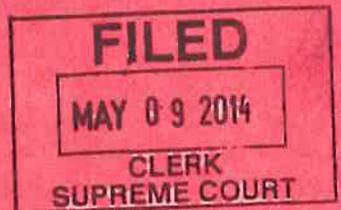


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2013-SC-000252-D



KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLANT

V. ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS
2011-CA-1764

KEITH JUSTIN CONLEY, ET AL.

APPELLEES

**BRIEF OF KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY**

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief has been served by mailing a true copy thereof, postage prepaid, this 8th day of May, 2014 to: Hon. Kimberley Childers, Judge, Knott Circuit Court, P.O. Box 867, Hindman, KY 41822; Hon. Glenn M. Hammond, P.O. Box 1109, Pikeville, KY 41502; Hon. Debbie Lewis, P.O. Drawer 1179, Hazard, KY 41702; Hon. Ned Pillersdorf, 124 West Court Street, Prestonsburg, KY 41653; and Hon. Steven W. Owens, P.O. Box 1426, Pikeville, KY 41502. It is further certified that the Record on Appeal has been returned to the Knott Circuit Clerk's Office.


Michael D. Risley

INTRODUCTION

Kentucky Farm Bureau Mutual Insurance Company seeks reversal of the dismissal of its appeal from the Knott Circuit Court's decision that a Kentucky Farm Bureau homeowners policy provided coverage for claims arising from the shooting death of Jessica Newsome even though Keith Justin Conley, the Kentucky Farm Bureau insured, was criminally found guilty of murder, an essential element of which is the intent to cause the death of another. The Court of Appeals dismissed the appeal based on its conclusion that Kentucky Farm Bureau's timely Rule 59 motion did not toll the time for filing a notice of appeal because the motion was not sufficiently particular for purposes of Rule 7.02.

STATEMENT CONCERNING ORAL ARGUMENT

Kentucky Farm Bureau requests that oral argument be held.

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STATEMENT OF THE CASE

In December 2004, Keith Justin Conley (“Keith”)¹ shot and killed his girlfriend, Jessica Newsome, in Knott County, Kentucky. At the time, Keith and Ms. Newsome were living together in the home of Keith’s father, Keith E. Conley (“Mr. Conley”). (R. 1-4) Keith was convicted of murder in connection with Ms. Newsome’s death, and that conviction became final in 2007. *See Conley v. Commonwealth*, 2006-SC-427, 2007 Ky. Unpub. LEXIS 6 (Ky. Aug. 23, 2007) (attached as Exhibit B).

In December 2005, the Newsomes filed a lawsuit against Keith seeking damages arising from Ms. Newsome’s murder. (R. 1-4) The complaint was later amended to add Mr. Conley as a defendant, but Mr. Conley was dismissed from the action on statute of limitations grounds. (R. 52)

At the time Keith murdered Ms. Newsome, Mr. Conley’s home was insured through a homeowners insurance policy issued by Kentucky Farm Bureau to Mr. Conley. (R. 20-26) Kentucky Farm Bureau did not, and does not, believe that its homeowners policy provides coverage to Keith for the claims asserted against him arising from the murder of Ms. Newsome. That policy provided coverage if a claim was made or suit was brought against an “insured” for damages because of bodily injury or property damage caused by an “occurrence” to which the coverage applied. (R. 20-26) “Occurrence” is defined in the Kentucky Farm Bureau policy as an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result during the policy period in bodily injury or property damage. (*Id.*) Murder, which is not

¹ The Court of Appeals Orders identify the Appellee as Keith Justin Conley. From the trial court’s Orders and the Opinion entered by this Court in his criminal case, it appears that his name is actually Justin Keith Conley.

accidental, does not fall within the policy's definition of "occurrence." *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299 (Ky. App. 2008).

In addition, the policy's bodily injury and property damage coverage provisions exclude coverage for bodily injury or property damage that is expected or intended by one or more insureds. As a matter of law: (1) an intent to injure can be inferred from the act of pointing a gun at and shooting someone, *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809 (Ky. App. 2000); and (2) Keith's conviction for murder, an essential element of which is the intent to cause the death of another, established that Keith intended to cause the death of Ms. Newsome. *Parsley v. Kentucky Farm Bureau Mut. Ins. Co.*, 32 S.W.3d 103 (Ky. App. 2000).

Subject to a reservation of rights, Kentucky Farm Bureau provided a defense to Keith for the Newsomes' claims asserted against him arising from his murder of Ms. Newsome. Kentucky Farm Bureau also intervened in this action for the purpose of seeking a declaration that the homeowners policy issued to Mr. Conley did not provide coverage to Keith for the claims arising from Keith's murder of Ms. Newsome. (R. 20-26)

After Keith's murder conviction became final, Kentucky Farm Bureau moved the trial court for a ruling on its declaratory judgment petition. (R. 105-08) Kentucky Farm Bureau asked the court to determine that there was no coverage under the homeowners policy because Keith's murder of Ms. Newsome was an intentional act and thus was not a covered "occurrence" under the policy. (*Id.*) Following a hearing, the trial court ruled on Kentucky Farm Bureau's motion. (R. 123-126, 6/23/11 Order and Judgment, attached as Exhibit C)

The trial court's opinion did not address the threshold question of whether Keith's act of murder constituted an occurrence for purposes of the Kentucky Farm Bureau policy but instead went right into a discussion of the policy's exclusions. (*Id.*) The trial court, however, should never have considered any exclusion. As this Court has made clear: "[A] court need not consider the applicability of an exclusion if there is no initial grant of coverage under the policy. . . . **Since we concluded that there is no coverage in this case because there was no occurrence, we need not examine any exclusions.**" *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 78 n.35 (Ky. 2010) (emphasis added).

After failing to make the required threshold determination of whether Ms. Newsome's murder was an "occurrence" potentially covered by the policy, the trial court erroneously determined that an inapplicable endorsement created ambiguity as to whether the "fatal injuries suffered by Jessica Newsome were intended or expected by" Keith when he committed the intentional act of murder. (Exhibit C at 3) In holding that the meaning of "intent" in the exclusion contained in the policy's bodily injury coverage was ambiguous and, thus, that the policy provided coverage, the trial court relied on an exception contained in a separate exclusion set forth in an endorsement which was not a part of the policy. (*Id.* at 2-3)

The trial court first found that "contained in the homeowner's policy issued by" Kentucky Farm Bureau was an endorsement which included an exclusion "excluding coverage for injuries caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of an insured." (*Id.* at 2) While that endorsement and the exclusions applicable to the coverage provided by that endorsement were physically in

the booklet sent to Mr. Conley, the endorsement containing that exclusion was not purchased by Mr. Conley and therefore was not part of the applicable policy.

Second, the trial court recognized that that endorsement was inapplicable: “However, [Kentucky Farm Bureau] did not apply said Endorsement to [Mr.] Conley’s homeowner’s policy.”² (*Id.*) Of course, Kentucky Farm Bureau did not apply that endorsement or its exclusions (which would have applied only to the coverage provided by that endorsement) because they were not part of the Kentucky Farm Bureau policy purchased by Mr. Conley.

Third, the trial court found that the inapplicable exclusion contained in the endorsement that was not even a part of Mr. Conley’s policy created an ambiguity in the policy purchased by Mr. Conley: “In interpreting the contract’s terms, by assigning language its ordinary meaning, taking into account the drafter’s failure to apply a more specific definition of intent as contained in the Endorsement not applied to the subject policy,” Keith’s conviction for murdering Ms. Newsome “does not thereby determine that the fatal injuries suffered by Jessica Newsome were intended or expected by [Keith] as defined in the homeowner’s policy.” (*Id.* at 3) The law of Kentucky is actually the exact opposite. *See Parsley v. Kentucky Farm Bureau Mut. Ins. Co.*, 32 S.W.3d 103, 106 (Ky. App. 2000) (“[S]ince the crimes for which Crawford was convicted required a finding of intent, . . . this finding precludes relitigation of the issue of Crawford’s intent to cause bodily injury within the policy’s exclusions.”). In addition, Kentucky courts previously have found that the language contained in the policy’s exclusion for intentional acts is not ambiguous, and the trial court’s decision to the contrary is

² The only endorsement purchased by Mr. Conley related to golf carts and motorized land conveyances, and that endorsement does not contain the “intent” language relied upon by the trial court.

inconsistent with several controlling precedents. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Pelgen*, 241 S.W.3d 814 (Ky. App. 2007); *Kentucky Farm Bureau Mut. Ins. Co. v. Coyle*, 285 S.W.3d 299 (Ky. App. 2008); and *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809 (Ky. App. 2000).

Finally, ostensibly “interpreting the contract’s terms by assigning language its ordinary meaning” (but without saying what “ordinary meaning” was applied to what contract terms), the trial court held that the “policy provides coverage” for Keith. (Exhibit C at 3)

On June 29, 2011 (within 10 days of the entry of the trial court’s Order and Judgment on June 23, 2011), Kentucky Farm Bureau filed a motion under Rule 59 asking the court to alter or amend its Order and Judgment. (R. 127-29, Motion to Alter, Amend or Vacate, attached as Exhibit D) While the motion clearly asked the court to reconsider the Order and Judgment, Kentucky Farm Bureau did not at that time submit a brief setting forth in detail the reasons it believed the court had erred. It did not do so because the trial court had relied on an exclusion that neither side had cited or relied on, and counsel wanted to investigate that exclusion, including confirming whether it actually was a part of the policy at issue.

The motion was noticed for August 11, 2011, the next motion day the presiding judge would be present. Before that hearing, on August 8, 2011, Kentucky Farm Bureau filed a supporting memorandum that provided case law demonstrating why the trial court’s decision as to coverage was wrong and referenced an affidavit confirming that there were no additional endorsements to Mr. Conley’s homeowners policy. (R. 137-50, Memorandum of Points and Authorities, attached as Exhibit E) On the same day (August

8, 2011), the Newsomes filed a motion to strike Kentucky Farm Bureau's Rule 59 motion, for the first time arguing that the motion was deficient because it did not comply with Rule 7.02's pronouncement that a motion shall "state with particularity the grounds" for the motion. (R. 134-36) Two days later, on August 10, the Newsomes filed a response to Kentucky Farm Bureau's Rule 59 motion and supporting memorandum. (R. 151-56)

The court heard arguments on both Kentucky Farm Bureau's Rule 59 motion and plaintiff's motion to strike on August 11, 2011. On the same date, Kentucky Farm Bureau filed a written response to Keith's motion to strike. (R. 157-59)

The trial court denied Kentucky Farm Bureau's Rule 59 motion in an Order entered on August 30, 2011. (R. 166, 8/3/11 Order, attached as Exhibit F) While that Order did not expressly address the Newsomes' motion to strike, the court's ruling on the Rule 59 motion had the practical effect of denying that motion.

Kentucky Farm Bureau filed its notice of appeal on September 26, 2011, within 30 days of the trial court's denial of its Rule 59 motion. (R. 167-74) On October 12, the Newsomes filed a belated cross appeal from the trial court's denial of their motion to strike Kentucky Farm Bureau's Rule 59 motion. (R. 175-77)

The Newsomes moved to dismiss Kentucky Farm Bureau's appeal, arguing that Kentucky Farm Bureau's Rule 59 motion did not toll the 30 days in which the notice of appeal was to be filed and, thus, Kentucky Farm Bureau's appeal was untimely. Following a response from Kentucky Farm Bureau, the Court of Appeals passed the motion to the panel considering the appeal on its merits. At the same time, on the Court's

own motion, the Court dismissed the Newsomes' cross-appeal as untimely. The Newsomes did not seek further review of that dismissal, which has long been final.

In an Order entered on March 13, 2013, the Court of Appeals dismissed Kentucky Farm Bureau's appeal. On March 19, 2013, the Court of Appeals entered an Order vacating its March 12, 2013 Order and entered a new Order dismissing Kentucky Farm Bureau's appeal (the March 13 order was missing some pages). *See Exhibit A.* In doing so, the Court of Appeals held:

Ordinarily, a timely CR 59.05 motion to alter, amend, or vacate an order of a trial court will toll the 30-day period the parties have to file a notice of appeal. CR 73.02(1)(e). When the motion states no grounds, however, it is deficient and does not toll the 30-day period in which to file a notice of appeal. *Matthews v. Viking Energy Holdings*, 341 S.W.3d 594, 597 (Ky. App. 2011) (citing the requirement of CR 7.02 that all motions "shall state with particularity the grounds therefor"). If not supplemented with grounds for the motion before the expiration of the ten-day period, the motion is rendered invalid, and the party must file a notice of appeal within thirty days of entry of the judgment or order. *Id.* Any appeal filed after that date is untimely and subject to automatic dismissal or denial. CR 73.02(2); *see also Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918, 921 (Ky. App. 1998) (*citing Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994)).

Order of March 19, 2013, at 2.

This Court subsequently granted Kentucky Farm Bureau's motion seeking discretionary review of that Order dismissing its appeal.

ARGUMENT

Two of the fundamental guiding principles of appellate procedure are to decide cases on their merits and to protect a party's constitutional right to appeal whenever possible. *Johnson v. Smith*, 885 S.W.2d 944, 949 (Ky. 1994). Long ago this Court

directed Kentucky appellate courts to follow a rule of substantial compliance. *See, e.g., id.* at 949-50 (“losing litigants are constitutionally vested with a right of appeal” and the “battle between strict compliance with the rules of appellate practice to avoid dismissal . . . and substantial compliance . . . is now over. . . . [W]e follow a rule of substantial compliance.”). The emphasis is not on technicalities but on promoting justice by deciding cases on their merits. *Lassiter v. American Exp. Travel Related Services Co.*, 308 S.W.3d 714, 718 (Ky. 2010).

In following the rule of substantial compliance, appellate courts must recognize that “the penalty for a breach of a rule should have a reasonable relationship to the harm caused. Likewise the sanction imposed should bear some reasonable relationship to the seriousness of the defect.” *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986). The “three significant objectives of appellate practice” are: “achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal.” *Id.*

In dismissing Kentucky Farm Bureau’s appeal, the Court of Appeals did not even mention these guiding principles. Instead, although recognizing that a “timely Rule 59.05 motion to alter, amend, or vacate” will “ordinarily” toll the time for filing an appeal, the Court of Appeals held that, when a Rule 59.05 motion states no grounds in support of the motion, it is “deficient,” which deficiency somehow means that, unlike other Rule 59.05 motions, it does not toll the time to file a notice of appeal. *See Exhibit A at 3, citing Matthews v. Viking Energy Holdings*, 341 S.W.3d 594 (Ky. App. 2011), CR 7.02, and CR 73.02(2).

The Court of Appeals erred when it dismissed Kentucky Farm Bureau's appeal. For the reasons discussed below, the Court of Appeals' dismissal of Kentucky Farm Bureau's appeal should be reversed and the appeal allowed to proceed on the merits.

I. The Court of Appeals erred in holding that Kentucky Farm Bureau's timely Rule 59 motion did not toll the time for filing a notice of appeal.

While Rule 73.02(1)(a) provides that a notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2), Rule 73.02(1)(e) provides that the running of the time for appeal is terminated by a timely motion filed pursuant to Rule 59. Rule 73.02(1)(e) further provides that the full time for appeal commences to run upon entry and service of an order granting or denying the Rule 59 motion.

Six days after the trial court entered its June 23, 2011 Order and Judgment, Kentucky Farm Bureau filed a timely Rule 59 motion. The trial court denied that motion on August 30, 2011. Pursuant to Rule 73.02(1)(e), Kentucky Farm Bureau had 30 days from August 30 in which to file its notice of appeal. Kentucky Farm Bureau timely filed its notice of appeal on September 23, 2011.

The Court of Appeals' dismissal of Kentucky Farm Bureau's appeal was premised on two propositions. First, the Court of Appeals held that Kentucky Farm Bureau's timely Rule 59 motion was not sufficiently particular to satisfy Rule 7.02's pronouncement that a motion "shall state with particularity the grounds therefor" Second, the Court of Appeals held that the consequence of the violation of Rule 7.02's particularity requirement was not that the Rule 59 motion should be denied, but that the motion should be treated as having never been made. Therefore, according to the Court

of Appeals, the timely Rule 59 motion failed to toll the time in which Kentucky Farm Bureau had to file its notice of appeal.

Thus, although Kentucky Farm Bureau satisfied the express requirements of Rule 73.02(1)(e) by filing its notice of appeal within 30 days of the denial of its Rule 59 motion, the Court of Appeals dismissed Kentucky Farm Bureau's appeal because Kentucky Farm Bureau did not file the notice of appeal by July 23, 2011, 30 days after the trial court entered its original Opinion and Judgment on June 23, 2011. Of course, prior to July 23, 2011, Kentucky Farm Bureau had timely filed its Rule 59 motion, which was pending as of July 23, 2011.

Rule 73.02(2) requires dismissal of an appeal only for failure to "file timely a notice of appeal," while "[f]ailure to comply with other rules relating to appeals . . . does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate" Rule 73.02(1)(e) does not place any requirements other than timeliness on the various types of motions that toll the time to appeal. The only rule with which Kentucky Farm Bureau supposedly did not comply was Rule 7.02, which does not include any time element as a part of the rule. Moreover, Kentucky Farm Bureau subsequently cured the Rule 7.02 insufficiency by filing a supporting memorandum that the trial court refused to strike.

While failing to comply with the specificity requirement of 7.02 in filing a motion under Rule 59.05 may or may not make that Rule 59.05 motion "deficient," it does not magically make it untimely. Rule 59.05 states in its entirety: "A motion to alter or amend a judgment or to vacate a judgment and enter a new one shall be served not later than ten (10) days after the entry of the final judgment." Rule 59.05 contains no requirements

other than timeliness of the motion. Thus, a timely appeal following the denial of a timely yet “deficient” Rule 59.05 motion should not be subject to the automatic dismissal requirement of 73.02(2), as ordered by the Court of Appeals.

In *Ready v. Jamison*, *supra*, following changes to Rule 73.02(2), this Court directed that “[c]ontinued adherence to” a “policy of automatic dismissal regardless of prejudice is in conflict with the policy of substantial compliance.” 705 S.W.2d at 481. While dismissal “may be appropriate where the breach of the rule and the harm to the opponent is sufficiently serious,” the appropriate sanction must be decided on a case-by-case basis, which should “result in fewer rather than more motions for relief, since the opponent will realize no advantage from a motion to dismiss where the violation is only technical and no prejudice can be demonstrated.” *Id.* at 482. In *Crossley v. Anheuser-Busch, Inc.*, 747 S.W.2d 600, 601 (Ky. 1988), this Court reiterated that “dismissal is a disfavored remedy for violation of the civil rules relating to appellate procedure.” Rather, “the sanction imposed” should be “commensurate with the harm caused by the violation,” and the appellate court in which the case is pending has “the duty to decide the appropriate sanction on a case-by-case basis and exercise its discretion only after considering the seriousness of the defect.” *Id.* See also *Capital Holding v. Bailey*, 873 S.W.2d 187, 197 (Ky. 1994) (appellate sanctions “are not to be used as a method of docket control” and do not “justify a hypertechnical reading” of the civil rules).

The dismissal of Kentucky Farm Bureau’s appeal in this case and the Court of Appeals Opinion in *Matthews*, *supra*, represent a significant retreat from the doctrine of substantial compliance repeatedly recognized and applied by this Court. Instead of seeking to achieve the objective of deciding appeals on their merits, the Court of Appeals

has adopted a strict rule of automatic dismissal of an appeal when a losing party timely files its notice of appeal within 30 days of the trial court's denial of a Rule 59 motion that the Court of Appeals subsequently determines did not comply with Rule 7.02's particularity requirement. Such an approach to appellate practice in Kentucky is wrong for multiple of reasons and should be rejected by this Court.

II. The Court of Appeals should be reversed, and *Matthews* should be overruled.

In dismissing Kentucky Farm Bureau's appeal, the Court of Appeals relied on its earlier decision in *Matthews v. Viking Energy Holdings*, 341 S.W.3d 594 (Ky. App. 2011), a decision that is fundamentally flawed and should be overruled. In *Matthews*, following entry of a final judgment quieting title to a pipeline easement, parties to that action (the Matthews) moved the court to "vacate, alter, and/or amend" the judgment. Viking's counsel advised the Matthews' counsel that he thought the motion was deficient under CR 7.02(1) and suggested that the Matthews withdraw the motion and file a notice of appeal within 30 days of the judgment. The Matthews did not do so. Viking then moved to strike the motion as non-compliant with CR 7.02(1). The trial court denied both the motion for a new trial and the motion to strike. *Id.* at 596. The Matthews appealed, and Viking timely cross-appealed.³ *Id.* The Court of Appeals dismissed the Matthews' appeal, holding that, because the motion did not comply with CR 7.02(1), it was "invalid" and, thus, did not effectuate the tolling provision of CR 73.02(1)(e) (which simply requires a "timely" motion pursuant to certain enumerated rules). *Id.* at 597.

³ Here, the Newsomes did not timely cross-appeal from the denial of their motion to strike; their untimely cross-appeal was dismissed. Further, while the opposing party in *Matthews* raised the issue when the losing party could still file a notice of appeal within 30 days of the trial court's original order, the issue was not raised in this case until August 8, 2011, more than 30 days after the entry of the trial court's Opinion and Judgment on June 23, 2011.

The Court of Appeals' dismissal of Kentucky Farm Bureau's appeal in this case and its decision in *Matthews* were erroneous for a variety of reasons.

A. *Matthews* is inconsistent with the doctrine of substantial compliance.

The first and most fundamental error committed by the Court of Appeals in *Matthews* is that it does not even mention, much less address, this state's public policy, repeatedly reaffirmed by this Court, that Kentucky follows the rule of substantial compliance and upholds, whenever possible, the constitutional right to appeal. Contrary to the Court of Appeals' approach, appeals are to be decided on their merits. Even if Kentucky Farm Bureau's Rule 59.05 motion was inadequate, it was timely.

Further, even if Kentucky Farm Bureau's motion violated Rule 7.02, the penalty for such a breach must "have a reasonable relationship to the harm caused," and the "sanction imposed should bear some reasonable relationship to the seriousness of the defect." *Ready, supra*, 705 S.W.2d at 482; *Johnson, supra*, 885 S.W.2d at 949. A possible appropriate remedy for a skeletal, but timely, Rule 59.05 motion would be the denial of that motion, NOT the dismissal of an appeal filed within 30 days of an order denying such a motion. *Newdigate v. Walker*, 384 S.W.2d 312, 313 (Ky. 1964); *Ligon Specialized Hauler, Inc. v. Smith*, 691 S.W.2d 902, 904 (Ky. App. 1985) (Appellant filed a "bare bones" motion for a new trial, with no affidavits or supporting grounds for almost three weeks. The belated affidavits alleged juror misconduct. On appeal, the Court held that the issue of juror misconduct was not properly preserved, but the appeal was not dismissed).

Kentucky has moved far away from appeals being automatically dismissed for violation of a technical or procedural rule. The Court of Appeals has gone back to those

days in *Matthews* and in dismissing Kentucky Farm Bureau's appeal in this case. It was wrong to do so and should be reversed.

B. *Matthews* is inconsistent with the applicable rules.

Second, the *Matthews* decision ignores the actual language of Rule 59.05 and Rule 73.02. Although *Matthews* declares that a Rule 59.05 motion is "invalid" if it fails to state the grounds for the motion with particularity, Rule 59.05 contains no such "invalidity" provision. Nor does Rule 7.02 declare that motions that fail to conform with the rule are "invalid." The *Matthews* decision next declares that "invalid" motions do not effectuate the tolling provision of Rule 73.02(1)(e). Rule 73.02 does not, however, contain an "invalidity" provision. The rule actually states that "[t]he running of the time for appeal *is terminated by a timely motion* pursuant to any of the Rules hereinafter enumerated" Rule 73.02(1)(e) (emphasis added). Thus, the only requirement of the applicable tolling rule is a "timely" motion. The merits of the motion are not mentioned and are immaterial to its timeliness under Rule 73.02.

C. *Matthews* is inconsistent with controlling precedent.

Third, *Matthews* misapplies an opinion from this Court's predecessor establishing that a timely-filed Rule 59.05 motion, even if it violates Rule 7.02, tolls the time for filing a notice of appeal. Specifically, *Matthews* states that its opinion is consistent with

Newdigate v. Walker, 384 S.W.2d 312 (Ky. 1964), in which our highest court reviewed a local rule that stated: "Failure to state with particularity the grounds for motions, and to include authorities, *will be deemed dilatory filings*, and will not toll time in which to file responsive pleading." *Newdigate*, 384 S.W.2d at 313 (quoting Mason Circuit Court Rule 606 (promulgated March 1, 1958, pursuant to CR 78(2) and CR 83); emphasis supplied). In that case, the former Court of Appeals held that the local rule "is in harmony with the provisions of CR 7.02." *Id.*

Matthews, 341 S.W.3d at 598. Rather than being “consistent with” *Newdigate*, the *Matthews* opinion is directly contrary to the holding in *Newdigate* that a “dilatory” motion not conforming to Rule 7.02 still tolls the timelines in the civil rules.

In *Newdigate*, this Court’s predecessor addressed a motion to dismiss (not a post-trial motion) to which Rule 7.02 and a local rule clearly applied. The plaintiff filed a motion to strike the motion to dismiss as non-conforming and also filed a motion for default. 384 S.W.2d at 313. The trial court granted the motion to strike and entered a default judgment because of the local rule, which stated: “Failure to state with particularity the grounds for motions, and to include authorities, will be deemed dilatory filings, and will not toll time in which to file responsive pleading.” *Id.* Thus, according to the trial court, the “dilatory” filing did not toll the time to answer.

On appeal, this Court’s predecessor affirmed the decision to strike the motion to dismiss because it failed to conform to Rule 7.02 and the local rule. Importantly, however, the Court reversed the default judgment. *Id.* It held that, “to the extent the” local rule “requires the motion to state grounds with particularity and to include a statement of authorities, it is consistent with the provisions of” Rule 7.02. *Id.* But the Court then went on to declare the local rule inconsistent with the civil rules to the extent that a “dilatory” but timely motion did not toll the civil rule deadlines:

The provisions of CR 12.01 give a party twenty days after service of summons upon him within which to serve his answer. The service of any motion permitted by Rule 12 alters this period of time (unless the court fixes a different time). Appellant's motion was filed pursuant to CR 12.02, therefore, CR 12.01 permitted appellant to file his answer within ten days after notice that the circuit court had ordered his motion stricken. Consequently, that portion of Mason Circuit Court Rule 606 providing that a motion

which is deemed dilatory will not toll time for filing a responsive pleading is inconsistent with CR 12.01.

Id. Thus, statements in *Matthews* to the contrary notwithstanding, *see* 341 S.W.3d at 598, 599, the *Newdigate* opinion is directly contrary to holding that a timely, albeit “dilatory,” motion fails to toll the civil rule timelines.

The *Matthews* decision also is inconsistent with an earlier Court of Appeals decision in which the Court of Appeals held that a Rule 59.05 motion that was not noticed for a hearing as required by the local rules, was “merely defective” and not a “nullity.” *See Hollins v. Joe Guy Hagan Realtors Co.*, 171 S.W.3d 57, 59 (Ky. App. 2005). In *Hollins*, the Rule 59 motion was filed but not scheduled for a hearing as required by an applicable procedural rule. The motion was later noticed for a hearing and denied. The appeal, which was filed within 30 days of the denial of the procedurally-deficient Rule 59 motion, was not dismissed because the Rule 59 motion “was timely served, which is the sole requirement set forth in CR 59.05, and, as a consequence, the motion tolled the running of time for appeal.” *Id.* at 60.

The Court of Appeals has strayed from these precedents at a time when this Court has adopted and strongly emphasized the rule of substantial compliance. As recognized in these cases, a timely motion tolls the running of deadlines even if the timely motion is later determined to be deficient.

D. *Matthews* improperly relied upon an unpublished opinion in violation of Rule 76.28.

A fourth problem with *Matthews* is its reliance upon the opinion in *Williams v. Williams*, 2001-CA-761-MR and 2001-CA-862-MR (Ky. App. Oct. 25, 2002). *Matthews*, 341 S.W.3d at 597 n.3. Although *Matthews* cites January 14, 2004, as the rendition day for the *Williams* opinion, it was, in fact, rendered on October 25, 2002.

January 14, 2004, was the date this Court granted discretionary review in the case. Because the Court of Appeals Opinion was rendered in October 2002, it falls outside the scope of Rule 76.28(4)(c) and is not to be cited or used in any other case in this Commonwealth. Moreover, the case is particularly unreliable as authority. This Court decided that it should review the opinion and granted discretionary review in the case. Because, however, the appeal became moot, this Court dismissed the appeal. *See Williams v. Williams*, No. 2003-SC-00054-DG (Ky. June 16, 2005) (copy attached as exhibit G). No party, and no court, should be citing the Court of Appeals Opinion in *Williams v. Williams* as persuasive authority in light of that history.

E. The question is not jurisdictional.

The *Matthews* opinion's fifth fundamental flaw is its statement that the trial court "lacked jurisdiction to entertain" a timely but inadequate Rule 59.05 motion. Multiple civil rules and decades of case law have made clear that, for ten days after a final judgment, trial courts retain jurisdiction to amend their judgments and only lose jurisdiction after ten days. The remedy for a faulty, deficient, invalid, dilatory, ill-advised, or otherwise non-meritorious motion filed within that ten-day window is denial of the motion, not removal of the motion and the entire case from the trial court's jurisdiction.

In applying *Matthews*, other Court of Appeals panels have furthered the misconception that a timely but deficient Rule 59.05 motion raised jurisdictional issues. For example, in *Stanley v. C & R Asphalt, LLC*, 396 S.W.3d 924, 926 (Ky. App. 2013), the Court of Appeals held that a skeletal, and therefore "invalid," Rule 59.05 motion did not toll the time to file a notice of appeal, "and so we lack subject matter jurisdiction to

entertain the appeal,” an issue that can be raised at any time, even sua sponte.⁴ But a notice of appeal is not jurisdictional: “Losing litigants are constitutionally vested with a right of appeal and appellate courts are constitutionally vested with jurisdiction. Strictly speaking, the notice of appeal is not jurisdictional. It is a procedural device prescribed by the rules of the court by which a litigant may invoke the exercise of the inherent jurisdiction of the court as constitutionally delegated.” *Johnson v. Smith, supra*, 885 S.W.2d at 949-50.

The rule Kentucky Farm Bureau allegedly violated, Rule 7.02(1), is not jurisdictional in nature. Instead, it addresses technical requirements of a written motion. A party’s compliance or non-compliance with Rule 7.02(1) does not affect a court’s jurisdiction.

F. *Matthews* eschewed the specific rule in favor of a more general rule.

Sixth, *Matthews* relies on the language of the general rule, Rule 7.02, and does not address the language of the more specific rules applicable to the issues (Rules 59.05 and 73.02). The specific statute or rule “always prevails” over the general. *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005).

G. *Matthews* interferes with a trial court’s control of its docket.

A seventh problem with *Matthews* is that it limits the trial court’s right to control its own docket. It is in both trial courts’ and appellate courts’ best interest to allow time for reasoned consideration of post-trial motions and possible briefing on the subjects before them. It is relatively common for trial courts to set scheduling orders for post-trial

⁴ *Stanley* is truly a unique decision, as only one member of the three-judge panel believed that *Matthews* was correctly decided. The second member of the panel concurred in the result but made clear that he disagreed with it. The third member of the panel dissented and called for this Court to overrule *Matthews*.

motions so that the issues can be competently and adequately raised and addressed. Here, for example, after filing a barebones Rule 59.05 motion, but before the hearing on that motion, Kentucky Farm Bureau brought its Rule 59.05 motion into compliance with Rule 7.02 by filing a supporting memorandum to which the Newsomes responded. The trial court denied the Newsomes' motion to strike the Rule 59.05 motion, perhaps recognizing that the Newsomes were not harmed by the filing of the timing of the supporting memorandum.

H. Dismissal would not be required under the federal rules.

Matthews also relies on federal law purportedly requiring strict compliance with Fed. R. Civ. P. 7(b)(1). But, “[i]n spite of the implications of some of the cases, in practice the ‘particularity’ requirement in Rule 7(b)(1) frequently is ignored by the federal courts.” Wright and Miller, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D* § 1192 at 56-57 (2004). Instead, “[m]any district judges tend to focus on whether any party has been prejudiced by the movant’s lack of particularity and whether the court can comprehend the basis of the motion and deal with it fairly; as a result, courts generally avoid engaging in an overly technical evaluation of the papers on which the motion is predicated and grant or deny the requested relief on the basis of the underlying merits of the petition.” *Id.* “It also should be kept in mind that the ten-day period permitted for presenting a new trial motion is relatively brief . . . [t]hus, skeletal or pro forma motions for a new trial are not uncommon. District judges should exercise a degree of leniency . . .” *Id.* § 1192 at 61. *See also* Moore’s *Federal Practice 3d*, § 7.03[4][a] at 7-16 (2013) (the particularity requirement of FRCP 7(b)(1) “is flexible and has been interpreted liberally by the courts. The liberal construction of Rule 7(b)(1) is consistent with the

admonition that the civil procedure rules ‘be construed and administered to secure the just, speedy, and inexpensive determination of every action.’ [FRCP 1.]”)

Interestingly, in 2009, Federal Rule 59(e) was amended to extend the time in which a motion to alter or amend may be filed from 10 days to 28 days. Part of the reason for doing so was to ameliorate the potential uncertainty associated with whether a hastily filed Rule 59 motion tolled the time for filing a notice of appeal:

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days.

Advisory Committee Note to 2005 Amendment to Fed. R. Civ. P. 59.

The sensitivity to potential harshness and uncertainty exhibited by the Advisory Committee is the same sensitivity which led to this Court’s adoption of the substantial compliance doctrine. The rules should be applied to allow for appeals to be decided on their merits, not in such a way as to deprive a litigant of its appellate rights.

I. This Court should follow *Camp v. Camp*, 689 S.E.2d 634 (S.C. 2010).

In *Camp v. Camp*, 689 S.E.2d 634 (S.C. 2010), the South Carolina Supreme Court recently addressed the precise issue now before this Court. Recognizing that the non-moving party was not prejudiced and that the trial court could adequately deal with the Rule 59 motion, the 4-1 majority of the South Carolina Supreme Court held that an

unsupported Rule 59 motion that violated Rule 7's particularity requirement nonetheless tolled the time for filing a notice of appeal:

Because the particularity requirement is to be read flexibly in light of the peculiar circumstances of each case, we do not believe applying the particularity requirement in an overly technical fashion in this case would serve the purpose behind the rule. . . .

...

When neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRCP. For these reasons, we reverse the court of appeals decision and hold Father's motion for reconsideration tolled the time for filing a notice of appeal.

689 S.E.2d at 636-37. *See also First Security Bank of Idaho, N.A. v. Stauffer*, 730 P.2d 1053, 1061 n.6 (Idaho App. 1986) ("Although particular grounds should be stated in support of any written motion, we do not find this flaw fatal since a Rule 59(e) motion may also serve to enable a trial judge to reconsider his judgment and thus avoid an appeal.").

The South Carolina's decision in *Camp* is consistent with Kentucky's substantial compliance doctrine and precedent such as *Newdigate*. This Court should follow *Camp*, not reject it like the Court of Appeals.

III. Kentucky Farm Bureau should not be deprived of its constitutionally guaranteed right of appeal.

The Kentucky Constitution provides that, in all cases, "there shall be allowed as a matter of right at least one appeal to another court" Kentucky Constitution § 115. Depriving a party of that right because the party's motion to reconsider was not initially sufficiently particular is inconsistent with the rules themselves, authority from this

Court's predecessor, and the pronouncements from this Court that appeals should be decided on their merits.

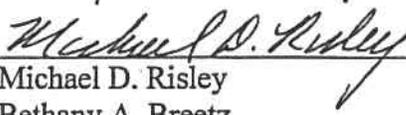
This is an appeal that should be decided on its merits. The trial court has held that insurance coverage exists for claims arising against an insured who has been found to have intentionally killed the victim. In reaching that conclusion, the trial court did not address the policy's occurrence requirement but found that an exception to an exclusion contained in an endorsement that was not purchased and therefore not a part of the policy at the time of the murder nonetheless created an ambiguity in an exclusion that was in the policy that had been purchased. But Kentucky is not a state in which someone can buy homeowners insurance that will indemnify them for murder, and the trial court's ruling on that issue is directly contrary to settled Kentucky law. If that ruling is going to stand, it should do so only after the Court of Appeals has given Kentucky Farm Bureau the appeal to which it is entitled.

CONCLUSION

The Court of Appeals has denied a deserving appellant its constitutional right to appeal based on a hyper-technical reading of Rule 7.02, rather than applying the clear and unambiguous wording of Rule 73.02 that a timely Rule 59 motion tolls the time in which to file a notice of appeal. In doing so, it totally ignored the doctrine of substantial compliance, a doctrine repeatedly embraced and applied by this Court, and misapplied controlling precedent.

Pursuant to Rule 73.02(1)(e), a timely Rule 59 motion tolls the time in which to file a notice of appeal, and Kentucky Farm Bureau filed a timely Rule 59 motion. For the reasons stated above, Kentucky Farm Bureau asks that the Court of Appeals' dismissal of

Kentucky Farm Bureau's appeal be reversed and the case remanded to the Court of Appeals for a decision on the merits.


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APPENDIX

- A - 3/19/13 Court of Appeals Order Dismissing Appeal
- B - *Conley v. Commonwealth*, 2006-SC-427, 2007 Ky. Unpub. LEXIS 6 (Ky. Aug. 23, 2007)
- C - 6/23/11 Order and Judgment (R. 123-26)
- D - Kentucky Farm Bureau's Rule 59 Motion to Alter, Amend or Vacate (R. 127-29)
- E - Kentucky Farm Bureau's Memorandum of Points and Authorities (R. 137-50)
- F - 8/30/11 Order Denying Kentucky Farm Bureau's Rule 59 Motion (R. 166)
- G - Kentucky Supreme Court Order in *Williams v. Williams*, No. 2003-SC-00054-DG (Ky. June 16, 2005)