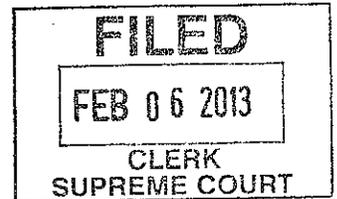


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-000242-D



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

APPELLANTS

v.
ON REVIEW FROM
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.

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CERTIFICATION

I hereby certify that true and correct copies of the Reply 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 6th day of February 2013.



COUNSEL FOR APPELLANTS

STATEMENT OF POINTS AND AUTHORITIES

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INTRODUCTION

This Reply Brief is filed to address the points made in the Brief for Appellee, and in the same order as they appear in that Brief.

I. THE STANDARD OF REVIEW FOR AMENDMENT OF PLEADINGS IS ABUSE OF DISCRETION.

Appellee Lexington Clinic (sometimes referred to here as “the Clinic”) begins its argument by invoking *de novo* review. (Brief for Appellee, p. 14.) This is partly correct, as questions of law generally are, of course, subject to *de novo* review by this Court (with no deference to the Court of Appeals’ analysis either). But it is not fully correct in this case, which turns on Appellee’s insistence that it should have been allowed to amend its pleadings -- again¹ -- even though it never filed a motion to do so until after judgment had already been entered against it. (See Orders granting summary judgment on April 22, 2010 (RA 1129, p. 65) **followed by** a Motion to Amend filed April 30, 2010 (RA 1129, p. 108.)

The standard of review on amendment of pleadings is **not** *de novo*, but abuse of discretion:

A trial court’s ruling on a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.

Bowling v. Commonwealth, 981 S.W.2d 545, 548 (Ky. 1998), citing Graves v. Winer, 351 S.W.2d 193 (1961) (both cases finding no abuse of discretion in decision of trial court not to allow amendment). See also Johnston v. Staples, 408 S.W.2d 206 (Ky.

¹ As discussed in the opening Brief for Appellants, pp. 39-44, this would have been Appellee’s **fourth** bite at the apple.

1966); Bradford v. Billington, 299 S.W.2d 601, 603 (Ky. 1957); M. A. Walker v. PBK Bank, 95 S.W.3d 70, 74 (Ky. App. 2003).

No abuse of discretion existed or is even argued to have existed below. Instead, the Clinic is trying to hide behind the wrong standard (*de novo* review).

II. NO STATUTORY CLAIM WAS PLEADED AT ALL.

The Clinic next insists that its claim was properly pleaded and “did not cite a source of the directors’ duties one way or the other” (whether statutory or common law). (Brief for Appellee, pp. 14-15.) But the circuit court in this case had a lot more to go on than just the pleadings, which indisputedly did not make any statutory claim at all. The Clinic repeatedly made flat-out assertions that it was **not** making a statutory claim because the statute did not, in Appellee’s view, even apply. Appellee’s belated and cagey argument --- that maybe its pleadings were meant to encompass a statutory claim all along --- is an argument properly rejected.

The Clinic tries to distinguish Sahni v. Hock, 369 S.W.3d 39 (Ky. App. 2010), by pointing out that it was an individual plaintiff (not a corporation) in that case who failed to invoke the corporate statute and whose breach of fiduciary claim was thus ordered dismissed. That is truly a distinction with no meaning. The decision in Sahni speaks to the present case as clearly as if it were calling Lexington Clinic by name when it says that a plaintiff “who couched her complaint against [the officer/director] as a breach of fiduciary duty” but “made no reference to KRS 271B.8-300” could not proceed because “she did not sufficiently allege a cause of action under KRS 271B.8-300” – the very same statute and same fatal pleading involved here. 369 S.W.3d at 47 (reversing with **directions to dismiss the claim**).

III. THE DECISION NOT TO ALLOW FURTHER AMENDMENT WAS WITHIN THE DISCRETION OF THE TRIAL COURT AND PROPERLY EXERCISED.

Appellee's third argument is to insist, again, that it should have been allowed to amend – even though its motion was not filed until after judgment had been entered against it and even though previous amendments had already been allowed. The law in Kentucky, as discussed above and in the opening Brief for Appellants, is clear that the decision on whether to allow amendment is firmly within the circuit court's discretion. See Bowling and other cases cited supra.

Yet the Court of Appeals here did disturb the circuit court's exercise of discretion, with no finding whatsoever of any abuse of discretion. This should be reversed, and the circuit court's decision re-instated, consistent with all Kentucky precedent.

IV. THE CORPORATE STATUTES EXPRESSLY APPLY TO CLAIMS AGAINST OFFICERS/DIRECTORS FOR MONEY DAMAGES.

On p. 20 of its Brief, Appellee argues that the corporate statute should be disregarded as inapplicable. But the statute says it is applicable to claims “for monetary damages” against a director. KRS 271B.8-300(5).² This is a claim “for monetary damages” against these former directors. As Lexington Clinic's own Brief confirms, it “did not pursue claims against” other doctors who left because “none were directors of” Lexington Clinic. (Brief for Appellee, p. 2.) The only claim pursued against the directors who did leave was one “for monetary damages” based on what they did or did not do as directors.

² KRS 271B.8-420(5) provides similarly for officers. Copies of these statutes are attached as Appendix A. Subpart (7) of both statutes makes it clear they are intended to limit the liability of officers and directors for conduct occurring after July 15, 1988, the date of enactment.

Appellees' arguments on this issue were anticipated (as they are the same ones rejected by both the circuit court and Court of Appeals)³ and have already been fully addressed in the Brief for Appellants, pp. 16-26. For all of the reasons previously briefed, the statute applies to this claim for money damages. Appellee's strategic and calculated attempt to evade its application makes this case even more compelling than Sahni, supra. The circuit court's decision not to allow Lexington Clinic to start all over with a statutory claim it had expressly disavowed was within its discretion, properly exercised, and should be reinstated.

V. THE "DISCONNECT" ON CASUATION IS FATAL TO APPELLEE'S CLAIMS IN ANY EVENT.

(A) Circuit Court's Ruling on Causation Not Subject to Review

The Clinic turns to its causation problem at p. 35 of its Brief but never really faces up to it. Instead, it provides a litany of reasons it believes Appellants' arguments are "legally insufficient." Appellants will address that litany below, but are compelled to state, first and foremost, that the circuit court's decision on this point is not properly subject to review. The Court of Appeals did not reverse nor even address the Fayette Circuit Court's decision that:

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.

³ The Court of Appeals correctly observed that "the Legislature cast a wide net which addresses *any* claim for monetary damages arising from a director's alleged breach of fiduciary duty." (Opinion, p. 10) (emphasis supplied by the Court).

(Order and Judgments entered April 22, 2010, p. 2, RA 1129.) This was an **alternative** ground for the circuit court's decision, and one that the Court of Appeals did not reach (despite Appellants' request by Petition for Rehearing that it do so). Appellee did not file a cross-motion for discretionary review to raise the issue. This part of the circuit court's Opinion and Judgments remains intact, with no one having sought review of it here.

(B) "Litany" Has No Merit

If the Court does consider Argument V of the Brief for Appellee, however, it will find the litany beginning at p. 35 to be without merit.

(1) Question of Law

Causation can indeed be a question of law, as acknowledged by Lexington Clinic below and demonstrated by the cases cited in the opening Brief for Appellants, pp. 36-38. Contrary to what Appellee argues in its Brief at p. 36, the Court of Appeals did **not** find that there were material facts on this issue, and never even addressed the issue of causation. Instead, the Court of Appeals' reference, and sole focus, was to the statutory cause of action, if it were allowed to go forward (which it cannot because of the absence of any abuse of discretion, as discussed above).

(2) Arizona Law Not Applicable

Appellants have already distinguished the Arizona decision in Security Title, at p. 35 n.21 of the Brief for Appellants. In any event, Kentucky law, not Arizona law, governs this dispute.

(3) (4) Steelvest and Other Cases Do Not Help Lexington Clinic on Causation.

Lexington Clinic on p. 37 argues that it should be entitled to "any profits that may accrue" from the "enterprise" that is Baptist itself. Steelvest does not support this as it

was uncontroverted that Baptist was a long established, pre-existing “enterprise,” not one formed by the doctors who left Lexington Clinic. If Steelvest and other common law did apply, causation would be required under the Kentucky cases discussed at pp. 31-36 of the Brief for Appellants. See, e.g., Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166, 168 (Ky. 1974) (“damages attributable to a breach of that responsibility”). The statute that does apply is just as explicit, providing expressly that the person seeking monetary damages must show by clear and convincing evidence that the alleged breach “was the legal causation of damages suffered by the corporation.” KRS 271B.8-300(6).

(5) **No “Relaxed Standard” Under Kentucky Statutes or Case Law.**

Appellee again looks to other jurisdictions (New York and the Second Circuit) to argue for a “relaxed standard” that does not exist under the Kentucky case law or Kentucky statutes discussed above.

(6) **(7) No Argument is Made About Accomplishing “Same Result in Legal Manner”**

Appellee takes liberties more than once in its Brief, attributing to Appellants arguments they do not even make and have never made.⁴ Its discussion of the cases on pp. 39-40 does just that, saying the Sixth Circuit and a Michigan Court rejected an argument that someone could have accomplished “the same result in a legal manner.”⁵ (Brief for Appellee, p. 39.) Appellants’ argument is very different and it is one Appellee

⁴ See, for example, p. 47 where Appellee states that “Appellants argue they are ‘above the law. . . .’” Appellants have never made any such argument. See discussion at VII, infra.

⁵ Neither of the cited cases involved an alleged breach of fiduciary duty, but instead involved breach of contract and tortious interference, claims even Lexington Clinic does not pursue here. Its tortious interference claims were dismissed by agreement in related Court of Appeals cases 2010-CA-466 and 467.

carefully avoids ever addressing. It is this simple: Even if one accepts everything Appellee says as to what these physicians did or failed to do as **directors** (i.e., failed to disclose their discussion with Baptist, or resign in advance of having any discussions with Baptist), the question becomes: What harm legally flowed from that? It cannot be any financial loss attributable to the fact that they did not stay and practice medicine with the Clinic; it was uncontroverted that these physicians did not want to, nor intend to, stay and practice with Lexington Clinic, and they were under no legal obligation to do so. Regardless of whether common law or the statutes apply, there would have to be some harm **caused by** (“attributable to”) (“legal causation of”) their purported failure as directors to disclose their plans (or failure to leave without any plans). The circuit court’s ruling on this is beyond assail and is the reason remand would be completely futile in this case. There is a complete “disconnect” between what Appellee wants to recover (post-employment competition revenues caused the mere fact of leaving) and the conduct of which Appellee complains (failure to disclose plans to leave).

(8) **Kentucky Case Law Does Address Causation in the Fiduciary Context.**

The Clinic says at p. 42 that “Appellants never cited a single case where this defense [lack of causation by fiduciary breach] has worked.” But Appellants have cited, to this Court and to the other courts below, exactly such cases. (See Brief for Appellants, pp. 31-36, discussing Kentucky cases requiring causation to be shown.)

(9) **No Forfeiture Under Statute.**

Finally, Appellee clings to the common law at p. 42, citing an unpublished decision for the idea that “a faithless servant forfeits any right to compensation after the

breach occurs”⁶ But the statute now expressly requires “legal causation” to be proven in cases for money damages against corporate fiduciaries. Appellee cannot have it both ways, suing these physicians for what they did or did not do as directors, but then ignoring what Kentucky’s General Assembly has said must be proven to recover money damages against them.

VI. WHAT APPELLEE KNEW OR DID NOT KNOW CANNOT CHANGE THE OUTCOME OF THE CASE.

For all of the reasons shown above, and in Appellants’ initial Brief, what Appellee’s attorneys now say it knew or did not know cannot make any possible difference to the outcome of this case.⁷ The legal issues are exactly the same and were correctly decided by the circuit court: The corporate statutes apply; Appellee attempted to evade the statute and chose not to make any claim under it until after judgment had already been entered; leave to amend was within the discretion of the circuit court, and properly denied by it. The circuit court also made an independent, alternative ruling on

⁶ Under the old common law cases, that might have been arguable as to officer/director fees (if any) paid as compensation to a fiduciary, but it was never true as to the salary or other compensation earned in a **non-fiduciary**, purely physician context (i.e., performing surgery or other medical services).

⁷ Lexington Clinic’s attorneys now say boldly that “No NLC Officer or Directors Knew of These Activities” (Brief for Appellee, p. 46), but the Clinic itself testified otherwise. Dr. Horn swore that he, as a member of Lexington Clinic’s Board of Directors, asked other Lexington Clinic Board members why they were acquiescing in Dr. McKinney’s continued service on the Board when everyone knew Dr. McKinney was talking to Baptist. (See e-mails at RA 466, p. 1315, Sealed Ex. I; RA 466, p. 1315, Sealed Ex. J, Dr. Horn depo, pp. 65-66.) The Clinic’s Chief Financial Officer, Randy LeMay, and the Clinic’s Board members openly speculated for many months before Dr. McKinney’s resignation whether he would be part of Baptist’s Brannon Crossing location. (See e-mail found at RA 466, p. 1315, Sealed Ex. F.) The Chief Executive Officer and President at the time, Dr. Andrew Henderson, nevertheless encouraged Dr. McKinney to remain on the Board. (RA 466, p. 1315, Sealed Ex. G, Andrew Henderson depo., p. 96.) This was the uncontroverted sworn testimony of Lexington Clinic’s own officers and directors.

the independent basis of causation, a ruling left intact and the issue not preserved for review. (If the issue of causation is reviewed, it is properly affirmed for the reasons shown above.) Nothing in Appellee's Argument VI adds to or takes away from any of this.

VII. LEXINGTON CLINIC PHYSICIANS ARE NOT ABOVE THE LAW.

On Appellee's final point the parties agree: Physicians are not above the law. Appellants have never argued otherwise. But that applies most pointedly to the physicians who make up Lexington Clinic, who flagrantly disregarded and violated AMA medical guidelines in placing barriers between patients and their medical care. Appellee's conduct in this case was reprehensible, locking Dr. McKinney out of his office, telling patients they weren't sure how these doctors could be reached, taking nearly half a million dollars from Drs. Winkley and Cooper to "buy" their freedom to compete, and then relentlessly pursuing them to recover every penny they would ever make if they did. For Lexington Clinic to now protest that this has no effect on patient choice or medical care in this community and is "necessary for corporate governance" (Brief for Appellee, p. 48) is to protest too much.

While Lexington Clinic's focus has always been on money, concern over patient care was indeed a vital issue raised by Dr. McKinney in the list of problems he gave to the Clinic's new president on January 17, 2008. (RA 466, p. 1315, Sealed Ex. N). Unfortunately, the Clinic's president took the list, but did not follow up on it and never spoke to Dr. McKinney again. (RA 466, p. 1315, Sealed Ex. M, Arthur Henderson depo., pp. 62-63.) Instead, Lexington Clinic turned its efforts to using the courts to try to extract a ransom and revenge. Real people, patients and doctors, and real medical care have indeed been affected and this Court is respectfully urged to put a final end to it.

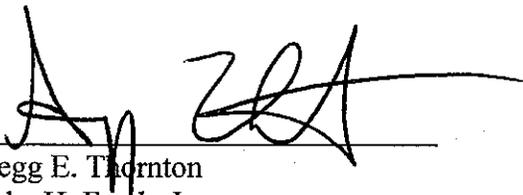
CONCLUSION

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.

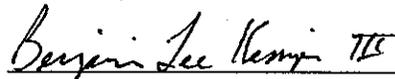
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APPENDIX

DOCUMENT

TAB

Copies of KRS 271B.8-300 (for directors)
and KRS 271B.8-420 (for officers)

A