

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001614-MR

NATIONWIDE INSURANCE COMPANY

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE PHIL PATTON, JUDGE  
ACTION NO. 10-CI-00162

JOHN G. MADISON; AND ENGLISH,  
LUCAS, PRIEST & OWSLEY, LLP

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Nationwide Insurance Company appeals from an order of the Barren Circuit Court awarding attorneys' fees and costs pursuant to Kentucky Rules of Civil Procedure (CR) 37.03. Nationwide argues that the trial court lost jurisdiction to enter the award because the judgment had already become final.

After careful review, we affirm the orders of the Barren Circuit Court.

This case arises from a motor vehicle accident in which a vehicle driven by an uninsured motorist, Berri S. Humphrey, backed out into the path of a vehicle being driven by John Madison. At the time of the accident, Madison was covered under a policy of automobile insurance issued by Nationwide Insurance Company (Nationwide), and the policy included uninsured motorist coverage. Madison named Nationwide as a party to this action, claiming uninsured motorist benefits.

During discovery, Madison propounded requests for admissions upon Defendant Humphrey. Prior to the deadline for timely response, Nationwide answered Madison's Requests for Admissions to Humphrey, stating, "Nationwide states that it contests the issue of fault and would respond to the plaintiff's requests for admission propounded to Humphrey as follows[.]" Nationwide then denied requests for admission that the motor vehicle accident was entirely Humphrey's fault.

At trial, the Barren Circuit Court granted a directed verdict in favor of Madison on liability, and the jury awarded damages in the amount of \$50,000.00 by judgment entered June 1, 2011. On June 20, 2011, Madison moved for an order awarding attorneys' fees and costs pursuant to CR 37.03. In response to Madison's motion, Nationwide argued that it had a good-faith basis for denying liability and that Madison did not incur additional cost in proving the issue of liability. The trial court awarded attorneys' fees and costs in the amount of \$15,580.00 by order entered August 3, 2011. This appeal now follows.

Nationwide first argues that the trial court lacked jurisdiction to impose attorneys' fees and costs pursuant to CR 37.03 after the judgment became final. Because jurisdiction is an issue of law, we review it *de novo*. *Monin v. Monin*, 156 S.W.3d 309 (Ky. App. 2004). Madison argues that Nationwide's jurisdictional argument is not properly before this Court because it was not raised at the trial court level below. However, as Nationwide correctly points out, subject matter jurisdiction cannot be waived because "it goes to the very heart of a court's ability to determine an issue in controversy...." *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) (citation omitted). Thus, Nationwide's jurisdiction argument is properly before this Court.

Turning to the merits of the jurisdictional argument, CR 37.03 provides:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to Rule 36.01, or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (d) there was other good reason for the failure to admit.

The rule does not directly address when a motion for attorneys' fees and costs should be made, and there are no cases setting forth the appropriate time frame for bringing the motion.

Both parties agree that CR 37.03 is analogous to Federal Rules of Civil Procedure (FRCP) 37(c)(2) and, accordingly, that federal cases are instructive as to the proper timing of a motion for attorneys' fees and costs. Nationwide submits that the U.S. Seventh Circuit Court of Appeals' holding in *Popeil Bros., Inc. v. Schick Elec., Inc.*, 516 F.2d 772, 777-78 (7<sup>th</sup> Cir. 1975), requiring an FRCP 37(c) motion to be brought prior to the judgment, is proper.

However, in *Chemical Engineering Corp. v. Essef Industries, Inc.*, 795 F.2d 1565, 1574 (Fed.Cir. 1986), the Federal Circuit criticized the holding in *Popeil*, stating:

[N]o rule specifies the time during which a Rule 37(c) motion must be filed, and, as is explained in the advisory committee note to Rule 37(c), the rule is intended to provide post-trial relief. As a practical matter, it will often be necessary to complete a proceeding before it can be said that a requester has "proved" the truth of the matter for which an admission had been requested.

Following the holding in *Chemical*, in *Kasuri v. St. Elizabeth Hosp. Med. Ctr.*, 897 F.2d 845 (6<sup>th</sup> Cir. 1990), the Sixth Circuit held that the defendants' motion for attorneys' fees pursuant to FRCP 37(c) was timely filed despite the fact that said motion was filed after the case had been appealed.

Nationwide argues that Madison has overlooked the principle that judgments are final ten days following their entry and the trial court generally loses

jurisdiction to amend judgments at that time. *See Harris v. Camp Taylor Fire Protection Dist.*, 303 S.W.3d 479, 482 (Ky. App. 2009). *See also Scott v. Campbell County Bd. of Educ.*, 618 S.W.2d 589 (Ky. App. 1981). In *Harris*, this Court addressed a similar issue and held that a plaintiff's failure to request that the judgment reserve the trial court's jurisdiction to address a post-judgment award of attorneys' fees precluded the trial court from having jurisdiction to consider the motion. *Harris*, 303 S.W.3d at 482-83.

Madison argues that Nationwide's contention that a court loses jurisdiction once its judgment is final is misplaced. Madison contends the correct proposition, as espoused by Kentucky courts, is that "[a] trial court loses jurisdiction to amend its judgment ten days after entry." Thus, Madison argues that an order awarding attorneys' fees is not a true amendment to a judgment and urges this Court to consider *Brett v. Isaac*, 2009 WL 2707092 (Ky. 2009)(2008-SC-000712-MR).

In *Brett*, the Kentucky Supreme Court held that CR 52.02, which deprives a trial court of jurisdiction to amend a final judgment ten days after entry of the judgment, did not deprive the trial court of jurisdiction to enter a supplemental judgment which awarded costs to a prevailing party more than ten days after the final judgment. In making its determination, the Court acknowledged that "the trial court lost jurisdiction to amend its final judgment ten days after the final judgment was entered. However, CR 52.02 is not to be read to deprive a trial court of all jurisdiction." *Id.* at 2. In support of its holding, and looking specifically at the rule addressing costs, CR 54.04, the Court stated:

Clearly, this retained supplemental judgment jurisdiction has nothing to do with the lost jurisdiction to amend or supplement the final judgment. There is no Kentucky case directly on point, probably because the rule is self-explanatory.

The Kentucky Supreme Court's analysis in *Brett* seems to follow the federal courts' jurisprudence concerning FRCP 37(c). Thus, we conclude that awarding attorneys' fees and costs under CR 37.03 more than ten days after entry of the judgment is permissible, and the trial court did have jurisdiction to enter the order awarding costs and attorneys' fees in the instant case.

Nationwide next argues that the trial court erred by awarding attorneys' fees and costs pursuant to CR 37.03 against a party to whom requests for admissions had not been served. Madison argues that Nationwide waived its right to assert that CR 37.03 is inapplicable because it responded to the requests for admissions in defendant Humphrey's place.

While previously quoted in full, the relevant part of CR 37.03 with regard to this argument is as follows, "If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36...." Nationwide argues that the plain language of this rule indicates that it is only applicable (i) to a party to whom requests for admissions are propounded, and (ii) to that party when it fails to admit the genuineness of a document or the truth of a matter.

Madison argues that when Nationwide chose to respond to the requests for admissions in Humphrey's place, it waived its right to any future defense to paying attorneys' fees resulting from its responses under CR 37.03. Nationwide counters

that under *Allstate Insurance Co. v. Hatfield*, No. 2009-CA-000604-MR, it was required to respond in Humphrey's place to protect its own interests. In *Hatfield*, this Court held that an insurer's failure to "protect its own interest by ensuring [the tortfeasor] responded to the [] request for admissions" could preclude the insurer from challenging liability. *Id.* at 11-12. In the instant case, Nationwide argues that there was an issue of liability because the evidence reflected that the uninsured motorist, Humphrey, was backing out at approximately three to five miles per hour. Nationwide argues that whether Madison should have been able to see Humphrey was a factual issue for the jury. Thus, Nationwide contends it had a good faith basis for denying the request for admission in Humphrey's place.

We do not agree with Nationwide that CR 37.03 precludes the trial court from awarding fees to an insurance company responding to a request for admissions in place of an underlying defendant. The rule provides for costs and fees to a party who is forced to prove liability that allegedly should have been admitted. Accordingly, the trial court did not err in awarding attorneys' fees to Madison for having to prove liability in addition to damages.

In conclusion, the trial court had jurisdiction to enter the order awarding attorneys' fees and costs. Furthermore, we discern no error in the trial court ordering Nationwide to pay attorneys' fees for failing to admit liability in the requests for admissions under CR 37.03. Therefore, we affirm the Barren Circuit Court's August 3, 2011, order.

CAPERSON, JUDGE, CONCURS.

VANMETER, J. DISSENTING: I respectfully dissent. In my view, this court's decision in *Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479 (Ky. App. 2009), *disc. rev. denied*, 2009-SC-000427 (Ky., Mar. 10, 2010) is controlling. I acknowledge that the Kentucky Supreme Court appears to have issued a contrary decision in *Brett v. Isaac*, 2009 WL 2707092 (Ky. 2009)(2008-SC-000712-MR), but the court decided not to published that opinion, and subsequently decided to deny discretionary review in *Harris*. Under CR 76.28(4)(c), unpublished opinions "shall not be cited or used as binding precedent in any other case in any court of this state[.]" The rule then sets forth an exception for unpublished opinions rendered in 2003 and thereafter "if there is no published opinion that would adequately address the issue before the court." *Id. Harris*, published, adequately addresses the issue in this case, and thus resort to *Brett*, unpublished, is unnecessary and improper.

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