Received: 2023-SC-0395 05/06/2024
Filed: 2023-SC-0395 05/07/2024
M. Katherine Bing, Clerk
Supreme Court of Kentucky

# Supreme Court of Kentucky

**2023-SC-0395-DG**

NATHAN TORIAN, Individually, and as representative of a class of similarly situated persons comprising the unincorporated labor organization, The International Association of Fire Fighters, Local 168, **APPELLANT**

**VS.** **INITIAL BRIEF FOR APPELLANT NATHAN TORIAN**

CITY OF PADUCAH, KY, *et al.*, **APPELLEES**

ON MOTION FOR DISCRETIONARY REVIEW FROM
THE KENTUCKY COURT OF APPEALS
NO. 2022-CA-01071-MR
APPEAL FROM THE McCRACKEN CIRCUIT COURT
DIVISION TWO (II)
HONORABLE W. A. KITCHEN
NO. 21-CI-000490

Peter J. Jannace
HERZFELD, SUETHOLZ, GASTEL, LENISKI & WALL, PLLC
515 Park Avenue
Louisville, Kentucky 40208
(502) 636-4333
peter@hsglawgroup.com
*Counsel for Appellant Nathan Torian*

**CERTIFICATE OF SERVICE AND CERTIFICATE OF WORD COUNT**

It is hereby certified that on the 6th day of May, 2024, the foregoing was electronically filed using the court's eFiling system, which will automatically generate and send a Notice of Electronic Filing to all eFilers/parties associated with the case, along with a hyperlink to it; and one (1) copy of the foregoing was served via U.S. mail to: Hon. Kate Morgan, Court of Appeals Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, KY 40601; Hon. W. A. Kitchen, Circuit Judge, McCracken County Courthouse, 300 Clarence Gaines St., Paducah KY, 42003; and Hon. Stacey A. Blankenship and Hon. Kristen N. Worak, KEULER, KELLY HUTCHINS, BLANKENSHIP & SIGLER, LLP, 100 S. 4th St., Ste. 400, Paducah, KY 42001, *Counsel for Appellees*.

It is hereby further certified that this document contains 9,229 words.

*/s/ Peter J. Jannace*
Peter J. Jannace

## INTRODUCTION

This case is about an ordinance and a statute; Paducah Ord. § 2-304 and KRS 311A.027. The ordinance and the statute conflict with one another. Accordingly, the statute preempts the ordinance, so it is thereby null, void and unenforceable.

The Trial Court below and the Kentucky Court of Appeals declined to engage with the interplay between the ordinance and the statute and held that Paducah firefighters are not protected by KRS 311A.027 at all. Those courts reached that conclusion relying on qualifying language that the statute does not contain. But that is not how you interpret a statute in Kentucky. Since the Trial Court's and the Court of Appeals's construction of KRS 311A.027 was erroneous, it follows that their rulings are properly reversed by this Court.

## STATEMENT CONCERNING ORAL ARGUMENT

This Court's Order granting discretionary review stated that oral argument will be heard at a time to be scheduled by separate order upon submission of the case, as defined by RAP 37. The undersigned looks forward to addressing the Court at that time.

## STATEMENT OF POINTS AND AUTHORITIES

**Page**

May it please the court:

## STATEMENT OF THE CASE

Firefighting has been described as both "an inherently dangerous and vitally important occupation"[1] because firefighters do not just put out fires but are also the principal first responders for emergency medical services in most communities across the Commonwealth. Indeed, Paducah does not employ and train a separate emergency medical services department *at all*; if you need an ambulance, Paducah, like many cities, will send a firefighter.

The General Assembly has proscribed the way municipalities like Paducah can tell its emergency medical services personnel where they can live in KRS Chapter 311A. Since the enactment of KRS 311A in 2002[2], this has not been an issue. However, recently, the Appellee, the City of Paducah, Kentucky ("Paducah") unilaterally decreed that its Fire Department ("Paducah Fire")—which is also its EMS department—can only employ firefighters a specified distance from one of its fire stations. This decree immediately imperiled members of Local 168 of the Paducah Fire Department.

---

[1] Jeff Funke MS, CSP, *et al.*, *Protecting Firefighters*, CENTERS FOR DISEASE CONTROL AND PREVENTION, NIOSH Science Blog, (May 17, 2021), *available at* https://blogs.cdc.gov/niosh-science-blog/2021/05/17/firefighters/.

[2] KRS 311A.027 started out as KRS 311.657, which was enacted by the General Assembly via SB 125 during the 2002 Regular Session. The following year, during the 2003 Regular Session, the General Assembly repealed and reenacted KRS 311.657 as KRS 311A.027 by way of HB 524. The words of KRS 311.657 were left unchanged when they were recodified in KRS 311A.027.

Rather than grapple with that irreconcilable statutory conflict[3], the Trial Court and the Court of Appeals below sidestepped the issue and held that Paducah firefighters are not protected by KRS 311A.027 *at all* merely because firefighters are also addressed in other statutes. Both courts below reached that conclusion relying on non-existent qualifying language and a simplistic and erroneous view that firefighting is limited to putting out fires. Since that interpretation is contrary to well-settled rules of statutory interpretation, those courts are due to be reversed.

## I. FACTUAL BACKGROUND

When the Appellant, Nathan Torian ("Torian") was hired as a fire-

[3] Indeed, *this very Court*—along with the courts of sister states—does not hesitate to strike down local residency ordinances that conflict with similar statutes. *See, e.g.*, *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668, 669 (Ky. 1994) (holding that "an Ashland city ordinance was invalid insofar as it required new city employees to reside within the city from…" a specified date, because it conflicted with a version of KRS 311A.027 that applies to police officers, KRS 15.335.); *Lima v. State*, 2009-Ohio-2597, ¶ 17, 122 Ohio St. 3d 155, 160, 909 N.E.2d 616, 621 ("We conclude that R.C. 9.481 is constitutional and, therefore, that municipalities may not require their employees to reside in a particular municipality…"); *Bjorseth v. City of Seattle*, 15 Wash. App. 797, 800, 551 P.2d 1372, 1374 (1976), *on reh'g*, 17 Wash. App. 521, 563 P.2d 1320 (1977) ("The intended purpose of the statute was to protect civil service employees from city charter provisions demanding residence within the city's boundaries as a requisite to continued employment by the city. Accordingly, it follows that the city may not base its removal of an employee—however characterized—on whether or not he resides within the municipality's boundaries."); *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680 (1980) (per curiam) (striking down residency requirement in New York City Local Law No. 20 as inconsistent with Public Officers Law); *Black v. City of Milwaukee*, 2016 WI 47, ¶ 39, 369 Wis. 2d 272, 306, 882 N.W.2d 333, 350 (holding that city's residency requirement was precluded by constitutionally valid statute).

fighter in 2004 by Paducah Fire, he was the 73rd firefighter, down from a membership of one-hundred-and-three in the 1990s. (Appellant's Verified Pet. ¶14); [R. at 6][4]. Since then, that number has declined, as Paducah Fire was budgeted for sixty firefighters in 2021, and there were then only 53 firefighters on the roster. *Id.* ¶15; [R. at 6]; *see also* (Appellees' Answer ¶6); [R. at 49]. Due to that shortfall, Paducah Fire is not compliant with the National Fire Protection Association ("NFPA") national standards for fire department staffing and has not been for years.[5] Retention and recruitment within the Department is at an all-time low and has been for years. (Appellant's Pet. ¶16); [R. at 6]. As of the filing of this Action, the Union[6] represented 53 firefighters of the City of Paducah's Fire Department, with its

[4] Since the pleading that initiated this action, Petitioner's Verified Petition for Declaration of Rights and Injunctive Relief, was verified, it is the functional equivalent of an affidavit for the purposes of summary judgment. *See, e.g.*, *Singleton v. Bd. of Ed.*, 553 S.W.2d 848, 851 (Ky. App. 1977) (permitting litigant to "adopt[] verified pleadings as their affidavits" in support of summary judgment motion); *Maxum Indem. Co. v. Broken Spoke Bar & Grill*, 420 F. Supp. 3d 617, 631 (W.D. Ky. 2019) ("'[A] verified complaint ... carries the same weight as would an affidavit for the purposes of summary judgment.'" ellipsis and bracketed material in original, quoting *El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008)).

[5] *See generally NFPA 1710: Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments*, NAT. FIRE PROT. ASS'N, (2020 ed.), *available at:* https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=1710 (the National Fire Protection Association's Standard that specifies requirements for effective and efficient organization and deployment of fire suppression operations, emergency medical operations, and special operations to the public by career fire departments to protect citizens and the occupational safety and health of fire department employees).

[6] Torian and the other firefighters are represented by IAFF Local 168. (Appellant's Pet. ¶25); [R. at 8].

headquarters in Paducah, Kentucky. *Id.* ¶17; [R. at 7].

The chronic understaffing at Paducah Fire has had serious consequences for its firefighters. Due to the low staffing of the Paducah Fire Department, there are not enough firefighters to operate all the available apparatus to fight fires in Paducah. *Id.* ¶18; [R. at 7]. The danger that firefighters face is inversely proportional to the number of firefighters that are available to help. A smaller pool of available firefighters results in a department that must assume more risk, is more fatigued as a whole and responding to fires has become more dangerous as a result. *Id.* ¶19; [R. at 7]. Although many potential firefighters want to work for the Paducah Fire Department, they are unable to do so, because of the arbitrary residence requirement in Paducah Ordinance § 2-304 this Action arises from. *Id.* ¶20; [R. at 7]; *see also* (Affidavit of Nathan Torian ¶4, Sep. 9, 2021); [R. at 91].

Under KRS 311A.027: "No public agency, tax district, or other publicly funded emergency medical service first response provider or licensed ambulance service shall have a residence requirement for an employee of or volunteer for the organization." KRS 311A.027(1); *see also* (Appellees' Answer ¶3); [R. at 49]. However, that prohibition "shall not preclude an employer or agency specified in subsection (1) of this section from having a requirement for response to a specified location within a specified time limit for an employee or volunteer who is off duty but who is on call to respond to work." KRS 311A.027(2); *see also* (Appellees' Answer ¶3); [R. at 49].

The Appellee City of Paducah and its Fire Department are collectively a public agency, tax district, or other publicly funded emergency medical service first response provider or licensed ambulance service within the meaning of § 027(1). (Appellant's Pet. ¶24); [R. at 8]. The Union is comprised of employees of same. *Id.* ¶25; [R. at 8].

Torian and all other active firefighters for Paducah Fire are required to be certified and/or licensed by the Kentucky Board of Emergency Medical Services as "Emergency medical services personnel" within the meaning of KRS 311A.010(13) as part of their job. (Torian Aff. ¶5, Sep. 9, 2021); [R. at 91-92]; (Affidavit of Jacob Blackwell ¶¶6-7, Aug. 9, 2022); [R. at 214-15]; (Affidavit of Heston Campbell ¶¶6-7, Aug. 9, 2022); [R. at 217-18]; (Affidavit of Jennifer J. Fuchs ¶¶6-7, Aug. 9, 2022); [R. at 220-21]; (Affidavit of Justin Gray ¶¶6-7, Aug. 3, 2022); [R. at 223-24]; (Affidavit of Joshua Guess ¶¶6-7, Aug. 3, 2022); [R. at 226-27]; (Affidavit of Kurt Hansen ¶¶6-7, Aug. 8, 2022); [R. at 229-30]; (Affidavit of Joey Harrell ¶¶6-7, Aug. 9, 2022); [R. at 232-33]; (Affidavit of Jonathan Holzapfel, ¶¶6-7, Aug. 9, 2022); [R. at 235-36]; (Affidavit of Jeremy King ¶¶6-7, Aug. 9, 2022); [R. at 238-39]; (Affidavit of Dalton Lucas ¶¶6-7, Aug. 3, 2022); [R. at 241-42]; (Affidavit of Matthew D. Meiser ¶¶6-7, Aug. 1, 2022); [R. at 244-45]; (Affidavit of Robert C. Powless ¶¶6-7, Aug. 8, 2022); [R. at 247-48]; (Affidavit of Nathan Torian ¶¶6-7, Aug. 8, 2022); [R. at 250-51]; (Affidavit of Aiden Yarbrough ¶¶6-7, Aug. 8, 2022); [R. at 253-54]; Standard Operating Guidelines – 208 Firefighter Candidate

Recruitment §11(C); [R. at 260]; City of Paducah, Kentucky Ordinance No. 2019-8-8589, Sec 2-315 §(a); [R. at 263].

The Paducah Fire Department, Standard Operating Guidelines, Chapter 200 provides that members of the Union are subject to "call-back", or a situation where the incident commander can request fire fighters to respond to a call, and fire fighters are free to do so on a *voluntary* basis only. Paducah fire fighters are not on call within the meaning of KRS 311A.027(2). *Id.* ¶26; [R. at 8]; *see also* (Appellees' Answer ¶5); [R. at 49]; Standard Operating Guidelines – Call Back §§1-3; [R. at 262]; [OAG 78-511]; [R. at 256-57]; (Blackwell Aff. ¶¶8-14); [R. at 215-16]; (Campbell Aff. ¶¶8-14); [R. at 218-19]; (Fuchs Aff. ¶¶8-14); [R. at 221-22]; (Gray Aff. ¶¶8-14); [R. at 224-25]; (Guess Aff. ¶¶8-14); [R. at 227-28]; (Hansen Aff. ¶¶8-14); [R. at 230-31]; (Harrell Aff. ¶¶8-14); [R. at 233-34]; (Holzapfel Aff. ¶¶8-14); [R. at 236-37]; (King Aff. ¶¶8-14); [R. at 239-40]; (Lucas Aff. ¶¶8-14); [R. at 242-43]; (Meiser Aff. ¶¶8-14); [R. at 245-46]. (Powless Aff. ¶¶8-14); [R. at 248-49]; (Torian Aff. ¶¶8-14, Aug. 8, 2022); [R. at 251-52]; (Yarbrough Aff. ¶¶8-14); [R. at 254-55].

Despite the prohibition contained in KRS 311A.027, the Paducah Code of Ordinances provides that "All members of the Fire Department hired after October 1, 1988, shall reside within McCracken County or within forty-five (45) minutes of Station 4 as measured by a recognized mapping program, i.e., Mapquest, Google Maps, etc., as a condition of their continued employment with the Fire Department of the City." Paducah Ord. § 2-304; *see also*

(Appellees' Answer ¶3); [R. at 49].

At least one member of the Union, Jonathan Casner, lives outside of McCracken County and more than forty-five minutes from Station 4. (Appellant's Pet. ¶30); [R. at 9]; *see also* (Appellees' Answer ¶3); [R. at 49]. During a staff meeting for the Paducah Fire Department held on Wednesday, June 30, 2021, for which Torian was personally present, Appellee Kyle, the Chief of Paducah Fire, indicated that he was going to go before the Paducah City Commission with the purpose of referring charges against Jonathan Casner, whereupon Appellee Kyle would recommend that Union member Casner's employment be terminated forthwith for no other reason except that he resided outside the arbitrary boundary of the City's ordinance. (Appellant's Pet. ¶31); [R. at 9]; *see also* (Appellees' Answer ¶7); [R. at 49].

**II. PROCEDURAL BACKGROUND**

Torian, as putative class representative of his Union IAFF Local 168, commenced this Action by filing suit against the Appellees, the CITY OF PADUCAH, KY, PADUCAH CITY COMMISSION, GEORGE P. BRAY, IN HIS OFFICIAL CAPACITY AS MAYOR, PADUCAH, KY, RAYNARLDO HENDERSON, IN HIS OFFICIAL CAPACITY AS CITY COMMISSIONER, DAVID GUESS, IN HIS OFFICIAL CAPACITY AS CITY COMMISSIONER, CAROL C. GAULT, IN HER OFFICIAL CAPACITY AS CITY COMMISSIONER, SANDRA WILSON, IN HER OFFICIAL CAPACITY AS CITY COMMISSIONER AND MAYOR PRO-TEM, and STEVE KYLE, IN

HIS OFFICIAL CAPACITY AS FIRE CHIEF (hereinafter, collectively, "Paducah") via Verified Petition in the McCracken Circuit Court on July 2, 2021. *See generally* (Appellant's Pet.); [R. at 1-16]. Torian simultaneously moved for an *ex-parte* restraining order, seeking a *pendente lite* status-quo order from the trial court, restraining and enjoining Paducah from enforcing or otherwise taking any personnel action in reliance on Paducah Ord. § 2-304 pending an opportunity for the Parties to be heard on Torian's then forthcoming Motion for Temporary Injunction. (Appellant's Mot. *Ex-Parte* Restraining Order 1-2); [R. at 19-20].

Paducah responded to Torian's Motion for *Ex-Parte* Restraining Order on July 9, 2021 and filed its Answer on July 20, 2021. *See generally* (Appellees' Resp. to Pet. Inj. Relief); [R. at 42-45]; *see also* (Appellees' Answer); [R. at 48-51][7]. The trial court declined to hear Torian's Motion *ex-parte*, so Torian noticed it for motion hour on July 23, 2021, and the Parties ultimately agreed that Paducah would not take any action against Torian or the Union Class in reliance upon Paducah Ord. § 2-304 "until [the trial] Court resolve[d] the merits of this case." (Agreed Order, Jul. 26, 2021); [R. at

[7] It is worth noting at this juncture Paducah judicially admitted that "[t]he Paducah Fire Department, Standard Operating Guidelines, Chapter 200 provides that members of the Union are subject to 'call-back', or a situation where the incident commander can request fire fighters to respond to a call, and fire fighters are free to do so on a voluntary basis only…" in paragraph 5 of their Answer. *Compare* (Appellant's Pet. 26); [R. at 8], *with* (Appellees' Answer 5); [R. at 49].

52-53]. Therein, the Parties also agreed on a briefing schedule.

Prior to the entry of the Parties' Agreed Order, Appellee Kyle advised Torian that adverse employment action against Jonathan Casner due solely to his residence was imminent. (Torian Aff. ¶6, Sep. 9, 2021); [R. at 92].

Although not contemplated by the briefing schedule, Paducah moved for summary judgment first. *See generally* (Appellees' Mot. Summary J.); [R. at 66-67]. In so doing, Paducah attached an Affidavit of Appellee Kyle and an excerpt of the Parties' Collective Bargaining Agreement ("CBA") to its Motion, wherein it attempted to create a fact issue as to whether its firefighters were required to come into work—in other words, whether they were "on call". (Appellees' Ex. A); [R. at 63-65].

In accordance with the trial court's Agreed Briefing Schedule, Torian cross-moved for summary judgment. *See generally* (Appellant's Mot. Summary J.); [R. at 93-94]. The trial court, *sua sponte,* set a status hearing for September 24, 2021, and the Parties proceeded to brief their respective summary judgment motions.

At the very end of briefing, on November 11, 2021, Torian reminded Paducah that they judicially admitted in their Answer that Paducah Fire was subject to call-back as opposed to being on-call. *See* (Appellant's Sur-Reply Supp. Mot. Summ. J., 3-6); [R. at 152-55]. About two weeks later, Paducah moved for leave to amend its Answer to *take back* that judicial admission. (Appellees' Mot. Leave to File Am. Answer); [R. at 158-62]. Torian opposed

Paducah's belated amendment request, and the trial court set the Motion for a hearing. The Parties subsequently submitted Paducah's Motion for decision on briefs.

On January 26, 2022, the trial court granted Paducah's Motion to Amend its Answer. (Order, Jan 26, 2022); [R. at 195-96]. Accordingly, since Paducah's Amended Answer created a factual dispute as to whether Paducah Fire was on-call or subject to call-back, Torian moved the trial court for a hearing. (Appellant's Mot. Hearing); [R. at 197-202]. The trial court set the matter for review on July 8, 2022, and ultimately denied Torian's request for an evidentiary hearing from the bench. *See* (Order Setting Review, Jul. 5, 2022); [R. at 209-10].

Since the trial court denied Torian's request to present evidence, Torian proceeded to file with the trial court: (i) fourteen (14) affidavits from himself and other firefighters; (ii) a Kentucky Attorney General Opinion – Ky. OAG 78-511; (iii) Paducah Fire, Standard Operating Guidelines – 208 Firefighter Candidate Recruitment; (iv) Paducah Fire, Standard Operating Guidelines – Call Back; and (v) City of Paducah, Kentucky Ordinance No. 2019-8-8589, Sec 2-315. *See* (Appellant's Not. Filing); [R. at 211-64].

On August 22, 2022, the trial court granted Paducah's Motion for Summary Judgment. (Order, Aug. 22, 2022); [R. at 265-68]. Torian timely appealed, and after receiving briefing and declining to entertain oral argument, the Court of Appeals affirmed the Trial Court's Order in a not-to-

be-published decision on July 28, 2023. (Op. Aff'g, July 28, 2023).

Torian timely moved this Court for discretionary review, which it granted by Order, entered March 6, 2024. (Order, Mar. 6, 2024).

## STANDARD OF REVIEW

The interpretation of KRS 311A.027 presents a question of law which this Court reviews *de novo*, with no deference to the statutory interpretation decided by the courts below. *See Hauber v. Hauber*, 600 S.W.3d 204, 207 (Ky. 2020) (citing *Commonwealth v. Moore*, 545 S.W.3d 848, 850 (Ky. 2018), *and Seeger v. Lanham*, 542 S.W.3d 286, 290 (Ky. 2018)). The appeal at bar implicates Civil Rule 56, which provides that summary judgment is only appropriate 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." CR 56.03. "Our black-letter law directs that 'summary judgment is to be cautiously applied and should not be used as a substitute for trial.'" *Brown v. Louisville Jefferson Cnty. Redev. Auth., Inc.*, 310 S.W.3d 221, 223 (Ky. App. 2010) (quoting *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991)).

> "The record must be viewed in a light **most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor**. Even though a trial court may believe the party opposing the motion may not succeed at trial, it **should not** render a summary judgment if there is **any** issue of material fact. The trial judge must examine the evidence, **not to decide any issue of fact, but to discover if a real issue exists**. It clearly is not the purpose of the summary

> judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try."

*Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (emphases added, quoting *Steelvest, Inc.*, 807 S.W.2d at 480). Put another way, summary judgment is "a remedy to be used sparingly" and even then, only if "'it appears that it would be **impossible**[8] for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Patton v. Bickford*, 529 S.W.3d 717, 723 (Ky. 2016) (emphasis added, quoting *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013)).

The procedure for summary judgment is well-settled and straightforward. First, "'[t]he moving party bears the initial burden of showing that no genuine issue of material fact exists'". *Blackstone Mining Co. v. Travelers Ins. Co.*, 351 S.W.3d 193, 198 (Ky. 2010) (quoting *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. 2010)). To satisfy its burden, the movant must rely on neither inadmissible evidence nor unsworn statements. *See, e.g.*, *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). If and only if the movant carries its burden, "then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Blackstone Mining Co.*, 351 S.W.3d at 198 (quoting *Lewis*, 56 S.W.3d at 436). If the non-movant makes that

[8] "'Impossible' is to be used in 'a practical sense, not in an absolute sense.'" *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 n.4 (Ky. 2013) (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992)).

showing, then summary judgment is properly denied. That is what Appellant easily accomplishes here. Therefore, the courts below are properly reversed.

## ARGUMENT[9]

KRS 311A.027 preempts an ordinance contained in the City of Paducah Code of Ordinances, *to wit*, Chapter 2, Article V, Division 5, § 2-304 (hereinafter "Paducah Ord. § 2-304"), so Paducah should be enjoined from enforcing the same. Torian's overall argument in support thereof can be summarized syllogistically.

Kentucky law prohibits public agencies or other publicly funded emergency medical service first response providers, such as the City of Paducah and its Fire Department, from having a residence requirement for their employees or volunteers, other than for those who are "on call" to respond to work. The Ordinance in question, Paducah Ord. § 2-304, requires "all members of the Fire Department to reside within McCracken County or within forty-five (45) minutes of Section 4 as measured by a recognized mapping program, i.e., Mapquest, Google Maps, etc., as a condition of their continued employment within the Fire Department of the City[,]" whether those members are on call or not. Paducah Ord. § 2-304. In other words, the Ordinance in question is an unwavering residency requirement for the Paducah Fire Department's employees and volunteers.

[9] Torian's arguments were preserved below at [R. at 1-16, 68-94, 110-26, 134-43, 150-57, 168-77, 197-202, 211-64]. Torian's arguments were likewise preserved in the Brief he filed with the Kentucky Court of Appeals. (Brief for Appellant 9-22).

However, Torian and members of the Union class are not "on call" to respond to work within the meaning of KRS 311A.027, but are rather subject to "call back", whereby they can volunteer to respond to a call—for the incentive of overtime—when they are off duty. Accordingly, Paducah Ord. § 2-304 is prohibited by the express terms of KRS 311A.027, so it is null, void and of no force and effect. Therefore, the courts below are properly reversed.

**a. <u>State Preemption</u>**

Section 156b of the Kentucky Constitution enables the General Assembly "to afford cities the power to pass laws which are 'in furtherance of a public purpose.'" *Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d 425, 427 (Ky. 2016) (quoting Ky. Const. § 156b). Pursuant to that delegation of authority, the General Assembly enacted the "home rule" statute, KRS 82.082, which provides that a city such as the City of Paducah "may exercise any power and perform any function within its boundaries … that is in furtherance of a public purpose of the city **and not in conflict with a … statute**." KRS 82.082(1) (emphasis added). The home rule statute goes on to provide that "[a] power or function is in conflict with a statute if it is expressly prohibited by a statute…" *Id.* § 82.082(2). That proscription is echoed in § 156b of the Kentucky Constitution, which also prohibits "any local ordinances being passed which are 'in conflict with a … statute.'" *Ky. Rest. Ass'n*, 501 S.W.3d at 427 (quoting Ky. Const. §156b).

In trade parlance, an ordinance that conflicts with a statute "'is

preempt[ed],'" such that the city "is 'without authority' to enact that ordinance, and the ordinance must be struck down as 'invalid[].'" *Sheffield v. City of Fort Thomas*, 620 F.3d 596, 604 (6th Cir. 2010) (quoting *Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cnty. Gov't*, 131 S.W.3d 745, 750 (Ky. 2004), *and quoting Ky. Licensed Beverage Ass'n v. Louisville-Jefferson Cnty. Metro Gov't*, 127 S.W.3d 647, 649 (Ky. 2004)). Put another way, "'[a]n ordinance … cannot forbid what a statute expressly permits…" *Ky. Rest. Ass'n*, 501 S.W.3d at 428 (quoting *City of Harlan v. Scott*, 162 S.W.2d 8, 9 (Ky. 1942)).

And this Court does not hesitate to strike down municipal residency ordinances that conflict with the Acts of the General Assembly. For example, in this Court's decision of *City of Ashland v. Ashland Fraternal Order of Police #3, Incorporated*, 888 S.W.2d 667 (Ky. 1994), the City of Ashland adopted a city ordinance that required all new employees to be residents of the city by the end of a probationary period. *Id.* at 668. The Ashland Fraternal Order of Police challenged the validity of that ordinance because the residency ordinance could not be reconciled with a statute that barred any such residency requirements for police officers—just like KRS 311A does for fire fighters in this case. *Ibid.* The Ashland F.O.P. was awarded summary judgment for its efforts, which this Court affirmed. *Id.* at 668-69; *see also* n.3, *supra* (collecting cases that held similarly).

This case presents an irreconcilable conflict between Paducah Ord. § 2-

304 and KRS 311A.027 in light of the language of KRS 311A.027 itself. When interpreting a statute, "[t]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (internal citation and quotation marks omitted). In giving effect to the intent of the legislature, the first place to look is "the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration…" *Ibid.* So, the language of KRS 311A should be consulted to ascertain what the legislature intended when it enacted it.

According to KRS 311A.027: "No public agency, tax district, or other publicly funded emergency medical service first response provider or licensed ambulance service shall have a residence requirement for an employee of or volunteer for the organization." KRS 311A.027(1); see also (Appellees' Answer ¶3); [R. at 49]. The statute goes on to provide that the aforesaid prohibition "shall not preclude an employer or agency specified in subsection (1) of this section from having a requirement for response to a specified location within a specified time limit for an employee or volunteer **who is off duty but who is on call to respond to work**." KRS 311A.027(2) (emphasis added); *see also* (Appellees' Answer ¶3); [R. at 49].

So, the statute means exactly what it says it means; entities, including public agencies and publicly funded emergency medical service first response

providers, cannot institute a residency requirement for their employees or volunteers, other than a requirement for response to a specified location within a specified time limit for those in their employ who are "on call."

Contrast Paducah Ord. § 2-304, which applies an across-the-board residency requirement regardless of on-call status: "All members of the Fire Department hired after October 1, 1988, shall reside within McCracken County or within forty-five (45) minutes of Station 4 as measured by a recognized mapping program, i.e., Mapquest, Google Maps, etc., as a condition of their continued employment with the Fire Department of the City." Paducah Ord. § 2-304; *see also* (Appellees' Answer ¶3); [R. at 49].

It follows that two (2) questions must be answered to determine if Paducah Ord. § 2-304 is preempted by KRS 311A: (1) is the City of Paducah's Fire Department either a public agency or a publicly funded emergency medical service first response provider? and (2) Are the employees and volunteers of the City of Paducah's Fire Department "on call" within the meaning of KRS 311A.027(2)?

**i. <u>Paducah Fire is subject to KRS Chapter 311A.</u>**

Neither KRS Chapter 311A nor the regulations promulgated thereunder define either "public agency" or "publicly funded emergency medical service first response provider." *See* KRS 311A.010; 202 KAR 7:010.[10]

[10] The Parties do not dispute that Paducah does not qualify as either of two other enumerated entities subject to KRS 311A.027—tax district and licensed ambulance service. The Court of Appeals erroneously stated that the Parties *also*

There is generally applicable language in KRS 446.080 that is quite instructive however: "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such other as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4). So, to interpret what those words mean, one looks to the common and approved usage of language, or in other words, the "plain meaning of the statutory language,"[11] as can be ascertained by, unsurprisingly, dictionary definitions of the words at issue. *See Fell*, 391 S.W.3d at 719.

First, the words "public agency" *have* acquired a "peculiar and appropriate meaning" in Kentucky jurisprudence. Under both the Kentucky Open Meetings Act, 61.805, *et seq.*, and the Kentucky Open Records Act, KRS 61.870, *et seq.*, the definition of "public agency" includes, *inter alia*, cities and their departments. *See, e.g.*, KRS 61.805(2); KRS 61.870(1). Clearly, the City of Paducah's Fire Department qualifies under those expansive definitions. *See, e.g.*, *Alvey v. State Farm Fire & Cas. Co.*, No. 5:17-CV-00023-TBR-LLK, 2018 WL 3572526, at *1 (W.D. Ky. July 25, 2018) ("The parties do not dispute

agreed that Paducah was not a public agency. (Op. Aff'g at 6). On the contrary, Torian has maintained that Paducah is a "public agency" subject to KRS 311A.027 since the beginning of this Action. *See, e.g.,* (Appellant's Pet. ¶24) ("The Respondent the City of Paducah and its Fire Department are collectively a public agency… within the meaning of § 027(1)."); [R. at 8]; *see also* (Brief for Appellant 12-14).

[11] *Revenue Cab. v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).

that the Paducah Fire Department is a 'public agency' subject to the Act.").[12] Since Paducah cannot dispute that the Paducah Fire Department is a public agency here either, it is subject to KRS 311A.027.

KRS 311A does not define the meaning of "publicly funded emergency medical service first response provider." With that being said, it is beyond cavil that the Paducah Fire Department is supported by public funds.[13] Further, the record is replete with evidence for the proposition that Torian and all other active firefighters for the City of Paducah are ***required*** to be certified and/or licensed by the Kentucky Board of Emergency Medical Services as "Emergency medical services personnel" within the meaning of KRS 311A.010(13) within twenty-four (24) months of hire as part of their job. This is overwhelmingly clear from the fifteen (15) Affidavits submitted by Appellant. (Torian Aff. ¶5, Sep. 9, 2021); [R. at 91-92]; (Blackwell Aff. ¶¶6-7); [R. at 214-15]; (Campbell Aff. ¶¶6-7); [R. at 217-18]; (Fuchs Aff. ¶¶6-7); [R. at 220-21]; (Gray Aff. ¶¶6-7); [R. at 223-24]; (Guess Aff. ¶¶6-7); [R. at 226-27]; (Hansen Aff. ¶¶6-7); [R. at 229-30]; (Harrell Aff. ¶¶6-7); [R. at 232-33]; (Holzapfel Aff., ¶¶6-7); [R. at 235-36]; (King Aff. ¶¶6-7); [R. at 238-39]; (Lucas

[12] In accordance with RAP 41, copies of this and other unpublished decisions cited herein are annexed hereto in Torian's RAP 30(E)(1) Record Appendix. These decisions are not cited as binding authority, and Torian represents that there is no published opinion of the Supreme Court or the Court of Appeals that would adequately address the point of law argued therein.

[13] *See, e.g.*, *Track Your Tax Dollars*, City of Paducah, *available at:* http://paducahky.gov/track-your-tax-dollars (last accessed Sep. 9, 2021).

Aff. ¶¶6-7); [R. at 241-42]; (Meiser Aff. ¶¶6-7); [R. at 244-45]; (Powless Aff. ¶¶6-7); [R. at 247-48]; (Torian Aff. ¶¶6-7, Aug. 8, 2022); [R. at 250-51]; (Yarbrough Aff. ¶¶6-7); [R. at 253-54]; Standard Operating Guidelines – 208 Firefighter Candidate Recruitment §11(C); [R. at 260]; City of Paducah, Kentucky Ordinance No. 2019-8-8589, Sec 2-315 §(a); [R. at 263]. Therefore, under the plain meaning of KRS 311A.027(1), the Paducah Fire Department qualifies as a "publicly funded emergency medical service first response provider" as well.

Nevertheless, the courts below came to a different conclusion. Rather than interpreting KRS 311A.027 as written by the General Assembly, those courts adopted Appellees' interpretation which effectively added language to the statute, as shown below (bracketed, underlined and redlined).

> (13) "Emergency medical services personnel" means:
>
> (a) Persons trained to [only, or primarily] provide emergency medical services and certified or licensed by the board under this chapter as an AEMT, EMR, EMR instructor, EMT, EMT instructor, paramedic, or paramedic instructor.
>
> [(b) "Emergency medical services personnel" does not include firefighters…]

KRS 311A.010(13)(a)-(b) (Trial Order and Court of Appeals amendments incorporated in redline). The Circuit Court effectively added the bracketed language to KRS 311A.027:

> If Paducah firefighters were emergency medical service first responders only, or even if their primary duty were medical services first response providers, Torian's argument may have merit. However, firefighters are firefighters first and emergency medical responders second. KRS 311A.027 was not intended to

apply to firefighters.

(Order, Aug. 22, 2022); [R. at 271]. And the Court of Appeals was persuaded by the Trial Court's reasoning. *See* (Op. Aff'g at 6) ("As to whether the Paducah Fire Department is a 'publicly funded emergency medical service response provider,' we find persuasive the circuit court's reasoning that the primary duty of Paducah firefighters is not emergency medical service, but rather fighting fires.").

But deciding which life-saving duties Torian and the other firefighters engage in are most paramount is not a proper part of the analysis. It is undeniable that neither Paducah, the trial court nor the Court of Appeals—nor, for that matter, even this Court—are at liberty to step into the shoes of the General Assembly and amend KRS 311A.027.[14] Since one would have to amend KRS 311A.027 to reach the same result as the courts below, it follows that this Court should reverse the orders of the courts below holding same.

The trial court and the Court of Appeals found persuasive the fact that

[14] Such a statutory interpretation method is contrary to the law:

> It is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute *rather than surmising what may have been intended but was not expressed*. When language is clear and unambiguous, it will be held to mean what it plainly expresses. Consequently, this Court has long held that when a statute on its face is intelligible, *[courts] are not at liberty to supply words* or… make additions. Thus, *the power to create exceptions by construction can never be exercised* where the words of the statute are free from ambiguity and its purpose plain.

*Metzinger v. Ky. Ret. Sys.*, 299 S.W.3d 541, 546 (Ky. 2009) (emphases added, internal citations, brackets and quotation marks omitted).

KRS 311A.027 is codified within KRS Chapter 311A, which is titled Emergency Medical Services. That observation supported the trial court's conclusion that KRS 311A should not apply to the Paducah Fire Department. However, where the Legislative Research Commission put KRS 311A.027 does not control here. That is so, simply because "[t]itle heads, chapter heads, section and subsection heads or titles, and explanatory notes and cross references, in the Kentucky Revised Statutes, **do not constitute any part of the law**, except as provided in [the Kentucky Uniform Commercial Code]. KRS 446.140 (emphasis added); *see also J.A.S. v. Bushelman*, 342 S.W.3d 850, 855 n.3 (Ky. 2011) ("By this acknowledgement of the statute's heading…, we do not suggest that the heading constitutes any part of the law. The words of the statute speak for themselves.") (citing KRS 446.140).

The Court of Appeals' erroneous reliance on the titles of KRS 311A and 95 is perhaps best exemplified by it opining that its conclusion was "bolstered by the Legislature's enactment of KRS Chapter 95, titled 'City Police and Fire Departments,' which contains no prohibition against residency requirements for fire departments." (Op. Aff'g at 7). But there is nothing unusual about firefighters and their departments being subject to more than one statute. For example, KRS 311A.070 explicitly provides that when a complaint is filed against a "*fire district*-operated ambulance service, emergency medical services provider, or educational institution…", "written notice of the complaint or proposed action shall be sent to: … The chairman of the *fire*

*protection district*…" KRS 311A.070, (d) (emphases added). That is so, even though fire protection districts are also subject to, and indeed exist by virtue of KRS Chapter 75. Simply put, both KRS 311A.070 and KRS Chapter 75 *explicitly* apply to firefighters. The same should hold true with respect to KRS 311A.027 and KRS Chapter 95.

Since the Trial Court and the Court of Appeals erred in their interpretation of KRS 311A.027, and especially given the important interests at stake for all firefighters who also act as licensed medical service first responders, this Court should reverse the decision of the Court of Appeals.

**ii. <u>Paducah Firefighters are Not "on call" within the meaning of KRS 311A.027(2).</u>**

The second question is whether Paducah firefighters are "on call" within the meaning of KRS 311A.027(2). The phrase "on call" is not defined in KRS 311A, so we turn to the dictionary. For the phrase, "on call", the first listed definition in Webster's Dictionary is "available when called for or summoned".[15] Likewise, the Cambridge Dictionary defines "on-call" as "used to describe workers who are available to make official visits at any time when they are needed", or "relating to the work of someone who is available at any time when needed."[16] Also, just like with the words "public agency", the

[15] On Call Definition, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010).
[16] On-Call Definition, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS ONLINE EDITION, *available at:* https://dictionary.cambridge.org/us/dictionary/english/on-call (last accessed Sep. 9, 2021).

words "on call" have been defined elsewhere under Kentucky law:

> "On-call time. An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while on call. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."

*Lazzari v. Norton Healthcare, Inc.*, No. 2016-CA-001349-MR, 2018 WL 2383588, at *4 (Ky. App. May 25, 2018) (quoting 803 KAR 1:065 § 3(4)). Hence, the phrase "on call" in KRS 311A, by its terms, connotes *mandatory* availability.

Even if we assume, for the moment, that the words of KRS 311A.027 are ambiguous, the legislative history of similar statutes supports Torian's interpretation. "Where statutory language is ambiguous, Kentucky courts turn to legislative history. 'Legislative history' is a broad term that encompasses several different categories of information… [including] legislative committee reports, prior drafts of the statute, bills presented but not passed and legislators' comments in debates as examples of legislative history that can prove elucidating." *Fell*, 391 S.W.3d at 723.

Torian's proffered textual distinction between "on call" and "call back" is demonstrated by unsuccessful floor amendments to an identically worded statute, KRS 61.409. That statute applies the same proscription contained in KRS 311A.027 to employees of law enforcement agencies "who do not possess peace officer powers…"; *to wit*, they cannot be subject to a "residency

requirement…" KRS 61.409(1). That general prohibition nevertheless allows an enumerated employer to institute "a requirement for response to a specified location within a specified time limit for an employee or volunteer who is **off-duty but who is on-call to respond to work**." KRS 61.409(3) (emphasis added). KRS 61.409(3) is worded identically to KRS 311A.027(2).

On two occasions during the 2003 Regular Legislative Session, Senator Denton proposed that KRS 61.409(3) be amended. He proposed, *inter alia*, that subsection (3) be amended to permit enumerated government agencies to "require that a public servant **who is off duty but who is subject to call back** to respond to work reside within a geographic area which will permit that public servant to respond to work within the time limit set by the employing or appointing jurisdiction." Kentucky Senate Journal, 2003 Reg. Sess. No. 25 (emphasis added); *see also* Kentucky Senate Journal, 2003 Reg. Sess. No. 27 (identical).

KRS 61.409 is not the statute at issue here. However, those unsuccessful floor amendments are relevant because they demonstrate that the General Assembly is more than capable of amending the language of KRS 311A.027(2) to apply to employees subject to call back—like Torian—yet, it has chosen not to do so.

As for the factual dispute Paducah created regarding whether Torian and the Class are "on call", there is, *at minimum*, a triable issue of material fact on that score. The Paducah Fire Department, Standard Operating

Guidelines, Chapter 200, provides that members of the Union are subject to "call-back", or a situation where the incident commander can request fire fighters to respond to a call, and they are free to do so on a voluntary basis only. (Appellant's Pet. ¶26); *see also* (Appellees' Answer ¶5). Furthermore, the record is replete with evidence supporting that proposition. *See, e.g.*, Standard Operating Guidelines – Call Back §§1-3; [R. at 262]; [OAG 78-511]; [R. at 256-57]; (Blackwell Aff. ¶¶8-14); [R. at 215-16]; (Campbell Aff. ¶¶8-14); [R. at 218-19]; (Fuchs Aff. ¶¶8-14); [R. at 221-22]; (Gray Aff. ¶¶8-14); [R. at 224-25]; (Guess Aff. ¶¶8-14); [R. at 227-28]; (Hansen Aff. ¶¶8-14); [R. at 230-31]; (Harrell Aff. ¶¶8-14); [R. at 233-34]; (Holzapfel Aff. ¶¶8-14); [R. at 236-37]; (King Aff. ¶¶8-14); [R. at 239-40]; (Lucas Aff. ¶¶8-14); [R. at 242-43]; (Meiser Aff. ¶¶8-14); [R. at 245-46]. (Powless Aff. ¶¶8-14); [R. at 248-49]; (Torian Aff. ¶¶8-14, Aug. 8, 2022); [R. at 251-52]; (Yarbrough Aff. ¶¶8-14); [R. at 254-55].

Thus, Paducah firefighters are not "on call" within the meaning of KRS 311A.027(2) because they are not subject to mandatory availability. Since the Paducah Fire Department implements a "call-back" system for its firefighters as opposed to placing them "on call"—with the corresponding compensation potentially required under the Kentucky Wages and Hours Act, KRS 337.010, *et seq.*, and the regulations promulgated thereunder—the exception contained in KRS 311A.027(2) does not apply here.

**iii. <u>Torian's interpretation of KRS 311A is not absurd.</u>**

Below, Paducah argued that Torian's interpretation of KRS 311A would create an absurd result that the General Assembly could not have possibly intended. *See* (Appellees' Resp. in Opp. to Pet. Mot. Hrg., June 21, 2022, pg. 3) [R. at 207]. That argument is specious. In Kentucky, statutes are interpreted according to their plain meaning unless that meaning leads to an absurd or wholly unreasonable result. *See, e.g.*, *Johnson v. Branch Banking & Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010). Below, Paducah argued that interpreting KRS 311A.027 according to its plain meaning would result in an absurd result. "The doctrine of absurd results may allow a reviewing court to disregard or correct a particular provision in the event the disposition cannot be reasonable and the error is technical or the result of oversight." *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 273 n.30 (Ky. 2016).

> The doctrine of absurd results is a longstanding, yet narrow one:
>
> > The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood on the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person who fell down on the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt."

*United States v. Kirby*, 74 U.S. 482, 487 (1868) (holding that a law that criminalized the "obstruction or retarding of the passage of mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.") (internal citations

omitted). The bar for the absurd results doctrine is not easily surmounted.

Indeed, this Court routinely finds that applying the plain meaning of statutes to reach an odd result does not equate with an absurd result. *See, e.g.*, *Garrard Cnty. v. Middleton*, 520 S.W.3d 746, 752-53 (Ky. 2017) (holding statutory scheme which allowed jailers that service county jails "to be subject to term-to-term salary changes and reductions, but insulates jail-less jailers from salary decreases in perpetuity…" to be a "head-scratching result," but not an absurd one.); *Owen*, 486 S.W.3d at 272 (rejecting absurd result argument and declining to interpret the Kentucky Civil Rights Act contrary to its plain meaning, despite "serious concerns"). Simply put, Torian's argued interpretation would not be an absurd result.

**b. <u>The trial court abused its discretion by allowing late amendment</u>**

Finally, the trial court abused its discretion by allowing Paducah to amend its Answer after summary judgment was fully briefed. Whether a Court should bestow leave to amend a pleading is entrusted to its sound discretion. *See, e.g.*, *Nami Res. Co., v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 343 (Ky. 2018) (citing *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869-70 (Ky. App. 2007)). In exercising that discretion, courts should "'consider such factors as… **whether amendment would prejudice the opposing party** or would work an injustice.'" *Insight Ky. Partners II, L.P. v. Preferred Auto. Servs., Inc.*, 514 S.W.3d 537, 554—55 (Ky. App. 2016) (emphasis added, certain internal citations and quotation marks omitted,

quoting *Kenney*, 269 S.W.3d at 869-70).

Courts routinely deny leave to amend pleadings *after* summary judgment has been filed. *See, e.g.*, *Bradford v. Billington*, 299 S.W.2d 601, 603 (Ky. 1957) (Denying leave to file amended answer after summary judgment had been filed, citing CR 15.01)[17]. *A fortiori*, leave to amend was particularly prejudicial—and highly inappropriate—where, as here, a litigant reversed its litigation posture after summary judgment has been **fully briefed** in reliance on the movant's pre-amendment litigation posture.

Alternatively, amendment should have been conditioned on the payment of costs. Such a condition is a creative solution fashioned by courts to alleviate the prejudice attendant to allowing a litigant to "reverse course" after it becomes clear that its position was a losing one:

> Under certain circumstances a court may impose conditions when granting leave to amend. **Where an adverse party will incur additional expense as a result of the amendment, the court may condition the amendment on the payment of costs** or

[17] *See also Johnston v. Staples*, 408 S.W.2d 206, 207 (Ky. 1966) (affirming denial of leave to amend pleading after summary judgment was filed, citing CR 15.01, *and* citing *Bradford*, 299 S.W.2d 601); *Burke v. Burke*, No. 2021-CA-0073-MR, 2021 WL 5141760 at *3 (Ky. App. Nov. 5, 2021) (same, quoting *Bradford*, 299 S.W.2d at 603); *Est. of Laird v. Mills Health & Rehab Ctr., Inc.*, No. 2017-CA-000288-MR, 2019 WL 2406380, at *2 (Ky. App. June 7, 2019) ("In addition, our Supreme Court instructs that '[a]fter a motion for summary judgment has been made, a motion to amend a pleading rests in the sound discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion is clearly shown.'" quoting *Johnston*, 408 S.W.2d at 207); *Yokohama Indus. Americas Inc. v. Fluid Routing Sols.*, No. 2020-CA-1157-MR, 2021 WL 4699520, at *6 (Ky. App. Oct. 8, 2021) ("In short, [non-movant] would have suffered palpably undue prejudice if [movant] had been permitted, without explanation, to alter completely its litigation strategy after dispositive motions had been submitted.").

allow a set-off against a judgment in the event a plaintiff prevails. Kurt A. Phillips, Jr., 6 KENTUCKY PRACTICE (Rules of Civil Procedure Annotated) § 15.01 (West Publishing Co. 2021) (emphasis added); *see also*, *e.g.*, *Farmers Crop Ins. Alliance, Inc. v. Gray*, No. 2009-CA-000969-MR, 2010 WL 5018284, at *6 (Ky. App. Dec. 10, 2010) ("[I]n a proper case conditions may be imposed on the party seeking [an] amendment; for example, costs of preparing litigation could be imposed on the party who asserts a valid, but untimely, dispositive affirmative defense." cleaned up).

Simple fairness dictates that if Paducah was to be permitted to "about face" after Torian pointlessly shadow-boxed their since abandoned position—at his significant expense—the least the trial court could have done was to order them to reimburse Torian and the Union so as not to prejudice them.

## CONCLUSION

For all the foregoing reasons, the decisions of the Trial Court and the Kentucky Court of Appeals should properly be reversed by this Court forthwith.

Dated: May 6, 2024

Respectfully submitted,

/s/ Peter J. Jannace

PETER J. JANNACE
HERZFELD, SUETHOLZ, GASTEL, LENISKI & WALL, PLLC
515 Park Avenue
Louisville, Kentucky 40208
PH: (502) 636-4333
peter@hsglawgroup.com

*Counsel for Appellant Nathan Torian*