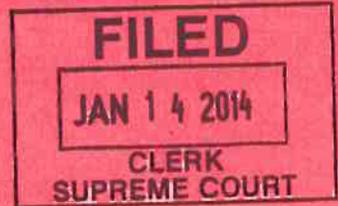


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2013-SC-228-DG



JOHN J. SCOTT AND WHITLOW & SCOTT

APPELLANTS

v.

APPEAL FROM KENTUCKY COURT OF APPEALS  
No. 2011-CA-431

APPEAL FROM HARDIN CIRCUIT COURT  
No. 05-CI-800

TIM DAVIS AND  
TIM DAVIS & ASSOCIATES, INC.

APPELLEES

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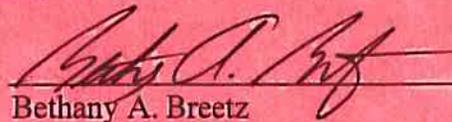
**BRIEF FOR APPELLANTS**

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Certificate of Service

I hereby certify that a copy of the foregoing was sent by first-class mail January 13, 2014, to: Hans G. Poppe, 8700 Westport Road., Suite 201, Louisville, KY 40242; Hardin Circuit Court Clerk, Hardin County Courthouse, 120 E. Dixie Ave., Elizabethtown, KY 42701; and Hon. Douglas M. George, Washington County Judicial Center, 100 E. Main St., Suite 200, Springfield, KY 40069.

  
Bethany A. Breetz

## INTRODUCTION

In the trial court and first round of appeals concerning this matter, every judge involved held that plaintiffs' 2005 lawsuit was brought pursuant to an assignment of a legal malpractice claim that is illegal under Kentucky law and that the lawsuit should be dismissed; this Court differed only in ordering that the 2005 lawsuit be dismissed without prejudice rather than with prejudice. This appeal concerns the trial court's order denying plaintiffs' Rule 59.05 and 60.02 motion to vacate or overturn the order dismissing their 2005 lawsuit.

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## STATEMENT OF THE CASE

### A. Summary

The original 2005 action at issue was brought pursuant to a settlement agreement and assignment between initial adversaries that the trial court, the Court of Appeals, and this Court found to be an unlawful assignment of a legal malpractice claim. This Court ordered the trial court to dismiss the action. *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (Appx. A). The trial court did as directed. Following the ordered dismissal, the plaintiffs moved to vacate the dismissal order. The trial court denied the motion to vacate. (Appx. B.) Failing to mention CR 59.05 or 60.02 or the very deferential standard of review, the Court of Appeals reversed the trial court and ordered that, following remand, the 2005 “lawsuit should continue.” (Appx. C.) That decision was based on a misconception of the law of the case doctrine and the Court of Appeals’ interpretation of what this Court meant to say when it ordered dismissal. But the Court of Appeals actually violated this Court’s holding that the “current suit [the 2005 suit], born of the improper assignment, cannot be permitted to continue.” 320 S.W.3d at 92. The Court of Appeals should be reversed and the trial court’s well-reasoned order denying the motion to vacate should be reinstated.

### B. Facts leading to illegal assignment of legal malpractice claim

Tim Davis is the President of Tim Davis & Associates, Inc. (collectively “Davis”), a third-party administrator of health care benefits. In 2002, Davis negotiated to purchase PICA Group Services’ third-party administrator business, and the parties entered into a letter of intent in September 2002. (Davis Dep., pp. 57-58.) Davis was permitted to review PICA’s books, business operations, and records and to speak with PICA’s customers as part of its due diligence. (Martin Dep., Exh. 3.) Davis agreed not

to communicate with or solicit the customers of PICA for a period of 15 months from the date the parties' letter of intent was terminated if Davis did not acquire PICA's assets. (Davis Dep. p. 62, Exh. 2.) In November 2002, the deal fell through over a disagreement about how the purchase price would be paid. (Davis Dep. pp. 59-61.) In December 2002, PICA sold its third-party administrator assets to Global Risk Management, Inc. for \$225,000. (TR 840 at Exh. A, p.2.)

In February 2003, Davis received a letter from Coal Exclusive, a customer of PICA, telling him that PICA was purchased by Global Risk and that Coal Exclusive was interested in receiving a quote from Davis to become the third-party administrator of its benefits plan. (Davis Dep. p. 73 and Exh. B.) Davis faxed this correspondence to Mr. Scott and called him to discuss it. (Davis Dep. pp. 84-85.) Davis asked John Scott if Davis could contact three customers of PICA (Coal Exclusive, Coal Transport, and Battleground Academy) since PICA sold its business to Global Risk. (*Id.* at pp. 85-86.) Davis also asked Mr. Scott if there could be potential litigation if Davis attempted to pursue PICA's former customers. (*Id.* at p. 93.)

Mr. Scott told Davis he could still be sued and did not advise him to go out and solicit the customers. (Scott Dep., p. 47.) Davis said that Mr. Scott gave him a "yellow light" cautioning him, but never told him that he could not solicit former customers of PICA. (Davis Dep., p. 94.) Davis admitted that Mr. Scott warned him that he could be sued. (*Id.*)

In addition to Mr. Scott, Davis consulted two other attorneys, Paul Musselwhite and Kimico Orosz, for advice on the non-solicitation agreement. (Davis Dep., pp. 117-122.) Mr. Scott was told that Mr. Musselwhite and Ms. Orosz gave Davis more positive advice than Mr. Scott gave. (Scott Dep., pp. 29-30.) Further, Ms. Orosz said that, since

Global Risk purchased PICA, the clients were no longer customers of PICA. (Gibson Dep., p. 32.)

Davis solicited Battleground Academy, Coal Exclusive, and Coal Transport, and it got their business. (Davis Dep., at pp. 100, 108-109.) In April 2003, PICA wrote Davis stating that his communications with Coal Exclusive violated the letter agreement. (TR 840 at Exh. C.) Mr. Davis faxed a copy of the letter to Mr. Scott and discussed the matter with Mr. Scott. (Davis Dep., p. 114.) Mr. Davis, however, does not remember whether the conversation took place in person or over the telephone, and he cannot recall the contents of the conversation. (*Id.* at pp. 115-16.) Mr. Scott agrees that they discussed the April 22, 2003 letter, but also cannot remember the contents or substance of their conversation. (Scott Dep., pp. 81-82.)

In July 2003, Global Risk and PICA sued Davis in federal court in Tennessee alleging a violation of the letter agreement. (Davis Dep. p. 118.) Mr. Davis asked Mr. Scott to represent him and his company in that action, (*Id.* at p. 134), but they were instead represented by Frost Brown Todd.

In May 2004, Mr. Davis met with Lee Henningsen, Global Risk's President and Chairman, to discuss a potential settlement. (Davis Dep., pp. 8-9.) Henningsen told Mr. Davis that he felt Mr. Scott gave Davis incorrect advice and that Davis should sue him. (*Id.* at p. 9.) Before his conversation with Henningsen, Mr. Davis never believed Mr. Scott was negligent or had violated the standard of care. (*Id.* at p. 12.)

Although PICA had been sold in its entirety for only \$225,000, Davis offered \$300,000 to settle the lawsuit regarding three of PICA's clients, and Henningsen suggested that he review Mr. Scott's deposition because Henningsen knew that there was some type of insurance there and that Mr. Scott had committed an error. (*Id.* at p. 19.)

Henningsen conditioned the settlement on Davis pursuing a legal malpractice claim against Mr. Scott and assigning 80% of the proceeds of that claim to Global Risk. (*Id.* at p. 21.) Under their agreement, Davis agreed to pay Global Risk \$300,000. (TR 840 at Exh. D, pp. 1-2.) The settlement agreement also provided:

- Global Risk would secure a lawyer for the malpractice action;
- Davis would provide written notice to Mr. Scott of the malpractice action with a copy to Global Risk;
- Davis would cooperate and use its best efforts to assist malpractice counsel with the claim;
- Davis would not settle the malpractice claim without consent from Global Risk;
- Davis would execute an agreement to share attorney-client privileged information with Global Risk;
- Global Risk would receive 80% of any recovery from the malpractice claim; and,
- If Global Risk decided not to pursue the malpractice claim, then Davis's obligations were fulfilled.

(*Id.* at pp. 2-3.) In June 2004, Davis and Global Risk executed the settlement agreement ending the underlying litigation. (*Id.* at pp. 8-9.)

**C. Davis files suit in 2005 as required by the unlawful assignment**

Global Risk arranged for Davis's present counsel in this action. (TR 1526 at p.10, Davis Dep., p. 23.) Global Risk forced Davis to sue John Scott and Whitlow & Scott (but not the other two attorneys who provided similar, yet more positive, allegedly erroneous illegal advice). (TR 2526 at 10; Davis Dep., p. 19.) Mr. Davis did not want to sue Mr. Scott, but Henningsen made him. (Theresa Davis Dep., p. 40.)

As mandated by Global Risk, in May 2005, Davis sued John Scott and Whitlow & Scott (collectively "Scott") for malpractice for Mr. Scott's alleged incorrect advice. (TR

2.) Davis's complaint sought to recover the \$300,000 paid to settle the underlying litigation, the money paid Frost Brown Todd to represent Davis in the federal litigation, and the attorneys' fees for bringing this case. (Davis Dep., p. 31.)

In March 2006, the trial court granted Scott's motion to compel production of all privileged communications between Davis and its counsel in the federal litigation. (TR 179.) The trial court found that Davis and Global Risk agreed that: Davis would share attorney-client privileged information with Global Risk; Davis would give Global Risk 80% of the proceeds of the action; Davis would not settle the case without Global Risk's express written consent; and Davis was not responsible financially for prosecuting the legal malpractice action. (*Id.* at pp. 3-6.) The trial court held that Global Risk and Davis essentially joined forces "to pave the way toward this malpractice action." (TR 179 at p. 5.) The court likened Davis's agreement to allow Global Risk access to Davis's attorney-client privileged information to "turning the fox loose in the chicken house." (*Id.* at p. 6.) It held that, "instead of standing toe to toe in battle, the parties [Global Risk and Davis] are now walking hand in hand to this court." (*Id.* at 7.)

**D. The lower courts held that the agreement was an unlawful assignment and directed that the action be dismissed with prejudice.**

In summary judgment briefing, Scott argued that the assignment was contrary to Kentucky law while Davis argued that, despite the presence of many earmarks of an assignment, it was really only a partial assignment of the proceeds of the malpractice claim and was not illegal. (TR 838, 1350.) Davis was wrong.

After examining the terms of the settlement agreement and assignment, the trial court found that "[i]f it walks like a duck, and quacks like a duck, it's probably a duck" and ruled that "an assignment of the legal malpractice claim has occurred as a matter of

law.” (TR 1545-46.) The trial court ordered that the complaint be dismissed with prejudice. (*Id.* at 1546.) The Court of Appeals agreed. *Davis v. Scott*, 2007-CA-2279 (Ky. App., Feb. 13, 2009).

**E. This Court held that the agreement was an unlawful assignment and directed that the action be dismissed without prejudice.**

At Davis’s request, this Court granted discretionary review and in August 2010 rendered its opinion finding that the assignment was, indeed, an assignment of a malpractice claim. The Court held that, “[t]hough Global and Davis assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against Scott, but of the entire claim itself. Kentucky law does not permit an assignment of a legal malpractice claim.” *Id.*

In addition to disagreeing whether the assignment was illegal, the parties also disagreed regarding the effect of the illegal assignment—whether Davis could proceed with the litigation as the real party in interest or whether the 2005 complaint should be dismissed. The trial court, the Court of Appeals, and this Court all directed that the complaint be dismissed—the trial court and Court of Appeals with prejudice and this Court without prejudice.

This Court recognized that, “as both parties acknowledge, the general rule is that an invalid assignment has no effect on the validity of the underlying action.” 320 S.W.3d at 91. Under the general rule, Davis could pursue his “claim as the real party in interest, as opposed to simply a nominal party.” *Id.* at 92. But, although the Court agreed “that Davis has not forfeited his claim, we also cannot ignore the fact that the present suit was born out of the invalid assignment and is, therefore, tainted in some respect. . . . [T]o allow Davis to proceed on the present claim would be to ‘wink at the rule against

assignment of legal malpractice claims.” *Id.* (citations omitted) Moreover, this Court recognized that Davis’s lawsuit “is complicated by the fact that the invalid assignment was made pursuant to a settlement agreement that has been approved by a federal court.”

In arguing regarding the effect of the illegal assignment, Davis contended that, even if the assignment were illegal, it was void ab initio and, thus, he was the real party in interest and could continue his 2005 litigation. (Davis Brief in 2009-SC-159 at 13-29, Reply at 2-3.)<sup>1</sup> Scott argued that, because the Tennessee federal court retained jurisdiction over the settlement agreement and assignment, the Kentucky trial court could not modify it to allow Davis to continue the 2005 litigation free of the taint of the illegal assignment. (Scott Brief in 2009-SC-159 at 23-25.)

This Court “reject[ed] Davis’s claim that the agreement is void” and that he could proceed as the real party in interest. 320 S.W.3d at 92. The Court could not, “necessarily, however, accept” Scott’s assertion that the agreement could only be modified by the Tennessee federal court, because it was unclear from the record. “At any rate, by its own terms, the agreement may only be modified with the approval of both Global and Davis.” *Id.*

Thus, this Court held that “the most appropriate solution under the circumstances is to remand the matter to the circuit court *with directions to dismiss Davis’s complaint without prejudice.*” *Id.* (emphasis added.) This Court continued: “As stated above, though Davis has not forfeited his malpractice claim, *the current suit, born of the improper assignment, cannot be permitted to continue.*” *Id.* (emphasis added). After

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<sup>1</sup> After the undersigned noted that the certification of the record does not mention the appellate briefs, the circuit court clerk’s office advised that they “toss” the appellate briefs when the case is remanded and that their office no longer has the appellate briefs. Those briefs are, however, maintained by the clerks of the appellate courts and are a matter regarding which this Court can take judicial notice.

ruling that the “current suit” (the 2005 suit) could not continue, the Court advised that, “[s]hould Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest.” *Id.*

Davis did not request this Court to reconsider its opinion, and Davis took no issue in this Court with the direction to dismiss the complaint in the 2005 litigation or the direction that “the current suit”—the 2005 lawsuit—could not continue.

**F. The 2005 lawsuit is dismissed as directed by this Court.**

On remand, both parties requested that the trial court enter an order dismissing the case without prejudice. (TR 1687, 1692.) Davis’s tendered order, however, contained language that did not come from this Court’s opinion and that is not generally contained in dismissal orders following remand: “Per the Supreme Court mandate, the Plaintiffs shall have the right to reassert their claims *in this action* upon a showing that the attempted assignment . . . is no longer in place.” This Court’s opinion, however—after ordering dismissal of the complaint in “the current suit,” which “cannot be continued”—states that, “[s]hould Davis wish to reassert *his claim against Scott*, he will be able to do so only upon a showing that the attempted assignment is no longer in place.” *Id.* In other words, while this Court ordered the action to be dismissed without prejudice, it allowed Davis, should he choose to do so, to file another suit free of the taint of the assignment if he could show that the new suit was indeed untainted.

Based on this Court’s specific direction, the trial court dismissed the 2005 complaint without prejudice in an order entered on November 12, 2010. (TR 1698.)

**G. Davis sought to alter, amend, or vacate the dismissal order.**

The following week, Davis filed a motion pursuant to CR 59.05 to vacate the order dismissing his complaint or, in the alternative, set aside the dismissal order pursuant to CR 60.02. Attached to that motion was an “agreed order” in the Tennessee case severing the illegal assignment from the settlement agreement. (TR 1699 at Exh. 5.)

In briefing to the trial court, the Court of Appeals, and this Court, Davis had, however, repeatedly argued that he was the real party in interest, at least in part because Global Risk was defunct.

- In response to Scott’s motion for summary judgment, Davis argued that “[d]ismissal would be especially egregious here because *it is unknown* whether [Global] can, or will, even attempt to enforce the Settlement Agreement against Davis. Based on counsel’s phone conversations and letter communications with the departments of insurance and secretaries of states in both Tennessee and North Carolina, [Global] may have sold its assets to a third-party which has since dissolved.” (TR.1350, Pl’s Resp. Mem., p. 13.)
- Before the Kentucky Court of Appeals, Davis argued that “[d]ismissal would be especially egregious here because [Global] *has gone out of business* and cannot and will not attempt to enforce the Settlement Agreement against Davis. Based on counsel’s phone conversations and letter communications with the departments of insurance and secretaries of states in both Tennessee and North Carolina, [Global] may have sold its assets to a third-party which has since dissolved.” (Davis Brief in 2007-CA-2279, p. 17.)
- Finally, before the Supreme Court of Kentucky, Davis argued that “(a) *Global is no longer in existence*, (b) former Global executives have no interest in pursuing the terms of the Settlement Agreement, (c) Global representatives never attended any hearings, mediation, or proceeding of any kind; and (d) letters from the North Carolina and Tennessee Secretaries of State showed that Global has ceased to exist as a business entity.” (Davis Brief in 2009-SC-159 at pp. 33-34 and Exh. 12).

After more than three years and an increasingly definitive assertion that Global did not exist, less than three months after this Court held that Davis needed to prove that the assignment was no longer in place, Davis produced an “agreed order” tendered to the federal court in Tennessee stating that “GRM [Global] acknowledges and accepts the

tender of payments and [Davis has] completely and adequately discharged the obligations in” certain paragraphs of the agreement. (TR 1699 at Exh. 5, ¶ 5.) That agreed order went on to state that, because the “Kentucky Supreme Court holds the assignment of the legal malpractice proceeds is unenforceable . . . § 1(e) of the Agreement should be severed” and Davis “should be released from complying with § 1(3).” (*Id.* ¶ 13.) The federal court entered the agreed order, which found that Davis had “satisfied all enforceable provisions of the Settlement Agreement and General Release” and had “completely fulfilled their obligations under the Settlement Agreement.” (*Id.* )

Davis’s motion to vacate asserted that, because the Tennessee federal court order severed the assignment, the trial court “must allow Davis to reassert his claim by vacating” the dismissal order. (TR 1699, p. 3.) Following briefing and oral argument, the trial court denied that motion. (TR 1875-79.)

Reading the *Davis* opinion’s final substantive paragraph “as a whole,” the trial court found it “clear that the Supreme Court did not intend for the ‘current suit’ [the 2005 suit] to continue.” (TR 1878, Appx. B.) To determine what the Supreme Court meant by Davis “reassert[ing]” his claim, the court looked at the definition of the word “reassert.” (*Id.*) “Re” means “again “ or “anew,” which, in turn, means “once more in a new and different form. Thus, it would appear that the Supreme Court meant that Davis could file a new action but not amend the original action.” (*Id.*) Finally, the court held that Davis’s motion “does not fit any of the requirements under CR 59.05 or CR 60.02. The fact that the Plaintiff may be barred by the statute of limitations if he is required to file a new action is not the extraordinary situation contemplated by those rules.” (*Id.*) Davis appealed. (TR 1881.)

**H. Davis filed a new complaint.**

Meanwhile, in November 2010, Davis filed a new lawsuit in Hardin Circuit Court, Case No. 10-CI-2530, *Tim Davis, et al v. John Scott, et al.*, re-alleging the claims asserted in the 2005 lawsuit. The allegations in the complaint arose from legal advice that was provided by Scott in 2003, and the complaint asserted that, because of his reliance on that advice, Davis was sued in federal court in Tennessee in a case that was settled in 2004. (TR<sub>2</sub><sup>2</sup> 2.)

Because the 2010 complaint was barred by the statute of limitations, Scott moved to dismiss it. (TR<sub>2</sub> 29.) Implicitly conceding that the complaint was filed outside the limitations period, Davis claimed that, “[i]n essence, if not form, the 2010 Complaint is an amended complaint” and that, even though the 2010 complaint “is not an amended pleading under CR 15.01,” the 2010 complaint should relate back to the 2005 complaint. The trial court granted Scott’s motion to dismiss, and Davis appealed. (TR<sub>2</sub> 96, 101.) Davis’s two appeals were consolidated in the Court of Appeals. The dismissal of the 2010 complaint is the subject of Davis’s cross appeal.

**I. The Court of Appeals, guessing at this Court’s “intent” rather than looking to its actual holding, reversed the trial court without even mentioning CR 59.05, CR 60.02, or the highly deferential standard of review.**

The Court of Appeals reversed the trial court’s denial of the motion to alter, amend, or vacate. (Appx. C at 6.) In doing so, it quoted from the portion of *Davis* where this Court cited the “general rule” that, if an assignment is invalid, the underlying action is still valid. From that “general rule,” the court continued: “it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff. *Id.*, quoting *Davis*, 320 S.W.3d at 91-92. The Court of Appeals

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<sup>2</sup> The appellate record in the original case, 05-CI-800, is referred to as TR. The appellate record in the second case, 10-CI-2530, is referred to as TR<sub>2</sub>.)

neglected, however, to notice that in that paragraph of the *Davis* opinion this Court was citing the general rule and how “several other jurisdictions “ have handled “similar circumstances.” *Id.*

But this Court went on in the very next paragraph to state: “However, while we agree that Davis has not forfeited his claim, we also cannot ignore the fact that the present suit was born of the invalid assignment and is, therefore, tainted in some respect . . . . [T]o allow Davis to proceed on the present claim would be ‘to wink at the rule against assignment of legal malpractice claims.’” *Davis* at 92 (citation omitted). The Court of Appeals simply ignored that paragraph of this Court’s opinion in *Davis*.

The Court of Appeals also ignored the fact that this Court directed that Davis’s 2005 complaint be dismissed and that the “*current suit* [the 2005 suit], born of the improper assignment, cannot be permitted to *continue*.” 320 S.W.3d at 92. Indeed, in directing that following remand, upon certain showings, the 2005 “*lawsuit* should *continue*,” Appx. C at 6, the Court of Appeals opinion is directly contrary to this Court’s specific direction.

This Court, which is quite capable of making its intentions known, did not direct that the case be remanded with leave for plaintiffs to continue the 2005 suit upon a showing that the assignment was no longer in place. It did not direct that the 2005 suit be dismissed and that it be reinstated or revived in some manner if Davis got the assignment released. It directed that the complaint in the 2005 “tainted” suit be dismissed and that the “current suit” could not continue.

In addition to ignoring the specific directions regarding what was to happen in this case and focusing on what it believed this Court intended to say, the Court of Appeals appeared concerned with Davis’s supposed lack of remedy. Appx. C at 7. But,

as addressed in questioning during oral argument in this Court on the first appeal, in addition to the fact that Davis “never thought Scott was negligent” before being told so by Global’s president (Davis’s former adversary), 320 S.W.3d at 89, if Davis really does have a valid claim against Scott, he can seek redress against whomever advised Davis to enter into an assignment that is illegal in Kentucky.

In doing its utmost to allow Davis’s 2005 “tainted” lawsuit to continue, the Court of Appeals also completely ignored the requirements of CR 59.05 and 60.02. Indeed, the Court of Appeals opinion, which flouts this Court’s specific directions, does not even mention either rule, let alone explain how the trial court abused its discretion in denying Davis’s motion to alter, amend, or vacate.

#### ARGUMENT

- I. **The trial court did not abuse its discretion in denying Davis’s motions seeking to obtain relief from the dismissal ordered by the Supreme Court.**
  - A. **The only mechanism to reach the law of the case doctrine is through a post-judgment motion.**

The Court of Appeals reversed and remanded the trial court’s order denying Davis’s motion to alter, amend, or vacate because the trial court’s actions somehow “violated the Supreme Court’s mandate<sup>3</sup> and the law of the case doctrine.” (Appx. C at p. 6.) The trial court, however, only had two mechanisms through which it could allow Davis’s 2005 lawsuit to continue. First, it could have refused to dismiss the 2005 action, which would have been in direct violation of this Court’s specific direction. Davis, correctly, did not argue that this was an option below, and the Court of Appeals

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<sup>3</sup> The appellate courts no longer issue mandates. CR 76.30(2)(f).

recognized that the trial court was “acting in conformity with the Supreme Court opinion” when it dismissed the 2005 action.

Given that the trial court had no choice but to dismiss the 2005 complaint, the only other mechanism through which Davis could have continued his 2005 action was if a post-judgment motion vacating that dismissal was granted. Post-judgment motions, however, must be brought pursuant to specific rules and are subject to specific legal requirements, and the trial court’s decision on such motions is subject to a specific standard of review. The Court of Appeals simply ignored this step in the process and failed to mention the rules allowing a judgment to be vacated. Nor did the Court of Appeals evaluate whether Davis’s motion met the legal requirements for post-judgment vacatur or whether the standard for reversing the trial court’s decision was met.

**B. Standard of review**

Appellate review of the trial court’s denial of Davis’s Rule 59.05 and 60.02 motion “is limited to whether the court abused its discretion.” *Batts v. Illinois Central Railroad Co.*, 217 S.W.3d 881, 883 (Ky. App. 2007); *Brenzel v. Brenzel*, 244 S.W.3d 121, 125 (Ky. App. 2008). Moreover, “the test for abuse of the circuit court’s discretion is whether the decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Commonwealth, Cabinet for Health & Family Serv. v. Byer*, 173 S.W.3d 247, 249 (Ky.App. 2005), citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 581 (Ky. 2000)).

The trial court did not abuse its discretion in denying Davis’s motion to alter, amend, or vacate. Davis himself described the motion as providing “options” that were “viable” rather than requirements that were mandatory. (Davis Brief in 2011-CA-431 at pp. 5, 9, 11.)

**C. The trial court did not abuse its discretion in denying Davis's CR 59.05 motion.**

A motion to vacate a judgment may *only* be granted when: (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) there is newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; and (4) there is an intervening change in controlling law.

*Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005.) (citations omitted).

“[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Id.* (citation omitted). Indeed, a “party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment.” *Id.*

Davis's CR 59.05 motion did not present any of the four situations upon which a motion to alter, amend, or vacate may be granted. (TR 1699.) First, there can be no argument that the trial court's dismissal order was based on manifest errors of law or fact—the complaint was dismissed after years in the trial court and appeals to the Court of Appeals and the Supreme Court, with directions upon remand “*to dismiss Davis's complaint without prejudice.*” Second, Davis failed to produce any newly discovered or previously unavailable evidence. Third, Davis failed to demonstrate any manifest injustice resulting from the order dismissing the action without prejudice. Fourth, Davis did not demonstrate any intervening change in controlling law since issuance of the dismissal.

Rather than addressing the four circumstances contemplated by CR 59.05—circumstances that Davis did not even attempt to demonstrate—Davis simply claimed in the trial court that this is “one of” those “certain situations” requiring CR 59.05 relief

because the Kentucky Supreme Court “specifically contemplated” that Davis would be allowed to “reassert” his claims “upon showing that the attempted assignment is no longer in place.” (*Id.* at pp. 4-5.) But, as demonstrated above, this Court “specifically contemplated” exactly what happened here: the “current suit,” the 2005 lawsuit, could not continue so the trial court was directed to “dismiss the complaint without prejudice,” which it did. Accordingly, Davis failed to meet the standard for a motion to alter, amend, or vacate pursuant to CR 59.05, and his motion was correctly denied.

**D. The judgment remains equitable, and the trial court did not abuse its discretion in denying Davis’s motion for CR 60.02 relief.**

The trial court could only reconsider its dismissal order under Civil Rule 60.02 upon a showing of mistake, inadvertence, surprise, excusable neglect, or any other reason of an extraordinary nature justifying relief. Rule 60.02, which applies only in extraordinary situations, requires a very substantial showing to merit relief under its provisions. *Ringo v. Commonwealth*, 455 S.W.2d 49, 50 (Ky. 1970). Davis failed to make such a showing.

Davis argued that this Court’s opinion meant that, once the plaintiffs were able to establish that the assignment was no longer in place, they could reassert their claims. (TR 1699 at p. 5.) Davis, however, ignored the fact that it was not simply the assignment of the proceeds of his claim but the control of the original lawsuit by the assignee that resulted in its dismissal. Equity does not intervene to protect those with unclean hands. Equity did not and would not allow the “tainted” lawsuit to continue. This Court, which is capable of making its intentions known, did not state that the dismissal was only effective for a period of time or until certain events occurred, and it clearly contemplated

“prospective application” of its very specific remand “to the circuit court *with directions to dismiss Davis’s complaint without prejudice.*” 392 S.W.3d at 92 (emphasis added).

This Court’s opinion did not direct that the case be remanded with leave for plaintiffs to continue *the 2005 suit* or reinstate *the 2005 suit* upon a showing that the assignment was no longer in place. Because Rules 59.05 and 60.02 apply to orders dismissing cases both with and without prejudice, if the remedy for a tainted lawsuit was simply to get rid of the illegal assignment before filing a post-judgment motion for relief, there would have been no need for this Court’s direction that the original tainted lawsuit be dismissed without prejudice rather than with prejudice. This Court did not direct that 2005 suit be dismissed and that it be revived in some manner if Davis got the assignment released. It directed that the complaint in the 2005 “tainted” suit be dismissed without prejudice and that the “current suit” could not continue. Period.

Davis brought this suit pursuant to an assignment that is illegal in Kentucky. Rather than initially choosing not to enter into the assignment or seeking relief from the assignment years ago and filing a proper lawsuit untainted by the illegal assignment within the statute of limitations, he took the position that he had assigned only a portion of the proceeds. Yet as the trial court, the Court of Appeals, and this Court found, the assignment was more than simply a partial assignment of proceeds, but was an assignment of a malpractice claim, which is illegal in Kentucky. Davis must now reap what he has sown.

**E. The trial court followed the Supreme Court’s directions.**

This Court directed that the complaint in “the current suit”—the 2005 lawsuit—which “cannot be continued” must be dismissed. It then stated that, “[s]hould Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the

attempted assignment is no longer in place.” 320 S.W.3d at 92. In other words, this Court held that a showing that the illegal assignment was no longer in place was a prerequisite for Davis to be allowed to reassert his claims; it was not, however, a guarantee that Davis could prevail on such a reassertion, if any, of his claims.

Opinions from appellate courts provide the law applicable to everyone in this Commonwealth. The *Davis* opinion directs that, while persons who bring a claim pursuant to an illegal assignment do not necessarily forfeit their claims, they must rid themselves of the taint of the illegal assignment before doing so. While Davis had the ability, once he met the prerequisite of demonstrating that the assignment was no longer in place to “reassert his claim against Scott,” if he “should . . . wish” to do so, 320 S.W.3d at 92, the opinion does not direct what will happen upon the reassertion of Davis’s claim. The opinion, most certainly, does not direct that the civil rules applicable to every other case would not be applicable to Davis’s reassertion of his claims.

Unless this Court’s opinion in *Davis* required that the trial court dismiss the original action (it did) and then immediately grant post-dismissal relief from that order (it did not), the trial court was vested with discretion to act upon the post-judgment motion. Only abuse of that discretion—a decision that is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles,” *Certainfeed v. Dexter*, 330 S.W.3d (Ky. 2010)—would provide grounds for reversal. If Davis was “aggrieved” by this Court’s direction, his remedy was in this Court at the time the opinion was rendered, “because an objection to the trial court is futile and an appeal from the trial court’s implementation of the appellate determination is nothing more than an attempt to relitigate the issue previously decided.” *Williamson v. Comm.*, 767 S.W.2d 323, 325 (Ky. 1989).

The Court of Appeals opinion reversing the trial court's decision—a decision that addressed and complied with the law regarding CR 59.05 and 60.02 motions—does not even mention CR 59.05, CR 60.02, or the standard of review. It fails to articulate how the trial court could have abused its discretion in refusing to vacate a judgment that this Court directed it to enter when none of the legal requirements for CR 59.05 or 60.02 relief were met. This Court should reverse the Court of Appeals and reinstate the trial court's order.

**II. The Court of Appeals misapplied the law of the case doctrine, which actually supports the trial court's orders.**

Even assuming that Davis met the standard for post-judgment relief and that the trial court abused its discretion in refusing to grant such relief (neither of which is true), the Court of Appeals misapplied the law of the case doctrine.

**A. The law of the case doctrine only applies to legal questions addressed by the appellate court.**

The law of the case doctrine directs that, “if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case.” *Fischer v. Fischer*, 349 S.W.3d 582, (Ky. 2011), quoting *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). “The term ‘law of the case’ is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court.” *Id.* The Court of Appeals was confused as to how the law of the case doctrine applies here.

Opinions from appellate courts provide the law applicable to everyone in this Commonwealth. In *Davis*, this Court first distinguished between when an agreement claimed to be merely a partial assignment of the proceeds of a malpractice action is actually an assignment of the malpractice claim itself, which remains illegal in Kentucky. Next, partially following the treatment of illegal assignments in other jurisdictions, this Court held that persons who bring a claim pursuant to an illegal assignment do not necessarily forfeit their malpractice claims by virtue of entering into such an assignment. But, the Court also held that if a malpractice action is brought pursuant to an illegal assignment that action, “born of the invalid assignment,” is “tainted” and must be dismissed *without prejudice*, thereby potentially allowing a subsequent action “reassert[ing]” the “claim.” In order to bring an untainted malpractice claim after having entered into an illegal assignment, the plaintiff must first rid itself of the illegal assignment and be able to show that it is no longer in place. Only then, may the plaintiff bring a potentially valid claim. These are the “legal questions” this Court ruled on, and they are the “legal questions” that must be followed under the law of the case doctrine.

The *Davis* opinion incentivizes potential legal malpractice plaintiffs not to enter into illegal assignments in the first place or to rid themselves of the taint of such an assignment quickly. The opinion also incentivizes attorneys in the underlying case to avoid recommending settlement agreements whereby a party in an underlying action illegally assigns its legal malpractice claim to its former adversary in that action or, if representing a legal malpractice plaintiff who entered into an illegal assignment, to quickly eliminate that assignment.

In addition to setting forth the law applicable throughout the Commonwealth and the law applicable on remand, this Court also applied its holdings to the specific facts

before it. First, despite his vehement protestations to the contrary, Davis entered into an agreement that was not simply a partial assignment of proceeds but placed sufficient control in his former adversary's hands that it was an illegal assignment of his entire claim. Next, Davis did not forfeit his potential malpractice claim simply because he entered into that illegal assignment. But, although Davis did not forfeit his claim simply by assigning it, his 2005 action, born of that illegal assignment, was tainted and had to be dismissed without prejudice. If Davis desired to reassert his claim against Scott, he had to rid himself of the illegal assignment.

This Court's opinion in *Davis* applies not just to Davis's case, but to other similar cases if they arise in this state. Every court and every judge who looked at this matter on the first round of appeals agreed that the 2005 lawsuit must be dismissed. This Court differed only in holding that the dismissal should be without prejudice, as opposed to with prejudice as directed by the trial court and Court of Appeals. The only reason the difference would matter is that a dismissal without prejudice does not automatically prevent another complaint with the same allegations from being filed. Thus, this Court's opinion in *Davis* provides the possibility that a party entering into an illegal assignment of a legal malpractice claim may somehow salvage and "reassert" that "*claim*"; it does not, however, guarantee that the party may salvage the original *lawsuit* (although the party might have a claim against whomever recommended the illegal assignment).

Further, while getting rid of the taint of an illegal assignment is a *prerequisite* for filing a valid suit, the *Davis* opinion does not direct that having first filed a tainted complaint somehow eliminates any other requirements for asserting a claim. In other words, ridding oneself of the illegal assignment is simply the start of the process for reasserting a claim; it is not the end of the process.

**B. The law of the case doctrine actually prohibited the Court of Appeals from directing that the 2005 “lawsuit could continue” on remand.**

In agreeing with Davis that the trial court violated this Court’s “mandate and the law of the case doctrine” and “only partially complied” with this Court’s instructions, Appx. C at 6, the Court of Appeals misunderstood this Court’s opinion in *Davis* and was apparently confused as to what the law of the case doctrine is and how it applies. The Court of Appeals revisited and altered this Court’s actual holding—violating the law of the case doctrine rather than following it—in finding that it was this Court’s “intention” that Davis be “permitted to pursue his first action” and that the 2005 “lawsuit should continue.” Appx. C at 7. This Court ruled against Davis on this very point.

The Court of Appeals was focused on its quest for what this Court intended by its mandate rather than on the legal questions addressed in *Davis* or the opinion’s specific direction that “the current suit, born of the improper assignment, cannot be permitted to continue.” Instead the Court of Appeals tried to find this Court’s intent in its statement that, “[s]hould Davis wish to reassert his claim against Scott, he will be able to do so only upon a showing that the attempted assignment is no longer in place and that he is the real party in interest.” 320 S.W.3d at 92.

In that sentence, this Court held that a showing that the illegal assignment was no longer in place (and, thus, that Davis was the real party in interest) was a prerequisite for Davis to be allowed to reassert his claim; it was not, however, a guarantee that Davis could prevail on such a reassertion, if any, of his claim. But instead of addressing how or whether Davis could “reassert” his claim, the Court of Appeals jumped to the conclusion that the Supreme Court must have intended to give Davis an avenue for relief: “If we were to interpret the Supreme Court’s language as permitting Davis to proceed with his

claim in a second action, then we must also interpret it to mean that the statute of limitations period has been tolled by his filing of the first action,” an interpretation that “would directly conflict with well-established precedents.” Appx. C at 6. Under the law of the case doctrine, however, because Davis had not yet reasserted his claim in any way, this Court made no determination regarding any legal questions—including defenses such as statute of limitations—that could arise following such a reassertion. Further, if the legislature is presumed to know the law, surely the Supreme Court of Kentucky knows the law and the legal ramifications of its holding—a holding that applies in future cases as well as the one then before it. This Court knew what dismissal without prejudice means and its legal consequences.

In addressing the “Effect of the Improper Assignment,” this Court first set forth how invalid assignments are treated elsewhere, stating:

As both parties acknowledge, the general rule is that an invalid assignment has no effect on the validity of the underlying action. “[I]f an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name.” 6 Am. Jur. 2d Assignments § 122 (2010). Thus, it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff. Indeed, several other jurisdictions considering similar circumstances have acknowledged that the underlying legal malpractice claim survives an invalid assignment. See *Weiss v. Leatherberry*, 863 So.2d 368, 373 (Fla. Dist. Ct. App. 2003) (remanding matter to trial court because “invalidity of the agreement [to assign] has no effect on the underlying cause of action for legal malpractice”). See also *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538, 542 (Ariz. Ct. App. 2002); *Weston v. Dowty*, 163 Mich. App. 238, 414 N.W.2d 165, 167 (Mich. Ct. App. 1987); *Tate v. Goins, et al*, 24 S.W.3d 627, 635 (Tex. App. 2000).

*Davis*, 320 S.W.3d 87, 91-92. Although this portion of the *Davis* opinion simply provided the background against which this Court was ruling rather than the holding of

the case, the Court of Appeals quoted from and relied upon that portion of the opinion. Appx. C at 6 (the “Supreme Court clearly stated: . . .”).

But the *Davis* opinion went on to specifically hold that, although Davis did not forfeit his claim by virtue of the assignment, “the present suit was born of the invalid assignment and is, therefore, tainted in some respect. . . . [T]o allow Davis to proceed on the present claim [which is what the Court of Appeals opinion allows] would be ‘to wink at the rule against assignment of legal malpractice claims.’” *Davis* at 92 (citation omitted). Accordingly, this Court directed that the 2005 lawsuit be dismissed without prejudice because the “current suit” could not “be permitted to continue.” *Id.* Instead, however, the Court of Appeals found that this Court’s “intention” was “that Davis should be permitted to pursue the 2005 action by showing the assignment no longer exists and he is the real party in interest”—the very result that Davis sought in the trial court, the Court of Appeals, and the Supreme Court the first time around and the very result prohibited by the law of the case doctrine.

The question for the Court of Appeals erroneously became: “how can Davis successfully show that he is now the real party in interest?” But this was a question that was not addressed by the trial court (or even briefed in the trial court), and it was not properly before the Court of Appeals. The parties and trial court below simply assumed that that the Tennessee federal court order rid Davis of the illegal assignment. The question actually addressed by the trial court, which the Court of Appeals simply ignored, was how can Davis “reassert” his claim and does Scott have any defenses to such a reassertion?

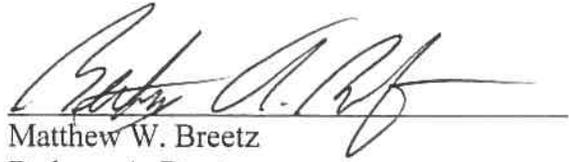
The Court of Appeals’ strained attempt to comply with this Court’s supposedly intended “mandate,” rather than complying with this Court’s specific directions and the

legal questions actually decided by this Court, led the Court of Appeals to fail to even mention, let alone address, the requirements of Rule 59.05 or 60.02 or the abuse of discretion standard in reviewing the trial court's denial of Davis's motion to alter, amend, or vacate. Other than its specific directions that the "present or "current suit" (the 2005 suit) "cannot be permitted to continue" and must be dismissed, the *Davis* opinion does not address how such an untainted malpractice "claim" will proceed once it has been "reassert[ed]." The opinion, most definitely, does not direct that the requirements to obtain CR 59.05 and 60.02 relief be ignored to permit the "present" and "current" 2005 suit to be continued.

Given that no "legal question" concerning CR 59.05 or 60.02 was before this Court in *Davis*, the law of the case doctrine plays no part in determining whether the trial court abused its discretion in denying Davis's motion to alter, amend, or vacate. The Court of Appeals erred in applying the law of the case doctrine to reverse the trial court's order denying post-judgment relief. The Court of Appeals should be reversed and the trial court's order should be reinstated.

#### CONCLUSION

Davis's 2005 suit was brought pursuant to an assignment that the trial court, this Court, and the Supreme Court found to be illegal. This Court ordered the trial court to dismiss the action. The trial court did as the Supreme Court directed and dismissed the 2005 suit. Having done as directed, the trial court cannot have abused its discretion when it refused to undo the very dismissal ordered by this Court, particularly when Davis's CR 59.05 and 60.02 motion failed to meet the requirements of those rules. The Court of Appeals should be reversed and the trial court's order denying post-judgment relief should be reinstated.



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APPENDIX

**Appx. A** ..... *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010)

**Appx. B** ..... *Trial Court Order Denying Motion to Vacate*

**Appx. C** ..... *Court of Appeals Opinion*

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