RENDERED: AUGUST 7, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001289-MR

DONALD ROOF, DEPUTY LIQUIDATOR
OF KENTUCKY HEALTH COOPERATIVE, INC. APPELLANT

v.
APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-01160

JANIE MILLER; JOSEPH SMITH;
OFFICERS AND BOARD OF DIRECTORS
OF KENTUCKY HEALTH COOPERATIVE,
INC.; BEAM PARTNERS, LLC; TERRY SHILLING;
MILLIMAN, INC.; RACHEL KILLIAN; AND
CGI TECHNOLOGIES AND SOLUTIONS, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR, AND K. THOMPSON, JUDGES.

TAYLOR, JUDGE: Donald Roof, Deputy Liquidator of Kentucky Health Cooperative, Inc., (deputy liquidator) brings this appeal from an August 3, 2018, Opinion and Order of the Franklin Circuit Court rendering summary judgment

dismissing claims asserted against Janie Miller, Joseph Smith, and the Board of Directors of Kentucky Health Cooperative, Inc. We affirm.

The underlying facts of this case are complex; therefore, only those facts necessary to disposition of this appeal will be recited. On November 10, 2011, Kentucky Health Cooperative, Inc., (KYHC) was formed as a Kentucky nonprofit corporation. The purpose of the corporation was to provide health insurance through a health benefit exchange created in Kentucky after Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010. The ACA sought to expand nationally available health insurance programs, especially to individuals and families who were uninsured.

In passing the ACA, Congress acknowledged that the legislation was creating a new and unknown marketplace, with substantial risk to insurers, given that millions of new customers nationwide would be brought into the health insurance market. To address this risk, the legislation included stabilization programs, including a three-year risk corridor program, that effectively would subsidize unprofitable insurers during the period of 2014-2016.

Under its Articles of Incorporation, KYHC's ownership was "vested collectively in 'Members,' as defined in Regulation 45 [Code of Federal Regulations] § 156.505 issued pursuant to Section 1322" of the ACA. Articles of Incorporation Section 3. Additionally, KYHC was to be operated "in the interests

of its Members and for the benefit of its Members." Articles of Incorporation Section 4.1. Effectively, the members were individuals covered by health insurance policies issued by KYHC.

To carry on its business of providing health insurance, KYHC engaged CGI Technologies and Solutions, Inc. (CGI) to serve as KYHC's business outsourcing vendor. In this capacity, CGI handled claims processing and payment, membership enrollment, provider services, call center operations, application processing, and other similar services. KYHC also engaged Milliman, Inc., to provide actuarial services and, in such capacity, to develop premium rates for KYHC's insurance policies offered on the health insurance exchange in Kentucky.

Joseph E. Smith was recruited by KYHC to serve as chairman of KYHC's Board of Directors, a position for which he received no compensation. And, Janie Miller was hired to serve as chief executive officer of KYHC; under her employment contract, Miller received a salary of $250,000 per year and the opportunity to earn a $50,000 bonus upon attainment of certain "milestones."

KYHC offered insurance policies on the Kentucky benefit exchange in 2014, 2015, and 2016. In 2014, KYHC incurred a 50-million-dollar loss. However, KYHC projected that it would receive 77 million dollars for its 2014 risk corridor payment, but only received approximately 9.7 million dollars. This reduction in payment was caused, at least in part, by changes to ACA by

Congress.[1] Despite corrective action plans initiated by the Department of Insurance, the Franklin Circuit Court placed KYHC into rehabilitation on October 29, 2015, and then into liquidation on January 15, 2016. Upon placing KYHC into liquidation, the circuit court appointed the Commissioner of the Kentucky Department of Insurance as liquidator and Jeff Gaither and David Hurt as deputy liquidators. On August 14, 2017, Donald Roof was substituted as deputy liquidator.

On October 28, 2016, July 24, 2017, and September 6, 2017, the deputy liquidator filed complaints against, *inter alios*, Janie Miller, individually and in her capacity as chief executive officer of KYHC; the Officers and Board of Directors of KYHC; and Joseph E. Smith, individually and in his representative capacity as chairman of the Board of Directors. The deputy liquidator claimed, *inter alia*, that Miller, Smith, and the Board were grossly negligent in their management of KYHC. In particular, the deputy liquidator alleged in part:

> 51. Janie Miller owed to KYHC a fiduciary duty to operate KYHC for the ultimate benefit of its members to accomplish the following: (a) to establish premiums at a sufficient level to ensure the solvency of KYHC; (b) to provide financial statements to fellow KYHC Board members, officers, employees, and regulators that were not materially misleading; (c) to procure and maintain adequate reinsurance coverage to protect members; and,

[1] For reasons not relevant to this opinion, the Centers for Medicare & Medicaid Services would only pay 12.6 percent of requested risk corridor program payments nationwide in 2014, including the request made by Kentucky Health Cooperative, Inc. (KYHC).

(d) to establish and maintain adequate reserves for payment of claims.

52. Janie Miller failed to establish premiums at a sufficient level to ensure the solvency of KYHC, and failed to establish and maintain adequate reserves for the payment of claims.

53. Janie Miller failed to exercise reasonable diligence, due care, and skill in managing KYHC's business and failed to act in good faith.

54. As a direct and proximate result [of] Janie Miller's failures, and as a direct and proximate result of her breach of fiduciary duties, KYHC has been damaged in an amount to be proven at trial, including punitive damages.

. . . .

57. Pursuant to [Kentucky Revised Statutes] KRS 273.229, officers of a [nonprofit] corporation must act with the same care as an ordinary prudent person in a like position in similar circumstances when tending to the corporation's affairs.

58. Pursuant to KRS 273.229(5), officers of a [nonprofit] are subject to monetary damages for injuries resulting from the officer's willful, wanton, and reckless conduct.

59. Miller willfully and recklessly ignored the obvious and foreseeable danger of setting inadequately low insurance premiums, and continued the willful and reckless conduct after it became known that the insurance premiums would result in KYHC's insolvency.

60. Miller willfully and recklessly ignored the obvious and foreseeable danger posed by CGI's continuing failure to adequately process claims on behalf of KYHC's insureds.

61. Miller's gross negligence was a substantial factor in causing KYHC's insolvency.

. . . .

64. Janie Miller owed KYHC a duty to operate KYHC for the ultimate benefit of its members to accomplish the following: (a) to establish premiums at a sufficient level to ensure the solvency of KYHC; (b) to provide financial statements to fellow KYHC Board members, officers, employees, and regulators that were not materially misleading; (c) to procure and maintain adequate reinsurance coverage to protect members; and, (d) to establish and maintain adequate reserves for payment of claims.

65. As an officer of KYHC, Janie Miller was required to discharge these duties in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC.

66. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she recommended, approved, ratified, and implemented woefully inadequate insurance premium rates.

67. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she ignored the obvious and foreseeable danger of setting inadequately low insurance premiums, and continued her conduct after it became known that the insurance

premiums would result in KYHC's insolvency.

68. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she failed to establish and maintain adequate reserves for KYHC for the payment of claims.

69. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she did not take remedial action to correct KYHC's deficit position.

70. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she unjustifiably relied upon the opinions of others without appropriate procedures in place to justify such reliance, and agreed to expend KYHC funds in an inappropriate manner.

71. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she accepted a large bonus from KYHC in the amount of $50,000 even as KYHC was losing millions of dollars.

72. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC in managing of KYHC's business.

73. Janie Miller failed to exercise reasonable diligence, due care, and skill and failed to act in good

faith, on an informed basis, and in a manner she honestly believed to be in the best interest of KYHC when she ignored the obvious and foreseeable danger posed by CGI's continuing failure to adequately process claims on behalf of KYHC's insureds.

74. As a direct and proximate result of Janie Miller's failures, and as a direct and proximate result of her breach of her statutory duties, KYHC has been damaged in an amount to be proven at trial, including punitive damages.

75. Janie Miller breached and failed to perform her statutory duties as an officer of KYHC in compliance with KRS 273.229.

76. Janie Miller's misconduct and her breach of and failure to perform her statutory duties was willful, intentional, wanton, and/or was done with reckless disregard of the property and rights of KYHC.

. . . .

78. The KYHC Officers and Directors, including Joseph E. Smith, had statutory and common law duties to govern and oversee the administration of KYHC.

79. Pursuant to KRS 273.229, officers of a [nonprofit] corporation must act with the same care as an ordinary prudent person in a like position in similar circumstances when tending to the corporation's affairs.

80. Pursuant to KRS 273.215, directors of a [nonprofit] corporation must act with the same care as an ordinary prudent person in a like position in similar circumstances when tending to the corporation's affairs.

81. The Officers and Directors, including Joseph E. Smith, failed to exercise ordinary care by approving the establishment of woefully inadequate insurance

premiums, and by failing to adequately inquire into its actuary's insurance premium determination, which led ultimately to KYHC's insolvency.

82. The Officers and Directors, including Joseph E. Smith, failed to exercise ordinary care when they continued to charge woefully inadequate insurance premiums, knowing that such inadequate premiums would result in KYHC's insolvency.

83. The Officers and Directors, including Joseph E. Smith, failed to exercise ordinary care by failing to take action to correct CGI's known and continuing inability to adequately process claims on behalf of KYHC's insureds.

84. The Officers and Directors, including Joseph E. Smith, failed to exercise ordinary care by paying large bonuses to KYHC executives even as KYHC was losing millions of dollars.

85. The Officers' and Directors' negligence, including the negligence of Joseph E. Smith, was a substantial factor in causing KYHC's insolvency.

. . . .

88. Pursuant to KRS 273.229(5), officers of a [nonprofit] are subject to monetary damages for injuries resulting from the officer's willful, wanton, and reckless conduct.

89. Pursuant to KRS 273.215(5), directors of a [nonprofit] are subject to monetary damages for injuries resulting from the directors' willful, wanton, and reckless conduct.

90. The Officers and Directors, including Joseph E. Smith, willfully and recklessly ignored the obvious and foreseeable danger of setting woefully inadequate

insurance premiums, and continued their willful and reckless conduct after it became known that the insurance premiums would result in KYHC's insolvency.

91. The KYHC Board, including Joseph E. Smith, willfully and recklessly ignored the obvious and foreseeable danger posed by CGI's continuing failure to adequately process claims on behalf of KYHC's insureds.

92. The KYHC Board's gross negligence, including the gross negligence of Joseph E. Smith, was a substantial factor in causing KYHC's insolvency.

. . . .

95. The Officers and Directors, including Joseph E. Smith[,] owed to KYHC a fiduciary duty to operate KYHC for the ultimate benefit of its members to accomplish the following: (a) to establish premiums at a sufficient level to ensure the solvency of KYHC; (b) to provide financial statements to fellow KYHC Board members, officers, employees, and regulators that were not materially misleading; (c) to procure and maintain adequate reinsurance coverage to protect members; and, (d) to establish and maintain adequate reserves for payment of claims.

96. The Officers and Directors, including Joseph E. Smith, failed to establish premiums at a sufficient level to ensure the solvency of KYHC, and failed to establish and maintain adequate reserves for the payment of claims.

97. The Officers and directors, including Joseph E. Smith[,] elected to pay large bonuses to KYHC executives even as KYHC was losing millions of dollars.

98. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due

care, and skill in managing KYHC's business and failed to act in good faith.

. . . .

101. The Officers and Directors, including Joseph E. Smith, owed KYHC a duty to operate KYHC for the ultimate benefit of its members to accomplish the following: (a) to establish premiums at a sufficient level to ensure the solvency of KYHC; (b) to provide financial statements to fellow KYHC Board members, officers, employees, and regulators that were not materially misleading; (c) to procure and maintain adequate reinsurance coverage to protect members; and, (d) to establish and maintain adequate reserves for payment of claims.

102. The Officers and Directors, including Joseph E. Smith, were required to discharge these duties in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC.

103. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC when they ignored the obvious and foreseeable danger of setting woefully inadequate insurance premiums, and continued their conduct after it became known that the insurance premiums would result in KYHC's insolvency.

104. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC when they approved the establishment of woefully inadequate insurance premiums, and failed to adequately inquire into KYHC's actuary's insurance premium determination, which led

ultimately to KYHC's insolvency.

105. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC when they continued to charge woefully inadequate insurance premiums, knowing that such inadequate premiums would result in KYHC's insolvency.

106. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC by failing to take action to correct CGI's known and continuing inability to adequately process claims on behalf of KYHC's insureds.

107. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC by paying large bonuses to KYHC executives even as KYHC was losing millions of dollars.

108. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an informed basis, and in a manner they honestly believed to be in the best interest of KYHC when they failed to establish premiums at a sufficient level to ensure the solvency of KYHC, and failed to establish and maintain adequate reserves for the payment of claims.

109. The Officers and Directors, including Joseph E. Smith, failed to exercise reasonable diligence, due care, and skill and failed to act in good faith, on an

> informed basis, and in a manner they honestly believed to be in the best interest of KYHC in managing KYHC's business.
>
> 110. The Officers and Directors, including Joseph E. Smith, breached and failed to perform their statutory duties as officers and/or directors of KYHC in compliance with KRS 273.229 and/or KRS 273.215.

September 6, 2017, Second Amended Complaint at 9-18.

By order entered July 31, 2017, the circuit court dismissed the claims of negligence, unjust enrichment, and breach of fiduciary duty against Miller and the claims of negligence and breach of fiduciary duty against the Board and Smith. The court also directed the parties to proceed with limited discovery upon the claim of gross negligence against Miller, Smith, and the Board.

Thereafter, in April 2018, Miller, Smith, and the Board filed Motions for Summary Judgment upon the remaining claim of gross negligence. They maintained that the material facts were undisputed and demonstrated that neither Miller nor Smith acted grossly negligent in their respective positions at KYHC. Conversely, the deputy liquidator argued that facts existed demonstrating the gross negligence of each party and that summary judgment would be improper.

By Opinion and Order entered August 3, 2018, the circuit court granted summary judgment in favor of Miller, Smith, and the Board. The circuit court initially pointed out that the deputy liquidator could not impose liability upon Smith as a representative of the Board. In support thereof, the circuit court

determined "there is no legal authority to impose . . . liability on him [Smith] for the actions or inactions of the Board" as a whole. The court held that the deputy liquidator failed to establish any genuine issues of material fact demonstrating gross negligence by Miller, Smith, or the Board. Additionally, as chairman of the Board, the circuit court determined that KRS 411.200 shielded Smith from the deputy liquidator's claims. This appeal follows.

To begin, summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991); Kentucky Rules of Civil Procedure (CR) 56.03. All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Steelvest*, 807 S.W.2d at 480. Our review proceeds accordingly.

The deputy liquidator contends that the circuit court erroneously rendered summary judgment in favor of Miller, Smith, and the Board. Initially, the deputy liquidator maintains the circuit court improperly weighed facts and decided factual issues raised by the parties. The deputy liquidator also believes the circuit court failed to consider the "evidence" it presented and only considered Miller and Smith's facts. In support of his argument, the deputy liquidator points to the following facts it presented to the court:

> Louisiana CO-OP terminated its contract with CGI after just three months due to . . . incompetence. Miller, Smith

> and the Board agreed to pay an additional $1 million to CGI despite its obvious failures; the Board approved Milliman's rate increases for 2015 despite Miller's knowledge that neither the Board nor Milliman had accurate enrollment or claims data; faced with the DOI's concerns about providers not receiving payment due to CGI's incompetence, the Board failed to take action to remedy the situation; Miller failed to report KYHC's monthly losses to the Board in August 2014; Miller admitted that she did not know if KYHC's premiums were adequately priced; faced with the CGI's continued problems, and with KYHC in a deeper hole, neither Miller nor the Board took action to oversee or audit CGI's performance; despite Milliman's failures, KYHC engaged the actuarial firm again to develop its 2016 rates.

Deputy Liquidator Brief at 13 (citations omitted).

While the circuit court may have utilized confusing terminology in its August 3, 2018, Opinion and Order, we are convinced the court properly considered the facts presented by the deputy liquidator and did not weigh the facts. Instead, the circuit court properly applied the summary judgment standard. To defeat summary judgment, it was incumbent upon the deputy liquidator to raise and establish genuine issues of material fact, not just allege issues of fact. And, given that KYHC was a nonprofit corporation, to recover damages against Miller, Smith, or the Board, it was insufficient to simply allege or demonstrate that their conduct was negligent. Rather, the deputy liquidator was mandated by statute to present facts demonstrating that Miller, Smith, and/or the Board engaged in willful misconduct or acted wantonly or recklessly in disregard of human rights, safety, or

property, in order to recover monetary damages. In other words, it was necessary to establish that their conduct was grossly negligent. Kentucky Revised Statutes (KRS) 273.229(5)(b); KRS 273.215(5)(b).[2] And, to satisfy this heightened standard, "it is not necessary to show ill will toward the person injured, but an entire absence of care for the life, person, or property of others which exhibits indifference to consequences makes a case of constructive or legal willfulness. A complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence." *Louisville & N.R. Co. v.*

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[2] Kentucky Revised Statutes (KRS) 273.229(5) provides:

> (5) Any action taken as an officer, or any failure to take any action as an officer, shall not be the basis for monetary damages or injunctive relief unless:
>
> > (a) The officer has breached or failed to perform his duties in compliance with this section; and
> >
> > (b) In the case of an action for monetary damages, the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for human rights, safety or property.

And, KRS 273.215(5) provides:

> (5) In addition to any other limitation on such director's liability for monetary damages contained in any provision of the corporation's articles of incorporation adopted in accordance with the provisions of KRS 273.248, any action taken as a director, or any failure to take any action as a director, shall not be the basis for monetary damages or injunctive relief unless:
>
> > (a) The director has breached or failed to perform the duties of the director's office in compliance with this section; and
> >
> > (b) In the case of an action for monetary damages, the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for human rights, safety or property.

George, 129 S.W.2d 986, 989 (Ky. 1939) (citation omitted); *see also Brotherton v. Victory Sports, Inc.*, 24 F. Supp. 3d 617 (E.D. Ky. 2014).

Here, viewing the facts and inferences therefrom in favor of the deputy liquidator, the deputy liquidator simply failed to raise or identify facts demonstrating that Miller, Smith, or the Board acted with a complete indifference to the consequences or with an entire absence of care in their actions or inactions relative to KYHC. We believe the circuit court's thorough analysis clearly sets out the shortfall in the deputy liquidator's claims. In particular, the deputy liquidator failed to raise or identify facts demonstrating that Miller, Smith, and/or the Board engaged in willful misconduct or acted wantonly or recklessly as to the actions or inactions regarding the employment and continued employment of Milliman and CGI; or as to the low premium rates set for insurance policies offered by KYHC; or by offering the platinum health plan on the exchange.[3] While it is uncontroverted that KYHC was placed in liquidation due to substantial losses, Miller, Smith, and the Board presented undisputed facts concerning the unique and novel environment in which KYHC operated under the ACA, including the anticipated receipt of risk corridor program payments to offset the initial losses.

[3] The platinum health plan offered through the exchange was geared toward high risk individuals with more health problems than those in other plans, for which up to 90 percent of the costs would be covered by the insurer.

And, the circuit court pointed to such a novel environment as providing a context for the losses suffered by KYHC:[4]

> [T]hese programs worked to expand healthcare access, [but] also increased the risk that some insurers would incur "massive new costs," as they were required to "accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage." Further, "[b]ecause insurers lacked reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage via the new exchanges, insurers faced significant risk if they elected to offer plans in the exchanges."
>
> To combat this risk, the ACA created a temporary risk corridor program. In operation from 2014 to 2016, this program required profitable insurers to make payments to the United States Department of Health and Human Services ("HHS"), which in turn made payments to unprofitable insurers. These "risk corridor payments" therefore "permit[ted] issuers to lower [premiums] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." In other words, the payments "protect against uncertainty in the rate setting for qualified health plans by limiting the extent of issuer's financial losses in gains."
>
> . . . .
>
> KYHC suffered major losses in its first years and necessarily sought risk corridor payments in 2014 and

[4] The circuit court also noted that the deputy liquidator has initiated an action in the United States Court of Claims against the United States to recover risk corridor program payments totaling more than 142 million dollars on behalf of KYHC. The United States Supreme Court, in a recent opinion, has held that Section 1342 of the Patient Protection and Affordable Care Act (ACA) imposed a legal duty on the United States to make risk corridor program payments to insurers under the ACA, and that obligation was not repealed by appropriation riders passed by Congress. *Maine Cmty. Health Options v. United States*, ___ U.S. ___, 140 S. Ct. 1308, 26 L. Ed. 2d 764 (2020).

> 2015. However, by that time, Congress changed directions and backtracked on its original commitments in the ACA, significantly restricting the funds available for risk corridor programs. . . . HHS refused to make the requested [risk corridor] payments in full [to KYHC].

Opinion and Order at 2-3 (citations omitted). Viewing the facts and inferences most favorable to the deputy liquidator, we are unable to conclude that the circuit court misapplied the summary judgment standard or improperly rendered summary judgment.

The deputy liquidator also maintains that the circuit court erroneously relied upon the filed rate doctrine to shield Miller, Smith, and the Board from liability for the low rates set for KYHC's insurance policies. The filed rate doctrine effectively provides that insurance rates or premiums approved by a regulatory agency, in this case the Department of Insurance, are not subject to collateral attack in court. *Commonwealth ex rel. Chandler v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 52-53 (Ky. App. 1999). Even if we were to agree that the filed rate doctrine were inapplicable to this case, the deputy liquidator, nonetheless, failed to establish facts demonstrating that Miller, Smith, or the Board engaged in willful conduct or conduct in wanton or reckless disregard of human rights, safety, or property in relation to the setting of rates for KYHC's insurance policies. Miller, Smith, and the Board relied upon Milliman to develop rates for each plan year. In the end, these rates were too low; however, KYHC was offering health

insurance in a new and novel market. As pointed out by the circuit court, "this lack of precedent presented a significant challenge to Milliman, who struggled to set adequate rates and factor in certain costs." Opinion and Order at 14. And, the Department of Insurance approved those rates. We, thus, perceive no error.

The deputy liquidator further argues that the circuit court erroneously determined that KRS 411.200 shielded Smith from liability. We would point out that such determination served as an alternative ground to dismiss the claims against Smith. KRS 411.200 provides a liability shield for officers and directors of nonprofit organizations that have qualified as tax exempt entities and its provisions are consistent with the liability protections set out in KRS 273.215(5). And, the circuit court concluded "the undisputed facts do not indicate that any alleged damages resulted from [Smith's] willful or wanton misconduct; instead, the actions at issue here were taken in good faith." Opinion and Order at 21. Once again, viewing the facts and inferences therefrom most favorable to the deputy liquidator, the deputy liquidator failed to demonstrate that Smith engaged in willful or wanton misconduct while serving as chairman of the board. In the absence of facts establishing gross negligence, the deputy liquidator's claims fail under CR 56.

We view any remaining contentions of error to be moot or without merit.

To summarize, we are of the opinion that the circuit court properly applied the summary judgment standard in rendering summary judgment in favor of Miller, Smith, and the Board.

For the foregoing reasons, we affirm the Opinion and Order of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Paul C. Harnice
Sarah J. Bishop
Justin D. Clark
Connor B. Egan
Andrew T. Hagerman
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Connor B. Egan
Louisville, Kentucky

BRIEF FOR APPELLEE JANIE MILLER:

Darryl W. Durham
B. Keith Saksefski
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE JANIE MILLER:

B. Keith Saksefski
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES JOSEPH SMITH AND BOARD OF DIRECTORS OF KENTUCKY HEALTH COOPERATIVE, INC.:

Stewart C. Burch
Frankfort, Kentucky