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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001883-MR

SYDNEY BURGER, AS THE COURT APPOINTED ADMINISTRATRIX OF THE ESTATE OF CLINTON DRISCOLL, AND AS NEXT FRIEND OF EMMA MICHELLE DRISCOLL, A MINOR — APPELLANTS

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 15-CI-03347

DR. RAYMOND WRIGHT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND SMALLWOOD, JUDGES.

NICKELL, JUDGE: Sydney Burger, as Administratrix of the Estate of Clinton Driscoll, and as Next Friend of Emma Michelle Driscoll, a minor, appeals the Fayette Circuit Court's trial verdict and judgment entered September 1, 2017, and

order overruling her motion to alter, amend or vacate and for new trial entered October 26, 2017.[1] After careful review, we affirm.

The underlying case stems from a medical malpractice action against Dr. Raymond Wright for treatment and care of Sydney Burger's late husband, Clinton Driscoll. In late July 2014, Driscoll sustained a leg fracture in an All-Terrain Vehicle (ATV) accident. The fracture was surgically repaired by Dr. Michael Krueger at Hardin County Hospital. At the follow-up visit ten days after the surgery, Dr. Kreuger instructed Driscoll to avoid weight-bearing activities four to six weeks. After his initial follow-up visit with Dr. Kreuger, Driscoll's care was transferred to Dr. Wright at the University of Kentucky and Driscoll was scheduled to meet with Dr. Wright on September 10, 2014.

On September 5, 2014, Driscoll engaged in weight-bearing activities and exposed his wound during a hunting trip. On September 9, 2014, Driscoll's wound appeared worse and he experienced increased pain, swelling, and fever, prompting him to go to the Emergency Room (ER) at Saint Joseph Jessamine. At the ER, Driscoll was administered antibiotics and discharged with instructions to follow-up with Dr. Wright the following morning.

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[1] The notice of appeal states an order overruling Burger's objection to a defense bill of costs is also appealed, but no such argument is included in the Brief for Appellant. Lack of any argument on a point constitutes its abandonment. "The failure to argue before the Court of Appeals . . . is tantamount to a waiver." *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000).

On September 10, 2014, Dr. Wright and his resident, Dr. Ryan Snowden, evaluated Driscoll at their clinic. Driscoll's vital signs were normal, and he did not have a fever. Neither Driscoll nor Burger mentioned Driscoll's hunting trip or weight-bearing activities to Dr. Wright, Dr. Snowden, or any other medical care provider or staff. Nonetheless, Dr. Wright was concerned Driscoll's leg wound might be infected, ordered Driscoll be admitted,[2] placed orders to obtain wound cultures, and scheduled a wound debridement which was performed on September 11, 2014. However, Driscoll's condition continued to deteriorate. On September 12, 2014, Driscoll became delirious and was diagnosed with severe sepsis. On September 13, 2014, Driscoll experienced renal failure. On September 14, 2014, Driscoll underwent a second surgical debridement and his leg was amputated below the knee. On September 15, 2014, Driscoll perished.

On September 9, 2015, Burger filed this lawsuit against Dr. Wright alleging he breached the medical standard of care by failing to appropriately treat Driscoll's infection and failing to recognize the signs of sepsis on September 10, 2014. Burger alleged Driscoll was septic on his initial presentation to Dr. Wright and Dr. Wright should have immediately provided antibiotics and debrided

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[2] Evidence was presented that while Driscoll and Burger were waiting for a hospital bed to become available they left the clinic, ate lunch and returned home to engage in marital relations. This evidence was presented to refute Burger's claims Driscoll was so ill at his initial presentation to Dr. Wright that he required immediate operation.

Driscoll's wound, removing the recently placed hardware from the surgical repair of his leg fracture, as well. Dr. Wright maintained Driscoll was not septic on the first two days of his care and it was clinically appropriate to withhold antibiotics until after blood cultures were taken to identify any infectious organisms. Dr. Wright testified in his own defense and also presented experts in critical care surgery, infectious disease, and orthopedic trauma surgery. Dr. Wright's witnesses testified he met the standard of care and his actions did not cause Driscoll's death.

Prior to trial, through a motion *in limine*, Burger sought to exclude admission of evidence concerning Driscoll's ATV accident, weight-bearing after his leg injury, and hunting trip as irrelevant to whether Dr. Wright breached the standard of care. Burger also sought to preclude apportionment instructions from being submitted to the jury. Burger's motions were granted in part and denied in part. Dr. Wright was allowed to discuss Driscoll being a passenger in an ATV accident injuring his leg so long as comparative fault was neither suggested nor argued. Dr. Wright was also permitted to discuss Driscoll's weight-bearing and hunting trip. Burger's motion for reconsideration was denied.

At trial, jurors were permitted to question witnesses in accordance with KRE[3] 614(c). During the fourth day of trial, Dr. Wright moved to exclude Juror No. 3296 based on questions the juror was asking during the defense case-in-

[3] Kentucky Rules of Evidence.

chief. Burger objected. The court stated she had considered disqualifying the juror based on his facial expressions and body language, but the juror remained on the panel. Burger states in her appellate brief once she understood the weight the court placed on such non-verbal cues she decided to move to disqualify Juror No. 3311 on the fifth and final day of trial. After making this decision, Burger reviewed the juror's qualification form, conducted a CourtNet search regarding the juror's prior litigation history, and discovered Juror No. 3311 failed to disclose his involvement in litigation arising from an automobile accident in 1995. The juror was called to the bench to discuss this discrepancy and the court determined the juror's omission was based on a misunderstanding rather than an intent to deceive. The court offered to remove Juror No.'s 3296 and 3311, but Burger declined, and trial proceeded.

At the conclusion of Dr. Wright's evidence, Burger moved for directed verdict on issues of Driscoll's negligence but was denied. Burger then objected to apportionment but was overruled. Ultimately, the jury returned a defense verdict without reaching questions of Driscoll's negligence or apportionment.

Burger moved for post-trial relief via new trial under CR[4] 59.01. Burger argued evidence of Driscoll's negligence was irrelevant and unduly

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[4] Kentucky Rules of Civil Procedure.

prejudicial and apportionment instructions should not have been presented to the jury. Burger further argued she was entitled to a new trial based on the court's failure to strike Juror No. 3311. Burger's motion was denied. This appeal followed.

On a motion for new trial, the trial court must determine if grounds for a new trial exist. If the trial court is convinced such circumstances exist, whether to grant a new trial lies within its sound discretion. *Gibson v. Fuel Transport, Inc*., 410 S.W.3d 56, 62 (Ky. 2013). "Accordingly, we treat the decision of a trial court on this issue with a great deal of deference." *Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005). The trial court's decision is "presumptively correct[,]" and we will reverse only if the "decision is clearly erroneous." *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky. App. 1992) (citations omitted).

Burger presents two arguments on appeal, asserting entitlement to a new trial due to: (1) failure to disqualify Juror No. 3311, and (2) presentation of evidence about Driscoll's negligence. Neither alleged error warrants relief.

Burger asserts the trial court decided not to strike Juror No. 3311 based on the juror's assurances he did not intend to deceive the court. Burger argues intentionality is not the test for disqualification under Kentucky law, as elucidated in *Gullett v. Commonwealth*, 514 S.W.3d 518 (Ky. 2017). In *Gullett*, cited by both parties, the Supreme Court of Kentucky held, "[t]he test for obtaining

a new trial . . . may also be satisfied by showing that the juror's dishonesty prevented inquiry into a critical subject that may have exposed a disqualifying bias or prejudice." *Id.* at 525.

While the analysis of *Gullett* is controlling, the facts of *Gullett* are so distinguishable from the facts of this case they compel a different result. In *Gullett*, a juror was asked at least four times whether she had family members who had been involved in the criminal justice system leading to her potential bias in a criminal proceeding. Each time she chose to remain deceitfully silent. *Id.* In the case at hand, only a few cursory and general questions were presented in the juror qualification forms, and the only questions about prior litigation asked during *voir dire* concerned involvement in medical malpractice actions, not automobile accidents. Based on the questions and responses on the juror qualification forms, *voir dire* questions, and the record in general, involvement in a prior automobile accident was not a subject critical to the instant litigation.

Gullett discusses a case more akin to the one at bar. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), is a personal injury action wherein the jury pool was asked during *voir dire* whether "any members of your immediate family sustained any severe injury . . . that resulted in any disability or prolonged pain and suffering[.]" *Id.*, 464 U.S. at 550, 104 S.Ct. at 847. In *McDonough*, a juror did not respond, but after trial it

was discovered the juror's son had been injured by the explosion of a truck tire. The juror believed his son's injury did not fall within the scope of the question. The United States Supreme Court held:

> [t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. . . . We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id.

On the juror qualification form in this case, potential jurors were asked generally about their involvement in prior claims or litigation. During *voir dire*, neither counsel nor the court asked any additional questions regarding involvement in any type of litigation aside from medical malpractice actions. Answers to the litigation questions on the juror qualification forms were independently verifiable through searches of public records, which Burger could have conducted *before* the jury was empaneled. When questioned by the court, Juror No. 3311 appeared to give truthful answers to the best of his ability, understanding, and recollection on his juror qualification form, during *voir dire*,

and when questioned at the bench. The trial court found the juror's omission was not deliberate, intentional, or material. We agree.

Burger's argument that had the information concerning the juror's prior litigation about his automobile accident been disclosed properly on the juror qualification form she would have stricken Juror No. 3311 is disingenuous in light of Juror No. 3188's juror qualification form. Her form revealed a claim for personal injury against her or a family member was made for an automobile accident; however, Burger declined to strike that juror for cause or utilize a peremptory strike against her.

Further, Burger was given the opportunity by the trial court to strike Juror No.'s 3296 and 3311 and failed to take it. Considering all these circumstances and the guidance provided by *Gullett* it would be patently unfair to grant a new trial based on the failure to disqualify Juror No. 3311. As such, the trial court did not err in allowing Juror No. 3311 to serve on the jury. Nor did it clearly err in exercising its discretion to deny Burger's motion for new trial based on its decision not to strike Juror No. 3311 from the jury panel.

Next, citing *Pauly v. Chang*, 498 S.W.3d 394 (Ky. App. 2015), Burger argues she is entitled to a new trial due to admission of evidence about Driscoll's negligence. In *Pauly*, a patient's actions led to his 30-foot fall resulting

in injuries necessitating medical treatment which later was the subject of a wrongful death and medical malpractice action. *Pauly* observed:

> [t]he general rule appears to be that, in order to support a claim of comparative negligence, "a patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based." *Jensen v. Archbishop Bergan Mercy Hospital*, 236 Neb. 1, 459 N.W.2d 178, 186 (Neb. 1990). Further, the defense of comparative or contributory negligence does not apply when "a patient's conduct provides the occasion for medical attention, care or treatment which later is the subject of a medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care or treatment on which a subsequent medical malpractice claim is based." *Id*. at 187.
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> We agree with those jurisdictions holding that a plaintiff's negligence that merely provides the occasion for the medical care, attention, and treatment that subsequently results in a medical malpractice action should not be considered by a jury assessing fault. A medical malpractice case is distinctly different from a personal injury case in which the injured party's pre-injury fault may be considered in the apportionment of damages. Here, the issue was not how or why Dr. Pauly was injured but whether, once he arrived at UKMC, Appellees utilized the required standard of care in his diagnosis and treatment. The fact that a patient has injured himself, negligently or non-negligently, has no bearing on the duty of the hospital and health care providers to treat him in accordance with the appropriate standard of care. . . .

. . . .

> We agree with the trial court herein that this case concerned "the care not the cause" of Dr. Pauly's injuries, and evidence relating to Dr. Pauly's alleged negligence was not relevant. Thus, the trial court properly excluded the testimony of Appellees' accident reconstructionist, Vince Sayre.

Id. at 416-18 (citation omitted).

As noted above, our function in reviewing denial of a new trial motion is to decide whether the trial judge clearly erred in exercising their discretion. The trial court determined the admission of evidence of Driscoll's actions was relevant to his duty to provide an accurate medical history to Dr. Wright concerning his actions and presented a factual question of comparative negligence for the jury. We must determine whether admission of such evidence in this case was consistent with *Pauly*. *Pauly* addressed, as a matter of first impression, whether a patient's negligent acts prior to seeking medical treatment can constitute comparative fault in medical malpractice cases. *Pauly* held, "[a] medical malpractice case is distinctly different from a personal injury case in which the injured party's pre-injury fault may be considered in the apportionment of damages." *Id*. at 417. *Pauly* is a recent decision with little case law interpreting or clarifying it. Nonetheless, evidence admitted in the case at bar was not offered for the purposes prohibited by *Pauly*. As such, the trial court did not clearly err by admitting the

evidence and denying Burger's request for a new trial based on admission of such evidence.

Here, the trial court allowed the evidence because there was sufficient evidence presented to create a factual question for the jury on Driscoll's duty to give an accurate and complete medical history to the doctor providing him medical care. In Kentucky, patients have a duty to "tell the truth" in giving an accurate history to the treating physicians. *Mackey v. Greenview Hospital, Inc.*, 587 S.W.2d 249, 254 (Ky. App. 1979). This is to prevent a patient from misleading a physician, which may have disastrous results. *Id.* Burger's orthopedic expert, Dr. Anthony McEldowney, testified Driscoll had a duty to give a complete and accurate history to Dr. Wright, so Dr. Wright could make informed medical judgments on how to treat Driscoll.

Dr. Wright testified had Driscoll disclosed the hunting trip on his initial presentation he very well may have asked an infectious disease specialist about ordering additional blood cultures. This testimony indicates Driscoll's negligence in failing to give a complete medical history of recent outdoor exposure to his open leg wound as well as weight-bearing activity may have actively contributed to Dr. Wright's alleged failure to properly treat the infection. As such, a reasonable juror could conclude Driscoll was comparatively negligent and the issue of such comparative negligence was a factual question for the jury. Evidence

concerning Driscoll's actions and his failure to recount them to Dr. Wright resulting in an inaccurate medical history was not admitted for the impermissible purposes discussed by *Pauly*—to assign fault to Driscoll for his careless or negligent actions prior to and for which he sought medical treatment from Dr. Wright—but rather to demonstrate how Driscoll's failure to disclose an accurate medical history affected Dr. Wright's treatment.

For the forgoing reasons, the verdict and judgment of the Fayette Circuit Court is AFFIRMED.

SMALLWOOD, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND WRITES SEPARATELY.

ACREE, JUDGE, CONCURRING: I concur but write separately to point out that Kentucky lawyers continue to improperly appeal from, and our courts unnecessarily address, non-final, interlocutory denials of motions brought pursuant to CR 59.01 and CR 59.05. Naming these orders in the Notice of Appeal is no longer fatal to an appeal because of *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). However, the futility of addressing these orders, except to document procedure in the trial court, is a waste of time and energy for all involved.

"[A]n order either sustaining or denying a motion for a new trial authorized by CR 59.01 and 59.02 is not a final order and is not appealable as such, though it may be reviewed on appeal from the final judgment." *White v. Hardin*

County Bd. of Educ., 307 S.W.2d 754, 756 (Ky. 1957). That is to say, "Under present procedure, *where a judgment has been vacated*, the order granting the new trial is regarded as interlocutory and reviewable on the appeal from the second judgment." *Ballard v. King*, 373 S.W.2d 591, 592 (Ky. 1963) (emphasis added). It is only reviewable on appeal because "that [second] judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders . . . ." CR 54.02(2). *Denial* of a motion for a new trial does not precede a second judgment and, so, the interlocutory denial of a new trial is never readjudicated, but remains forever interlocutory.

Similarly, it has always been that "[o]rders denying CR 59.05 relief 'are interlocutory, *i.e.,* non-final and non-appealable and cannot be made so by including the finality recitations.' *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011)." *Hoffman v. Hoffman*, 500 S.W.3d 234, 236 (Ky. App. 2016). We reiterated as much just this last June, indicating "the order denying [a] CR 59.05 motion [is] . . . an inherently interlocutory and non-appealable order." *Jones v. Livesay*, 551 S.W.3d 47, 49 (Ky. App. 2018). When an appellant says it is appealing the interlocutory order denying CR 59.05 relief, we should ignore it because "[t]here is no appellate jurisdiction over the typical interlocutory order." *Cassetty v. Commonwealth*, 495 S.W.3d 129, 132 (Ky. 2016).

So why do we have nine cases that say, often in these exact words: "We review a trial court's denial of a motion to alter, amend, or vacate pursuant to CR 59.05 for an abuse of discretion"? *Mullins v. Consol of Kentucky, Inc.*, 368 S.W.3d 119, 120 (Ky. App. 2012). The answer is because we have been parroting a case that mistakenly said so – *Batts v. Illinois Central Railroad Co*., 217 S.W.3d 881 (Ky. App. 2007). Misinterpreting the Kentucky Supreme Court, *Batts* says:

> Our review of a trial court's denial of a CR 59.05 motion is limited to whether the court abused its discretion. *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005).

Batts, 217 S.W.3d at 883. If this Court had read *Gullion* closely, we would have seen *Gullion* was not a review of the denial of a CR 59.05 motion.

In *Gullion*, a mother sought to amend a custody order to name her as the sole custodian. She did not base her motion on KRS[5] 403.340 because ten days had not elapsed from the date of the original custody order. She moved the court pursuant to CR 59.05, and the motion was granted. *Gullion*, 163 S.W.3d at 890. "The Court of Appeals [reversed the trial court, holding] that [mother] did not comply with KRS 403.340 because in her CR 59.05 motion she did not file affidavits . . . ." *Id.* at 891. The Supreme Court reversed this Court, noting the original custody order had not become final and so KRS 403.340 did not yet come into play. The Supreme Court held that even in the context of a custody dispute,

[5] Kentucky Revised Statutes.

"affidavits are not required in support of a CR 59.05 motion to alter, amend or vacate a judgment." *Id.* at 890. That part of *Gullion* has no applicability here, but the Supreme Court went on.

The Supreme Court said: "An ancillary issue we must review is whether the family court abused its discretion *in granting* Appellant's CR 59.05 motion to alter or amend its judgment." *Id.* at 892 (emphasis added). The Court should have said it was moving on to review the new, amended judgment awarding custody but, for whatever reason, chose to phrase its review this way. CR 59.05 (motion is to "enter a new one [judgment]"). When this Court decided *Batts*, we failed to understand *Gullion* in the full context of our jurisprudence and, because of that, made a misstep. Here is how *Batts* goes.

Batts brought a personal injury claim against a railroad (ICRR), but the trial court dismissed his claim by order dated June 2, 2005. Batts filed a timely CR 59.05 motion which was denied on June 29, 2005. "This appeal of *only* the June 29, 2005 order followed." *Batts*, 217 S.W.3d at 882-83 (emphasis in original). A footnote revealed that ICRR wanted the appeal dismissed "because of Batts's failure to properly designate the trial court's June 2, 2005 judgment." *Id.* at 883 n.2. In the early 1980s, dismissal would have been required. *See, e.g., Foremost Ins. Co. v. Shepard*, 588 S.W.2d 468, 469 (Ky. 1979) ("notice of appeal must 'designate the judgment or part thereof appealed from.' CR 73.03. . . . We

have consistently enforced the policy of strict compliance with CR 73.03[.]”). However, we also noted something very important in the same footnote in *Batts*.

We said, “our Supreme Court held in *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), that dismissal is *not* an appropriate remedy for an appellant’s failure to properly specify the final judgment appealed from when it can be ascertained within a reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the appellee.” *Batts*, 217 S.W.3d at 883 n.2..

If, while deciding *Batts*, we had only paid attention to what we just said in that footnote, we would not have created the confusion we now have. Although Batts “fail[ed] to properly specify the final judgment appealed from[,]” we could have easily “ascertained within a reasonable certainty from a complete review of the record on appeal” that Batts was, in fact, appealing the June 2, 2005 final judgment. *Id.* We should have said *that* was the judgment under review. Instead, we ignored the fact that denials of CR 59.05 motions are interlocutory and not appealable and casually said we were reviewing the June 29, 2005 denial of CR 59.05 relief anyway. Having selected the wrong trial court decision for review, we needed a reviewing standard to apply and found it by misreading *Gullion*. We applied the abuse of discretion standard to denials of CR 59.05 motions, not just

grants of CR 59.05 motions that, unlike denials, result in a *new appealable final judgment*.

Later, in *Bowling v. Kentucky Dep't of Corrections*, 301 S.W.3d 478 (Ky. 2009), *Batts*'s author wrote: "A trial judge's ruling pursuant to CR 59.05 is reviewed by an appellate court under the abuse of discretion standard. *Gullion,* 163 S.W.3d at 892." *Id.* at 483. However, the CR 59.05 motion in *Bowling* was granted and a new judgment was entered on December 27, 2006, amending and replacing the November 30, 2006 judgment. *Id.* at 484. Said the Court, "[T]here was no abuse of discretion by the trial court in its decision to vacate the prior [November 30, 2006] order granting Appellants' summary judgment. Accordingly, the December 27, 2006 Order was properly entered and is properly before this Court for review." *Id.* The Supreme Court was careful to quote in full the pertinent part of the rule – "CR 59.05 authorizes the trial court to 'alter or amend a judgment, or to vacate a judgment *and enter a new one*' on a motion properly filed by a party within ten days after entry of a final judgment." *Id.* at 483 (emphasis added). That is what happened; the December 27, 2006 order did both. It granted CR 59.05 relief and constituted the new judgment. The new judgment was the final judgment under review – not, technically, the grant of the motion.

We tried to put all this in context in 2011, in a footnote in *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99 (Ky. App. 2011), saying:

> Orders granting or denying motions brought pursuant to CR 59.05 are non-final and non-appealable, *Mingey v. Cline Leasing Service, Inc.,* 707 S.W.2d 794, 796 (Ky. App. 1986), although grants of such motions may be reviewed for abuse of discretion once a new final judgment is entered. *See, e.g., Bowling v. Kentucky Dept. of Corrections,* 301 S.W.3d 478, 483-84 (Ky. 2009). When, in a Notice of Appeal, a party erroneously designates an order denying CR 59.05 relief as the order from which the appeal is taken, this Court applies a substantial compliance analysis, *see Lassiter v. American Exp. Travel Related Services Co., Inc.,* 308 S.W.3d 714, 718 (Ky. 2010), and, under circumstances void of prejudice, considers the appeal properly taken from the final judgment that was the subject of the CR 59.05 motion.

Tax Ease Lien, 340 S.W.3d at 103 n.5. Obviously, when a CR 59.05 motion is granted, it is still an interlocutory order but, when the new judgment is entered, that new judgment readjudicates all prior interlocutory rulings; that is why the grant of a CR 59.05 motion can be reviewed – it becomes part of the new final judgment. A denial of a CR 59.05 motion comes *after* the final judgment and so never is re-adjudicated and remains unappealable because this Court has no jurisdiction to review such interlocutory orders.

When the Supreme Court next addressed this issue, it cited *Tax Ease Lien*, saying: “There is no appellate jurisdiction over the typical interlocutory order. And it is for that reason that attempted interlocutory appeals are dismissed. *See, e.g., Tax Ease Lien Investments 1, LLC v. Brown,* 340 S.W.3d 99, 104 (Ky.

App. 2011)." *Cassetty*, 495 S.W.3d at 132. The Court went on to repeat the rule of substantial compliance in *Ready v. Jamison*, as follows:

> a notice of appeal naming only the order denying a post-judgment motion, although previously fatally defective, can now constitute substantial compliance with the rules and is usually sufficient to invoke appellate jurisdiction. Under this approach, "[d]ismissal is not appropriate . . . so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent." [*Ready v. Jamison*, 705 S.W.2d] at 482.

Cassetty, 495 S.W.3d at 132-33.

The substantial compliance rule only allows us to review the actual final judgment if it can be identified by reading the Notice of Appeal. It does not allow us to review denials of CR 59.05 motions themselves. And the only reason it allows us to review grants of CR 59.05 motions is because of readjudication under the new judgment.

I concur in the majority opinion but consider discussion of the merits of the motions under CR 59 surplusage.

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