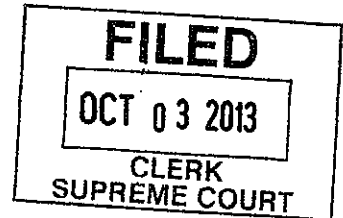


KENTUCKY SUPREME COURT
2012-SC-000626-D



COMMONWEALTH OF KENTUCKY On Behalf of
the COMMERCIAL MOBILE RADIO SERVICE
EMERGENCY TELECOMMUNICATIONS BOARD

APPELLANT

v. ON REVIEW FROM COURT OF APPEALS
NOS. 2010-CA-001185 and 2010-CA-001266

and

JEFFERSON CIRCUIT COURT
NO. 08-CI-10857

VIRGIN MOBILE U.S.A., L.P.

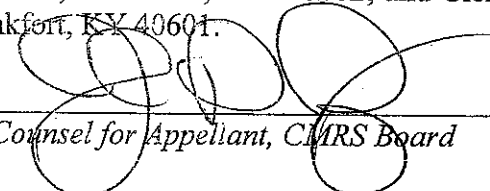
APPELLEE

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ARGUMENT

I. The Court of Appeals erroneously substituted its own discretion for the discretion of the Circuit Court in reversing the attorney's fees award to the CMRS Board.

The Court of Appeals erred in holding that a reversal of the attorney's fee award was "warranted" in this case, and that the lower court "exceeded its discretion" in awarding attorney's fees. (Op, pp. 29-30). Unless there is a showing of clear abuse of discretion, a reviewing court cannot substitute its judgment for the lower court's judgment. *Duke v. Duke*, 2005-CA-001508-MR, 2006 WL 2190755 at *2 (Ky. Ct. App. Aug. 4, 2006). "[A]buse of discretion applies...where, for example, a court is empowered to make a decision—of its choosing—that falls within a range of permissible decisions." *Cooper v. Com.*, 2011-CA-001126-MR, 2012 WL 5457507 at *2 (Ky. Ct. App. Nov. 9, 2012)(internal citations and quotations omitted).¹ See also *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2011), cited by Virgin Mobile. Therefore, the relevant question is whether an award of attorney's fees to the CMRS Board was "within the range of permissible decisions allowed [to the Circuit Court] by a correct application of the facts to the law [KRS 65.7635(5)]." *Id.*

KRS 65.7635(5) permits an award of attorney's fees to the "prevailing party," without further qualification. There is no doubt that the CMRS Board was the "prevailing party" in its litigation with Virgin Mobile, as required by KRS 65.7635(5). Therefore, awarding attorney's fees to the CMRS Board (the "prevailing party") certainly was within "the range of permissible decisions" of the Circuit Court. *Id.* As the Sixth Circuit succinctly stated in affirming the attorney's fee award in the CMRS Board's

¹ Copies of these unpublished decisions are attached hereto at Tabs 1 and 2 respectively pursuant to CR 76.28.

litigation with TracFone: “The CMRS Board was entitled to attorneys' fees as the prevailing party in the litigation; therefore, the district court did not abuse its discretion in awarding the fees.” *Kentucky Commercial Mobile Radio Serv. Emergency Telecommunications Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905, 916 (6th Cir. 2013).

Virgin Mobile claims that the award of attorney’s fees in the *TracFone* litigation is distinguishable because TracFone was more “litigious” than Virgin Mobile, and because TracFone also disputed its liability for CMRS service charges subsequent to the 2006 amendments. The CMRS Board would not disagree with Virgin Mobile’s characterizations. However, the court’s basis for approving the attorney’s fees award against TracFone was not that TracFone acted without “good faith” with respect to its post-2006 liability. TracFone’s position with respect to the pre-2006 statutes was *the same* as Virgin Mobile’s position, and had no impact on the attorney’s fees award. On the contrary, Judge Heyburn opined that TracFone did not act in bad faith, but that the CMRS Board should nevertheless be rewarded with its reasonable attorney’s fees for pursuing a difficult litigation in good faith to protect CMRS service charges. *Kentucky Commercial Mobile Radio Serv. Emergency Telecommunications Bd. v. TracFone Wireless, Inc.*, 3:08-CV-660-H, 2011 WL 4007668 at *2 (W.D. Ky. Sept. 8, 2011) *aff’d*, 712 F.3d 905 (6th Cir. 2013).

Whether a court has abused its discretion is dependent upon the facts and circumstances of each case. *Kentucky Ret. Sys. v. Foster*, 338 S.W.3d 788, 803 (Ky. Ct. App. 2010). “If there is doubt about the correctness of his ruling, it must be upheld. If the record supports [the lower court’s] ruling, it will not be reversed. Even if in [the reviewing court’s] opinion the record would more strongly support a different conclusion,

if there is substantial reason for [the lower court's] decision, then he has not clearly erred." *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73 (Ky. 2010) (internal citations and quotations omitted). A reviewing court cannot reverse a lower court's decision *even if* it doubts the correctness of the decision, or disagrees with the decision. *Id.* In this case, although the Court of Appeals apparently disagreed with the decision of the Circuit Court, it improperly substituted its own judgment of "fairness" for the lower court's judgment. Given the facts and circumstances of this case - the CMRS Board's substantial justification in bringing suit against Virgin Mobile (and TracFone), and the CMRS Board's success in that litigation - there was simply no "unfairness" in awarding the CMRS Board its reasonable attorney's fees as the prevailing party, as permitted by KRS 65.7635(5).

The Circuit Court did not abuse its discretion, and the Circuit Court's award of attorney's fees to the CMRS Board should be reinstated.

II. The "prevailing party" attorney's fees statute is intended to encourage the CMRS Board to ensure the collection and remittance of CMRS service charges, not to "penalize" Virgin Mobile.

KRS 65.7635(5) permits an award of attorney's fees to the CMRS Board as the "prevailing party" to encourage the CMRS Board to protect the collection and remittance of CMRS service charges. The statute is not a "penalty" on Virgin Mobile.² Certainly,

² Virgin Mobile argues that awarding attorney's fees pursuant KRS 65.7635(5) would be unconstitutional absent a finding that the CMRS provider did not act in "good faith." See VM Response Brief, pp. 14-15, citing *City of Louisville v. Slack*, 39 S.W.3d 809 (Ky. 2001). Virgin Mobile cannot assert the unconstitutionality of the statute for the first time on appeal. See *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. Ct. App. 1987) overruled by *Conner v. George W. Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992) on other grounds (holding that a challenge to a statute on a constitutional basis is waived if not raised before the trial court). Furthermore, an attorney-fee-shifting statute for the "prevailing party" is not unconstitutional. Unlike the appellant in *Slack*, Virgin Mobile did not

there are statutes (and courts interpreting those statutes) that allow attorney's fees as a punishment against the non-complying or "losing" party for "bad faith" conduct. However, an attorney-fee-shifting statute does not always have the purpose of "penalizing" the losing party.³ In interpreting a similar "prevailing party" attorney-fee-shifting statute within the Kentucky Consumer Protection Act, this Court stated that the relevant question should be whether "the denial of attorney fees...will deter others aggrieved by violations of [the Act] from bringing suit in the future or attorneys from representing them." *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 306 (Ky. 2000). Therefore, a relevant question in *Alexander* was whether the Court should reward the prevailing plaintiff for risking litigation.

Similarly, in *Forester v. Stearns Bank, N.A.*, 5:12-CV-00080, 2013 WL 1453376 at * 11 (W.D. Ky. Apr. 9, 2013), the court distinguished the purposes of statutory penalties from the purpose of a reasonable attorney fee award pursuant to KRS § 382.365(4), and found that without the filing of the action, the property owner may never have received a release of his mortgage. Therefore, the court awarded attorney's fees, although it denied other statutory penalties. *Id.* Likewise, in this case, had the CMRS Board not filed its collection action, it may never have received remittance of CMRS

"appeal an agency action," but it refused to remit CMRS service charges, forcing the CMRS Board to file a collection action. Furthermore, by choosing to provide prepaid wireless services in the Commonwealth, Virgin Mobile was on notice of the fee-shifting statute pursuant KRS 65.7635(5), and could proceed accordingly. *See Baker v. Motorists Ins. Companies*, 695 S.W.2d 415, 417 (Ky. 1985)("[A]n insurer who elects to do business in the state also impliedly consents to be bound by the statutes regulating the industry.")

³ Virgin Mobile argues the attorney's fees statute is "penal" and should be strictly construed. However, even assuming that KRS 65.7635(5) is "penal," a strict construction of the statute should not "defeat the purpose of its enactment." *Louisville Courier-Journal Co. v. Commonwealth*, 92 Ky. 22, 17 S.W. 163 (Ky. 1891).

service charges from Virgin Mobile pursuant to the pre-2006 statutes. The purpose of awarding the CMRS Board its attorney's fees was to encourage that choice.

Absent an attorney's fees award, the CMRS Board would most certainly be deterred from pursuing good faith collection actions against non-compliant CMRS providers who undoubtedly have far greater resources than the CMRS Board. *See Champion v. Dunn*, 233 Ky. 366, 25 S.W.2d 1023, 1024 (Ky. 1930) (noting that the plain purpose of an attorney's fee statute "was to make the plaintiff in such cases whole.") In the CMRS Board's litigation with TracFone, Judge Heyburn noted that TracFone did not act in "bad faith," and that it had "reasonable grounds" for disputing its liability for CMRS service charges. However, Judge Heyburn concluded that the circumstances of the CMRS Board's litigation "exemplify those in which an award of fees is appropriate." *TracFone*, 2011 WL 4007668 at *2. Similar to this Court in *Alexander*, Judge Heyburn concluded that the fee-shifting provision in KRS 65.7635(5) was intended to encourage the CMRS Board to pursue collection efforts without risking a "pyrrhic" result. *Alexander*, 28 S.W. 3d at 306. Judge Heyburn noted that "[t]he CMRS Board could have let the entire matter slide or even settled for a nominal amount. Instead, the Board, at some risk and expense to itself, sought to enforce its view of the statute. *The attorney's fee provision is designed to encourage precisely this choice.*" *TracFone*, 2011 WL 4007668 at *2 (W.D. Ky. Sept. 8, 2011)(emphasis added).

The Circuit Court's award of attorney's fees to the CMRS Board pursuant to KRS 65.7635(5) was in keeping with the legislative intent to avoid a "pyrrhic" result to the CMRS Board for pursuing and protecting CMRS service charges in good faith. The award of attorney's fees was not a "penalization" of Virgin Mobile, but "serve[d] an

ultimate public purpose,” to encourage the protection of the CMRS Fund, and was certainly not an abuse of discretion. *Alexander*, 28 S.W.3d at 305 (internal citations and quotations omitted).

Therefore, the Circuit Court’s award of attorney’s fees to the CMRS Board should be reinstated.

III. Virgin Mobile’s manner of challenging the pre-2006 CMRS Act was not “in good faith” and the CMRS Board did not “rebuff” Virgin Mobile in bad faith.

It is undisputed that Virgin Mobile remitted CMRS service charges to the CMRS Board for almost *three years* without question or protest. [Gary Wagner “Wagner” Depo. at pp. 18-19, 49, attached as Exhibit 2 to CMRS Board’s Memorandum in Support of its Motion for Summary Judgment filed under seal on December 23, 2009 (“CMRS Board’s Sealed Memo”)]. Instead of discussing with the CMRS Board its new interpretation of 911 fee statutes across the nation, Virgin Mobile abruptly ceased remitting the CMRS service charges in Kentucky in June, 2005 and demanded a refund for the previously *voluntarily* remitted amounts. (Wagner Depo. at p. 73). Virgin Mobile complains that in response, it was “rebuffed” by the CMRS Board. Quite to the contrary, Virgin Mobile received a response in December, 2005 that its request was denied.⁴ [Exhibit 11 to CMRS Board’s Sealed Memo]. This denial was consistent with the CMRS Board’s ongoing position that the CMRS Act applied to prepaid providers, which the CMRS Board had already conveyed to Virgin Mobile in *September, 2004* (without a response from Virgin Mobile). [Exhibit 5 to CMRS Board’s Sealed Memo].

⁴ A denial of a request is not *ipso facto* a “rebuff” simply because the receiving party does not like the response.

Thereafter, from the period of June, 2005 until January 1, 2007, Virgin Mobile refused to remit CMRS service charges whatsoever. Then Virgin Mobile *advised* the CMRS Board that it would again begin remitting CMRS service charges, but that it was going to take a unilateral credit for the amounts that it had previously remitted voluntarily (and for which its refund had already been denied). The CMRS Board responded to Virgin Mobile's unilateral announcement and reiterated that Virgin Mobile was not entitled to take a credit since the CMRS Act had always applied to prepaid services. [Exhibit 17 to CMRS Board's Sealed Memo].

Thus, the CMRS Board disputes that Virgin Mobile acted in "good faith" in the same vein as the cases cited by Virgin Mobile in support of the proposition that "good faith" negates the right to award attorney's fees. In *Commonwealth v. Cincinnati, N.O. & T.P. Ry. Co.*, 288 Ky. 43, 155 S.W.2d 460, 461 (Ky. 1941) the taxpayer "never attempted to evade or even postpone the payment of the taxes, but had in good faith only sought to ascertain the person to whom the amount should be paid." In *Meyers v. Arcadia Realty Found., Inc.*, 367 S.W.2d 836, 838 (Ky. 1963), the taxpayer "acted promptly to have their tax liability determined."⁵ *Com. v. Thomas*, 298 S.W.2d 302, 303 (Ky. 1957) involved a property tax situs dispute between two counties, in which the taxpayer had paid taxes to one of the counties. In *Genex/London, Inc. v. Kentucky Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky. 1981), the "keystone" to the case was that the *statute* alleviated the

⁵ Furthermore, the court in *Meyers* upheld an award of ordinary interest on the unpaid taxes from the date they became delinquent, although denying additional penalties. *Id.* at 838.

taxpayer from penalties based on “reasonable cause.”⁶ Each of these cases is clearly distinguishable from the present case.

The CMRS Board also most strenuously disputes that it acted in “bad faith” in responding to Virgin Mobile.⁷ The CMRS Board consistently announced its position that the CMRS Act applied to prepaid wireless services, it consistently applied this position, and Virgin Mobile simply ignored the CMRS Board. As this Court noted in denying attorney’s fees to certain taxpayers: “Appellants had an adequate remedy under Kentucky law for their objections to the tax levied upon them.” *St. Ledger v. Com., Revenue Cabinet*, 942 S.W.2d 893, 902 (Ky. 1997). In this case, Virgin Mobile simply ignored the state agency to its own benefit because it did not like the response received from the agency.

For these reasons, should this Court agree that Virgin Mobile’s “good faith,” or lack thereof, is relevant to an award of attorney’s fees pursuant to KRS 65.7635(5), the

⁶ Furthermore, Virgin Mobile’s reliance on *Clark v. BellSouth Telecommunications, Inc.*, 2007 U.S. Dist. LEXIS 87138 (W.D.Ky. Aug. 14 2007) and *Permakil Pest Control, Inc. and D. Brian Richmond v. Cincinnati Bell*, Case 2:07-cv-00097-WOB (E.D. Ky. Northern Division) [Doc No. 58], engaging in “scare tactics” is unpersuasive. Virgin Mobile did not separately collect CMRS service charges from its customers, and it ceased paying CMRS service charges in 2005. Furthermore, in those cases, the providers received refunds from the Department of Revenue.

⁷ Virgin Mobile makes too much of the fact that the CMRS Board never sought an opinion from the Attorney General. It speculates that the CMRS Board feared a negative opinion, but has nothing but speculation to support that assumption. An Attorney General opinion would not be binding precedent for either the CMRS Board or Virgin Mobile. *York v. Com.*, 815 S.W.2d 415, 417 (Ky. Ct. App. 1991)(“An attorney general’s opinion is highly persuasive, but not binding on the recipient.”). Given the parties’ stark position on this issue, it is unlikely that an Attorney General opinion would have avoided litigation and the ultimate necessity for a binding court decision. For the same reasons, Virgin Mobile’s claim that the CMRS Board should not receive its attorney’s fees because it did not engage in a long dialogue with Virgin Mobile is illogical.

CMRS Board disputes that Virgin Mobile challenged its liability for CMRS service charges in good faith such that would prohibit an award of attorney's fees to the CMRS Board. The Circuit Court's award of attorney's fees to the CMRS Board should be reinstated.

IV. KRS 65.7635(5) authorizes an award of attorney's fees in this case.

The Circuit Court and the Court of Appeals correctly held that KRS 65.7635(5) authorizes an attorney's fee award in this case, even though Virgin Mobile did not "collect" CMRS service charges from its customers.⁸ (Op., pp. 29-30). Virgin Mobile argues that KRS 65.7635(5) permits an award of attorney's fees to the CMRS Board *only if* the CMRS provider actually collected but failed to remit CMRS service charges to the CMRS Board (i.e., Virgin Mobile converted the service charges to its own use). However, the first sentence of KRS 65.7635(5) directs CMRS providers to remit, every sixty days, those CMRS service charges that they have collected. The second sentence provides that the Commonwealth may institute collection actions and that the prevailing party may be awarded attorney's fees in "such" a collection action. *Id.* The two sentences, read together or independently, do not limit the CMRS Board's right to pursue a collection action only against CMRS providers who have converted CMRS service charges. *Id.*

More importantly, pursuant to Virgin Mobile's strained statutory interpretation, a CMRS provider who utterly *fails or refuses to collect* CMRS service charges is completely immune from an award of attorney's fees in a successful action by the CMRS

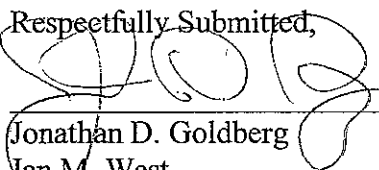
⁸ Although Virgin Mobile may not have "collected" the CMRS service charge as a separate line item, Virgin Mobile certainly receives compensation for providing its prepaid wireless services.

Board. As Judge Heyburn concluded, dispatching with a similar argument made by TracFone: “It seems illogical that TracFone could impose its own failure to attempt to collect the fees as a defense to its failure to remit.” *Commonwealth of Ky. Commercial Mobile Radio Serv. Emergency Telecommunications Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713, 725 (W.D. Ky. 2010) aff’d sub nom. *Kentucky Commercial Mobile Radio Serv. Emergency Telecommunications Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013). Virgin Mobile’s self-serving construction of KRS 65.7635(5) is not supported by the plain language of the statute, is contrary to the manifest legislative intent, and was properly rejected by the Circuit Court and the Court of Appeals.

CONCLUSION

KRS 65.7635(5) permits an award of attorney’s fees to the CMRS Board as the prevailing party to reward the CMRS Board for protecting the CMRS Fund, and to prevent the deterrent effect of costly, but sometimes necessary, litigation. The Circuit Court exercised its broad discretion to award attorney’s fees to the CMRS Board, and that discretion should not be questioned simply because the Court of Appeals may have disagreed with the Circuit Court’s decision. For the foregoing reasons, the Circuit Court’s award of attorney’s fees to the CMRS Board should be reinstated.

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APPENDIX

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