FILED

APR 13 2023

CLERK
SUPREME COURT

Received: 2022-SC-0354 03/21/2023
Tendered: 2022-SC-0354 03/22/2023
Kelly L. Stephens, Clerk
Supreme Court of Kentucky

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2022-SC-0354-DG

HUGH KEITH MCWHORTER, et al. APPELLANTS

v.

On Discretionary Review From
Kentucky Court of Appeals
Case No. 2021-CA-0844
Fayette Circuit Court
Civil Action No. 21-CI-00532

BAPTIST HEALTHCARE SYSTEM INC.
D/B/A BAPTIST HEALTH LEXINGTON APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE*
KENTUCKY JUSTICE ASSOCIATION

Kevin C. Burke (KBA #87131)
Jamie K. Neal (KBA # 88507)
BURKE NEAL PLLC
2200 Dundee Rd., Suite C
Louisville, Kentucky 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com
Counsel for Amicus Curiae,
Kentucky Justice Association

CERTIFICATE OF SERVICE

I certify that on March 21, 2023, this brief was filed with Clerk, Kentucky Supreme Court, and copies served via U.S. Mail on: Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Ernesto M. Scorsone, Fayette Circuit Court, 120 N. Limestone St., Lexington, KY 40507; David M. Cross, 200 E. Cumberland St., Albany, KY 42602; Donald L. Wilkerson III, Hoover & Assoc., 40 S. Main St., Jamestown, KY 42629; Jeffrey T. Barnett, Kimberly Goetz DeSimone, Barnett, Benvenuti & Butler PLLC, 489 E. Main St., Ste. 300, Lexington KY 40507.

s/ Jamie K. Neal
Jamie K. Neal

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE* 1

KRS 411.167 .... 1, 2
Smith v. Isaacs, 777 S.W.2d 912 (Ky. 1989) 1
Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd., 554 S.W.3d 323 (Ky. 2018) 1

ARGUMENT 2

I. The intent of KRS 411.167 is *not* to "bar" access to the courts and its language reflects flexibility for compliance 2

Travelers Indem. Co. v. Armstrong, 565 S.W.3d 550 (Ky. 2018) 2
KRS 411 2-5
Commonwealth v. Claycomb, 566 S.W.3d 202 (Ky. 2018) 2
KRS 411.110 5
KRS 411.115 5

II. KRS 411.167 should be interpreted to allow substantial compliance 5

C.M.C. v. A.L.W., 180 S.W.3d 485 (Ky. App. 2005) 5
Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986) 5
Young v. J.B. Hunt Transp., Inc., 781 S.W.2d 503 (Ky. 1989) 5
Petition Committee by and Through a Majority of its Members v. Board of Education of Johnson County, Kentucky, 509 S.W.3d 58 (Ky. App. 2016) 6
Skaggs v. Fyffe, 98 S.W.2d 884 (Ky. 1936) 6
Knox County v. Hammons, 129 S.W.3d 839 (Ky. 2004) 6
Webster County v. Vaughn, 365 S.W.2d 109 (Ky. 1963) 6
George v. Alcoholic Beverage Control Board, 421 S.W.2d 569 (Ky. 1967) 7
Armstrong v. Logsdon, 469 S.W.2d 342 (Ky. 1971) 7
KRS 411.167 7
Commonwealth v. Claycomb, 566 S.W.3d 202 (Ky. 2018) 7

III. Medical malpractice actions are not special statutory proceedings, so the civil rules apply and allow amendments and extension 8

Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd., 554 S.W.3d 323 (Ky. 2018) 8
Kentucky Home Mutual Life Insurance Co. v. Hardin, 126 S.W.2d 427 (Ky. 1938) 8
Smith v. Isaacs, 777 S.W.2d 912 (Ky. 1989) 8
McCann v. Sullivan University System, Inc., 528 S.W.3d 331 (Ky. 2017) 8, 9
C.C. v. Cabinet for Health and Family Services, 330 S.W.3d 83, (Ky. 2011) 8
CR 15.01 9

CR 6.02 9
Howard v. Nationwide Prop. & Cas. Ins. Co., 306 F. App'x 265 (6th Cir. 2009) 9
Goldstein v. Barron, 414 N.E.2d 998 (Mass. 1980) 9
Ramada Inns v. Lane & Bird Advert., 426 P.2d 395 (Ariz. 1967) 9
Griffin v. Rogers, 399 F.3d 626 (6th Cir. 2005) 10
Ward v. Housman, 809 S.W. 2d 717 (Ky. App. 1991) 10
Toler v. Rapid American, 190 S.W.3d 348 (Ky. App. 2006) 10
Sargent v. Shaffer, 467 S.W.3d 198 (Ky. 2015) 10

IV. KRS 411.167(7) does not limit the time for compliance 11

KRS 411.167 11
KRS 446.080 11

V. Failure to comply with KRS 411.167 is an affirmative defense that must be specifically pled 12

KRS 411.167 12
CR 8.03 12
American Founders Bank, Inc. v. Moden Investments, LLC, 432 S.W.3d 715 (Ky. App. 2014) 12
Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478 (Ky. 2009) 12
Nichols v. Zurich American Ins. Co., 423 S.W.3d 698 (Ky. 2014) 12
CR 15.01 12

CONCLUSION 12

KRS 411.167 12

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury.

This case, which involves the interpretation of KRS 411.167, the new "Certificate of merit for medical malpractice actions" statute, is of substantial interest to *Amicus Curiae* because it affects every medical malpractice injury victim in Kentucky. And, depending on how this Court interprets the statute, it could affect those suing healthcare providers and even related entities for claims other than medical malpractice.

At the core, this and related cases ask this Court to address the nature of KRS 411.167. Is KRS 411.167 effectively a statute of limitation that requires strict, technical compliance? Or is it like the vast majority of other statutory or rules-based requirements for civil pleadings, for which we "no longer … search[] for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law." *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989). As this Court recently confirmed, "Kentucky law 'favors the right of litigants to have their rights disposed of on the merits rather than technicalities,' and therefore courts have broad discretion in permitting amendments or other reasonable changes in pleadings." *Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323, 343 (Ky. 2018). Even statutes of limitation allow for equitable exceptions. There is nothing in the language of KRS 411.167 to alter the important, fundamental rule that cases should be decided on their merits whenever possible. Indeed, the language in KRS 411.167 specifically supports the common-sense

notion that the information required by KRS 411.167 may be provided *after* suit is filed.

The intent of KRS 411.167 is to confirm what those who filed meritorious medical negligence claims in the past did before the adoption of KRS 411.167: consult with an expert before filing suit or, if faced with a hurdle like a looming statute of limitation, within a reasonable time after filing suit. Whether written *confirmation* of the expert consultation is filed post-suit should not defeat an otherwise meritorious claim. KRS 411.167 itself does not require dismissal, and neither should this Court.

ARGUMENT

I. The intent of KRS 411.167 is *not* to "bar" access to the courts and its language reflects flexibility for compliance.

Ultimately, the "fundamental rule in statutory interpretation is to give effect to the legislative intent." *Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 550, 559 (Ky. 2018).

The Kentucky Legislature enacted KRS 411.167 in 2019. Certificates of merit were originally proposed as an alternative to the Medical Review Panel Act ("MRPA"), passed in 2017.[1] Shortly after this Court declared the MRPA unconstitutional in *Commonwealth v. Claycomb*, 566 S.W.3d 202 (Ky. 2018), Representative Chad McCoy brought the concept of certificates of merit for medical malpractice actions back before the Legislature via 2019 Kentucky House Bill 429. As Representative McCoy explained, the intention of the Bill was to "help stop frivolous lawsuits" by requiring medical malpractice plaintiffs to certify that they have "talked to an expert to see that there has been a breach of the standard

[1] *See* 3/1/19 Proceedings of the Ky. House at 39:00, https://www.ket.org/legislature/archives/?nola=WGAOS+020117&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzEyMDExNy5tcDQvcGxheWxpc3QubTN1OA%3D%3D (last visited 3/20/23).

of care" before filing suit.[2] The intention of the Bill was ***not*** to ***bar*** *"anyone's access to the courthouse."*[3] Indeed, in light of the decision in *Claycomb*, HB 429 repealed the MRPA in its entirety and replaced it with the certificate of merit provision.[4]

Consistent with the statute's purpose, the baseline ***substantive*** requirement of KRS 411.167 is that a claimant consult with at least one qualified expert before filing suit and "conclude[] on the basis of review and consultation that there is reasonable basis to commence the action." KRS 411.167(2)(a). The statute also provides exceptions, allowing the claimant to consult with an expert after filing the complaint *or not at all*:

Time for consulting with expert	**Scenario**
Before filing complaint	KRS 411.167(2)(a)
Within 60 days after filing complaint	Claimant did not have time to consult with expert before statute of limitations expired; KRS 411.167(2)(b)
Within 90 days after receipt of medical records	Claimant requested medical records, and defendants have not produced them; KRS 411.167(5)
Undefined	"The claimant, in lieu of serving a certificate of merit, may provide the defendant or defendants with expert information in the form required by the Kentucky Rules of Civil Procedure." KRS 411.167(7)
Never	Claimant asserts only causes of action for which expert testimony is not required, i.e. claims of res ipsa loquitur and lack of informed consent; KRS 411.167(4)

---

[2] *Id.* at 39:35.
[3] *Id.* at 39:55.
[4] See HB 429, available at https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb429/bill.pdf (last visited 3/20/23).

The statute has a ***procedural*** requirement for a certificate of merit to confirm that the expert consultation or attempts took place. But the statute defines that "certificate of merit" to mean multiple different things: (1) confirmation of consulting with at least one expert, (2) confirmation that there was not time to consult with an expert, or (3) confirmation that no expert would agree to consult after at least three attempts. KRS 411.167(2). And the statute provides multiple options for when a certificate should be provided, including options *where no certificate is required*:

Time for certificate/supplement	**Section**
With the complaint	KRS 411.167(2)
Within 60 days after filing complaint	Claimant did not have time to consult with an expert before filing complaint; KRS 411.167(2)(b)
Within 90 days after receiving medical records	Claimant requested medical records, and defendants have not produced them; KRS 411.167(5)
Never	Claimant only asserts claims for which expert testimony is not required; KRS 411.167(4)
Never	"The claimant, in lieu of serving a certificate of merit, may provide the defendant or defendants with expert information in the form required by the Kentucky Rules of Civil Procedure." KRS 411.167(7)
Never	A new defendant is added in a case where a certificate has already been filed; KRS 411.167(3)

In addition, with only one exception, the statute provides *no penalty* for non-compliance. The one exception is KRS 411.167(2)(b), which provides that if the claimant did not have time to consult with an expert before filing suit and thereafter fails to file a

certificate confirming the expert consultation (or attempts) within 60 days, "the suit shall be dismissed *unless the court grants an extension for good cause*." Thus, even the *one instance* in which the statute imposes a penalty also reflects the ability of the court to grant an extension.

The Court of Appeals' opinion below holds that because McWhorter did not file a certificate of merit **"with the complaint,"** the only option was dismissal of the complaint with prejudice, without any possibility for amendment of the complaint or extension of time. But the language and purpose of the statute do not support that conclusion. Had the legislature intended that dismissal is the *only* option for noncompliance it could have said so. Or it could have borrowed the language from other statutes that set conditions precedent to maintaining any claims, such as the statute requiring notice of an action against a city for any injury growing out of any defect in the condition of any bridge, street, sidewalk, alley or other public thoroughfare. KRS 411.110 (specifying in unqualified terms that "[n]o action shall be maintained against any city … unless notice has been given to the mayor, city clerk or clerk of the board of aldermen in the manner provided for the service of notice in actions in the Rules of Civil Procedure"); *see also* KRS 411.115 (requiring "no action shall be maintained" without notice of damages, noise abatement or otherwise, arising from the operation of aircraft). The Legislature included no such requirement in KRS 411.167.

III. KRS 411.167 should be interpreted to allow substantial compliance.

Kentucky law generally reflects a strong preference "to decide a case on its merits whenever possible." *C.M.C. v. A.L.W.*, 180 S.W.3d 485, 490 (Ky. App. 2005); *see also Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986) (deciding cases on the merits is among an appellate court's "significant objectives"); *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d

503, 504 (Ky. 1989) (deciding cases on the merits is "a primary objective of appellate procedure"). Consistent with that preference, and to "further the legislative intent, courts will apply substantial compliance when a statutory provision is directory rather than mandatory." *Petition Committee by and Through a Majority of its Members v. Board of Education of Johnson County, Kentucky*, 509 S.W.3d 58, 64–65 (Ky. App. 2016) (citing *Skaggs v. Fyffe*, 98 S.W.2d 884, 886 (Ky. 1936)). This determination is crucial because "[a] proceeding not following a mandatory provision of a statute is rendered illegal and void, while an omission to observe or failure to conform to a directory provision is not." *Skaggs*, 98 S.W.2d at 886.

Whether a statutory provision is mandatory or directory is not necessarily resolved by the statutory language. The use of the word "shall" is not determinative if the "legislative intention appears otherwise." *Id.* Quoting *Skaggs*, this Court in *Knox County v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004), explained as follows (emphasis added):

> In considering whether the provision is mandatory or directory, we depend not on form, but on the legislative intent, which is to be ascertained by interpretation from consideration of the entire act, its nature and object, and the consequence of construction one way or the other. In other words, if the directions given by the statute to accomplish a given end are violated, **but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely**.

The doctrine of substantial compliance was applied, for example, in *Webster County v. Vaughn*, 365 S.W.2d 109 (Ky. 1963), in which a statute provided that the compensation of every county officer be fixed "not later than the first Monday in May in the year in which such officers are elected," and upon failure to do so, required that compensation be the same as for the preceding term. The fiscal court met on May 5, 1953, which was the first Tuesday of the month. The Court identified the issue as whether being

one day late in fixing salaries is too late according to the language of the statute. The Court held that it was not based on the doctrine of substantial compliance. *See also George v. Alcoholic Beverage Control Board*, 421 S.W.2d 569 (Ky. 1967) (holding that a statute must not be interpreted so as to bring about an absurd or unreasonable result and that in the process of interpretation, courts should look behind the strict wording of the statute to ascertain its purpose and the mischief it was designed to remedy). In short, "[s]imple justice" must prevail over "mere technicality." *Armstrong v. Logsdon*, 469 S.W.2d 342, 343 (Ky. 1971) (the context of statutes of limitation).

The purpose of KRS 411.167, as Representative McCoy explained when discussing HB 429, is to "help stop frivolous lawsuits" by requiring medical malpractice plaintiffs to certify that they have "talked to an expert to see that there has been a breach of the standard of care," generally before filing suit.[5] The intention was ***not*** to ***bar*** "anyone's access to the courthouse," especially coming as it did on the heels of this Court's decision in *Commonwealth v. Claycomb*, 566 S.W.3d 202 (Ky. 2018).[6]

Here, the purpose of KRS 411.167 was satisfied because McWhorter filed a certificate of merit before dismissal, specifically identifying the expert he consulted with who opines that Baptist Health violated the standard of care.[7] The only evidence is that this is *not* a frivolous lawsuit.

---

[5] *See* 3/1/19 Proceedings of the Kentucky House of Representatives at 39:35 available at https://www.ket.org/legislature/archives/?nola=WGAOS+020117&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzEyMDExNy5tcDQvcGxheWxpc3QubTN1OA%3D%3D (last visited 12/6/22).
[6] *Id.* at 39:55.
[7] *See* Ex. 2 to Appellant's Brief.

III. Medical malpractice actions are not special statutory proceedings, so the civil rules apply and allow amendments and extension.

Moreover, the civil rules apply to any medical malpractice action, just as to any other tort action. As this Court recently confirmed, "Kentucky law 'favors the right of litigants to have their rights disposed of on the merits rather than technicalities,' and therefore courts have broad discretion in permitting amendments or other reasonable changes in pleadings." *Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323, 343 (Ky. 2018), *quoting Kentucky Home Mutual Life Insurance Co. v. Hardin*, 126 S.W.2d 427, 431 (Ky. 1938). "Long ago, in 1953, we abandoned the old rules of common law pleadings and adopted modern Rules of Civil Procedure. We no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law." *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989).

The modern civil rules allow extensions of time and amendment of pleadings and otherwise generally eschew dismissal based on technicalities. Indeed, the rules apply to *all* civil actions except special statutory proceedings. Pursuant to Section 116 of the Kentucky Constitution, CR 1 defines the scope of the civil rules' application, stating: "[t]hese Rules govern procedure and practice in *all actions* of a civil nature in the Court of Justice except for special statutory proceedings...." *McCann v. Sullivan University System, Inc.*, 528 S.W.3d 331, 333 (Ky. 2017) (emphasis in original). "A 'special statutory proceeding' is one that is 'complete within itself having each procedural detail prescribed.'" *Id.*, *quoting C.C. v. Cabinet for Health and Family Services*, 330 S.W.3d 83, 87 (Ky. 2011). Stated another way, a special statutory proceeding for which the civil rules would not apply

"provides for a comprehensive, wholly self-contained process that prescribes each procedural detail of the cause of action." *McCann*, 528 S.W.3d at 334. Such proceedings include "[a]n appeal from an adverse decision of the [Unemployment Insurance] Commission" and "dependency, neglect, and abuse (DNA) actions." *Id.* at 333. In *McCann*, however, this Court held that the requirements in KRS 337.385 did not prescribe every detail of a cause of action. Therefore, the civil rules, including CR 23, applied and were not preempted by KRS 337.385 in *McCann*. For the same reasons, KRS 411.167 does not preempt or displace the civil rules here.

Here, McWhorter moved the trial court for an extension of time to file a certificate of merit. The civil rules provide multiple alternatives for the failure—if there was any—to comply with the timing of the certificate of merit submission. For example, CR 15.01 provides that leave to amend a pleading "shall be freely given when justice so requires." And CR 6.02 allows a court to enlarge the time for any act "required or allowed to be done at or within a specified time" by a statute or by the civil rules "where the failure to act was the result of excusable neglect." Excusable neglect pursuant to CR 6.02(b) is an issue of fact and equity that requires consideration of "of all relevant circumstances surrounding the party's omission." *Howard v. Nationwide Prop. & Cas. Ins. Co.*, 306 F. App'x 265, 266 (6th Cir. 2009) (interpreting FRCP 6(b)(1)(B), which is equivalent to CR 6.02(b)). Numerous courts have held that a delay in filing under unsettled law can constitute excusable neglect. *See, e.g., Goldstein v. Barron*, 414 N.E.2d 998, 1001 (Mass. 1980) (late filing resulted from excusable neglect where the "particular questions of procedure" at issue "were without definite precedent"); *Ramada Inns v. Lane & Bird Advert.*, 426 P.2d 395, 397 (Ariz. 1967) (where law was "confused" and "unsettled," "defendant's delay in

submitting its answer was occasioned by excusable neglect"). Indeed, the Sixth Circuit Court of Appeals has even held that the statute of limitations was properly tolled where a party was ignorant "of the filing deadline given the unstable and unsettled nature of [the controlling statute] at the crucial time of mistake." *Griffin v. Rogers*, 399 F.3d 626, 637 (6th Cir. 2005).

More generally, a court typically cannot dismiss an action with prejudice for non-compliance with a deadline without considering less severe alternatives. In *Ward v. Housman*, 809 S.W. 2d 717 (Ky. App. 1991), the Court of Appeals reversed a summary judgment based on counsel's failure to timely disclose an expert witness pursuant to the Civil Rules and the trial court's order and deadlines, holding that the trial court inappropriately applied the "death sentence" to the case without considering alternative sanctions. Before dismissing, the Circuit Court ***must*** consider certain factors, including: "(1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions." *Toler v. Rapid American*, 190 S.W.3d 348, 351 (Ky. App. 2006). While the trial court has discretion when applying the factors, the court has no discretion to decide as a matter of law that court rules and the *Ward* factors have no application. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). A dismissal with prejudice is the civil death penalty in that it forever preludes a party from litigating the cause of action. "[B]ecause it is a final termination of the litigation, it should be resorted to only in the 'most extreme cases' and, when resorted to by the trial court, should be carefully scrutinized by an appellate court." *Stapleton v. Shower*, 251 S.W.3d 341, 343 (Ky. App. 2008).

IV. KRS 411.167(7) does not limit the time for compliance.

In addition to the general principles discussed above, the specific provisions of KRS 411.167(7) are at issue here. KRS 411.167(7) states that "in lieu" of a certificate of merit the claimant "may provide the defendant or defendants with expert information in the form required by the Kentucky Rules of Civil Procedure," excluding the disclosure of any "'consulting' or nontrial expert."

KRS 411.167 does not state *when* the expert information must be provided, although the courts below interpreted the statute as requiring the information with the complaint. But that interpretation ignores that the statute provides several situations in which the certificate can be filed ***after*** the complaint, or even not at all. *See* KRS 411.167(2)(b) and (5). That interpretation also renders meaningless the provision that allows a claimant to provide the expert information "in the form required by the Kentucky Rules of Civil Procedure." KRS 411.167(7). Our Civil Rules do not provide for any type of pre-suit identification of experts. Thus, there is no "form required" by our Civil Rules that occurs *pre-suit* or that could be filed with the complaint. The only logical interpretation of the provision allowing "expert information in the form required by the Kentucky Rules of Civil Procedure" is that KRS 411.167(7) permits the trial court to allow a party to confirm pre-suit compliance with the expert consultation requirement after suit is filed.

Statutes such as KRS 411.167 are to be "liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" KRS 446.080(1). Given the lack of any suitable pre-suit discovery procedures for expert disclosure in our Civil Rules, the most reasonable interpretation of KRS 411.167(7) is that the Legislature intended that the expert information could be provided *after* the complaint is filed.

V. Failure to comply with KRS 411.167 is an affirmative defense that must be specifically pled.

Baptist Health did not assert failure to comply with KRS 411.167 as an affirmative defense in its answer.[8] KRS 411.167 is a "matter constituting an avoidance or affirmative defense" that ***must*** be presented in the Answer, CR 8.03, but was not in this case. The Opinion below holds that the Civil Rules did not require this defense to be affirmatively pled, but without any explanation or citation to authority. Even the statute of limitations is an affirmative defense that must be pled. CR 8.03.

"As a general rule, a party's failure to timely assert an affirmative defense waives that defense." *American Founders Bank, Inc. v. Moden Investments, LLC*, 432 S.W.3d 715, 722 (Ky. App. 2014), *citing Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 485 (Ky.2009). "Applying this rule would mean [the affirmative defense is] waived, unless the circuit court allowed it to be presented later." *Id.* at 722; *see also Nichols v. Zurich American Ins. Co.*, 423 S.W.3d 698, 707–08 (Ky. 2014) (trial court has discretion to allow or disallow a waived affirmative defense provided the discretion is not abused); CR 15.01 (requiring a defendant to seek leave of court to amend an Answer). Here, Baptist Health did not assert KRS 411.167 as an affirmative defense in its answer, nor did it seek leave to amend. Any reliance on KRS 411.167 remains waived to this day.

CONCLUSION

The language and legislative history of KRS 411.167 reflect its intention, which is *not* to bar anyone from the courthouse. KRS 411.167 should be interpreted consistent with the flexibility inherent in the statute and consistent with general principles favoring

---

[8] *See* Ex. 4 to Appellant's Brief.

decisions on the merits and liberal allowance for amendments and extensions. This Court should reverse the dismissal of the claims here and remand for discovery.

Respectfully submitted,

s/ Jamie K. Neal
Kevin C. Burke (KBA #87131)
Jamie K. Neal (KBA # 88507)
BURKE NEAL PLLC
2200 Dundee Rd., Suite C
Louisville, Kentucky 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com

Counsel for Amicus Curiae,
Kentucky Justice Association

WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B) because, excluding the parts of the document exempted by RAP 15(D), this document contains 3,468 words.

s/ Jamie K. Neal
Counsel for Amicus Curiae