NO. 17-CI-002146

JEFFERSON CIRCUIT COURT
DIVISION FIVE (5)
JUDGE TRACY DAVIS

JESSICA SNYDER, ADMINISTRATRIX OF THE ESTATE OF RICHARD JOSEPH SNYDER, et al. PLAINTIFFS

Electronically file

v. **CONSOLIDATED OPINION AND ORDER**

KOSMOS CEMENT COMPANY, et al. DEFENDANTS

**** **** ****

The above-styled and numbered action is before the Court on numerous post-trial motions of the parties, to wit and in order of filing: (**1**) the Defendants, Louisville Cement Assets Transition Company (f/k/a Kosmos Cement Company), CEMEX, Inc., and Lone Star Industries, Inc. (hereinafter, collectively, "Kosmos")'s motion for judgment notwithstanding the verdict ("J.N.O.V.") and/or for a new trial filed on July 14, 2023. The Third-Party Defendant, Huelsman & Sweeny Construction, Inc. (hereinafter "H&S") having responded thereto on July 20, 2023, and the Plaintiffs, Jessica Snyder, as Administratrix of the Estate of Richard Joseph Snyder, and individually and as natural parent and next friend of Ava Snyder and Sean Snyder, and Alisa Snyder, individually ("Plaintiffs") having responded on August 08, 2023, to which Kosmos replied on August 18, 2023; (**2**) Kosmos's July 19, 2023, motion to alter, amend or vacate the Court's July 12, 2023 Order which granted H&S's motion to dismiss Kosmos's negligence claims against H&S. H&S filed their response thereto on July 25, 2023; (**3**) Kosmos's motion to file complete deposition transcripts of certain depositions, also filed on July 19, 2023. Plaintiffs responded thereto on August 04, 2023, to which Kosmos replied on August 15, 2023; (**4**) Plaintiffs' renewed motion for CR 37.01 (d) sanctions against Kosmos. Kosmos responded thereto on September 05, 2023, to which Plaintiffs replied on September 11, 2023; and (**5**) Plaintiffs' motion for leave to file an

Amended Complaint seeking to name American International Group Insurance, Inc., AXA Insurance Company & National Union Fire Insurance Co. of Pittsburgh, PA ("National Union") (collectively the "Insurance Defendants") as Defendants for bad faith and UCSPA claims, which was filed on September 20, 2023. Kosmos responded thereto on October 05, 2023, to which Plaintiffs replied on October 16, 2023. The Insurance Defendant, National Union, sought and obtained leave to file its response to this motion on October 30, 2023, to which Plaintiffs replied on November 09, 2023.

In addition to the pleadings set forth *above*, the Court allowed multiple hours of oral arguments over two days regarding these pleadings on September 12 and September 21, 2023. Thereat, the Plaintiffs were represented by the Hon. Chadwick N. Gardner, the Hon. Jeremiah A. Byrne, and the Hon. Savannah Nolan. Kosmos was represented by the Hon. Richard W. Edwards, the Hon. David F. Cooney, and the Hon. Bethany A. Breetz. H&S was represented by the Hon. Denis C. Wiggins. PEBCO, Inc. ("PEBCO") was represented by the Hon. John R. Martin, Jr. These matters are now ripe for adjudication. After careful consideration of the record, the motions and memoranda of the parties, arguments of counsel, as well as the applicable case, statutory and procedural law, and being otherwise sufficiently advised, and for the reasons set forth herein below, the Court hereby finds and Orders as follows:

DISCUSSSION

Although CR 52.01 provides, in pertinent part, that: "Findings of fact and conclusions of law are unnecessary on . . . **any other motion** except as provided in Rule 41.02," (emphasis added), the Court authors the following for clarification and ease of appellate review. Any post-trial issues raised by any party which are not expressly addressed herein are hereby **DENIED**. *See e.g.* 46 Am.Jur.2d., Judgments, § 94 (1994): "Where a judgment is silent with regard to the disposition

of a matter, it is presumed that the claim is denied." *Cited with approval in Madden v. City of Louisville,* No. 2003-CA-001162-MR, *unpublished*, 2004 WL 1588279 at *3 (Ky. App. July 16, 2004).

The parties continue to dispute the facts of the underlying matter even after the jury heard the case and rendered their verdict. When convenient, Kosmos attempts to myopically focus exclusively on the events which occurred on August 09, 2016, when Plaintiffs' decedent, Richard Joseph "Joey" Snyder ("Mr. Snyder), was killed while servicing the 1631 loadout spout (aka "the barge loadout chute," colloquially, and technically the MK III PEBCO Cascade chute) located at Kosmos's cement plant on Dixie Highway, in Louisville, Jefferson County, Kentucky.[1] At other times, Kosmos seeks to widen the field of view, *e.g.*, to blame H&S for the chute's failure due to repairs made by H&S in 2014 when the barge loadout chute was placed back in operation with only three of eight required bolts having been installed. Kosmos attributes this to H&S, and H&S attributes the same to Kosmos.[2]

A. KOSMOS'S MOTION FOR J.N.O.V. AND/OR NEW TRIAL.

For purposes of a motion for a J.N.OV. the Court is required to resolve factual disputes in favor of the verdict.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of

[1] This was the position taken by Kosmos throughout much of the parties' discovery disputes.

[2] That the jury found against Kosmos' in this regard is evidenced by the jury's return of a unanimous verdict in favor of H&S under Instruction No. 9 and apportioning 0% fault to H&S under Instruction No. 11.

> proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). With this standard in mind, the Court will address Kosmos's most compelling arguments as to potential errors by this Court as raised in its motion for J.N.O.V. and/or for a new trial.

I. DRUG USE AND IMPAIRMENT

Post-mortem toxicology testing of Mr. Snyder's blood samples obtained during his autopsy revealed methamphetamine at 1,606 ng/ml and amphetamine at 345 ng/ml which Kosmos describes as "well above the therapeutic range and within the toxic range of methamphetamine concentration ranges reported." The blood testing would relate to Mr. Snyder's condition at the time of the fatal incident on August 09, 2016. Post-mortem testing of Mr. Snyder's urine sample obtained during his autopsy revealed the presence of methamphetamine, amphetamine, buprenorphine, norbuprenorphine, opiates, oxycodone, and oxymorphone. This testing would relate to these drugs being used near the August 09, 2016, incident. The Court excluded this evidence from trial under KRE 403, reasoning that the danger of undue prejudice, confusion of the issues and misleading the jury substantially outweighed its probative value, if any.

"Evidence that a person uses drugs is highly prejudicial." *Baumgardt v. Woods*, No. 5-08-CV-31-R, *unpublished*, 2009 WL 2222904 at *3 (W.D.Ky. July 23, 2009) *citing United States v. Czuprynski*, 65 F.3d 169, *unpublished*, 1995 WL 518873, at *2 (6th Cir. Aug. 31, 1995) *quoting United States v. Vizcarra-Martinez*, 57 F.3d 1506, 1516 (9th Cir. 1995). Kosmos admits as much. "While most evidence that a person uses drugs is highly prejudicial, when such evidence is also **highly probative of issues in the case**, it is admissible." [Kosmos's Memorandum in Support of Motion J.N.O.V. at pg. 23 (emphasis added)]. It is the emphasized language which bears closer scrutiny.

Kosmos cites a number of criminal DUI (or DUI related) prosecution cases: *e.g. Parsons v. Commonwealth*, 144 S.W.3d 775 (Ky. 2004); *Pemberton v. Commonwealth*, No. 2007-CA-001016, *unpublished*, 2008 WL 4530906 (Ky. App. Oct. 10, 2008); *Kilgore v. Commonwealth*, No. 2015-CA-000801, *unpublished*, 2016 WL 6543580 (Ky. App. Nov. 04, 2016); *Berryman v. Commonwealth*, 237 S.W.3d 175 (Ky. 2007), however this reliance is misplaced. In such cases, whether the defendant was "impaired" is of fundamental concern and is **the** ultimate issue of fact to be determined. In such cases, drug testing of the sorts involved in the cited opinions, is highly probative of the issues in the case - - even if prejudicial to the defense. This, however, is primarily a negligence case. In Kentucky, "[t]he elements of a negligence claim are (1) a legally-cognizable duty, (2) a breach of that duty, (3) **causation** linking the breach to an injury, and (4) damages." *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016) *citing Pathways v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003) and *Mullins v. Commonwealth Life Insurance Co.*, 839 S.W.2d 245, 247 (Ky. 1992)(emphasis added). It is the lack of any identifiable nexus between Mr. Snyder's toxicology results and the direct and proximate cause of his death which makes KRE 403 applicable.

Mr. Snyder was killed when attempting to replace a sheave on the barge loadout chute while the apparatus was stuck, inoperable, mid-air. During the repair, the lower portion, the flange, separated from the chute causing the cables surrounding Mr. Snyder to tighten thereby crushing him. The flange separated for two (2) reasons: (1) because it was secured by only three of eight intended bolts; and (2) because there was approximately seven to ten tons [14" deep] of cement buildup on the shroud [the base of the flange].[3] This was the **cause** of the chute failure which led to Mr. Snyder's death.

[3] The excess buildup of cement obscured the condition of the missing bolts, thereby creating a hidden or latent defect and danger.

Whether Mr. Snyder was 'high as a kite' or 'sober as a judge' on August 09, 2016, or in the days and weeks leading thereto, is irrelevant because there is **no causal relationship between** his alleged **drug use** and/or impairment and **the missing bolts** (which occurred in 2014) **nor the excessive cement buildup** on the flange. Although Kosmos attempts to argue that Mr. Snyder's failure to recognize and/or remediate the buildup of excess of cement on the flange/shroud is evidence of his impairment on the date of his death, the same could be said of **all** of Kosmos's managers and employees, *who were presumably not on methamphetamine*, for the months and years that the chute was operated in this condition. Indeed, Kosmos employees familiar with the equipment could not even recognize the shroud in pictures without the buildup of excess cement.

Kosmos's other claims of relevance regarding Mr. Snyder's alleged impairment: That he "initially failed to utilize properly sized rigging equipment;" that he improperly rigged the chute; that he "failed to listen to a coworker who warned that the spout should be rigged at a separate location;" and that he "placed himself in a known 'pinch point;'" are all refuted by other evidence introduced at trial. Again, in ruling on a motion for a J.N.O.V., the Court is required to give every fair and reasonable inference which can be drawn therefrom. *See Taylor v. Kennedy*, *supra*.

Without a causational nexus between Mr. Snyder's alleged drug use and "impairment" to the **causes** of this incident, the prejudicial effect of his toxicology results far outweighs any probative value of this evidence. Allowing this evidence under the facts of this case would only serve to prejudice the jury and amount to impermissible character evidence under KRE 404. The Court next reviews Kosmos's claims that other evidence was impermissibly introduced under Rule 404 (b).

II. KRE 404 (B)

Kosmos complains bitterly that the Plaintiffs were allowed to introduce, over its objection, evidence of "prior bad acts" not related to Mr. Snyder's death or the 1631 loadout spout, and that this therefore violated KRE 404 (b). The Court disagrees.

KRE 404 is entitled "character evidence and evidence of other crimes," and provides, in pertinent part:

> (a) Character evidence generally. **Evidence of** a person's **character or a trait of character is not admissible for the purpose of proving action in conformity therewith** on **a particular occasion**, . . .
>
> (b) Other crimes, wrongs, or acts. **Evidence of other crimes, wrongs, or acts is not admissible** to prove the **character** of a person in order **to show action in conformity therewith. It may, however, be admissible**:
>
> > (1) If offered for **some other purpose**, such as proof of **motive**, **opportunity**, **intent**, preparation, plan, **knowledge**, identity, **or absence of mistake or accident**; **or**
> >
> > (2) **If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party**.

(Emphasis added). Here, the challenged evidence satisfies **both** exceptions found in KRE 404 (b) (1) and (2).

Again, Kosmos would like to focus (here) solely upon the events of August 08 and 09, 2016, and the 1631 loadout spout. Of course, there is less evidence that Kosmos did anything negligent at that time and place. However, as set forth above, the failure of the loadout chute and flange separation resulting in Mr. Snyder's death was **caused** by events which occurred far in advance of August 09, 2016. The Plaintiffs' theory of the case was that Mr. Snyder's death resulted

from Kosmos's failure to provide a safe workplace[4] and its failure to perform regular maintenance on the loadout chute. An overarching theme presented at the trial was that Kosmos was motivated by profits and production, and that it prioritized production over the maintenance of its equipment and the safety of its workers and independent contractors.

The Plaintiffs did **not** offer evidence of Kosmos's prior accidents, near misses, and MSHA citations to prove **actions in conformity** therewith. Rather, this evidence and the other testimony regarding Kosmos's prioritizing production over safety, went directly to *why* the barge loadout chute was placed back in operation with only three of the eight necessary bolts, and *why* Kosmos operated the chute with an accumulation of seven to ten tons of cement buildup on the shroud. It went to explain why Kosmos continued to use the barge loadout chute for five months - - between March and August 2016 - - after a work order was submitted for changing out the sheaves and cables on March 03, 2016 - - with a priority level of "within one week." It explained why routine maintenance was not performed on the chute. It explained why Kosmos opted to attempt to repair the chute in mid-air, as opposed to attempting to lower it to a barge. This evidence was relevant[5] for a legitimate purpose, probative, and its probative value substantially outweighed any prejudicial effect. *Trover v. Estate of Burton*, 423 S.W.3d 165, 173 (Ky. 2014).

These were not "prior bad acts" offered to prove the Kosmos acted in conformity therewith. This was not evidence offered to prove that Kosmos was allegedly negligent previously and therefore was more likely to have been negligent on August 09, 2016. While it is true that this

[4] The Court perceives this to be separate and distinct from the poor "safety culture" line of cases argued by Kosmos.

[5] KRE 401 defines relevant evidence: '"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

evidence tended to "depict the plant as a dangerous place to work" even though not directly related to the loadout chute itself, that *was* Plaintiffs' theory of the case. In short, this evidence proved Kosmos's motive, opportunity, intent, knowledge, and absence of mistake, **and** was "inextricably intertwined" with Plaintiffs' other evidence such that separation could not be accomplished without serious adverse effect on the Plaintiffs' case. The Court perceives no error in its admission.

III. *AUSLANDER*

Kosmos's reliance upon *Auslander Properties LLC v. Nalley*, 558 S.W.3d 457 (Ky. 2018) is likewise misplaced. Prior to trial Kosmos submitted its proposed jury instructions which included, *inter alia*, its proposed Instruction No. 3. This proposed instruction was purportedly premised upon *Auslander*, and read, in pertinent part:

> By using a specialized independent contractor such as [Mr. Snyder], the Kosmos Cement Company, is entitled to rely upon the contractor's skill and superior knowledge of the risks inherent in the work and the safety equipment and techniques required to minimize those risks. . . . The Kosmos Cement Company, as the owner of the property, **owes no duty of care to employees of an independent contractor**, including [Mr. Snyder], **aside from the duty to warn of hidden dangers**.

(Emphasis added). Determining that Kosmos's proposed instruction misstated *Auslander* as to the duty element,[6] the Court submitted a modified *Auslander* instruction in addition to an instruction on common law negligence. The Modified *Auslander* instruction was as follows:

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[6] Duty presents a question of law," *Patton v. Bickford*, *supra.* As to the specific duties owed to an independent contractor, *Auslander* held that: ". . . an employer subject to KOSHA regulations for the protection of its own employees is also bound to comply with the same regulations for the benefit of an independent contractor **performing** on the employer's premises **the same work as the employer's employees**." 558 S.W.3d at 465, *citing Hargis v. Baize*, 168 S.W.3d 36, 43 (Ky. 2005), and *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984)(emphasis added). "Together, *Teal* and *Hargis* make it clear that an employer's KOSHA responsibility can extend beyond its own employees to include other, such as independent contractors and their employees." *Id.* This holding in *Auslander* was further limited to situations involving the same work as the employer, "[b]ut when the employer engages the services of an independent contractor for a task alien to the core function of the employer's business, the employer is relying

> It was the duty of Kosmos Cement Company as the owner of the premises, to warn an independent contractor, such as Joey Snyder, of hidden or latent defects and dangers that (a) Kosmos Cement Company knew, or had reason to know about, and (b) Joey Snyder did not know about and could not have discovered for himself.
>
> Are you satisfied from the evidence that Kosmos Cement Company failed in this duty to warn Joey Snyder of hidden defects and dangers, and such failure was a substantial factor in causing injury to and the death of Joey Snyder?

[Jury Instruction No. 6]. The jury's affirmative answer to this Interrogatory was unanimous.

As this case is not a KOSHA or negligence per se case, *Auslander* is of limited applicability, and regardless, the Court does not read *Auslander* as sweepingly broad as does Kosmos. However, even accepting Kosmos's interpretation as valid, factual disputes prohibit its application hereto. First, and most obviously, it is disputed whether H&S, and by implication, their employee, Mr. Snyder, was contracted or specifically hired by Kosmos to repair the barge loadout chute.[7] When the sheave first jammed on August 08, 2016, it was Kosmos's employees who performed the original attempts to repair. Having failed in the attempt, the next day, Kosmos pulled Mr. Snyder and other H&S personnel **off an unrelated project** at the Kosmos facility to assist its employees in the repair effort.

As noted above, a work order for changing out the sheaves and cables was generated on March 03, 2016, with a priority level of "within one week." Kosmos took no action on that work order. Had it done so, and had Kosmos contracted with H&S to replace the sheaves based upon

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upon the special expertise and ability of the contractor to know and obey the applicable safety standards of that activity." *Id*. at 466. Still even with independent contractors a landowner owes a duty to warn of hidden defects or dangers "neither known to the contractor, nor such as he ought to know." *Id.* at 467.

[7] Although Kosmos has presented an Invoice indicating that it was ultimately billed for 32 hours of work performed on August 9, 2016, being billed for H&S's work on that day is different from directly engaging H&S to perform the work.

that work order and relied upon H&S to inspect the chute and do the job, *Auslander* could be more applicable.

Second, what occurred on August 09, 2016, could best be described as a joint effort between Kosmos and H&S. The crew working on the spout that day was made up of both. Kosmos's Wayne Amburgey appeared to make managerial decisions regarding the project, and supplied the original chain falls, which proved insufficient for the weight of the shroud. Kosmos's Jose Madera was also involved in decision making. In short, there is a factual dispute as to how much Kosmos directed the project and how much it, in fact, relied upon Mr. Snyder's and H&S's special expertise.

Third, there is a factual dispute whether the August 2016, work on the loadout chute was "alien" to the work Kosmos's employees regularly engaged in. It is undisputed that Kosmos added the "dog ears" to the equipment, and that Kosmos had used these for rigging in the past. Kosmos's Nick Wolfe trained Mr. Snyder to use them. Mr. Wolfe also testified that Kosmos's personnel had previously changed the cables and pulleys on the equipment by rigging it. Given these factual disputes, and the standard set forth in *Taylor v. Kennedy*, *supra*., the Court concludes that its jury instructions were appropriate under *Auslander*.

The remaining arguments and points raised by Kosmos in their motion for J.N.O.V. and/or for a new trial are **DENIED** without further elaboration.[8]

[8] Because they relate to Kosmos's motion to file certain deposition transcripts, the Court explains that that Kosmos's desire to question Ms. Snyder about her relationship with Mr. Wolfe was found to be irrelevant (*see fn. 5, above*) and/or the prejudicial effect outweighed any probative value under KRE 403 as to her loss of consortium claim. While it could go to bias on the part of Mr. Wolfe, the Court does not believe this would have swayed the jury verdict or otherwise altered the outcome of the trial. Likewise, the Court concedes a procedural irregularity in the handling of H&S motion for a directed verdict. However, as the jury returned its finding in favor of H&S and apportioned zero fault to H&S (*see fn. 2*, *above*) the Court does not believe the verdict would otherwise have been swayed.

Kosmos's motion to Alter, Amend, or Vacate the Court's July 12, 2023, Order is **DENIED** for the reasons set forth therein as well as the reasons set forth herein *above*.

B. KOSMOS'S MOTION TO FILE COMPLETE DEPOSITION TRANSCRIPTS OF CERTAIN DEPOSITIONS

Kosmos seeks to file six (6) complete deposition transcripts into the record. Plaintiffs oppose the request. It has long been held that:

> It is a fundamental rule of appellate practice that after a **final judgment** has been rendered in the circuit court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered. . . . The case must be tried in this court on the record as it was presented to the trial court. . . . [A]dditions cannot be made to the record of matters not considered by the trial court in rendering it judgment.

Fortney v. Elliot's Adm'r, 273 S.W.2d 51, 52 (Ky. 1954) (emphasis added) (internal citations omitted). This rule continues to be cited, *see e.g.*: *Sanders v. Wal-Mart Stores East, LP*, No. 2015-CA-000865, *unpublished*, 2018 WL 672428 at *3 (Ky. App. Feb. 2, 2018). Here, the judgment was not yet final when Kosmos filed its motion. *See* CR 54.01, CR 54.02, CR 59.05, and RAP 3 (E)(2).

Further, the Court agrees with Kosmos's position that the deposition transcripts were erroneously excluded from the record originally. This Court cannot fault the Office of the Jefferson County Circuit Court Clerk for honoring and following the prior General Orders entered by the term on May 21, 2021, and February 09, 2017. The Court likewise understands the problem these General Orders were enacted to prevent, *i.e.*, the monumental growth of civil files to unmanageable levels with the inclusion of deposition transcripts.[9] *See* the February 09, 2017,

[9] The Court notes the file in this case voluminous as it is, has been needlessly expanded with multiple filings of the same pleadings - - including court orders - - deposition excerpts, exhibits etc., s*ee e.g.,* PEBCO's AOC-280 Notice of Submission filed June 02, 2023. The file is already into its 12th volume and that is *without* the transcripts of the 50+ depositions taken in this action.

General Order: "Physical delivery of the original [of the deposition transcript] to the court clerk is prohibited due to space limitations of the Jefferson Circuit Clerk."

However, CR 30.06 (1) is clear and unambiguous in its command that the officer taking the deposition "promptly **shall** deliver the deposition to the clerk of the court . . . **for filing**." (Empasis added). Regardless of how well-intentioned or necessary the above-mentioned General Orders may be, the 30th Judicial Circuit cannot unilaterally disregard, override, or overrule the Kentucky Rules of Civil Procedure. *See e.g.,* CR 1 (2), JRP 101, Kentucky Constitution § 116, SCR 1.040 (3)(a), and *see Abernathy v. Nicholson*, 899 S.W.2d 85, 87 (Ky. 1995) summarizing as follows:

> Under Section 116 of the Constitution, the power to prescribe rules of practice and procedure for the Court of Justice is vested **exclusively** in the Supreme Court and should **not** be undertaken by other courts. The authorization to enact local rules pursuant to SCR 1.040 (3)(a) is subject to two conditions: first, that **no local rule shall contradict any** . . . **rule** . . . **promulgated by this Court**, and second, that it shall be effective **only** upon Supreme Court approval.

(Emphasis added).

Wherefore, Kosmos's Motion to File Complete Deposition Transcripts of Certain Depositions is hereby **GRANTED**.

C. PLAINTIFFS' RENEWED MOTION FOR CR 37 SANCTIONS

The judgment following the jury's verdict was entered herein on July 06, 2023. Plaintiffs filed their renewed motion for sanctions under CR 37.01 (d) on August 08, 2023. Kosmos argues that Plaintiffs' renewed motion is untimely and outside the particular case jurisdiction of the Court. To avoid the jurisdictional problem, the Plaintiffs cite analogous federal decisions and two unpublished decisions: *Brett v. Isaac*, No. 2008-SC-00712, *unpublished*, 2009 WL 2707092 (Ky. Aug. 27, 2009); and *Nationwide Ins. Co. v. Madison*, No. 2011-CA-001614, *unpublished*, 2012

WL 6213794 (Ky. App. Dec. 14, 2012).[10] However, as highlighted by C.J. VanMeter's dissent while he was in the Court of Appeals, in *Hunt v. North American Stainless*, No. 2012-CA-000098, *unpublished*, 2014 WL 1881891 (Ky. App. May 9, 2014) there are contrary **published** decisions holding otherwise. *See Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479 (Ky. 2009) and *Scott v. Campbell County Bd. of Educ.*, 618 S.W.2d 589 (Ky. App. 1981). To date, the Kentucky Supreme Court has not acted on C.J. VanMeter's [then J. VanMeter] plea to resolve the issue.

Regardless, the Court need not rule on the particular case jurisdiction issue in this regard. Despite this Court's conclusion that many of Kosmos's positions and tactics taken in discovery were unjustified, unwarranted, and caused unnecessary delay and needlessly increased the costs of litigation, CR 37.02 (3) limits the otherwise mandatory imposition of sanctions, including attorneys' fees, if "other circumstances make an award of expenses unjust." Here, the jury's verdict included **$25 million as punitive damages**. Of course, that award was not premised on Kosmos's discovery abuses and gamesmanship, per se, but it more than adequately compensates Plaintiffs and their counsel for the "tens of thousands of dollars" spent in pursuing the discovery issues. In this circumstance the Court finds that further financial punishment as sanctions - - although otherwise warranted - - would be unjust. The Plaintiffs' Renewed Motion for Sanctions is therefore **DENIED.**

D. PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Like Plaintiffs' renewed motion for sanctions, the Motion for Leave to File Plaintiffs' Third Amended Complaint raises an issue with this Court's particular case jurisdiction. Again, the judgment following the jury's verdict was entered herein on July 06, 2023. Plaintiffs did not move

[10] *See also Louisville-Jefferson County Metro Gov't v. Brooks*, No. 2012-CA-001141, *unpublished*, 2013 WL 4512649 (Ky. App. Aug. 23, 2013).

for leave to file an amended complaint until September 20, 2023. Kosmos and National Union argue that the Court lost particular case jurisdiction ten days after the entry of judgment.

"Despite its preeminent place in the legal cannon, 'the word 'jurisdiction' is more easily used than understood'." *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky. 2007) *quoting Commonwealth, Dept. of Highways v. Berryman*, 363 S.W.2d 525, 526 (Ky. 1963). The Supreme Court continues:

> This is because the "term is too often used in a loose fashion," . . . with the single word being used to describe several related but nevertheless very different concepts. There are actually three separate types of jurisdiction, all of which must be met before a court may hear a case. . . .
>
> First, there is personal jurisdiction, or "the court's authority to determine a claim affecting a specific person." . . . When the question is whether the court has the power to compel a person to appear before it and abide by its rulings, this is a question of personal jurisdiction. . . .
>
> Often, discussions of jurisdiction concern subject-matter jurisdiction, or the court's power to hear and rule on a particular type of controversy. . . . Subject matter jurisdiction is not for a court to "take," "assume," or "allow." "Subject-matter jurisdiction cannot be born of waiver, consent or estoppel," but it is absent "only where the court has not been given any power to do anything at all in such a case." . . . A court either has it or it doesn't . . . .
>
> "Finally, there is jurisdiction over the *particular* case at issue, which refers to the authority and power of the court to decide a *specific* case, rather than the class of cases over which the court has subject-matter jurisdiction." . . . This kind of jurisdiction often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expired. . . . Jurisdiction over a particular case can perhaps be the most difficult of the jurisdictional ideas, as it also includes, or at least relates to, concepts such as ripeness and failure to state a claim, which are usually discussed in terms of their jurisdictional effect, although without specific reference to particular-case jurisdiction.

Id. at 737-38 (internal citations omitted).

Both Kosmos and National Union rely upon *Keeny v. Osborne*, No.s 2007-CA-2112, 2007-CA-002177, *unpublished*, *not reported* (Ky. App. March 5, 2010) *rev'd other grounds*, *Osborne*

v. Keeney, 399 S.W.3d 1 (Ky. 2012). The Plaintiffs correctly note that with the depublishing of the Court of Appeals opinion, *Keeny v. Osborne* is not binding or precedential authority. That, however, does not make *Keeny* less applicable to the facts presented herein nor diminish J. Clayton's thoughtful analysis and application of the civil rules and prior jurisprudence including *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 93 (Ky. 1956):

> Under CR 59.05, a motion to alter or amend a judgment must be served not later than 10 days after entry of the judgment. . . . [T]he judgment must be reopened before an amendment to the complaint can be allowed, and the motion to reopen must be served within 10 days.

Id. As to CR 15.01, which applies to amendment of pleadings, the court in *James* was unambiguous that "this Rule applies only to amendments offered during the pendency of the action. Certainly it was not intended to apply in situations where, by the lapse of a period of 10 days after judgment, the court has lost control of the judgment." *Id*. at 94.

It is axiomatic that "a judgment becomes final ten days after its entry by the trial court." *Harris v. Camp Taylor Fire Prot. Dist.*, *supra*., at 482, *citing* CR 52.02, 59.04, and 59.05. "And, 'a court loses jurisdiction once its judgment is final.'" *Id.*, *quoting Mullins v. Hess*, 131 S.W.3d 769, 774 (Ky. App. 2004). This is one of the so called "jurisdictional facts" for particular case jurisdiction as referenced in *Nordike*, *supra.* As to the effect of Kosmos's filing a timely motion for J.N.O.V. and/or new trial, the Court believes J. Clayton, in *Keeny* correctly interpreted *Johnson v. Smith*, 885 S.W.2d 944, 947 (Ky. 1994) as holding "[u]nder Kentucky law one party's motion for postjudgment relief under CR 50 or 59 does not toll the ten-day limitation period for another party to file a CR 59 motion on different grounds."

The Court of Appeals in *Keeny* ultimately held that "the trial court **did not have jurisdiction** to allow Osborne to amend her complaint nineteen days following the entry of the judgment." (Emphasis added). While the Plaintiffs do an admirable job of attempting to

distinguish *Jonhson* based upon the specific appellate jurisdictional facts inherent therein and the opinion's focus on "affected parties," the Kentucky Supreme Court implicitly accepted J. Clayton's interpretation of *Johnson* in *Keeny*, albeit in dicta, finding that: "The Court of Appeals appropriately resolved the issue . . . whether the trial court retained jurisdiction [to allow an] amended complaint . . . nineteen days after the entry judgment." 399 S.W.3d at 5, fn.1.

The Court need not rely upon *Keeny v. Osborne* nor the dicta in *Osborne v. Keeney*, as the legal underpinnings thereof are clear under the Rules of Civil Procedure. The July 06, 2023, Judgement was a final order adjudicating all the rights of all the parties to this action.[11] *See* CR 54.01. CR 59 is clear that motions made thereunder must be made within the ten (10) days prescribed thereby. *See e.g.*: CR 59.02; CR 59.04; and CR 59.05. *See also* CR 62.01, which provides, in pertinent part:

> A motion for a new trial or to alter, amend or vacate a judgment made pursuant to Rule 59, or a motion for judgment in accordance with a motion . . . made pursuant to Rule 50 . . . shall operate to stay the execution of or any proceedings to enforce a judgment **pending the disposition of any such motion or motions, provided that such motion is filed with the court within the time prescribed for the making of or service of such motion**.

(Emphasis added). *See also* RAP 3 (E)(2) & (3), the latter of which provides that: "If a party files a notice of appeal . . . before the disposition of any **timely** motions under CR 50.02, CR 52.02, or CR 59, the trial court **retains jurisdiction to rule on the motion**." (Emphasis added). By necessary reverse implication, any motion made *after* the entry of a *final judgment*, and not

[11] Prior to trial, and again during the trial, the Court sustained the motions to dismiss the Intervening Complaint filed by Motorists Mutual Insurance Company ("MMIC") as MMIC completely failed to participate in the action or take any steps to advance and support its claims. Although Kosmos was to file a proposed Order to formerly dismiss MMIC's Intervening Complaint, it has failed to do so, the Court therefore adds the same to this Order.

provided for under Rules 50, 52.02, 59 [and 60] and/or not made within the time prescribed, are *not* within the jurisdiction of the Court.

As the Plaintiffs did not move to modify or reopen the judgment herein, their Motion for Leave to File Plaintiffs' Third Amended Complaint was brought under Rule 15 and was filed over two months after the judgment was entered, is outside the particular case jurisdiction of the Court and is therefore **DENIED**.

E. MOTORISTS MUTUAL INSURANCE COMPANY'S INTERVENING COMPLAINT

MMIC's Intervening Complaint is hereby **DISMISSED**.

This is a final and appealable order, there being no just cause for delay.

/s/ HON. TRACY E. DAVIS
electronically signed
11/14/2023 1:38:03 PM ET

TRACY E. DAVIS JUDGE,
JEFFERSON CIRCUIT COURT
DIVISION FIVE (5)

DATE: _____

NOE:
Counsel of Record
via electronic service per § 5 (10) of the eFiling Rules.