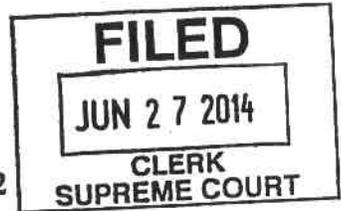


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. ~~2013-SC-000528~~ and 2013-SC-000682



JOHN J. SCOTT and
WHITLOW & SCOTT

MOVANTS/
CROSS-RESPONDENTS

v. FROM CASE NO. 2011-CA-431 and 2011-CA-000592
(HARDIN CIRCUIT COURT CASE NO. 05-CI-00800)

TIM DAVIS and
TIM DAVIS & ASSOCIATES, INC.

RESPONDENTS/
CROSS-MOVANTS

REPLY BRIEF ON BEHALF OF RESPONDENTS/CROSS-MOVANTS

Respectfully submitted,

A handwritten signature in black ink, appearing to be "H. G. Poppe", written over a horizontal line.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 26th day of June 2014, a true and correct copy of Respondents/Cross-Movants' Reply Brief was served via U.S. First Class Mail to the following: Matthew W. Breetz, Bethany A. Breetz, Demetrius O. Holloway, Stites & Harbison, 400 West Market Street, 1800 Aegon Center, Louisville, Kentucky 40202; Hardin Circuit Court Clerk, Hardin County Courthouse, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Hon. A. Bailey Taylor, 186 East Wood Trail, Mt. Washington, KY 40047; five copies to Hon. Sam Givens, Jr. Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the original and ten copies Via U.S. Registered Mail to: Susan Stokley Clary, Clerk Kentucky Supreme Court, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415.

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ARGUMENT

I. The Trial Court's Dismissal Of Davis's 2010 Complaint, And Denial Of Davis's CR 59.05 And 60.02 Motions Violate The Supreme Court's Mandate And The Law-of-the-Case Doctrine

After this Court issued its Opinion in 2010, this case should have taken a quite simple course. First, Davis, consistent with the Opinion, needed to ensure the partial assignment of proceeds impediment was removed. Davis complied with this Court's instruction by obtaining an "Agreed Order Severing Assignment Clause and Finalizing Discharge of Settlement Obligations." [Tab 1, R. at 22] [2010 Case Record] Second, once this impediment was removed, the trial court should have allowed Davis to proceed to trial with his claim by altering, amending, or vacating its prior dismissal—or in the alternative, allowing Davis to proceed with the identical complaint filed by Davis. Either one of these courses of action would have complied with this Court's mandate and the law-of-the-case doctrine. However, the trial court felt it had a way out of allowing Davis his day in court and took neither of the appropriate and equitable avenues available to it, instead denying Davis's motion to set aside the dismissals and also dismissing his new complaint.

Denying Davis's motions and dismissing his case was clearly inconsistent with the mandate of this Court. The Court of Appeals felt this Court was quite clear, holding "the Supreme Court's intention is that Davis should be permitted to pursue the first action by showing the assignment no longer exists and he is the real party in interest." [Tab 2 at p. 7].

In fact, this Court in fact, was so explicit and clear in its intent that it seemed to outline what it wanted to happen. It held, "**Davis has not forfeited his claim**" *Id.* at 9

(emphasis added) The Court then instructs, “though Davis has not forfeited his malpractice claim, the current suit, born of the improper assignment, cannot be permitted to continue. Should 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.* at 10 (emphasis added)

By completely ignoring, and in fact taking the opposite course set forth by the Kentucky Supreme Court, the trial court violated the law-of-the-case doctrine. This Court has defined the doctrine as follows.

The doctrine of “the law of the case” is founded upon the policy that there should be an end to litigation, and cases may not be presented by piecemeal. It is a sound policy, and well developed and understood in this jurisdiction. The doctrine, as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error

Sowers v. Coleman, 223 Ky. 633, 4 S.W.2d 731 (1928)

Further, this Court has held, “The doctrine is reserved for situations where the decision of a superior court within the same judicial organization is binding on a subsequent trial court of that judicial organization or upon itself.” *Sherley v. Com.*, 889 S.W.2d 794, 797 (Ky. 1994)

This Court resolved the issue of what should happen to Davis’s claim and set forth the path Davis and the trial court should take. The trial court failed to comply with this Court’s mandate. The Court of Appeals only partially complied with this Court’s mandate.

This Court has held “interpreting court orders differs from that of statutes and contracts only to the extent that instead of construing the intent of the legislature or the intent of the parties, we must determine the intent of the ordering court.” *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006). Further, “where the order is ambiguous and open to interpretation, we will endeavor to construe and effectuate the intent” of the ordering court. *Id.* at 465-66. The intent of the ordering court in this case, this Court, is obvious—Davis was to remove the assignment impediment, which he did, and then pursue the case in his own name, as the real party in interest. Davis complied with his requirements yet the trial court ignored this Court and denied Davis the ability to reassert his claim.

As a result, it is clear the trial court, when it dismissed Davis’s reasserted 2010 Complaint, and when it denied Davis’s motions to alter, amend, or vacate or set aside the Order dismissing his 2005 complaint, violated the clear intent and mandate of this Court and violated the law of the case doctrine.

II. Trial Court Committed Error By Dismissing Davis’s Complaint Based On A Statute Of Limitations Defense

The trial court’s dismissal of Davis’s complaint based on the statute of limitations, and the Court of Appeals’ affirmation of that ruling, does not comport with the stated intent of this Court, which held Davis should be permitted to reassert his claim once the invalid assignment was removed. This Court found that an assignment of a portion of the proceeds of Davis’s legal malpractice suit was against public policy. It held that the assignment could not stand and ordered that once the assignment issue was resolved Davis could PURSUE his legal malpractice lawsuit against Scott.

If an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name. Thus it would follow that Davis can pursue his malpractice claim as the real party in interest, as opposed to simply a nominal plaintiff.

Davis v. Scott, 320 S.W.3d 92-93 (Ky. 2010) [Tab 3]

Davis faithfully complied with the instructions of this Court only to have the trial court dismiss his claims as time barred. Scott would have this Court believe that this was appropriate as further punishment for Davis. Scott repeatedly, and inaccurately, labels the assignment as “illegal” in an attempt to paint Davis as some sort of criminal in the eyes of the Court. However, this Court realized the assignment issue was an ambiguous one, and an issue never previously addressed in Kentucky. This Court, siding with courts across the country, held that even if an assignment is found to be invalid, that does not mean the plaintiff cannot pursue his claim once the assignment impediment has been removed. Specifically, this Court held, “we agree that Davis has not forfeited his claim, [but] we also cannot ignore the fact that the present suit was born of the invalid assignment and is, therefore, tainted in some respect.” *Id.* at 92. The Court held the original trial court order dismissing with prejudice was in error and remanded the case “with directions to dismiss Davis’s complaint without prejudice” so Davis could reassert the claim and pursue it as the real party in interest. *Id.* (emphasis added).

Davis did exactly as this Court instructed. He cleared up any doubt about the assignment being removed and attempted to pursue the claim in his own name (which, to be clear, had always been filed in Davis’s and TD&A’s name alone) only to run headfirst into a trial court that had no intention of hearing this case, and dismissed it based on the statute of limitations.

This Court has held, “Statutes of limitation are designed to bar stale claims arising out of transactions or occurrences which took place in distant past.” *Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. 1971). Additionally, “The primary purpose of any limitations statute is to require timely notification to a party that a claim is being brought against him.” *Revenue Cabinet v. GTE South, Inc.*, 238 S.W.3d 655 (Ky. 2007).

Tim Davis did not and is not asserting a stale claim. He has diligently pursued his legal malpractice claim against John Scott since 2005, even going so far as to take it to the Kentucky Supreme Court, twice. Scott has been on notice of the claim against him since 2005, almost a decade. His attorneys have diligently defended this claim from the Hardin Circuit Court to the Kentucky Supreme Court and back down to the Hardin Circuit Court (and through at least three trial judges). Scott is not being surprised with any new claims or causes of action.

Despite this Court’s clear intent and Opinion, and despite Davis giving the trial court every possible way to adhere to this intent and allow him to pursue his claim with a new complaint, identical to the previous complaint, the trial court dismissed Davis’s claim as time barred. This dismissal was inappropriate, unequitable, and incorrect. Davis should not be punished for adhering to the instructions of the Supreme Court of Kentucky to the letter. As a result, Davis respectfully requests this Court reverse the dismissal of Davis’s complaint as time barred and allow him to pursue the claim he has been diligently pursuing since 2005.

III. Court Of Appeals Correctly Reversed Trial Court’s Denial Of Davis’s CR 59.05 Motion To Alter, Amend Or Vacate

The Court of Appeals correctly reversed the trial court’s denial of Davis’s motion to alter, amend, or vacate the order dismissing his case. The Court of Appeals obviously

felt this was the most appropriate and equitable solution and the one most closely comporting with the clear intent of this Court's 2010 Opinion. Scott argues the Court of Appeals was wrong as Davis's motion does not satisfy the requirements of 59.05 or 60.02. Scott is incorrect.

The Court of Appeals' decision to reverse the denial of Davis's CR 59.05 motion was correct and equitable. This Court's Opinion was issued August 26, 2010. Following issuance of the Opinion, Davis filed a motion with the trial court, on October 18, 2010, asked the trial court to comply with the instructions of this Court and dismiss Davis's claim but also find that he had not forfeited any claim. It further made clear to the trial court Davis would be reasserting his claim once he removed the improper assignment impediment. [Tab 4, R. at 1692-1693; Order at R. 1694] [2010 Case Record]

A hearing was held on November 4, 2010 wherein Davis's counsel informed the trial court that Davis was obtaining an Agreed Order severing the assignment clause of the settlement agreement. Davis's counsel in the hearing stated,

GRM and its lawyer have seen the opinions, your opinion, the opinion of the Court of Appeals and the opinion of the Kentucky Supreme Court and they have agreed to enter, and I've tendered a copy to counsel to -- they have agreed to tender an order, which we've already tendered to federal court, severing the assignment clauses. There's a -- the copy that was tendered yesterday to the court, and uphold the remainder of the settlement agreement and specifically state that Davis has complied with all the obligations of the settlement agreement under the settlement agreement in Tennessee, that the assignment of proceeds is now severed and that Davis can move forward with any action that he has in any other jurisdiction without any constraints imposed by the assignment that previously existed.

[November 4, 2010 Hearing at 9:24:50 – 9:26:00]

However, the trial court denied Davis's motion and subsequently, on November 12, 2010, dismissed Davis's case.

Davis's November 4, 2010 motion and the subsequent hearing is important as it supports his argument that failure to grant Davis's Motion to Alter Amend or Vacate under 59.05 was an abuse of discretion as the trial court knew, before it entered the dismissal, Davis was obtaining and would provide new evidence, previously unavailable, which was necessary to prevent manifest injustice. The trial court knew Davis, who had been yelling from the rooftops that he was the real party in interest, was going to provide concrete evidence that he was the real party in interest, and that he was going to pursue the claim he had been litigating since 2005. Yet despite having this knowledge before the trial court entered the dismissal, despite knowing necessary new evidence was forthcoming which would change the entire standing of the case, the trial court quickly entered the Order of Dismissal, again denying Davis his day in court. The trial court's actions were manifestly unjust. New evidence was available which was necessary to prevent manifest injustice and the trial court knew of it before the dismissal. Further, even if the trial court did not know what Davis was doing, which it did, once the Agreed Order was presented to the trial court it was incumbent on the trial court to reverse its decision to prevent manifest injustice. Granting Plaintiff's CR 59.05 motion was one of two appropriate choices presented to the court. Denying the motion was a clear abuse of discretion.

IV. The Trial Court Abused Its Discretion by Denying Davis's CR 60.02 Motion To Reconsider

The Court of Appeals correctly held the trial court also abused its discretion by denying Davis's motion for relief under Kentucky Civil Rule 60.02. Setting aside the

Order of Dismissal under 60.02 would have complied with the intent of this Court's Opinion, maintained the continuity of this action, eliminated any statute of limitation issue, and allowed the real party in interest to continue with his claim.

The situation here meets the requirements of CR 60.02(e) and (f). CR 60.02(e) allows a court to set aside a judgment if "the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have **prospective application.**" (emphasis added). Civil Rule 60.02(f) provides a judgment or order may be set aside for "any other reason of an extraordinary nature justifying relief."

Here, once Davis brought definitive proof that he was the real party in interest, a position he had maintained for years, it was no longer equitable for the dismissal of his lawsuit, based on the belief he was not the real party in interest, to stand. This Court made clear that Davis had not forfeited his claim, and once he made clear that he was the real party in interest he could pursue the claim to trial. It held, even citing secondary sources, that

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."

Davis at 92.

The trial court knew this Court held that Davis could pursue his claim once he provided evidence he was the real party in interest, it knew Davis was obtaining that evidence and would provide it to the trial court, yet it determined that Davis's claim should be denied and he should not be permitted to pursue his claim. This is inequitable and improper and the trial court abused its discretion, ignored this Court's mandate, and violated the law of the case doctrine by making and adhering to its ruling.

CONCLUSION

Davis, the real party in interest, has diligently pursued his claim against Scott since 2005. He has now fought for a trial from the trial court to the Supreme Court of Kentucky twice. Davis followed the instructions of this Court's 2010 Opinion to the letter, strictly adhered to this Court's mandate, and was again denied a trial. Now, he is back before this Court seeking only the opportunity to try his case in front of a jury. In 2010 this Court stated that Davis had not forfeited his claim and could pursue it once he showed he was the real party in interest. Davis has done that by providing an Agreed Order stating that he alone will receive any proceeds from this case. Davis respectfully requests this Court affirm the Court of Appeals' reversal of the trial court's denial of Davis's motion to alter, amend or vacate the Order of Dismissal of Davis's 2005 Complaint. In the alternative, Davis respectfully requests this Court reverse dismissal of Davis's 2010 Complaint.

*As to Respondents/
Cross-Movants Reply Brief*

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