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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001971-MR

SHIRLEY A. CUNNINGHAM, ET AL. APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE WILLIAM WEHR, JUDGE
ACTION NO. 05-CI-00436

MILDRED ABBOTT, ET AL. APPELLEES

AND
NO. 2007-CA-001981-MR

MELBOURNE[1] MILLS, JR. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 05-CI-00436

MILDRED ABBOTT, ET AL. APPELLEES

[1] We note discrepancies in the notice of appeal regarding the spelling of Mills's first name, We are aware the correct spelling of his first name is Melbourne and have chosen to use that spelling in this opinion.

AND
NO. 2007-CA-002173-MR

CHARLOTTE BAKER, ET AL. APPELLANTS

v. CROSS-APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 05-CI-00436

STANLEY M. CHESLEY, ET AL. APPELLEES

AND
NO. 2007-CA-2174-MR

MILDRED ABBOTT, ET AL. CROSS-APPELLANTS

v. CROSS-APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 05-CI-00436

STANLEY M. CHESLEY, ET AL. CROSS-APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

NICKELL, JUDGE:

BACKGROUND

THE *GUARD* ACTION

This appeal flows from the mediated settlement of 431 claims against American Home Products (AHP), the manufacturer of fenfluramine and phentermine, commonly referred to as "Fen-Phen," a drug combination used for weight loss that was ultimately removed from the market in the 1990's after numerous users suffered heart damage. As a result, class action lawsuits were filed across the nation. At least one such action was filed in Kentucky, *Darla S. Guard, et al*. (or *Jonetta Moore, et al.) vs. American Home Products Company, Inc. et al*., Boone Circuit Court Case No. 98-CI-795.

The 431 plaintiffs in the *Guard* action were represented by one of three attorneys, Shirley A. Cunningham, Jr., William J. Gallion, or Melbourne Mills, Jr. (collectively referred to as GMC).[2] Their representation was based upon contingency fee agreements allowing reasonable attorney fees not to exceed between thirty and thirty-three and one-third percent of the recovery. A fourth attorney, Stanley M. Chesley, negotiated a $200,000,000.00 settlement on behalf of the class in May of 2001. Chesley did not have a contingency fee agreement with any of the 431 plaintiffs, but he did have a fee-splitting agreement with GMC whereby he was to receive twenty-one percent of the gross fees and GMC was to

[2] As a result of their representation of several plaintiffs in the *Guard* action, Cunningham and Gallion were charged with twenty-two violations of our Supreme Court Rules. Both men moved the Supreme Court of Kentucky to allow them to withdraw their membership in the Kentucky Bar Association under terms of permanent disbarment. By opinion and order entered October 23, 2008, the Court granted their motions, disbarred them permanently, and terminated all disciplinary proceedings against them. *Gallion v. Kentucky Bar Ass'n*, 266 S.W.3d 802 (Ky. 2008); *Cunningham v. Kentucky Bar Ass'n*, 266 S.W.3d 808 (Ky. 2008). As a result of Mills's participation, he was permanently disbarred by the Supreme Court of Kentucky. *Kentucky Bar Ass'n. v. Mills,* --- S.W.3d ---, 2010 WL 2017103 (Ky. 2010).

receive seventy-four percent of the gross fees. A fifth attorney, Richard D. Lawrence, received the remaining five percent under the fee-splitting agreement.

One requirement of the settlement was that the class be decertified which then-Judge Joseph F. Bamberger[3] did by order entered on May 16, 2001. That same order dismissed the action but authorized the parties to continue filing motions with the court pertaining to enforcement of the settlement. Bamberger entered orders in the case through December 30, 2003.

Another clause in the settlement agreement stated in relevant part:

> 15. The Settling Attorneys will maintain in absolute confidence the terms of this Letter Agreement and will not directly or indirectly communicate the Settlement Amounts to any person other than the Settling Claimants.

GMC withheld the terms of the ultimate settlement agreement from the plaintiffs (the settling claimants) and did not reveal to them how their individual payouts were calculated. GMC threatened the plaintiffs with jailtime or forfeiture of their recovery if they discussed receiving a settlement with anyone.

Pursuant to their fee agreements with the plaintiffs, as alleged by plaintiffs in their sixth amended complaint, GMC was to receive $60,798,783.14, of which Chesley's portion was to be $12,767,744.46. However, GMC paid itself and others $126,793,551.22, well over half of the $200,000,000.00 settlement fund.

[3] Bamberger was publicly reprimanded by the Judicial Conduct Commission for his handling of the *Guard* case and resigned rather than face removal from the bench. As a result, he will be referred to simply as "Bamberger" throughout the remainder of this opinion.

Once the class was decertified, GMC met with their individual clients and began dispersing checks to the 431 plaintiffs, all of whom signed a release and a statement of satisfaction with the amount of compensation received. A significant amount of money was withheld by GMC in the event other claimants came forward. About nine months later, Bamberger entered an order authorizing a second round of checks, equal to fifty percent of the residue, to be paid to the plaintiffs. Again, each recipient signed a release and a statement of satisfaction. The remaining fifty percent of the residue was to be retained by GMC for "indemnification or contingent liabilities." GMC never told their clients the class had been decertified,[4] the total amount of the settlement, how each plaintiff's recovery had been calculated, nor the full amount of fees and expenses GMC was receiving. The clients did receive a letter informing them that if funds remained after all disbursements had been made from the gross settlement, the court was considering donating the remaining funds to charity.

$20,000,000.00 was ultimately set aside by court order to establish a non-profit corporation named The Kentucky Fund for Healthy Living, Inc. (KFHL)[5] with GMC being named as directors. The clients were not told a charitable organization was being created with the remaining funds nor the amount of funds being used for this purpose.

[4] A requirement of Kentucky Rules of Civil Procedure (CR) 23.05.

[5] On January 23, 2003, KFHL was established as a non-profit organization under Kentucky law by filing Articles of Incorporation with the Office of the Kentucky Secretary of State.

Despite many opportunities to submit proof of expenses, Cunningham and Gallion never did. Mills tendered expenses including salaries, daily office operation and maintenance, advertising, rent, utilities, phones, supplies, a legal publication and postage. Mills also claimed a lump sum of $1,303,831.81 for services from Business Securities Solutions/Litigation Consultant, but submitted no invoice or detailed explanation for said services and no proof it related exclusively to the *Guard* litigation. While the record does not contain an accounting of attorney's fees and expenses charged to the plaintiffs, nor an accounting of settlement funds and dispersals, the order Bamberger entered on June 6, 2002, states that the court approved an accounting of settlement proceeds, including attorney's fees and expenses. In an order entered on July 31, 2002, Bamberger again stated he had received an accounting of funds and had been "advised of the consent of the individual plaintiffs who received settlements for use of the remaining funds for charitable purposes." Contrary to this order, the plaintiffs assert they were never told a charity was being created to receive and disburse the excess funds and they were misled into believing the amount given to charity was "miniscule."

THE *ABBOTT* ACTION

The appeal currently under review flows from, but is independent of, the *Guard* action in that the defendants are different, the issues are different, and the orders being appealed from were not entered in the *Guard* action. *Guard* was a products liability action against a drug manufacturer whereas the current litigation

focuses on the conduct, and alleged misconduct, of the attorneys who represented the settling claimants in the *Guard* action. The current allegations were not brought in the settlement of the plaintiffs' claims against AHP and there has been no attempt to re-open the *Guard* action to set aside orders entered in that litigation. The goal of the *Abbott* action is to retrieve misallocated monies and to receive damages for breaches of professional duty that may amount to legal malpractice.

At GMC's request, on December 30, 2003, Bamberger entered an order relinquishing jurisdiction over KFHL. One year later, on December 30, 2004, suit was filed under CR 23 in Fayette County[6] by several plaintiffs from the *Guard* action (collectively referred to as Abbott)[7] against GMC, Chesley and KFHL. In count one of the amended complaint, Abbott alleged breach of fiduciary duty based on GMC and Chesley putting "themselves in a unique position of trust and confidence with" Abbott and Abbott having confidence in GMC and Chesley "to faithfully and honestly perform their duties," thereby creating a fiduciary relationship. Abbott further alleged GMC and Chesley:

> have failed to disclose material information related to [Abbott's] settlement and have refused to provide other basic information to which they are entitled, including

[6] We note that a substantially similar matter was originally filed in Woodford Circuit Court. After discovering an error in choosing that venue, the plaintiffs filed a motion to change the venue to Fayette County. However, the Woodford Circuit Court ordered the matter transferred to the Boone Circuit Court. Thereafter, the plaintiffs voluntarily dismissed the action pursuant to CR 41.01. Following the dismissal of that complaint, a new action was filed in Fayette Circuit Court alleging many of the same claims, albeit with a new and expanded group of plaintiffs. This action was ultimately transferred to Boone Circuit Court.

[7] Mildred Abbott, et al. and Charlotte Baker, et al. are both represented by the same counsel. Baker is a group of fifteen plaintiffs who were omitted from the notice of appeal filed by GMC. By order of this Court entered July 7, 2008, Case Nos. 2007-CA-002173 and 2007-CA-002174 were ordered consolidated. Both Baker and Abbott shall be referred to as "Abbott" for purposes of this opinion.

> copies of settlement agreements, information related to expenses deducted from settlement funds and information related to settlement funds diverted into a corporation established, owned and controlled by [GMC and Chesley].

Count two of the amended complaint alleged fraudulent misrepresentation against GMC and Chesley based upon claims that they:

> themselves or through their agents intentionally misrepresented or failed to disclose material facts regarding the amount of settlement funds set aside for purported charitable contributions in that [Abbott was] either never told that settlement funds were set aside or were expressly or implicitly told that only a small amount of funds was going to be donated to charity when, in truth, millions of dollars were set aside and transferred to a corporation owned and operated by [GMC and Chesley.] [GMC and Chesley] owed a duty as fiduciaries to give full and complete disclosure to [Abbott] and to refrain from misrepresenting or failing to disclose material information regarding the settlement funds.
>
> 142. [Abbott] relied on the material misrepresentations of [GMC and Chesley] and had they known that all settlement funds had not been distributed they would have acted differently with respect to the settlement. [GMC and Chesley's] failure to disclose to [Abbott] the true amount of settlement funds set aside to fund a corporation established by them was intentional, misleading and constitutes fraudulent and deceitful conduct for which [Abbott is] entitled to recover compensatory and punitive damages in excess of the minimum jurisdictional limits of this Court.

Counts three, four and five of the amended complaint sought a declaratory judgment for GMC and Chesley's "breach of their contractual, ethical, fiduciary and professional duties"; an accounting of all settlement funds received by GMC and Chesley, including those transferred to KFHL; disgorgement of any

and all fees earned; and imposition of a constructive trust on all settlement funds currently held by or under the control of the defendants, specifically including those funds held by KFHL. Abbott did *not* ask that Bamberger's orders in the *Guard* action be rescinded or set aside.

GMC successfully moved to have the *Abbott* case transferred to Boone County where the case was ultimately assigned to Judge William J. Wehr as a special judge. Two years later, in preparation for trial, Abbott unsuccessfully moved to have the case transferred back to Fayette County.

GMC, Chesley and KFHL all moved for summary judgment prior to answering the complaint arguing there were no genuine issues of material fact in dispute, the complaint was untimely because the one-year statute of limitations arising from the rendering of professional services to others under KRS[8] 413.245 had expired, the settling claimants had been adequately compensated, and the $20,000,000.00 placed in KFHL was simply "excess funds." Abbott filed a consolidated response to all of the summary judgment motions arguing it had started requesting copies of sealed orders in the *Guard* action and disclosure of other relevant documents as early as October of 2004 but nothing had been forthcoming. Abbott further argued it had sufficiently pled its claims to withstand a motion for summary judgment and was entitled to a jury trial.

As for the applicable statute of limitations, Abbott argued it was either five years from the date of discovery of the fraud under KRS 413.120(12) and KRS

[8] Kentucky Revised Statutes.

413.130(3), or five years under KRS 413.120(6) on the theory of breach of fiduciary duty. Even if the one year period for legal malpractice applied, Abbott contended the complaint was timely filed because Bamberger's last order, relinquishing control over KFHL, was entered on December 30, 2003, and the complaint was filed one year later, on December 30, 2004. Furthermore, Abbott argued the "continuous representation rule" tolls the running of any statute of limitations so long as the attorney continues to represent the client in the underlying matter, and GMC and Chesley still represented the 431 plaintiffs on December 30, 2003. By order entered on July 1, 2005, all defense motions for summary judgment were denied.

On December 6, 2005, following receipt of the Settlement Agreement, Abbott moved for partial summary judgment against Chesley and GMC on its allegations of breach of fiduciary duty, declaratory judgment, disgorgement and constructive trust. Abbott sought to have Chesley and GMC made:

> jointly and severally liable to [Abbott] for all settlement funds withheld from [Abbott], based upon settlement amounts listed in the Settlement Agreement and the payments actually made to [Abbott], plus interest from the date of the first distribution of settlement funds, disgorgement of [GMC and Chesley's] fees, and [recognition] that any and all settlement proceeds that [GMC and Chesley] withheld from their clients are subject to a constructive trust in favor of [Abbott].

If granted, the only remaining issues would be the fraudulent misrepresentation allegation and Abbott's claim for punitive damages under the breach of fiduciary duty claim.

In the same motion, Abbott moved for partial summary judgment against KFHL on its requests for declaratory judgment and constructive trust. Abbott sought "[a] judgment declaring [Abbott is the rightful owner] of all settlement proceeds held by the [KFHL]." Coupled with the request for partial summary judgment was a request for dismissal of a Petition for Declaration of Rights[9] filed by KFHL.

The same five orders entered by Judge Wehr are challenged on appeal by all parties. The first order was entered on March 8, 2006,[10] to resolve Abbott's motions for partial summary judgment against GMC and KFHL. Based upon GMC's fee contracts and a schedule of deposits and disbursements, the court found GMC had breached its fiduciary duty to Abbott. The court's rationale was as follows:

> Defendant Gallion had fee contracts with his client (sic) calling for an attorney fee of thirty-three (33%) percent and an agreement to make no settlement without the consent of the claimant. Defendant Cunningham had a fee contract for thirty-three and one-third (33 1/3%) percent and likewise agreed to make no settlement without the consent of his clients. Defendant Mills had an agreement with his clients that attorney's fees shall be set by the Court, but shall not be more than thirty (30%) percent of client's net recovery. Although these three defendants argue that they operated as a consortium in the handling of matters in this case, they still are bound by the individual fee contracts of the others. Defendant Chesley was to receive a percentage of the fees obtained by these three Defendants, not a percentage in addition

[9] The Petition, dealing with whether KFHL should continue in existence, was treated by Judge Wehr as a counterclaim pursuant to an order entered on May 2, 2005. The motion to dismiss the Petition was denied.

[10] Due to the need for ongoing discovery, this order did not resolve any issue regarding Chesley.

thereto. Instead, according to their own exhibit, which they identified as Attachment "6", they admitted paying themselves over more than Twenty Million Dollars ($20,000,000.00) each, the same as to Defendant Chesley, millions to other lawyers and close to Three Million Dollars ($3,000,000.00) to non-lawyers for a subtotal of over One Hundred and Six Million Dollars ($106,000,000.00) Dollars (sic) out of Two Hundred Million Dollars ($200,000,000.00) in a category called "Subtotal for Attorney Fees and Other Costs". Their justification for all of this is a blanket Court Order (entered by a now reprimanded presiding judge) approving their expenditures which does not afford them the protection they desire, for it does not identify either a percentage or a dollar amount which they were allowed to charge. Furthermore, since contingency fees cannot be shared with non-lawyers, there is no explanation as [to] how such large sums of money were arrived at in expenditures to such individuals. This same document shows that these three defendants accepted directors' fees of Eighty-Five Thousand Six Hundred Dollars ($85,600.00) each with another One Hundred and Twenty Thousand Dollars ($120,000.00) disbursed to a non-defendant director of The Kentucky Fund for Healthy Living, Inc.

As argued by Plaintiffs' counsel, simple arithmetic shows that the above subtotal for attorney fees and other costs yields a figure far in excess of any contracted for contingent attorneys' fees in this case. The only plausible argument made by these three Defendants as to why this simple mathematical approach might be off somewhat has to do with the side letter agreement of May 29, 2001 (sic) as part of this Two Hundred Million Dollar ($200,000,000.00) settlement. Under that side letter agreement, Seven Million, Five Hundred Thousand Dollars ($7,500,000.00) was set aside according to the documents produced in discovery, that money sat for a year with no claims being made and during a hearing on June 27, 2002, the Court did authorize the attorneys to just keep it. Earlier that month, the Court noted an absence of any objection by any individual claimant as to how much attorney fees were being taken by these individuals. But it is now clear that no notice of fees

being requested or taken in excess of the fee contracts were ever disclosed to any of their clients. Likewise, it was represented to the Court during the June 27, 2002, hearing regarding that Seven Million Five Hundred Thousand Dollars ($7,500,000.00) that all clients had or would agree to the balance of funds going to charity. It is now clear from the paper discovery produced that same was not true, and none of the clients were advised of the magnitude of the funds being transferred.

These three Defendants argue that all of these issues could have and should have been raised in the underlying tort action, but clearly that was impossible since all of the above was never disclosed to their clients. They argue that at first this was a class action with different guidelines to be followed, but they were all part of the mediation settlement agreement where this case reverted back to individual claims after the class action was decertified. Likewise, an argument has been made that special rules might apply to mass tort litigation which might be applicable herein, but again these three Defendants are bound by the fee contracts they themselves executed. To get the vague Order of Approval from the Court that did not spell out percentages or amounts, they represented that all proceeds were handled in accordance with the intention of the parties. In reality they were passing out money to themselves and others like it was theirs (sic) to do with as they wished.

Via paper discovery and documents found under seal or in the judge's office in Boone County, it is now clear that it was not true that none of the Plaintiffs' (sic) objected to the amounts they were receiving. There was no disclosure of any settlement details to the clients. There was no agreement by the Plaintiffs to fund a charitable corporation in the amount of Twenty Million Dollars ($20,000,000.00) and have these attorney defendants continue to make money from that fund. It is not true that excess dollars were used to pay numerous claims of various constituencies as represented by them.

As to The Kentucky Fund for Healthy Living, Inc., that corporation was created in January of 2003, and until

September of 2004, there were no grants. However, the directors were paying themselves over Twenty-Three Thousand Dollars ($23,000.00) per month in either fees or expenses. At least twice during their meetings in 2003, they were reminded how essential it was to keep financial information in the corporation private, and that it should be deemed "highly sensitive and confidential". Since the funds used to create this corporation came from funds as a direct result of the Defendants breach of their fiduciary duty, the relief of a declaratory judgment and constructive trust is applicable both to these defendants and the Fund they created. Other than CPA expenses necessary to seek an extension of time for their approving grants and filing other reports in the event of an appeal hearing, no further expenditures of any type shall be made. One need look no further than the Fund's May 2003 minutes where the Directors agreed to treat themselves to a trip for a meeting and retreat in Pebble Beach, CA, to see why the Court's earlier Order entered in this record was appropriate.

In conclusion, the uncontroverted facts show that in rounded figures the Plaintiffs received Seventy Four Million Dollars ($74,000,000) from this litigation, lawyers and others received One Hundred Six Million Dollars ($106,000,000) with some of that going to expenses, and the other Twenty Million Dollars ($20,000,000) deposited into a "charitable fund". A Court Order based on false representations does not afford the Fund any protection. A review of the financial data for the first two years showing that the Directors paid themselves more than they ever paid out in grants (January 2003 through January 2005) negates any argument that the Fund should be allowed to continue unless, as is argued by Plaintiffs (sic) counsel, the Fund wants to do so without any dollars derived from the underlying Fen-Phen litigation.

Summary judgment is governed by *C.R. 56.03* which states that judgment shall be entered from the moving party if the ". . . pleadings, depositions, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* In *Steelvest, Inc. v. Scansteel Service*

Center, Inc., 807 S.W.2d 476 (Ky[.] 1991), the Kentucky Supreme Court specifically rejected the federal standard for summary judgment and adopted instead the standard set forth in *Paintsville Hospital Company v. Rose*, 683 S.W.2d 255, 256 (Ky[.] 1985):

> "We adhere to the principle that summary judgment is to be cautiously applied and should not be used as a substitute for trial. As declared in Paintsville Hospital (sic), it should only be used 'to terminate litigation when, as a matter [of] law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.' It is vital that we not sever litigants from their right of trial, if they do in fact have valid issues to try, just for the sake of efficiency and expediency."

Steelvest v. Scansteel, 807 S.W.2d 483.

"The Kentucky Supreme Court has held that the word 'impossible' as set forth in the standard for summary judgment, is meant to be 'used in a practical sense, not in an absolute sense'." *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992); *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724 (Ky. 1999). The trial court must view the evidence in the light most favorable to the non-moving party, and summary judgment should be granted only if it appears impossible that the moving party will be able to produce evidence at trial warranting a judgment in his favor. The trial court should not decide any issues of fact but should look at the evidence in the record to discover if a real issue exists. *Id*. As discussed herein, it does not, as to these three defendants, nor through them, The Kentucky Fund for Healthy Living, Inc.

Accordingly, Plaintiffs' Motion for Partial Summary Judgment as to Count One (Breach of Fiduciary Duty) against Defendants Cunningham/Gallion/Mills is sustained. By operation of

> law, that holding necessitates sustaining as well Plaintiffs' Motion for Declaratory Judgment and Constructive Trust as to both these three Defendants and The Kentucky Fund for Healthy Living, Inc. The Court is of the opinion that the Motion for Partial Summary Judgment under Count Five (Disgorgement) is not a matter for summary judgment disposition.

The next order appealed was entered on April 4, 2007. It denied a motion by Mills to vacate the partial summary judgment awarded to Abbott on March 8, 2006, because the fees received by GMC were not supported by a "vague" court order "obtained without disclosing fee contract information[.]" It also denied a motion by Chesley to reconsider the order denying his motion to dismiss and denied Abbott's motion for partial summary judgment against Chesley because of a factual dispute. It overruled Abbott's motion for joint and several liability of GMC, but allowed the issue of whether a *Steelvest* exception applied to be revisited in the future. It partially granted Abbott's motion for compensatory damages because GMC did not reveal their contingency fee contracts to Bamberger and stated that once legitimate expenses are calculated, "each Defendant will be ordered to [pay] into the settlement fund as part of the previously entered partial summary judgment[.]" It denied Abbott's motion for an order of disgorgement/fee forfeiture until a jury could decide factual disputes. Finally, it granted Abbott's motion to compel the surrender of Chesley's telephone records.

The third order being appealed was entered on August 1, 2007. This order awarded Abbott:

> $42 million dollars as a baseline compensatory damage award. Prejudgment interest is awarded at the legal rate of interest of 8%. This amount was arrived at by rounding down to 64 million the overpaid amounts claimed by [Abbott], and then deducting a rounded up figure of 20.5 million used to fund the [KFHL] and another 1.5 million as rounded up for expenses claimed by Defendant Mills.

The fourth order being appealed was entered on August 27, 2007. It denied motions to alter, amend or vacate filed by Abbott and GMC and made final and appealable the order entered on March 8, 2006, awarding partial summary judgment to Abbott and overruling Abbott's motion for a change of venue. The appeals of GMC and the cross-appeal of Abbott followed.

The final order being appealed was entered on September 24, 2007. It denied Gallion and Cunningham's motion to vacate the order of August 27, 2007, which Mills joined. GMC argued there were genuine issues of material fact about whether they had breached their fiduciary duties toward Abbott and that Bamberger was "overtly aware" of their contracts with their clients when he approved their taking of excess funds. The court explained:

> On the record in Boone Circuit Court on April 23, 2007, Ms. Meade-McKenzie was questioned about her statement in pleadings that there were "repeated assertions" in the file to this same effect. She was asked to identify where they were and give even one example. She asked for additional time during which she stated that she would be happy to supplement the record, but has never done so. She then stated that two examples were the specific orders issued by Judge Bamberger in the Swiger and Toler Orders of June 20, 2002. She said then, and again now, that those Orders make specific reference to the contingency fee contracts. They do not. Furthermore, and contrary to counsel's argument, it <u>does</u>

matter. The class had been decertified, Judge Bamberger was not made aware of the fee contracts, and the Plaintiffs were not made aware of how much the case was settled for nor the amounts that their lawyers were taking in fees or dispersing to others.

Second, the Court's Order of August 27, 2007, is not facially invalid nor an attempt to compensate persons not parties to this litigation. As explained on the record, this is why the Court accepted the Plaintiffs' argument of a base line judgment award and rounded every figure down in its analysis. The only clients considered were those who have been made part of this litigation and whose cases were settled as part of the underlying Fen-Phen litigation in Boone County, not others whom Ms. Ford and Mr. Ramsey now represent.

As to the partial summary judgment previously entered and now being finalized with a base line compensatory damage amount, the movants express dismay that since they have filed an affidavit a partial summary judgment can never be entered. However, there is nothing in the record to demonstrate that the affiants attempted to be relied upon knew the true undisputed facts of this case. An affidavit signed by someone based only on the information you want them to know does not provide the "cover" Defendants seek from a partial summary judgement (sic). Furthermore, they are totally incorrect when they argue that a partial summary judgment is inappropriate unless the entire matter can be disposed of in that fashion. Here, summary judgment on the breach of fiduciary duty claim was called for based upon the undisputed facts adduced through discovery, while the claims for disgorgement, etc., were not. Clearly some counts in a lawsuit can be disposed of by summary judgment while others remain for trial as here, and the civil rules do not preclude such handling. It follows, also, that if a partial summary judgment is called for and the minimum damages are clear then a damage award also is appropriate.

Since the movants also have incorporated by reference other arguments made earlier in their motion to vacate the August 1, 2007, Order, two arguments made

> therein need to be addressed in this Order as well. The movants claim there is no factual basis for a $42 million base line compensatory damage award, and that already was addressed in open Court on the record on August 18, 2007, and in the Court's Orders of August 1, 2007, and August 27, 2007. Movants then argue that a lot of this money is now in the hands of others whom Plaintiffs chose not to pursue. They are correct. The $7 million plus clearly overpaid to Defendant Chesley does constitute part of that $42 million. Any other attorneys or individuals who are not parties to this action but who have been given significant dollars will have to be pursued by the movants, not the Plaintiffs. Defendants, Gallion, Cunningham, and Mills, were the ones who were in complete control of this $200 million, who never disclosed to their clients the true handling of these dollars, and who treated this money as their own long before any alleged Court permission was sought.
>
> The Motion to Vacate the Court's Order of August 27, 2007, is OVERRULED. There being no just cause for delay, this Order shall constitute a final and appealable Order.

LEGAL ANALYSIS

The arguments presented on appeal by GMC are as follows: (1) Was the independent action filed by Abbott an impermissible collateral attack on orders entered by Bamberger in the *Guard* action? 2) Did the trial court err in denying GMC's motion for summary judgment? 3) Did the trial court err in granting partial summary judgment to Abbott in light of disputed material facts?

The arguments presented by Abbott on cross-appeal are as follows: (1) Did the trial court err in denying Abbott's motion to transfer venue from Boone County back to Fayette County for purposes of trial? (2) Did the trial court err in denying Abbott a partial summary judgment regarding Chesley? (3) Should the

trial court have found Mills lacked standing to appeal dismissal of KFHL's counterclaim and imposition of a constructive trust on its funds? (4) Whether the trial court erred in awarding Mills unsubstantiated expenses?

Independent Action

GMC's first argument is that Abbott's filing of an independent action is an impermissible collateral attack on valid orders entered by Bamberger in the *Guard* action even though they have not specified any such order that has been attacked.[11] They contend that to garner review of GMC's handling of the Fen-Phen settlement, Abbott should have moved to alter, amend or vacate the judgment in the *Guard* action under CR 59.05; moved to set aside the *Guard* judgment under CR 60.02; appealed the *Guard* judgment under CR 73; or entered an appearance in the *Guard* action through separate counsel under CR 23.03(2)(c). Having taken none of these steps, GMC argues the filing of an independent action was forbidden because the Boone Circuit Court had both personal and subject matter jurisdiction over the *Guard* action and therefore its judgment and orders are presumed valid absent clear and convincing evidence to the contrary. *Burchell v. Hammons,* 289 S.W.2d 737, 739 (Ky. 1956); *Mitchell Mill Remnant Corp. v. Long,* 3 S.W.2d 639

[11] Because GMC's appellate briefs do not state with specificity how and where in the record this issue was preserved, they do not conform to CR 76.12(c)(v). The same is true of briefs filed by the other parties. When a brief does not comport with the requirements of CR 76.12(c)(v), we are authorized to strike the brief entirely. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990). Alternatively, we may review the allegations of error for manifest injustice rather than considering them on the merits. *Id.;* CR 61.02.

Because no party has scrupulously heeded the rule, and we will not sanction one party without sanctioning all, we choose to review the allegation on the merits. However, we will not hesitate to impose sanctions in the future.

(Ky. 1928); *Luckett v. Gwathmey,* 16 Ky. 121 (1811). Finally, they argue it is not the role of one circuit court to review the orders of another circuit court. *Lowe v. Taylor,* 29 S.W.2d 598, 599 (Ky. App. 1930).

Abbott counters with the argument that it had no knowledge of GMC and Chesley's misconduct until well after the time to challenge the *Guard* action had expired.[12] Furthermore, there has been no request to set aside any orders in the *Guard* action and different defendants are being sued in the *Abbott* action. Abbott points out that GMC gave it no notice of the true amount of fees it was taking, or that it had asked Bamberger to approve fees in excess of the contingent fee contracts it had executed. Moreover, GMC made no disclosures to Abbott regarding settlement details, creation of KFHL, or actual dollar amounts it intended to donate to "charity." Abbott argues that the case before us is not against the *Guard* defendants, but instead challenges the distribution of settlement funds by GMC. These matters, it says, were not addressed in Bamberger's orders, and hence, this is not an impermissible collateral attack brought under the guise of an independent action.

This issue presents a matter of law. Therefore, our review is *de novo*. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381 (Ky. App. 2002); *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829 (Ky. App.

[12] Under CR 60.02(d), a motion for relief due to fraud must be filed within "a reasonable time." While Abbott could still file such a motion upon a showing of reasonableness, such filing is not a prerequisite to filing an independent action. CR 60.03 specifies, "Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds." Therefore, Abbott's choice not to file a CR 60.02 motion was not fatal.

2000). After careful consideration, we deem Abbott's argument to be both compelling and convincing. For the following reasons we reject GMC's argument.

First, because the record was sealed, and requests for basic documents, such as the settlement agreement, went unanswered, Abbott, through no fault of its own, had no opportunity to learn of GMC's handling of the settlement in time to take the actions GMC suggests. Upon discovering that GMC had made unauthorized use and disbursements of settlement funds, it was too late for Abbott to appeal those orders, or seek to have them altered, amended or vacated. We will not allow GMC to benefit from its own dilatory and allegedly fraudulent tactics.

Second, the *Guard* action was a products liability case against AHP whereas the *Abbott* action is against GMC and Chesley for conduct amounting to legal malpractice. The orders Abbott challenges were directive in nature, instructing the attorneys to act accordingly as agents. Bamberger's orders approved the dispersal of the settlement funds and are necessarily involved in determining whether GMC and Chesley misappropriated funds in the breach of their fiduciary duties. As such, the orders themselves may be considered evidence of any professional misconduct. This is an independent action that is not the result of a modification or vacation of Bamberger's orders in the *Guard* action.

Third, the failure of GMC to disclose settlement details, the amount of attorney's fees, and information regarding the creation of KFHL, prevented Abbott from appearing or presenting its concerns in opposition to Bamberger's orders.

Because Abbott remained unaware of the *Guard* orders, and was misinformed on many of the issues therein, it had no reason to believe they should have any concerns regarding attorney misconduct or court orders. Those claimants who were diligent in their efforts to follow the settlement and the resulting litigation were refused the necessary information to discover the extent of GMC's acts. GMC and those commissioned by it made Abbott believe it was getting the best deal from the settlement and that its best interests were being protected. We can infer, then, that Abbott was "lulled, gulled, or seduced" into inactivity during the course of the *Guard* litigation and was unable to discover GMC and Chesley's misdeeds until after time had passed to file an appeal. *Grubb v. Wurtland Water Dist.*, 384 S.W.2d 321, 323 (Ky. 1964). Although Abbott received a settlement from the manufacturer and distributors of Fen-Phen, in a sense it was still defeated because it did not receive as great a settlement as it might have received had GMC and Chesley only paid itself the amounts for which it had contracted.

Fourth, independent actions are an effective method of obtaining relief from a judgment or order once time for an appeal has expired. CR 60.03 offers equitable relief for parties by means of an independent action, so long as such relief was not previously denied under CR 60.02. Under CR 60.03, an independent action must satisfy three requirements: (1) the movant must have no other available or adequate remedy; (2) the movant must not have created the situation for which he seeks equitable relief, by his own fault, neglect, or carelessness; and (3) the equitable relief must be justified based on a recognized ground such as

fraud, accident, or mistake. *Bowling v. Commonwealth*, 163 S.W.3d 361, 365 (Ky. 2005). Based upon our review of the facts, the filing of an independent action pursuant to CR 60.03 was appropriate.

As noted in Judge Wehr's orders, GMC knew and controlled the details of the settlement. Because it did not apprise its clients of those details, the clients fully relied upon GMC to protect their interests. GMC did not. Abbott had no reason to question Bamberger's orders or ask that they be rescinded—indeed, Bamberger's orders establish GMC's conflict of interest and pursuit of its own self-interest over that of its clients. For the foregoing reasons, we are convinced an independent action was properly filed to review GMC's alleged misconduct.

Grant of Partial Summary Judgment to Abbott

GMC's next argument is that the trial court erred in awarding partial summary judgment to Abbott when genuine issues of material fact were in dispute. We agree and for that reason reverse and remand for proceedings consistent with this opinion.

We begin with an explanation of our standard of review as expressed in *York v. Petzl America, Inc*., --- S.W.3d ---, 2010 WL 3717266, (Ky. App. 2010):

> When a trial court grants a motion for summary judgment, the relevant standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). The party opposing summary judgment must present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis*,

> 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must "view the evidence in the light most favorable to the nonmoving party[.]" *Id*. (quoting *Steelvest*, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, "an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436.

In response to Abbott's motion for partial summary judgment, the seventeen-page affidavit of Hon. Kenneth R. Feinberg, a practicing attorney and an expert in mass tort litigation, was submitted. Feinberg's affidavit concluded the settlement entered in the *Guard* action was "reasonable" and the "side letter" agreement supported the conclusion that the $200,000,000.00 paid by AHP was not intended to compensate only the 431 plaintiffs, but was also intended "to provide for other payments, including potential claims or (sic) other Phen-Fen (sic) users, subrogation claim holders, and other unforeseen claims." Feinberg went on to state:

> There was nothing out of the ordinary in the Boone Circuit Court approving the use of approximately twenty million dollars from *Guard* for *cy pres* purposes or in approving the formation of a charitable foundation, the Kentucky Fund for Healthy Living, Inc. (Kentucky Fund), to administer the *cy pres* funds. I am aware that certain of the plaintiffs' attorneys were appointed by the Court to serve as directors of the Kentucky Fund. In my opinion, there was no conflict of interest or impropriety whatever in those appointments. The plaintiffs' attorneys were in an excellent position to understand the purposes of the fund and to carry out the intent of the Court that approved the establishment of the charitable foundation.
>
> . . .

> In my opinion, the case was handled properly and ethically. I have seen nothing that credibly suggests any misconduct by the attorneys or any inappropriate action by the judge who presided over the case. It appears that the instant action against the plaintiffs' attorneys in *Guard* is based on nothing more than misinformation or lack of understanding of the procedures involved in class action or common fund or aggregate mass tort settlement.

Feinberg's affidavit was sufficient to create genuine issues of material fact such as: whether the entire settlement, minus fees and expenses, was to be split between the 431 settling claimants; whether the settling complainants were fairly and adequately compensated; whether KFHL was funded with money that should have been distributed to the settling claimants or was funded with excess funds for which the plaintiff's consent to its ultimate use was not required; and, whether GMC and Chesley were obligated to indemnify AHP for additional claimants who might come forward after the settlement had been dispersed. The foregoing questions of fact justified going forward with trial. *Steelvest,* 807 S.W.2d at 480-82; *See also, Chalothorn v. Meade,* 15 S.W.3d 391 (Ky. App. 1999).

Therefore, reversal is necessary. Because we have determined partial summary judgment was improvidently granted to Abbott, several issues stemming from the order entered on March 8, 2006, are rendered moot including the award of $42 million dollars in baseline compensatory damages, the award of allegedly unproven damages, the application of joint and several liability, the lack of proof of damages by the individual plaintiffs, and the denial of due process.

Denial of Summary Judgment to Gallion & Cunningham

Next, Gallion and Cunningham contend the trial court erred in denying their motions for summary judgment and dismissal of the action. They contend each of the individual claimants in the *Guard* action—now plaintiffs in this action—settled their claims, signed multiple documents acknowledging their understanding and satisfaction with the compensation and representation received, and thus were foreclosed from complaining about inadequate representation. In addition, they argue the present action was barred by the running of the statute of limitations. They argue that either of these grounds was sufficient to support the granting of summary judgment in their favor and the trial court erred in not so holding. Alternatively, Gallion and Cunningham contend these same grounds were sufficient to foreclose the grant of summary judgment in favor of Abbott.

"It is well-settled in this Commonwealth that the denial of a motion for summary judgment is interlocutory and is not appealable." *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004) (citing *Ford Motor Credit Co. v. Hall,* 879 S.W.2d 487 (Ky. App. 1994); *Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave,* 751 S.W.2d 36 (Ky. App. 1988); *Gumm v. Combs*, 302 S.W.2d 616 (Ky. 1957); *Battoe v. Beyer,* 285 S.W.2d 172 (Ky. 1955); *Bell v. Harmon,* 284 S.W.2d 812 (Ky. 1955)). There is one exception to this general rule. "The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." *Leneave*, 751 S.W.2d at 37. Here, there were disputed facts present regarding both

grounds urged in support of the motion for summary judgment and the trial court's ruling was not purely one of law, thus precluding application of the exception. Therefore, this challenge to the denial of a motion for summary judgment is not well-taken.

Further, an order denying dismissal of an action is inherently interlocutory and non-appealable. *Gooden v. Gresham,* 6 Ky.Op. 560 (Ky. 1873) (denial of motion to dismiss is not a final order from which a party may appeal); *Parton v. Robinson,* 574 S.W.2d 679 (Ky. App. 1978) (denial of motion to dismiss was not final and appealable order); *see also Louisville Label Inc. v. Hildesheim,* 843 S.W.2d 321 (Ky. 1992) (order denying motion for voluntary dismissal is not appealable and action below merely continues). We see no reason to deviate from this sound principal of law.

We have previously determined the trial court erred in *granting* partial summary judgment to Abbott. Therefore, we need not comment on Gallion and Cunningham's alternative contention that the trial court erred in *denying* entry of summary judgment for Abbott based on these same grounds.

Mills's Standing to Defend KFHL

Mills additionally engages in a discussion regarding the appropriateness of the creation of KFHL as a *cy pres* trust utilizing the "excess funds" from the original settlement amount. He argues KFHL was properly created as a legitimate act of the discretion of the Boone Circuit Court in *Guard*. Thus, he contends Judge Wehr, without authority to do so, effectively "dissolved"

KFHL by seizing all of its assets and imposing a constructive trust on those funds. We agree that creation of a *cy pres* trust is a valid option under the appropriate circumstances. However, Mills has failed to grasp that he has no standing to appeal on behalf of a corporate entity. Without citation to authority, Mills argues "that as a member of the governing board of the trust and a citizen of the Commonwealth of Kentucky . . . he is in the best position to pursue this matter on behalf of the *cy pres* trust." We disagree.

KFHL is a separate corporate entity which was a party to the *Abbott* action. KFHL participated in the instant litigation and had the ability to appeal from an adverse ruling, but it did not do so. A notice of appeal must be filed within thirty days of the notice of service of the adverse judgment. CR 73.02(1)(a). Under CR 73.02(2), the time for filing a notice of appeal is considered mandatory and subject to strict compliance. *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995). The failure to timely file a notice of appeal deprives appellate courts of jurisdiction. *Burchell v. Burchell*, 684 S.W.2d 296, 299 (Ky. App. 1984). Such a defect is fatal and cannot be cured. *Fox*, 912 S.W.2d at 451.

Because KFHL did not appeal from the adverse ruling seizing its assets and placing same in a constructive trust, it is not a party to this appeal and we are without jurisdiction to consider the argument Mills attempts to present on its behalf. Mills is properly a party to this appeal, but he cannot "bootstrap" an argument in support of KFHL onto his appeal as he has no standing to prosecute an appeal on behalf of this corporate entity. Mills cites us to no authority supportive

of his contention to the contrary and we are convinced none exists. Thus, no further discussion of the issue is warranted, and that portion of the order of March 8, 2006, seizing all KFHL assets and imposing a constructive trust thereon shall stand.

ABBOTT CROSS-APPEAL

On cross-appeal, Abbott contends Judge Wehr erred in denying its motion for a change of venue, allowing Mills an offset in the judgment for undocumented expenses, and improperly denying its motion for summary judgment against Chesley. We shall discuss each of these contentions in turn.

Venue

First, Abbott contends Judge Wehr erred in denying its motion to transfer venue to the Fayette Circuit Court. It is axiomatic that decisions on motions for a change of venue are left to the sound discretion of the trial court and we review such rulings only for an abuse of discretion. *Bringardner Lumber Co. v. Knuckles*, 278 Ky. 356, 128 S.W.2d 727 (1939); *Louisville Times Co. v. Lyttle*, 257 Ky. 132, 77 S.W.2d 432 (1934); *Drake v. Holbrook*, 28 Ky.L.Rptr. 1319, 92 S.W. 297 (1906). In the absence of such an abuse, we will not disturb a trial court's ruling on appeal.

The instant complaint was initially filed in Fayette Circuit Court but was transferred to the Boone Circuit Court over Abbott's objection. Following nearly two years of litigation in Boone Circuit Court, Abbott petitioned the court for a change of venue to Fayette Circuit Court for purposes of conducting the trial

of this matter. Although Abbott made a conclusory statement indicating Boone Circuit Court was an improper venue, the true thrust of the petition was centered on the argument that Boone Circuit Court was a *forum non conveniens*. The trial court heard arguments on the matter on two separate occasions.

Following the second hearing, Abbott filed a supplemental pleading in support of its original motion. In the supplemental pleading, Abbott contended that Fayette Circuit Court was the only appropriate venue for the action, Boone Circuit Court was an improper venue, and, pursuant to KRS 452.105, Judge Wehr had no discretion but was required to grant the change of venue as requested.[13] Interestingly, Abbott's prayer for relief still sought to have the case moved for trial purposes only. Upon reviewing the various written pleadings and oral arguments of the parties, Judge Wehr ultimately determined a transfer of venue was unwarranted. After a careful review of the record before us, we discern no abuse of discretion in Judge Wehr's determination.

Abbott contends before this Court that the only proper venue for this action is in Fayette Circuit Court. It argues the initial transfer to Boone Circuit Court in March of 2005 was improper and the Fayette Circuit Court was without jurisdiction to order the transfer. Abbott then argues the Boone Circuit Court

[13] Abbott also engaged in a lengthy discussion of the "law of the case" doctrine as being inapplicable to the issue at bar. This discussion was intended to correct a perceived misperception by the Boone Circuit Court that it was powerless to make a determination on this point of law because of the Fayette Circuit Court's prior order. The trial court ultimately did not rely on the law of the case doctrine and no mention of the matter appears in Abbott's brief before this Court. Thus, no further discussion on this point is necessary.

abused its discretion in failing to transfer the case back to the Fayette Circuit Court upon being informed its jurisdiction was suspect.

As a preliminary matter, we must dispel the notion that Abbott can properly complain about the actions of the Fayette Circuit Court. We note that although designated as a part of the record on appeal, no transcripts of the Fayette Circuit Court's numerous hearings on the original change of venue motion appear in the record before this Court. We must attribute this failure to Abbott as the responsibility for ensuring a complete record falls upon the party appealing the adverse ruling. In the absence of a complete record, we must assume the omitted portions of the record support the rulings of the trial court. *Thompson v. Commonwealth*, 697 S.W.2d 143, 145 (Ky. 1985).

Further, the actions of the Fayette Circuit Court are not properly before us in this appeal. Had Abbott wished to contest the rulings of that court, it had ample opportunity to do so, but did not. Although Abbott did request specific findings of fact from the Fayette Circuit Court, none were forthcoming. However, during the two years of litigation following the transfer of this matter to the Boone Circuit Court, it took no further action to challenge the transfer. Rather than object to the transfer, Abbott nearly immediately filed a motion seeking appointment of a special judge to replace Judge Anthony Froelich whom Abbott contended had a special relationship with Bamberger. Upon receiving notice Judge Froelich had not actually been assigned the case, Abbott filed a supplemental pleading objecting to the assignment of the matter to Judge Stanley Billingsley as he likewise had a

close personal relationship with Bamberger. These pleadings did not complain of a lack of jurisdiction in the Boone Circuit Court, nor did any subsequent pleadings lodge objections to the transfer of venue until 2007 when Abbott moved to transfer the case back to Fayette County. Any objection to a change of venue is waived by a subsequent appearance in and failure to object to the jurisdiction of the court to which the transfer was made. *Vinsen v. Lockard*, 70 Ky. 458 (1870). Abbott simply cannot now be heard to complain about the actions of the Fayette Circuit Court.

We must now turn to Judge Wehr's denial of Abbott's motion to transfer. Although Abbott makes cursory reference to the venue statutes in arguing the Boone Circuit Court was an improper venue, the true crux of its argument was that Boone Circuit Court was a *forum non conveniens*. In fact, in written pleadings filed in support of its motion, the convenience to the parties was the main issue set forth. It is well-settled that convenience is insufficient to justify a change of venue. *See Blankenship v. Watson*, 672 S.W.2d 941 (Ky. App. 1984), *overruled on other grounds by Dept. of Educ. v. Blevins*, 707 S.W.2d 782 (Ky. 1986). Further, counsel indicated at a hearing on the motion that Abbott was seeking only to move the *trial* to Fayette Circuit Court but *all other matters* could continue to be heard in Boone Circuit Court. This position was likewise evident in the written pleadings filed in the Boone Circuit Court. We know of no statutory provision allowing for such bifurcated proceedings and Abbott cites us to no authority supportive of its proposition of transferring venue of a case for trial purposes only.

Venue is purely a legislative matter and the courts are powerless to add or subtract from the wording of the statutes. *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995). Thus, we discern no abuse of discretion in Judge Wehr's denial of the motion to transfer the case to Fayette Circuit Court.

We also believe it important to emphasize that following the transfer of this matter to the Boone Circuit Court, Abbott actively prosecuted this matter for nearly two years before complaining to the court regarding venue. The failure to assert a request for a change of venue in a timely fashion and without undue delay operates as a bar to such request. *Miller v. Watts*, 436 S.W.2d 515 (Ky. 1969). *See also Pierce v. Crisp*, 267 Ky. 420, 102 S.W.2d 386 (1937); *Paducah Gulf Railroad Co. v. Adams*, 8 Ky. Opin. 100 (1874). Although Judge Wehr did not rely on waiver as a basis for his ruling, we believe he would have been well within his discretion to have done so.

Mills's Undocumented Expenses

Second, Abbott alleges the trial court erred in granting Mills an offset in the judgment for undocumented expenses. However, because of our resolution in the direct appeal reversing and remanding the entry of partial summary judgment in favor of Abbott and the resulting April 4, 2007, order awarding baseline compensatory damages, this issue is rendered moot. Thus, it is unnecessary for us to explore this question in detail.

Denial of Motion for Partial Summary Judgment Against Chesley

Third, Abbott argues the trial court erroneously denied its motion for partial summary judgment against Chesley. As we have previously noted, the denial of a motion for summary judgment, being interlocutory, is not appealable. Further, the exception to this general rule, as stated in *Leneave*, 751 S.W.2d at 37, and set forth previously in this Opinion, does not apply. As noted by the trial court and contrary to Abbott's assertions, there were issues of disputed facts remaining in relation to Abbott's claims against Chesley, and discovery was still ongoing. Further, there has been no entry of a final judgment on any of Abbott's claims against Chesley. Therefore, the exception has no application in the case *sub judice* and we are thus without jurisdiction to consider this claim of error. Abbott's contention that judicial economy would be served by addressing this issue may be laudable, but it is without justification under the well-settled law of this Commonwealth.

For the foregoing reasons, that portion of the order of the Boone Circuit Court entered on March 8, 2006, awarding partial summary judgment in favor of Abbott on its breach of fiduciary duty claim, is reversed and this matter is remanded for further proceedings consistent with this Opinion. Subsequent orders stemming from the improvident grant of partial summary judgment are necessarily vacated. Thus, the order of April 4, 2007, insofar as it partially granted compensatory damages to Abbott, is hereby vacated; and that portion of the order of August 1, 2007, awarding Abbott baseline compensatory damages in the amount of $42 million dollars and declaring GMC to be joint and severally liable is also

vacated. All other orders, or portions thereof, not specifically referenced are affirmed.

ALL CONCUR.

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