selected portions of the contract between G-C-M and Chesley to imply that Chesley was involved in every aspect of representing the *Guard* plaintiffs. But Abbott omits the express provisions of the same contract that document the explicit (and permissible) division of labor and client responsibilities among the group of lawyers. According to the contract between G-C-M and Chesley, Chesley was

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[19] Appellants' Brief, p. 2.

[20] April 14 and December 29, 2000, fee-sharing agreements, Cunningham Depo., Vol. II. Depo. Ex. 6 (R. at Packet #5, attached to Abbott brief as Appendix Ex. C); Lawrence Depo., pp. 76-77, 174-176.

engaged for a limited purpose – to act only as "lead counsel in any negotiations."[21] Gallion remained lead counsel in the litigation and would be the lead trial lawyer if the case did not settle. Mills and Cunningham expressly assumed responsibility for communicating with G-C-M's clients because they had the engagement agreements and relationships with the clients.[22]

It is undisputed that Chesley had no involvement in – or knowledge of – the amounts paid to the *Guard* plaintiffs in the first distribution. As an attempt to create a connection between Chesley and the second distribution to the *Guard* plaintiffs, Abbott cites an untested and self-serving affidavit from David Helmers. But the full evidentiary record – which Abbott ignores – contradicts Helmers' attempt to shift blame to Chesley for his own actions. Helmers claimed that "Chesley's office" – and not Chesley himself – prepared a letter to clients about the second distribution. But the sworn testimony of Fay Stilz, an attorney in Chesley's office who did not work on the *Guard* action, reveals that *Helmers contacted her* and asked her to assist him with a letter to the claimants regarding a second distribution because of her experience with class action settlements.[23] She spent little time editing the document, made no final approval of the letter, and did not inform Chesley when Helmers contacted her.[24]

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[21] April 14 and December 29, 2000, fee-sharing agreements, Cunningham Depo., Vol. II. Depo. Ex. 6 (R.A. at Packet #5, attached to Abbott brief as Appendix Ex. C);

[22] The Settlement Agreement formalized the responsibilities of counsel with respect to the settlement and the allocation of settlement funds. The Agreement specifically designated G-C-M and Richard Lawrence as the "Settling Attorneys" and required them to allocate the settlement amount among the Settling Claimants, obtain releases and dismissals from the Settling Claimants, and take all other necessary steps to effectuate the settlement. R.A. 2167-2173, Settlement Agreement, Cunningham Depo., Vol. II, Depo. Ex. 10 (R. at Packet #5). Chesley was not a "Settling Attorney" under the Settlement Agreement and he did not sign the Agreement because he had not been directly engaged by any of the clients.

[23] R.A. Stilz Depo., pp. 41-42, 48-49.

[24] *Id.* at 50, 55, 58-60.

Abbott also attempts to blame Chesley for a 2002 meeting – which Abbott concedes is undocumented – where Judge Bamberger purportedly approved G-C-M's criminal scheme. But the evidentiary record does not establish who was present at this alleged meeting[25] if, in fact, it occurred.[26] The Order allegedly arising out of that meeting – purportedly signed February 15, 2002 but not actually entered until June 6, 2002 – approved the manner in which the settlement proceeds had been handled to date, approved attorneys' fees and expenses paid to date (without mention of an amount), and sanctioned an unquantified second distribution to claimants.[27] There is no credible evidence in the record that Chesley played any part in convincing Judge Bamberger to enter this Order.

Thus, Abbott's repeated assertions of "undisputed" evidence establishing Chesley's liability are wholly inaccurate. And repetition alone cannot make it true. More importantly, none of these mischaracterizations can create appellate jurisdiction over the circuit court's interlocutory denial of summary judgment. Rather the record – at best – demonstrates that the circuit court correctly concluded that summary judgment against Chesley was improper.

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[25] Chesley has no recollection of attending the alleged meeting, he does not know who drafted the Order eventually entered on June 6, and he did not review the order prior to entry. R.A. Chesley Depo., pp. 346-47, 355-56, 363-64. While Cunningham claims to recall the meeting, he cannot recall whether he attended or not, let alone whether Chesley was there. R.A. Cunningham Depo., pp. 346-49. Gallion was unclear about whether Chesley attended the meeting. R.A. Gallion Depo., pp. 28-29.

[26] Only Bamberger testified regarding what was said at an alleged February 2002 meeting, and his testimony falls far short of the embellished version presented in Abbott's brief. R.A. Bamberger Depo., pp. 35-40. No witness has provided an exact date for this alleged meeting. In fact, it was a July 2002 Order, entered after a June 2002 hearing – which it is undisputed Chesley did not attend – that Bamberger approved the creation of the Kentucky Fund for Healthy Living. Abbott ignores Bamberger's statements that he relied upon a formal legal opinion from Pierce Hamblin – not on Chesley or any information he provided – for that ruling. *Id.* at 51; Pierce Hamblin opinion is Exhibit No. 38 to Bamberger Depo.; Transcript of June 27, 2002 hearing is Exhibit No. 6 to Bamberger Depo., pp. 4-5. It is undisputed that Chesley was not involved in the Fund's operation and never received any money from the Fund.

[27] June 6, 2002 Order, Cunningham Depo., Vol. II, Depo. Ex. 13 (R. at Packet #5).

## ARGUMENT

### I. The Court of Appeals correctly held there is no appellate jurisdiction to review the circuit court's interlocutory order denying summary judgment.

The order denying summary judgment against Chesley is not final and is not appealable. Under the finality rule, Kentucky appellate courts do not have jurisdiction to review such an order. The circuit court did not certify the interlocutory order for appeal under CR 54.02 and, under established Kentucky law, could not have certified the non-final order for appeal. Further, an order denying summary judgment is not even reviewable on appeal after entry of a final judgment where – as here – the denial was based on a determination that disputed issues of fact precluded summary judgment. The cases upon which Abbott relies are consistent with the finality rule and do not support appellate review here. The Court of Appeals therefore correctly held that the order is not reviewable on appeal.[28]

#### A. There has been no final judgment as to Chesley and thus no basis for appellate review of the order denying summary judgment against him.

The circuit court's order denying Abbott's motion for partial summary judgment against Chesley is inherently interlocutory and thus not appealable. Rule 54.01 limits appealable judgments to "final order[s] adjudicating all the rights of all of the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR. 54.01; *Hale v. Deaton*, 528 S.W.2d 719, 721 (Ky. 1975). The final judgment rule is jurisdictional. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005). As this Court has stated: "[A]n

[28] Ct. App. Op. at 38.

appeal may be properly considered only if perfected according to our rules of practice and procedure. Our rules require that there be a final order or judgment from which an appeal is taken." *Id.*

It is black letter law that the denial of a motion for summary judgment is a non-final, interlocutory, and non-appealable order. *E.g., Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955); *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004) ("It is well settled in this Commonwealth that the denial of a motion for summary judgment is interlocutory and is not appealable.").

There has been no final judgment entered as to Chesley. Thus, the circuit court's denial of summary judgment is interlocutory and not appealable.

### B. The interlocutory order denying summary judgment against Chesley was not certified for appellate review under CR 54.02, nor could it have been.

The order denying summary judgment as to Chesley does not include the finality language under CR 54.02 – nor could it, as CR 54.02 has no application here. That rule is intended for multiple party cases where an otherwise final judgment is entered against "one or more but less than all of the claims or parties" and the trial court finds "there is no just reason for delay." CR 54.02(1). It only applies where there has been "a final adjudication upon one or more of the claims in litigation" and "[t]he judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding." *Hale v. Deaton,* 528 S.W.2d 719, 722 (Ky. 1975).

Rule 54.02 does not permit appeal of interlocutory orders by anyone. Accordingly, an order denying summary judgment – which is inherently interlocutory –

cannot be made appealable via certification under CR 54.02. *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681, 684 (Ky. App. 2009);[29] *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004). Thus, even if the circuit court had intended its certification of the G-C-M ruling to include its order denying summary judgment against Chesley – which it did not – the certification would have been ineffective and would not have made that interlocutory order appealable.

Abbott cannot make an end run around the final judgment rule by relying upon the trial court's CR 54.02 certification of the separate order granting summary judgment against G-C-M. That certification applied only to the rulings against G-C-M, not Chesley. The order at issue with regard to Chesley is the trial court's April 4, 2007 interlocutory order denying summary judgment against Chesley – not the August 1, 2007 order granting compensatory damages against G-C-M. Abbott tries to conflate the two orders by asserting that the award against G-C-M "included the money Chesley was overpaid...." But there has been no award of damages against Chesley, at all. The fact that the $42 million awarded against G-C-M might include money paid by G-C-M to Chesley does not transform it into an appealable award of damages against Chesley.

Abbott also makes an ironic public policy argument that the denial of summary judgment as to Chesley should be reviewed under the "historic policy against piecemeal

[29] The Court of Appeals took jurisdiction in *Medcom* only because the trial court's order certifying its denial of summary judgment also dismissed the appellant's counterclaims on the same issues and the Court of Appeals held that the dismissal constituted an "adjudication on the merits." 290 S.W.3d at 684. The same reasoning does not apply to this case, where the trial court did not adjudicate the merits of Abbott's claims against Chesley.

litigation...."[30] But the public policy disfavoring piecemeal litigation is a factor that weighs **against** a trial court's decision to certify an order for appeal under CR 54.02. *See generally Jackson v. Metcalf*, 404 S.W.2d 793, 794 (Ky. 1966). Abbott's argument tries to turn that policy on its head. In this case, Special Judge Wehr apparently determined that the issues addressed in his August 1, 2007 Order awarding damages against G-C-M were sufficiently separate from other parts of the case to be certified for immediate appeal. If the piecemeal litigation doctrine has any application here, it would be that the certification as to G-C-M under CR 54.02 was premature – not that an interlocutory order as to Chesley could nevertheless be reviewed on appeal because a separate portion of the case was certified under CR 54.02.

The circuit court's decision to certify the August 1, 2007 Order under CR 54.02 as to G-C-M did not change the fact that its April 4, 2007 Order was not final and not appealable as to Chesley. The Court of Appeals therefore correctly followed the final judgment rule, holding that it was without appellate jurisdiction to review the circuit court's interlocutory order denying summary judgment against Chesley.

### C. The circuit court's express determination that genuine factual issues precluded summary judgment is not reviewable.

An appellate court cannot review *de novo* the existence of genuine issues of material fact – even after a final judgment. *Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955); *and see, e.g., Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (review proper only where "the only basis of the [trial court's] ruling is a matter of

[30] Appellants' Brief, pp. 28-29. The part of CR 54.02(1) that aims to prevent staggered appeals is the provision that any order that does not adjudicate all claims of all parties and does not contain the "final judgment" / "no just reason for delay" recital shall remain interlocutory (and thus non-appealable) until the entry of a final judgment.

law...."). In overruling Abbott's motion for partial summary judgment against Chesley, Special Judge Wehr held: "The rationale of the previously entered Partial Summary Judgment does not apply to [Chesley] since the facts are in dispute...these disputed facts preclude summary judgment on both the breach of fiduciary duty and fee disgorgement claims. These will remain issues for the jury as to him."[31] Judge Wehr's determination that disputed facts preclude summary judgment as to Chesley cannot be reviewed on appeal.

An order denying a motion for summary judgment is not a final determination of any issue in the case – "[b]y nature it is a pretrial motion." *Transp. Cabinet, Bureau of Highways, Commonwealth of Ky. v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988). After a denial of summary judgment, a movant still has the opportunity to present evidence at trial and raise legal arguments in motions. Accordingly, "once the trial begins, the underlying purpose of the summary judgment expires and all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial and/or judgment notwithstanding the verdict." *Id.* Thus, in *Bell*, the Court held that the trial court's order denying the defendant's summary judgment was not reviewable, but the order denying the defendant's motion for a directed verdict on the same issue was reviewable.[32] 284 S.W.2d at 814. Likewise, in *Dr. Pepper Bottling Company, Inc. v. Ricks*, the Court

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[31] R.A. 3470-72, Order at 3, 04/04/07.

[32] As the Court noted in *Bell*, a trial court's interlocutory decision that genuine factual disputes exist should not be second guessed at the appellate level for the additional reason that such review "would be inconsistent with [the] admonition to proceed cautiously when granting a summary judgment. It would put the appellate court in the position of trying the question of doubt in the mind of the trial judge." 284 S.W.2d at 814; *and see Gumm v. Combs*, 302 S.W.2d 616, 617 (Ky. 1957) ("In [*Bell*] we pointed out that on appeal we could not try the issue of doubt in the mind of the trial court as to whether or not such genuine issue [of material fact] existed....").

reviewed the issues raised by the defendants' motions for a directed verdict and for judgment notwithstanding the verdict, but observed that the trial court's rulings denying the parties' motions for summary judgment on the same issues were not reviewable on appeal. 376 S.W.2d 299, 301 (Ky. 1964).

Here, Special Judge Wehr did not render any factual or legal determinations that would hamper Abbott's ability to put on a case against Chesley at trial. Judge Wehr simply determined that summary judgment was inappropriate because of the existence of disputed factual issues. That decision is not reviewable and thus there is no need to debate those facts. Abbott's choice to dedicate several pages of the opening brief to arguing about the evidence and its significance is telling: Abbott asks this Court to ignore the finality rule and, effectively, to "try the issue of doubt in the mind of the trial court." *See Gumm*, 302 S.W.2d at 617. This is not the role of appellate courts and is prohibited by the finality rule.

### D. Abbott's cited cases are consistent with the finality rule and do not support appellate review of an interlocutory order.

The cases mistakenly relied upon by Abbott are completely consistent with the final judgment rule. They merely stand for the unremarkable proposition that when a final judgment has been entered, the appellate court can review a pure question of law that was preserved for appellate review by an unsuccessful motion for summary judgment.

For example, in *Gumm v. Combs*, a final, appealable judgment had been entered upon a jury verdict and the appeal was taken from that final judgment. 302 S.W.2d 616 (Ky. 1957). Similarly, *Harrington v. Asset Acceptance, LLC*, involved cross-motions for summary judgment. 270 S.W.3d 405, 407 (Ky. App. 2008). Thus, a final and appealable

judgment was entered for the prevailing party and the losing party argued that it was entitled to judgment as a matter of law. As there was no jury trial – and thus no need for a JNOV motion – the losing party was entitled to assert its legal argument because a final and appealable judgment had been entered in favor of the opposing party. Finally, in *Midwest Mutual Insurance Company v. Wireman*, the Court of Appeals correctly stated that entry of a final judgment is required for appellate review and it reversed the trial court on a pure issue of law.[33] 54 S.W.3d 177, 179 (Ky. App. 2001).

The cases Abbott cites are not exceptions to the finality rule but are merely cases in which the finality requirement is satisfied, *i.e.*, there was a final and appealable judgment. The only relevance of summary judgment in those cases is that it was the procedural vehicle by which the appellant preserved for appellate review the question of law being advanced on appeal. Most importantly, none of those cases stand for the proposition for which Abbott is advocating, namely, that an appellate court can review a trial court's interlocutory determination that there are genuinely disputed facts and decide *de novo* that there is no genuine issue of material fact.

## II. There is no basis for a judgment making Chesley "jointly and severally" liable with G-C-M.

Despite the fact that no judgment or finding of liability has been entered against Chesley, Abbott asks this Court to hold Chesley jointly and severally liable to Abbott as a matter of law. There is no basis in the record to support such a judgment.

Abbott's argument rests on two faulty premises: (1) that the circuit court's order awarding $42 million in damages against G-C-M allegedly implied a judgment that

[33] The Court of Appeals' opinion in *Midwest Mutual* states that the trial court made "findings of fact." 54 S.W.3d at 179. It is unclear whether this indicates there was a bench trial prior to the appeal; if not, then the panel incorrectly applied the rule it correctly stated.

Chesley acted in concert with G-C-M; and (2) that "undisputed" facts allegedly support summary judgment on Abbott's conspiracy claim.

### A. Chesley has not been held liable and thus cannot be found "jointly and severally liable" as a matter of law.

Abbott misstates the circuit court's holding in its order awarding damages against G-C-M. The circuit court held only G-C-M liable for a $42 million award and expressly found that disputed factual issues prevented the trial court from holding Chesley liable as a matter of law.

The circuit court expressly found only G-C-M at fault, stating "Gallion, Cunningham, and Mills, were the ones who were in complete control of this $200 million, who never disclosed to their clients the true handling of these dollars, and who treated this money as their own long before any alleged Court permission was sought."[34] The court did not – and could not – make any finding or judgment about Chesley's alleged involvement in G-C-M's misconduct. Thus, Abbott misrepresents the circuit court's rulings by asserting that the court "recognized that all four Defendants acted in concert when it included the $7 million plus clearly overpaid to Defendant Chesley in the $42 million for which he found Defendants Gallion, Cunningham and Mills jointly and severally liable."[35] The circuit court did not – in the September 24, 2007 Order or otherwise – find Chesley liable for anything at all.

Abbott cannot use the doctrine of joint and several liability – which does not even apply to Abbott's claims[36] – to bootstrap Chesley into the trial court's judgment against

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[34] R.A. 4064-67, Order at 3-4, 08/01/2007.

[35] Appellant's Brief, p. 41.

[36] Abbott argues, at length, that Kentucky's adoption of pure several liability in tort claims under the apportionment statute, KRS 411.182, does not apply to claims for conspiracy or aiding and abetting.

G-C-M and to bypass the necessity of a separate finding as to Chesley's liability. It is axiomatic that in order to be held jointly and severally liable, a party must first be found **liable** – that is, there must be a judgment against that party. *See, e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220-21 (1994) ("Joint and several liability applies when there has been a judgment against multiple defendants."). There has been no judgment entered against Chesley and thus there is no basis to apply – or even discuss – the joint and several liability doctrine.

### B. Chesley did not "act in concert" with G-C-M.

Abbott recounts many of the same **disputed facts** in asserting that Chesley was a co-conspirator or "acted in concert" with G-C-M as a matter of law. The trial court declined to grant summary judgment against Chesley on this issue and thus it is not reviewable in this appeal for the same reason Abbott's other claims against Chesley are not reviewable.

Further, the "facts" upon which Abbott relies fail to support Abbott's claim that Chesley acted in concert with G-C-M. In Kentucky, to prevail on a claim of civil conspiracy, "the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act." *James v. Wilson*, 95 S.W.3d 875, 897 (Ky. App. 2002) (citing *Montgomery v. Milam*, 901 S.W.2d 237 (Ky. 1995)). In determining what constitutes "concerted action," Kentucky

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Abbott Brief, pp. 37-41. But the apportionment statute explicitly applies to "all tort actions" involving fault of more than one party. KRS 411.182(1). Recently, a federal court applying Kentucky law rejected the argument now being made by Abbott and held that the apportionment statute applies even where it is claimed that the defendants acted in concert. *Gundaker/Jordan American Holdings, Inc. v. Clark*, 2009 WL 2390162, *8-9 (E.D. Ky., Aug. 4, 2009) (this is a later opinion issued by the same court issuing an opinion cited by Abbott – Abbott Brief, p. 38). The *Clark* court specifically noted the absence of any Kentucky case examining KRS 411.182's effect on liability for those who aid and abet a breach of fiduciary duty. *Id.* at *8. Abbott cites no such cases either.

courts look to the Restatement (Second) of Torts, Section 876.[37] *James*, 95 S.W.3d at 897 (citing the use of Section 876 in *Farmer v. City of Newport*, 748 S.W.2d 162, 164 (Ky. App. 1988)). Accordingly, to hold Chesley jointly and severally liable for G-C-M's tortious acts, Abbott must prove Chesley acted tortiously, pursuant to a common design, or rendered substantial assistance to others to accomplish a tortious act in order to establish liability based on concert of action.

There is no simply evidence in the record to support a finding that Chesley participated in any act in furtherance of G-C-M's alleged conspiracy. Chesley cannot be held to have acted in concert with G-C-M by virtue of his role as settlement negotiator[38] when there has been no claim in this action that the settlement negotiations themselves, or the amount of settlement, constituted a breach of fiduciary duty.[39] There is no credible evidence in the record that Chesley had *any* knowledge of the scheme conducted by G-C-M or could have taken any steps to stop it. Abbott cannot point to one scintilla of evidence showing that Chesley knew in February 2002 that G-C-M had converted more than 50% of the settlement funds to their own use or that he personally argued in favor of a 49% attorney's fee. There is absolutely no evidence in the record that Chesley "played a role in the creation of [the Kentucky Fund] and thus aided and abetted G-C-M's alleged

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[37] Section 876 states that one is subject to liability for the tortious acts of another if he:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the third person.

[38] *See* Appellants' Brief, p. 42.

[39] Nor could there ever be such a claim. With a prior settlement offer of $10 million, Chesley was able to negotiate for the ultimate settlement of $200 million. R.A. Gallion Depo., p 170.

breaches of fiduciary duty," as Abbott claims.[40] Similarly, there is no credible evidence that Chesley knew anything about the amount of the settlement fund that had been held back after the initial distribution, or about the use of the second distribution as an alleged cover up that could possibly render him liable for aiding and abetting G-C-M.[41]

## CONCLUSION

The order denying Abbott's motion for partial summary judgment against Chesley is undeniably interlocutory and is therefore not reviewable on appeal under well-settled law.

Further, as the circuit court recognized, the material facts pertaining to Chesley are genuinely in dispute. Summary judgment therefore was correctly denied. And there is no basis upon which this Court could award Abbott judgment as a matter of law.

The Court of Appeals properly concluded that it was without jurisdiction to review the trial court's denial of summary judgment against Chesley. That ruling should be affirmed.

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[40] Appellants' Brief, p. 45.

[41] Helmers' self-serving, untested, and contradicted affidavit states not that Chesley knew anything about the amount of the settlement fund that had been held back or about the use of a second distribution as a cover up, but only that Chesley discussed "the procedures" used in a second distribution and that Chesley's "office" (not Chesley personally) prepared a letter to be given to clients regarding the second distribution. Helmers Affidavit, § 14, Ex. 20, Mem. Law Support Plaintiffs' Mot. Partial Summ. J. against Def. Chesley (R. at Packet #7).

Respectfully submitted,

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# APPENDIX

**A** February 4, 2011 Kentucky Court of Appeals Opinion Affirming in Part, Vacating in Part, Reversing in Part and Remanding, Case Nos. 2007-CA-001971-MR; 2007-CA-001981-MR; 2007-CA-002173-MR; and 2007-CA-2174-MR

**B** April 21, 2011 Kentucky Court of Appeals Order Denying Petition for Rehearing, Case Nos. 2007-CA-001971-MR; 2007-CA-001981-MR; 2007-CA-002173-MR; and 2007-CA-2174-MR