FILED
DEC 20 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-000242-D

BAPTIST PHYSICIANS LEXINGTON, INC.; BAPTIST HEALTHCARE SYSTEM, INC.; MICHAEL MCKINNEY, M.D.; GREGORY COOPER, M.D.; AND JAMES WINKLEY, M.D. — **APPELLANTS**

ON REVIEW FROM
v. THE KENTUCKY COURT OF APPEALS
CASE NOS. 2010-CA-001182, 2010-CA-001183,
2011-CA-001128 AND 2011-CA-00129

FAYETTE CIRCUIT COURT
08-CI-01004 AND 09-CI-06390

THE NEW LEXINGTON CLINIC, P.S.C. — APPELLEE

BRIEF FOR APPELLANTS

Anne A. Chesnut
Wendy Bryant Becker
BINGHAM GREENEBAUM DOLL LLP
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507
Telephone: (859) 231-8500
Facsimile: (859) 255-2742
COUNSEL FOR BAPTIST PHYSICIANS LEXINGTON, INC. AND BAPTIST HEALTHCARE SYSTEM, INC.

Gregg E. Thornton
Licha H. Farah, Jr.
Ashley K. Brown
WARD, HOCKER & THORNTON, PLLC
333 West Vine Street, Suite 1100
Lexington, Kentucky 40507
COUNSEL FOR MICHAEL MCKINNEY, M.D.

B. Lee Kessinger, III
Adrian M. Mendiondo
KINKEAD & STILZ PLLC
301 East Main Street, Suite 800
Lexington, KY 40507
COUNSEL FOR GREGORY COOPER, M.D. AND JAMES WINKLEY, M.D.

CERTIFICATION

I hereby certify that true and correct copies of the Brief for Appellants were served upon the Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; the Hon. Kimberly N. Bunnell, Fayette Circuit Judge, 521 Robert F. Stephens Courthouse, 120 North Limestone St., Lexington, KY 40507; and Thomas W. Miller and David T. Faughn, Miller, Griffin & Marks, PSC, 271 West Short St., Ste. 600, Lexington, KY 40507, by mailing same, postage prepaid, this 14th day of December 2012.

Anne Chesnut
COUNSEL FOR APPELLANTS

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants believe that oral argument would be appropriate and helpful in this case, which involves the application of corporate statutes of practical interest to all companies, and their officers and directors, throughout the Commonwealth.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES
(Continued)

STATEMENT OF POINTS AND AUTHORITIES
(Continued)

STATEMENT OF POINTS AND AUTHORITIES
(Continued)

STATEMENT OF THE CASE

I. INTRODUCTION

This dispute arose when several physicians left their medical practice at Lexington Clinic[1] in 2008 to practice medicine with Baptist[2] instead. It was uncontroverted below that the doctors honored their non-competition agreements and were not in breach of them, with Lexington Clinic even accepting over a half-million dollars in "buy-outs" from Drs. Cooper and Winkley, but then suing the doctors anyway. The Court of Appeals' Opinion (attached as Appendix 1), as modified (Appendix 2), should be vacated and the Fayette Circuit Court's judgments (attached as Appendix 3) reinstated.

II. FACTS UNCONTROVERTED BELOW

All of the material facts were undisputed:

(A) DR. MCKINNEY'S CIRCUMSTANCES

Because Dr. Michael McKinney was the first to resign (and the first to be sued), his circumstances are reviewed first.[3]

(1) Dr. McKinney's Employment Agreement with Lexington Clinic

Dr. McKinney worked under contract at Lexington Clinic's Veteran's Park location in Fayette County from 1997 until February 2008. Under the terms of that

---

1 Appellee's formal corporate name is "The New Lexington Clinic, P.S.C." It is referred to herein as "Lexington Clinic" or "the Clinic."

2 "Baptist" is used herein to refer jointly to Appellants Baptist Physicians Lexington, Inc. ("BPL") and Baptist Healthcare System, Inc. ("BHSI").

3 As will be shown below, the contracts and circumstances of each doctor were slightly different, but the legal issues were identical. Because the case was decided on legal issues, the slight factual variations are not material.

Agreement, the Clinic made no promises to keep Dr. McKinney employed and Dr. McKinney made no promises to stay for any set term. (RA466, p. 1315, Sealed Ex. A.)[4] Instead, either side was free to give 60 days notice to the other of termination for any reason, or for no reason at all. (See id., p. 3, § 15.)

On February 8, 2008, Dr. McKinney did give 60 days written advance notice of his resignation, to be effective on April 20, 2008, all in accordance with the Agreement. (A copy of that resignation appears in the record at RA466, p. 1315, Sealed Ex. B.) The Clinic's reaction was swift and brutal, as described in more detail below. The Clinic locked Dr. McKinney out of his office on February 29, 2008, and sued him in Fayette Circuit Court ("First Case").

(2) No Breach of Contract

Lexington Clinic agreed that Dr. McKinney's resignation was not a breach of the Agreement and that he was free to leave and join the Baptist Group at its location in the Brannon Crossing Shopping Center in Jessamine County. The only geographical restriction in Dr. McKinney's contract with Lexington Clinic was his agreement not to practice in Fayette County for one year after leaving Lexington Clinic. (RA466, p. 1315, Sealed Ex. A, p. LC01363.) It was uncontroverted that Dr. McKinney's new location in Brannon Crossing is in Jessamine County.

As Randy LeMay, the Chief Financial Officer of Lexington Clinic, testified:

> Q. When [Dr. McKinney] actually gave his 60 days' notice in the year of 2008 and his 60 days' intention to leave, he didn't have to stay and

---

4 References are to the records in the Court of Appeals. The record that was initially certified for appeal number 2010-CA-466 will be referred to as "RA466;" 2010-CA-467 as "RA467;" 2010-CA-1128 and 2010-CA-1183 jointly as "RA1128;" and 2010-CA-1129 and 2010-CA-1182 jointly as "RA1129." Exhibits sealed below may, of course, be unsealed by this Court for appellate review.

work any more in 2009 or 2010 or any of the years that follow; is that correct?

A. His contract did not obligate him, no.

Q. He was free to walk out at any time, give 60 days' notice?

A. That's my understanding, yes.

(RA466, p. 1315, Sealed Ex. H, LeMay depo., p. 128.) Thus there was no claim in this case that Dr. McKinney breached his contract with Lexington Clinic in any way. It was uncontroverted that he honored the contract by giving the required notice in advance and by observing the geographical restriction imposed on him.

(3) <u>Board Member</u>

The Clinic sued Dr. McKinney based on a purported breach of fiduciary duty owed as a member of its Board of Directors.[5] It is uncontroverted that Dr. McKinney discussed with Baptist the idea of leaving Lexington Clinic and going to Brannon Crossing before he resigned from the Board, as stated in greater detail below. Dr. Sartini, a long-serving Board member at the Clinic, testified for the Clinic that the only thing Dr.

---

5 The original complaint against Dr. McKinney included two other counts, one for alleged misappropriation of trade secrets (Count II) and one for injunctive relief (Count III). Dr. McKinney agreed to the injunction and the Clinic later represented to the circuit court repeatedly that "all of our claims have related exclusively to the breach of fiduciary duty." (<u>See, e.g.,</u> RA466, p. 1315, Sealed Ex. C, Transcript of January 12, 2010, hearing, p. 9.) No claim other than breach of fiduciary duty was pursued by the Clinic on its appeal. Because the Clinic did not pursue the trade secret claim below and did not brief it on appeal, it should be deemed abandoned or waived. <u>See, e.g., Koplin v. Kelrick</u>, 443 S.W.2d 644, 646 (Ky. 1969); <u>White v. Rainbo Baking Co.</u>, 765 S.W.2d 26, 30 (Ky. App. 1988).

The Clinic and Baptist also expressly agreed to waive various claims they made against each other for tortious interference with contract, thus narrowing the focus of the appeal solely to the breach of fiduciary duty claim against the doctors and an aiding and abetting claim against Baptist. (<u>See</u> Joint Motion to Dismiss Appeal in related Case Nos. 2010-CA-466 and 467.)

McKinney did wrong was not resigning from the Board while having those discussions. As Dr. Sartini put it:

> I think all Mike [McKinney] had to do – I mean, he can pursue whatever he wants legally. **He should have resigned from the Board.**

(RA466, p. 1315, Sealed Ex. D; Sartini depo, p. 155 (emphasis added).)[6]

(4) Board Knowledge and Acquiescence

It was further uncontroverted in this case that Lexington Clinic was well aware of Dr. McKinney's consideration of various plans to leave the Clinic long before his February 2008 resignation. In late 2006, Dr. McKinney discussed with Dr. Craig Irwin (Lexington Clinic's head of the Veteran's Park group where Dr. McKinney practiced) a scenario where they might leave the Clinic together and go into practice with Dr. Gullo, also a physician at Veteran's Park. (See RA466, p. 1315, Sealed Ex. E., Dr. Irwin depo., pp. 24-25.) Dr. Irwin's wife even prepared a pro forma business plan for the physicians to use in planning and the Irwins scouted out various office locations for the new practice. (Id., pp. 37-38.)

When those plans did not materialize, Dr. Irwin (who as head of Lexington Clinic's Veteran's Park location was also a member of the Heads of Sections group at the Clinic, **a group with direct Board of Directors contact on a regular and frequent basis**), Dr. Gullo and Dr. McKinney began discussing the possibility of practicing with Baptist. (Id., pp. 61-62.) This was not some well-kept secret. **Dr. Irwin knew by early**

6 The Clinic's minutes are not maintained in such a way as to give any indication of how the directors voted on any issue or even whether they were present throughout a meeting or for only a few minutes. (RA466, p. 1315, Sealed Ex. H; LeMay depo., pp. 38-40.) Because the gist of the claim against these doctors was their failure to resign from the Board before speaking to Baptist about leaving, the Clinic did not focus on any particular vote or issue.

spring of 2007 that if, they went with Baptist, it would be at the Brannon Crossing location. (Id., p. 71.) This was approximately **one year before** Dr. McKinney resigned. Dr. Irwin himself went to meetings at Baptist and saw both "rudimentary - - - blueprints of a facility at Brannon Crossing" and later "large blueprints with much detail." (Id., 71-72.)

Randy LeMay, the Clinic's Chief Financial Officer, who regularly attended Board meetings in that capacity, heard "in the first half" of 2007 that Dr. McKinney was leaving, which was at least 6-8 months in advance. That Baptist was building a facility at Brannon Crossing was in the newspaper and, as LeMay admitted, "common knowledge." (RA466, p. 1315, Sealed Ex. H, LeMay depo., p. 83.) As news of the Brannon Crossing facility appeared in the newspaper, LeMay and the Clinic Board members openly speculated many months before the February 2008 resignation whether Dr. McKinney would be part of Baptist's Brannon Crossing location. (See e-mail found at RA466, p. 1315, Sealed Ex. F.) Additionally, the Clinic's CEO and former President knew Dr. McKinney was considering leaving at least as early as the fall of 2007 (RA466, p. 1315, Sealed Ex. G, Andrew Henderson depo., p. 56) and "probably in the summer sometime in '07." (Id., p. 153).

Despite all of this knowledge, it is uncontroverted that the Clinic's Board did not seek Dr. McKinney's resignation. Indeed, Dr. Andrew Henderson **admitted that Dr. McKinney was <u>encouraged</u> to stay on the Board** during this time:

> Q. In fact, are you aware that he was encouraged to stay on the board even though directors and members of the administration of Lexington Clinic knew that he was talking to someone else?
>
> A. I believe he was encouraged to stay at the Clinic and **stay on the board** because he was a respected partner and respected leader.

(Id., p. 96, emphasis added.) Dr. Sartini's testimony was to the same effect. He observed that Dr. McKinney "appeared to me to be coming disengaged." (RA466, p. 1315, Sealed Ex. D, Sartini depo., p. 121.)

> And I remember speaking to him probably late in the year [2007] and saying, "Mike, are you thinking of leaving?" And his response to me is, he said, "John, I'm" – as close as I can quote something, he said, "well, not really. But I'm weighing my options."

(Id.) "I think . . . my recommendation was that he should consider a leave of absence, you know, rather than [resigning] . . . ." (Id., p. 122.)

The Board's acquiescence in Dr. McKinney remaining on the Board while exploring other options did not change until Dr. Horn raised the issue in January 2008, asking why Board members were acquiescing in it. (See e-mails found at RA466, p. 1315, Sealed Ex. I; RA466, p. 1315, Sealed Ex. J, Dr. Horn depo., pp. 65-66.) Thereafter, it was undisputed that Dr. McKinney never attended another Board meeting. In fact, he resigned from the Board on February 6, 2008 (RA466, p. 1315, Sealed Ex. K).

(5) Dr. McKinney's Board Resignation

Although Dr. McKinney had signed a Letter of Intent to explore a position with Baptist in 2007, that letter had long since expired without him deciding to go to Baptist. He and Baptist had not come to terms even as of December 2007. (See RA466, p. 1315, Sealed Ex. L.)

Dr. Arthur Henderson, as newly elected President of the Clinic Board, sent an e-mail to Dr. McKinney on January 10, 2008, saying he knew Dr. McKinney had been "very discouraged over the past few years." (RA466, p. 1315, Sealed Ex. M, Arthur Henderson depo., pp. 52-53.) He met with Dr. McKinney on January 17, 2008, at which time Dr. McKinney told Dr. Henderson, both in person and in writing, issues he would like to see addressed at the Clinic. (RA466, p. 1315, Sealed Ex. N.) Unfortunately, Dr. Henderson took this list without comment, did not follow up on it, and never spoke to Dr. McKinney again. (RA466, p. 1315, Sealed Ex. M, Arthur Henderson depo., pp. 62-63.) It is uncontroverted that Dr. McKinney's resignation from the Board followed shortly thereafter, as announced on February 6, 2008.[7]

(6) **More Resignations**

Instead of waiting for the effective April 20 date of Dr. McKinney's resignation, the Clinic terminated Dr. McKinney without warning on February 29, 2008, locked him out of his office, and filed this lawsuit. (RA 466, p. 2.) Other professionals and staff were dismayed by the Clinic's harsh response and more resignations followed.

(7) **No Adverse Impact to the Clinic**

The Lexington Clinic's patient practice at Veteran's Park continued and actually improved after Dr. McKinney announced his decision to leave. Dr. Irwin, head of the Veteran's Park office, said everyone was happier at Veteran's Park once the decision was finally made and announced. (RA466, p. 1315, Sealed Ex. E, Irwin depo., p. 135.) **Two other physicians at Veteran's Park, Drs. Hall and Thompson, had made it clear they would leave the Veteran's Park practice if Dr. McKinney did not. (Id., p. 136.)** Once Drs. McKinney and Gullo left, Dr. Hall was able to see more patients and tensions were eased. (Id., pp. 179-81.) "When Dr. McKinney left, they had space and availability to see patients" that they did not have when he was there. (RA466, p. 1315, Sealed Ex. G, Andrew Henderson depo., pp. 44-45.)

---

[7] It is further uncontroverted that Dr. McKinney did not compete with the Clinic at any time during his tenure with it. Brannon Crossing did not open until later, in May 2008. (RA466, p. 1315, Sealed Ex. O, Dr. Bensema depo., p. 16.)

Nor could Dr. Irwin identify any financial impact to the Veteran's Park location or the Clinic from the departures.[8]

> Q. So there hasn't been any adverse impact at Veterans Park - - in fact, it has improved, from what you were saying, with the resignations of Dr. McKinney and Dr. Gullo. The atmosphere and the working, day-to-day, the team work, that has all actually improved at Veterans Park?
>
> A. With a lot of work and a lot of time commitment to make it happen, yes.
>
> * * * *
>
> Q. And did the practice at Veterans Park financially improve since the time that Dr. McKinney and Dr. Gullo have left?
>
> A. It took an initial dip, settled out, and we've done reasonably well.
>
> Q. Steadily improved?
>
> A. Steadily improved.

(RA466, p. 1315, Sealed Ex. E, Dr. Irwin depo., pp. 146-48.) Indeed, Dr. Irwin confirmed he has done even better financially since Dr. McKinney left. (Id., 146.) The Clinic's Chief Financial Officer, Randy LeMay, was similarly unaware of any adverse financial impact to the Clinic or the Veteran's Park location, testifying that he had "not attempted to determine that." (RA466, p. 1315, Sealed Ex. H, LeMay depo., p. 9.)

(B) DR. COOPER'S AND DR. WINKLEY'S CIRCUMSTANCES

Dr. Gregory Cooper and Dr. James Winkley have been part of this litigation from the beginning, as Lexington Clinic identified their contracts in Dr. McKinney's case as being among the ones purportedly interfered with and for which the Clinic was seeking damages. (RA466, p. 758.) Although their contracts were not identical to Dr.

---

8 Dr. Irwin testified he had been the "head of section" at Veteran's Park "for four or five years" before Dr. McKinney left. (RA466, p. 1315, Sealed Ex. E, Irwin depo., p. 119.) He was also the Chair of the entire Heads of Section group for the whole Lexington Clinic. (Id., p. 120.)

McKinney's, it was also undisputed that they honored the terms of their non-compete agreements and, as shown below, paid a hefty price to do so.

(1) Drs. Cooper and Winkley's Employment Agreements with Lexington Clinic

Dr. Cooper began working at the Clinic's neurology practice located in Fayette County in February 2001. (RA 467, p. 249, Sealed Ex. Vol., Ex. A.) Dr. Winkley began working at the Clinic's neurology practice located in Fayette County in January 2003. (Id., Sealed Ex. Vol., Ex. B.) Under the terms of the Agreements, the Clinic made no promises to keep Drs. Cooper and Winkley employed and Drs. Cooper and Winkley made no promises to stay for any set term. Instead, either side was free to give 90 days notice to the other of termination for any reason, or for no reason at all. (See RA467, p. 249, Sealed Ex. Vol., Ex. A and B, p. 3, Art. 5.1) D.)

On February 8, 2008, Dr. Winkley did give 90 days written advance notice of his resignation, to be effective on May 8, 2008, all in accordance with the Agreement. (RA467, p. 249, Sealed Ex. Vol., Ex. D.) On February 18, 2008, Dr. Cooper did give 90 days written advance notice of his resignation, to be effective on May 18, 2008, all in accordance with the Agreement. (RA467, p. 249, Sealed Ex. Vol., Ex. C.)

(2) Resignations from Board Prior to Agreement with Baptist

While Drs. Cooper and Winkley did serve on the Clinic's Board of Directors, the record was uncontroverted, as detailed below, that both left the Clinic's Board of Directors prior to reaching any agreement with Baptist.

a. Dr. Winkley

In December 2007, Dr. Winkley lost his bid for reelection to the Clinic's Board for the following year. Shortly afterwards, he decided he no longer wanted to practice with the Clinic. (RA467, p. 249, Sealed Ex. Vol., Ex. F, Winkley depo., p. 62.) Dr. Winkley did not execute a contract for employment with Baptist until February 2008. (RA467, p. 249, Sealed Ex. Vol., Ex. J.) As such, **he had been off the Board for more than a month** before entering into an agreement with Baptist. And he had not participated in any board actions for over two months, as he ceased all board-related activities immediately upon losing his reelection. (RA467, p. 249, Sealed Ex. Vol., Ex. F, Winkley depo., p. 62.)

b. Dr. Cooper

On February 12, 2008, Dr. Cooper submitted his resignation from the Clinic's Board. (RA467, p. 249. Sealed Ex. Vol., Ex. E.) Dr. Cooper did not decide to resign as an employee, however, until **after** resigning from the Board. (RA467, p. 249, Sealed Ex. Vol., Ex. E, Cooper depo., p. 17.) In fact, he did not sign a contract for employment with Baptist until "the latter part of February" 2008, well **after** his resignation from the Board on February 12. (Id., p. 73, a copy of his contract with BPL is at RA467, p. 249, Sealed Ex. Vol., Ex. I.)

(3) Board Knowledge

The Clinic's president (Dr. Arthur Henderson) testified that he heard "rumors that Winkley and Cooper might leave . . . ." (RA467, p. 249, Sealed Ex. Vol., Ex. K, Arthur Henderson depo., p. 155.) Dr. Henderson knew that Drs. Cooper and Winkley were "very disappointed" about Dr. Winkley's loss in the December 2007 Board election (Id., p. 156), and even made a point to meet with Dr. Winkley after this election – a meeting at which Dr. Winkley declined to tell Dr. Henderson whether or not he was going to stay with the Clinic. (Id., pp. 156, 175-76.) Dr. Henderson also communicated his receipt of Dr. Winkley's resignation letter as "not a surprise." (RA467, p. 249, Sealed Ex. Vol., Ex.

L.) Likewise, Dr. Michael Horn, the physician who beat Dr. Winkley in the December 2007 Board election, indicated that Dr. Winkley's resignation "was not a surprise." (RA467, p. 249, Sealed Ex. Vol., Ex. M, Dr. Horn depo., p. 102.)

(4) Free to Compete

Lexington Clinic agreed that Drs. Cooper and Winkley's resignations were not a breach of the Agreements and that they were free to leave and practice neurology with Baptist in Fayette County because they both paid the Clinic to "opt-out" of the geographical restriction in their contracts. **It is uncontroverted that Drs. Cooper and Winkley together paid over $500,000 to "opt-out" of their geographical restriction, and that Lexington Clinic accepted this money.** (RA467, p. 249, Sealed Exhibit Volume, Ex. E, Dr. Cooper depo., p. 89; RA467, p. 249, Sealed Ex. F, Dr. Winkley depo., p. 106.) Thus, there was no claim in this case that Drs. Cooper and Winkley breached their contracts with Lexington Clinic in any way. **Lexington Clinic pocketed the buy-out money but then sued them anyway.**

(C) LEXINGTON CLINIC SOUGHT TO HOLD THESE DOCTORS – AND THEIR PATIENTS – HOSTAGE BY DEMANDING "MILLIONS OF DOLLARS"

Despite paying lip service to the doctors' freedom to compete, Lexington Clinic filed suit to recover every penny all three doctors have ever earned or ever will earn in their treatment of patients ever seen at the Clinic by any doctor at any time. In fact, the Clinic sought to recover even more than that, claiming damages **measured by the estimated life-expectancy of the patients** and even speculating about what diseases they might someday develop and what specialists they might need. (See RA466, p. 522.) Simply put, and in the Clinic's own words, it speculated that all "income generated for

[Baptist]" by these doctors "would otherwise have been paid to NLC [New Lexington Clinic] . . . ." (RA466, pp. 499-500, Plaintiff's Motion filed August 17, 2009.)

> NLC seeks to establish how many of its former patients are now seeing physicians at Baptist and how much money those physicians and patients are generating for Baptist and related entities . . . as it is likely that this income would have gone to NLC if not for the defections of the former employees.

(Id., p. 505.) The Clinic was not merely seeking income it would have received if the doctors had remained for the full length of their contracts; that number is zero. The doctors did remain for the full length of their contracts, which were terminable at will any time upon advance notice. All of the physicians dutifully and properly provided such notice. Instead, Lexington Clinic was seeking speculative future revenues that would only have been generated if every patient had come to them for every medical procedure they ever needed in the future and if the physicians had chosen to remain at the Clinic forever, a choice they simply did not make:

> The lost revenue includes not only the amount of revenue from fees associated with services provided by Dr. McKinney and the other named physicians, but **also from referrals** within [Baptist] for ancillary services and to other physicians.

(Id., p. 513.) (Emphasis added.) The Clinic gave examples:

> Suppose, for example, that "Patient 1" was being treated by McKinney in 2007, that he had only an annual physical exam, and that NLC received $200 from him in that year. Suppose also that, in 2008, "Patient 1" was treated by Dr. McKinney (after he became employed by Baptist) for a stroke, that Dr. McKinney referred him for further treatment to Dr. Winkley (a neurologist, and also now a Baptist employee), and that he had MRI and CT scans and physical therapy at Baptist, which received $10,000 for his 2008 care. NLC's books would show only a $200 decline in revenue from the loss of "Patient 1." That, however, is not the true measure of NLC's loss since, **in the absence of the misconduct that occurred,**[9] the $10,000 paid to Baptist in 2008 would have been paid to

9 This is the complete "disconnect" on causation discussed in Argument III below, as it was uncontroverted that it was **not** "misconduct" for the physicians to leave and was

> NLC. While it is true that part of NLC's losses may be reflected by the $200 decline in revenue from 2007 to 2008, this simply is not the full picture. The actual and concrete loss to NLC is more accurately reflected by the $10,000 that Patient 1 generated in 2008 at Baptist.

(Id.) After speculating in this example that the patient might have a stroke (and in other examples, perhaps develop prostate problems years from now), the Clinic then wanted to multiply these figures over the entire remaining life expectancy of each patient (some of whom are just children) to come up with what it called "millions of dollars in damages." (Id., p. 522.) Lexington Clinic sought, in other words, to hold these patients and physicians as financial hostages for the rest of their lives.

III. PROCEDURE BELOW

(A) FIRST CASE

Dr. McKinney was the only Defendant named in the initial Complaint filed February 29, 2008. (RA466, p. 2.) BPL was added by Amended Complaint on October 7, 2008. (RA466, p. 109.) Extensive discovery followed, with approximately 44 depositions, 500 deposition exhibits, and 4,096 pages of testimony taken, along with numerous, lengthy hearings and extensive motion practice. Significantly, this included the deposition testimony of Drs. Cooper and Winkley, before they were formally named as Defendants (and when they were without counsel). By Second Amended Complaint tendered in November, 2009, the Clinic added BHSI to the litigation. (RA466, p. 720.)

---

further agreed that they were free to do so. The hypothetical $10,000 not paid to the Clinic in this example is "lost" revenue not tied to any purported fiduciary breach, but simply caused by the physician's decision to practice elsewhere, which they were legally free to do.

(B) SECOND CASE

The Clinic also instituted a separate proceeding ("the Second Case") against Drs. Cooper and Winkley in December, 2009, duplicating the same claims it was making against Baptist in the First Case. (RA467, p. 5.) This was over the vehement objections of Baptist and Dr. McKinney (RA466, pp. 733-741) and despite the fact the Clinic had already pursued discovery from Drs. Cooper and Winkley in the First Case; had specified their contracts as being part of the First Case; and had claimed damages relating to their practice in the First Case.

(C) SUMMARY JUDGMENT

After the litigation had been pending for nearly two years (and after the 44 depositions, 500 deposition exhibits, and thousands of pages of sworn testimony detailed above had been taken), the doctors and Baptist filed a joint defense motion for summary judgment on the only claim made against them, which was a common law breach of fiduciary duty. The parties stipulated that if there were no liability on the part of the doctors for the alleged breach, there could be no liability on the part of Baptist for aiding and abetting. (RA1129, Sealed Pleadings.)[10] The Fayette Circuit Court entered judgment in favor of all Defendants on April 22, 2010, holding as a matter of law that Kentucky's corporate statutes apply to the board of directors' conduct in this case. (Appendix 3.) Because the Clinic made a calculated decision below not to proceed on a statutory claim, Defendants were entitled to judgment as a matter of law. (RA1129, p. 65.) The Clinic

---

10 Plaintiff's Memorandum in Response to Joint Motion for Summary Judgment on Claims of Breach of Fiduciary Duty and Aiding and Abetting Same, filed 3/19/10, p. 5, n. 2.

filed post-judgment motions that were denied on June 3, 2010 (RA1129, p. 196) (also part of Appendix 3). The Clinic appealed and Appellants filed a protective cross-appeal.

(D) COURT OF APPEALS

The Court of Appeals affirmed the application of the corporate statutes to this case, but in doing so added confusing language about the common law not being supplanted by these statutes. The Court of Appeals also held - - in direct contravention of recent published precedent on the same issue involving the same corporate statutes - - that the Clinic could start over and pursue the very corporate claim the Clinic had spent years disavowing. In so doing, the Court of Appeals disregarded long-standing precedent that leaves amendment of pleadings to the sound discretion of the trial judge. No abuse of discretion on the part of the trial court was found, yet the Court of Appeals nevertheless reversed the trial court's ruling that the statutory cause of action could not be added by amendment **after** summary judgment had been granted.

(E) DISCRETIONARY REVIEW GRANTED

This Court granted review by order entered October 17, 2012.

ARGUMENT

The case below did not involve, as the Clinic tried to suggest, any earth-shaking departure from established common law on fiduciary duties. The Kentucky **legislature** did make statutory changes to the common law many years ago, to the extent that breach of fiduciary duty is claimed against a director or an officer of a Kentucky corporation. This is neither earth-shaking nor new.

What the case below did involve was the Clinic's calculated strategic decision to avoid the application of those corporate statutes (with their higher burden of proof and strict requirements to be met in any lawsuit where money damages are sought against an officer or director). The Fayette Circuit Court properly rejected that attempt and its decision should be reinstated here.

I. THE FAYETTE CIRCUIT COURT PROPERLY RULED ON THE ONLY CLAIM THE CLINIC MADE, WHICH WAS A COMMON LAW CLAIM NO LONGER VIABLE UNDER CURRENT STATUTES.

(A) KENTUCKY STATUTES HAVE SUPPLANTED THE COMMON LAW ON WHICH APPELLANT RELIES.

[The issues briefed herein were preserved at the trial court level in the arguments made by the Joint Defense Motion and Memoranda filed February 19, 2010 (RA466, p. 1315); their Reply Memoranda filed April 9, 2010 (RA1129, p. 19); and at oral argument on April 15, 2010 and June 1, 2010 (RA1129, pp. 60 and 195). They were preserved at the Court of Appeals by Combined Brief filed March 23, 2011, Reply Brief filed May 23, 2011, oral argument on October 25, 2011, and by Petition For Modification and Rehearing filed January 5, 2012.]

After years of discovery, months of briefing, and more than two hours of oral argument, the Fayette Circuit Court ruled at a hearing on April 15, 2010 (and entered final summary judgments on April 22), that there were no genuine issues as to any material fact and Defendants were entitled to judgment as a matter of law. In reaching its decision, the Court read the language of KRS 271B.8-300(5) that says:

> **[A]ny action** taken as a director, or **any failure to take any action** as a director, **shall not be the basis for monetary damage** . . . [unless proven by clear and convincing evidence to be in violation of the statutory standard].

Id. (emphasis added). Because these cases were clearly actions "for monetary damages," the circuit court properly (and inescapably) found the statute applies. The circuit court further (and inescapably) found that the Clinic had not pursued any claim under the corporate statutes but had instead insisted the statutes did not even apply. See, e.g., the Clinic's Reply (filed in January 2010) In Support of Motion to Dismiss the Counterclaims (RA466, p. 1079) where **the Clinic described its own claims** in these words:

> [The Clinic's] claims are taken straight out of Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166 (Ky. 1974) and Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991), including the damages theory . . . . This case is about what Steelvest provides were [the Defendants'] obligations . . . .

(Id., pp. 1079-80, n. 1.) Indeed, even the Clinic's Response filed March 19, 2010 to the Joint Defense Motion for Summary Judgment insisted at p. 6 that its "legal theories are indistinguishable from those in Aero Drapery and Steelvest" and, in all caps and **bold type** at p. 16 said "**KRS 271B.8-300 DOES NOT APPLY.**" (RA1129, Sealed Pleadings.) The Clinic kept clinging to this argument (and the all caps and bold type) in the Court of Appeals saying, "**KRS 271B-8-300 DOES NOT APPLY.**" (Clinic's Brief in Court of Appeals, p. 12.) It wanted to recover money damages, in other words, but it did not want to do so within the confines of the statute. Accordingly, the circuit court found against the Clinic as a matter of law. This involved nothing more than reading and applying the statutes.

(1) The Statutory Standard Is Clear.

KRS 271B.8-300(5) provides as follows:

> **[A]ny action** taken as a director, or any failure to take any action as a director, **shall not be the basis for monetary damages** or injunctive relief **unless:**
>
> (a) The director has breached or failed to perform the duties of the director's office in compliance with **this Section; and**
>
> (b) In the case of an action for monetary damages, the breach or failure to perform constitutes **willful misconduct or wanton or reckless disregard** for the best interests of the corporation and its shareholders.[11]

---

[11] KRS 271B.8-420 provides the same standard of conduct for officers, and the same exclusivity provision, as KRS 271B.8-300 provides for directors. Thus all arguments related to the corporate statutes apply fully to both officers and directors and to both statutes.

(Emphasis added.) KRS 271B.8-300(6) further provides that the person seeking monetary damages "shall have the burden of proving by **clear and convincing** evidence" the foregoing "**and** the burden of proving that the breach or failure to perform **was the legal cause of damages** suffered by the corporation." (Emphasis added.)

Although this litigation had been pending for over two years when the motion for summary judgment was made, the Clinic had never identified any conduct by the doctors falling within this mandatory statute framework for lawsuits seeking monetary damages from an officer or director. Indeed, the Clinic tried to ignore this statute, insisting that case law such as <u>Steelvest</u> and <u>Aero Drapery</u> (discussed below) governs its claim.

(2) <u>The Corporate Statutes Now Govern This Issue.</u>

The facts giving rise to <u>Steelvest</u> occurred in 1984-85, and that lawsuit was filed in 1986, all predating by several years Kentucky's adoption in 1988 of the **statutory standard that applies here.** This point was made in <u>Gundaker/Jordan American Holdings, Inc. v. Clark,</u> 2008 U.S. Dist. LEXIS 80907 (E.D. Ky. October 9, 2008) at *4 - 8 (copy attached as Appendix 4).

> The parties disagree over how KRS § 271B.8-300 and § 271B.8-400 affect the plaintiff's common-law claims of breach of fiduciary duty and aiding and abetting claims and the statutes are not mutually exclusive, while the defendants assert that the statutes completely abrogate the common-law claims.
>
> The cause of action for breach of fiduciary duty by a director or officer still remains, **but it has been significantly altered by the statutes.**

<u>Id</u>. at *4 (emphasis added). The court went on to note:

> The statutes apply to "*[a]ny* action taken as" an officer or director and to "*any* failure to take *any* action as" an officer or director.

Id. (emphasis supplied by the court). "Using [the Oxford English Dictionary] definition of 'any,' the court cannot impose a limitation on the types of actions or failures 'taken as' a director or officer." Id.[12] The court also noted specifically that "the operative facts" in Steelvest and Aero Drapery "occurred prior to the enactment of the statutes."[13]

---

12 The court in Gundaker specifically rejected the same argument that the Clinic made in this case, which is the idea that the statutes do not apply to officers and directors who have a conflict of interest. (See the Clinic's Brief in the Court of Appeals, p. 13, citing law review article arguing for statutory standard to apply only to "non-conflicted fiduciaries"). Rejecting the argument that the statutes apply only in "cases involving non-conflicted" directors, the court in Gundaker held that the statutes must be applied as written, which literally include ANY action or any failure to take any action as an officer or director. Id. at *5.

> [T]he court cannot impose a limitation on the type of actions or failures "taken as" a director or officer. Therefore, the application of the statutes to all cases involving actions taken by directors and officers acting in their respective capacities is perfectly logical and cannot be considered an absurd result.
>
> Furthermore, it is clear that the legislature contemplated situations involving conflicts of interest because it enacted KRS § 271B.8-310, which deals with transactions in which a director has a direct or indirect interest. If the General Assembly wanted causes of action against conflicted and nonconflicted directors to be analyzed differently, it could have provided for such . . . .

Id. at *6.

13 The federal court in Gundaker went on, in dictum, to opine that the corporate statutes might not have applied in those cases anyway. The court mentioned in passing that the conduct complained of in those cases would not seem to be conduct taken as an officer or director. In the case at bar, however, the Clinic's entire case was premised on what the physicians did or did not do as directors – i.e., the purported failure to disclose what the Clinic says a director must disclose and the failure to resign as a director. Regardless of the dictum in Gundaker, its holding completely supports application of the corporate statutes here. As the statute says, it applies to "any action" that is the "basis for monetary damages." KRS 271B.8-300(5).

The statute is explicit in its application, to "**any** action taken as a director" for which monetary damages are sought. This is such an action, where the Clinic insisted it had sued the doctors solely because of their failure to take action (resign, or disclose their negotiations with Baptist) **as directors.**[14] Thus it is the corporate statutes, not the common law, that governed the Clinic's claims in this case, and the circuit court was correct in so ruling.

(3) The Legislature, Not The Court, Has Changed The Law.

The Clinic took the position that the circuit court's decision "represents a fundamental departure from over 35 years of Kentucky jurisprudence." (Clinic's Brief in Court of Appeals, p. 14.) But the **legislature** changed Kentucky law in 1988 with the enactment of KRS 271B.8-300 and it is this **legislative** change over which the Clinic is still in denial.

This codification of a predictable statutory standard for officer and director liability was important to the Kentucky legislature. As the Commentary included in the Baldwin's Official Edition of 1988 Acts Issue explained:

> Director and officer liability is currently an area of crucial importance to the management of both small and large corporations and a critical factor in their selection of a corporate domicile. Since June 1986, when Delaware enacted its well-publicized provision allowing limitation of director liability, at least thirty-four states have adopted legislation of one form or another to make it clear that directors will not be liable for honest business decisions made in good faith, thereby **attempting to reduce the number of baseless lawsuits against directors.** The steep increase in liability insurance premiums precipitated the current wave of legislation . . . . This is of extreme importance to smaller corporations, which have the most difficulty in obtaining insurance at an affordable cost.

14 Other physicians and staff employees who left at the same time (Dr. Gullo, for example) were not directors and were not sued.

(Baldwin's Official Edition KRS 1988 Acts Issue, with Commentary, RA 466, p. 1315, Sealed Ex. No. 2) (emphasis added) (attached here as Appendix 5).) The Commentary is even more specific in the section discussing "Standards of Conduct and Liability for Directors and Officers" at p. 7:

> **Uncertain standards of liability resulting from court decisions in recent years** . . . have caused a majority of the states to enact new statutes establishing or clarifying the standards of conduct and liability for officers and directors.
>
> * * * *
>
> Increasingly state laws defining director and officer liability are becoming a chief factor in where both large and small corporations choose to incorporate or reincorporate. Noting the relative ease with which they can reincorporate under another state's corporate law, spokesmen for Kentucky corporations expressed concern about this issue to the KBA committee.

Id. (emphasis added). This new statute was the legislature's response to those concerns, and it cannot be ignored by clinging to older cases now supplanted by this statutory standard. Kentucky decided it wanted to be among the majority and its **legislature** (not the courts) changed the law at that time. The result was this:

> Under the Act . . . directors and officers will be personally liable for monetary damages to the corporation **only** if their conduct is shown by clear and convincing evidence to be willful misconduct, or wanton or reckless disregard for the best interests of the corporation and its shareholders.

Id. (emphasis added). The Kentucky **legislature**, not the courts, made the statutory change for these reasons.[15]

---

[15] What the legislature did not do, however, is what it has done in other instances when a statutory enactment is **not** intended to supplant the common law. See, e.g., KRS 411.570, expressly stating that the nuisance statutes "shall not be construed as repealing any of the statutes or common law of the Commonwealth relating to nuisance, nor shall it be construed to abridge any other rights or remedies available for personal or property damage . . . ." **No such provision appears in the corporate statutory change.**

(4) Post-statutory Case Law Supports the Decision Here

The Clinic also argued below that, "[i]t defies all logic to believe that, after being effective since 1989, not a single Kentucky appellate court decision has ever had to address an argument that the statutes obviated the fiduciary duty owed by a corporate director, if that was the legislative intent." (RA1129, pp. 69, 88, Plaintiff's Motion, p., 20 n. 5.)[16] It continued in the Court of Appeals to ignore the post-statutory case law, contending that the circuit court's ruling "is not supported by a single case . . . ." (Clinic's Brief in Court of Appeals, p. 14.) This is not accurate. Kentucky courts certainly have recognized that the statutory standard does control.

Most recently, and directly on point, is the Court of Appeals' decision in Sahni v. Hock, 369 S.W.3d 39 (Ky. App. 2010). In that case, the plaintiff filed a derivative shareholder's action and claimed that Sahni **had breached his fiduciary duty in various respects, but did not plead a statutory cause of action.** The Court quoted extensively from the exact same statute at issue here (KRS 271B.8-300) and then held:

> Hock couched her complaint against Sahni as a breach of fiduciary duty. **She made no reference to KRS 271B.8-300** nor did she allege Sahni committed willful misconduct or that he acted with wanton or reckless disregard for the best interests of the corporation or its shareholders.
>
> * * *
>
> We conclude that . . . she did not sufficiently allege a cause of action under KRS 271B.8-300.

16 The Clinic's arguments from below are addressed here both in anticipation that they will resurface in its Brief for Appellee and to provide the full background of how the circuit court reached its decision.

Id. (emphasis added), reversing with **directions to dismiss the claim**. The allegations missing in Sahni are the same allegations missing here, and the result must necessarily be the same.

Another Kentucky case that discusses the application of the statute is a case the Clinic cites, Patmon v. Hobbs, 280 S.W.3d 589 (Ky. App. 2009). Patmon involved "the hybrid nature of a limited liability company" (instead of a corporation) and for hybrids there was no "clear case law and statutory guidance." Id. at 595. Patmon looked to "the partnership context" to decide the case. Id. Patmon also expressly recognized (in dictum) that KRS 271B.8-310 (1) sets the standard for conflicts of interest for corporate directors. Id. at 597. What the Clinic refuses to face up to is that for corporations, there is this "statutory guidance" and it expressly covers all cases in which money damages are sought against a director of a corporation. Patmon's discussion of fiduciary duty "in the absence" of a statute was pertinent to the hybrid business entity involved in that case (a limited liability company with members in a relationship akin to partners), but Patmon recognized in its discussion the controlling statute that does govern **corporations.**

In Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co., LLC, 277 S.W.3d 255 (Ky. App. 2008), the Court expressly noted that "KRS 271B.8-300 is relevant to determine the standard of care which . . . directors were obliged to exercise." 277 S.W.3d at 269.[17] See also R. Keats, 4A Kentucky Practice § 14:59, pp. 140-41 (4th ed. 2007) (KRS 271B.8-300 sets standard of care, and a plaintiff "in order to obtain money

---

17 The Peoples Bank case did not allow subsection (3) of the statute to be "used offensively to support a cause of action against" an accounting firm that had provided auditing services to the directors, but did hold the statute applicable to the director's own standard of care, which is the issue here. 277 S.W.3d at 269.

damages against a director" must make statutory showing). See also Gundaker, 2008 U.S. Dist. LEXIS 80907 at * 4.

Thus the post-statutory case law, and especially the very recent case of Sahni, fully supports the circuit court decision here, which should be reinstated.[18]

---

[18] On p. 13 of its Court of Appeals Brief, the Clinic cited Estep v. Werner, 780 S.W.2d 604, 606 (Ky. 1989), for purportedly "using Aero Drapery as an example of a" common law claim against a director not displaced by statute. This is **exactly the opposite** of what Estep and Aero Drapery actually say:

> For example, in Aero Drapery . . . the court held that a fiduciary duty is owed by a director to the corporation even though such a duty [was] **no longer imposed by statute**.

Estep, 780 S.W.2d at 606. Aero Drapery was decided at a time when KRS 271B.8-300 was not yet in effect. Although that case (and others) recognize a fiduciary duty on the part of the company's director, those cases could not and did not address the statute that subsequently came into effect and said, in express terms, that it controls in all cases in which money damages are sought from the director. Estep did not, as the Clinic mischaracterized it, hold out Aero Drapery "as an example of non-displaced [by statute] claim." (Clinic's Brief in Court of Appeals, p. 13.) Estep actually discusses Aero Drapery as a case decided when no statute was in effect. Now we have KRS 271B.8-300(5) which, by its own terms, applies in all cases in which money damages are sought from a director.

Nor did this Court address in Estep "an argument that a different part of the corporate statutes displaced common-law claims" as the Clinic stated on p. 13 of its Brief in the Court of Appeals. Instead, the Court in Estep noted that the earlier corporate statute ("KRS Chapter 271A") had been applied by the Court of Appeals, but stated:

> [W]e feel it is not necessary to discuss the existence and extent of such [fiduciary] duties in the State of Kentucky in this opinion . . . . Based on the facts presented in this appeal, there is no justification for finding a breach of any type of fiduciary duty.

780 S.W.2d at 606.

(B) A COURT IS JUST AS OBLIGATED TO FOLLOW STATUTORY ENACTMENTS AS IT IS TO FOLLOW CASE LAW.

The Clinic insisted that the circuit court should follow case law. But the case law it wanted the circuit court to follow (Aero Drapery, decided in 1974, Steelvest, based on facts occurring in 1984-85, and case law from states other than Kentucky) constitutes the very "uncertainty" the Kentucky legislature set out to change by adopting a **statutory** standard of conduct **in 1988**.

The circuit court was just as duty-bound to follow **statutory** law as it was case law. As Kentucky courts have long recognized and recently re-emphasized:

> Where the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and **the statute must be given effect as written.**

Light v. City of Louisville, 248 S.W.3d 559, 562 (Ky. 2008), quoting from Lincoln County Fiscal Court v. Dept. of Public Advocacy, 794 S.W.2d 162 (Ky. 1990). As the Court said in Light:

> We are not at liberty to add or subtract from the legislative enactment nor to discover a meaning not reasonably ascertainable from the language used.

248 S.W.3d at 562. See also Peterson v. Shake, 120 S.W.3d 707, 709 (Ky. 2003) (courts should "not speculate about what the General Assembly may have intended but failed to articulate" but should rather "determine the General Assembly's intention" from the words used).

> [A] longstanding rule in this Commonwealth prohibits a court from judicially creating and grafting exceptions onto a statute when the General Assembly did not see fit to do so.

Jones v. Commonwealth, 279 S.W.3d 522, 526 (Ky. 2009).

The circuit court did indeed follow precedent - - the precedent that mandates a statute "be given effect as written." It is the Clinic who would ignore precedent, both by ignoring the Kentucky cases and by trying to ignore the statute as written.

II. THE COURT OF APPEALS CONFUSED THE ISSUE AND ITS OPINION SHOULD BE VACATED.

For all of the reasons discussed above, the Fayette Circuit Court got it exactly right in ruling that the statutory standard supplants the common law on claims made against officers and directors for money damages. The Court of Appeals got it mostly right, but confused the issue by saying in some parts of its Opinion that the General Assembly did intend for the statute "to apply in all circumstances" but saying elsewhere that the common law was not "entirely" supplanted. In modifying its Opinion, the Court of Appeals inadvertently confused the issue even further.

(A) THE COURT OF APPEALS' OPINION IS AN OPINION IN CONFLICT WITH ITSELF.

Specifically, the Opinion, as originally worded, stated on p. 3 that "the circuit court correctly determined that KRS 271B.8-300 supplanted the common-law claim of breach of fiduciary duty" but then noted on p. 15 that it had concluded "KRS 271B.8-300 does **not** supplant the common law." (Emphasis added.) Appellants respectfully asked that the word "not" be deleted from p. 15 to reconcile it with the rest of the Opinion. The Court of Appeals denied that Petition and instead changed page 3 to say that "the circuit court **in**correctly determined that KRS 271B.8-300 supplanted the common law . . . ." (change by the Court in bold). Yet the Court of Appeals left intact on pp. 9-11 its more specific discussion of the issue, a discussion that appropriately decided the case.

The Court of Appeals properly framed the issue on pp. 9-10 as "whether KRS 271B.8-300 supplants the common-law claim" and then immediately answered that question in the affirmative:

> We must conclude that the General Assembly intended for KRS 271B.8-300 to apply in all circumstances where money damages are sought in a claim of breach of fiduciary duty against a corporate director.

The Court of Appeals appropriately noted that the language used by the Legislature was "clear and unambiguous" and used the "mandatory" word "shall." The Court of Appeals properly held:

> In enacting this section, the Legislature cast a wide net which addresses *any* claim for monetary damages arising from a director's alleged breach of fiduciary duty.

(Id., p. 10.) All of the foregoing is exactly right. The problem is this: Despite these clear, specific holdings on pp. 9-10 that "Steelvest and Aero Drapery . . . occurred prior to the enactment of KRS 271B.8-300 . . . [and] cannot reasonably be relied upon" by the Clinic, the Court of Appeals said in passing at the top of p. 11 that a "change in the burden of proof" does not "abrogate the common-law claim entirely." This is an Opinion in conflict with itself, saying in some places that the General Assembly did intend for the statute "to apply in all circumstances" but saying elsewhere that the common law is not "entirely" supplanted.

It cannot be both ways. The reason it cannot be both ways is that the statute itself says it applies in all cases where money damages are sought and that what must be proven to recover such damages is a breach of the statute - - not a breach of any common law standard. The public and business community need to know that the statutes mean what they say. The Court is respectfully asked to vacate the Court of Appeals' Opinion and to reinstate the Fayette Circuit Court's straightforward application of the statutes.

(B) THE COURT OF APPEALS VASTLY UNDERSTATES THE CHANGES MADE BY THE LEGISLATURE.

The Court of Appeals' Opinion also says that "KRS 271B.8-300(5) tracks the common law very closely." (Opinion, p. 10.) With all due respect, this is not an accurate or fair comparison of the common law and the statute. The common law, for example, allowed disgorgement of profit for fiduciary violations; the statute says the **only** money damages that will be allowed are those shown by clear and convincing evidence to be damages legally caused by the breach of the statute and suffered by the corporation.

The substantial differences between the common law and the Kentucky statutes have been noted by other courts:

> The cause of action for breach of fiduciary duty by a director or officer still remains, but it has been **significantly altered** by the statutes.

Gundaker/Jordan American Holdings v. Clark, 2008 U.S. Dist. LEXIS 80907 (E.D. Ky. Oct. 9, 2008) at *4 (emphasis added).

Indeed, the Legislature passed the statutes in order to make these substantial, important differences. See, e.g., Baldwin's Official Edition KRS 1988 Acts Issue, with Commentary (RA466, p. 1315, Sealed Ex. No. 2), describing director and officer liability as "an area of crucial importance to the management of both small and large corporations and a critical factor in their domicile." (Appendix 5.) This legislation was specifically aimed toward reducing "the number of baseless lawsuits against directors" and removing the "uncertain standards of liability from court decisions." Id.

Yet on pp. 10-11 of the Opinion, the Court of Appeals minimizes the change wrought by the statutes as merely a "change in the burden of proof" that the Court of Appeals does not believe would "abrogate the common-law claim entirely." This is from the same Court of Appeals quoting with approval and with emphasis the provisions of the statutes that allow monetary recovery only for a failure to perform duties "*in compliance with this section.*" (Emphasis in Opinion, p. 10.) Such language does indeed necessarily abrogate and supplant the common law entirely. There is no longer any action for money damages against an officer or director except for failing to comply with the statute.

Thus, the Opinion vastly understates the effect of the statute, which does certainly increase the burden of proof to a clear and convincing standard, but also does much more. The increased burden of proof is not the only change wrought by the statutes, which also expressly require clear and convincing proof of: (1) a breach of **the statute**, and (2) legal **causation** between the breach and the damages claimed. The Fayette Circuit Court correctly decided all of these points and its decision should be re-instated in its entirety.

(C) THE COURT OF APPEALS' INCONSISTENT APPROACH WOULD CAUSE FUTURE PROBLEMS IN EVERY CASE INVOLVING CORPORATE FIDUCIARIES.

Because the Court of Appeals' Opinion is inherently in conflict with itself (yes, the statute absolutely governs, but maybe the common law is not completely abrogated either), it should not be the last word on guidance for future cases. The Court of Appeals' Opinion is a needless turn in the wrong direction, away from the certainty provided by these statutes for nearly a quarter of a century and veering toward some unknowable murky in-between where the statutes apply, but with the common law not "entirely" abrogated. This will cause confusion and uncertainty in every case that involves a corporate fiduciary. This Court is respectfully asked to reverse and vacate the decision of the Court of Appeals, and re-instate the Fayette Circuit Court's straight-forward application of these clear and unambiguous statutes.

III. THE TRIAL COURT'S DECISION SHOULD BE REINSTATED WITHOUT REMAND, AS ITS ALTERNATIVE RULING REMAINS INTACT.

The Fayette Circuit Court articulated a completely independent basis for its summary judgment ruling, which was entirely separate from the application of the corporate statutes:

> The Court further finds as a matter of law that the Defendants are also entitled to judgment as a matter of law because Plaintiff has presented insufficient evidence to suggest that the alleged fiduciary breach was the legal cause of any damages claimed by Plaintiff. Plaintiff has not articulated or identified any harm to it nor benefit to the Defendants flowing from or attributable to the alleged fiduciary breach.

(Fayette Circuit Court Order and Judgments entered April 22, 2010, at p. 2) (Appendix 3).

The Court of Appeals never did address this legal causation issue, which was the key ruling by the lower court. The omission was raised in the Petition for Modification and Rehearing, but the Court of Appeals still failed to address it. Thus this alternative basis for the summary judgment remains intact,[19] making the remand ordered by the Court of Appeals pointless. Regardless of whether the statute or the common law governed, no causal link existed between the conduct complained of and the damages claimed, making summary judgment proper. See, e.g., Bruck v. Thompson, 131 S.W.3d 764, 766 (Ky. App. 2004) (party is entitled to summary judgment if it shows, as movants did here, that "any breach of a duty . . . was not the proximate cause of the non-moving party's injuries").

---

19 The Clinic did not file any cross-motion for discretionary review. Since the Court of Appeals did not disturb (or even address) this alternative ruling, this part of the Fayette Circuit's decision is now beyond the scope of review.

Remand would constitute manifest injustice to these physicians who have lived with this litigation hanging over their lives, and their families' lives, for more than five years. They finally and fully prevailed in the circuit court, only to have the Court of Appeals arbitrarily and capriciously remand the case **without even reviewing the key legal issue**. This does not comport with due process, and the order of remand should be reversed, with the circuit court's ruling fully reinstated.

Although this alternative part of the circuit court's decision is not within the scope of the current review, it is explained at length here because it also demonstrates why amendment to make a statutory claim would have been futile, as discussed in Argument IV(A)(4) below. The point here is that the circuit court found causation lacking, as a matter of law, and that decision remains intact (with the Court of Appeals having left it undisturbed). Regardless of whether the corporate statutes apply, causation is an essential element that the circuit court found lacking. This missing element of causation would have been just as fatal under Aero and other common law cases as it is under the modern statutes.

(A) AERO DRAPERY AND OTHER KENTUCKY CASES ALSO REQUIRE A CAUSAL LINK.

(1) Aero Drapery Facts And Holding

In Aero Drapery a fiduciary relationship existed between Reynold Engdahl and the retail company Aero (which sold custom-made draperies). 507 S.W.2d at 167. Mr. Engdahl was a stockholder, director and officer of Aero although he was employed by Aero's wholesale supplier, the J.H. Cox Manufacturing Company. Id.

After meetings in May 1967, Engdahl and some employees of Aero decided on June 4, 1967, to create "a new enterprise" and "to go into the custom-drapery business in direct competition with Aero." On July 10, Engdahl tendered his resignations as director and treasurer of Aero, to be effective on August 10. "In reality, the last day of his employment . . . was August 5." Engdahl and the others opened the competing business on August 13.

The Court found that Engdahl's "fiduciary position obligated him not to develop interests antagonistic to Aero without full disclosure." Id. at 169.

> Engdahl knew of a forthcoming, simultaneous loss of key employees. A fiduciary could reasonably expect that this loss, **without forewarning,** would decrease the efficiency of Aero's operation.

Id. (emphasis added). The Court noted that fiduciaries do often resign and enter into competing enterprises and that this "is permissible" but found that Engdahl "should have terminated his duties as director and treasurer when he first began preparation to directly compete with Aero." Id.

The Court fixed a date of August 5, 1967, as the date when the fiduciary relationship ended (because it was the last "of actual responsibilities"). Id. at 170. Significantly, the Court then held:

> After termination of his fiduciary relationship, he is allowed the freedom to compete . . . .

Id. at 167-170. (emphasis added). The case was remanded for further proceedings, with a ruling that Engdahl would be "liable for damages **attributable to** a breach" of his fiduciary duty (id. at 168) – **not for all of the revenue or profits generated by the new enterprise.** The freedom to compete in the new enterprise was expressly recognized, as was the requirement that any damages must be linked by causation ("attributable to") the breach.

(2) This Case Is Not Steelvest Or Aero Drapery.

Steelvest emphasized the particular facts that led the Court to its decision in that case; it is undisputed that those key facts (and that commercial setting) do not exist here. Scanlan was setting up his own business (while the doctors left to practice medicine with Baptist, long-established). Scanlan's co-investors in his new company were the chief executive officers of major customers of his employer. 807 S.W.2d at 484. There is nothing like that in the present case. "Scanlan failed to disclose such activities to any representative of Steelvest." (Id.) In the present case, it is uncontroverted that the Clinic was well aware of the physicians being extremely unhappy and wanting to leave. The resignations were even communicated by the Clinic's President (Dr. Arthur Henderson) to the Board as "no big surprise." (RA466, p. 1315, Sealed Ex. P.) The Clinic had months to prepare for their departures and accepted Drs. Cooper and Winkley's payment of over $500,000. All of these same factors distinguish the present case from Aero Drapery, where the employees quit "without prior notice" and Engdahl was faulted because the loss was "**without forewarning.**"[20]

---

[20] Courts in other jurisdictions have criticized Steelvest and have followed Maryland Metals, Inc. v. Metzner, 382 A.2d 564 (Md. 1978), which recognizes bluntly that "an agent need not wait until he is on the street before he looks for other work." Id. at 569, citing Keiser v. Walsh, 118 F.2d 13, 14 (App. D.C. 1941). See, e.g., Scientific Enterprises, Inc. v. George, 47 Va. Cir. 9 (Va. Cir. Ct. 1998). See also Midwest Janitorial Supply Corp. v. Greenwood, 629 N.W.2d 371, 375-76 (Iowa 2001) (distinguishing Steelvest because the conduct in Steelvest "included solicitation of financing for the defendant's new company from his former company's leading customers"). As in Midwest, there is nothing like that in the present case.

In Miles Farm v. Helena Chem. Co., 2008 U.S. Dist. LEXIS 58430 (W.D. Ky. Oct. 10, 2008) (Appendix 6), aff'd, 595 F.3d 663 (6th Cir. 2010) (applying Kentucky law), the court assumed that a Steelvest-type of fiduciary duty existed but nevertheless held "there is no reason why these men could not have met with each other 'to plan for the opening of a rival company for which they would rather work.'" Id. at *39. Thus the idea that Steelvest absolutely requires what Lexington Clinic insists upon here (i.e., the

(3) This Is Medical Care, Not Commerce.

Most importantly, Steelvest and Aero Drapery did not in any way touch upon the additional and most compelling policy concern presented by the case at bar: **the importance of the patient/physician relationship.** The law favoring competition is magnified in this medical, health care context:

> Having a greater number of physicians practicing in a community benefits the public by providing greater access to health care. Increased competition for patients tends to improve quality of care and keep costs affordable. Furthermore, **a person has a right to choose his or her physician and to continue an on-going professional relationship with that physician.**

Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 679 (Tenn. 2005) (emphasis added). Thus **cases in the medical context "involve other considerations" not invoked by the typical commercial case** and "the patients' legitimate interest in selecting the physician of their choice [should not be] impaired." Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford, 900 N.E.2d 786, 796 (Ind. 2009) (affirming summary judgment in favor of physicians).

Thus even if the circuit court had not applied the corporate statutes, Steelvest and Aero Drapery (like the statutes) absolutely require proof of a causal connection between a purported breach of fiduciary duty and the purported harm. See, e.g., Aero Drapery, 507 S.W.2d at 168 ("liable for damages **attributable to a breach of that responsibility**")

---

resignation of a physician/director before he even considers going to practice medicine in circumstances that might improve the quality of care for his patients) should not be persuasive. It is not required in the "rough and tumble world comprising the competitive marketplace" (Scientific Enterprises, supra, at 14) and certainly **should not be required in the unique context of medical care.**

(emphasis added).[21] See also Chappell v. Kuhlman Elec. Corp., 304 S.W.3d 8 (Ky. 2009) (affirming summary judgment on fiduciary claim where no damages could be shown); Flegles, Inc. v. TruServe Corp., 289 S.W.3d 544, 553 (Ky. 2009) (finding no fiduciary duty existed, but also noting that "even if [defendant] had breached a fiduciary duty . . . that breach cannot be deemed the **cause** of [plaintiff's] alleged losses") (emphasis added); Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transp., LLC, 2008 Ky. App. Unpub. LEXIS 18 at * 18 (Ky. App. 2008) (copy attached as Appendix 7).[22] As the Court stated in Hinton Hardwoods:

> [T]o maintain a claim for breach of fiduciary duty, [plaintiff] must show that [defendant] owed him a duty, breached it, and **caused [him] damages.**

Id. (emphasis added) (affirming summary judgment). Indeed, the Court stated this **twice**:

> Kentucky law describes fiduciary duty as "one founded on trust or confidence reposed by one person in the integrity and fidelity of another . . . . Steelvest, 807 S.W.2d at 485. In order to prevail on a claim for breach of fiduciary duty, [plaintiff] must establish that (1) [defendant] owes a fiduciary duty to it; (2) [defendant] breached that duty; and (3) [plaintiff] suffered damages **as a result of that breach.**

---

21 The Clinic relied on an Arizona case (Clinic's Brief in Court of Appeals, p. 20), but that case actually affirmed a jury instruction that asked the jury to determine whether "the damages would not have occurred without the breach." Security Title Agency, Inc. v. Pope, 200 P.3d 977, 989 (Ariz. App. 2009). That is exactly what was **uncontroverted** in the present case. The "lost" revenue to the Clinic was not linked to the purported breach in any way and would have occurred regardless, since (even under Kentucky's Aero Drapery) the directors were free to work for a competing enterprise as soon as they resigned. It is undisputed and uncontroverted that these doctors did not compete with Lexington Clinic prior to their resignations. While it may be the law **in Arizona** that the plaintiff only had to prove that the breach "caused some harm" (id. at 993), the law of Kentucky is recent, firm and clear that the harm must be caused by the breach itself.

22 Unpublished Kentucky cases are cited in accordance with CR 76.28(4)(c), with copies attached.

Id. (emphasis added). Thus Kentucky law could not be more clear: even if Steelvest were the governing law (as it was in Hinton Hardwoods, where no officer/director liability was at issue), Plaintiff must show damages "**as a result of that breach**" of fiduciary duty. Id. Otherwise, as in Hinton Hardwoods, the defendant is entitled to summary judgment.

Hinton Hardwoods involved the aborted sale of one piece of property, followed by a sale of the realtor's own property to the purchaser. It is particularly instructive because the plaintiff in that case, like Lexington Clinic here, complained of the fiduciary's financial gain, specifically that the realtor had made a "profit from the sale of other property." Id. at *19. But the Court made the key point that there was nothing to indicate that the alleged fiduciary "did anything to **cause** [plaintiff] to lose its sale." Id. (emphasis added). Even though the fiduciary "made significantly more money" from the deal (id. at *7) than he would have if the sale of plaintiff's own property had gone through, the record showed that the purchaser "decided not to buy the [plaintiff's] property based on dissatisfaction over access to the property." Id. at *19. Thus the claim based on the realtor's breach of fiduciary duty, even though he received a profit, failed because causation was missing. **Summary judgment was affirmed on this key issue,** just as it was granted on the alternative ground here. Id. at *17-19. There is nothing in this case that could possibly connect the "lost revenue" to anything other than the doctors' free choice to practice medicine elsewhere, which everyone agreed they were free to do.

(B) THE LACK OF A CAUSAL LINK WAS UNDISPUTED.

Even the Clinic acknowledged below that causation "can become a question of law" when the facts are undisputed (RA1129, Sealed Pleadings, Plaintiff's Response filed March 19, 2010, p. 30). This was reaffirmed in Bruck v. Thompson, 131 S.W.3d 764, 766 (Ky. App. 2004), which held that a "party moving for summary judgment . . . is entitled to **judgment as a matter of law** if the moving party shows that . . . any breach of a duty owed to the non-moving party was **not the proximate cause** of the non-moving party's injuries." (Emphasis added.) Here the Clinic was trying to claim injuries measured by every penny these doctors will ever generate treating former Clinic patients, insisting that all of that revenue would otherwise have been generated in coming years by these doctors for the Clinic's coffers. But it was uncontested, uncontroverted, and undisputed that **these doctors were not obligated to stay at the Clinic and generate that revenue**. The proximate cause of the "loss" of the revenue is the fact they left, which the Clinic concedes they were free to do, not in any way "attributable to" any purported breach of fiduciary duty.[23]

To state the obvious: The reason the doctors are no longer practicing medicine at Lexington Clinic is not because of some purported fiduciary breach; it is because they made choices everyone agrees they were free to make: They chose not to practice medicine with Lexington Clinic anymore. This same point was made in Fox Valley Thoracic Surgical Associates v. Ferrante, 747 N.W.2d 527 (Wisc. 2008) (copy attached as Appendix 8). Dr. Ferrante, a heart surgeon with a group called Heart Surgeons, resigned from that practice and opened his own practice in the same building. Heart

[23] The Clinic tried to twist Appellants' argument into one that "a party might have been able to accomplish the same result in a legal manner." (Clinic's Brief in Court of Appeals, p. 21.) This is not even an argument the Appellants make. The Appellants are simply saying, and the circuit court agreed, that the Clinic never articulated a single way in which the Clinic was harmed as a result of the doctors' purported breach of fiduciary duty. The uncontroverted (and indisputable) cause of the "lost" revenue of which the Clinic complained was the result of the doctors no longer working at the Clinic, but it was not a breach of fiduciary duty nor a breach of contract for the doctors to stop working there and to work elsewhere.

Surgeons sued both Dr. Ferrante for leaving and a group called Cardiology Associates who approached Ferrante while he was still with Heart Surgeons and supported him with receptionist help and referrals after he set up his own practice. The court granted summary judgment to the defendants, noting the lack of any evidence that Dr. Ferrante "was willing and able to continue performance of his contract." Id. at p. 18. Instead, as here, "[e]very indication was that [the doctor] was seeking a way out." Id. Defendants, just like the heart surgeon and cardiology practice in Fox, were also properly awarded entitled to summary judgment.

Thus, the circuit court's decision was correct on this alternative ground as well: The defendants below were entitled to summary judgment even under Aero Drapery and other case law, completely apart from the statutes. Kentucky law,[24] whatever the source, requires damages to be causally related to the claimed breach of fiduciary duty. Where it is not, as here, the case is properly decided as a matter of law. Because the Court of Appeals left this much of the Fayette Circuit Court decision intact, remand would serve no purpose and should be reversed.

---

24 The Clinic's reliance on Bancroft-Whitney Co. v. Glen, 411 P.2d 921 (Cal. 1966), was puzzling. That case actually recognizes that the "mere fact that the officer [or director] makes preparations to compete before he resigns his office is not sufficient to constitute a breach of duty." Id. at 935. See also Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244 (Cal. App. 1968) ("failure of [officers/directors] to disclose their plans to leave the plaintiff and thereafter go into competition with it is not a breach of fiduciary duties to the plaintiff in absence of facts showing that nondisclosure was harmful to corporation") (emphasis added). Diodes affirmed the dismissal of the lawsuit and expressly cited Bancroft on this key point. 260 Cal. App.2d at 254.

IV. AN APPELLATE COURT SHOULD NOT FORCE A TRIAL COURT TO ALLOW A PLAINTIFF TO PURSUE A STATUTORY CLAIM IT DISAVOWED FOR YEARS, ALL TO THE PREJUDICE OF THE OTHER PARTIES AND IN DISREGARD OF PUBLISHED PRECEDENT TO THE CONTRARY.

(A) THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO ALLOW YET FURTHER AMENDMENT AFTER JUDGMENT HAD ALREADY BEEN ENTERED.

(1) The Clinic Never Sought To Make A Claim Under The Statute Until Judgment Had Been Entered Against It.

The Clinic argued that it should have been allowed to amend its pleadings – again – to make a statutory claim.[25] But the Clinic did not even seek leave to amend its pleadings to raise the statutory claim until **judgment had already been entered against it**. (See Orders granting summary judgment on April 22, 2010 (RA1129, p. 65, **followed by** a Motion to Amend filed April 30, 2010 (RA1129, p. 108).) This was not a case of being surprised by new statutes (these have been in existence for more than 20 years) or by a legal argument; this was a sustained dispute, running over the course of the litigation, where the Clinic was purposefully attempting to avoid the application of the corporate statutes at all costs for its own strategic reasons.

The Clinic contended at p. 14 of its Brief in the Court of Appeals that it had argued below, at p. 18 of its Sealed Response opposing Summary Judgment, "that the conduct at issue violated KRS 271B-8-300." But if the Court looks at that Response (RA1129, Sealed Pleadings filed 3/19/10), what it will find is an argument saying the statute "offers no protection" and "provides no defense." (Id.) The point the Clinic kept

[25] The Clinic had already amended the original complaint twice prior and had filed a separate duplicate lawsuit, thus taking **four prior bites at the apple** before tendering a pleading with the statutory claim, and then only after judgment had been entered against it.

missing was that the statute is <u>the exclusive source of directors' liability</u> for money damages and yet the Clinic refused to make any claim under it! (RA1129, pp. 19, 23 Joint Defense Reply filed April 9, 2010.) While the Clinic continued to argue that the statute "provides no defense," it is not accurate to say that the Clinic sued for an alleged violation of the statutes. It did not. It refused to, and argues to this day that the statute does not apply.

(2) <u>The Clinic Should Not Be Heard To Blame The Circuit Court For Its Own Calculated Strategy In Trying To Avoid The Application Of The Statute.</u>

The circuit court's ruling was a calculated risk the Clinic knowingly took when it pursued an intentional strategy of avoiding application of the corporate statutes, at all costs. The Clinic should not be heard to blame the circuit court because that strategy failed.

The Clinic protested that this was all just a hypertechnical treatment of its pleadings. (<u>See</u> Clinic's Brief in Court of Appeals, pp. 14-18.) But the circuit court and Appellants had far more than just bare pleadings to flesh out what the Clinic was claiming in this case. The circuit court had the benefit of two years of discovery, 44 depositions, thousands of documents, the Clinic's own witnesses' repeated explanations of what it was claiming, and extensive argument from the Clinic's counsel (both in written and oral form). The record was clear that the Clinic did not intend to make any claim under the statute and indeed intentionally sought to <u>avoid</u> its application at all costs.

There is nothing harsh or unfair in holding the Clinic to the position it repeatedly has taken, even in its amended pleadings and current arguments. As in <u>Sahni</u>, <u>supra</u>, the decision to pursue only a common law breach of fiduciary duty, and ignore the controlling corporate statutes, properly results in dismissal.

(3) Appellants Would Have Been Severely Prejudiced By Amendment.

Amendment, if it had been allowed yet again, would have affected all facets of the case. The elements that must be proven under the statute are different than at common law and must be proven by clear and convincing evidence. These differences are, of course, the very reason the Clinic fought so hard to avoid the application of the statute.

The prejudice to Appellants, of having to start all over defending a case after they had finally prevailed on the only theory the Clinic chose to pursue, cannot be overstated. This case has affected the daily lives of these doctors for nearly five years now. It is also fundamentally a claim that impacts the medical care of many patients, as it seeks to extract an enormous penalty from the doctors and Baptist for every former Clinic patient these doctors treat for the rest of their lives. The Fayette Circuit Court was well within its discretion in declining to allow yet further amendment in this case.

(4) Amendment Would Have Been Futile In Any Event.

The alternative basis for the Fayette Circuit Court's ruling noted the complete disconnect between the purported fiduciary breach (the failure to resign before discussing future employment elsewhere) and the damages claimed (all of the money these physicians would ever make over their lifetimes for treating any former Clinic patients).[26] This causal connection is required by KRS 271B.8-300(5), which provides that the

[26] This alternative finding is also discussed at III, supra, in the context of the common law requirement for causation as well. Contrary to the Clinic's assertion that the circuit court did not explain its decision fully, the court painstakingly explained and discussed its decision at the April 15 hearing (RA1129, p. 60, Video Record) and incorporated that explanation by reference into the April 22 judgments.

person seeking monetary damages "shall have the burden . . . of proving that the breach or failure to perform **was the legal cause of damages** suffered by the corporation." (Emphasis added.) Thus amendment would have been futile in any event, because the Fayette Circuit Court has already found that the statutory **causation** requirement has not been met. It would be a wasteful exercise in futility to remand and allow amendment to make a statutory claim where it has already been determined by the circuit court that the statutory element of causation has not been met.[27]

It is uncontroverted that these physicians were legally free to go and compete and practice medicine anywhere they chose. Once they made that choice, the revenues from their medical practice would not, of course, be enjoyed any longer by the Clinic. Yet the "damages" the Clinic wanted to recover were the loss of revenue generated by the doctors, including all their future revenues and referrals!

The value of the doctors' post-employment compensation is completely, and indisputedly, unrelated to the failure to resign their board positions. This was the complete disconnect between the conduct claimed and the damages sought. The Clinic's claim was properly rejected as a matter of law. See Kininmonth v. Ky. Farm Bureau Mut. Ins. Co., 2009 Ky.App. Unpub. LEXIS 987 (Ky. Ct. App. 2009) at * 7 (resolution of the causation issue "did not necessitate additional discovery or resolution of disputed facts") (copy attached as Appendix 9). As this Court re-emphasized recently:

> [An unnecessary] jury trial is a futile exercise, wasteful of judicial time, jurors' time, and the litigants' time and resources. CR 56 is intended to avoid such unnecessary proceedings.

---

27 Again, the Court of Appeals did not disturb (or even address) the trial court's ruling on this point.

Blankenship v. Collier, 302 S.W.3d 665, 675 (Ky. 2010) (affirming summary judgment as a matter of law on causation).

The Clinic argued, contrary to the statute, that it was not required to show any causation at all. (RA1129, p. 60, Video Record, 11:23:03 of April 15 hearing). This is completely contrary to the statute[28] and was appropriately rejected by the circuit court. "Legal cause" must be shown, according to the unmistakable language in the statute.[29]

For all of these reasons, the decision of the Fayette Circuit Court should be reinstated.

(B) CIRCUIT COURTS NEED TO KNOW THEIR DECISIONS COUNT FOR SOMETHING WHEN DISCRETION IS VESTED IN THEM.

While the Clinic argued that it should have been allowed to amend its pleadings (again), it (and the Court of Appeals) avoided any mention of the standard by which Kentucky appellate courts review such rulings.

> Although leave to amend shall be freely given when justice so requires, the decision is within the discretion of the trial court. Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770, 779 (2000). Furthermore, the

---

28 This is even contrary to Aero Drapery, as discussed above.

29 The Clinic contended in the Court of Appeals that it should have been allowed even more discovery and more time to come up with something (more than the 44 depositions and thousands of documents exchanged during the two years the litigation was pending). But it was the Clinic who thwarted discovery by claiming its damage calculations were "confidential" and even **by failing to appear at its own deposition duly noticed a full month in advance.** (See RA466, p. 1100, Baptist's Renewed Notice of Hearing filed February 8, 2010, with motions to compel attached, having been originally filed September 14, 2009, and renewed in January 25, 2010, detailing Defendants' efforts "to know what damages the Plaintiff claims flow from [the] purported breach" of fiduciary duty.) The Fayette Circuit Court cut through the discovery battles and kept its focus on what mattered, which was the complete disconnect between any possible damages being claimed by Lexington Clinic and the conduct of which it complained.

> discretion of the trial court will not be disturbed absent an abuse of discretion. Id.

M. A. Walker v. PBK Bank, 95 S.W.3d 70, 74 (Ky. App. 2003) (affirming refusal to allow amendment after motion for summary judgment had been filed). See also, Bradford v. Billington, 299 S.W.2d 601, 603 (Ky. 1957):

> A party may amend his pleadings after the motion for summary judgment has been made only by leave of court . . . . CR 15.01. While liberality in granting leave to amend is desirable, the application is addressed to the **sound discretion of the trial judge**. Where, as in this instance, abuse of discretion is not shown clearly, the action of the trial judge **will not be disturbed.**

Id. (emphasis added). No abuse of discretion was found here and the Fayette Circuit Court's decision should not be disturbed.

Strong established precedent recognizes that a litigant need not be permitted to start all over on a new path after having led the court and other parties down a different path for several years to a complete dead-end. See, e.g., Johnston v. Staples, 408 S.W.2d 206 (Ky. 1966) (affirming trial court rejection of an amended complaint after the other side had moved for summary judgment). See also Valley View Farm I, Ltd. Partnership v. City of Shepherdsville, 2010 Ky. App. Unpub. LEXIS 240 (March 19, 2010) (copy attached as Appendix 10) (holding that the trial court properly refused to allow a second amended complaint where the **first amended complaint could have contained alternative allegations but did not**).

The Court will note that some of these cases affirmed the denial of amendment when it was sought pre-judgment, but after a motion for summary judgment had been filed. The present case is even more compelling, where the motion for leave to amend was not filed until April 30, after the judgments already had been entered on April 22.

SUMMARY

The Clinic's entire case against Drs. McKinney, Cooper and Winkley was cast by the Clinic as one against them because of what they did (or did not do) as directors. Kentucky's statutes provide the **exclusive** method of obtaining a money judgment against someone for what he did (or failed to do) as a director. Yet the Clinic insisted it was not making any claim under the statutes and tried to resurrect older, pre-statutory cases. The circuit court properly rejected the common-law claim.

This case did present important issues, but they were ones already long resolved by the careful work of the legislature and prior decisions of Kentucky courts. The law (even in Aero Drapery) allows competition, once the employment has ended, and does not support any damages measured by post-employment competition. This is particularly important here, in the context of medical care and **patient choice**.

Even if the case had gone forward under common law, or even if amendment had been allowed to include a statutory claim, the circuit court's alternative ruling on the lack of causation remains intact as the alternative ground for summary judgment, not disturbed by the Court of Appeals and not reviewable here. For this reason, remand would be pointless and the decision of the circuit court should be fully reinstated.

In summary, Lexington Clinic was complaining about something that is not actionable, which is post-employment competition. Yes, the doctors left. They were free to do so. Yes, some of their former patients from the Clinic may seek treatment from them. Those patients are free to do so. Lexington Clinic does not own the doctors, does not own the patients, and cannot hold either the doctors or patients hostage for monetary ransom.

CONCLUSION

The decision of the Court of Appeals should be reversed and vacated, and the Fayette Circuit Court's decision should be reinstated in its entirety.

Respectfully submitted,

Anne Chesnut

Anne A. Chesnut
Wendy Bryant Becker
BINGHAM GREENEBAUM DOLL LLP
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507
Telephone: (859) 231-8500
Facsimile: (859) 255-2742
COUNSEL FOR APPELLANTS BAPTIST PHYSICIANS LEXINGTON INC AND BAPTIST HEALTHCARE SYSTEM, INC.

Gregg E. Thornton
Licha H. Farah, Jr.
Ashley K. Brown
WARD, HOCKER & THORNTON, PLLC
333 West Vine Street,
Suite 1100
Lexington, Kentucky 40507
COUNSEL FOR APPELLANT MICHAEL MCKINNEY, M.D.

Benjamin Lee Kessinger III

B. Lee Kessinger, III
Adrian M. Mendiondo
KINKEAD & STILZ PLLC
301 East Main Street,
Suite 800
Lexington, KY 40507
COUNSEL FOR APPELLANTS GREGORY COOPER, M.D. AND JAMES WINKLEY, M.D.

14231798_8.doc

APPENDIX