COMMONWEALTH OF KENTUCKY
PIKE CIRCUIT COURT
DIVISION II
CASE NO. 19-CI-00233

NICKY GAUZE, Individually, and
NICKY GAUZE, as Administrator of the
ESTATE of MARY E. GAUZE, Deceased;
NICKY GAUZE, as Guardian of
JOEY GAUZE, a Minor; and
CODY GAUZE, Individually **PLAINTIFFS**

v.

PIKEVILLE MEDICAL CENTER, INC.
d/b/a PIKEVILLE MEDICAL CENTER; and
JOHN DOES 1 through 3, Unknown Defendants **DEFENDANTS**

ELECTRONICALLY FILED

PIKEVILLE MEDICAL CENTER'S JOINT RESPONSE TO PLAINTIFFS' MOTIONS TO VACATE THE COURT'S ENTRY OF DEFENDANT'S PROPOSED ORDER OF PROCEEDINGS, VACATE ORDER STRIKING FOREPERSON, VACATE ORDER DECLARING MISTRIAL AND TO ENTER JUDGMENT CONSISTENT WITH THE JURY'S VERDICT , OR, IN THE ALTERNATIVE, FOR AN EVIDENTIARY HEARING WITH FULL JURY PRESENT FOR *VOIR DIRE* BY COURT AND COUNSEL AND PLAINTIFFS' MOTION TO MODIFY COURT'S ENTRY OF DEFENDANT'S PROPOSED ORDER OF PROCEEDINGS AND CORRECT THE RECORD

Comes the Defendant, Pikeville Medical Center, Inc. d/b/a Pikeville Medical Center, by counsel, for its Joint Response to Plaintiffs' Motions to Vacate the Court's Entry of Defendant's Proposed Order of Proceedings, Vacate Order Striking Foreperson, Vacate Order Declaring Mistrial, and to Enter Judgment Consistent with the Jury's Verdict, or, in the Alternative, for an Evidentiary Hearing with Full Jury Present for *Voir Dire* by Court and Counsel, and Plaintiffs' Motion to Modify Court's Entry of

Defendant's Proposed Order of Proceedings and Correct the Record, respectfully submits the following:

FACTUAL BACKGROUND

While it is anticipated that the Court likely remembers very well the circumstances leading to the present Motion, because a significant number of the discussions leading to the current posture of this case occurred in chambers and/or otherwise off the record, PMC thus believes it prudent and necessary to remind the Court of those discussions and circumstances. To that end, counsel for Pikeville Medical Center, Daniel G. Brown and James Smith, have each submitted affidavits detailing those discussions as those discussions – which have been altogether omitted from Plaintiffs' factual recitation – are critically important to the Court's consideration of the issues raised by the current Motion.

Trial of this matter was set to begin on Monday, January 20, 2023, but because there were not enough jurors available that morning to conduct *voir dire*, the Court ultimately adjourned proceedings on the first day with directions to return the following morning to begin proceedings. The parties returned the next day as directed and were able to successfully impanel a jury and begin proof. That proof continued until Thursday, February 09, 2023, at which time two alternate jurors were selected and dismissed from further service. The remaining 12 jurors then began their deliberations before returning to the courtroom to re-watch the trial testimony of Plaintiff Nicky Gauze. They then requested to adjourn for the evening.

Juror No. 1 approaches to express a concern – shared by multiple jurors – about Juror No. 2's ability to continue in service

The jury returned Friday morning, February 10, 2023, to resume deliberations. Prior to returning to the jury room, however, one juror asked to approach and ask a question which, ultimately, has no bearing on the issues to be addressed in this Motion. A second juror then asked to approach to speak about a concern he had and it is this encounter which ultimately led to the current Motion.

As the Court likely recalls, this juror ("Juror No. 1") advised the Court about his concerns regarding statements made by another juror ("Juror No. 2") which he, and reportedly various other jurors, found to be concerning and which several believed to have been potentially disqualifying. Although Plaintiffs have submitted affidavits from other jurors acknowledging that there had been concern about the statements made by Juror No. 2, as will be discussed later in this Response, those same affidavits in and of themselves prove that the jurors unilaterally and altogether improperly usurped a function reserved exclusively for the Court -- namely, determining the eligibility of another juror to continue in service.

In any event, after learning of the concerns expressed by Juror No. 1, the Court questioned him outside the presence of counsel to understand the basis of his concerns. The Court then advised the parties of the juror's comments. At that point, counsel for PMC indicated that they needed time to discuss these developments with their client in order to make a decision as to how to proceed.[1] The Court granted that opportunity and

[1] Affidavit of Dan Brown, ¶4; Affidavit of Jim Smith, ¶8

adjourned the jurors, with an appropriate admonition given, and with instructions to return later that morning.[2]

PMC moves to excuse Juror No. 2 and Plaintiffs affirmatively advise the Court, for the first of many times, that they did not object to or otherwise oppose the Motion

After that opportunity for discussion, PMC opted to move to strike Juror No. 2 from further service and counsel advised the Court accordingly.[3] Though occurring in open court, this discussion took place off the record and before the jurors had been instructed to return to the courtroom.[4] During this same discussion, Plaintiffs likewise informed the Court that they agreed Juror No. 2 needed to be stricken and, thus, that they were not opposing or otherwise objecting to PMC's Motion to strike the juror.[5]

Recognizing that excusing Juror No. 2 from further service would leave the parties with less than twelve jurors to deliberate, counsel for PMC advised the Court that they had not been authorized to agree to proceed with only eleven jurors.[6] Just as importantly, Plaintiffs similarly advised the Court that they would not agree to proceed with only eleven jurors.[7] As such, since Plaintiffs affirmatively assented to Defendants' Motion to Strike Juror No. 2 and since neither party would agree to proceed with less than twelve jurors, everyone recognized and acknowledged that a mistrial was required.[8]

Plaintiffs assure the Court of their lack of opposition a second time

At this point, after the likelihood of a mistrial was proverbially "on the table", the Court very pointedly asked Plaintiffs' counsel if they were "sure" they did not want to

[2] Affidavit of Dan Brown, ¶5; Affidavit of Jim Smith, ¶8
[3] Affidavit of Dan Brown, ¶6; Affidavit of Jim Smith, ¶9
[4] *Id.*
[5] Affidavit of Dan Brown, ¶6; Affidavit of Jim Smith, ¶10
[6] Affidavit of Dan Brown, ¶6; Affidavit of Jim Smith, ¶9
[7] Affidavit of Jim Smith, ¶10
[8] Affidavit of Dan Brown, ¶11; Affidavit of Jim Smith, ¶10

oppose the Motion to Strike as, "I might just deny it."[9] Following that question, Plaintiffs' counsel indicated they were, in fact, sure of their position but then asked for a brief opportunity to confer amongst themselves. After talking for several minutes, counsel for Plaintiffs approached PMC counsel and inquired whether PMC would be willing to agree to a high/low agreement and, in turn, to proceed with eleven jurors after all.[10] Counsel for PMC indicated that they needed to discuss that proposal with their client.

Both parties then approached the bench, still off the record, to advise the Court that perhaps they might be able to reach a compromise that would obviate the need for a mistrial.[11] Additional time was needed, however, to discuss the high/low proposal and make a decision in that regard.[12] The Court acknowledged its understanding of the situation and, hence, shortly after the jurors returned to the courtroom as previously instructed, it again adjourned them with instructions to return later that afternoon.[13]

Following the necessary discussions, counsel for PMC advised Plaintiffs that they had not been authorized to enter a high/low agreement or otherwise proceed with only eleven jurors. Accordingly, counsel advised that PMC was proceeding with its Motion to Strike Juror No. 2 and, if granted, would in turn move for mistrial.[14]

[9] Affidavit of Dan Brown, ¶6; Affidavit of Jim Smith, ¶11
[10] Affidavit of Dan Brown, ¶7; Affidavit of Jim Smith, ¶11
[11] Affidavit of Dan Brown, ¶8; Affidavit of Jim Smith, ¶11
[12] *Id.*
[13] *Id.*
[14] Affidavit of Dan Brown, ¶9; Affidavit of Jim Smith, ¶14

After the proposed compromise could not be reached, Plaintiffs assure the Court for a third and fourth time, they do not object to or otherwise oppose the Motion

Counsel for both parties then proceeded to chambers with the Court to advise it of these developments and expected path forward.[15] Although these in-chambers discussions were, again, not on the video record, counsel for PMC informed the Court that they had been directed to move forward with the Motion to Strike Juror No. 2 and that PMC would not, in turn, agree to proceed with less than the full complement of jurors.[16]

The Court then turned to Plaintiffs' counsel and asked for their position in this regard.[17] Plaintiffs' counsel indicated that they did not oppose PMC's request to strike Juror No. 2 and, as such, directly said to the Court that "we are not going to fight to keep her."[18] The Court very pointedly, again, asked Plaintiffs if they were sure they did not want to object to the juror being stricken.[19] Plaintiffs, *for the fourth time*, advised the Court they did not "want to fight to keep" Juror No. 2 and, thus, did not object to the Motion to excuse her from further service.[20] Plaintiffs likewise reiterated that they, too, would not agree to proceed with only eleven jurors.[21] Hence, both parties agreed that a mistrial was thus required.[22]

In light of Plaintiffs' agreement to excuse Juror No. 2 from further service, PMC's Motion was granted and a mistrial declared.[23] Accordingly, the jointly agreed-to plan at that point was to have the jurors return to the courtroom at the appointed time

[15] Affidavit of Dan Brown, ¶10; Affidavit of Jim Smith, ¶15
[16] *Id.*
[17] Affidavit of Dan Brown, ¶11
[18] Affidavit of Dan Brown, ¶11; Affidavit of Jim Smith, ¶16
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Affidavit of Dan Brown, ¶12

only to then advise them that their continued service and deliberations were no longer needed and, in turn, to adjourn further proceedings in the matter.

Following that decision, the parties remained in chambers and talked about various different subjects for a period of time. When discussions returned to the present case, the Court expressed its disappointment that the previous two weeks appeared as they were going to have been all for naught.[24] At that point, Mr. Smith inquired as to whether the Court might be willing to informally poll the jurors upon their return to find out where they were in deliberations in an effort to give the parties some feeling and insight, hopefully, for potential future settlement discussions.[25] Plaintiffs' counsel agreed with Mr. Smith's suggestion.[26]

The Court proposes the "advisory verdict" procedure and all parties expressly agree that, if used, any "verdict" would be non-binding and confidential

The Court then *sua sponte* asked what the parties thought about, in lieu of simply informally polling them, not immediately advising the jurors of the mistrial and allowing them to engage in additional discussions "at least for a little while"[27] to see if they could ultimately reach an agreement one way or the other.[28] The Court specifically indicated that he thought allowing them to render what it termed an "advisory verdict" would be most helpful in allowing the parties to gain valuable insight into what the jury had

[24] Affidavit of Dan Brown, ¶12; Affidavit of Jim Smith, ¶17
[25] Affidavit of Dan Brown, ¶13; Affidavit of Jim Smith, ¶18
[26] Affidavit of Dan Brown, ¶13
[27] More specifically, since this turn of events was occurring around lunch time on a Friday afternoon, after two full weeks of trial, the Court did not want to keep the jurors there all afternoon. Instead, the Court indicated it would let them discuss the case for a couple of hours simply to see if they came back with anything. If, however, after a few hours they had not returned with an advisory decision, he would dismiss them accordingly.
[28] Affidavit of Dan Brown, ¶14; Affidavit of Jim Smith, ¶19

thought about the proof in hopes that such insight might lead to a future resolution of the case without the need for another trial.[29]

Intrigued by the suggestion, the parties remained in chambers to discuss the parameters of that process with the Court. Most importantly, the parties and the Court unequivocally agreed that any result that might be returned would be advisory only.[30] It was expressly agreed that under no circumstances would anything returned ever be binding on either party.[31] Plaintiffs, in fact, took this notion of a solely advisory verdict even further by suggesting that if an advisory verdict were to be returned, it should remain confidential because they were concerned an "advisory verdict" in favor of PMC would be trumpeted or touted as a "defense win".[32] As such, the Court indicated that, if an "advisory verdict" were to be returned, the proceedings surrounding its return and announcement thus would not be on the record and, hence, would be treated confidentially among the parties.[33]

Before the proposal is discussed with PMC, Plaintiffs confirm the agreement that any "verdict" to be returned will be non-binding and confidential – period

Counsel for PMC then advised the Court that they had to discuss the Court's proposal with their client before they could formally agree to go forward.[34] Anticipating questions that would be asked of them, before leaving chambers counsel for PMC expressly confirmed with both Court and Plaintiffs' counsel that any agreement to give "advisory deliberations" a try would be expressly conditioned on the agreement that any "verdict" returned would be purely advisory only and, hence, non-binding on either party

[29] Affidavit of Dan Brown, ¶14; Affidavit of Jim Smith, ¶20
[30] Affidavit of Dan Brown, ¶15; Affidavit of Jim Smith, ¶21
[31] Affidavit of Dan Brown, ¶16; Affidavit of Jim Smith, ¶22
[32] Affidavit of Dan Brown, ¶15; Affidavit of Jim Smith, ¶22
[33] Affidavit of Dan Brown, ¶16; Affidavit of Jim Smith, ¶22
[34] Affidavit of Dan Brown, ¶16; Affidavit of Jim Smith, ¶23

no matter the result and, in turn, that it would be confidential.[35] Assurances as to both conditions were provided by the Court and Plaintiffs' counsel before departing chambers.[36]

The Court and the parties later gathered in open court, albeit again not on the video record.[37] Counsel for PMC advised that PMC would, indeed, agree to the Court's proposed procedure but, again, only upon the express conditions that this "advisory verdict" would, first and foremost, never be binding on either party no matter the result, and, second, would be treated as confidential settlement discussions.[38] Plaintiffs expressly acknowledged, for a third time, their unconditional agreement to both conditions, as did the Court.[39] With those agreements in hand, counsel advised the Court that PMC would agree to the give the "advisory verdict" proposal a try.

To be perfectly clear, if there had been any equivocation whatsoever by Plaintiffs that they would abide those conditions if and only if the "advisory verdict" had been returned *against them*, PMC would have never agreed to the Court's proposal.[40] Instead, PMC would have asked that proceedings be terminated with the declaration of the mistrial and, in turn, that the jury and parties be sent home with no additional discussions or deliberations taking place.[41] PMC thus affirmatively relied upon Plaintiffs' unequivocal promise that any "verdict" that might be returned would be both confidential and non-binding on either party -- no matter the result -- in hopes that it would help foster

[35] Affidavit of Dan Brown, ¶16; Affidavit of Jim Smith, ¶22
[36] *Id.*
[37] Affidavit of Dan Brown, ¶18; Affidavit of Jim Smith, ¶24
[38] *Id.*
[39] Affidavit of Dan Brown, ¶20; Affidavit of Jim Smith, ¶25
[40] Affidavit of Dan Brown, ¶19; Affidavit of Jim Smith, ¶26
[41] *Id.*

future settlement discussions. Plaintiffs must therefore be estopped from seeking to enforce a "verdict" that they unequivocally agreed would never be enforced.

Plaintiffs, for a fifth time, tell the Court they have no objection or opposition to the Motion to Strike Juror No. 2 and that they are "not going to fight to keep her."

Nevertheless, accepting Plaintiffs' representations as being truthful and, in turn, binding, PMC agreed to the "advisory deliberations" on the conditions described above. But before going back on the record to officially declare the mistrial, the Court once again asked Plaintiffs whether they were sure they did not want to oppose the Motion to strike Juror No. 2.[42] And Plaintiffs' response – for a fifth time – was that they "were not going to fight to keep her" and thus had no objection to the Motion.[43] Having responded to the Court's inquiries -- not just once, not just twice, not just three or four times -- but on five separate occasions that they did not object or otherwise oppose the Motion to excuse Juror No. 2 or, in turn, the need for a mistrial, Plaintiffs as a matter of clear Kentucky law affirmatively and formally agreed to Juror No. 2 being excused. Moreover, with her having been excused, neither Plaintiffs nor PMC agreed to proceed with only eleven jurors; hence, the mistrial was in order and officially declared on the record at that time.

The Court, on the record, expressly raises the possibility that Juror No. 2 might deny the statements but Plaintiffs, having already contemplated that possibility, maintain their position of "not fighting to keep her" and eschew the chance to *voir dire* her or any other juror about the statements attributed to her

Just as importantly, when it went on record to announce that the juror was being excused from additional service and, in turn, that a mistrial was being granted, the Court directly raised the possibility that Juror No. 2 might deny at least some of those

[42] Affidavit of Dan Brown, ¶21
[43] *Id.*

statements.[44] Though clearly a chance to make the record they so desperately now need, Plaintiffs did not seize upon that opportunity but chose, instead, on this particular occasion to say nothing.

Instead, the record reflects that the parties had previously contemplated and discussed the possibility that Juror No. 2 might deny some or all of the statements attributed to her by Juror No. 1.[45] During those earlier discussions with PMC counsel, however, Plaintiffs advised counsel for PMC that they did not believe it necessary to question Juror No. 2 or otherwise make a record upon which they might object to her being stricken, since they were "not going to fight to keep her."[46] As such, they never once asked the Court to conduct a hearing of any kind, to *voir dire* Juror No. 2, to *voir dire* Juror No. 1 further, or to otherwise investigate the situation despite the clear chance and opportunity to do so.

The jurors returned shortly thereafter and, given the agreement to let them see if they could return an advisory verdict for purposes of fostering future settlement discussions, were permitted to return to the jury room to continue discussing the case.[47] Approximately two hours later, they returned to the courtroom to announce they had reached a decision.

In conformity with the parties agreement of confidentiality, receipt of the "advisory verdict" is done off the record.

As the Court and the parties had previously agreed that anything to be returned would be non-binding and, further, confidential, the Court intentionally did not go on the

[44] *See* Trial Transcript 2, February 10, 2023 (Exhibit 7 to Plaintiffs' Motion), pp. 9-10. *See also* Affidavit of Dan Brown, ¶12; Affidavit of Jim Smith, ¶16
[45] *Id.*
[46] Affidavit of Dan Brown, ¶12; Affidavit of Jim Smith, ¶16
[47] Affidavit of Dan Brown, ¶23

video record to receive whatever result was about to be returned. One of the jurors, however, noticed that the red light was not on and advised the Court accordingly.[48] As the transcript of the proceedings that afternoon then makes unequivocally clear, although the Court turned on the recording system, it specifically did not announce that this particular proceeding was "back on the record" and, further, did not announce the case number as it had otherwise done every other time on the-record proceedings resumed before the mistrial was declared and official proceedings concluded.[49] Thus, while the Court activated the recording system, the return of the "verdict" was not on the record and, thus, not part of the official proceedings of this case in an effort to protect the confidentiality as agreed to by the parties.

That fact notwithstanding, the Court read the jury's "advisory verdict." Still acting under the belief that Plaintiffs intended to abide the parties' agreement that that "verdict" was null and void and, hence, non-binding for any purpose, PMC did not thereafter request to poll the jury and did not otherwise make or reserve the right to file post-verdict motions or seek other potential relief.[50] Instead, the jurors and parties were promptly dismissed with expressions of the Court's gratitude for their time and service. Given the lateness of the day, the Court excused the jurors and later advised the parties that, since this same jury pool was scheduled to be back in his courtroom the following week, he would advise them of that day's developments at that time.[51]

Despite the additional agreement that any result that might be returned would be kept confidential, news of the "verdict", along with photographs of the jury's verdict

[48] Affidavit of Dan Brown, ¶24
[49] Affidavit of Dan Brown, ¶25
[50] Affidavit of Dan Brown, ¶26
[51] Affidavit of Dan Brown, ¶27.

form, somehow became public knowledge within hours; indeed, before counsel for PMC could even complete the drive home to Louisville. To be very clear, counsel for PMC did not release news of the "advisory verdict." Plaintiffs' counsel has likewise confirmed that they did not breach the confidentiality of the proceedings and, thus, were not the source of that particular news. While it thus remains unknown who leaked the information, the confidentiality breach remains deeply troubling.[52]

In any event, following the public release of the "advisory verdict," Juror No. 2 became aware of the accusations made against her. She called Plaintiffs' counsel and advised that she intended to speak with the Court about those claims. Plaintiffs' counsel called defense counsel at approximately 7:30 p.m. on Monday, February 13, 2023, to advise of Juror No. 2's call and to advise that they intended to be present for whatever discussion occurred.[53]

That meeting took place in chambers on the morning of February 14, 2023, and suffice it to say, Juror No. 2 indeed took exception to at least some of the statements attributed to her by Juror No. 1 and/or the timing of when those statements were made. The Court will no doubt recall that Juror No. 2 was demonstrably upset about the comments attributed to her and became emotional during the meeting; however, once the Court advised her that the mistrial had been granted "by agreement of the parties," she acknowledged her understanding of the situation but nevertheless remained upset that she had been implicated as the potential source of that need to agree to a declared mistrial.[54]

---

[52] If the Court is inclined to conduct any kind of investigation or hearing into this matter, PMC respectfully submits that it should be into the source of the confidentiality breach and, as such, requests that the Court take whatever action it deems appropriate should such an inquiry ultimately reveal the identity of the person(s) who violated the Court's and the parties' trust by breaching that confidentiality agreement.
[53] Affidavit of Dan Brown, ¶29.
[54] Affidavit of Dan Brown, ¶ 30; Affidavit of Jim Smith, ¶28

The Court later requested the parties to tender proposed Orders of Proceedings reflecting the events having occurred prior to trial. The parties obliged accordingly. Prior to any Order being entered, however, Plaintiffs filed a Motion -- essentially the very same Motion now being addressed -- seeking to instate the jury's "advisory verdict" and enter a judgment in their favor thereon. In direct response to that Motion, the Court entered PMC's tendered Order of Proceedings and, in turn, indicated that its entry of that Order was its ruling on Plaintiffs' Motion thus making the first version of this Motion moot. Shortly thereafter, the present Motion followed.

As demonstrated below, however, Plaintiffs' Motion, simply put, is neither factually nor legally sound. Given Plaintiffs' affirmative agreement to PMC's request to excuse Juror No. 2, their own affirmative refusal thereafter to continue with less than twelve jurors, their conscious decision not to question Juror No. 2, or otherwise make an appropriate record at a meaningful point in time, their unequivocal agreement expressed to the Court that any "verdict" returned would be purely advisory – period – and, in turn, confidential, their Motion should not only be denied but they should be estopped from making it in the first place thus requiring it to be stricken from the record of this case.

ARGUMENT

I. Plaintiffs repeatedly and actively invited the "error" which forms the basis of their motion.

Plaintiffs' Motion is based largely on the altogether erroneous argument that they did not "agree" that Juror No. 2 needed to be excused from further service and, thus, that they did not "agree" to the mistrial. But rather than acknowledge their agreement to everything about which they now complain, Plaintiffs proclaim, instead, that they simply did not object to any of the issues currently before the Court. In turn, they argue that

their multiple failures to object do not equate to an agreement to PMC's Motion seeking to strike Juror No. 2; in other words, they proclaim that their silence did not make them complicit in the striking of Juror No. 2 and the inevitable consequences that flowed therefrom.

It is a fundamental concept of Kentucky law, of course, that agreement or assent to any particular act or course of conduct need not be express. Even when a party remains completely silent – which most certainly was not the case here – his agreement or assent can nevertheless be found by examining the totality of the circumstances.[55] But unlike a situation where, in the heat of trial, counsel may not have heard or appreciated a particular question and, hence, innocently failed to object, Plaintiffs here made a conscious and deliberate choice to voice to the Court that they had no objection and, thus, did not oppose Juror No. 2 being stricken.

Indeed, this case is the polar opposite of that situation. Plaintiffs did not merely remain silent, "forget" or otherwise innocently fail to object to Juror No. 2 being released from further service, they expressly informed the Court – on at least five different occasions – that they affirmatively had no opposition to PMC's Motion and, thus, that they did not object to it. Indeed, the Court specifically asked Plaintiffs multiple times whether they were "sure" or "certain" that they did not want to object. And on each such occasion, Plaintiffs readily affirmed to the Court the certainty of their position. That certainty was then bolstered by explicit subsequent statements indicating that "we are not going to fight to keep her."

Plaintiffs thus did not simply remain silent. They did not "forget" to object. They did not fail to object because they were unaware of the Motion or otherwise appreciate its

[55] *Juett v. Cincinnati, N.O. & T.P. Ry. Co.*, 53 S.W.2d 551, 245 Ky. 379 (Ky. Ct. App. 1932).

significance. Plaintiffs and counsel for PMC discussed this issue together and/or with the Court for nearly three full hours that morning. Each time the issue was raised, Plaintiffs made conscious and affirmative decisions not to oppose the Motion and not to fight to keep Juror No. 2. They then communicated those decisions to the Court in response to direct questions from the Court. Consequently, whether in open court (but not on the record) or in chambers, there was no confusion about Plaintiffs' position and, indeed, the Court itself told Juror No. 2 that the mistrial had been "by agreement of the parties" during its meeting with her and counsel on the morning of February 14, 2023.

Moreover, because they made and expressed the decision that they were "not going to fight to keep her," Plaintiffs made a further choice not to have the Court bring Juror No. 2 in for questioning about the statements attributed to her. Indeed, when it went on record to announce that the juror was being stricken and a mistrial granted, the Court directly raised the possibility that Juror No. 2 might deny at least some of those statements.[56] Though clearly a chance to make the record they so desperately now need, that was, in fact, the one and only time they actually did remain silent; Plaintiffs did not seize upon that opportunity to ask the Court to explore that very possibility.

Instead, the record reflects that the Court was told that the parties had previously contemplated and discussed the chance that Juror No. 2 might, in fact, deny some or all of the statements attributed to her by Juror No. 1. Following those discussions, however, Plaintiffs decided that they did not want to question Juror No. 2 as there was no need to so since they were not objecting to her dismissal from service. As a result of that decision, they never once asked the Court to conduct a hearing, to *voir dire* Juror No. 2, to *voir dire* Juror No. 1, to *voir dire* any other juror, or to otherwise investigate the

[56] *See* Trial Transcript 2, February 10, 2023 (Exhibit 7 to Plaintiffs' Motion), pp. 9-10.

situation despite the clear chance and opportunity to do so. That they now seem to regret that decision is simply not a basis upon which the requested relief can be granted.

Further still, once Juror No. 2 was excused from further service by agreement of the parties, a mistrial was inevitable. If both parties would have agreed to proceed with less than twelve jurors, deliberations could have continued. In this case, though, neither party would agree to proceed with only eleven. Irrespective of what PMC chose to do or not do, as the case may be, Plaintiffs' refusal to proceed with less than the full complement of jurors in and of itself mandated the subsequent decision to grant a mistrial.

These facts readily prove that Plaintiffs did not simply fail to object, they chose not to object. They chose not to oppose. They chose not to fight to keep Juror No.2. They chose to acquiesce. And when directly asked on multiple different occasions whether they opposed PMC's Motion, they expressly advised the Court of the certainty of their position and, thus, never "fought" to keep Juror No. 2. That is not mere silence or oversight. Those were conscious and affirmative agreements to strike Juror No. 2 and to grant a mistrial.

And to be sure, the Court has already once-rejected Plaintiffs' after-the-fact claim that they did not agree to striking the juror and granting the mistrial. The respective Orders of Proceedings tendered by the parties were diametrically opposed on this point. Plaintiffs took the same position that they take here, that is, that they simply "did not object" to PMC's requests. PMC's tendered Order, in contrast, reflected that Plaintiffs' actions under the circumstances constituted an affirmative agreement to the request. The Court rejected Plaintiffs' proposed Order and, instead, entered an Order of Proceedings in

which it expressly recited what it knew to be true, that is, that Plaintiffs agreed to strike Juror No. 2 and, in turn, agreed to the requested mistrial.

In light of those findings and the inescapable conclusion that Plaintiffs, both *de jure* and *de facto*, agreed to those Motions, they simply cannot be heard to complain to this Court – or any other court for that matter – that they are now entitled to any relief whatsoever. Indeed, having actively agreed to those Motions, they cannot now complain about the purported "errors" they themselves invited.[57]

A. The "Invited Error" Doctrine Precludes the Relief Requested by Plaintiffs.

"The doctrine of 'invited error' refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit."[58] In turn, "invited errors are those that reflect a party's knowing relinquishment of a right."[59] As with its contemporaneous objection counterpart, invited errors are not subject to post-trial review by any court.[60] Indeed, Kentucky's then-highest Court has even gone so far as to say that "[n]othing is better settled in this jurisdiction than that a party may not invite an error and then complain of it."[61] The rationale behind the notion is that a party will not be heard to complain of an error which he himself has induced the trial court to commit,[62] as doing so would permit a party "to take advantage of an error produced by his own act."[63]

---

[57] *See, e.g., Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (a party is estopped from raising post-trial any errors he invited).
[58] *Harvis v. Roadway Express, Inc*., 923 F.2d 59, 60 (6th Cir. 1991) (citation omitted).
[59] *See Quisenberry*, 226 S.W.3d at 38.
[60] *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006); *Miles v. Southeastern Motor Truck Lines*, 173 S.W.2d 990, 998 (Ky. 1943).
[61] *Sparks v. Doss*, 253 S.W.2d. 245, 247 (Ky. App. 1952).
[62] *Miles v. Southeastern Motor Truck Lines*, 173 S.W.2d 990, 998 (Ky. 1943).
[63] *Wright v. Jackson*, 329 S.W.3d 560 (Ky. 1959) ("We have often held that a party is estopped to take advantage of an error produced by his own act."), and *Miles v. Southeastern Motor Truck Lines*, 173

Instead of it being "invited error," Plaintiffs argue that, at most, their failure to object equates to palpable error which can thus be reviewed under the palpable error standard. Kentucky law, however, plainly distinguishes between "forfeited errors" and "waived errors;" it is a distinction which proves immediately fatal to Plaintiffs' position here: "There are essentially two types of unpreserved errors: "forfeited errors, which are subject to plain [or palpable] error review, and waived errors, which are not."[64] Whereas "forfeited errors" are those that were not asserted due to oversight, inattention, or ineffective assistance of counsel, "waived errors" occur "when a party knowingly relinquishes a right or when a party invites the court to err."[65]

On this point, the Kentucky Supreme Court's decision in *Tackett v. Commonwealth* is dispositive.[66] In *Tackett*, the prosecution sought to introduce into evidence a report from a physician in which that physician had identified Mr. Tackett as the perpetrator of a particular crime:

> The trial court specifically asked Tackett's counsel if he had any objection to the admission of [the physician's] report which identified Tackett as the perpetrator, and he stated that he did not…. In the face of the explicit statement that he had no objection to the entry of the report into evidence and a failure to object to Dr. Hunt's testimony, Tackett cannot now claim that Dr. Hunt's testimony rose to the level of palpable error.[67]

The *Tackett* Court then proceeded to review the defendant's claim under an "invited error" analysis. Its conclusion is instructive and, indeed, immediately fatal to Plaintiffs' argument in this case:

S.W.2d 990, 998, 295 Ky. 156, 173 (1943) ("It is the rule that one cannot complain of an invited error."). *Gray v. Commonwealth*, 203 S.W.3d 679, 686 (Ky. 2006) ("Generally, a party is estopped from asserting an invited error [post trial]" (brackets added))

[64] *Mullins v. Commonwealth*, 350 S.W.3d 434, 439 (Ky. 2011) (brackets in original) *citing Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011).

[65] *Mullins*, 350 S.W.3d at 439 (emphasis added).

[66] 445 S.W.3d 20 (Ky. 2014).

[67] *Id.* at 29 (emphasis added).

> When, as here, a party not only forfeits an error by failing to object to the admission of evidence, but specifically waives any objection, the party cannot complain on appeal that the court erroneously admitted that evidence. Here, Tackett explicitly stated that he had no objection to the admission of Dr. Hunt's report, which stated that Tackett was the perpetrator. Thus, he explicitly waived any objection to the admission of that evidence, whether by way of the report or through Dr. Hunt's testimony about the report's contents. Because Tackett waived this error, it … is not subject to review....[68]

Put simply, affirmatively responding to this Court's multiple inquiries that they had no objection is an affirmative waiver of that objection as a matter of law. Not just once, not just twice, not even just three or four times, but every single time the Court asked whether they objected to the Motion to strike Juror No. 2 or to declare mistrial or whether were "sure" they did not object, Plaintiffs unequivocally told the Court they did not object and were certain of that decision.

As *Tackett* thus makes perfectly clear, this is not a case of "palpable error" where Plaintiffs merely failed or somehow forgot to object due to oversight or simple inadvertence by counsel. The parties and the Court discussed the Motion to strike and the potential for a mistrial for more than three hours that morning. Plaintiffs affirmatively advised the Court on multiple occasions that they did not object to the Motion. Those repeated statements were an affirmative waiver and, thus, "invited error" which, as a matter of law, cannot serve as the basis for the relief requested in either of the present Motions.

Of similar import is the decision of the Georgia Supreme Court in *State v. Johnson.*[69] In that case, one defendant moved for a mistrial. In response to that motion,

[68] *Tackett*, 445 S.W.3d at 29 (emphasis added).

[69] 267 Ga. 305, 477 S.E.2d 579 (1996).

however, a codefendant remained completely silent and expressed no objection to the request. The trial court ultimately granted the mistrial. When the silent codefendant later moved for relief due to the allegedly erroneous granting of the mistrial, the Court, relying upon its earlier decision in *McCormick v. Gearinger,*[70] held that the codefendants "failure to object to a mistrial, coupled with even tacit joining of co-defendant's motion for mistrial, constitutes consent to mistrial." Accordingly, the Court had little trouble concluding that the codefendant's silence and failure to object in those circumstances amounted to at least implied consent to the mistrial.[71]

The circumstances in *Johnson* are sufficiently similar to the present matter to justify the same conclusion. Although the party consciously choosing not to object, here, was the Plaintiff as opposed to the co-defendant in *Johnson*, the same logic and rationale absolutely apply. Indeed, that logic and reasoning is even stronger in this case because Plaintiffs did not simply remain silent like the *Johnson* codefendant. To the contrary, like the defendant in *Tackett,* each time they were asked and given the opportunity to object, to oppose the motion, to fight to keep the juror and, each time they were given the opportunity to reconsider their position, they did not simply stay mute. They spoke. And each time they spoke, they assured the Court they had no objection, no opposition, and that they were not going to fight to keep her. Respectfully, that is not merely "implied consent," that is active consent.[72]

---

[70] 253 Ga. 531, 322 S.E.2d 716 (1984).

[71] *Johnson,* supra at 305-306, 477 S.E.2d 579.

[72] Even in the absence of an affirmative statements of "no objection," the mere failure to object to a mistrial amounts to "implied consent." *See also Akery v. State,* 515 S.E.2d 853, 237 Ga.App. 549 (Ga. App. 1999) (the defendant "did not object at trial to the state's motion for mistrial. Instead, he stated repeatedly that he had no position on the motion. Thus, he impliedly consented to the granting of a mistrial"), *Hope v. State,* 239 Ga.App. 331, 521 S.E.2d 372 (Ga. App 1999) (even in criminal cases, a defendant who does not object to a mistrial waives any right to complain about a retrial on double jeopardy grounds).

Either way, this is not a case where Plaintiffs' failure to object is merely a "forfeited error" based upon inadvertence, inattention, or some other failure to appreciate the implications of PMC's Motions. Quite to the contrary, this is a case where Plaintiffs were directly asked -- on multiple occasions -- for their position on the Motion to Strike. Not one single time did they simply remain silent. Instead, they responded to the Court's multiple inquiries and expressed that they had no objection or opposition to the Motion and, thus, that they were not going to "fight to keep" Juror No. 2. Just like the defendant in *Tackett*, far from an inadvertent or otherwise innocent failure to object, theirs was a knowing, intelligent, and voluntary waiver of any objection to the Motion to strike and consequent mistrial. It was an open and unqualified agreement for the Court to do exactly what it did.

Given the circumstances of this case and the Court's already-made finding in its Order of Proceedings that Plaintiffs agreed to Juror No. 2 being stricken and to PMC's consequent Motion for mistrial,[73] the "invited error doctrine" affirmatively precludes them from raising either issue in this Court or later on appeal. By agreeing to both Motions, by choosing "not to fight" to keep the juror, and by choosing not to make the record they now clearly wish they would have made, Plaintiffs actively invited the Court to strike Juror No. 2 and grant the mistrial. As they cannot now be heard to complain that they received the very mistrial they agreed to, the Motion should therefore be denied in its entirety.

---

[73] Because the Order of Proceedings is consistent with Kentucky law and thus accurately reflects that Plaintiffs agreed to Juror No. 2 being stricken and, in turn, agreed to the mistrial, that Order of Proceedings need not be "modified" or "corrected" in any way. Plaintiffs' alternative Motion seeking to modify that Order of Proceedings to reflect that they did not agree should likewise be denied.

II. Plaintiffs' express and unequivocal agreement that any "advisory verdict" would never be binding on either party and would otherwise be confidential, judicially estops them from arguing that verdict should now be binding and a matter of public record.

Apart from inviting the Court to excuse Juror No. 2 from further service and agreeing to the mistrial, Plaintiffs should be formally estopped from pursuing this Motion and their Motion should, in turn, be stricken from the record in this case. More specifically:

> The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding . . . . The 'prior success' requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits ... judicial acceptance means only that the first court has adopted the position urged by the party." At its very core, then, "Judicial estoppel is an equitable principle intended to protect the integrity of the judicial process."[74]

Having already agreed to the mistrial, during lengthy off-the-record discussions in chambers and later in open court, Plaintiffs readily agreed to the Court's proposed "advisory verdict" proposal – a solution that was expressly conditioned upon the agreement that any "verdict" that might be returned would never be binding on any party and, further, that it would be kept confidential among the parties. On more than one occasion during those discussions, counsel for PMC advised the Court and counsel for Plaintiffs that PMC would agree to the "advisory verdict" proposal if and only if it was agreed to that any "verdict" that might be returned would, indeed, be purely advisory, and hence, could only be used for purposes of fostering future settlement discussions.

At no point in time was there ever any equivocation from Plaintiffs – or the Court – on that point. There was never even the barest of suggestions that Plaintiffs only

[74] *Colston Investment Co. v. Home Supply Co*., 74 S.W.3d 759, 763 (Ky. App. 2001)(citations omitted).

intended to accept a verdict as "advisory" if that verdict were to come back against them. Instead, they readily agreed that it would never be binding, no matter the result. PMC reasonably and justifiable relied on that agreement, as did the Court, in deciding to move forward with the "advisory deliberations."

To be perfectly clear, if there had been any inkling of any kind that Plaintiffs did not intend to abide that agreement in the event the "advisory verdict" were to come back in their favor, PMC would never have agreed to the proposal. Instead, it would have asked the Court, after declaring the mistrial, to simply discharge the jurors from further service and send everyone home. No verdict, advisory or otherwise, would have been returned and the Court would not be considering this Motion.

Both the Court and PMC thus justifiably relied, much to their great detriment, on Plaintiffs' agreement regarding the "advisory jury" proposal. Whether under specific principles of judicial estoppel and/or under general principles of promissory estoppel,[75] Plaintiffs must be prohibited from taking the position in this Motion that the "verdict" should be binding on PMC – when the only reason the "advisory verdict" was returned in the first instance was because Plaintiffs expressly and repeatedly agreed that it never would be binding. Thus, not only should Plaintiffs' Motion be denied outright, it should be stricken from the record in this action.

[75] *See, e.g., Rivermont Inn v. Bass Hotels & Resorts*, 113 S.W.3d 636 (Ky. Ct. App. 2003) ("Promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement"); *Meade Const. Co., Inc. v. Mansfield Commercial Elec, Inc*., 579 S.W.2d 105, 106 (Ky. 1979) (citation and internal quotation marks omitted) ("Promissory estoppel is described as follows: 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'")

III. Sound public policy encourages utilization of creative techniques to foster settlement discussions amongst parties; accordingly, allowing Plaintiffs to renege on such an agreement simply because they received an unexpected result effectively undermines that policy.

As a matter of sound public policy, Kentucky law encourages the settlement and other resolution of claims in an effort to reduce the burden on the court system and to encourage the efficient disposition of cases. Kentucky's courts therefore promote and utilize mediation, arbitration, and other creative solutions that might foster the resolution of lawsuits. As a result, "KRE 408 generally prohibits the admissibility of 'conduct or statements made in compromise negotiations.' This evidence is excluded primarily to support the Commonwealth's general policy of encouraging negotiation and settlement of disputes out of court."[76]

Among the things excluded by KRE 408 is "conduct occurring during the course of settlement negotiations."[77] Because the Court specifically designated its "advisory verdict" proposal to be solely for the purpose of potentially informing the parties as to future settlement discussions, the entirety of the advisory deliberations after the declaration of the mistrial and termination of all formal trial proceedings was "conduct occurring during the course of settlement discussions." Nevertheless, Plaintiffs now want to use that settlement conduct, not for the purposes of informing future settlement discussions, but as the basis of a $10,000,000 judgment against PMC despite their very own agreement that that could never happen.

Not only is their after-the-fact effort to walk away from their express agreements in this case wildly inequitable, unjust, and unfair, but allowing them to now take both sides of the same issue affirmatively undermines the sound public policy of this state.

[76] *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846,854 (Ky. 2016).
[77] *Id.*

Indeed, in the occasional instance when a mistrial is required or granted by agreement during the course of deliberations, the proceedings up to that point, ideally, should not be for naught. Instead, Courts should be encouraged to find a way to get the parties some benefit and insight from the proceedings in hopes that it might ultimately lead to a resolution and obviate the need for a retrial.

Given the circumstances of this case, the Court laudably proposed a unique and creative solution expressly intended to aid the parties in future settlement discussions. The jury's advisory deliberations and "verdict" thus became conduct occurring incidental to settlement discussions. Since that conduct could never even be introduced into evidence for any purpose, it necessarily follows that such conduct, as a matter law, cannot serve as the basis for a judgment to be entered in this case – especially when Plaintiffs unconditionally agreed that any "verdict" that might be returned would never be binding on either party.

As a matter of sound public policy, then, the use of an agreed-to, non-binding "advisory verdict" procedure when a mistrial is declared during deliberations should be actively encouraged, especially when both parties affirmatively agree as much. But if either party to such an agreement is permitted to successfully take both sides of the same issue -- to take the good but not the bad -- it will never be used again. And in that situation, Kentucky's courts and litigants will lose an incredibly valuable and insightful tool which would have a high degree of likelihood to lead a future resolution of any given case. In short, denying Plaintiffs' Motion serves and fosters Kentucky's sound public policy of encouraging the resolution of lawsuits.

IV. Plaintiffs affirmatively waived the opportunity to *voir dire* Juror No. 2 – and all other jurors – and their request for a post-trial evidentiary hearing should be denied.

Kentucky law has long recognized that the determination whether to exclude or strike a juror for cause is one reserved solely for the trial court to make upon an examination of the totality of the circumstances.[78] It is not now, nor has it ever been, for the jurors to make that determination for themselves. In other words, jurors are not competent to make determinations that their fellow jurors are or are not qualified or otherwise eligible to continue in service on any given case. As such, whenever concerns about another juror's ability to be fair and impartial come to light, the appropriate procedure is for those concerns to be brought to the Court's attention for determination as appropriate.[79] While Plaintiffs retrospectively question his motivation for doing so, bringing his concerns to the attention of the Court is exactly what Juror No. 1 did -- and exactly what should have been done – in this case.

In contrast, the juror affidavits submitted by Plaintiffs in and of themselves prove that it was not Juror No. 1 that usurped the Court's role in this case, it was the other jurors who were concerned that Juror No. 2's comments might somehow disqualify her from continued service yet took it upon themselves to decide that question instead of letting the Court do its job in that regard. Indeed, the affidavits establish that Juror No. 2, in fact, expressed comments which, at the very least, caused numerous other jurors to

[78] *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008) *citing Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002)); *see also Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004).

[79] *See, e.g.*, *Doyle By and Through Doyle v. Marymount Hosp., Inc.*, 762 S.W.2d 813, 815 (Ky.App.1988) (internal citations omitted) (recognizing that Kentucky law precluding the use of post-judgment juror affidavits to attach a verdict is based upon the "the theory is that a juror will recognize and report any misconduct to the trial court immediately and that to allow him to do it after the verdict would invite the very kind of mischief the rule was designed to obviate").

question whether she was somehow biased against PMC. They then talked about it and made the decision for themselves that she was okay to continue.

Such inquiries and determinations, of course, were not then, are not now, and never will be for the jurors themselves to decide. Because the affidavits are submitted for the purpose of suggesting that Juror No. 2 was, in their opinion, okay to continue in service and, thus, ultimately opine on legal questions reserved exclusively for the Court to make, they are incompetent for any purpose in this litigation and should be stricken from the record of this case.[80]

But even setting aside the fact that the juror affidavits submitted by Plaintiffs are incompetent for any purpose – much less to justify a full-blown evidentiary hearing with the entire jury present – Plaintiffs' request to *voir dire* the jury nevertheless fails for an even more fundamental reason. More specifically, the time to have conducted that hearing was the morning of February 10, 2023 – the day that these issues arose. Plaintiffs had every opportunity to have had the Court call Juror No. 2 – or any other juror they wanted to *voir dire* – into the courtroom and ask whatever questions they wanted to ask.

But they chose to go an altogether different direction. Instead of asking for a hearing to make a record and make even the slightest effort to oppose PMC's Motion to strike Juror No. 2, they told the Court multiple times that they did not object to the Motion, they did not oppose the Motion, and they were not going to fight to keep Juror No. 2. By voicing their complete lack of opposition to the Motion to the Court, Plaintiffs

[80] *See, e.g., Tamme v. Commonwealth,* 973 S.W.2d 13, 32 (Ky. 1998) (noting that witnesses cannot opine or otherwise testify on questions of law).

agreed to Juror No. 2 being stricken and, as such, invited the very "error" they now seek to rectify.[81]

Even more specific to this particular point, though, during the prolonged break in the proceedings that morning, counsel for PMC and Plaintiffs' counsel had various discussions including, in particular, whether Juror No. 2 needed to be questioned about the statements attributed to her. Having decided that they did not want to "fight to keep her," however, Plaintiffs' counsel advised counsel for PMC that they did not think it necessary to bring Juror No. 2 in to be questioned. In other words, there simply was no need to conduct the hearing since Plaintiffs affirmatively agreed that she should not continue in further service.

As such, when the Court *sua sponte* raised the potential that Juror No. 2 might deny some or all of the statements attributed to her, Plaintiff this time did remain silent. They did not seize upon the Court's suggestion and ask that she be brought in to answer questions or otherwise give her the opportunity to confirm or deny the circumstances of the statements she reportedly had made. Counsel for PMC, however, noted on the record their discussions with Plaintiffs' counsel on this point that morning and that the parties had actively contemplated the chance that she might deny what Juror No. 1 had reported to the Court. Plaintiffs did not take exception to those comments but instead remained silent – at least on that particular point – and thus chose not to ask for any kind of hearing or opportunity to *voir dire* Juror No. 2.

In short, the time for Plaintiffs to have fought to keep Juror No. 2 was <u>before</u> she was stricken by agreement and <u>before</u> the mistrial was likewise declared by agreement.

[81] *Tackett*, 445 S.W.3d at 29 (explicitly advising the Court that one has no objection is an affirmative waiver of any objection and must thus be treated as "invited error").

For whatever reason, Plaintiffs chose not to do so. Their decision was thus not an error of omission; that is, that they did not know they could or needed to *voir dire* Juror No. 2. Quite to the contrary. Because it had been discussed with counsel for PMC that morning -- well before the Court again brought it expressly to their attention – Plaintiffs recognized that Juror No. 2 might deny some or all of the statements attributed to her. They knew they could ask to bring her in, to give her that very chance, and to make an appropriate record. But they chose a very different path.

For those reasons, Plaintiffs' claims that the information presented in the juror affidavits somehow qualifies as "newly discovered evidence" sufficient to justify vacating the Order of Proceedings and, in turn, entry of judgment in their favor on the "advisory verdict." Kentucky law, of course, is directly to the contrary. Indeed,

> Newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence." *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008). *See also Sanders v. Commonwealth*, 339 S.W.3d 427, 437 (Ky. 2011) (holding that CR 60.02 allows appeals based upon claims of error that "were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court").

The information contained in the juror affidavits was readily available to Plaintiffs at the time of trial and could have been made known to them at that time through the exercise of reasonable diligence. Simply put, rather than make the conscious decision not to fight to keep Juror No. 2, they had every opportunity to make a record during the three hours that this matter was being discussed that morning – especially after the Court expressly raised the possibility that Juror No. 2 might deny everything attributed to her; yet, at no point in time did they chose to request such a hearing at a point in time when it might have actually mattered.

Plaintiffs thus assumed the risk of incomplete or inconsistent information having been communicated to them when they made the decision not to fight to keep or question Juror No. 2 or to otherwise conduct an inquiry into the situation. That was a conscious and considered choice which they affirmatively chose to eschew instead of exploring and making the appropriate record. Plaintiffs affirmatively waived the opportunity to conduct a hearing and to *voir dire* the jurors at a meaningful point in time. This, too, is "invited error" which Kentucky law expressly precludes them from raising at this point in time.

Given those affirmative choices, they simply cannot be heard to complain that, if only the matter had been explored before the juror was stricken and the mistrial granted, they might have made a different decision. Nor can they credibly claim that this was not evidence that they could have discovered with the exercise of reasonable diligence. They had the opportunity to make that record on a real time basis, they just chose not to.

CONCLUSION

Plaintiffs' Motion is neither legally nor factually sound. By representing – multiple times – that they did not object to or otherwise oppose the Motion seeking to excuse Juror No. 2 from further service in direct response to the Court's questions as to their position on that very Motion, Plaintiffs actively and affirmatively agreed – as a matter of law – to the Motion. The decision to excuse Juror No. 2 and declare a mistrial is neither "forfeited error" or "palpable error." It is invited error and Kentucky law formally estops them from claiming any relief in this Motion. Further still, both the Court and PMC affirmatively relied on Plaintiffs' agreement that any "advisory verdict" that might be returned would never be binding on either party regardless of the result.

They are therefore equitably estopped from taking the exact opposite position now that the received an unexpected result.

Plaintiffs' Motions should therefore be denied in all respects and, indeed, both Motions stricken from the record in this case.

Respectfully submitted,

/s/ Daniel G. Brown
Daniel G. Brown – KY 85873
James E. Smith – KY 90979
Madeline M. Berry – KY 98551
Gazak Brown, P.S.C.
3220 Office Pointe Place, Suite 200
Louisville, Kentucky 40220
(502) 412-5020 Tel.
(502) 412-1004 Fax
dbrown@gazakbrown.com
jsmith@gazakbrown.com
mberry@gazakbrown.com
Service Email:
pleadings@gazakbrown.com
sjacobsvaldes@gazakbrown.com
Counsel for Defendant,
Pikeville Medical Center, Inc. d/b/a
Pikeville Medical Center

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Court, and that a true and correct copy was sent via electronic service and/or U.S. Mail, this 26th day of April 2023 the following:

Ross F. Mann
Kevin A. Osborne
Michael Rothacker
Ross Mann Law, PLLC
2257 Executive Drive
Lexington, Kentucky 40505
606-367-7116 Tel.
ross@rossmannlaw.com
kevin@rossmannlaw.com
michael@rossmannlaw.com
jordan@rossmannlaw.com
Counsel for Plaintiffs

A. J. Ryan (KY61035)
130 W. 2nd Avenue
Williamson, WV 25661
304-235-7510 Tel.
304-235-5585 Fax
aj@wvdsl.net
Co-Counsel for Plaintiffs

Brian M. Jasper
Thomas Law Offices, PLLC
9418 Norton Commons Blvd, Suite 200
Prospect, KY 40059
502-473-6540 Direct
Brian.Jasper@ThomasLawOffices.com
Co-Counsel for Plaintiffs

/s/ Daniel G. Brown
One of counsel for Defendant,
Pikeville Medical Center, Inc.