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SUPREME COURT OF KENTUCKY
2010-SC-0397-D
(2007-CA-2112 & 2007-CA-2177)
(JEFFERSON CIRCUIT COURT ACTION NO. 06-CI-001717)

BRENDA C. OSBORNE

APPELLANT/MOVANT

V.

STEVEN H. KEENEY;
CAROLINA CASUALTY INSURANCE CO.; AND
MONITOR LIABILITY MANAGERS, INC.

APPELLANTS/RESPONDENTS

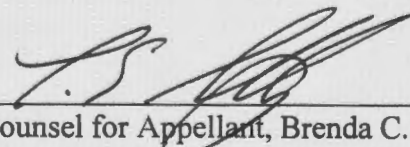
REPLY BRIEF FOR APPELLANT, BRENDA C. OSBORNE

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Reply Brief on behalf of Appellant, Brenda C. Osborne, was sent by First Class U.S. Mail this 16th day of September, 2011 to Sheryl G. Snyder, Griffin Terry Sumner, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, Kentucky 40202; Matthew W. Breetz, Andrew G. Beshear, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202; Douglas C. Ballantine, Stoll Keenon Ogden PLLC, 500 West Jefferson Street, Suite 2000, Louisville, Kentucky 40202; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Div. 6, 700 West Jefferson Street, Louisville, Kentucky 40202. It is further certified that the record on appeal was not withdrawn by Appellant, Brenda C. Osborne.



Counsel for Appellant, Brenda C. Osborne

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PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief will be to respond to Appellee Steven Keeney's counterstatement of the case contained in his Brief for Appellee, Steven H. Keeney, and to respond to Appellees, Carolina Casualty Insurance Company and Monitor Liability Managers Inc.'s arguments set forth in their Brief for Appellees.

The particular issues to which this Reply Brief is addressed are as follows;

- (1) Reply to Brief for Appellee, Steven H. Keeney
 - (a) The Court of Appeals erred in vacating those portions of the jury's verdict which awarded \$500,000 to Brenda Osborne for the personal injury which she endured as a direct result of the airplane crashing into her home and \$250,000 for her emotional distress suffered as a result of Attorney Keeney's negligence, gross negligence and fraud.
 - (b) The Court of Appeals erred in vacating the jury's award of "Lost Punitive Damages" in spite of the clear and undisputed evidence of the airplane pilot's gross negligence.
 - (c) The Court of Appeals erroneously reduced the jury's punitive damage award against Attorney Keeney from \$3,500,000 to \$1,000,000.
- (2) Reply to Brief for Appellees, Carolina Casualty Insurance Company and Monitor Liability Managers, Inc.
 - (a) The Court of Appeals erroneously concluded that the Trial Court lacked jurisdiction to permit the filing of Osborne's Second Amended Complaint adding Carolina Casualty Insurance Company and Monitor Liability Managers, Inc. as additional parties to this action.

ARGUMENT

In his Brief, Appellee Steven H. Keeney (hereinafter “Attorney Keeney”) not only mischaracterizes the evidence introduced at trial but continues to totally ignore and violate the basic rule of appellate review that the evidence is to be viewed in a light most favorable to the prevailing party at trial with all reasonable inferences to be drawn therefrom in favor of upholding the jury’s verdict.¹

The record does support Ms. Osborne’s claim that she suffered physical and emotional injuries.

In his Brief, Steven Keeney takes statements from the record out of context and mischaracterizes the evidence in an attempt to suggest that this was a minor impact and that Ms. Osborne did not suffer any physical harm. Such misuse of testamentary evidence, of course, is violative of the manner in which trial evidence must be viewed on appeal.

Contrary to Attorney Keeney’s suggestion, Ms. Osborne described the impact as being a “sonic boom” which shook her home and dislodged doors. Her chimney was knocked from the roof and the aircraft sliced through the top of her home. Ms. Osborne ran screaming from her home with flames shooting behind her. Her home was totally destroyed.² Ms. Osborne was physically shaking and in shock. Her blood pressure was taken and was dangerously high and she was immediately transported to the hospital emergency room.³

¹ Childers Oil Co. Inc. v. Adkins, 256 S.W.3d 19, 25 (Ky. 2008); Bayless II v. Boyer M.D., 180 S.W.3d 439, 451 (Ky. 2005); Whitten v. Pack, 237 S.W.3d 133, 135 (Ky. 2007); United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999); Bierman v. Klapheke II, 967 S.W.2d 16, 19 (Ky. 1998); Meyers v. Chapman Printing Co., 840 S.W.2d 814, 822-823 (Ky. 1992); Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-462 (Ky. 1990); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984).

² VR No. 3:8/20/07:1:18:10-1:28:40 p.m.

³ VR No. 3:8/20/07:1:20:44-1:21:33 p.m.

In the hospital emergency room, she was attended by Dr. Rhonda Sivley, a physician board certified⁴ in Internal Medicine who was familiar with her medical history. Dr. Sivley described her as being “devastated” and testified that her blood pressure was sky high. She was tachycardic, in shock and presented a potentially life-threatening situation.⁵ When specifically asked whether Ms. Osborne sustained any physical harm, Dr. Sivley testified as follows;

Q. In your opinion, Dr. Sivley, did Brenda sustain actual physical harm as a result of the plane crashing into her home, even though it did not come into physical contact with her personally?

A. Absolutely.⁶

Q. In your opinion here today - - we are now in March 2007 - - the same as it was in October 2004 when you authored this letter, that Brenda sustained both emotional and **physical harm** as a result of this airplane crash into her home?

A. Absolutely.⁷

The record not only supports but clearly demonstrates the fact that Keeney rendered “no legal services” to earn legal fees in excess of \$50,000.

In his Brief for Appellee, Attorney Keeney makes the gratuitous and unsubstantiated statement that he “negotiated an initial payment to allow her to purchase a new home”. The uncontradicted evidence is that Ms. Osborne had obtained estimates substantiating her entitlement to the full amount of benefits for the structural damage to her home under her homeowner’s policy with State Farm before she ever even met Attorney Keeney. The amount of the payment was never “negotiated” by Attorney Keeney as State Farm readily paid the maximum amount of benefits for structural damage under its policy. In fact, the State Farm claim representative brought a check in that amount to their initial meeting. Attorney Keeney’s name had been placed on that check solely because he had sent State

⁴ VR No. 6:8/23/07:9:43:10-9:43:24 a.m.

⁵ VR No. 6:8/23/07:9:49:10-9:49:41 a.m.; VR No. 6:8/23/07:9:54:30-9:54:49 a.m.

⁶ VR No. 6:8/23/07:9:53:24-9:53:40 a.m.

⁷ VR No. 6:8/23/07:11:42:59-11:43:15 a.m.

Farm a letter a few days prior to that meeting instructing State Farm to include his name on that check.⁸

To the same effect, Attorney Keeney did absolutely nothing to assist Ms. Osborne in recovering payment for her personalty under her homeowner's policy with State Farm. On her own, Ms. Osborne compiled a large binder documenting her items of damaged personalty with estimated values and supporting documentation. That binder was compiled by Ms. Osborne before she ever met Attorney Keeney. Any and all documentation with respect to Ms. Osborne's lost or damaged personal property was obtained and compiled by Ms. Osborne without any assistance from Attorney Keeney.⁹

Attorney Keeney's further contention that he provided a valuable service to Ms. Osborne because he communicated with her "treating physician about her mental and physical condition"¹⁰ is absurd. As previously described in Ms. Osborne's Brief for Appellant, Attorney Keeney never communicated with Dr. Sivley until after the time period for the filing of Ms. Osborne's lawsuit against the airplane pilot/owner had expired. At that time his purpose was to attempt to persuade Dr. Sivley to give false testimony regarding Ms. Osborne's competence so as to enable him to avoid a summary judgment due to his late filing of her lawsuit. In his attempt to give this Court the false impression that he rendered valuable legal services to Ms. Osborne, Attorney Keeney fails to refute the numerous omissions and commissions set forth in Appellant's Brief including but not limited to Attorney Keeney's falsification of his employment contract with Ms. Osborne and his fraudulent endorsement of a homeowner's payment check and depositing same in his own personal checking account to cover his overdrawn account.

⁸ VR No. 3:8/20/07:2:16:30-2:20:25 p.m.; VR No. 4:8/21/07:10:31:33-10:34:22 a.m.

⁹ VR No. 4:8/21/07:10:34:50-10:35:39 a.m.; VR No. 4:8/21/07:10:58:12-10:58:31 a.m.

¹⁰ Brief for Appellee, p. 7.

In sum, the evidence was overwhelming that Attorney Keeney not only failed to render any valuable legal service for Ms. Osborne but that his grossly negligent and wrongful conduct deprived her of compensation for her personal and property damage losses.

The record clearly supports Ms. Osborne's contention that Attorney Keeney never informed her that her claims against the airplane pilot/owner were barred by limitations.

Attorney Keeney's suggestion that Ms. Osborne "was aware of the statute of limitations issue" is not only unsubstantiated but contradicted by the evidence. At no time did Attorney Keeney advise Ms. Osborne that her lawsuit was barred by limitations.¹¹ At no time did Attorney Keeney ever advise her that a motion had been filed to dismiss her lawsuit against the airplane pilot/owner due to limitations and at no time did Attorney Keeney ever inform her that the Court had actually dismissed her lawsuit against the airplane pilot/owner. Ms. Osborne testified that Attorney Keeney never informed her of his numerous commissions and omissions either prior to or subsequent to the filing of her lawsuit against the airplane pilot/owner.¹²

Other evidence further supported Ms. Osborne's testimony in this regard. Attorney Brian Sullivan who represented the airplane pilot/owner in the lawsuit which Attorney Keeney had filed suspected that he would not tell Ms. Osborne that her lawsuit had been dismissed. Attorney Sullivan conveyed that information to Dr. Sivley¹³ and Dr. Sivley conveyed that information to Ms. Osborne.¹⁴

¹¹ VR No. 4:8/21/07:11:21:05 a.m.

¹² VR No. 5:8/22/07:10:14:39-10:16:47 a.m.

¹³ VR No. 3: 8/17/07:11:33:254-11:33:58 a.m.; Attorney Sullivan further testified that when he obtained Ms. Osborne's deposition he found her to be "truthful" in her testimony, VR No. 3:8/17/07: 11:06:00-11:06:56 a.m.

¹⁴ VR No. 6:8/23/07:10:05:45-10:06:25 a.m.

Lastly, Attorney Keeney's statement¹⁵ that Ms. Osborne "initially supported the legal strategy to assert Kentucky's incapacitation statute" is inaccurate and contradicted by the evidence.¹⁶

I. The Court of Appeals erred in vacating those portions of the jury's verdict which awarded \$500,000 to Brenda Osborne for the personal injuries which she endured as a direct result of the airplane crashing into her home and \$250,000 for her emotional distress suffered as a result of Attorney Keeney's negligence, gross negligence and fraud.

In his Brief, Attorney Keeney criticizes Ms. Osborne for not discussing this Court's Opinion in Steel Technologies v. Congleton, 234 S.W.2d 920 (Ky. 2007).¹⁷ Congleton, of course, dealt with claims for pre-impact damages for emotional harm whereas the within action involves claims for damages for both emotional and physical harm following an impact. In this regard, the within action is more closely analogous to the facts presented in Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) and Sutton v. Great Lakes Greyhound Lines, 51 F.Supp. 715 (W.D. Ky. 1943) discussed at length in Ms. Osborne's Brief.

In this regard, it remains Ms. Osborne's contention that the facts presented in the within action satisfy any "touching" requirement under Kentucky law even more so than the facts presented in Deutsch. In Deutsch, the "touching" was the unfelt and unseen radiation with only the "risk" of physical harm. In the within action, of course, Ms. Osborne both heard and felt the shaking of her home during the airplane crash and immediately experienced and displayed signs of physical harm for which she required immediate emergency medical treatment.

¹⁵ Brief for Appellee Steven Keeney p. 8.

¹⁶ See Brief for Appellee Brenda C. Osborne in companion case, Docket No. 2010-SC-000430.

¹⁷ In a somewhat unprofessional comment on page 10 of his Brief for Appellee, Attorney Keeney accuses Ms. Osborne's counsel of "a surprising lack of candor". (Brief for Appellee, p. 10).

However, in addition to her contention that the facts surrounding the crashing of the aircraft into her home which she was occupying and the actual physical harm resulting therefrom satisfied any "touching" requirement for the recovery of compensatory damages, Ms. Osborne has also requested that this Court revisit this issue and either abandon any "touching" requirement or craft a new and more reasonable rule that would permit innocent injured claimants to recover compensation for their emotional and physical harm while still taking into account any concerns about the danger of fraud and speculation. In this regard, Ms. Osborne's request appears to be consistent with this Court's reasoning in Congleton. In Congleton, the Plaintiff's estate had implied that this Court "should simply do away with the impact rule all together". (At p. 929). In that case, however, the Court stated that the crafting of such a rule would be difficult "without the proper case". (At p. 930). While the facts presented in Congleton did not present an appropriate case for the crafting of a new rule on this issue, it is respectfully submitted that the facts presented in the within action do present such an opportunity;

"On the other hand, injury actions could well give rise to a strong challenge to the impact rule in the future if the victim can give a first-hand account or reliable eye-witness testimony is available, and there is demonstrable evidence of mental distress manifesting in a medical injury proven through expert testimony. Absent such proof in this case, the Court declines to alter the impact rule." (At p. 930).

It is respectfully submitted that a trial judge who is present at trial and has the opportunity to hear and observe the evidence presented and assess the demeanor and credibility of the witnesses is in the best position to ferret out cases of potential fraud or speculative claims of emotional harm in rulings on either summary judgment or directed verdict motions. Those rulings, of course, should remain open for appellate review in cases where the trial judge's rulings are deemed an abuse of discretion. In any event, the

questionable task of determining what facts may or may not constitute an actual “touching” should not be required.

Lastly, as discussed in her Brief, Ms. Osborne contends that the Court of Appeals further erred in denying her recovery for mental anguish damages caused by Attorney Keeney’s conduct based on the absence of any “physical touching” between Attorney Keeney and Ms. Osborne. Although her arguments in this regard are similar to the arguments advanced by her in support of her recovery for damages from the emotional and physical harm caused by the airplane crashing into her home, an additional basis for the recovery of such damages for Attorney Keeney’s conduct exists under KRS 411.165. Attorney Keeney’s contention that Ms. Osborne is precluded from making that argument on this appeal is not supported by his cited authorities. Morgan v. Scott, 291 S.W.3d 622 (Ky. 2009); Commonwealth, Dep’t of Highways v. Thomas, 427 S.W.2d 213 (Ky. 1957). Ms. Osborne did not raise a new issue in her Petition for Rehearing before the Court of Appeals but rather cited an additional authority to the Court of Appeals which had reversed the Trial Court on that issue.

II. The Court of Appeals erred in vacating the jury’s award of “lost punitive damages” in spite of the clear and undisputed evidence of the airplane pilot’s gross negligence.

In his Brief, Attorney Keeney argues that the evidence was insufficient to support the jury’s determination that the airplane pilot/owner was grossly negligent. Rather than unnecessarily extending the length of this Reply Brief, Ms. Osborne would respectfully refer this Court to pages 30-34 of her Brief for Appellant which demonstrates that the evidence¹⁸ was clear and convincing with regard to the airplane pilot/owner’s gross

¹⁸ Attorney Keeney continues to suggest that Steve Hixson was not qualified to express opinions regarding the airplane crash in spite of the fact that his qualifications are not and have never been an issue raised by Attorney Keeney on appeal.

negligence. Any limitations on the evidence introduced at trial was the direct result of Attorney Keeney's negligence in failing to promptly investigate the accident, failing to timely file a lawsuit against the airplane pilot/owner and obtain important discovery and in failing to ensure that the damaged airplane's engine was preserved for inspection.¹⁹

The unreported "slip opinion" by District Judge Thomas B. Russell in McMurtry, M.D. v. Wiseman, 445 F. 756 (W.D. Ky. 2006), is neither controlling, compelling nor particularly relevant. In addition to not representing the controlling law of a Kentucky court, Judge Russell followed an Illinois court where the underlying conduct of the defendant attorney "did not amount to more than mere negligence". Contrary to the underlying facts presented in McMurtry, the underlying conduct of Attorney Keeney was clearly fraudulent and grossly negligent, and more than "mere negligence".

Contrary to Attorney Keeney's contention, KRS 411.165 entitles a client to recover "all damages" sustained by reason of his or her attorney's negligence. Had Attorney Keeney timely filed and properly prosecuted Ms. Osborne's claims against the airplane pilot/owner, she would have been entitled to recover punitive damages against the airplane pilot/owner. Therefore, in order to fully compensate her for "all damages" which she sustained as a result of Attorney Keeney's gross negligence, she should be entitled to recover the amount of both punitive and compensatory damages for which the airplane pilot/owner would have been liable to her.²⁰ In this regard, her claims against Attorney Keeney for "lost punitive damages" are merely additional compensatory damages.

In § 10:18 Ky. Prac. Tort Law, Professor David J. Liebson²¹ emphatically states that

¹⁹ The three (3) judge panel of the Court of Appeals was divided on this issue with Judge Stumbo writing a Dissenting Opinion. (Court of Appeals' Opinion p. 38).

²⁰ The loss of punitive damages is arguably a greater loss than compensatory damages since the tortfeasor would not be able to discharge that liability in a bankruptcy proceeding.

²¹ Bernard Flexner Professor of Law, University of Louisville and Member, Kentucky Bar.

KRS 411.165(1) “absolutely requires” a negligent lawyer to pay his aggrieved client any amount of punitive damages that would have been recoverable in her underlying case;

“This statute seems to absolutely require a lawyer who was “merely” negligent to pay the aggrieved plaintiff any amount of punitive damages that would have been recoverable in the underlying case. To the aggrieved plaintiff, such punitive damages should be considered as compensatory damages with regard to the malpractice claim.”

III. The Court of Appeals erroneously reduced the jury’s punitive damage award against Attorney Keeney from \$3,500,000 to \$1,000,000.

Attorney Keeney’s contention that he was “ambushed”²² by instructions tendered by Ms. Osborne prior to the commencement of trial and again near the end of trial is inaccurate. The tendered instructions initially submitted by Ms. Osborne clearly indicated a request that no limitation be placed by the Court on any award for punitive damages against Attorney Keeney. Attorney Keeney was advised prior to the commencement of trial that she would be requesting a monetary amount for punitive damages in excess of the \$1,000,000 which she had previously indicated in her pretrial discovery responses.

In Tennill v. Talai, 277 S.W.3d 248 (Ky. 2009) this Court recognized that a trial court can authorize to amend pleadings giving the opposing party notice of the amount of the unliquidated claim “as late as during the trial itself”.

In the present case, Attorney Keeney was well-aware throughout the pendency of the legal negligence case against him that Ms. Osborne was seeking to recover substantial punitive damages due to his grossly negligent conduct. Prior to the commencement of trial, he was further aware of the fact that the amount of punitive damages which she would be seeking from him would not be limited to the \$1,000,000 set forth in her previously filed pretrial compliance.

²² Brief of Appellee, Steven Keeney, p. 24.

IV. The Court of Appeals erroneously concluded that the Trial Court lacked jurisdiction to permit the filing of Ms. Osborne's Second Amended Complaint adding Carolina Casualty Insurance Company and Monitor Liability Managers, Inc. as additional parties to this action.


In its Brief for Appellees, Carolina Casualty Insurance Company and Monitor Liability Managers, Inc., (hereinafter "Carolina Casualty"), acknowledges in its Brief that "a trial court always retains jurisdiction to enforce its own judgments".²³ The Amended Complaint filed by Ms. Osborne after the entry of Judgment did not add or change any claims against Attorney Keeney but merely added Carolina Casualty as an additional party. The claims against Carolina Casualty are essentially the equivalent of claims to recover payment of an unsatisfied and unbonded judgment against a third party creditor.

Lastly, Carolina Casualty's contention that Ms. Osborne failed to file a CR 59.05 motion is irrelevant. Ms. Osborne was not attempting to alter, amend or vacate the Judgment which she had obtained against Attorney Keeney. The filing of a CR 59.05 motion by her would not have been an appropriate remedy.

CONCLUSION

Based on the foregoing it is respectfully requested that this Court render an opinion reversing so much of the Court of Appeals' Opinion that reversed the Judgment of the Trial Court.

Respectfully Submitted,



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²³ Brief of Appellees Carolina Casualty, p. 8. *Akers v. Stephenson*, 469 S.W.2d 704 (Ky. 1970); *Shelby Petroleum Corp. v. Croucher*, 814 S.W.2d 930 (Ky. App. 1991).