INTRODUCTION

Dr. Paul Kearney initiated this action against his employer, the University of Kentucky alleging that the university violated Kentucky's Whistleblower Act, Chapter 61 of the Kentucky Revised Statutes. The Fayette Circuit Court entered Summary Judgment in favor of the university on the 1st day of August, 2018. Dr. Kearney filed his appeal on the 21st day of August, 2018.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellant respectfully requests oral argument in this case to address any questions the court may wish the parties to address including the due process privilege issue which is one of first impression.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF CASE

Dr. Paul Kearney filed this Whistleblower action against his employer the University of Kentucky, alleging violations of KRS 61.102(1) and (2). (R. 1, Complaint, 2/12/15, R. 640, Amended Complaint, 9/14/16, Appendix 1 and 2, respectively). The Fayette Circuit Court granted the university summary judgment. (R. 2778, Judgment, 8/1/18, Appendix 3).

For twenty-seven years, Dr. Paul Kearney was employed in a dual capacity at the University of Kentucky as a trauma surgeon and tenured professor at the College of Medicine. During this period, Dr. Kearney achieved national prominence as a trauma surgeon attaining annually the highest job performance evaluations from his division chief and department chairs, and also being the only active clinical physician to have an endowed chair in his name. As a faculty member, he received the highest teaching awards. The only blemish on his record, a written reprimand in 2012. The university officials who had actual knowledge of Dr. Kearney's whistleblower activity were directly involved and directly affected his disciplinary process by feeding the Medical Staff Executive Committee false and unsubstantiated information withholding exculpatory information such as Dr. Kearney's exemplary job performance evaluations, teaching, awards and national recognition.

Attached to the appendix, for ready reference a chart of the university hierarchy. (Dep. Capilouto, Vol. II, 8/5/16, Exhibit 13, R. 2419-2421 – "See Deposition File", Appendix 4).

A. KEARNEY'S DISCLOSURES OF WRONGDOING AT THE APRIL 15TH, 2014 MEETING:

To put the April 15th, 2014 meeting between the university top officials and the UK

College of Medicine Faculty Council in full context let's step back to the faculty council investigation of January, 2014, the minutes of which are essential to fleshing out the backdrop. The UK College of Medicine Faculty Council, of which Drs. Paul Kearney, Davy Jones and Holly Swanson were members, jointly spearheaded an investigation regarding the functioning of the Practice Plan Committee which had been created by the UK Board of Trustees four years earlier in July, 2009. Under UK Administrative Regulation AR 3:14, Article X, the Practice Plan Committee is to serve as the faculty's budgetary oversight committee on sources of income within the UK College of Medicine, and therefore sources of income directly impacting compensation and research dollars. Administration Regulation AR 3:14, Article X reads:

> **The Practice Plan Committee:**
>
> B. *The Committee shall meet periodically and shall review the operation of the Plan and the College Addendum, including matters relating to the applicability of the Plan to sources of income, standard schedules of charges for services, and any other aspects of the operation of the Plan.* The Committee shall make such recommendations as it may deem appropriate to the dean of the college, with respect to the modification of the policies and procedures provided by this Plan or utilized in its operation. In the event that changes are deemed necessary by the dean, they shall be brought before the college Plan members by the Chair of the Committee.

(AR 3:14, Article X, R. 79, Response to Motion to Dismiss, 3/16/16, Exhibit 8, Appendix 5).

Drs. Kearney and Jones requested to be put on the agenda of the faculty council's January, 2014 regular meeting and at that meeting Kearney and Jones informed the faculty council that the Practice Plan Committee had not met since its formation under administrative regulation AR 3:14 in July 2009. The Faculty Council itself had no

authority to remedy the infraction. (Dep. Kearney, 6/30/16, p. 20, R. 2419-2421 "See Deposition File", Appendix 6). The Council forwarded their curative recommendations to Dr. Fred DeBeer, Dean of the UK College of Medicine, on January 21st, 2014. (Dep. Kearney, 6/20/16, Exhibit 1, para.. 8, R. 2419-2421 "See Deposition File", Appendix 7). No immediate response or confirmation was received from the Dean's office. Finally, an email scheduling a meeting for April 15th, 2014 was sent to the Council chair Swanson. The email fails to specify the subject matter of the meeting reading as follows:

> "Dr. Karpf and Bill Thro would like to address Faculty Council at their April meeting on Tuesday, April 15 regarding a *legal matter*..."

(Dep. Karpf, 7/28/17, 3/18/14 Email, Exhibit 11, R. 2419-2421 "See Deposition File", Appendix 8)

Appendix 9 (R. 79, Response to Motion to Dismiss, 3/16/15, Exhibit 10) contains the minutes of the April 15th, 2014 Faculty Council Meeting setting forth those in attendance. Dr. Swanson explained that the minutes are just a sketch. (Dep. Swanson, p. 34-35. R. 2419-2421 "See Deposition File", Appendix 10). The minutes accurately reveal who was on the administration side of the table at the meeting: Dr. Michael Karpf, Executive Vice President of Health Affairs; William Thro, UK General Counsel; Fred DeBeer, Dean UK College of Medicine; and John Wilson, Ph.D., UK Board of Trustees Member.

At first blush, a breach of AR 3:14, Article X may appear to be insignificant. Dr. Holly Swanson pointed out, a breach of AR 3:14 jeopardizes the very accreditation of the university. (Dep. Swanson, pp. 23, R. 2419-2421- "See Deposition File", Appendix 11). The impact of the violation is far more ranging and immediate when it comes to the millions

of dollars at stake and who has unfettered access to those funds. Two sources of revenue for the UK College of Medicine are the Kentucky Medical Service Foundation and the Dean's (College of Medicine) Enrichment Fund.

The Kentucky Medical Services Foundation is a non-profit, non-member 501(3)(c) corporation that collects the billings generated by the UK Clinical physicians and KMSF returns the funds back to the physicians for salaries. (Dep. Randall, 7/26/16, p. 32, R. 2419-2421- "See Deposition File" Appendix 12). As a non-profit, non-member 501(3)(c) corporation KMSF maintains that it is not affiliated with the University of Kentucky thus beyond the purview of the UK Board of Trustees. (Dep. Randall, 7/27/16, p. 32, R. 2419-2421- "See Deposition File" Appendix 13). The Board of Directors of KMSF is comprised of the 18 Chairpersons in the UK College of Medicine together with six elected faculty members and a member at large. (Dep. Randall, 7/27/16, pp, 17-18, R. 2419-2421- "See Deposition File", Appendix 14). The department chairs are appointed by Dean DeBeer thereby giving him direct control of KMSF funds since he controls who sits on the Board of Directors of KMSF. (Dep. DeBeer, p. 37-38, R. 2419-2421 "See Deposition File", Appendix 15.

KMSF, has an automatic annually renewable contract/contracts with the University of Kentucky Board of Trustees. (Dep. Randall, Exhibit 2, page 63. Section 9, R. 2419-2421- "See Deposition File", Appendix 16). Per the terms of that contract the Dean's Enrichment Fund receives "... 8% of the actual clinical income collected by said Foundation, with said funds to be used by the Dean of the College of Medicine for the enrichment of the programs of the college of or for the programs in his/her sole discretion". By virtue of this contract, Dean DeBeer is given unfettered discretion over nearly 16

million dollars in annual revenue. The 16-million-dollar figure extrapolated from former KMSF CEO Darrell Griffith who put KMSF annual revenues at 200 million dollars plus. (Affidavit Griffith, R. 461, Exhibit 3, 2/10/16, Appendix 17).

The contract between KMSF and the UK Board of Trustees gives the UK Board of Trustees the right to audit the books and accounts of KMSF. (Dep. Randall, Exhibit 2, page 63. Section 14, R. 2419-2421- "See Deposition File", Appendix 18).

The Practice Plan Committee, serving as the faculty financial oversight body, had not met in four years giving free rein to the Dean to spend millions of dollars earned by the UK clinical physicians.

Going into the April 15th, meeting, Dr. Kearney's suspicions that clinicians' earned money, collected by KMSF, was being wasted or mismanaged had been heightened through his investigation as well as his observations of changes that occurred over his long years of service to UK. First, the Practice Plan Committee had effectively been eliminated; its watchdog function gone. He also noted that KMSF's release of board minutes to the physicians had been cut off in the past two or three years. When he requested minutes in January, 2014, that request was denied. Dr. Kearney knew that KMSF funds were being used to purchase outside medical practices. He heard from former KMSF board members that KMSF funds had been used to make a multi-million-dollar loan to a child development center, and KMSF had leased a private airplane. (Dep. Kearney, p. 24-29, R. 2419-2421, - "See Deposition File", Appendix 19). Connecting the dots, Dr. Kearney approached the April 15th meeting with a well-grounded opinion that millions of dollars were being wasted or mismanaged. Dr. Kearney would grab the third rail of university operations, money, when he voiced his suspicions of waste, mismanagement and abuse of authority. Dr.

Kearney's opinions were later confirmed when Dean DeBeer admitted that the Dean's Enrichment Fund had loaned 5million dollars to the child development center; leased an airplane; paid for Karpf's box at Keeneland; and foxhounds at the Iroquois Hunt Club. (Dep. DeBeer, pp. 45-46; 53, R. 241-2412, "See Deposition File", Appendix 20)

Dr. Paul Kearney made two disclosures of wrongdoing at the April 15th meeting reported as follows:

> "Q. Well, and we can go through this in detail, but let me ask you this before we start that. What specifically did you do at the April 15, 2014 meeting that you contend in this lawsuit was whistleblowing?
>
> A. **Number one, I reported the violation of Administrative Regulation 3:14, which governs the practice plan and practice contracts that are signed with the physicians.**
>
> **Number two, I was concerned about mismanagement of KMSF funds, which is the MSO, the medical services organization, that bills and collects and distributes faculty professional fees.**
>
> ... ***And it finally settled down. And I spoke directly to Mr. Thro, and I said, "I think we need to have an outside attorney, somebody not affiliated with the university, look at the practice plan contracts and how they were developed." And then I said, "I think we need an independent audit of KMSF to look at the management of monies there.***
>
> That was promptly followed by Dr. Karpf raising his voice, pointing his finger at me and said, "Dr. Kearney, if you don't like it here, you can leave."
>
> That was followed by a comment from Hollie Swanson, Dr. Swanson, who said, "Dr. Karpf, did you just threaten Dr. Kearney?"

(Dep. Kearney, 6/30/16, pp. 15,18, R. 2419-2421- "See Deposition File", Appendix 21).

Both Drs. Davy Jones and Holly Swanson opined that Dr. Karpf threatened to fire Dr. Kearney. (Article 10 Hearing, Vol. II, 5/28/15, Swanson p. 47; Jones p. 41, R. 2201,

Appendix 22). Dr. Karpf understood Dr. Kearney. Dr. Karpf's on the spot threat to fire Dr. Kearney erases any doubt that Dr. Kearney's call for an outside audit was a call to look at suspected mismanagement of KMSF funds. Karpf's threat was designed to discourage any future disclosures by Dr. Kearney or fellow faculty members.

In July, 2014, an anonymous student complaint popped up. A couple of weeks later, Dean DeBeer suspended Dr. Kearney's teaching privileges based on an alleged anonymous student report that Dr. Kearney's lecture to his resident had been inappropriate. (Dep. Kearney, 6/20/16, p. 48, 50, R. 2419-2421 – "See Deposition File, Appendix 23. Later, assistant UK General Counsel Cliff Iler, who reviewed the audio, deemed the lecture to be fine. (Dep. Capilouto, 7/20/16, Vol. 1, Exhibit 5, R. 2419-2421 – "See Deposition File", Appendix 24).

Before his teaching status was restored, Dr. Kearney was hit with a patient complaint of allegedly calling a quadriplegic patient a "f***ing quad" during an endoscopy procedure. September 5th, 2014 Dr. Bernard Boulanger, Chief Medical Officer, suspended Dr. Kearney, banned Kearney from campus and ordered Kearney not to speak to colleagues. All memorialized in a memo of September 5th, 2014. (Dep. Karpf, 7/28/17, Exhibit 15, R. 2419-2421 – "See Deposition File", Appendix 25). Dr. Kearney strongly denied the accusation and at no point in the proceedings that followed were the allegations ever corroborated by those present in the operating room. Within days of the September 5th suspension, Dr. Michael Karpf called Mr. Greg Goodman, a patient of Dr. Kearney and major donor to the university, informing Mr. Goodman that he, Karpf, would control the direction of the disciplinary action given his position as Executive Vice President of Health Affairs. (Goodman Affidavit, R. 460, Exhibit 3, Appendix 17).

Before the month of September ran out, Dr. Kearney met with UK General Counsel William Thro. Dr. Kearney recounts the ultimatums and threats UK General Counsel threw down in that meeting: "your time at the university here is done. We don't want you back…" "The President has given me the authority to make you a reasonable offer and we can negotiate that. If you don't take the offer, *we will suspend your privileges and ruin your academic – "ruin your career".* (Depo. Kearney, 6/20/16, p. 33, R. 2419-2421- "See Deposition File", Appendix 26)

By virtue of the September 5th suspension, Dr. Kearney's teaching and clinical privileges had been effectively suspended at the university; he was banned from campus and under a gag order not to speak to colleagues. The campus ban and gag order being the most effective way to punish and silence Kearney not to mention the unequivocal pronouncement the university "did not want him back" coupled with the offer to buy his silence by means of a severance package.

B. DR. KEARNEY'S SECOND DISCLOSURE OF WRONGDOING 11/3/14:

The second disclosure coming in an 11/3/14 email form to assistant counsel Cliff Iler, now the only line of communication open, lawyer via lawyer.

> "Rather, it is obvious that the most recent complaints regarding Dr. Kearney, upon which this action is grounded, not only lack basis in fact but constitute a contrived effort to maliciously document Dr. Kearney's personnel file with allegations of wrongful conduct, unsupported by the University's own investigation(s) for the sole purpose of removing Dr. Kearney (a senior member of the Faculty Council and Chairman of the Department of Surgery Practice Plan Committee) from his position in retaliation **for his public disclosure of Dr. Karpf's impropriety i.e. attempting gain control of KMSF practice plan funding contrary to University regulations.**"

(November 3, 2014 email; Dep. Capilouto, Vol. 2, 8/5/16, Exhibit 19, R. 2419-2412 – "See Deposition File", Appendix 27).

The full text of the email chronicles unlawful reprisals taken against Kearney as well as Karpf's abuse of authority.

Following that disclosure, Dr. Michael Karpf admits he directed his subordinate Chief Medical Officer Boulanger to push the Kearney discipline to the next level: The Medical Staff Executive Committee:

> "A… As I recall, Boulanger came to my office. So I wasn't' in the Mediterranean- - I don't know, I'd have to go back and see the dates. Boulanger came to my office and told me about the incident that occurred. **I said that's going to the Medical Staff Executive Committee**…"

(Dep. Karpf, Vol. II, 7/28/17, p. 129, R. 2419-2421- "See Deposition File", Appendix 28).

Dr. Boulanger begins the Medical Staff Executive Committee proceedings with a summary suspension letter to Dr. Kearney on January 26th, 2015. (Dep. Karpf, 7/28/17, Exhibit 16, R. 2419-2421 – "See Deposition File", Appendix 29). This time, the summary suspension is grounded on an expanding fictious narrative that Kearney has a "long history of unprofessional behavior", a narrative incongruous with Dr. Kearney's promotions, awards and excellent job performance reviews. If such a history of unprofessional conduct, why is that history not reflected in his job performance evaluations? The most striking questions: Why now?

The UK Health Care Bylaw Section 9.4.2 states:

> Upon summary suspension of a Practitioner, the Medical Staff Executive Committee shall direct that an investigation be conducted by persons designated by the Medical Staff Executive Committee to determine the need for the suspension or further action concerning

the Practitioner. ***Within 14 calendar days thereafter, the Medical Staff Executive Committee shall conduct a hearing. . ..***"

(UK Health Care Bylaw Section 9.4.2, R. 1383. Exhibit 8, Appendix 30).

Drs. McDowell and Bezold were selected to conduct the investigation, one that would be directed and supervised by UK General Counsel. It was general counsel's office that provided McDowell and Bezold a select number of documents cherry picked from Dr. Kearney's file to focus the investigation and shore up the false narrative of Kearney's alleged history of unprofessional behavior. (Dep. McDowell, p. 46-49, Exhibit 3, R. 2419-2421 – "See Deposition File", Appendix 31). The stand-alone document that shines a light on the contrived nature of the charges against Dr. Kearney is the so-called "DRAFT" document that is unsigned, "DRAFT" boldly typed across the face, and recites a number of personnel actions against Dr. Kearney that never occurred. (Dep. McDowell, p. 46-49, Exhibit 3, Draft Document, R. 2419-2421 – "See Deposition File", Appendix 32). Where UK legal obtained this document is still unanswered. Documents withheld by General Counsel were Dr. Kearney's curriculum vitae and job performance evaluations.

Despite the bylaws mandating a hearing before the Medical Staff Executive Committee, Dr. Kearney was tried *in absentia.* Dean DeBeer appeared before the Medical Staff Executive committee portraying Dr. Kearney as an "imminent danger to the safety of patients, staff, residents and colleagues", as reflected in the Medical Staff Executive Committee minutes. Consequently, the sole source of information was what general counsel and the Dean stove piped to the medical staff to ensure sanctions. Attached are the minutes of the January and February Medical Staff Executive Committee's meetings. (Dep. Zachman, Exhibit 3 and 4, R. 2419-2421 – "See Deposition File", Appendix 33) In the upper right-hand corner of the February minutes it is noted that Sarah Bentley was

present and recorded the proceedings. Ms. Bentley admitted being present but denied recording the proceedings. (Dep. Bentley, 9/12/16, p. 25-26, R. 2419-2421 "See Deposition File", Appendix 34). Dr. Kearney was handicapped in the next step of the process given that he had no recording of what transpired before the February Medical Staff Executive Committee. What triggered his internal appeal to the Fair Hearing Panel was the letter MSEC of February 5th, 2015 signed by acting president Dr. Zachman revoking Dr. Kearney's clinical privileges, again banning him from campus and placing him under the same gag order.

C. THIRD DISCLOSURE OF WRONGDOING SET FORTH IN COMPLAINT:

On February 12th, 2015, Dr. Kearney filed his whistleblower action against the university alleging, *inter alia*, in paragraph 8 the following:

> "8. The defendant university, by and through its authorized agents including Dr. Michael Karpf caused, and continues to cause, improper access to Kentucky Medical Service Foundation's financial resources. The Kentucky Medical Services Foundation is a non-profit entity separate and apart from the university. The manner and method employed by the defendant university to access the funds of the Kentucky Medical Services Foundation were kept from public disclosure."

(R. 1, Complaint, Appendix 1)

Following the filing of this action, Dr. Kearney appealed to the three-member Fair Hearing Panel who in May issued a decision upholding the Medical Staff Executive Committee's ruling. At the Panel proceedings Dr. Kearney was permitted to testify, call witnesses and cross-examine university witnesses. However, Dr. Kearney was handcuffed at this stage by not having a record of the February 5th MSEC proceedings and being placed in a procedural corner having to prove the MSEC were arbitrary, unreasonable or

unfounded. (R. 1383, Response to Motion for Summary Judgment, 3/2/18, Exhibit 38, Appendix 35). What stands as a red flag that the proceedings before the Fair Hearing Panel were at best less than impartial is the finding on page 11 under the caption "Major Obstacles":

> "***As viewed by the Committee, multiple warnings, leaves of absence, remediation programs, written reprimands, and action plans had done little to eliminate the problem...***"

(R. 1383, Response to Motion for Summary Judgment, @ 1813, 3/2/18. (Exhibit 38), (Appendix 36). Nowhere in the proceedings before the Fair Hearing Panel was any testimonial or documentary evidence introduced that Dr. Kearney had multiple warnings, leaves of absence, remediation programs, written reprimands or action plans.

Dr. Kearney then appealed to the University of Kentucky Subcommittee of the Board of Trustees, which entered a return to work order:

> "The University HealthCare Committee voted unanimously to modify the Recommendation of the Appellate Review Panel. The Appellate Review Panel's recommendation was to revoke Dr. Kearney's clinical privileges permanently. The approved modification will revoke the clinical privileges permanently, but reaffirms Dr. Kearney's current status as a tenured faculty member. Specifically, the University will (1) allow Dr. Kearney to have access to campus; (2) allow Dr. Kearney to have an office in an appropriate location; (3) allow Dr. Kearney to communicate with his university colleagues; and (4) lift the suspension of Dr. Kearney's university email account. Dr. Kearney's access to campus shall be no greater or less than those of a tenured faculty member who lacks clinical privileges. This affirmation should happen immediately."

(Final Action of the University Health Care Committee Order, 8/24/15, Dep., Karpf, 7/28/17, Exhibit 18, R. 2419-2421, "See Deposition File", Appendix 37).

Immediately following Dr. Kearney's return to work as an active tenured professor, with campus access, the university again clamped down on Dr. Kearney's right to speak to staff, his teaching privileges, and campus access. UK General Counsel, William Thro, by

letter of August 28th, 2015, notified Dr. Kearney that he could not teach, access certain areas of the hospital, nor speak with staff on the pretextual premise that Dr. Kearney has no clinical privileges. (Dep. Capilouto, page 65, Vol. II, 8/5/16, Exhibit 20, R. 2419-2421, "See Deposition File", Appendix 38). Drs. Jones and Swanson are not medical doctors and they teach within the College of Medicine. Dr. Kearney remains a licensed physician with the ability to at least see patients. The restrictions imposed on August 28th, 2015 remain in effect to date. Dr. Kearney's salary was reduced to $42,000 in May, 2016, within three months following the Darrell Griffith disclosure made during the course of litigation.

D. THE DARRELL GRIFFITH AFFIDAVIT FILED DURING LITIGATION IS A DISCLOSURE OF WRONGDOING:

On February 10th, 2016, Dr. Kearney filed the Darrell Griffith affidavit in the record of these proceedings. A copy of that affidavit is attached in the appendix at Appendix 17 (Affidavit Griffith, R. 46, Exhibit 3, 2/10/16). Mr. Griffith, is the former CEO of KMSF, having served in that capacity until May of 2014. Mr. Griffith set forth in his affidavit that KMSF had loaned the child development center 5 million dollars and paid $400,000 to a pharmaceutical company. He avers that as of May, 2014 only 2.5 million dollars of the child development loan had been paid back. He further opines: *"The KMSF Board of Directors had a fiduciary duty to inform the UK Clinical Faculty who were members of the Faculty Practice Plan, of these business activities of KMSF."* The trial court found that this February, 2016 Griffith disclosure had came after the personnel action had concluded. The personnel action is an ongoing one. Following the Griffith disclosure in February 10th, 2016, Dr. Kearney's salary was reduced in May, 2016 to $42,000. (Dep. Kearney, 6/20/16, p. 60, R. 2419-2421, "See Deposition File", Appendix 39). The reprisals continue to date.

ARGUMENT

STANDARD OF REVIEW

The standard of review on appeal of a 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." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary disposition "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, 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." Kentucky Rules of Civil Procedure CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts resolved in his favor." Steelvest v. Scansteel Service Center Inc., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is only proper "where the movant shows that the adverse party cannot prevail under any circumstances. *Id.*

The appellate court conducts a *de novo* review of the trial court's grant of summary judgment for the reason that summary disposition involves only legal issues and the existence of any disputed material issues of fact. Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky. App. 2001).

1. DR. PAUL KEARNEY MAKES OUT A PRIMA FACIE CASE UNDER THE WHISTLEBLOWER ACT, KRS 61.102(1) AND (2):

The Act states, KRS 61.102(1):

> "(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports...any facts or

> information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to ***actual or suspected*** mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. . ."

KRS 61.102 (2) reads:

> "No Employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section."

A *prima facie* case of a violation of the Act consists of four elements: 1) the employer is an officer of the state; 2) the employee is employed by the state; 3) the employee made or attempted to make a good faith report or disclosure of wrongdoing to an appropriate body or authority; and 4) the employer took action or threatened to take action to discourage the employee from making the disclosure or to punish the employee for making the disclosure. Davidson v. Commonwealth, Dept. of Military Affairs, 152 S.W.3d 247 (Ky. App. 2004). The first two elements are not in question.

It is the second prong of the *prima facie* case upon which the trial court based summary judgment. The trial court erroneously found Professor Jones to be the sole whistleblower having made the initial disclosure in January, 2014; that Kearney's April disclosure to be merely a "thought" rather than a disclosure; the report in April solely to the wrongdoers and that the KMSF is a private corporation which has no university oversight. The trial court erred finding the disclosure in Kearney's complaint to be a "bare bones" legal conclusion and the Griffith affidavit to have been filed after the personnel action concluded.

Neither the parties nor the court had the advantage of the Kentucky Supreme Court's recent ruling in Harper v. University of Louisville, 559 S.W.3d 796 (Ky. 2018) holding that opinion disclosures of suspected waste, mismanagement or abuse of authority are protected under the Act and cannot be recast as "personnel opinions" so as to defeat the Act's protection. The trial court recast Dr. Kearney's April disclosure of waste and mismanagement as a "thought" when Kearney called for the audit of KMSF. Viewing the evidence in a light most favorable to Dr. Kearney, his "thought" is just another way to voice an opinion in the context of that April meeting when he called for an independent outside audit. Dr. Karpf got the message that Dr. Kearney suspected waste and mismanagement of KMSF funds as evidenced by Karpf's on the spot threat to fire Kearney. The Karpf threat leaves no doubt that Dr. Karpf knew that Dr. Kearney was disclosing suspected waste and mismanagement of funds.

The facts of this case are easily distinguishable from Thornton v. Office of the Fayette Cty. Atty. 292 S.W.3d 324 (Ky. App. 2009). Ms. Thornton's disclosures were not good faith disclosures for the reason her reports of wrongdoing were based solely on hearsay which she made no attempt to determine if accurate. Here, Dr. Kearney's opinion as to waste and mismanagement of KMSF funds was strongly formed by his investigation, observations over his years of service and strengthened by the breach of AR 3:14. Dr. Kearney's opinion of suspected waste, mismanagement and abuse of authority borne out later by Dr. Mark Randall, Darrell Griffith and Dean DeBeer.

The trial court erred in finding Professor Jones to be the initial whistleblower relying on Moss v. Kentucky State University, 464 S.W. 3d 457 (Ky. App. 2014) as being applicable to the facts of this case. Viewing the record in a light most favorable

to Kearney, the January, 2014 report to the faculty council was the result of a joint investigation spearheaded by Jones and Kearney uncovering the breach of AR 3:14. The faculty council had no authority to remedy this matter. (Dep. Kearney, p. 20, 6/20/16, R. 2419-2421 – "See Deposition File", Appendix 40) KRS 61.102(1) requires the intra-agency report/disclosure to be made to the appropriate person or body as opposed to fellow faculty members. Workforce Development Cabinet v. Gaines, 276 S.W.3d 789 (Ky. 2008). In Moss, claimant's report was not a disclosure because the university was already addressing the issue. Moss does not hold that the first in-line disclosure trumps subsequent disclosures. Moss stands for the proposition that a disclosure of what is widely or publicly known does not fall within the Whistleblower Act.

If Jones' January disclosure falls within the Act so does Kearney's January disclosure under KRS 61.102(2) since Kearney aided and supported Jones.

The trial court erred in relying on Pennyrile Allied Community Services v. Rogers, 459 S.W.3d 339 (Ky. 2015). Pennyrile stands for the proposition that a report of wrongdoing solely to the wrongdoer is not protected under the Act because it is not a report to the appropriate person e.g., the wrongdoer's supervisor. At the April 2014 meeting, Dr. John Wilson, a UK Board of Trustee member was present. There is no record evidence that he was a wrongdoer, aware of the breach of AR 3:14 or mismanagement, waste of KMSF funds. For that matter, there is no evidence that Mr. Thro was aware of the mismanagement of KMSF funds, had a role in wasting those funds, or abused his authority to misdirected those funds. That Thro later retaliated against Dr. Kearney is a different picture outside the purview of Pennyrile, especially in view of the facts that the reprisals did not begin until the summer of 2014.

What the trial court failed to address is the contractual relationship of KMSF, the University of Kentucky Board of Trustees, and the Dean's Enrichment Fund. Per the terms of their contract the university and KMSF are financially inextricably intertwined. The contract between KMSF and UK empowers the Board of Trustees to audit the books and accounts of KMSF thereby squarely placing trustee Dr. John Wilson as the "appropriate" person under Gaines to address the disclosure regarding KMSF as well as being the appropriate person to address the report of the AR 3:14 infraction.

The November, 2014 email disclosures is more than "reiteration" of Kearney's April disclosure. Viewing the email in a light most favorable to Kearney, Kearney spells out Karpf's suspected waste and mismanagement of KMSF funds as well as the subsequent reprisals violative of Dr. Kearney's tenure status. By November, 2014, all lines of Kearney's communication had been cut off except this lawyer via lawyer avenue to UK legal, represented by Mr. Cliff Iler. One need only read the entire content and context of the email to see that it falls within the Gaines intra agency fold as a report of mismanagement/abuse of authority, and whistleblower reprisals.

The disclosure in paragraph 8 of Kearney's whistleblower complaint is another protected disclosure under the Act as is the Darrell Griffith affidavit that was filed in the record on February 10, 2016. Davidson v. Commonwealth Dept. of Military Affairs, 152 S.W.3d 247, 251 (Ky. App. 2004) holds that disclosures made in pleadings, or in the course of litigation, are protected for they are disclosures to the appropriate persons, i.e., the judiciary. The trial court read paragraph 9 not paragraph 8. Paragraph 8 spells out mismanagement and abuses of authority by university officials including Dr. Karpf. The Griffith affidavit is improperly dismissed as a disclosure by the trial court on the basis

that the personnel action is concluded as of February 10, 2016, the date the Griffith affidavit was filed in the record. Just three months after the Griffith affidavit was filed, Dr. Kearney's salary was knocked down to $42,000 in May, 2016. The university reprisals continued against Dr. Kearney.

The fourth prong of the prima facia case is met by Dr. Kearney when viewed in a light most favorable to him. The record reveals the April Karpf threat to fire Kearney, which is followed up by the Thro threat in September to ruin Dr. Kearney's career. These threats to punish Dr. Kearney are compounded against the backdrop of a campus ban and gag order.

Any doubts whether the content and context of Dr. Kearney's disclosures fall within the Whistleblower Act are to be resolved in his favor at the summary stage. Steelvest v. Scansteel Service Center Inc., 807 S.W.2d 476, 480 (Ky. 1991). This court is respectfully urged to reverse the trial court's summary judgment in favor of the university and remand this case for trial.

2. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT:

Viewing the evidence in a light most favorable to Dr. Kearney, genuine issues of fact exist precluding summary judgment. Having made out a *prima facie* case, Dr. Kearney establishes genuine questions of fact exist whether his disclosures are "a contributing factor" in the personnel actions subsequently taken against him by the university. KRS 61.103(1)(b):

> *"'Contributing factor' means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. It shall be presumed there existed a 'contributing factor' if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time*

so that a reasonable person would conclude the disclosure was a factor in the personnel action."

Within four months of Kearney's April disclosures, Dean DeBeer suspended Dr. Kearney's teaching duties on the basis of an anonymous student complaint, one later determined meritless. DeBeer's August suspension action came weeks after Kearney's term on the faculty council expired in July, 2014. DeBeer had actual knowledge of the Kearney's April disclosures. Dean DeBeer would appear before the Medical Staff Executive Committee and push for revocation of Kearney's clinical privileges portraying Kearney as presenting an imminent danger to patients and staff.

Dr. Karpf told Mr. Goodman that, following the September 5th, suspension, no further disciplinary against Kearney would be imposed without Karpf's approval. Dr. Karpf admits that he directed Dr. Boulanger to take the Kearney personnel action before the Medical Staff Executive Committee, UK General Counsel's office steered the information culled from Dr. Kearney's to be passed on to the Medical Staff Executive Committee including the "DRAFT" document spelling out fabricated past personnel actions taken against Kearney. General counsel's office withheld from the committee Kearney's exculpatory job performance evaluations that not only fail to disclose any unprofessional conduct, those evaluations divulge excellent performance in all areas. Not a single patient or resident complaint over a twenty-seven-year career. Viewing the evidence in Kearney's favor, Drs. Karpf, DeBeer and UK General Counsel choreographed the disciplinary process thereby bringing their threats to terminate Kearney to fruition. Karpf, DeBeer and Thro having had actual knowledge of Kearney's disclosures. Their efforts underscored by the Fair Hearing Panel's finding of contrived multiple past personnel actions taken against Dr. Kearney as spelled out on page 11 of their decision.

In contravention of the trustees' order returning Kearney to campus as an active tenured professor, lifting the campus ban and gag order, that had been in effect for nearly a year, the administration continues to retaliate against Kearney refusing to let him teach, restricting his campus access and contact with colleagues. Personnel action continuing to the present date. The administration, cutting Kearney's salary to $42,000 dollars in May, 2016, three months after the Darrell Griffith disclosure is filed in the record during the course of this litigation, evincing the ongoing university reprisals.

Questions of Kearney's intent are solely for the jury. The Supreme Court's recent decision in Harper v University of Louisville, *supra* is dispositive of the issue whether genuine questions of fact preclude summary judgment on several points. Foremost Harper, holds whether Kearney's disclosures are "a contributing factor" tending to affect, in any way, the outcome of a decision is a question for the jury. Second, the university cannot escape liability under the Act on the basis of the decision maker's claimed ignorance of the disclosures when those with knowledge of the disclosures "steered" the disciplinary process. Karpf directed Dr. Boulanger to bring Dr. Kearney before the MSEC; General Counsel provided the select documents to the MSEC committee, and Dean DeBeer testified before the MSEC.

An unpublished opinion of this court comes into play with respect to the fact pattern set forth here. Jones v. Oldham County Sheriffs Dept., 2010 WL 1508150 (Ky. App.) 4/16/10; Appendix 41) addressed the defense raised by the sheriff's department that the independent Merit Board terminated Jones on legitimate charges. Rejecting that defense, the Court of Appeals reversed the trial court's summary based on sheriff's defense reasoning Jones need only establish the reports of wrongdoing were "a contributing factor"

not the sole factor affecting the decision.

KRS 61.103(3) reads:

> "Employees filing court actions...shall show by a *preponderance of evidence* that the disclosure was a contributing factor in the personnel action. Once a *prima facia* case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action."

KRS 61.103(3) raises the statutory presumption that the official taking the action knew of the disclosure and acted within a reasonable period of time so that a reasonable person would conclude the disclosure was a factor in the personnel decision. Assuming that the presumption is not applicable, the juxtaposition is not dispositive of issue. The employee may proceed to carry his or her burden without the presumption. To draw bright lines on what constitutes a "reasonable time", as a matter of law at the summary stage, runs the very real risk of stamping all whistleblower actions with a single pattern time stamp, as a matter of law, regardless of the underlying facts of each case. The savvy employer will deliberately delay the personnel action beyond the court drawn time line in order to undermine any whistleblower action.

Once the employee has made out a *prima facie* case, the matter moves to jury determination. The factual issues for the jury to determine are: 1) whether the employee proves, by a preponderance of the evidence, that the disclosure was a contributing factor in the personnel action; and 2) the burden then shifts to the employer to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action. Both burden of proof paradigms bring the case to a jury fact finding determination.

The trial court may not weigh the evidence nor assess the credibility of the witnesses. Whether Dr. Kearney or the university is able to carry their respective burden of proof is for jury determination. Steelvest, *supra*.

3. **THE TRIAL COURT ERRED GRANTING THE DECISIONMAKERS DELIBERATIVE PROCESS PRIVILEGE THEREBY PROHIBITING DR. KEARNEY FROM DEPOSING THE DECISIONMAKERS WHO PARTICIPATED IN HIS PERSONNEL ACTION.**

The trial court prohibited Dr. Kearney from deposing Dr. Wendy Hanson, a member of the Fair Hearing Panel. (R. 88, Order Denying Plaintiff's Motion to Depose Dr. Wendy Hanson, 11/1/2017, Appendix 42) Dr. Kearney filed a motion to compel Dr. Hanson to appear for a deposition desiring to determine how and from whom, the information that Dr. Kearney had multiple remediation actions, reprimands, leaves of absences and warnings during his twenty-seven years at the university had been secured by the Fair Hearing Panel. The university responded claiming deliberative process privilege prevented such discovery and the trial court agreed.

Kentucky Rules of Evidence 501 reads:

> "Except as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Court of Kentucky, no person has a privilege to:
>
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing."

There exists no Constitutional, statutory or Kentucky Supreme Court enactment recognizing the deliberative process privilege, particularly in the employment context. Shielding the decisionmakers by virtue of a privilege that is not recognized in Kentucky

impermissibly extends the withholding of evidence via a nonexistent privilege. Professor G. Lawson, The Kentucky Evidence Law Handbook, 5th Edition at Section 5.00 points out that the Federal Rules of Evidence are based upon the principles of common law whereas the Kentucky Rules of Evidence are "a creature of the legislative process." Whether the language "promulgated by the Supreme Court" leaves room for the Kentucky Supreme Court to develop new privileges is an open question. Professor Lawson goes on to add that "KRE 501 includes no provision for common law development of testimonial privileges.", citing dictum from Stidham v. Clark, 74 S.W.3d 719, 723 (Ky. 2002).

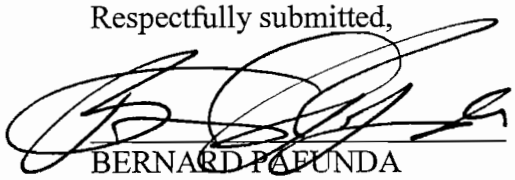
The circuit court erred by creating a new privilege not set forth in the Kentucky Rules of Evidence thereby denying Dr. Kearney the opportunity to obtain testimonial evidence from the university decision makers, e.g., Dr. Wendy Hanson.

This court is respectfully urged, on remand, to direct the circuit court to set aside the order recognizing deliberative process privilege and to permit Dr. Kearney to obtain testimonial evidence from the university decision makers.

CONCLUSION

This court is respectfully urged to reverse the trial court's summary judgment and remand this case to the Fayette Circuit Court. This court is further requested to set aside the trial court's order imposing the deliberative process privilege.

Respectfully submitted,



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