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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000710-MR

PURDUE PHARMA L.P.,
PURDUE PHARMA, INC.,
THE PURDUE FREDERICK COMPANY,
INC., D/B/A THE PURDUE FREDERICK
COMPANY, PURDUE PHARMACEUTICALS,
L.P., THE P.F. LABORATORIES, INC. APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 07-CI-01303

BOSTON GLOBE LIFE SCIENCES
MEDIA, LLC d/b/a STAT APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND D. LAMBERT, JUDGES.

ACREE, JUDGE: Purdue Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals

L.P., and the P.F. Laboratories, Inc. (collectively, "Purdue") appeal the Pike Circuit Court's ruling that court records should not be concealed from public inspection and its order that specific records be unsealed. We affirm.

FACTS AND PROCEDURE

In 2007, Purdue pleaded guilty to misbranding OxyContin, a prescription opioid pain medication, with the intent to defraud or mislead, a felony under the federal Food, Drug, and Cosmetic Act.[1] *United States v. Purdue Frederick Co., Inc.*, 495 F. Supp. 2d 569, 570 (W.D. Va. 2007). Purdue admitted it deceptively marketed and promoted OxyContin as less addictive, less subject to abuse, and less likely to cause tolerance and withdrawal than other medications.

As part of its plea, Purdue agreed to "monetary sanctions totaling $600 million[.]" *Id.* at 572. Purdue placed almost $60 million in escrow for states electing to settle their claims. Forty-nine states chose to settle; Kentucky did not.

In 2007, the Commonwealth of Kentucky, by and through its Attorney General, and jointly with Pike County, filed suit against Purdue. They alleged Purdue had violated Kentucky law by misleading health care providers, consumers, and officials regarding the risks of addiction, that the misrepresentation led doctors to overprescribe the drug, and that overprescribing resulted in excessive Medicaid

[1] 21 United States Code Annotated (U.S.C.A.) §§ 331(a), 333(a)(2) (West).

spending on OxyContin and programs to address abuse associated with the drug. Purdue removed the case to federal court where it lingered for several years.

The matter was remanded to Pike Circuit Court in late 2013 and the parties began discovery. To streamline the discovery process, the parties crafted a thirty-three-page Agreed Qualified Protective Order. The circuit court approved the agreed order and found "the parties have shown good cause" for a protective order "pursuant to CR[2] 26.03." (R. 1478). The protective order allowed the parties to unilaterally designate information, documents, depositions, and exhibits as confidential. It also provided that documents designated confidential would not be subject to the Attorney General's disclosure obligations under Kentucky's Open Records Act,[3] and it required that any motions or pleadings filed with the court containing or attaching confidential documents be filed under seal.

Purdue produced over 17 million pages of documents, many of which were designated confidential.[4] Relatively few of those documents were filed with the circuit court; when they were filed, they were filed under seal. Those relevant to this appeal include: the deposition transcript of Dr. Richard Sackler, a Purdue

[2] Kentucky Rules of Civil Procedure.

[3] Kentucky Revised Statutes (KRS) 61.870, *et seq.*

[4] Examples of documents designated confidential include: marketing strategies; business information and trade secrets; internal clinical trial analyses; settlement communications of a prior criminal case; and deposition testimony of confidential strategies and personnel actions.

board member; several discovery motions and exhibits; and summary judgment motions and exhibits.

In discovery, the parties deposed Dr. Sackler. The court reporter filed Dr. Sackler's deposition transcript with the circuit court as required by CR 30.06. In accordance with the protective order, it was filed under seal.

Additionally, five discovery motions discussed or included confidential documents as exhibits and those motions, in whole or in part, were filed under seal. The circuit court only ruled on the merits of one of these five discovery motions. (R. 1802; order granting the Commonwealth's motion to compel Purdue to produce documents concerning OxyContin that Purdue produced in other OxyContin litigations).[5] A ruling on a second motion to compel[6] was abated. (R. 1654). The remaining motions to compel[7] were not ruled upon at all.

In April 2014, the Commonwealth moved for partial summary judgment based, at least in part, on Purdue's failure to respond to requests for

[5] Commonwealth's motion to compel, filed on June 24, 2015, was filed under seal.

[6] Exhibit C to Commonwealth's motion to compel, filed on December 16, 2014, was under seal.

[7] The remaining motions consisted of Purdue's motion to compel filed on August 12, 2015 (only the Commonwealth's response was filed under seal), and the Commonwealth's two motions to compel, one each filed on December 2 and 3, 2015, both of which were filed under seal. This Court also discovered in the record a large packet of sealed documents filed June 29, 2014. No mention by the parties of these documents appears to have been made.

admission.[8] The court ruled that Purdue's failure to respond was an admission of the facts asserted in the requests.[9] Purdue asked the circuit court to allow withdrawal of the admissions pursuant to CR 36.02,[10] but the request was denied.

Purdue then turned to this Court and petitioned for a "writ of prohibition seeking to prohibit the Pike Circuit Court from enforcing [the] order deeming [the] requests for admissions . . . as admitted." *Purdue Pharma L.P. v. Combs*, 506 S.W.3d 337, 339 (Ky. App. 2014). While that petition was pending before this Court, the circuit court entered an order abating its consideration of the Commonwealth's motion for partial summary judgment. (R. 1650). When this Court denied the writ petition, *id.* at 344, Purdue appealed to the Supreme Court. *Notice of Appeal, Purdue Pharma, L.P. v. Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General,* 2014-SC-000168 (Ky. Apr. 2, 2014).

Before the Supreme Court addressed the writ denial, Purdue and the Commonwealth settled the litigation for $24 million. The settlement date was

[8] Purdue's reason for failing to respond is not relevant here, but is explained in *Purdue Pharma L.P. v. Combs*, 506 S.W.3d 337 (Ky. App. 2014).

[9] In pertinent part, CR 36.01 says: "Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . ." CR 36.01(2).

[10] "Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." CR 36.02.

December 18, 2015. Timing was such that the Supreme Court would never review this Court's denial of Purdue's writ petition.[11] Settlement also had a two-fold benefit to Purdue: (1) it avoided judicial resolution of Purdue's liability based on the circuit court's consideration of otherwise sealed documents, which Purdue argues justifies keeping the documents sealed, and (2) settlement eliminated the possibility of future issue preclusion because it would not be a decision on the merits. *Miller v. Admin. Office of Courts*, 361 S.W.3d 867, 872 (Ky. 2011) (to have preclusive effect, prior decision must be on merits).

The parties presented the settlement agreement to the circuit court for approval. It said the protective order would remain in effect, and the parties were not to disclose confidential documents. The court entered judgment approving and adopting the settlement agreement on December 22, 2015. That judgment also directed how the Attorney General was to utilize the settlement funds.

Appellee Boston Globe Life Sciences Media, LLC d/b/a STAT then submitted an open records request to the Attorney General for Dr. Sackler's

[11] Appellant filed with the Supreme Court a Notice of Appeal of the Court of Appeals opinion on April 2, 2014. On December 29, 2015, the parties jointly moved to dismiss the appeal of the Court of Appeals Order denying the writ petition. *Joint Motion to Dismiss Appeal, Purdue Pharma, L.P. v. Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General*, 2014-SC-000168 (Ky. Dec. 29, 2015). The next day, the appeal was dismissed, and dismissal became final. *Order to Dismiss, Purdue Pharma, L.P. v. Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General*, 2014-SC-000168 (Ky. Dec. 30, 2015).

deposition transcript. The Attorney General, citing the protective order and the settlement agreement incorporating that order, denied STAT's request.

STAT then moved to intervene in this case and to unseal Dr. Sackler's deposition and other sealed documents. Purdue did not oppose intervention, but vigorously opposed the request to unseal any sealed confidential documents on grounds that they were not subject to the common law right of access.

On May 11, 2016, the circuit court granted both of STAT's motions. Applying *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (Ky. 2002) ("*Noble I*"), the circuit court found a common law right of public access to the pre-trial discovery materials previously sealed. It noted that the parties settled shortly after filing Dr. Sackler's deposition in the clerk's office and following extensive briefing on dispositive motions that relied upon multiple sealed exhibits and briefs. Quoting from *Fiorella v. Paxton Media Group*, 424 S.W.3d 433 (Ky. App. 2014), the circuit court indicated that those court records were appropriate factors in the parties' decision to settle and in the circuit court's decision to enter judgment approving settlement. It further found a strong public interest in disclosing court records in matters involving settlements with government agencies, noting "the public interest in accessing the materials used to make the decision to settle is more than minimal." (R. 2107). It held there is "no higher

value than the public (via the media) having access to these discovery materials so that the public can see the facts for themselves." *Id*. This appeal followed.

STANDARD OF REVIEW

A decision to grant or deny public access to a circuit court's records is a matter soundly within the circuit court's discretion. *Cline v. Spectrum Care Academy, Inc*., 316 S.W.3d 320, 325 (Ky. App. 2010). We will not disturb its decision absent an abuse of that discretion. *Id.*

ANALYSIS

This case is about a rule of "common law." More specifically, it is about a rule of Kentucky common law. Our consideration of its progenitor – the common law of England, and of versions of federal common law that vary among the circuits, is helpful, but neither federal law nor English common law directly answers the question posed here. As said early in our jurisprudence, specifically regarding court records, "the authority to keep and give out copies of records, must be derived from the laws of the state where the record is . . . ." *Thomas v. Tanner*, 22 Ky. (6 T.B. Mon.) 52, 54 (1827).

The distinctiveness of these various common laws is not as self-evident as one might think. Too often, the phrase "the common law" is used in our appellate opinions without any jurisdictional adjective. That practice can lead one to misconceive of "the common law" as a borderless body of legal principles,

articulable by a court in any jurisdiction and just as applicable here as there. That is not so. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79, 58 S. Ct. 817, 823, 82 L. Ed. 1188 (1938) (rejecting notion of a "transcendental body of law" (citation and internal quotation marks omitted)).

Each jurisdiction has its own common law.[12] Each distinct body of common law evolved as each jurisdiction reacted to politics,[13] technology,[14]

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[12] Compare the first two definitions for "common law" from Black's Law Dictionary that we excerpt here. The first is necessarily specific to each and any jurisdiction that has a judiciary; the second describes the starting point and evolution in each such American jurisdiction, including Kentucky, that adopted the common law of England existing prior to the fourth year of the reign of James I – 1607. The common law is:

> **1.** The body of law derived from judicial decisions, rather than from statutes or constitutions; caselaw . . . .
>
> **2.** The body of law based on the English legal system . . . that was adopted as the law of the American colonies and supplemented with local enactments and judgments . . . that developed during and after the United States' colonial period, esp. since independence. . . . "Every country has its common law. . . . It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English Constitution, but not without considerable variations." *Guardians of the Poor v. Greene*, 5 Binn. 554, 557 (Pa. 1813).

Common Law, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] A "rule originated under a monarchic form of government . . . is likely to be ill-suited for application in a democratic society . . . ." *City of St. Matthews v. Voice of St. Matthews, Inc*., 519 S.W.2d 811, 815 (Ky. 1974).

[14] Where the question was whether a stream was navigable, and therefore a public waterway rather than private property, the question posed was: "Why should the common law as to English rivers be applied to the *Amazon*, the *Mississippi*, and the *Missouri*, [unlike the rivers of England] actually navigable, and constantly navigated, by steamboats for thousands of miles?" *Berry v. Snyder*, 66 Ky. (3 Bush) 266, 292 (1867).

sociology,[15] geography,[16] and even history,[17] specific to that jurisdiction. The evolution of Kentucky common law is prototypical of this phenomenon.

Early Kentucky lawmakers, including its jurists, were among that first generation of Americans who were never subjects of a king. They fully embraced the revolutionary idea of establishing a "government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). Kentucky jurists expressed their reverence of the laws, even well beyond the founding documents, when they said, "The preservation of the records, files and returns, in the various departments of government, is of such importance, . . . that nothing can justify it[s violation.]" *Commonwealth v. Barry*, 3 Ky. (Hard.) 229, 245 (1808); *Marshall v. Commonwealth*, 2 Ky. (Sneed) 326, 326 (1804) ("preservation of the records and papers of a court, and the keeping them at a convenient place, are objects of such great importance"). These trans-Appalachians took to

[15] Our Supreme Court made this point directly when it stated, "The loss of consortium is a judge-made common law doctrine which this Court has the power and duty to modify and conform to the changing conditions of our society." *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997).

[16] *See*, *supra*, footnote 14.

[17] "The historical justification marshaled for the rule in England never existed in this country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 384, 90 S. Ct. 1772, 1779, 26 L. Ed. 2d 339 (1970) (discussing the English common law rule against recovery for wrongful death).

independence from English institutions more fervently even than their Atlantic Coast countrymen, and their pioneer spirit was reflected in their jurisprudence.[18]

1) Kentucky's independent judiciary and independent jurisprudence

It is true that Kentucky adopted the common law of England in 1792, through our mother Commonwealth of Virginia. *Hilen v. Hays*, 673 S.W.2d 713, 715 (Ky. 1984) (citing KY. CONST. § 233). But it is also true that we soon distanced ourselves from our trans-Atlantic legal roots. *Denny v. Thompson*, 236 Ky. 714, 33 S.W.2d 670, 673 (1930) ("The common law of England local to that kingdom never became the law of this state, but only the laws of a general nature and suitable to our conditions . . . ."). In 1806, at the Frankfort, Kentucky trial of Aaron Burr, Henry Clay denounced "the courts of Great Britain . . . where law is tyranny, and its ministers tyrants, when compared with the mild system and impartial judges of our free constitution . . . ."[19] Perhaps thus inspired, "in 1808 the General Assembly registered its antipathy to British influences and customs by

[18] "The frontier experience was, moreover, extraordinarily influential in the development of early American jurisprudence . . . ." Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 641 (1974) (citing R. POUND, THE SPIRIT OF THE COMMON LAW 112-38 (1921)). One of our neighboring trans-Appalachian courts across the Ohio River expressed this concept well: "If there had been no courts of the past involved with a pioneering spirit – with the courage to venture forth into untested terrain – there would be no common law institution as we know it today." *Goldman v. Johns-Manville Corp.*, C.A. L-85-016, 1986 WL 7374, at *3 (Ohio App. June 30, 1986).

[19] JOHN WOOD, ED., A FULL STATEMENT OF THE TRIAL AND ACQUITTAL OF AARON BURR, ESQ. 21 (Alexandria, Va.: Cotton & Stewart, 1807) (quoting Clay's opening statement on December 3, 1806).

providing that all reported cases adjudged in the kingdom of Great Britain since July 4, 1776, 'shall not be read nor considered as authority in any of the courts of this Commonwealth, any usage or custom to the contrary notwithstanding.'" *Denny*, 33 S.W.2d at 673 (quoting 3 Littell's Laws 475 (superseded by KS[20] 2418 (superseded by KRS[21] 447.040 ("The decisions of the courts of Great Britain rendered since July 4, 1776, shall not be of binding authority in the courts of Kentucky.")))); *Campbell v. W.M. Ritter Lumber Co.*, 140 Ky. 312, 131 S.W. 20, 21 (1910) ("[T]he decisions of the courts of Great Britain . . . shall not be binding authority in the courts of this state.").

Since then, our courts rendered "two centuries of *Kentucky* common law[.]" *Nationwide Mut. Ins. Co. v. State Farm Auto. Ins. Co.*, 973 S.W.2d 56, 61 (Ky. 1998) (Cooper, J., dissenting) (emphasis added). Certainly, we look to the common law of other jurisdictions for inspiration, explanation, or simply imitation but, when we do, the threads we borrow must fit naturally in the warp and weft of our own unique common law. We borrow concepts "not indeed because it is law in England [or federal law], but because, being based on sound reason, it is [or in our opinion ought to be] law every where." *Ray v. Sweeney*, 77 Ky. (14 Bush) 1, 11 (1878).

[20] Kentucky Statutes.

[21] Kentucky Revised Statutes.

Failing to recognize this distinct and independent nature of Kentucky common law and of an independent judiciary, Purdue conflates "Kentucky and federal law uphold[ing] a common law right of access[,]" (Appellant's brief, p. 6). Purdue says:

> Only documents necessary to monitor the courts – documents that play some role in a trial court's adjudication of litigants' subjective rights – bear a presumption of access. . . . Documents such as the sealed documents here – that were neither admitted into evidence nor relied upon in an adjudication of litigants' substantive rights – are not "judicial documents" and thus "lie entirely beyond the presumption's reach." *Courier-Journal, Inc. v. McDonald-Burkman,* 298 S.W.3d 846, 849-50 (Ky. 2009), quoting *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2nd Cir. 1995) ("*Amodeo II*").

(Appellant's brief, pp. 6-7). This interpretation would "erroneously place the burden on the [party seeking a court record] to prove that sealing the record was improper . . . ." *Cline v. Spectrum Care Acad., Inc.*, 316 S.W.3d 320, 325 (Ky. App. 2010); *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974) ("the burden shall be upon the custodian to justify the refusal of inspection with specificity"). It would reverse Kentucky's presumption of broad public access, making all court records *inaccessible* until the public or press prove the document was admitted into evidence or until the court relies on the document to adjudicate the case. And yet, we can understand how this interpretation can be

teased out of our jurisprudence if one limits research, as Purdue has done, to federal case law and recent Kentucky cases that cite it.

A more thorough analysis of Kentucky jurisprudence reveals important aspects of our common law that are inconsistent with Purdue's arguments. It demonstrates a broader purpose underlying Kentucky's common law presumption of court-record access than both its federal and its English common law counterparts. It also shows that when the Supreme Court expanded our analytical toolbox with an idea from *Amodeo II*, adapting and naming it the "sliding-scale approach" for use by Kentucky courts, it had no intention of narrowing that broader purpose to align with federal courts. Our analysis further reveals that the common phrase "judicial documents" has been redefined by the Second Circuit as a unique legal idiom used in some federal courts, but that Kentucky courts have always used the term in its ordinary sense, without the slightest hint that we narrowed our presumption of court-record access to comport with that of the Second Circuit. For well over a century and to this day when our courts use the term "judicial documents," we understand it to be synonymous with "court records." *See*, *e.g.*, *Cline v. Waters*, 28 Ky. L. Rptr. 679, 90 S.W. 231, 232 (1906).[22]

[22] In *Cline*, the Court expressed concern for the reputation of Ann Perkins, who was "about 60 years of age, a married woman, and has raised a family of children." *Cline*, 90 S.W. at 232. The trial court would not allow counsel to ask her if she previously had "been employed in and also

Because learned counsel arguing this case have demonstrated, somewhat justifiably, a misunderstanding of the *Kentucky* common law presumption of the public's right to access court records, we take the time here to thoroughly explain how *Noble I* and *McDonald-Burkman* and *Fiorella* depend upon and apply that common law to the unique circumstances of those cases.

2) Kentucky's long-standing common law right of access to court records

Purdue's argument largely relies on references to federal cases cited in a trio of Kentucky opinions: *Noble I* and *McDonald-Burkman* and *Fiorella*. This argument presumes we rendered these opinions in a vacuum, and not as elaboration upon our existing, well-developed common law right of access to court records. That presumption is the weakness in Purdue's otherwise internally logical argument. Although these cases, and even Purdue, acknowledge Kentucky's "long-standing presumption of public access to judicial records," *McDonald-Burkman*, 298 S.W.3d at 848, none takes the time to discuss any of the earlier Kentucky common law.[23] We shall do so.

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lived in an assignation house[,]" which is to say a brothel. *Id.* The Court of Appeals recognized under the common law that Mrs. Perkins' testimony would be open to public viewing as a court record and refused to reverse, saying "the interests of justice do not require the errors of any man's life, long since repented of and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in *judicial documents*, at the pleasure of any future litigant." *Id.* (emphasis added).

[23] The most seasoned Kentucky case cited in *McDonald-Burkman* was *Noble I* (2002). Both *Noble* and *Fiorella* explored Kentucky jurisprudence only so far in the past as *Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125 (Ky. 1988), and only for ancillary reasons.

The earliest authority upon which Purdue and the Kentucky cases rely is *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Ironically, *Nixon* bases its analysis, in part, on the early Kentucky common law that the triad of cases necessarily presumes. Not surprisingly, when we research that early common law, we see that the abbreviated approach of these three Kentucky appellate opinions is entirely in harmony with it. Our analytical journey begins with Purdue's most cited case, *McDonald-Burkman*.

The Kentucky Supreme Court in *McDonald-Burkman* took something of a shortcut when it cited *Nixon* instead of the Kentucky common law *Nixon* cites. *McDonald-Burkman*, 298 S.W.3d at 848 ("Under the common law, there is a long-standing presumption of public access to judicial records." (citing *Nixon*, 435 U.S. at 597, 98 S. Ct. at 1311-12 (citing *Fayette County v. Martin*, 279 Ky. 387, 395-96, 130 S.W.2d 838, 843 (1939)))). There might be less confusion today if one of the triad of cases had quoted *Nixon* rather than merely citing it. However, citation should be enough for the thorough researcher because the Supreme Court of the United States began its own analysis by looking to Kentucky common law as

Fiorella, 424 S.W.3d at 441; *Noble I*, 92 S.W.3d at 728, 738 (court may "seal the record because of privacy interests"); *but see id.* at 731 (there is "a general, common-law right to 'inspect and copy public records and documents, including judicial records and documents.'" (quoting *Nixon*, 435 U.S. at 597, 98 S. Ct. at 1312, 55 L. Ed. 2d. at 579; *Peers*, 747 S.W.2d at 129)).

expressed in *Fayette County v. Martin*. And so, *McDonald-Burkman* refers us to *Nixon*; and *Nixon* takes us in our own jurisprudence back to *Martin*.

The Supreme Court in *Nixon* explains the reason for looking to state cases like *Martin*. The question of common law access to *federal* court records, said the Court, is "[a]n infrequent subject of litigation [and] its contours have not been delineated with any precision." *Id.*, 435 U.S. at 597, 98 S. Ct. at 1311. Of the several state cases *Nixon* cites, the Court began with the Kentucky case of *Fayette County v. Martin*, 279 Ky. 387, 130 S.W.2d 838 (1939), *overruled by City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974). *Nixon*, 435 U.S. at 597 n.7, 98 S. Ct. at 1312.[24]

Why would our nation's highest court turn first to a Kentucky case when it was neither the "leading case"[25] nor the earliest case on point?[26] Perhaps it is due to the fact, as we noted above, that our state once had a reputation for distinguishing our jurisprudence from English common law. Additional proof of

[24] The first case *Nixon* cited was a federal case applying Rhode Island law, *McCoy v. Providence Journal Co.*, 190 F.2d 760 (1st Cir.), *cert. denied*, 342 U.S. 894, 72 S. Ct. 200, 96 L. Ed. 669 (1951). In addition to *Fayette County v. Martin*, the following state cases were cited: *Nowack v. Auditor Gen.*, 219 N.W. 749, 750 (Mich. 1928) (called "the 'leading' case" in *McCoy*); *In re Egan*, 98 N.E. 467 (N.Y. 1912); *State ex rel. Nevada Title Guar. & Trust Co. v. Grimes*, 84 P. 1061 (Nev. 1906); *Brewer v. Watson*, 71 Ala. 299 (1882); *People ex rel. Gibson v. Peller*, 181 N.E.2d 376, 378 (Ill. App. 2nd 1962); *C. v. C.*, 320 A.2d 717 (Del. 1974); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758 (N.D. 1967). *Nixon*, 435 U.S. at 598 nn.7, 8.

[25] That distinction goes to the 1928 Michigan case of *Nowack*. *See*, *supra*, footnote 24.

[26] The earliest case cited in *Nixon* is *Brewer v. Watson*, 71 Ala. 299, 303-06 (1882).

Kentucky's forward thinking judicial independence is our attack on the primacy of federal interpretations of state common law – the widely criticized doctrine established in *Swift v. Tyson*. 41 U.S. (16 Pet.) 1, 18, 10 L. Ed. 865 (1842), *overruled by Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Swift "held that federal courts . . . need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court[, *i.e.*, state common law]; that they are free to exercise an independent judgment as to what the common law of the state is—or should be[.]" *Erie R. Co.*, 304 U.S. at 71, 58 S. Ct. at 819. As scholars put it, the Supreme Court of the United States used this "ridiculous case as the opportunity for federalizing – or nationalizing – a large part of the common law of the United States." Koen Lenaerts & Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 Am. J. Comp. L. 1, 23 (2006) (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 32 (1977)). As soon as *Swift* was rendered, the Kentucky high court was among the first to criticize it and the doctrine it created.[27]

[27] In 1859, in *Lee's Adm'r v. Smead*, our highest court wanted to follow what appeared an established point of commercial law, "adhered to by the courts of New York, New Hampshire, Pennsylvania, Tennessee, and of some of the other states." 58 Ky. (1 Met.) 628, 632, 1859 WL 8397, at *4 (1859). Begrudgingly, the Court had to yield, stating, "although this [commercial law] doctrine is thus shown to rest on adjudications and opinions of great weight, it has,

A century later, the proverbial camel's back-breaking straw came from Kentucky, too. It was a case in which a litigant forum shopped to avoid Kentucky common law in favor of a contradicting federal court's "independent judgment as to what the common law of the state [of Kentucky] should be."[28] *Erie*, 304 U.S. at 71, 73-74, 58 S. Ct. at 819-20. *Erie* was the Supreme Court's final response to widespread criticism and it reversed *Swift v. Tyson*, rejecting the idea "that there is 'a transcendental body of law outside of any particular State but obligatory within it[.]'" *Id.* at 79, 58 S. Ct. at 823 (quoting *Black & White Taxicab*

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nevertheless, been denied by very high authorities . . . [i]n the case of *Swift v. Tyson* . . . ." *Id.* at 633.

[28] Just before *Erie*, the Supreme Court applied *Swift v. Tyson* for the last time in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1928). *Erie*'s author, Kentucky-born Justice Louis Brandeis, described that case, saying:

> Criticism of the doctrine [of the primacy of federal interpretation of the common law established in *Swift v. Tyson*] became widespread after the decision of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* There, Brown & Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville & Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., Railroad station; and that the Black & White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown & Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift & Tyson* had been applied, affirmed the decree.

Erie R. Co., 304 U.S. at 73-74, 58 S. Ct. at 819-20 (internal citation and footnote omitted).

& Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533, 48 S. Ct. 404, 409, 72 L. Ed. 681 (1928) (Holmes, J., dissenting)).

We revisited this *Erie* episode of every lawyer's education to remind the reader that when determining Kentucky common law, we may benefit by considering federal cases, but they are not necessary and certainly not controlling. A reciprocal scenario is just as likely, as in *Nixon* when the Supreme Court of the United States turned to Kentucky, and other states, for enlightenment about their versions of the common law right of access to court records.

In *Nixon*, the Supreme Court distilled *Martin* and the common law concepts in other state cases for application in the federal courts and said, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597, 98 S. Ct. at 1312 (citations omitted). But it noted a "contrast to the English practice, [in that] American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." *Id.* (citation omitted). Relevant to our own analysis, the Court said the right of "access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government [.]" *Id.* at 597-98, 98 S. Ct. at 1312 (citations omitted).

Keeping federal interpretations in their place, we return to *Nixon*'*s* Kentucky source for the common law, *Fayette County v. Martin*, and the contrast *Nixon* recognized between English and American common law access to court records. *Nixon*, 435 U.S. at 597, 98 S. Ct. at 1312.

When *Martin* was rendered in 1939, jurisprudence regarding court-record access, in Kentucky and nationally, was still interwoven with the law of access to public records generally. As *Nixon* indicates, there was a long history of state court decisions that distinguished the American common law of court-record access from the English. *Id*. While the English rule with its "*qualified* right of access . . . protected the favored position of the King in the courts[,]"[29] America had no king. As the leading state court case of that day said, "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules." *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928) (cited in *Nixon*, 435 U.S. at 597 n.7, 98 S. Ct. at 1312).

This freer, more open, democracy-based, American approach to court-record access is well reflected in Kentucky's jurisprudence. For example, well

[29] William Ollie Key, Jr., Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or on Camera*, 16 Ga. L. Rev. 659, 661 (1982) (emphasis added); *Browne v. Cumming*, 10 B. & C. 70, 109 Eng. Rep. 377 (K.B. 1829) (quoting "Lord Coke in the preface to the third part of his Reports, where he says, that 'the records of the King's Courts, for that they contain great and hidden treasures, are faithfully and well kept, as they well deserve . . . .'").

before *Martin* and *Nowack*, and before First Amendment access to public records could be claimed in state courts,[30] Kentucky's highest court declared that "[t]he general interests of society in many important particulars depend most nearly upon the preservation of the purity and verity of our public records." *Snodgrass v. Adams*, 30 Ky. (7 J.J. Marsh) 165, 166 (1832). The Court expressed a similar liberality regarding access to those records, stating that a document "recorded in the office of the County Court . . . is open to the inspection of all who think proper to examine the public records . . . ." *Haskell v. Bakewell*, 49 Ky. (10 B. Mon.) 206, 209 (1850). The same broad access approach applied to settlements which "were adjudications of an indebtedness . . . , spread on the public records, to be sent [sic] and read by all who would take the trouble to examine them." *Rutherford's Heirs v. Clark's Heirs*, 6 Ky. Op. 326, 328, 1873 WL 11091, at *2 (1873) (estate settlement).

Occasionally, Kentucky records custodians tried but failed to have Kentucky courts adopt the more restrictive English rule. In *Barrickman v. Lyman*, the Court said it was "unnecessary in this case" to adopt the English rule because,

[30] Only after the Fourteenth Amendment was ratified in 1868 could the public or press claim rights of access to state courts and their records based on the First Amendment. "[I]n *Richmond Newspapers*[, *Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)] . . . seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603, 102 S. Ct. 2613, 2618, 73 L. Ed. 2d 248 (1982) (citing *Richmond Newspapers*, 448 U.S. at 558-81, 100 S. Ct. at 2818-30).

even if it applied, "plaintiff [wa]s not only a citizen and taxpayer, but ha[d] shown an interest in the records in question." 154 Ky. 630, 157 S.W. 924, 926 (1913). The next mention in our jurisprudence of the English rule appeared in the case *Nixon* cited, *Fayette County v. Martin*.

Kentucky jurisprudence was already decidedly against restrictions to court-record access when *Martin* was rendered. Two years before, the court had expressed the policy that "it is of vast importance to the public that the proceedings of courts of justice should be universally known." *Paducah Newspapers v. Bratcher*, 274 Ky. 220, 118 S.W.2d 178, 179 (1937).

Although *Martin* identified the restrictive English rule, just as *Barrickman* had, the rule was again irrelevant to the decision. In *Martin*, certain corporations[31] were paying a state franchise tax to the Kentucky Tax Commission. The Fayette County taxing authority wanted access to Commission records to cross-check the accuracy of its own tax assessments. *Martin*, 130 S.W.2d at 839. When the Tax Commissioner, James Martin, declined the request for access, Fayette County filed a petition for a writ of mandamus. *Id.* The petitioner argued the records sought "are public records and . . . [it] remained the common law right of plaintiffs or any person, officer or agent of any public or private corporation to

[31] They were the Lexington Water Company, the Lexington Utilities Company, Kentucky Utilities Company and Petroleum Exploration Corporation. *Martin*, 130 S.W.2d at 839.

inspect and examine the public tax records on file in the office of the Kentucky Tax Commission." *Id.* at 841.

Fayette County went further and said even if the English rule applied, it would have access because its interest "is such as would enable [it] to maintain or defend an action for which the document or record sought can furnish evidence or necessary information." *Id.* at 843 (quoting 23 Ruling Case Law (R.C.L.)[32] § 10, page 160 (1919)). Because the county had raised the issue of the English rule, the Court discussed it, quoting more than one version and, after "[c]onceding these to be proper statements of the general [English] common law rule[,]" *id.* at 843, found no further need to address it. The Court affirmed the denial of the writ on the basis of a "statute [KS 4114i-13 (1939)] . . . expressly forbidding the divulging of the information contained in these records to officers of taxing districts other

[32] No wonder we abbreviate the title of this 28-volume work published between 1914 and 1921. The first volume is: 1 RULING CASE LAW AS DEVELOPED AND ESTABLISHED BY THE DECISIONS AND ANNOTATIONS CONTAINED IN LAWYERS REPORTS ANNOTATED, AMERICAN DECISIONS, AMERICAN REPORTS, AMERICAN STATE REPORTS, AMERICAN AND ENGLISH ANNOTATED CASES, AMERICAN ANNOTATED CASES, ENGLISH RULING CASES, BRITISH RULING CASES, UNITED STATES SUPREME COURT REPORTS AND OTHER SERIES OF SELECTED CASES (William M. McKinney and Burdett A. Rich, eds., 1914). The title itself tells the story that, when the series was undertaken at least, American jurisprudence was still under the influence of English law. As that influence dissipated, uniquely American treatises prevailed. According to the original 1936 claim of copyright for American Jurisprudence Volumes 1 and 2, "American [J]urisprudence [is] a comprehensive text statement of American case law, as developed in the cases and annotations in the annotated reports system, *being a rewriting of Ruling* [*C*]*ase* [*L*]*aw* to reflect the modern developments of the law." Library of Congress, Catalog of Copyright Entries, Vol. 33 For the Year 1936, p. 361 (U.S. Gov't Printing Office, Washington: 1940) (emphasis added).

than Kentucky *cities* . . . ." *Id.* at 845 (emphasis added). Fayette *County* was denied access based on the statute.

As it turns out, two decades later, in *Courier-Journal & Louisville Times v. Curtis*, our highest court would misinterpret *Martin*. 335 S.W.2d 934 (Ky. 1959), *overruled by City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974). However, misinterpretation was a blessing in disguise. Without that deviance, subsequent Kentucky jurisprudence might not have stated our policy of broad court-record access with the same resoluteness or clarity.

Courier-Journal v. Curtis was a strongly split decision whether the press was entitled to a transcript of a defendant's statement made after the press was excluded from the courtroom. *Id.* at 935. The majority erroneously stated, "We recognized and adopted this [English common law] rule [of court-record access] in the case of *Fayette County v. Martin*. . . . The common law rule approved in *Fayette County v. Martin* will therefore be applied. Without the interest defined in the rule the right of inspection does not exist . . . ." *Id.* at 936-37. Judge Milliken concurred in result only stating, "I feel strongly that this was a matter to be determined by the judge in his discretion." *Id.* at 938 (Milliken, J., concurring in result only). Judge Stewart wrote an even stronger dissent in which Judge Moremen joined.

Judge Stewart said denying press access to a transcribed statement by a criminal defendant was wrong even though "buttress[ed] . . . by directing attention to this . . . very ancient common-law rule which appears in *Fayette County v. Martin*[.]" *Id.* at 939 (Stewart, J., dissenting) (citation omitted). He correctly pointed out that the Court in *Martin* "had no occasion to, and did not determine, what right of inspection a member of the public had . . . . [T]he common-law rule as regards the right to inspect public records, was never applied to the factual issues raised because a statute prohibited the right so asserted by Fayette County." *Id.* at 940. Calling the restrictive English rule "antiquated[,]" he laid out what he and Judge Moremen "believe[d] should be considered the law of this Commonwealth, since it is the weight of authority on the right to inspect public records:

> The English common-law rule . . . has not been generally observed in this country. . . . That common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells has been held to entitle a citizen to the right to inspect the public records in order to ascertain whether the provisions of the law have been observed.

Id. (quoting 45 AM. JUR., *Records and Recording Laws*, § 18, p. 428). Fifteen years later, our high court reversed *Curtis* in a decision that can be traced directly to Judge Stewart's dissent. *City of St. Matthews*, 519 S.W.2d at 813.

In 1974, our highest court reversed *Curtis* in *City of St. Matthews*, stating: "We do not construe our holding in Fayette County v. Martin, supra, as adopting the [English] common-law rule. . . . To the extent . . . *Martin* . . . and . . . *Curtis* . . . imposed this requirement, they are overruled." 519 S.W.2d at 813, 815. The Court said, "We cannot find any valid basis *in our society* for the imposition of the requirement of the interest stated in the [English] common-law rule as a prerequisite to the right to inspect public records." *Id.* at 815 (emphasis added). Sounding like Henry Clay generations earlier, the Court said a "rule originated under a monarchic form of government in which the people were subjects of the Crown . . . is likely to be ill-suited for application in a democratic society . . . ." *Id.*

> In a democratically constituted society every citizen and taxpayer has an interest in the manner in which the government is operated. The records reflecting that operation are many and varied. Where such records concern matters of primarily public interest, the public is entitled to see them. If it were otherwise, how could the citizenry determine whether public officials are properly fulfilling the functions of their office as required by law? The public business is indeed the public's business.

Id. at 815-16 (citation, internal quotation marks and parentheses omitted).

When *City of St. Matthews* was rendered in 1974, there was no legislation addressing access to Kentucky state government records generally. The Court took the rare step of filling that void, stating:

> Ordinarily we look to the General Assembly, as the most direct representatives of the people, to establish public

> policy in matters such as this but, except in limited areas, the General Assembly has not legislated precisely upon this subject. In these circumstances it is entirely proper and strictly in keeping with the ancient tradition of the common law for the courts to provide a policy when necessity demands it.

Id. at 814. The Court then proceeded to articulate clear rules for accessing government records of all three branches of government, as follows:

> (1) The inspection shall be conducted at reasonable times and places and in such a manner as not to unduly interfere with the proper operation of the office of the custodian of the records.
>
> (2) The records sought to be inspected are not exempt from inspection by law.
>
> (3) The disclosure of the information would not be detrimental to the public interest or violative of confidentiality under a countervailing public policy [entitled] to greater weight than the policy favoring free access to public records.
>
> [4] When a demand for the inspection of public records is refused by the custodian of the record, the burden shall be upon the custodian to justify the refusal of inspection with specificity.
>
> [5] A newspaper has the same right to inspect public records as a member of the general public.

Id. at 815.

This dictate of policy to the other branches did not last for long. "The Open Records Law was enacted [two years] after . . . City of St. Matthews[.]" *Ex parte Farley*, 570 S.W.2d 617, 625 (Ky. 1978). But the Supreme Court was quick

to claim the Kentucky courts' "constitutional right of control over their own records" and to assert that, in their own branch of government, "the public policy must be articulated by the courts themselves." *Id.* Having already laid down rules for access to all public records, including court records, the Supreme Court said it had already established policy and procedure for the courts and "we do not intend to retreat from the wholesome principles expressed in City of St. Matthews." *Id.*

Importantly to this case, on the same day *City of St. Matthews* was rendered, the Court applied its third rule for balancing public and private interests (the third rule stated in *City of St. Matthews*) when parties to litigation sought to seal a settlement agreement involving the government. In *Courier-Journal v. McDonald*, the Court said, "Certainly the payment of city funds in settlement . . . is a matter with which the public has a substantial concern, against which little weight can be accorded to any desire of the plaintiff in that suit to keep secret the amount of money he received." 524 S.W.2d 633, 635 (Ky. 1974), *overruled on other grounds by Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125 (Ky. 1988). Although the Court later reversed *McDonald* on other grounds, it did so while reiterating the "balancing test wherein the court is to decide whether the litigants' rights of privacy are outweighed by the public's right to know." *Peers*, 747 S.W.2d at 129 (quoting appellee's counsel).

We lay out this body of Kentucky common law to emphasize that the Supreme Court was not writing on a blank slate when it rendered its next case on the issue – *Noble I*. The Supreme Court, of course, was aware of all these older cases because "justices are presumed to know the law . . . ." *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 930 (Ky. 2002). That is, the absence of citation to this earlier body of common law does not indicate the Supreme Court's lack of familiarity with it. Quite the opposite. When the Supreme Court expresses no intention to set aside clearly established jurisprudence, we must be confident it intends to harmonize the case it is then reviewing with that prior jurisprudence. Beginning with *Noble I*, the Kentucky appellate courts' decisions did not supplant, but supplemented, that existing body of Kentucky common law.

3) The modern trilogy of Kentucky court-record access cases

As mentioned, whether to seal court records is the question presented in three relatively recent cases – *Noble I*, *McDonald-Burkman*, and *Fiorella*. Each addresses the question in the context of a narrow set of facts. In *Noble I*, the Supreme Court told a trial court what to do next after applying CR 12.06[33] to strike "impertinent and scandalous" allegations from a complaint. *Noble I*, 92 S.W.3d at 729. The Supreme Court called *McDonald-Burkman* "one of those 'limited

[33] In pertinent part, CR 12.06 says "the court may order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter."

circumstances in which the right of the accused to a fair trial might be undermined by publicity.'" *McDonald-Burkman*, 298 S.W.3d at 850 (quoting *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 9, 106 S. Ct. 2735, 2741, 92 L. Ed. 2d 1 (1986)). And *Fiorella* is this Court's "explicit consideration of the role of our own civil rules[,]" and specifically how "CR 26.03(1)[34] empowers the trial court . . . [to] deny[] public access to discovery filed with the court." *Fiorella*, 424 S.W.3d at 437.

None of these cases found it necessary, as we have found it necessary in this case, to belabor or even state the Kentucky common law underlying our presumption of public access to judicial records. It was apparently deemed sufficient to simply cite *Nixon's* summary of the various states' common law that included reference to *Fayette County v. Martin*. As we discuss below, each case in that trio implies what *Ex parte Farley* expresses – they should not be read as "retreat[ing] from the wholesome principles expressed in City of St. Matthews[.]" *Ex parte Farley*, 570 S.W.2d at 625. Rather, they apply Kentucky common law to specific fact patterns.

a) Noble I: the power of the courts and the "sliding-scale approach"

[34] In pertinent part, CR 26.03(1) says "the court . . . may make any order . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (f) that a deposition after being sealed be opened only by order of the court; . . . (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

The first of the three cases is *Noble I*. It is not surprising that there is little elaboration of Kentucky's common law right of access to court records. That is not the opinion's primary focus; the power of a trial court is. It says as much, with *Noble I's* author comparing the opinion to another he had recently penned,[35] *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000). "The case at bar is similar to *Wal-Mart Stores*[,]"[36] said the Court. *Noble I*, 92 S.W.3d at 729. *Wal-Mart Stores* considered the "power that allows a court of law to order discovery or . . . the walk through" of the defendant's premises. *Wal-Mart Stores*, 29 S.W.3d at 801. Specifically, "the issue raised in this case [*Wal-Mart Stores*] concern[s] the proper application of CR 34.01 . . . ." *Id.* *Noble I's* focus was the court's power under another rule, "CR 12.06 and the word 'strike.'" *Noble I*, 92 S.W.3d at 734. *Noble I* is like *Wal-Mart Stores*, said the Court, "in that the issue of a trial court's power and authority . . . is seldom . . . raised on direct appeal [resulting in] little Kentucky case law . . . ." *Id.* at 729. Although the Court eventually considered the

[35] Justice Johnstone authored both *Noble I* and *Wal-Mart Stores*.

[36] The similarity does not go far deeper than the fact that both involve the inherent authority of trial courts. *Wal-Mart Stores* was a direct appeal from this Court's denial of a writ "to prohibit the trial court from enforcing its order allowing the walk through" of Wal-Mart's loss prevention center. The Supreme Court faulted the trial court because "the order does not indicate the source of the trial court's authority" noting that there is "no common-law power that allows a court of law to order discovery or inspection of premises [and] . . . any equitable power the trial court may have had to order the walk through has been subsumed by the adoption of . . . CR 34.01 . . . ." *Wal-Mart Stores*, 29 S.W.3d at 801. The Court held "the motion to compel discovery and any resulting trial court order should specify the relation of the premises to be inspected to the asserted cause of action. It is here where the trial court's order fails." *Id.* at 802.

impact of the common-law right of access, *Noble I* begins by considering the "important issues concerning the inherent authority of the trial courts of this Commonwealth . . . ." *Id.*

The defendant in *Noble I*, Roman Catholic Diocese of Lexington, citing CR 12.06, succeeded in having the trial court exercise its power to strike certain allegations from the plaintiffs' first amended complaint "on grounds that it was not relevant to the gravamen of the plaintiffs' stated cause of action." *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 740, 742 (Ky. 2002) (*Noble II*). However, the trial court did not order the stricken pleading removed from its files, and the diocese failed to convince the trial court to seal the pleading. *Noble I*, 92 S.W.3d at 727-28. Obviously aware of the breadth of the common law right of court-record access, the trial court said, "documents preserved officially in the record" remain open to "meet[] the public interest . . ." even though "such openness does serve to publicize allegations that the Court has ruled should never have been in the pleadings . . . ." *Id.* at 730 (quoting trial court's order).

Arguing before the Supreme Court, the diocese faulted the trial court for "fail[ing] to recognize its common-law authority to control access to its records and documents." *Id.* The Court agreed, stating that the "critical issue in this case is whether the trial court was aware that it had this discretionary authority." *Id.* Then the Court noted a second power of which the trial court was unaware – that

"the power to 'strike' material from a court's record embraces the power to physically remove the stricken material from that court's record."[37] *Id.* at 734.

"The trial court erred[,]" said the Court, "in concluding that it did not have the discretion to seal the stricken allegations in question or to physically remove the material from the record." *Id.* The case was remanded for the trial court to exercise that discretion. *Id.* at 731. And so, the Supreme Court's work was done. However, it then offered, in *dicta*, a "discussion to guide the trial court's decision." *Id.*

i) <u>*Powers of the trial court under CR 12.06*</u>

Picking up the discussion of a trial court's civil-rule powers where *Wal-Mart Stores* left off, the Court cited *Nixon* in its section "III. The Right to

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[37] The Court might have made this point by citing its own hundred-year-old, but very similar, case of *May v. Ball*, 67 S.W. 257 (Ky. 1902), in which it reviewed "a motion to strike from the [court's] files [an] affidavit . . . [with allegations] perhaps too trivial to be termed scandalous, but which seem to reflect upon the respondent, and which are absolutely irrelevant and impertinent." *Id.* at 257-58. The Court's reasoning was as follows:

> While it is true that matters which are pertinent to a question under consideration are admissible without reference to their effect upon the reputation of any one, no one has a right to cumber the records of the court with impertinent matters, and especially is this true if the matter is not only impertinent, but injurious. As a considerable part of the affidavit is of this description, it is stricken *from the files*.

Id. at 258 (emphasis added); CR 12.06 ("court may [strike] any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter"). In this context, the word "admissible" as used in the quote simply means filing with the clerk of court, as indicated by the original Black's Law Dictionary of 1891. That first edition would have been in use when *May* was decided in 1902; the second edition was published in 1910. Defining "Admissible," Black gave its general meaning as "Proper to be received." In a more currently recognizable context he then said, "*As applied to evidence*, the term means that it is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced." BLACK'S LAW DICTIONARY 41 (1891) (emphasis added).

Control Access". The Court skipped over that part of *Nixon* where the Supreme Court of the United States discussed its central theme – the "common-law right of access to judicial records[.]" *Nixon*, 435 U.S. at 597, 98 S. Ct. at 1311. Because our Supreme Court's focus was a trial court's powers and not the right of access, it went straight to *Nixon's* subsidiary discussion that "a court has inherent, 'supervisory power over its own records and files.'" *Noble I*, 92 S.W.3d at 730 (quoting *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312). The Court devotes more than half this section to discussing whether the trial court was aware the sealing power existed before saying the "discretionary decision [to seal] . . . should be made by the court in which those records and documents reside and not by an appellate court." *Id.* at 730-31 (citing *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) ("*Amodeo I*"), *Nixon*, and *Peers*). Only then did *Noble I* transition to a discussion of the "limits" to that authority in its next section "IV. Common-Law Constraints[.]" *Id.* at 731.

Considering the richer Kentucky common law on court-record access, the sequencing of these discussions, even only to focus on a trial court's power, is a bit confounding. Saying "a trial court's right to control access to its records and documents *is constrained by* a general, common-law right[,]" *id.* (emphasis added), puts the cart before the horse *and* has the tail wagging the dog. Our common law consistently reaffirms that a court's powers are subservient to that "long-standing

presumption of public access to judicial records" and not the other way around. *McDonald-Burkman*, 298 S.W.3d at 848; *see also Maclean v. Middleton*, 419 S.W.3d 755, 761 (Ky. App. 2014) (There is a "*strong presumption* in favor of public access to court records." (citing *Noble I*, 92 S.W.3d at 730-31, 734 (emphasis added))).

But one should not be taken aback by the sequence. *Noble I's* purpose, again, was to examine a trial court's powers when striking a pleading pursuant to CR 12.06. *Id.* at 733-34. To the extent knowledge of Kentucky's common law right of access is necessary to understand *Noble I*, we believe the Justices presumed that, like themselves, the reader already possessed such knowledge. If that were not so, we would be forced to conclude that our Supreme Court searched for Kentucky common law principles in an unlikely source – *federal* jurisprudence. Doing so would be all the more remarkable considering that the same Court, just sixty-five years earlier, had led the movement to reject the bad idea of federal primacy established in *Swift v. Tyson*.

Noble I, however, does allude to Kentucky's presumption of broad court-record access, reiterating our "general, common-law right to 'inspect and copy public records and documents, including judicial records and documents.'" *Noble I*, 92 S.W.3d at 731 (quoting Nixon, 435 U.S. at 597, 98 S. Ct. at 1312; and citing *Peers*, 747 S.W.2d at 129). And, of course, the Supreme Court was aware it

had articulated the general balancing rule for access in *City of St. Matthews* (1974), had applied that balancing rule in *McDonald* (1974), had reaffirmed it in *Ex parte Farley* (1978), and repeated it in *Peers* (1988). And just a year before, in *Cape Publications, Inc. v. Braden*, a unanimous Supreme Court, citing *Peers*, said, "Kentucky has recognized that access of the press must be balanced with the right of privacy and that the trial judge is the appropriate person to make such decisions which should be upheld in the absence of a showing of an abuse of discretion." 39 S.W.3d 823, 826 (Ky. 2001) (citing *Peers*, 747 S.W.2d at 128).

Here then is what we make of *Noble I's dicta*. It reflects the Court's perception that, for some, the general balancing rule needed elaboration. So, the Court went "[i]n search of a workable standard that will assist trial courts in defining the weight to give the presumption of access[.]" *Noble I*, 92 S.W.3d at 731. It turned first to decisions of the Supreme Court of the United States – the only court with the authority to reverse it, at least as to constitutional questions such as court-record access based on the First Amendment. *See Feiner v. New York*, 340 U.S. 315, 316, 71 S. Ct. 303, 304, 95 L. Ed. 295 (1951) ("review of state decisions where First Amendment rights are drawn in question").

ii) *Discovering* Amodeo II

After deciding to consider *Nixon* for guidance regarding both the First Amendment and the common law right of access, the Supreme Court discovered

that "*Nixon* is silent as to the weight to be given to the common-law right to access when striking this balance." *Noble*, 92 S.W.3d at 731; *Nixon*, 435 U.S. at 599, 98 S. Ct. at 1313 ("we need not undertake to delineate precisely the contours of the common-law right"). It should surprise no one that the Kentucky Supreme Court then looked to federal cases interpreting *Nixon*. But, because the common law evolves uniquely in every jurisdiction, it should again come as no surprise that the Court found "no uniformity among the federal courts . . . ." *Id.* Narrowing the choice to a circuit court with guidelines it believed could be harmonized with existing Kentucky common law, the Court found in Second Circuit jurisprudence what it considered "a thoughtful and well-reasoned opinion that explores this very issue, *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (*Amodeo II*)." *Id.*

"According to the *Amodeo II* Court," says *Noble I*, there are two factors to consider in determining the weight to be given the presumption – "'the purpose underlying the presumption and the broad variety of documents' to which the right of access attaches."[38] *Id.* at 731-32 (quoting *Amodeo II*, 71 F.3d at 1048). We address *Noble I's* assessment of these factors separately.

[38] As discussed in more detail, *infra*, the Kentucky Supreme Court modified the second factor from "the broad variety of *documents deemed to be judicial*[,]" *Amodeo II*, 71 F.3d at 1048 (emphasis added), to "the broad variety of documents *to which the right of access attaches*." *Noble I*, 92 S.W.3d at 732 (emphasis added) (internal quotation marks omitted).

iii) *First of* Amodeo II's *two factors: purpose of the presumption of access*

Although obvious, we re-emphasize that the purpose underlying the presumption will vary depending on the jurisdiction. The Supreme Court of the United States also knew that. And that explains *Nixon's* silence on the point. The *Nixon* Court "signaled its reluctance to precisely define the right [of court-record access] when it stated that one of the factors to be weighed in the balancing of interests was 'the presumption—*however gauged*—in favor of public access to judicial records.' " *United States v. Graham*, 257 F.3d 143, 149 n.2 (2d Cir. 2001) (emphasis added) (quoting *Nixon*, 435 U.S. at 602, 98 S. Ct. at 1314). *Nixon* left "unanswered key questions regarding the strength of the presumption and its application" which allowed for differences in the various federal and state jurisdictions. *Id.* Among those jurisdictions, it would be hard to find one with a purpose for public access more broadly gauged than that of Kentucky. We must bear in mind that broadly gauged purpose as we continue to examine *Noble I*.

One must not read *Noble I* and jump to the conclusion that the purpose underlying the Kentucky common law presumption is the same as that underlying the Second Circuit's presumption. Taking for granted the reader's knowledge that Kentucky's purpose for and presumption of access is broad, *Noble I* says nothing about *Amodeo II's* first factor – purpose. In fact, the word "purpose" appears exactly once in *Noble I*, in the sentence quoting *Amodeo II*,

quoted again just above. But if there had been discussion, and citation to Kentucky's common law we discussed earlier, the Court could not have avoided recognizing the significant difference in scope between the underlying federal purpose and the underlying Kentucky common law purpose.

Amodeo II makes it clear that the purpose for the presumption in the Second Circuit and other federal courts is narrow and focused on the performance of Article III judges. The reason? To start, the federal government never adopted English common law as had the state governments,[39] so there was no presumption of access at all to federal court records, not even the restrictive English rule that Kentucky rejected.[40] That, of course, explains why *Nixon* turned to state decisions.

Amodeo II itself made the point that the function of federal courts and federal judges was different from those of the states. "Federal courts exercise

[39] "There is, however, no common law of the United States, the common law of England never having been made a part of our system by legislative adoption, and in the early case of *Wheaton v. Peters*, 8 Pet. 591, 8 L.Ed. 1055, the Supreme Court of the United States said that, when a common-law right is asserted, the federal courts will look to the laws of the state in which the controversy originated." *United States v. Swierzbenski*, 18 F.2d 685, 685 (W.D.N.Y. 1927); *Ward v. Soo Line Railroad Company*, 901 F.3d 868, 880 (7th Cir. 2018) ("Since *Erie* was decided in 1938, however, federal courts cannot apply general common law principles as federal common law. Instead, federal courts must apply the applicable state common law . . . .").

[40] It took an Act of Congress to permit inspection by someone with an interest to see even the indices and cross indices of federal court records. *Bell v. Commonwealth Title Ins. & Tr. Co.*, 189 U.S. 131, 134, 23 S. Ct. 569, 47 L. Ed. 741 (1903) ("all that this plaintiff is allowed by this decree is an inspection and examination of these indices, so far as may be necessary to assist in the examination of a title" (citing "Section 2 of the act of August 1, 1888 (25 Stat. at L. 357, chap. 729, U. S. Comp. Stat. 1901, p. 701")).

powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life . . . . [P]ublic monitoring is an essential feature of democratic control . . . [but] is not possible without access to testimony and documents that are used in the performance of Article III functions." *Amodeo II*, 71 F.3d at 1048; *Winter v. Wolnitzek*, 482 S.W.3d 768, 772 (Ky. 2016) ("The federal system secures . . . an independent judiciary at the expense of the people's ability to choose and replace their judges. Kentuckians . . . have judges who must earn the public's respect and maintain the public's confidence by periodically entering and re-entering the arena of elective politics."). Therefore, says the *Amodeo II* court, "[t]he presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *Amodeo II*, 71 F.3d at 1048.

Kentucky judges do not serve for life; they are not Article III judges and they do not perform Article III functions. The purpose underlying the Kentucky common law right of access to court records is not so limited as in the Second Circuit or the federal system generally. To be sure, *Amodeo II* recognizes the possibility of a much broader purpose, stating, "Although the presumption of access is based on the need for the public monitoring of *federal* courts, those who seek access to particular information may want it for entirely different reasons. . . .

[J]ournalists may seek access to judicial documents for reasons unrelated to the monitoring of Article III functions." *Id.* at 1050 (emphasis added).

That broader purpose exists, entirely divorced from Article III, in "the wholesome principles expressed in City of St. Matthews." *Ex parte Farley*, 570 S.W.2d at 625. There, Kentucky's high court stated the purpose in these terms: "the right to demand inspection of [court] records must be premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." *City of St. Matthews*, 519 S.W.2d at 815. And even though "no person has the right to demand inspection of [court] records to satisfy idle curiosity or for the purpose of creating a public scandal[,]" *id.*, we cannot deny that *City of St. Matthews* expresses a far broader purpose than *Amodeo II* describes.

We acknowledge, of course, that part of the purpose of our right of access is monitoring the performance of our judges, but it just as certainly embraces the public interest in monitoring job performance in all three branches of government. "[E]very citizen and taxpayer has an interest in the manner in which the government is operated [and to] . . . determine whether public officials are properly fulfilling the functions of their office . . . ." *Id.* at 815-16. But the purpose is even broader still.

"[R]ecords in the hands of the clerk are the records of the court." *Ex parte Farley*, 570 S.W.2d at 624 (quoting *Summers v. City of Louisville*, 140 Ky.

253, 130 S.W. 1101, 1102 (1910)). And "whatever belongs to the courts belongs to the public. In a fundamental sense we are only trustees . . . ." *Id.* at 625. "It is beyond question that a court has inherent, 'supervisory power over its own records and files.'" *Noble I*, 92 S.W.3d at 730 (quoting *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312). That is to say, courts have supervisory power over the records that belong to the people for whom the court serves as trustee. *See Fiorella*, 424 S.W.3d at 439 ("once filed with the courts, [even] the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public" (internal quotation marks, citation and emphasis omitted)).

In contrast to the federal courts, the starting point for determining access in the Kentucky system is a presumption of openness. As stated early in our jurisprudence, court records are "open to the inspection of all who think proper to examine the[m,]" *Haskell*, 49 Ky. at 209, and "read by all who would take the trouble . . . ." *Rutherford's Heirs*, 6 Ky. Op. at 328. This openness is regulated, as *Noble I* holds, by the court's role as trustee to "'insure that its records are not used to gratify private spite[,] promote public scandal' or to 'serve as reservoirs of libelous statements for press consumption.'" *Noble I*, 92 S.W.3d at 734 (quoting *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312). These minimal but important limitations demonstrate that the purpose for public access is broad and that

overcoming Kentucky's presumption of public access to court records is not easily accomplished. So much for *Amodeo II's* first factor – purpose.

iv) Amodeo II's *variety-of-documents factor and "judicial documents"*

When it comes to *Amodeo II's* second factor, – "'the broad variety of documents' to which the right of access attaches[,]" *id.* at 732 (quoting, in part, *Amodeo II*, 71 F.3d at 1048) – *Noble I* gives us more to consider. Purdue's analysis here, however, differs dramatically from our own. Contrary to the conclusion we just reached, Purdue claims *Noble I* "rejects a bright-line approach that would consider all documents filed in the record to be subject to the common law presumption of access." (Appellant's brief, p. 8). That would contradict most of our common law and so we are not persuaded.

Purdue's argument presumes that the Court in *Noble I* set aside Kentucky's pre-established common law in this area and replaced it with *Amodeo II's* analytical scheme *in toto*, including the idea that the term "judicial documents" does not refer to every document filed with a court. While Purdue is correct that in the Second Circuit and some other federal courts the term has taken on specialized meaning, Kentucky has never used the term except in its ordinary sense – documents maintained by the judiciary's clerks.

In the federal courts, "to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the

judicial process.'" *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (quoting *Amodeo I*, 44 F.3d at 145).[41] Kentucky has never created a subcategory of its court records as has the Second Circuit, and though the pairing of these words occasionally appears in Kentucky opinions, they have never had this special meaning. Both before and after *Amodeo I and II* and *Noble I*, our courts have used the term "judicial documents" only seven times, and always simply as a synonym for "court records."[42]

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[41] The Second Circuit gave this common two-word phrase special meaning in *Amodeo I*, 44 F.3d at 145 ("We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document."). It was repeated in that same special context in *Amodeo II* and expressly made an idiom in *Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 115-16 (2d Cir. 2006). As of this writing and based on subsequent citations identified by Westlaw as references to *Lugosch* keynote 4, the idiom has been used only by federal courts, mostly federal district courts in New York. However, in the latest edition of BLACK'S LAW DICTIONARY we have this entry: "**judicial document**[:] A court-filed paper that is subject to the right of public access because it is or has been both relevant to the judicial function and useful in the judicial process. *See Lugosch v. Pyramid Co. of Onandaga*, 435 F.3d 110, 119 (2d Cir. 2006)." *Judicial Document*, BLACK'S LAW DICTIONARY (10th ed. 2014). Notwithstanding this new definition, a Westlaw search for the term "judicial document" indicates that since *Amodeo I* was rendered, the term has been used in its ordinary, non-idiomatic sense by 39 state jurisdictions 277 times at the time of this writing, with no reference to *Lugosch*, *Amodeo I*, *Amodeo II*, or BLACK'S LAW DICTIONARY. (Westlaw search term used: da(aft 1995) & "judicial document" % Lugosch [or] Amodeo [or] "Black's Law Dictionary").

[42] *See*, *supra*, footnote 22, citing *Cline v. Waters*, 28 Ky. L. Rptr. 679, 90 S.W. 231 (Ky. 1906). *See also Harrod v. Whaley*, 239 S.W.2d 480 (Ky. 1951), where copies of "documents filed" with the court were used in a petition for a writ of *habeas corpus* but challenged as mere "attested copies of the judicial documents . . . ." *Id.* at 482. In 1986, the term came up in a discussion of the rule that parol evidence is "inadmissible when its introduction is sought to alter judicial documents . . . ." *Hall v. Arnett by Greene*, 709 S.W.2d 850, 853 (Ky. App. 1986); *see Simpson v. Antrobus*, 260 Ky. 641, 86 S.W.2d 544, 545 (1935) ("the record of a court imports verity and cannot be contradicted by parol evidence" (same rule but using the phrase "record of the court" where *Hall* substituted the words "judicial document")). It was used next in *Noble I*. We address that use in the body of this opinion. This Court used the term in the same context as

Of the trilogy of post-*Amodeo II* Kentucky opinions addressing the common law right of court-record access, *Noble I* is the only opinion in which the term "judicial document" appears, and then only in a quote from a Tenth Circuit case that also uses the words only in their ordinary sense. In the context of that reference, our Supreme Court said:

> Under this common-law right "***judicial documents*** are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring non-disclosure." *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997), *cert. denied sub nom Dallas Morning News v. U.S.*, 522 U.S. 1142, 118 S. Ct. 1110, 140 L. Ed. 2d 163 (1998), *citing Nixon*, 435 U.S. at 602, 98 S. Ct. at 1314, 55 L. Ed. 2d. at 582.

Noble I, 92 S.W.3d at 731 (emphasis added). Reading *McVeigh*, we see the Tenth Circuit used the term as synonymous with "court documents," *McVeigh*, 119 F.3d at 811, just as did the case *McVeigh* cites – *Nixon*.[43] In *Nixon*, the Supreme Court of the United States treats these terms as even more homogenous, referring to the

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Noble I in *Cline v. Spectrum Care Academy, Inc.*, 316 S.W.3d 320, 325 (Ky. App. 2010). The most recent appearance of the term was in *Brannan v. Brannan*, 2009-CA-001400-MR, 2010 WL 3927929, at *5 (Ky. App. Oct. 8, 2010), where we said: "CR 76.12 does not allow the inclusion of extra-judicial documents in the appendix." *See also*, *Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transport, LLC*, 2008-CA-000362-MR, 2008 WL 5429569, at *3 (Ky. App. Dec. 31, 2008) (referring to "extra-judicial document not in the record"). Notably, the term does not appear at all in *McDonald-Burkman* or *Fiorella*.

[43] "It is clearly established that ***court documents*** are covered by a common law right of access. *Nixon v. Warner Communications*, 435 U.S. 589, 599, 98 S. Ct. 1306, 1312-13, 55 L. Ed. 2d 570 (1978). Under that doctrine, ***judicial documents*** are presumptively available to the public . . . ." *McVeigh*, 119 F.3d at 811 (emphasis added).

common law "right to inspect and copy ***public records and documents***, including ***judicial records and documents***." *Nixon*, 435 U.S. at 597, 98 S. Ct at 1312 (emphasis added) (footnotes omitted). Not coincidentally, it is within this very quote that *Nixon* cites *Fayette County v. Martin*, 279 Ky. 387, 395-96, 130 S.W.2d 838, 843 (1939).

Furthermore, in *Noble I*, the Kentucky Supreme Court was careful to *avoid* adopting any special meaning for the term "judicial documents." This can be seen in the Court's modification of *Amodeo II's* original wording. The Second Circuit referred to "the broad variety of documents ***deemed to be judicial***." *Amodeo II*, 71 F.3d at 1048 (emphasis added). The Court in *Noble I* purposely changed that phrase to read "'the broad variety of ***documents' to which the right of access attaches***." *Noble*, 92 S.W.3d at 732 (emphasis added) (partially quoting *Amodeo II*, 71 F.3d at 1048).

This requires us to determine, under *Noble I*, what is meant by the phrase "documents to which the right of access attaches." Once again, those wholesome principles of *City of St. Matthews* provide the answer. In its formulation of policy for all three branches of government, a policy that survived to apply only to the judiciary after enactment of the Open Records Act, the Court spoke generally of "public records," stating:

> Our past decisions concerning the right to inspect public records have frequently bypassed the question of whether

> the document sought to be inspected was indeed a public record and were disposed of upon the ground of lack of the requisite interest. The decision here will remove the impediment of lack of interest in many cases but may serve to focus attention upon the question of what constitutes a public record.
>
> We cannot anticipate what considerations may be posed in determining whether or not a record is a public record but ordinarily it would appear to be *beyond cavil that all records maintained by a state, county or municipal government as evidence of the manner in which the business of that unit of government has been conducted are public records.*

City of St. Matthews, 519 S.W.2d at 816 (emphasis added); *Ex parte Farley*, 570 S.W.2d at 625 ("whatever belongs to the courts belongs to the public"). We understand this passage as meaning the right of public access attaches to every document filed with and maintained by the court clerks of the Commonwealth's judiciary. The conclusion is supported by *Noble I*, which refers throughout to the trial court's "records" and "files." *Noble I*, 92 S.W.3d at 730, 733, 734; *see also McDonald-Burkman*, 298 S.W.3d at 848 (enforcing "right of public access to documents or materials *filed in a trial court*" (emphasis added)); *Fiorella*, 424 S.W.3d at 439 ("once filed with the courts, [documents] are, in the absence of a court order to the contrary, presumptively public" (emphasis, quotation marks and citation omitted)).

v) Noble I *coins the term "sliding scale"*

Certainly, "*Noble* [*I*] relied heavily on the decision in *United States v. Amodeo* [*II*]," but what credit there is for naming and "establishing the sliding-scale approach" from selected portions of *Amodeo II* goes to our Supreme Court. *McDonald-Burkman*, 298 S.W.3d at 849. It does not signify a revolution in our approach to court-record access. It is better understood simply as a different way of expressing, under the unique facts of that case, the same balancing rule Kentucky common law has had in place at least since 1974 when *City of St. Matthews* was rendered, and which the Supreme Court referenced in *Braden* (citing *Peers*) just a year before *Noble I*. If that were not so, the Court surely would have overruled expressly at least one of the cases that articulates the rule.

It is important that we emphasize again the context in which *Noble I* was decided. A party had moved to strike an impertinent and scandalous allegation in the original complaint and the motion was granted. Such allegations "will be stricken from the pleadings in order to *purge the court's files* and protect the subject of the allegations." *Noble I*, 92 S.W.3d at 734 (emphasis added by Supreme Court) (citation and quotation marks omitted). The problem was that the trial court failed to purge the scurrilous allegations.

Merely stricken, not purged, the allegations the press wanted to see were still in the possession of the clerk – still among the people's documents.

Until *Noble I*, Kentucky had not addressed how to treat such documents. *Amodeo II* had and, so, that case seemed a likely source for guidance where the question was whether to seal a document that had absolutely no legal effect. *Statewide Envtl. Servs., Inc. v. Fifth Third Bank*, 352 S.W.3d 927, 932 (Ky. App. 2011) (Whether purged or not, "stricken pleadings have no legal effect[.]" (citing *Noble I*, 92 S.W.3d at 733-34)).

The Supreme Court might have simply noted that the diocese, by citing CR 12.06, had expressly identified "a countervailing public policy [entitled] to greater weight than the policy favoring free access to public records." *City of St. Matthews*, 519 S.W.2d at 815. That third rule of *City of St. Matthews* could have been sufficient guidance for the trial court in *Noble I* to seal the scurrilous allegations. But that was an old lesson and not the one the Court was teaching.

The new lesson *Noble I* taught was that appellate courts should not make the *initial* determination whether to seal records, even by applying the ingrained policy-balancing jurisprudence. *Noble*, 92 S.W.3d at 730 ("Court of Appeals should not have made a hypothetical decision concerning how it would have decided this case"). That is why the Court remanded to the trial court.

vi) *Supreme Court declined to embrace Purdue's interpretation of* Noble I

The Kentucky Supreme Court has heard parties in a prior case argue for the interpretation of *Noble I* that Purdue urges this Court to embrace. The case

was *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010). On its face, *George* appears to be an Open Records Act case[44]; procedurally, it presented only the issue of Kentucky's common law right of access to court records, and that is how the parties primarily argued the case.[45] But the Supreme Court did not decide the case based on *Noble I*. Contrary to Purdue's reading of *Noble I* as limiting public access, the Supreme Court said, "the agreements must be disclosed pursuant to Kentucky's Open Records Act." *George*, 306 S.W.3d at 45.

George's relevant underlying facts and procedure are as follows. After the local and the county school boards of education denied certain employment-related claims by a teacher, the teacher filed two separate lawsuits.

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[44] We say "appears to be" because, as discussed *infra*, the case did not arrive at the Supreme Court pursuant to the statutory procedure established by the legislature pursuant to the Open Records Act for challenging denial of public record access. The News-Journal elected not to invoke the circuit court's jurisdiction pursuant to KRS 61.882 to challenge the administrative decisions. "The right of appeal in administrative . . . proceedings does not exist as a matter of right. When the right is conferred by statute, a strict compliance with its terms is required. . . . [W]here the conditions for the exercise of the power of the court are wanting the judicial power is not, in fact, lawfully invoked. . . . [F]ailure of a party to strictly comply with the mandatory provisions of a statute authorizing an appeal from an administrative agency is jurisdictional. Therefore, any such failure is fatal to the appeal." *Taylor v. Kentucky Unemployment Ins. Comm'n*, 382 S.W.3d 826, 830 (Ky. 2012) (quoting *Pickhart v. U.S. Post Office*, 664 S.W.2d 939, 940 (Ky. App. 1983)).

[45] Briefs of all parties are available on WestlawNext. Those cited in this opinion are as follows: Brief for Appellant, Central Kentucky News-Journal, *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010) (No. 2009-SC-000018-MR), 2009 WL 6639461 (hereafter, "Brief for News-Journal"); Brief on Behalf of Taylor Circuit Court Judge Doughlas M. George by Real Parties in Interest, Taylor County Board of Education, *et al*, *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010) (No. 2009-SC-000018-MR), 2009 WL 6639463 (hereafter "Brief for Judge George"); Brief on Behalf of Taylor Circuit Judge Doughlas M. George by Real Party in Interest, Greg Chick, *Central Kentucky News-Journal v. George*, 306 S.W.3d 41 (Ky. 2010) (No. 2009-SC-000018-MR), 2009 WL 6639462 (hereafter, Brief for Chick").

Id. at 42. This prompted settlement efforts. "The settlement was reached as the result of a private mediation process that was not undertaken at the instance or under the supervision of the Court and in which the Court did not participate." Brief for Judge George, 2009 WL 6639463, at *8; *see also George*, 306 S.W.3d at 42 n.1. There was no judicial review of the settlement agreement when, "in an agreed order of dismissal, [Judge] George dismissed the Complaints, sealed the terms of the dismissal and settlement, and ordered the parties to strictly adhere to the confidentiality provisions contained in the agreements." *George*, 306 S.W.3d at 42. The agreement was not then even in the trial court's records, *id.* at 43, so the News-Journal went directly to the school boards to obtain a copy. Refusing all public access, the boards denied the News-Journal's request for a copy.

Pursuant to the Open Records Act, KRS 61.880(2), the News-Journal sought review by the Attorney General who could have issued "a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." KRS 61.880(2)(a). But because the agreements were subject to the trial court's order sealing them, the Attorney General's "authority was limited and the issue of public access to the agreements was one to be resolved by the court." *George*, 306 S.W.3d at 43.

The News-Journal could have pursued an administrative appeal. KRS 61.880(5)(a); KRS 61.882(3). This procedure invokes a circuit court's jurisdiction

to review the decision of the Attorney General, but that was not the route the News-Journal took. "This Open Records Decision of the Attorney General was not appealed, and therefore ha[d] 'the force and effect of law' pursuant to KRS § 61.880(5)(b)." Brief for News-Journal, 2009 WL 6639461, at *4.

Instead, the News-Journal sought *court-record* access by "mov[ing] to intervene in both actions . . . to assert its right of access . . . [and] to have the trial court unseal the terms of the agreements, vacate its orders regarding confidentiality, and to make any future hearings . . . public . . . ." *George*, 306 S.W.3d at 43. The trial court denied the motions and the News-Journal pursued a writ of mandamus with this Court. That is the procedure established in *Peers* and *Noble I* when a trial court denies access to its own records. *Id.* We "directed the trial court to vacate its order denying [the News-Journal's] motion to intervene, to enter an order allowing it to intervene, to address the remainder of its requested relief, and to file the agreements into the record." *Id.*

On remand, the trial court allowed intervention and filed the settlement agreements in the case record. Then, "[t]he court analyzed th[e Supreme] Court's holding in *Roman Catholic Diocese of Lexington v. Noble*" before deciding nothing in that case or any other authority "required the court to unseal the agreements for [the News-Journal's] access." *Id.* at 43-44.

Taking the very position Purdue now takes, "[t]he trial court reasoned . . . [under] *Noble* [*I*], the fact that the settlements were the result of 'a mediation rather than an official judicial proceeding' means that 'the interest of the public in monitoring the Court proceeding would not be served by disclosing terms of the agreement.'" Brief for News-Journal, 2009 WL 6639461, at *7 (quoting trial court's order of July 28, 2008[46]). When the News-Journal again sought redress in this Court, we said the "Appellant failed to show that the trial court was acting outside its jurisdiction or acting erroneously." *George*, 306 S.W.3d at 44. The News-Journal appealed our decision to the Supreme Court as a matter of right.

As noted above, the parties primarily argued the Kentucky common law of court-record access. Like the Supreme Court in *Noble I*, none of the various advocates cited the body of Kentucky common law culminating in those wholesome principles of *City of St. Matthews*. Instead, they focused on "[t]he most recent decision in Kentucky on the issue of the press's access to public records . . . *Roman Catholic Diocese of Lexington v. Noble*[.]" Brief for Judge George, 2009 WL 6639463, at *6; Brief for News-Journal, 2009 WL 6639461, at *17 (*Noble I* "recogniz[es] that a Kentucky common law right of access exists under which judicial documents are presumptively available to the public"); Brief

[46] The trial court's order upon this Court's first remand was entered October 26, 2007. When it entered its order on our second remand, the court said, "[T]his Court's position has not changed" since October 2007. Brief for News-Journal, 2009 WL 6639461, at *7.

for Chick, 2009 WL 6639462, at *4 (applying *Noble I* and arguing News-Journal is not entitled to access "under the Common Law").

The appellees in *George* urged the Supreme Court to affirm the trial court's order that sealed part of its record by making the same argument Purdue makes now. One appellee said:

> In its decision in *Noble*[*I*], the Court adopted the reasoning of *United States v. Amodeo*, 71 F.3d 1044, 1048 ([2d] Cir. 1995) (*Amodeo II)* . . . . According to the *Amodeo II* Court, the underlying purpose of the presumption is that access to the public serves as a method for the public to monitor the courts. Public monitoring of the judiciary serves as [a] check on judicial behavior, reduces the instances of injustice, and provides the public with a better understand[ing] of the judicial system. *Id*.

Brief for Chick, 2009 WL 6639462, *4-5. Another appellee said:

> The Court in *Noble* adopted the decision in *United States v. Amodeo*, 71 F.3d 1044 ([2d] Cir. 1995). . . . As stated in *Noble*:
>
> > *Access provides the means through which the citizenry monitor the courts*. And monitoring provides judges with critical views of their work. *Id*. It casts the disinfectant of sunshine brightly on the courts, and thereby *acts as a check on arbitrary judicial behavior and diminishes the possibilities for injustice, incompetence, perjury, and fraud. Id*., quoting *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 ([3d] Cir.1993). . . .
>
> 92 S.W.3d at 732.

> In short, in deciding whether it is proper to limit access to what would otherwise be public documents, Judge George was required to determine whether access to the settlement agreements would further the salutary purpose of exposing the activities of Courts . . . .
>
> Judge George correctly found, after a careful analysis of the facts peculiar to this case, that allowing the Newspaper access to the settlement agreements would not further the public's interest in monitoring the judicial process for the following reasons. The settlement was reached as the result of a private mediation process that was not undertaken at the instance or under the supervision of the Court and in which the Court did not participate. Since the Court was not involved in the mediation process, exposing the terms of the settlement to public scrutiny would not further the interest of the public in monitoring the proceedings of the Court.

Brief for Judge George, 2009 WL 6639463, *7-8.

These arguments were well taken because there was no administrative appeal of the executive agencies' Open Records Act decisions; rather, access to the court's record was being sought, and *Noble I* was the latest word. Apparently, however, this interpretation of *Noble I* was not well received because it was all but ignored in the opinion. The Supreme Court simply agreed with the News-Journal "that the Court of Appeals left uncorrected the trial court's erroneous conclusion that the settlement agreements at issue should remain under seal" in the court's records. *George*, 306 S.W.3d at 45. The Court then concluded that "the

agreements must be disclosed pursuant to Kentucky's Open Records Act" and said, "we see no need to address [other] arguments." *Id.*

vii) Our common law right of court-record access applies even to discovery

To bolster its argument that no common law access is available for the sealed records, Purdue cites *Amodeo II* directly. The language Purdue turns to is only partially quoted in *Noble I*, but in its complete version says "an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power." *Amodeo II*, 71 F.3d at 1048 (quoted with redaction in *Noble I*, 92 S.W.3d at 732). Examples of "[d]ocuments that play no role in the performance of Article III functions," said the Second Circuit, "[are] those passed between the parties in discovery, [and so would] lie entirely beyond the presumption's reach . . . ." *Id.* at 1050. Purdue infers from this that some documents filed with the court never make it onto the sliding scale at all. We do not draw the same inference from *Noble I*.

Noble I even tells us that *Amodeo II* did "[n]ot mean[] to lessen the importance of the presumption of access" by referencing discovery practice in federal courts. 92 S.W.3d at 732. We believe *Noble I's* quote from *Amodeo II* presumes an understanding that, in important ways, federal and Kentucky discovery procedures are diametrical opposites. The federal rules say, "the following discovery requests and responses must not be filed until they are used in

the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission." Fed. R. Civ. P. 5(d)(1)(A). Kentucky's rule, quite to the contrary, says: "All papers . . . required to be served upon a party shall be filed with the court . . . by filing them with the clerk of the court . . . ." CR 5.05(1), (2).[47] Absent a countermanding local rule,[48] even depositions must be filed with the clerk. CR 30.06(1) (requiring officer before whom deposition is taken to file deposition with court clerk).

We attempted in *Fiorella* to explain this passage from *Amodeo II* that is so critical to Purdue's argument. *Fiorella*, 424 S.W.3d at 443. Perhaps the Connecticut Supreme Court's explanation is better.

> [T]he presumption of public access never has extended to every document generated in the course of litigation. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). For example, raw ***discovery materials exchanged among parties, but not filed with the court***, are not open to the public. *Id.* Discovery proceedings never were open to the public at

[47] Additionally, "the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk." CR 5.05(2).

[48] In 2014, this Court conducted a search of local rules that countermanded CR 30.06. *Fiorella*, 424 S.W.3d at 438 n.7. Those circuits were the 12th Judicial Circuit (Henry, Oldham and Trimble Circuit Courts) (Local Rules of the Twelfth (12th) Judicial Circuit Rule 2.6(A)); 16th Judicial Circuit (Kenton Family Court) (RKFC 12), 21st Judicial Circuit (Rowan, Montgomery, Menifee and Bath Circuit Courts) (R21C-140); 22nd Judicial Circuit (Fayette Circuit Criminal and Civil Courts) (RFCC Rule 23); and the 53rd Judicial Circuit (Anderson, Shelby and Spencer Circuit Courts) (LCRP-53-10). Each of these local rules is nearly identical and they begin with the sentence: "Originals of depositions shall not be filed in the Court record."

> common law; *id.*, at 33, 104 S.Ct. 2199; and the principles supporting liberal discovery are distinct from those supporting public access to court documents. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986); *Mokhiber v. Davis*, 537 A.2d 1100, 1109 (D.C. 1988). Parties are obligated to disclose a wide range of information in the course of discovery to support the disposition of their underlying claims. See *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L.Ed.2d 930 (1983). Much of this material may be related only tangentially to the ultimate resolution of the issues presented and may have little to no impact on judicial action. *Seattle Times Co. v. Rhinehart*, supra, at 33, 104 S. Ct. 2199; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006); *see United States v. Amodeo, supra*, 71 F.3d at 1048 (discussing flood of material generated by litigation and its relevance to exercise of judicial power). The principles underlying public access, therefore, are inapplicable to such material, and consequently, unfettered ***access to discovered material not filed with the court never has been the norm.***

Rosado v. Bridgeport Roman Catholic Diocesan Corp., 292 Conn. 1, 36, 970 A.2d 656, 677 (2009) (emphases added), *cert. denied sub nom., Bridgeport Roman Catholic Diocesan Corp. v. New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500 (Mem), 175 L. Ed. 2d 348 (2009).

Noble I addressed proper treatment of a document, like unfiled discovery, so inconsequential it was unworthy of public attention or access. It was a document so impertinent that it was stricken pursuant to CR 12.06 and could have been, and should have been, removed from the trial court's records entirely.

We understand *Noble I* as holding that stricken materials removable entirely from a record are no more accessible to the public under our common law than raw discovery never filed in the first place.

We emphasize that this guidance from *Noble I* was provided to aid that trial court in deciding a pending motion to seal a part of the record that had already been stricken but not purged. The movant asserted that a countervailing public policy of protecting individual privacy was entitled to greater weight than the policy favoring free access to public records. Until a trial court is presented with such a motion, Kentucky's broad presumption of public access to court documents prevails, measured by "the wholesome principles expressed in City of St. Matthews." *Ex parte Farley*, 570 S.W.2d at 625.

Overall, we see nothing in *Noble I* that detracts from the guidelines for public access to court records established in *City of St. Matthews*.

b) <u>McDonald-Burkman:</u>

In *McDonald-Burkman*, the Courier-Journal sought access to discovery documents in the death-penalty case of a defendant accused of killing a four-year-old boy and leaving his body in a dumpster. The Commonwealth was required by local rule to file discovery documents in the record, but the trial court ordered that part of the record sealed. *McDonald-Burkman*, 298 S.W.3d at 847.

The Supreme Court affirmed the order sealing part of the record because allowing press access would deprive the defendant of a fair trial. *Id.* at 850.

Purdue implies that the Supreme Court affirmed the trial court's order sealing the record for a very different reason. The Supreme Court, says Purdue, held that sealing the discovery was proper because "none of the [sealed discovery] had any relation to the trial court's adjudication of the litigant's substantive rights." (Appellant's brief, p. 9). We disagree. Obviously, adjudication had not yet occurred and would be based on the verdict of a jury not yet selected.

Second, after considering federal cases in the context of determining there was "no *constitutional* [*i.e.*, First Amendment] right of access to discovery material," the Supreme Court discussed common law access to discovery in the same federal context as did *Noble I*. *McDonald-Burkman*, 298 S.W.3d at 849-50 (emphasis added). Without adopting *Amodeo II's* approach regarding the public's inability to access unfiled pre-trial discovery, the Court explained "where discovery documents fall on the scale" in the federal courts, or as Purdue would say, where they fall *off* the scale. *Id.* at 849. It quoted *Amodeo II*, saying: "Documents that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption's reach . . . ." *Id.* at 850 (emphasis added in *McDonald-Burkman*) (quoting *Amodeo II*, 71 F.3d at 1050). The Supreme Court's insertion of emphasis

here indicates to us that it shared the same understanding as expressed by the Connecticut Supreme Court – the quoted phrase refers to "raw discovery materials exchanged among parties, but not filed with the court[.]" *Rosado*, 292 Conn. at 36, 970 A.2d at 677. After all, documents passed between parties in discovery that are then filed and form the basis of the adjudication, even under Purdue's argument, *are* subject to public access in both federal and Kentucky courts. As said by the Sixth Circuit:

> "At the adjudication stage, however, very different considerations apply." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record. *Baxter*, 297 F.3d at 545. Unlike information merely exchanged between the parties, "[t]he public has a strong interest in obtaining the information contained in the court record." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983).

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016).

But telling us the approach of other jurisdictions, such as the Second Circuit approach, is not the same as adopting the approach in our jurisdiction. As mentioned near the beginning of this opinion, our courts often consider other approaches to legal problems, but when we borrow concepts, we make sure they meld smoothly with our own. Again, we find it unlikely that the Supreme Court has chosen the vehicle of mere suggestion to subtly signal a wholesale substitution

of federal common law for Kentucky common law in this area, as though *Erie* had not yet rejected the doctrine of federal primacy of state common law. There has been no rejection of the rules established in *City of St. Matthews*. It is clear to us that the Court in *McDonald-Burkman* was merely exploring further along the path *Noble I* took in examining *Nixon's* summary of the states' common law concepts.

This much is clear about *McDonald-Burkman*. When it came to its discussion of the "*common law* right of access to discovery material" filed with the clerk of the court, the Supreme Court said, "the trial court still has 'supervisory power over its own records and files,' and deference must be given to the trial court's determination after consideration of 'the relevant facts and circumstances of the particular case.'" 298 S.W.3d at 850 (quoting *Nixon*, 435 U.S. at 598-99, 98 S. Ct. 1306).[49] Reference and deference to this discretion are meaningless if discovery materials only make it onto the "sliding scale" when they are essential to the adjudication. *McDonald-Burkman*, like *Noble I* before it, remains consistent with our common law presumption of public access to court records.

[49] Purdue might believe its argument is supported by a more complete quote of this passage. It begins with the phrase, "even if a common law right of access to discovery material exists[.]" *McDonald-Burkman*, 298 S.W.3d at 850. However, any doubt that such right of access exists is fully dispelled both by the fact the Court went on to describe the very scope of the right, and by reference to Kentucky common law jurisprudence absent from *McDonald-Burkman*, but provided in this opinion.

c) Fiorella

In *Fiorella*, a state employee brought various tort claims against her employer. Without the trial court's sanction, the parties agreed to seal certain documents that were filed with the clerk. We rejected Fiorella's argument, based on *McDonald-Burkman*, for "a bright-line test that would keep all discovery materials off the sliding scale altogether, whether filing the discovery is compelled by a procedural rule or exempted from it." *Fiorella*, 424 S.W.3d at 442.

However, we had to address the meaning of a passage in *McDonald-Burkman* that Purdue raises again here. We repeat what we said then:

> [W]hat are we to make of the fact that *McDonald-Burkman* disagreed with the assertion that "because the discovery documents are filed with the court, as required under local rule, they become court records and immediately open to the public"? *McDonald-Burkman,* 298 S.W.3d at 848-849. On the contrary, said our Supreme Court, "Discovery, whether civil or criminal, is essentially a private process . . . to assist trial preparation [and t]he fact that the documents are in the custody of the court does not change their character." *Id.* The clear answer is that the Supreme Court made these statements in the context of its analysis of the media's *First Amendment* argument, not in the context of a civil-rules or common-law argument. In making these statements, our Supreme Court cited *United States v. Noriega*, 752 F. Supp. 1037 (S.D. Fla. 1990), which held that " . . . the right of access to judicial records is *not of constitutional dimension*. . . . " *Id.* at 1040 (emphasis added). The Court agreed with this statement in *Noriega,* wrapping up its First Amendment analysis in *McDonald-Burkman* by stating "we do not believe that there is a *constitutional right* of access to discovery material, and the Courier-

> Journal's position *in this regard* must fail." *McDonald-Burkman,* 298 S.W.3d at 849 (emphasis added). . . . These statements are not relevant to a common-law analysis.

Id. at 438; *see In re Policy Management Systems Corp.*, 67 F.3d 296, at *4 (4th Cir. 1995) (unpublished) ("Because documents filed with a motion to dismiss that are excluded by the court do not play any role in the adjudicative process, we find that the documents essentially retain their status as discovery materials and therefore are not subject to the First Amendment guarantee of access.").

We also said in *Fiorella* that the civil rules themselves support a presumption of openness, and "that once filed with the courts, the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." 424 S.W.3d at 439 (emphasis, quotation marks and citation omitted). This holding is consistent, as thoroughly explained earlier, with Kentucky's "long-standing presumption of public access to judicial records[.]" *McDonald-Burkman*, 298 S.W.3d at 848.

There is another principle noted in *Fiorella* that Purdue attempts to marginalize, having to do with litigation settlements involving the government. We said, "Because . . . settlement with Fiorella . . . involves the payment of public funds, the public interest in accessing the materials is more than minimal." *Fiorella*, 424 S.W.3d at 441. Purdue argues that this holding applies only where the government pays to settle a case, "[b]ut it has no application in cases where a

private party has paid monies to settle a suit brought by the Commonwealth." (Appellant's brief, p. 17). We disagree.

As noted earlier, Kentucky's presumption of public access to court records is broad because "every citizen and taxpayer has an interest in the manner in which the government is operated [and to] . . . determine whether public officials are properly fulfilling the functions of their office . . . ." *City of St. Matthews*, 519 S.W.2d at 815-16. Every claim of the Commonwealth against another, including the claim against Purdue, is the property of the people regarding which the public has a legitimate concern. On that basis, the right of access supersedes even the right to privacy. *Courier-Journal v. McDonald*, 524 S.W.2d at 635 ("right of privacy does not extend to affairs with which the public has a legitimate concern"); *George*, 306 S.W.3d at 46. Some agent of the government compromised the claim against Purdue; *i.e.*, some agent sold the people's property. That agent also agreed with Purdue that the settlement agreement and the documents filed with the trial court would be exempt from the Open Records Act and sealed in the court's records. The Supreme Court was not willing to accept that in *George*; we are not willing to accept it in this case. Without access to court records, how can the public assess whether a government employee's decision to compromise a valuable claim of the people adequately protected their interest or maximized the claim's value?

Furthermore, we are not persuaded by Purdue's argument that sealing the records made settlement possible. Says Purdue, without the parties' agreement to seal the record, the settlement would not have occurred. In terms of the balancing stated generally in *City of St. Matthews*, this is an argument that the "countervailing public policy [favoring settlements is entitled] to greater weight than the policy favoring free access to public records[.]" 519 S.W.2d at 815. Considering our state's general policy of open public records, we cannot agree.

Statutes governing access to public records lodged in the other branches of government "reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement." *George*, 306 S.W.3d at 46 (quoting *Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 472 (Ky. 1997) ("confidentiality clause reached by the agreement of parties to litigation cannot in and of itself create an inherent right to privacy superior to and exempt from the statutory mandate for disclosure")). We perceive nothing in our jurisprudence that would justify the judiciary's taking the opposite approach, especially when the Commonwealth or one of its agencies is a party to the litigation settlement.

4) Guidance from Kentucky common law regarding court-record access

We can draw certain guiding principles from our analysis of Kentucky common law. Some of them apply directly to this case.

It is obvious that *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974) remains good law. Until reversed, the starting point for analyzing the common law right of public access (including press access) to court records is "the wholesome principles expressed" in that case. *Ex parte Farley*, 570 S.W.2d at 625.

Fayette County v. Martin, 279 Ky. 387, 130 S.W.2d 838 (1939) tells us it would be error to allow public access to court records when a valid statute prohibits the inspection. *City of St. Matthews*, 519 S.W.2d at 813 ("the decision [in *Martin*] turns upon the fact that a valid statute prohibited the inspection of the document sought therein").

Noble I establishes that CR 12.06 is the Supreme Court's expression of policy prohibiting the filing of certain impertinent pleadings. Furthermore, it is a "public policy [entitled] to greater weight than the policy favoring free access to public records." *City of St. Matthews*, 519 S.W.2d at 815. Documents deemed so inappropriate that they are properly stricken and removable from the court's records have no weight at all in the balancing calculus of *City of St. Matthews*, and fall nowhere on the "sliding scale" of *Noble I*. *Noble I*, 92 S.W.3d at 733 ("The trial court's finding that certain allegations [were] . . . sham, redundant, etc., is sufficient to . . . strike. Access to the allegations themselves would sensationalize, but not inform.").

Courier-Journal v. McDonald, 524 S.W.2d 633 (Ky. 1974) tells us that when a claim against the government is settled with public funds, "any desire of the plaintiff in that suit to keep secret the amount of money he received" will be afforded "little weight" when balanced against the public's right of access to court records. *Id.* at 635.

Central Kentucky News-Journal v. George, 306 S.W.3d 41 (Ky. 2010) says it is an abuse of discretion to seal a settlement agreement lodged with a court in a case involving the government because "settlement agreements are presumably public records subject to disclosure, regardless of their confidentiality provisions." *Id.* at 46. Furthermore, when documents are lodged in the records of an executive branch agency, but also in a court's records, it is an abuse of discretion to seal the court record because, under KRS 61.870(2), such documents qualify as "public records for purposes of the Open Records Act" and cannot be sealed in a court's records unless a strictly construed exception is available under KRS 61.878. *Id.* at 45, 45 n.5; *see id.* at 48 (Cunningham, J., concurring) ("Open Records law is invoked—subject to its exemptions—anytime a public record keeping agency is employed, even by private parties. Of course, it is the circuit clerk to which I refer.").

Courier-Journal, Inc. v. McDonald-Burkman, reiterates the balancing rule of *City of St. Matthews* that "[d]ocuments . . . may . . . be 'sealed if the right to

access is outweighed by the interests favoring non-disclosure'" and that "the right to a neutral jury is a sufficiently important interest to outweigh the public and press's right of access." 298 S.W.3d 846, 849, 850 (Ky. 2009) (quoting *Noble,* 92 S.W.3d at 731).

From *Fiorella v. Paxton Media Group, LLC,* we know that "once filed with the courts, the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." 424 S.W.3d 433, 439 (Ky. App. 2014) (citation and internal quotation marks omitted; emphasis omitted). But *Fiorella* also tells us that, just as CR 12.06 empowers the trial court to strike and seal or purge pleadings, "CR 26.03(1) empowers the trial court, upon a showing of good cause, to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden[,]' by issuing a protective order denying public access to discovery filed with the court." *Id.* at 437.

5) <u>No abuse of discretion in this case</u>

"[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). We have exhaustively examined legal principles underpinning Kentucky's common law right of access to court records. We conclude that the Pike Circuit Court's May 11, 2016, order to unseal records is consistent with our analysis and well within the trial court's discretion.

The circuit court considered the privacy interests of the parties involved and ordered redaction of certain personal information to protect those interests. Having addressed those privacy concerns, the circuit court applied the sliding-scale approach and, effectively, concluded that Purdue did not identify a countervailing public policy entitled to greater weight than the policy favoring free access to public records. *City of St. Matthews*, 519 S.W.2d at 815. In the circuit court's words, Purdue's "arguments do not overcome the public's common law right of access [to] these documents . . . [and the circuit court] sees no higher value [than] the public (via the media) having access to these discovery materials" involved in the litigation.

CONCLUSION

We affirm the Pike Circuit Court's May 11, 2016 order granting STAT's motion to unseal discovery and affording STAT access to those documents.

ALL CONCUR.

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