

RENDERED: OCTOBER 25, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000920-MR

ALLISON J. BALL, IN HER OFFICIAL
CAPACITY AS KENTUCKY STATE
TREASURER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00656

THOMAS ELLIOTT; MARY HELEN
PETER; AND KENTUCKY
RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Allison J. Ball, in her official capacity as Kentucky State Treasurer, (hereafter referred to as “Ball”) brings this appeal from a May 15, 2018, Order and Judgment of the Franklin Circuit Court awarding Thomas Elliott and

Mary Helen Peter legal expenses in the amount of \$102,166.61 pursuant to Kentucky Revised Statutes (KRS) 61.645(2)(g). For the reasons stated, we affirm.

The genesis of this appeal originates in Kentucky Governor Matthew Bevin's issuance of Executive Order 2016-211 on April 20, 2016, Executive Order 2016-214 on April 21, 2016, and Executive Order 2016-273 on May 18, 2016.¹ These Executive Orders sought to remove Thomas K. Elliott as a member of the Board of Trustees (Board) of the Kentucky Retirement Systems even though Elliott's term had not expired.² Governor Bevin ultimately appointed Mark Lattis as Elliott's replacement.

At the Board's regular meeting on April 21, 2016, the Board directed Kentucky Retirement Systems' Executive Director, William A. Thielen, to obtain an opinion from the Attorney General of Kentucky concerning whether a governor may legally remove a member of the Board prior to expiration of the member's term. The Attorney General issued OAG 16-004 on May 17, 2016. Therein, the attorney general opined that "the Governor may not remove a Retirement Systems trustee at will prior to the expiration of the trustee's term." OAG 16-004.

¹ Executive Order 2016-211 removed Thomas K. Elliott as a member of the Board of Trustees (Board) of the Kentucky Retirement Systems. Executive Order 2016-214 appointed William F. Smith to replace Elliott as a member of the Board. Smith declined the appointment. Executive Order 2016-273 appointed Mark Lattis to replace Smith.

² Elliott was appointed to his second term on the Board on April 10, 2015, for a term expiring on March 31, 2019. At the time of his removal Elliott was serving as Chair of the Board.

Upon receiving the ruling, Elliott appeared in person at the next meeting of the Board on May 19, 2016, and intended to participate as a member of the Board. However, Elliott was confronted by the Governor's chief of staff and several Kentucky State Police troopers as he arrived prior to the meeting. Elliott was informed that if he attempted to participate in the meeting, the state police would immediately arrest Elliott. As a consequence, Elliott attended the meeting but did not participate as a Board member.

On June 17, 2016, Elliott and another sitting member of the Board, Mary Helen Peter, filed a Complaint for Declaration of Rights and For Injunctive Relief against, *inter alios*, Governor Bevin in the Franklin Circuit Court. In that complaint and amended complaints, Elliott and Peter alleged that Governor Bevin violated various provisions of the Kentucky Constitution and violated various statutory provisions by issuing Executive Orders 2016-211, 2016-214, and 2016-273, thereby ostensibly removing Elliott before expiration of his term. Elliott and Peter also sought injunctive relief and legal expenses under KRS 61.645(2)(g).

On June 17, 2016, Governor Bevin issued Executive Order 2016-340. In this sweeping Executive Order, Governor Bevin abolished the Kentucky Retirement Systems' Board of Trustees and concomitantly reconstituted the Board. Relevant to this appeal, Section I provided "[t]he Kentucky Retirement Systems Board of Trustees as established by KRS 61.645 is abolished. The terms of

members appointed by the Governor and serving on the Kentucky Retirement Systems Board of Trustees as it existed prior to the filing of this Order shall expire immediately upon the filing of this Order” Executive Order 2016-340 at 3.

Subsequently, the Attorney General filed a motion to intervene in the lawsuit, and the circuit court granted the motion by Order entered August 2, 2016. The circuit court then issued a temporary injunction under Kentucky Rules of Civil Procedure (CR) 65.04 on August 22, 2016. The circuit court enjoined the removal of Elliott from the Board and, likewise, enjoined the effectiveness of Executive Order 2016-211, Executive Order 2016-214, and Executive Order 2016-273. Shortly thereafter, on September 18, 2016, the circuit court rendered a modified temporary injunction. Therein, the circuit court permitted Elliott to serve as a nonvoting member of the Board and lifted the injunction staying the effectiveness of Executive Order 2016-211, Executive Order 2016-214, and Executive Order 2016-273.

On July 11, 2016, Ball, in her official capacity as Treasurer for the Commonwealth of Kentucky, filed a motion to intervene in the action filed by Elliott and Peter. The circuit court permitted Ball to intervene by order entered June 14, 2017. Ball’s intervening complaint was filed of record the same day. In the intervening complaint, Ball alleged that neither Elliott nor Peter were entitled to litigation expenses under KRS 61.645(2)(g) and sought recovery of any

litigation expenses previously paid by the Kentucky Retirement Systems in this litigation. Ball also requested an injunction barring any future payments of litigation expenses on Elliott's and Peter's behalf. By answer to the intervening complaint, Elliott and Peter affirmatively raised the defense that Ball, as Treasurer, lacked standing to oppose payment of their litigation expenses under KRS 61.645(2)(g).

Elliott and Peter filed a motion for summary judgment. Ball also filed a motion for summary judgment, and Governor Bevin filed a motion to dissolve the temporary injunction and to dismiss the action as moot. In the motion to dismiss, the Governor argued that the action was moot due to the General Assembly's enactment of Senate Bill 2, which confirmed Executive Order 2016-340, and which became effective upon the Governor's signature on March 10, 2017. The following language contained in Section 16 of Senate Bill 2 - "the General Assembly confirms Sections, I, II, except as to title 'Board of Directors', III, V, VII, VIII, XI, XII, XV, and XVI of Executive Order 2016-340." SB 2 § 16, 2017 Reg. Sess. (Ky. 2017).

By Opinion and Order entered January 8, 2018, the circuit court granted the governor's motion to dismiss this action as moot due to passage of Senate Bill 2 and dissolved the court's temporary injunction. The circuit court also granted, in part, Elliott and Peter's motion for summary judgment as to litigation

expenses. The court concluded that Elliott and Peter were entitled to litigation expenses under KRS 61.645(2)(g). In awarding litigation expenses per KRS 61.645(2)(g), the circuit court eruditely reasoned:

The bringing of these claims was both necessary and appropriate in light of the unprecedented factual context in which these claims arose. The actions of the Governor in unilaterally removing fiduciaries who served as trustees, reorganizing the board, and reconstituting the board with new appointments raised profound and legitimate questions concerning the scope of the Governor's reorganization powers, especially as it is applied to a board that has fiduciary obligations concerning hundreds of thousands of state employees and retirees and billions of dollars of retirement funds held in trust. As trustees, Mr. Elliott and Ms. Peter acted in good faith and within the scope of their duties as trustees to litigate the actions of the Governor purporting to remove Mr. Elliott and unilaterally reconstitute the Board of the Kentucky Retirement Systems. This duty was reinforced by the Opinion of the Attorney General that found that the Governor acted beyond the scope of his legal authority.

The importance of bringing this dispute before a court of law was heightened by virtue of the rash and unprecedented tactics employed by the Governor to effectuate his Executive Orders in the face of the legitimate legal questions that were raised. The record here is undisputed that the Governor sent his chief of staff, accompanied by armed officers of the Kentucky State Police, and threatened Mr. Elliott with arrest prior to a duly scheduled meeting of the Board unless Mr. Elliott stepped aside and acquiesced to the Governor's demands. Mr. Elliott had not violated any law, there was no valid legal basis for any arrest or threat of arrest, and there was certainly no probable cause to believe any crime had been committed.

Nevertheless, the Governor and his agents subjected Mr. Elliott to the threat of arrest and immediate incarceration for objection to the Governor's policy and asserting his continued right to serve the term to which he had been duly appointed. As a result, Mr. Elliott was coerced into acquiescing to the Governor's policy, which had been found to be in violation of law by the Attorney General, under threat of arrest by police officers acting under color of state law. The use of the Kentucky State Police in this manner was wholly unjustified. These ill-advised and extra-legal tactics raised valid concerns as to whether the Governor's conduct was consistent with the statutory and fiduciary protections from political interference in the administration of the Kentucky Retirement Systems.

The Commonwealth of Kentucky is not a police state. In a government of laws, officials cannot be threatened with arrest for disagreement with the Governor. Such disputes must be resolved in a court of law, and the use of these extra-legal tactics by the Governor further underscores the need for this statute providing for payment of attorneys' fees to board members who are required to initiate or defend legal actions in the course of their official duties.

This Court's interlocutory injunctive orders, for the most part, upheld the changes made by the Governor in reorganizing the Kentucky Retirement Systems. The legislature subsequently ratified most of those changes in Senate Bill 2. Nevertheless, the Court is mindful of the precedent the Governor's tactics may set and the vital importance in a democracy of resolving disputes—in a court of law—over the legal authority of the Governor.

The legislature has provided for payment of attorney's fees to board members who in good faith bring or defend legal actions concerning the discharge of their statutory and fiduciary duties. This action brought by Mr. Elliott and Ms. Peter is just such a case. This action

is squarely within the scope of the statute providing for payment of reasonable attorney's fees for board members. Because Mr. Elliott and Ms. Peter acted in good faith and raised valid legal questions within the scope of their duties as board members, they are entitled to indemnification for their reasonable attorneys' fees under this statute.

Therefore, this Court finds, pursuant to KRS 61.645(2)(g), that this was a civil action arising out of the performance of the official duties of Mr. Elliott and Ms. Peter. The Court further finds that they are entitled to reimbursement of their legal expenses resulting from this civil action.

January 8, 2018, Opinion and Order at 9-11 (citations omitted). Later, by Order and Judgment entered May 15, 2018, the circuit court awarded Elliott and Peter attorneys' fees and costs of \$102,166.61. This appeal follows.

Ball contends that the circuit court improperly awarded Elliott and Peter \$102,166.61 in attorneys' fees and costs. Ball argues that Elliott and Peter are not entitled to litigation expenses under KRS 61.645(2)(g). Ball asserts that Elliott and Peter's action against Governor Bevin did not arise out of an official duty as required by KRS 61.645(2)(g). Ball also maintains that upon enactment of Senate Bill 2, the action was immediately rendered moot. Consequently, Ball argues that Elliott is not entitled to payment of any legal expenses per KRS 61.645(2)(g) after enactment of Senate Bill 2.

When interpreting a legislative enactment, we are bound to follow legislative intent. *Dennis v. Commonwealth*, 156 S.W.3d 759, 761 (Ky. App.

2004). It is recognized that statutory words or phrases are to be given their literal meaning unless to do so would lead to absurd interpretation. *University of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017). And, the word “shall” is generally regarded as mandatory, while “may” is permissive. KRS 446.010(26) and (39). The interpretation of a statute presents an issue of law, and our review is *de novo*. See *City of Worthington Hills v. Worthington Fire Protection Dist.*, 140 S.W.3d 584 (Ky. App. 2004).

The statute at issue, KRS 61.645, provides, in pertinent part:

(2) The board is hereby granted the powers and privileges of a corporation, including but not limited to the following powers:

...

(g) The board shall reimburse any trustee, officer, or employee for any legal expense resulting from a civil action arising out of the performance of his official duties. The hourly rate of reimbursement for any contract for legal services under this paragraph shall not exceed the maximum hourly rate provided in the Legal Services Duties and Maximum Rate Schedule promulgated by the Government Contract Review Committee established pursuant to KRS 45A.705, unless a higher rate is specifically approved by the secretary of the Finance and Administration Cabinet or his or her designee.

Under KRS 61.645(2)(g), a board member shall be reimbursed legal expenses relating to a “civil action arising out of the performance of his official duties.” By the use of the word “shall,” the General Assembly clearly intended that the award

of legal fees be considered mandatory. So, if the action arises out of the performance of an official duty by a board member, the board member is entitled to payment of his or her legal expenses.

It is axiomatic that each member of the Board possesses a fiduciary duty to the Kentucky Retirement Systems. In fact, a Board member must act in good faith and consistently conduct his duties in the best interest of the Kentucky Retirement Systems. At the time of Elliott's purported removal from the Board by Governor Bevin through issuance of executive orders, there existed a good faith dispute as to whether the removal was legal. The Attorney General of Kentucky opined that Elliott's removal from the Board was legally improper. OAG 16-004. Such legal dispute unquestionably impacted the very quintessence of Elliott's ability to perform his official duties as a member of the Board. Therefore, the civil action filed by Elliott and Peter plainly qualifies as a civil action arising out of the performance of official duties within the meaning of KRS 61.645(2)(g).

As for Ball's argument that the action became immediately moot by passage of Senate Bill 2 and that no attorneys' fees were appropriate thereafter, we point out that the determination of whether the action became moot after passage of Senate Bill 2 was solely for the circuit court to decide. The judiciary, not the executive or legislative branches, interprets statutory law and resolves actions before it. An action does not automatically become moot due to passage of

legislative enactment; rather, an action becomes moot only upon the circuit court declaring it so. Likewise, Elliott and Peter's entitlement to legal fees was not automatically terminated upon passage of Senate Bill 2. Accordingly, we hold that the circuit court properly interpreted KRS 61.645(2)(g) and properly concluded that Elliott and Peter were entitled to legal expenses thereunder.

Ball next maintains that the circuit court's award of litigation expenses under KRS 61.645(2)(g) was improper. Ball specifically contends that the award of \$102,166.61 in attorneys' fees and costs in the May 15, 2018, Order and Judgment was excessive and unreasonable. Ball again argues that no litigation expenses should have been awarded after enactment of Senate Bill 2 because the action was automatically rendered moot. Ball even maintains that any legal fees incurred after passage of Senate Bill 2 were arbitrary and in violation of Section 2 of the Kentucky Constitution.

In its May 15, 2018, Order and Judgment awarding \$102,166.61 in attorneys' fees and costs, the circuit court concluded:

To determine reasonable attorneys' fees, the Court must consider the number of hours reasonably expended by each of the plaintiffs' attorneys, then multiply this by an appropriate hourly rate. *See Myers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 825 (Ky. 1992). When determining an appropriate hourly rate, courts often "use as a guideline the prevailing market rate . . . that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791

(6th Cir. 2004) (citation omitted). In addition, courts may consider a party's submissions, awards in similar cases, and its own knowledge and experience in handling similar fee requests. *Id.* at 791 (citation omitted). Multiplying this hourly rate by the number of hours expended provides the Court with a "lodestar" figure, "which may then be adjusted to account for various special factors in the litigation." *Myers*, 840 S.W.2d at 826. For example, under the Rules of the Supreme Court of Kentucky, "[t]he factors to be considered in determining the reasonableness of a fee include," among other things, the time and labor required, the novelty of the issues involved, customary fees for similar services in that locality, the attorneys' experience and reputation, and the results obtained. *See* SCR 3.130(1.5) (prohibiting lawyers from collecting unreasonable fees or expenses). Ultimately, reasonableness is the guiding principle in awarding attorney fees. *See Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999) (citing *Blum v. Stenson*, 465 U.S. 886, 893 (1984)).

Treasurer Ball and Defendants argue that the requested award of \$122,695.11 is unreasonable under the totality of the circumstances. For example, they note that this case ended prior to trial and before any significant discovery. In addition, they argue that the Kentucky Retirement Systems ("KRS") and its members received "no benefit whatsoever" from this suit, as Plaintiffs' claims were ultimately rendered moot by the passage of Senate Bill 2 ("SB2") in March 2017. It is true that SB2 rendered Plaintiffs' claims moot; however, the Court disagrees that this alone requires a reduction in the amount of attorneys' fees. The Court's January 8, 2018[,] Order and Opinion explains that the plaintiffs brought this suit in good faith and pursuant to the fiduciary duties that they owed to KRS as trustees of the KRS Board. Their underlying claims raised legitimate concerns over the Governor's authority to unilaterally abolish and reconstitute the Board under KRS 63.080(1). Accordingly, this Court will not now penalize the

plaintiffs merely because these claims were unforeseeably rendered moot by legislative action.

However, the Court notes that at the time that SB2 became effective, on March 10, 2017, the attorneys involved in this case were—or should have been—aware that the underlying claims were moot. Nevertheless, counsel for plaintiffs continued to accrue approximately 161.6 hours. These hours involved preparing for and participating in a status conference and hearings on the Motion to Dismiss and the Motions for Summary Judgment, as well as preparing the documents related to attorneys' fees. However, these hours did not, or should not, have involved significant research and argument on the complicated issues initially raised by Plaintiffs' Complaint, as those arguments were thoroughly flushed during the initial stages of the litigation. Accordingly, the Court finds it appropriate to reduce the hourly rate for the 161.6 hours expended after March 10, 2017, the effective date of SB2.

To do so, the Court considers the hourly rate set forth in SB2 for the compensation of KRS trustees. That bill amends KRS 61.645(2)(g) to state,

The board shall reimburse any trustee, officer, or employee for any legal expense resulting from a civil action arising out of the performance of his official duties. The hourly rate of reimbursement for any contract for legal services under this paragraph shall not exceed the maximum hourly rate provided in the Legal Services Duties and Maximum Rate Schedule promulgated by the Government Contract Review Committee established pursuant to KRS 45A.705, unless a higher rate is specifically approved by the secretary of the Finance and Administration Cabinet or his or her designee.

The Legal Services Duties and Maximum Rate Schedule (“Rate Schedule”), in turn, provides for \$125/hour for partners, \$100/hour for associates, and \$40/hour for paralegals. Thus, the Court will reduce the hourly rate for hours expended after March 10, 2017[,] to reflect these rates.

According to the time records submitted by Plaintiffs, the hours expended after March 10, 2017[,] total 161.6 hours, with 116.6 hours expended by lead counsel Kevin L. Chlarson (79.4 hours) and Dana L. Collins (37.2 hours), 30.7 hours expended by associates, and 14.3 hours expended by paralegals. After multiplying these figures by the hourly rates set forth in the Rate Schedule, the Court determines that the total amount of fees to be awarded for the period after March 10, 2017[,] is \$18,217. When this is added to the amount of unpaid fees accrued prior to March 10, 2017[,] (\$82,537), the final attorneys’ fees figure reaches \$100,754. For the reasons set forth above, the Court finds this figure represents the reasonable and necessary attorney’s fees incurred in the above-styled action, as evidenced by counsel’s invoice and affidavit herein. Thus, the Court will award \$100,754, as well as \$1,412.61 in costs, for a total award of \$102,166.61.

May 15, 2018, Order and Judgment at 2-6 (footnote and citations omitted).

We believe the circuit court thoroughly analyzed and properly considered the reasonableness of the legal expenses awarded and did not abuse its discretion in the amount of expenses awarded. The circuit court’s award of attorneys’ fees was ultimately \$20,000 less than requested by Elliott and Peter. And, as hereinbefore discussed, the action was not moot until the circuit court declared it to be so. In fact, the circuit court properly utilized its discretion to

award a reduced hourly rate to the attorneys for work performed after the effective date of Senate Bill 2. Such an award was well within the circuit court's discretion and did not offend Section 2 of the Kentucky Constitution.

We, as did the circuit court, recognize the extraordinary circumstances that gave rise to this action. Through four separate Executive Orders, Governor Bevin initially removed Elliott from the Board before expiration of his term, appointed a replacement for him, and then ultimately abolished "the Kentucky Retirement Systems Board of Trustees, as established by the provisions of KRS 61.645." Executive Order 2016-340 at 3. And, arguably under color of law, the Governor ordered armed Kentucky State Police troopers to threaten Elliott with arrest at the May 19, 2016, meeting of the Board if he attempted to participate in the meeting. As hereinbefore stated, Elliott and Peter each owed a fiduciary duty to the Board, and this action was initiated in furtherance of such duty. Therefore, we are of the opinion that the circuit court did not abuse its discretion by awarding \$102,166.61 in litigation expenses per KRS 61.645(2)(g) in its May 15, 2018, Order and Judgment. *See Royal Consumer Products, LLC v. Saia Motor Freight Line, Inc.*, 520 S.W.3d 753, 757 (Ky. App. 2016) (citing *King v. Grecco*, 111 S.W.3d 877, 883 (Ky. App. 2002)).

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

For the foregoing reasons, the Order and Judgment of the Franklin Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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NO BRIEF FOR APPELLEE
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