RENDERED: JANUARY 25, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000467-MR

COMMONWEALTH OF KENTUCKY,
ex rel. WILLIAM M. LANDRUM, III,
SECRETARY OF THE KENTUCKY
FINANCE AND ADMINISTRATION CABINET,
AND WILLIAM M. LANDRUM, III, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE
FINANCE AND ADMINISTRATION CABINET — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 17-CI-01129 AND 17-CI-01130

DOLT, THOMPSON, SHEPHERD & CONWAY, P.S.C.
f/k/a DOLT, THOMPSON, SHEPHERD & KINNEY, P.S.C.;
COMMONWEALTH OF KENTUCKY, ex rel. ANDY
BESHEAR, ATORNEY GENERAL; AND, ANDY BESHEAR,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL
FOR THE COMMONWEALTH OF KENTUCKY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: JONES, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: In this consolidated appeal of two complaints filed almost simultaneously in Franklin Circuit Court, the Commonwealth of Kentucky *ex rel.* William M. Landrum III, Secretary of the Kentucky Finance and Administration Cabinet ("FAC"), and Landrum, in his official capacity as FAC Secretary, seek reversal and remand of a grant of summary judgment entered on February 26, 2018, in favor of Dolt, Thompson, Shepherd & Conway, P.S.C. f/k/a Dolt, Thompson, Shepherd & Kinney, P.S.C. ("Dolt"); the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General ("AG"); and Andy Beshear, in his official capacity as Kentucky's current AG.[1] Having reviewed the record, briefs and law, we vacate the grant of summary judgment and remand for further proceedings due to premature entry of summary judgment without opportunity for discovery.

This case highlights another aspect of litigation spawned by the OxyContin epidemic.[2] This time the focus is on legal work performed by Dolt as

[1] This appeal results from two separate complaints filed against different defendants by different plaintiffs on the same day. *Commonwealth of Kentucky, ex rel. Andy Beshear, et al. vs. Landrum,* sought a declaration of rights and a permanent injunction. It was docketed as Case No. 17-CI-01129 and assigned to the Hon. Phillip J. Shepherd. In *Commonwealth of Kentucky vs. Dolt, Thompson, Shepherd, P.S.C.,* FAC sought recovery of $4.2 million from the law firm representing the Office of the Attorney General ("OAG") in settlement of a lawsuit with drug companies on behalf of the state. It was docketed as Case No. 17-CI-01130 and assigned to the Hon. Thomas Dawson Wingate. The parties having moved to dismiss and transfer the cases, and both judges agreeing, on November 9, 2017, Case No. 17-CI-01129 was transferred to Judge Wingate and consolidated with Case No. 17-CI-01130.

[2] Prior cases detailing the history of the litigation include: *United States v. Purdue Frederick Co., Inc.*, 495 F. Supp. 2d 569, 570 (W.D. Va. 2007); *Purdue Pharma L.P. v. Boston Globe Life Sciences Media, LLC*, 2016-CA-000710-MR, 2018 WL 6580507 (Ky. App. Dec. 14, 2018)

outside counsel to OAG in settling a case[3] originally filed in 2007 against Purdue Pharma L.P. and others in Pike Circuit Court by then-AG Greg Stumbo.

The first inkling trouble was brewing came on October 24, 2017, when FAC sent a letter to Beshear stating FAC "has reason to believe that your office may have unlawfully authorized or facilitated payment of approximately $4.2 million to [Dolt] in connection with the settlement of the lawsuit against various entities associated with Purdue Pharma L.P." The letter directed OAG to maintain all relevant documents and information while the Cabinet investigated.

A similar letter was simultaneously sent to Dolt stating FAC

> has reason to believe that your law firm may have unlawfully received and retained up to approximately $4.2 million of the Commonwealth's money in connection with the settlement of the lawsuit against various entities associated with Purdue Pharma L.P. ("Purdue Pharma"). Records we have reviewed indicate that your law firm's written contract with the Commonwealth expired on June 30, 2015, and was not renewed or extended. It thus appears that at the time of the Purdue Pharma settlement, on December 22, 2015, your law firm did not have a valid, written personal service contract with the Commonwealth. Kentucky law dictates that service providers must return to the

(motion for discretionary review pending in 2019-SC-45-D); *Purdue Pharma L.P. v. Commonwealth ex rel. Conway*, 2013-CA-001679-MR, 2015 WL 3533200 (Ky. App. June 5, 2015, unpublished); and *Purdue Pharma L.P. v. Combs*, 506 S.W.3d 337 (Ky. App. 2014).

[3] *Commonwealth et al. v. Purdue Pharma L.P. et al.*, Pike Circuit Court, Case No. 07-CI-01303. Other defendants were Purdue Pharma, Inc., Purdue Frederick Company, P.F. Laboratories, Inc. and Abbott Laboratories, Inc.

> Commonwealth all amounts received in the absence of a valid, written contract.
>
> Based upon the foregoing facts, this letter serves as a demand for your law firm to return all monies received and retained in connection with the Purdue Pharma matter, including all amounts representing your purported contingency fee and alleged reimbursement of expenses. Please remit this amount to the above-referenced address by 5:00 p.m. on October 26, 2017.

The letter to Dolt concluded with a directive to "preserve and do not destroy" documents and information in any way relevant to the Cabinet's investigation. Dolt did not refund any money. FAC filed suit a few days later.

The specific focus of this appeal is whether a valid contract was in place during critical times—particularly on December 22, 2015, when the Pike Circuit Court filed an agreement and release reached by then-AG Jack Conway with the drug companies and entered an agreed judgment with stipulation of dismissal with prejudice, directing the drug companies to pay the Commonwealth $24 million in nine installments. The drug companies paid the initial installment of $12 million directly into Dolt's escrow account.

In their pleadings and briefs, the parties in this appeal reference three separate contracts. The first contract, covering a two-week period beginning June 15, 2014, and expiring June 30, 2014, is the only one appearing to be fully executed.

The original two-week contract, "Doc ID No: PON2 040 1400003637 1," was forward-looking, containing no retroactivity language. Under the terms of this contingency fee contract, Dolt's compensation was conditioned on the Commonwealth receiving a settlement or award from which Dolt would be paid—no taxpayer dollars would be spent. Dolt was also to front all litigation costs for which it would be reimbursed for "all reasonable, normal, and verified 'out of pocket' costs and expenses." The AG was to determine how 84% of any settlement or judgment proceeds would be applied, and Dolt was to receive the remaining "16% or less" of any judgment up to $25 million, and a decreasing percentage of any amount over $25 million. Different percentages applied to a quicker resolution, but such did not occur. The contract required approval by FAC, as well as the Government Contract Review Committee of the Legislative Research Commission ("LRC").

Under Kentucky law, a contract cannot encompass more than one biennium, KRS[4] 45A.145(1),[5] but a contract can be renewed to cover another

[4] Kentucky Revised Statutes.

[5] KRS 45A.145(1) reads:

> Unless otherwise provided in the statute making appropriations therefor, multiyear contracts for supplies and services may be entered into for periods not extending beyond the end of the biennium in which the contract was made, if funds for the first fiscal year of the contemplated contract are available at the time of

biennium. By the contract's own terms, when the two-week period expired, it could be renewed "for as many additional two-year terms as needed for the purpose of and to the extent that said renewals are necessary to permit [Dolt] to conclude any work," subject again to approval by both FAC and LRC. Based on the certified appellate record, whether the original two-week contract was properly renewed is open to debate.

The contract could be cancelled and terminated by OAG "at any time not to exceed thirty (30) days' written notice." The executed contract required Dolt to "maintain supporting documents to substantiate invoices and shall furnish same if required by state government." It further provided FAC and LRC "shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this contract for the purpose of financial audit or program review." Dolt maintains the initial two-week contract was the only agreement it needed to receive payment of its contingency fee and expenses in 2016.

A second contract, covering July 1, 2014, through June 30, 2015, is referenced by the parties, but no fully executed agreement for that period appears in the record. The record contains a purported "FINAL" version of "Doc ID No: PON2 040 1400003637," stating it "is effective upon filing with [LRC] and expires

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> contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds therefor.

6/30/2015." However, this document bears no signatures and there is no indication of when—or if—it was filed with LRC. The document's cover page mentions nothing of it being a renewal or extension of a prior contract. The terms of this document essentially mirror the language of the original two-week contract.

The record contains a third agreement, executed on behalf of Dolt on February 2, 2016, and expiring on June 30, 2016. Identified as a "Final" version of Doc ID No: PON2 040 1600001236 1," it appears no one signed this document on behalf of OAG. It contains essentially the same terms as the first and second contracts and says it "is effective upon filing with [LRC] and expires 6/30/2016." OAG relies, at least in part, on this partially-executed third agreement.

All three purported contracts were prepared by Fran Pinkston, a purchasing agent for OAG. She executed an affidavit which is at odds with the record before us. Pinkston's affidavit is also contradicted by an affidavit executed by Joan Graham, Executive Director of FAC's Office of Procurement Services, detailing Graham's conversations with Pinkston and explaining her version of how the 2016 contract was structured and came to be approved by FAC.

The certified appellate record in this case contains seven volumes of written record and one DVD. Besides two dueling affidavits and three purported

contracts, there is little else. Specifically, there are no depositions,[6] no interrogatories or answers, no stipulations, no admissions, and no pretrial discovery order. The same exhibits are attached to motions and responses time and time again. We could expect nothing more because there has been no discovery. Arguments of counsel do not resolve questions of fact.

Both complaints were filed on October 31, 2017. Less than one month later, on November 27, 2017, before any answer was filed, Dolt moved for summary judgment claiming there were no genuine issues of fact and Dolt was entitled to judgment as a matter of law. That same day, Dolt moved to stay discovery, "pending a decision on Dolt Thompson's motion for summary judgment pending in Civil Action No. 17-CI-01130." As justification, Dolt claimed,

> [i]t would be manifestly unjust to require Dolt Thompson to incur substantial legal expenses, reputational risk, and countless productive work hours participating in frivolous discovery growing out of a political dispute, where summary judgment is clearly appropriate on the claims asserted.

Three days later, on November 30, 2017, OAG moved for summary judgment.

FAC answered OAG's complaint in Civil Action No. 17-CI-01129 on December 11, 2017. Dolt's motion to stay discovery was granted on December 18,

[6] There is a reference to a deposition given by a former OAG employee in an unrelated lawsuit.

2017. Summary judgment was entered resolving both consolidated cases on February 26, 2018.

Dolt's maneuver denied FAC **any opportunity** to discover facts. Once summary judgment was resolved—in favor of Dolt and OAG—there could be no discovery. Such a result is an improper use of summary judgment.

> The limitations on filing suit are those imposed upon an attorney by Rule 11 which requires a belief formed "after reasonable inquiry [that the pleading] is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." **A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence.** *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co*., Ky. App., 579 S.W.2d 628 (1979).

Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet, 758 S.W.2d 24, 29 (Ky. 1988) (emphasis added).

Pendleton, cited by FAC in its quest for discovery, is not alone in cautioning against entry of summary judgment too quickly. We could cite a myriad of cases, but choose to quote *Suter v. Mazyck*, 226 S.W.3d 837, 841-42 (Ky. App. 2007), at length.

> The proper standard of review in appeals from summary judgments has frequently been recited and is concisely set forth in *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[7] (citations omitted).
>
> A summary judgment is a final order and, therefore, should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). **It is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence.** *Pendleton Bros. Vending, Inc. v. Com. Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co*., 579 S.W.2d 628 (Ky. App. 1979)).

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[7] The trial court misquoted the burden on a motion for summary judgment as,

> [t]he moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show the absence of a genuine issue of material fact. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011).

The correct burden is quoted above.

In *Roberson v. Lampton*, 516 S.W.2d 838 (Ky. 1974), the court cautioned against the use of summary judgment as a means of luring a party into a "premature showdown" by forcing the opposing party to try his case on the merits. Citing *Conley*, *supra*, the court stated:

> We think that it should be borne in mind that the motion for summary judgment is not a trick device for the premature termination of litigation. Its function is to secure a final judgment as a matter of law when there is no genuine issue of a material fact . . . The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied. *Id*. at 840.

The holding in *Roberson* has been given a narrow construction in that the movant does not have to show that the party opposing a motion for summary judgment actually completed discovery but only that the opposing party had the opportunity to do so. *Hartford Ins. Group, supra*. **Absent a sufficient opportunity to develop the facts, however, summary judgment cannot be used as a tool to terminate the litigation.**

. . . .

[F]or summary judgment to be properly granted, the **party opposing the motion must have been given adequate opportunity to discover the relevant facts. Only if that opportunity was given do we reach the issue of whether there were any material issues of fact precluding summary judgment.**

Whether a summary judgment was prematurely granted must be determined within the context of the individual case. **In the absence of a pretrial discovery order, there are no time limitations within which a party is**

> **required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties.**

(Emphasis and footnote added). In this case, there was **no opportunity to take discovery**. Review of a case that at one point was valued by experienced attorneys to be in excess of $1 billion[8] was resolved in little more than three months. Since there was no discovery, obviously there was no "ample opportunity to complete discovery[,]" as required by *Suter*. Thus, we do not even reach the question of whether there were any material issues of fact precluding summary judgment. *Id.*

Vacation of the grant of summary judgment should not come as a surprise to the trial court. During a hearing on December 13, 2017, Judge Wingate himself stated,

> You know, it is sort of hard for me to stop discovery. You know, the times I've done that, I've always got in trouble.

On the strength of *Pendleton* and *Suter*, Judge Wingate's prediction rings true.

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[8] The FAC complaint quotes Stumbo as saying, "I always thought if we ever got [the case] to a court of law a billion dollars wouldn't touch it." The FAC complaint goes on to quote attorneys from the Stites & Harbison law firm—which represented Purdue Pharma—as stating in court filings, "the total amount at stake in [the Purdue Pharma] case surpasses a *billion dollars.*" (Emphasis in original.) Finally, the FAC complaint quotes Conway—after the request for admissions was deemed admitted due to lack of a response—as publicly saying, "I expect that a jury in Pike County, Kentucky would be very, very harsh on Purdue Pharma . . . . I'm not going to be really negotiating much less or below nine figures. I want to see something well into nine figures."

For the reasons expressed above, we vacate entry of summary judgment and remand the case to the trial court for proceedings consistent herewith.

ALL CONCUR.

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