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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001991-MR

LEO F. ROGERS, M.D. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 13-CI-03767

FAMILY PRACTICE ASSOCIATES OF LEXINGTON, P.S.C., KEITH D. APPLEGATE, M.D., DAVID P. DUBOCQ, M.D., JEFFREY FOXX, M.D., JOSEPH E. GERHARDSTEIN, M.D., DIANA HAYSLIP, M.D., MARY H. HENKEL, M.D., WESLEY W. JOHNSON, M.D., AND JOHN E. REESOR, M.D. — APPELLEES

AND

NO. 2016-CA-000040-MR

FAMILY PRACTICE ASSOCIATES OF LEXINGTON, P.S.C., KEITH D. APPLEGATE, M.D., DAVID P. DUBOCQ, M.D., JEFFREY FOXX, M.D., JOSEPH E. GERHARDSTEIN, M.D., DIANA HAYSLIP, M.D., MARY H. HENKEL,

M.D., WESLEY W. JOHNSON, M.D.,
AND JOHN E. REESOR, M.D. CROSS-APPELLANTS

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 13-CI-03767

LEO F. ROGERS, M.D. CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND THOMPSON, JUDGES.

JONES, JUDGE: This appeal and cross-appeal arise out of an order of the Fayette Circuit Court granting summary judgment in favor of Appellees/Cross-Appellants. For reasons more fully explained below, we affirm.

I. BACKGROUND

Family Practice Associates of Lexington, P.S.C. ("Family Practice") is a Kentucky medical professional services corporation formed in 1988. All individually named Appellees/Cross-Appellants (the "Physician Shareholders") were shareholders and directors of Family Practice at the time of the events giving rise to this action. Until January of 2013, Appellant, Dr. Leo F. Rogers ("Dr.

Rogers"), was employed by Family Practice and was also a shareholder and director of Family Practice.

As shareholders of Family Practice, all parties to this appeal have entered into various agreements concerning governance of the corporation and shareholder rights and obligations, several of which are relevant to this appeal. The Family Practice Shareholders Agreement, effective as of November 1, 2006, functions as corporate bylaws in that it "resolves certain business and management issues regarding the operation of the Corporation." Among other things, the Shareholders Agreement sets out the composition of the Board of Directors, indicates how to replace Directors, and lists decisions about corporate operations that require a supermajority vote. One such corporate action requiring a supermajority vote of the Board of Directors is "[a]ny change in the shareholders of the Corporation, including without limitation, all decisions involving the issuance, repurchase, redemption and rights to subscribe to the newly issued and reissued shares of the Corporation."

During his tenure with Family Practice, Dr. Rogers also entered into several stock restriction and purchase agreements with Family Practice and the other shareholders. It was Family Practice's custom to execute a new stock restriction and purchase agreement each time there was a change in shareholders. Accordingly, Dr. Rogers executed and entered into stock restriction and purchase agreements dated: July 1, 1994; January 23, 2001; January 1, 2003; November 1,

2006; and May 1, 2008. A fifth amended and restated stock restriction and purchase agreement was drafted and dated effective September 1, 2009; however, it is now undisputed that Dr. Rogers never executed that agreement. As is relevant to this appeal, the stock restriction and purchase agreements indicated that if a shareholder ceased to be employed by Family Practice, Family Practice "shall purchase from such Shareholder, and the Shareholder shall sell to [Family Practice] at the Contract Price . . . all of the Shareholder's shares." Each agreement sets out how the Contract Price is to be determined should a shareholder sell his shares back to Family Practice. Until the May 1, 2008, agreement (hereafter referred to as the "Fourth Amended Agreement"), "Contract Price" was calculated based on the fair market value of the shares. In 2008, a supermajority of Family Practice's Board of Directors voted to change how the contract price would be calculated. This change was then reflected in the Fourth Amended Agreement, which states that the contract price for all shares of the selling shareholder is the selling shareholder's *pro rata* share of Family Practice's (i) "Total Capital" less (ii) "Net Property and Equipment" plus (iii) "Cost of Property and Equipment" less (iv) "Undistributed Income."[1] All shareholders executed the Fourth Amended Agreement, with the exception of Dr. Brian Brown.[2]

[1] All terms in quotations are defined in the Fourth Amended Agreement.
[2] Dr. Brown had been on a leave of absence since 2007, and ultimately did not return to Family Practice.

In 2009, the Board of Directors voted to make Dr. Diana Hayslip a shareholder of Family Practice. Dr. Rogers was one of the two shareholders who did not vote in favor of adding Dr. Hayslip as a shareholder. The amended stock restriction and purchase agreement dated September 1, 2009 (hereafter referred to as the "Fifth Amended Agreement") was drafted in light of Dr. Hayslip's addition as a shareholder of Family Practice. The Fifth Amended Agreement contains the same methodology for calculating "Contract Price" as the Fourth Amended Agreement. The only significant difference between the two agreements is that Dr. Brown is no longer listed as a shareholder of Family Practice and Dr. Hayslip is added as a shareholder. While the Fifth Amended Agreement purports to have been executed by all of Family Practice's shareholders, in that there are signatures for each shareholder on the document, the course of this proceeding has revealed that only Dr. John Reesor and Dr. Hayslip actually signed the agreement.

By letter dated November 19, 2012, Family Practice informed Dr. Rogers that he was being terminated from Family Practice, effective January 18, 2013. Dr. Rogers was immediately placed on a paid leave of absence continuing until the official date of his termination. Following Dr. Rogers's termination, Family Practice attempted to repurchase Dr. Rogers's shares in Family Practice; the amount offered for Dr. Rogers's shares was calculated according to the terms set forth in the Fifth Amended Agreement. Dr. Rogers rejected Family Practice's offer to repurchase his shares. He claimed that because he had not executed the

Fifth Amended Agreement, it was invalid and unenforceable against him. As such, Dr. Rogers contended that Family Practice was required to pay him the fair market value of his shares as pursuant to KRS[3] 274.095(2) and (4). Family Practice contended that Dr. Rogers's argument was irrelevant, as even if the Fifth Amended Agreement was unenforceable against him, Family Practice was still entitled to purchase Dr. Rogers's shares from him at the Contract Price as stated in the Fourth Amended Agreement.

On September 12, 2013, Dr. Rogers filed a complaint in Fayette Circuit Court naming Family Practice and the Physician Shareholders, both in his or her individual capacity and capacity as a director of Family Practice, as a defendant. In his complaint, Dr. Rogers asserted the following causes of action: Count I - damages for Family Practice's violation of KRS 274.095;[4] Count II - breach of Family Practice officer fiduciary duties; Count III - breach of Family Practice director fiduciary duties; Count IV - damages for violation of KRS 516.030;[5] Count V - damages for violation of KRS 517.050;[6] and Count VI - damages for violation of KRS 14A.2-030.[7] Family Practice then filed a counterclaim against Dr. Rogers alleging breach of contract and seeking declaratory relief.

[3] Kentucky Revised Statutes.
[4] Withdrawing shareholders; procedure for redemption of stock; procedure upon death of sole shareholder; insolvency.
[5] Forgery in the second degree.
[6] Falsifying business records.
[7] Penalty for signing false document.

In September of 2014, Dr. Rogers moved to file a first amended complaint to add claims of tortious interference with contract ("Count VII") and negligence *per se* violation of KRS 311.597[8] ("Count VIII"). Subsequently, Family Practice moved for summary judgment on Counts I-VI of Dr. Rogers's complaint. Dr. Rogers was granted leave to file his first amended complaint on September 22, 2014. Family Practice's motion for summary judgment was denied on October 14, 2014.

In February of 2015, Dr. Rogers moved to file a second amended complaint. Over the objections of Family Practice, the second amended complaint was filed of record on March 2, 2015. The second amended complaint added Family Practice Properties of Lexington, LLC ("Properties") as a defendant.[9] It also added two new claims: Count IX – damages for violation of KRS 275.170,[10] Properties' operating agreement, and applicable law; and Count X – damages for intentional actions of Properties in attempting to utilize a forged instrument. Subsequently, the Physician Shareholders moved to dismiss Count IX of the second amended complaint, arguing that there was no recognized legal theory in Kentucky under which the directors of a professional services corporation have

[8] Acts declared to constitute dishonorable, unethical, or unprofessional conduct.
[9] Properties is a limited liability company that owns the real property where Family Practice operates its medical practice. The members of Properties include all of the Family Practice shareholders, as well as some individuals who are employed by Family Practice but are neither physicians nor shareholders of Family Practice. At the time that Dr. Rogers sought to amend his complaint to add Properties as a defendant, Properties had already filed a separate lawsuit against Dr. Rogers in Fayette Circuit Court.
[10] Duties of care and loyalty; approval of conflict of interest transactions; remedy for breach of the duty of loyalty.

legal duties imposed on them under limited liability company laws. Family Practice moved to dismiss Count X of the second amended complaint, arguing that Dr. Rogers had failed to set forth with particularity the actions of Family Practice that constituted the alleged fraud and that Dr. Rogers could not meet all the necessary elements of a fraud cause of action. Dr. Rogers moved to withdraw the second amended complaint on April 3, 2015.

On June 24, 2015, Dr. Rogers moved for partial summary judgment and for sanctions under CR[11] 11. Following a hearing, Dr. Rogers's motion for partial summary judgment was denied on August 6, 2015. On August 4, 2015, the Physician Shareholders and Family Practice, collectively, filed a motion for partial summary judgment as to Count VI of Dr. Rogers's complaint. The following week, the Physician Shareholders and Family Practice filed a joint motion for partial summary judgment as to Count VII and Count VIII of Dr. Roger's complaint. An agreed order was entered on August 21, 2015, dismissing Count VI of the complaint with prejudice. On August 26, 2015, the trial court entered an order granting the motion for summary judgment as to Counts VII and VIII of the complaint, and dismissing those claims.

Thereafter, Family Practice and the Physician Shareholders made several separate motions for partial summary judgment. On September 15, 2015, defendants moved for summary judgment as to Count V of Dr. Rogers's

[11] Kentucky Rules of Civil Procedure.

complaint. On October 26, 2015, the Physician Shareholders moved for summary judgment as to Counts II and III of the complaint; all defendants collectively moved for summary judgment as to Count I of the complaint; and all defendants moved for summary judgment as to Count IV of the complaint. All motions were heard on December 3, 2015. On December 23, 2015, the trial court entered an order granting all motions for summary judgment, which made the following conclusions of law:

> 1. No genuine issue of material fact exists which would allow the Court to rule in the Plaintiff's favor as to Counts I, II, III, IV and V of the Complaint, and the Defendants are entitled to judgment as a matter of law.
>
> 2. The signatures on the Fifth Amended Stock Agreement of those shareholders other than Dr. Reesor and Dr. Hayslip were not valid. In equity and as a matter of law, the Court sets aside and disregards the Fifth Amended Stock Agreement.
>
> 3. Dr. Brown's failure to execute the Fourth Amended Stock Agreement does not void said agreement, as eight of the nine then shareholders/directors signed the Fourth Amended Stock Agreement in excess of the 70% needed under the Shareholders Agreement. Even accepting Dr. Rogers [sic] argument that he would not have signed the Fourth Amended Stock Agreement if he had known Dr. Brown would not be signing it, seven of the nine shareholders/directors (77%) signed the Fourth Amended Stock Agreement in excess of the 70% needed under the Shareholders Agreement to bind the practice group. The Plaintiff cannot prevail on Count I of the Plaintiff's Complaint as the 70% requirement was reached and exceeded even if disregarding Dr. Rogers' [sic] signature.

> 4. The Plaintiff cannot prevail under Counts II and III of the Plaintiff's Complaint as the duties under KRS 271B.8-420 and KRS 271B.8-300 run to the corporation, and no duty is owed thereunder to the individual shareholders.
>
> 5. Given the Fifth Amended Stock Agreement is not being enforced, Count IV, forgery/negligence per se, and Count V falsification of a business record/negligence per se, become moot. In addition, there has been no showing of an intent to defraud or deceive by the other shareholders in relation to Counts IV and V.

This appeal and cross-appeal followed.

II. Standard of Review

When hearing a motion for summary judgment, a trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate only if "it appears impossible in a practical sense for the respondent to prevail at trial." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007). On appeal, "the standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Cantiff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense

that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

III. Analysis

On appeal, Dr. Rogers maintains that he is entitled to the fair market value for his shares in Family Practice. He argues that neither the Fifth Amended Agreement nor the Fourth Amended Agreement can be valid because they lack all necessary signatures and, therefore, lack the meeting of the minds and mutuality of obligation necessary for the agreements to become binding on him and the Physician Shareholders. Dr. Rogers contends that, by holding that the Fourth Amended Agreement was binding on him, the trial court effectively "cut-and-pasted" the Fourth Amended Agreement and Fifth Amended Agreement together, so that it would include all of the necessary Physician Shareholders. Dr. Rogers additionally argues that the trial court erred in finding that, because the requisite supermajority of the board of directors had voted to enact the Agreements, his signature was not necessary to make the Agreements binding on him. Further, Dr. Rogers contends that the trial court erred in concluding that his claims for damages or sanctions were moot in light of the Fifth Amended Agreement being set aside.

Family Practice and the Physician Shareholders (collectively, the "Appellees") argue on cross-appeal that the trial court erred in holding that equity required the Fifth Amended Agreement be set aside. Additionally, Appellees maintain that Dr. Rogers either ratified the Fifth Amended Agreement by accepting

benefits under it or that, by executing and approving the Fourth Amended Agreement, Dr. Rogers is estopped from challenging the enforceability of the Fifth Amended Agreement. We address each argument below.

A. Effect of the Shareholders Agreement

Much of this appeal concerns the effect of the 2006 Shareholders Agreement. Appellees rely on their interpretation of the Shareholders Agreement – specifically, two sections of that agreement – to support their argument that Dr. Rogers, or any other Family Practice shareholder, need not have signed the Fifth Amended Agreement to be bound by its terms. The trial court declined to consider this argument in relation to Fifth Amended Agreement – instead choosing to set aside and disregard it on grounds of equity. In deciding to enforce the Fourth Amended Agreement, however, the trial court applied Appellees' posited interpretation of the Shareholders Agreement to support its finding that signatures were not required for the Fourth Amended Agreement to be effective against Dr. Rogers.[12]

The interpretation of a contract, including a determination of whether a contract is ambiguous, is an issue of law, which we review *de novo*. *Cantrell Supply Co. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). "Our

[12] While much discussion is made of signatures, none of the parties argue that a writing and signature are required to enforce either agreement under the statute of frauds. Based on the parties' arguments, the real issue is whether – in light of certain provisions of the Shareholders Agreement – a shareholder was required to individually assent to the stock purchase and restriction agreements to be bound by them or a supermajority board of directors vote regarding those agreements binds all shareholders.

review must begin with an examination of the plain language of the instrument." *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 694 (Ky. 2016). "When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions." *3D Enters. Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006) (quoting *Cantrell Supply, Inc.*, 94 S.W.3d at 385).

The sections of the Shareholders Agreement on which Appellees rely in support of their argument read as follows:

> 4. Board Decisions
>
> (a) The Shareholders agree that the following decisions regarding the operation of the Corporation shall be made solely by the affirmative vote of at least seventy percent (70%) of the Corporation's Board of Directors:
>
> . . .
>
> (iii) Any change in the shareholders of the Corporation, including, without limitation, all decisions involving the issuance, repurchase, redemption and rights to subscribe to the newly issued and reissued shares of the Corporation;
>
> . . .
>
> 6. Miscellaneous.

> (a) This Agreement shall be binding upon and shall inure to the benefit of each of the parties to this Agreement and their respective successors, assigns, heirs, executors, administrators, and personal representatives.

Under Appellees' interpretation of the above quoted sections of the Shareholders Agreement, once there was a 70% affirmative vote on the motion regarding Dr. Hayslip's buy-in terms as a shareholder, all shareholders were bound not only to the decision voted on, but bound to agree to any terms of any contracts that might arise out of that buy-in. The plain language of the Shareholders Agreement does not lend itself to such interpretation.

Appellees are correct that the plain language of the Shareholders Agreement indicates that it is binding on all signatories to it. Being so bound, however, does not have the effect that Appellees argue it does. The plain language of the Shareholders Agreement indicates that, in signing the Agreement, Dr. Rogers agreed that an affirmative vote of at least 70% of the shareholders/directors would be sufficient to authorize Family Practice to issue shares to Dr. Hayslip and otherwise add her as a shareholder. Thus, despite the fact that Dr. Rogers dissented in the vote to add Dr. Hayslip as a shareholder, he has no grounds to contest her buy-in as it received the requisite supermajority affirmative vote. However, there is no language indicating that a supermajority vote of the shareholders/directors can decide things for *individuals* or obligate shareholders to enter into agreements with Family Practice. Accordingly, pursuant to the plain

language of the Shareholders Agreement, the May 19, 2009, vote worked only to approve Dr. Hayslip's buy-in terms. It did not bind Dr. Rogers, or any other Family Practice shareholder, to any separate agreement that might arise as a result of Dr. Hayslip's buy-in provisions.

B. Enforceability of the Fifth Amended Agreement

Appellees contend that the trial court's decision to set aside and disregard the Fifth Amended Agreement was erroneous for three reasons. First, Appellees contend that the trial court committed reversible error in failing to hold that an approval by a supermajority of the board of directors made the Fifth Amended Agreement binding on Dr. Rogers. Second, Appellees argue that the trial court should not have set aside the Fifth Amended Agreement "*in equity* and as a matter of law" because there were adequate remedies at law; although Appellees do not indicate what those adequate legal remedies are. Finally, Appellees argue that the trial court erred in failing to find that Dr. Rogers ratified the Fifth Amended Agreement by accepting benefits under it.

While Appellees refer to the May 19, 2009, Board of Directors' vote approving the terms of the Fifth Amended Agreement, this is a mischaracterization. A review of the minutes shows that the only relevant vote concerned the terms of Dr. Hayslip's buy-in as a shareholder. While deposition testimony indicates that there was a vote explicitly concerning acceptance of the terms of the Fourth Amended Agreement after it was drafted and executed, there is

nothing in the record suggesting that a similar vote was taken concerning the Fifth Amended Agreement. Nonetheless, the express terms of the Shareholders Agreement do not indicate that a supermajority vote approving the terms of an agreement would bind the individual shareholder to that agreement – rather, the terms indicate that a supermajority vote will bind the *corporation*. "To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954). While Appellees initially argued that Dr. Rogers assented to the Fifth Amended Agreement by offering "his" signature as proof, they have since stipulated to the fact that Dr. Rogers's signature was forged. There is no evidence before us indicating that Dr. Rogers even saw the Fifth Amended Agreement, let alone assented to its terms, and Dr. Rogers has testified that he did neither. The trial court's conclusion that because "[t]he signatures on the Fifth Amended Agreement of those shareholders other than Dr. Reesor and Dr. Hayslip were not valid" the Fifth Amended Agreement must be "set aside and disregard[ed]" is therefore technically incorrect. Without mutual assent among the parties, there is no contract to set aside or disregard.

Agreeing with the trial court that the Fifth Amended Agreement was not legally binding on Dr. Rogers, we turn to Appellees next argument – that the trial court erred in failing to find that Dr. Rogers ratified the Fifth Amended Agreement. "Ratification is a question of fact, and, as applied to contracts, it may

be express or implied." *Hofgesang v. Silver*, 232 Ky. 503, 23 S.W.2d 945, 947 (1930) (citing *Short v. Metz Co.*, 105 Ky. 319, 176 S.W. 1144 (1915)). "If a party desires to rely upon the invalidity of a contract, he must disclaim it and refuse to permit anything to be done under it in so far as it concerns him." *Id.* Appellees note that the Fifth Amended Agreement contains a provision stating that $51,496.00 of Dr. Hayslip's accounts receivable were to be redistributed to all the shareholders of Family Practice, including Dr. Rogers. By accepting his portion of the redistribution, Appellees argue, Dr. Rogers implicitly ratified the Fifth Amended Agreement and is now bound by it.

While Appellees made this argument in one of their partial motions for summary judgment, the trial court did not make any findings of fact concerning the issue of ratification and did not rule on the issue. Appellees made no request for specific findings on the issue of ratification under CR 52.04 following entry of the trial court's order. Therefore, we are precluded from addressing the issue of ratification "because the trial judge did not rule on these matters and the [Appellees] made no request for specific findings on them." *Abuzant v. Shelter Ins. Co.*, 977 S.W.2d 259, 262 (Ky. App. 1998). Appellees' failure to file a CR 52.04 motion requesting findings on the issue of ratification "constitutes a waiver and precludes appellate review." *Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987) (citing CR 52.04; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)).

C. Enforceability of the Fourth Amended Agreement

Dr. Rogers contends that the trial court's finding that the Fourth Amended Agreement was enforceable against him was in error. While Dr. Rogers acknowledges that he signed the Fourth Amended Agreement, he contends that it is still unenforceable because it was not signed by all of Family Practice's shareholders. Additionally, he contends that the Fourth Amended Agreement is unenforceable because it does not cover the relevant group of Family Practice shareholders. The trial court rejected Dr. Rogers's arguments and found that the Fourth Amended Agreement was enforceable despite the missing signature – and would have been valid even without Dr. Rogers's signature – because "seven of the nine shareholders/directors (77%) signed the [Fourth Amended Agreement] in excess of the 70% needed under the Shareholders Agreement to bind the practice group." As discussed *supra* Section III.A, we disagree with the trial court's interpretation of the Shareholders Agreement; accordingly, the trial court's reasoning for finding that the Fourth Amended Agreement is enforceable against Dr. Rogers was in error. However, our rejection of the trial court's reasoning does not necessitate reversal, as "it is well-settled that an appellate court may affirm a lower court for any reason supported by the record." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009).

Dr. Rogers has alleged throughout this dispute that the various stock restriction and purchase agreements he has entered into throughout the term of his employment with Family Practice only became effective "if and when they [were]

signed by each and every named party to the agreement." Likewise, he believes that any stock restriction and purchase agreement executed by a group of shareholders becomes invalid once that group of shareholders changes in any way. It is Dr. Rogers's belief that all signatures on the Agreement were conditioned on the belief that all other signatories to the Agreement would sign it. Thus, when Dr. Brown did not sign the Fourth Amended Agreement as all parties to it believed he would, all signatures on the Fourth Amended Agreement became invalid and the Fourth Amended Agreement failed to be a valid contract because there was no meeting of the minds between all parties.

It is unclear on what authority Dr. Rogers bases his posited theories of contract law. Dr. Rogers cites no legal authority to support his theory that the Fourth Amended Agreement can only become valid once executed by all named shareholders and only remains valid for so long as all named shareholders remain shareholders of Family Practice. Our independent research has not yielded any case law or statute that would support Dr. Rogers's theory. Further, there is nothing in the Shareholders Agreement or in the Fourth Amended Agreement that speaks to such a result. In contrast, the Fourth Amended Agreement states that "no change, modification, addition *or termination* of this Agreement shall be enforceable unless in writing and signed by the party against whom enforcement is sought." (Emphasis added). No party has submitted any evidence of a signed writing terminating the Fourth Amended Agreement. Presumably, the Fifth

Amended Agreement was meant to terminate and supersede the Fourth; however, the Fifth Amended Agreement cannot work to terminate the Fourth Amended Agreement because Dr. Rogers, the party against whom enforcement is sought, never signed that agreement.

In arguing a different point, Dr. Rogers notes that if one prospective party to the contract refused to sign, the solution for the remaining shareholders is to simply vote the dissenting shareholder out of the practice. This seems to contradict his argument that all needed to sign. While parties are certainly free to condition the effectiveness of a contract on all individuals signing the contract, nothing in the Fourth Amended Agreement indicates that the parties agreed to such a condition. Dr. Rogers has put forth no evidence indicating that the parties agreed the Fourth Amended Agreement would not be binding on them unless signed by all parties.

While the custom of Family Practice was to have a new agreement drafted and executed each time there was a change in shareholders and to have all shareholders sign that agreement, there is nothing in those agreements that creates any obligations among the shareholders regarding the purchase and sale of shares when a shareholder's employment at Family Practice is terminated. Rather, by signing the agreement, an individual shareholder agrees that there are certain events that will trigger Family Practice's right to buy-back shares and agrees to the formula by which the price of those shares will be calculated. If Dr. Rogers did

not wish to be bound by the Fourth Amended Agreement until he was certain that all other Family Practice shareholders would agree to it, he had the right to wait until all other signatures had been obtained before signing it. He did not do so. Further, Dr. Rogers has at no point argued that Dr. Brown did not assent to the Fourth Amended Agreement. Dr. Brown was terminated as a practitioner from Family Practice and sold his shares back to the corporation subsequent to the drafting and execution of the Fourth Amended Agreement.[13] The time to challenge the validity of the Fourth Amended Agreement in relation to Dr. Brown was at the time that Dr. Brown sold his shares to Family Practice.

Accordingly, we see no reason why the Fourth Amended Agreement cannot be enforced against Dr. Rogers.

D. Dr. Rogers's Claims for Damages on *Negligence Per Se* Claims

The trial court ruled that Family Practice was entitled to summary judgment on Counts IV and V of Dr. Rogers's complaint, both of which alleged that Dr. Rogers was entitled to damages under KRS 446.070, Kentucky's *negligence per se* statute, for Family Practice's violation of certain criminal statutes – respectively, KRS 516.030 (fraud) and KRS 517.050 (falsification of business records). Specifically, the trial court found that there had been "no showing of an intent to defraud or deceive by the other shareholders" in relation to Dr. Rogers's claims, as would be necessary for Dr. Rogers to prevail.

[13] None of the parties have offered evidence regarding how the contract price for Dr. Brown's shares was calculated.

Additionally, the trial court found that both claims were moot, as the trial court was not enforcing the Fifth Amended Stock Agreement.

KRS 446.070 codifies the common-law doctrine of *negligence per se*. It provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation . . . ." *Id.* "[I]t applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect." *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100-01 (Ky. 2000) (citing *Hackney v. Fordson Coal Co.*, 230 Ky. 362, 19 S.W.2d 989 (1929)). Therefore, for Rogers to be able to prevail on his claims he must show both a violation of the alleged statute and that he is a member of the class that the statute is intended to protect.

i. Forgery

Under KRS 516.030, "[a] person is guilty of forgery . . . when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument . . . ." At the summary judgment hearing, the parties stipulated to the fact that the signature on the Fifth Amended Agreement that purported to be Dr. Rogers's was not made by Dr. Rogers. However, Dr. Rogers conceded in depositions that he did not have evidence to support his claim that the Shareholder Physicians forged his name on the Fifth Amended Agreement, and all Shareholder Physicians stated under oath that they were not present when Dr. Rogers's signature was placed on the Fifth Amended Agreement and did not instruct anyone

to do so. As Dr. Rogers is unable to present any evidence supporting his claim that one of the Appellees forged the Fifth Amended Agreement, he cannot prevail on his claim under KRS 516.030.[14] Therefore, summary judgment on the claim was proper.

ii. Falsification of Business Records

Under KRS 517.050, a person is guilty of falsifying a business record when, with an intent to defraud, he "[m]akes or causes a false entry to be made in the business records of an enterprise[.]" KRS 517.050(1)(a). Dr. Rogers contends that the forgery of the Fifth Amended Agreement, a business record, constitutes a falsification of business records under KRS 517.050. Appellees counter that the statute is inapplicable, because an unauthorized signature does not fall into the plain meaning of "false entry." We need not address what constitutes a "false entry," however, as even if Dr. Rogers were able to show that that the signature constitutes a false entry, he is unable to point to an "offender" as required under KRS 446.070. Accordingly, summary judgment in favor of Appellees was proper as to Count VI of Dr. Rogers's complaint.

E. Dr. Roger's Request for Sanctions

Dr. Rogers's final claim on appeal is that the trial court improperly denied his motion for CR 11 sanctions. A review of the record, however, has

[14] The facts that Dr. Rogers alleges in support of his claim under KRS 516.030 better lend themselves to a claim under KRS 516.060, Criminal possession of forged instrument in the second degree.

demonstrated that the issue of CR 11 sanctions is not properly before this Court. Dr. Rogers's notice of appeal indicates that he is appealing from the trial court's order entered December 23, 2015 – the order granting Appellees' motions for summary judgment. The issue of sanctions was not ruled upon by that order. Rather, the trial court denied Dr. Rogers's motion for CR 11 sanctions by order dated August 6, 2015. As the issue of CR 11 sanctions was not properly raised on appeal, we lack the jurisdiction to consider it.

IV. CONCLUSION

Based on the above analysis, we affirm the decision of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert E. Maclin, III
Lisa English Hinkle
Masten Childers, III
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Daniel Hitchcock
Lexington, Kentucky