

SUPREME COURT OF KENTUCKY
Case Number 2010-SC-000397

Court of Appeals Case Nos. 2007-CA-002112 and 2007-CA-002177
Jefferson Circuit Court Case No. 06-CI-01717

BRENDA C. OSBORNE

APPELLANT

v.

CAROLINA CASUALTY INSURANCE COMPANY
MONITOR LIABILITY MANAGERS, INC.

APPELLEES

STEVEN H. KEENEY

**Brief for Appellees Carolina Casualty Insurance
Company and Monitor Liability Managers, Inc.**

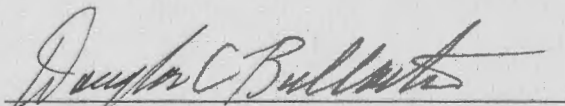
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The undersigned does hereby certify that a copy of this brief was served upon the following named individuals by U.S. mail, postage pre-paid, on September 6, 2011: Hon. Olu A. Stevens, Division Six, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, Ky. 40202; Clerk, Kentucky of Appeals, 360 Democrat Drive, Frankfort, Ky. 40601; Lee Sitlinger, Esq., Sitlinger, McGlincy, Theiler & Karem, 455 S. Fourth St., Ste. 370, Louisville, Ky. 40202; Sheryl Snyder, Esq., Frost Brown Todd LLC, 400 W. Market St., 32nd Floor, Louisville, Ky. 40202; and Matthew W. Breetz, Esq., Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, Ky. 40202.



Douglas C. Ballantine

STATEMENT CONCERNING ORAL ARGUMENT

Appellees Carolina Casualty Insurance Company and Monitor Liability Managers, Inc. believe that oral argument is not necessary on the narrow question of the trial court's jurisdiction to rule on Appellant's motion to file a second amended complaint.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT	i
COUNTERSTATEMENT OF POINTS AND AUTHORITIES.....	ii
COUNTERSTATEMENT OF THE CASE.....	1
<i>Asset Acceptance, LLC v. Moberly,</i> 241 S.W.3d 329 (Ky. 2007)	3
ARGUMENT.....	5
<i>Ky. Emplrs. Mut. Ins. v. Coleman,</i> 236 S.W.3d 9, 13 (Ky. 2007)	5
A. Osborne’s Motion to File a Second Amended Complaint Was Procedurally Faulty and Untimely	5
<i>James v. Hillerich & Bradsby Co.,</i> 299 S.W.2d 92-94 (Ky. 1956)	5,6, 9, 10
<i>Benzon v. Morgan Stanley Distribs., Inc.,</i> 420 F.3d 598, 613 (6th Cir. 2005)	5
<i>Morse v. McWhorter,</i> 290 F.3d 795, 799 (6th Cir. 2002)	5
<i>Vicom, Inc. v. Harbridge Merchant Servs.,</i> 20 F.3d 771, 785 (7th Cir. 1994)	5
6 Kurt A. Phillips et al., Kentucky Practice 382 (6th ed. 2005).....	5
<i>West v. Goldstein,</i> 830 S.W.2d 379, 384 (Ky. 1992)	5
<i>State Contracting & Stone Co. v. Walker,</i> 294 S.W.2d 931, 932 (Ky. App. 1956)	5
<i>Whittenberg Eng’g & Constr. Co. v. Liberty Mut. Ins. Co.,</i> 390 S.W.2d 877, 884 (Ky. 1965)	6
<i>Alliant Hosps., Inc. v. Benham,</i> 105 S.W.3d 473, 478 n.12 (Ky. App. 2003)	6
<i>Johnson v. Smith,</i> 885 S.W.2d 944, 947 (Ky. 1994)	6, 7
<i>Marrs Elec. Co. v. Rubloff Bashford, LLC,</i> 190 S.W.3d 363, 366-67 (Ky. App. 2006)	6

1. The Authority Cited By Osborne Does Not Apply	7
<i>Atkisson v. Atkisson</i> ,	
298 S.W.3d 858 (Ky. App. 2009).....	7, 8, 9
<i>Elk Horn Coal Corp. v. Cheyenne Resources, Inc.</i> ,	
163 S.W.3d 408 (Ky. 2005).....	7, 8, 9
<i>Thompson v. McLean County</i> ,	
No. 2006-CA-000172, 2008 WL 744928	
(Ky. App. March 21, 2008).....	7, 9
(a) <i>Atkisson v. Atkisson and Elk Horn v. Cheyenne</i>	8
<i>Akers v. Stephenson</i> ,	
469 S.W.2d 704, 706 (Ky. 1970).....	8
<i>Shelby Petroleum Corp. v. Croucher</i> ,	
814 S.W.2d 930, 934 (Ky. App. 1991).....	8
<i>Young v. U.S. Bank, Inc.</i> ,	
___ S.W.3d. ___, No. 2009-CA-001759, 2011 WL 2162539	
(Ky. App. June 3, 2011).....	8
(b) <i>Thompson v. McLean County</i>	9
B. Osborne’s Other Arguments Have No Merit	10
CONCLUSION	10

COUNTERSTATEMENT OF THE CASE

This brief addresses only the narrow issue of whether the Court of Appeals was correct in ruling that the trial court lacked jurisdiction to grant the plaintiff's motion to amend her complaint, which was served more than ten days after a judgment became final, to add a new cause of action (bad faith) against an entirely new party (the insurer). Appellant Brenda C. Osborne's Statement of the Case is voluminous and focuses on her arguments against Appellee Steven H. Keeney. Appellants Carolina Casualty Insurance Company and Monitor Liability Managers, Inc. do not accept her Statement of the Case and provide this short Counterstatement of the Case to inform the Court of the facts relevant to the narrow issue addressed in this brief.

Plaintiff/Appellant Brenda C. Osborne ("Osborne") retained attorney Steven H. Keeney ("Keeney") to represent her after a small airplane hit the roof of her house. On February 24, 2006, after her tort suit in federal court against the airplane's pilot and mechanics was dismissed, Osborne filed a complaint against Keeney in Jefferson Circuit Court. Record on Appeal ("ROA") at pp. 1-3. Osborne filed an amended complaint against Keeney on June 4, 2007 that alleged legal malpractice, fraud, and breach of contract (the "Osborne Lawsuit"). ROA at pp. 412-416. Pursuant to a legal malpractice insurance policy issued to Keeney by Carolina Casualty Insurance Company and administered by Monitor Liability Managers, Inc.¹ (collectively, "Carolina") to Keeney, Carolina hired and paid independent counsel for Keeney's defense. The policy provided

¹ Monitor Liability Managers, Inc. is a third party administrator for Carolina. For purposes of this action, Monitor's interests are identical to Carolina's and both are represented by the same counsel.

\$1,000,000 in coverage, reduced by the amount of attorney's fees and costs incurred by his counsel.

The Osborne Lawsuit was tried before a jury, and, at the conclusion of the trial, the jury awarded Osborne damages. On August 30, 2007, judgment was entered for Osborne by the Jefferson Circuit Court Clerk. ROA at pp. 1880-1882.

On September 10, 2007, the tenth day after the trial court's judgment became final,² Keeney filed his post-judgment motions: (a) for judgment notwithstanding the verdict under Kentucky Rule of Civil Procedure ("CR") 50.02; (b) to alter, amend or vacate the judgment or for a new trial under CR 59.05; and (c) for relief from the judgment under CR 60.02. On September 18, 2007, the nineteenth day after the judgment became final, Osborne served a motion under CR 15.01 to amend her complaint to add Carolina as a defendant and to add claims under KRS 304.12-230, KRS 367.170, and Kentucky common law for bad faith conduct in refusing to settle the case. ROA at pp. 1981-2012. Noticeably absent from Osborne's brief in this Court is any mention of the dates these post-judgment motions were filed.

Osborne did not serve the required motion pursuant to CR 59.05 before her motion for leave to file her second amended complaint. Further, nothing in her motion referenced CR 59.05. By order of October 10, 2007, the trial court denied Keeney's post-judgment motions, but granted Osborne's motion to file the second amended complaint. ROA at pp. 2310-2312. The order was made appealable by the trial court's CR 54.02(1)

² Although September 10, 2007, was actually the eleventh day after the judgment became final, September 9, 2007 (the tenth day), fell on a Sunday. CR 6.01 thus designates the following workday, *i.e.*, September 10 in this case, as the final day for filing.

recitation at its end. *Id.* Osborne's second amended complaint is listed in the case history as filed October 10, 2007. ROA at p. 2358.

Keeney filed a notice of appeal on October 19, 2007, naming Carolina as an appellee. ROA at pp. 2313-2322. Carolina filed a notice of cross-appeal on October 29, 2007. ROA at pp. 2327-2337.

Carolina argued in its Court of Appeals brief that the trial court lacked jurisdiction to allow Osborne to file her second amended complaint. By its opinion of March 5, 2010 ("Opinion"), the Court of Appeals agreed and held that when the trial court granted Osborne's motion to amend her complaint it "no longer had any jurisdiction over the case." Opinion at 35. The court thus vacated the trial court's October 10, 2007 order. *Id.*

With respect to Keeney and Osborne's arguments on the merits, the Court of Appeals affirmed in part, vacated in part, and remanded. Keeney and Osborne filed petitions for rehearing and both were denied. Keeney and Osborne then filed motions for discretionary review. This Court granted those motions on May 11, 2011.

Only one issue relating to Carolina is before this Court. In her motion for discretionary review, Osborne asked the Court to review the Court of Appeals' ruling that the trial court did not have jurisdiction to grant Osborne's motion to file a second amended complaint.³ She filed her Supreme Court brief on July 5, 2010, arguing as to

³ Carolina re-affirms its argument that, because the trial court lacked jurisdiction to enter the order granting Osborne's motion to amend her complaint, the order was not interlocutory and thus was immediately appealable by Carolina. *See Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007). However, Osborne did not move for review of the issue and it is therefore not before the Court.

Carolina that the Court of Appeals erred in vacating the order allowing Osborne to file a second amended complaint. This brief addresses only that issue.

ARGUMENT

The Court of Appeals' holding that the trial court lacked jurisdiction to grant Osborne's post-judgment motion to file a second amended complaint is correct and should be affirmed. Questions regarding the trial court's jurisdiction are purely a matter of law and are reviewed *de novo*. *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007). As a matter of law, the trial court did not have jurisdiction to allow Osborne to amend her complaint after the entry of final judgment.

A. Osborne's Motion to File a Second Amended Complaint Was Procedurally Faulty and Untimely

Osborne's motion to file a second amended complaint pursuant to CR 15.01 was defective for two related reasons: (a) she did not first serve a motion to amend the judgment under CR 59.05 as required by Kentucky law, and (b) her motion was served after the ten day time limit to file a CR 59.05 motion expired. The Court of Appeals so held, citing the cases relied on by Carolina in its opinion.

This Court explicitly held in *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1956) that a trial court has no jurisdiction to grant a motion to file an amended complaint after final judgment unless a CR 59.05 motion is timely filed beforehand. *See also Benzon v. Morgan Stanley Distribs., Inc.*, 420 F.3d 598, 613 (6th Cir. 2005) (construing FRCP 15 and 59⁴); *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002); *Vicom, Inc. v. Harbridge Merchant Servs.*, 20 F.3d 771, 785 (7th Cir. 1994); 6 Kurt A.

⁴ CR 15 is "in substance . . . identical to FRCP 15." 6 Kurt A. Phillips et al., *Kentucky Practice* 378 (6th ed. 2005). Accordingly, federal cases interpreting the federal analogue to CR 15 are persuasive. *West v. Goldstein*, 830 S.W.2d 379, 384 (Ky. 1992); *State Contracting & Stone Co. v. Walker*, 294 S.W.2d 931, 932 (Ky. App. 1956).

Phillips et al., Kentucky Practice 382 (6th ed. 2005). A motion to alter, amend or vacate a judgment under CR 59.05 must be made no later than ten days after a judgment becomes final. See *Whittenberg Eng'g & Constr. Co. v. Liberty Mut. Ins. Co.*, 390 S.W.2d 877, 884 (Ky. 1965). Once this ten-day limitations period expires, the trial court loses jurisdiction to grant a motion under CR 59.05. *James*, 299 S.W.2d at 94.

Here, the judgment became final on August 30, 2007, when the Jefferson Circuit Court Clerk entered the trial court's judgment disposing of every issue presented in Osborne's complaint and concluding with the sentence "There being no just cause for delay, this judgment is final and appealable." See CR 58(1); *Alliant Hosps., Inc. v. Benham*, 105 S.W.3d 473, 478 n.12 (Ky. App. 2003). Osborne filed a motion to amend her complaint on September 18, 2007, nineteen days after the entry of final judgment. She did not first file a CR 59.05 motion within ten days of entry of final judgment. The trial court by order of October 10, 2007 granted her motion. Because Osborne failed to file a timely CR 59.05 motion before moving to amend her complaint, the trial court acted outside of its jurisdiction and that order is invalid. *James*, 299 S.W.2d at 94.

Keeney's motions for post-judgment relief do not change this analysis. He served his motions on September 10, 2007, the final day to file post-judgment motions. Although Osborne's motion was served within ten days of Keeney's motions, Osborne's motion was not served within ten days of the entry of the final judgment, *i.e.*, August 30, 2007. It is well-established in Kentucky that one party's motion for post-judgment relief under CR 59 does not toll the ten-day limitations period for another party to file a CR 59 motion on other grounds. *Johnson v. Smith*, 885 S.W.2d 944, 947 (Ky. 1994); *Marrs*

Elec. Co. v. Rubloff Bashford, LLC, 190 S.W.3d 363, 366-67 (Ky. App. 2006). Osborne's motion to amend her complaint was made on grounds other than Keeney's motions for post-judgment relief, and thus is subject to the ten-day limitation of CR 59.05.

As the Court of Appeals held, "[t]he timeline regarding this issue allows only one conclusion – the trial court lacked jurisdiction to rule on Osborne's motion when it granted the motion to amend the complaint." Opinion at 36. The Court of Appeals' ruling vacating the trial court's order granting Osborne's motion to amend her complaint is correct and should be affirmed.

1. The Authority Cited By Osborne Does Not Apply

Osborne argues that the trial court retained jurisdiction to rule on her motion to file a second amended complaint because Keeney filed post-judgment motions under CR 59.05. She states that "[w]hile the Trial Court retains jurisdiction of the case, any party can request rulings from the Trial Court on other matters arising out of the case." Appellant's Brief at 40. This statement ignores the foregoing law holding that when a party fails to file a CR 59.05 motion within ten days of final judgment, the trial court loses jurisdiction and cannot rule on subsequent motions made by that party. *Johnson*, 885 S.W.2d at 947.

Remarkably, Osborne fails to address any of the authority cited by the Court of Appeals in its opinion or by Carolina in its Court of Appeals brief. Instead, she relies on three cases: *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009); *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408 (Ky. 2005); and *Thompson v. McLean*

County, No. 2006-CA-000172, 2008 WL 744928 (Ky. App. March 21, 2008).⁵ *Atkisson* and *Elk Horn* are not on point, and *Thompson* supports Carolina's position.

(a) *Atkisson v. Atkisson and Elk Horn v. Cheyenne*

In *Atkisson*, both parties filed CR 59.05 motions within ten days after final judgment. 298 S.W.3d at 861. The trial court partially granted one of the motions and denied the other. *Id.* The trial court acted properly within its jurisdiction in ruling on both motions because they were timely filed within ten days after entry of final judgment.

In both *Atkisson* and *Elk Horn*, the trial court exercised jurisdiction after the entry of final judgment to enforce its judgment. In *Atkisson*, while the case was on appeal, the appellee garnished several of the appellant's accounts and filed a judgment lien on his real property. *Id.* at 862. The appellant filed a motion to quash and the trial court denied his motion. *Id.* at 865. In *Elk Horn*, after a motion for discretionary review was denied, the appellees moved the trial court for additional damages pursuant to KRS 26A.300. 163 S.W.3d at 413. The trial court granted the motion. *Id.*

A trial court always retains jurisdiction to enforce its own judgments. *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970); *Shelby Petroleum Corp. v. Croucher*, 814 S.W.2d 930, 934 (Ky. App. 1991). After entering final judgment, a trial court keeps jurisdiction only to "assure that the judgment is carried out" and cannot alter it in any way. *Young v. U.S. Bank, Inc.*, ___ S.W.3d. ___, No. 2009-CA-001759, 2011 WL 2162539, at *2 (Ky. App. June 3, 2011).

⁵ *Thompson v. McLean County* is unpublished, but nevertheless cited by Osborne. A copy of the opinion is attached to Osborne's brief.

The trial courts in *Elk Horn* and *Atkisson* exercised jurisdiction after entering final judgments pursuant to their limited power to enforce those judgments. The law is clear that a trial court lacks jurisdiction to rule on a post-judgment motion unless the moving party first makes a motion under CR 59.05. *James*, 299 S.W.2d at 94. *Atkisson* and *Elk Horn* do not hold otherwise and do not support Osborne's argument that the trial court retained jurisdiction to grant her motion to file a second amended complaint after the entry of final judgment.

(b) *Thompson v. McLean County*

Osborne also cites *Thompson v. McLean County*, a case that actually supports the Court of Appeals' holding. In *Thompson*, the plaintiff filed a CR 59.05 motion along with a motion to amend her complaint after final judgment. 2008 WL 744928 at *3. The defendants argued that the trial court could not grant the motion to amend after the entry of final judgment. *Id.* at *11-12. The court held that the CR 59.05 motion suspended the finality of the judgment and thus the trial court had jurisdiction to rule on the plaintiff's motion to amend her complaint. *Id.* at *11-12.

Unlike Osborne, the plaintiff in *Thompson* followed the correct procedure by filing a CR 59.05 motion together with the motion to amend her complaint. *Id.* at *3. Like the Court of Appeals in this case, the *Thompson* court correctly applied the requirement that after final judgment a party must file a CR 59.05 motion before a court may rule on a motion to file an amended complaint.

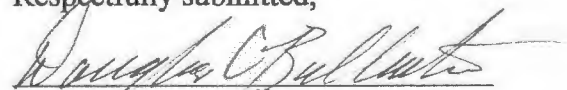
B. Osborne's Other Arguments Have No Merit

Osborne further argues that she should be allowed to amend her complaint to add Carolina as a party to avoid a possible limitations argument by Carolina at a later date and to pursue remedies to collect on the unsuperseded portion of the judgment against Keeney.⁶ These tag-along arguments are an attempt to distract the Court from the only relevant issue: whether the trial court had jurisdiction to grant Osborne's motion to file a second amended complaint. As shown above, Osborne's failure to file a CR 59.05 motion within ten days of final judgment leaves no doubt that the trial court lacked such jurisdiction. *See James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1956). Therefore, the order allowing Osborne to amend her complaint was invalid and properly vacated by the Court of Appeals.

CONCLUSION

For all of the reasons stated above, this Court should affirm the Court of Appeals' ruling vacating the trial court's October 10, 2007 order because the trial court lacked jurisdiction to grant Osborne's motion to file a second amended complaint.

Respectfully submitted,



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⁶ Carolina posted a supersedeas bond in the amount of the then-remaining policy limits. Keeney did not supersede the remainder of the judgment.