

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

GEORGE MCCULLOUGH, ET AL,

Appellants

v.

COMMERCE BANK, N.A.,

Respondent

DOCKET NUMBER WD73219

DATE: June 12, 2012

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Sandra Carol Midkiff, Judge

Appellate Judges:

Division Three
Thomas H. Newton, P.J., James M. Smart, and Victor C. Howard, JJ.

Attorneys:

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Attorneys:

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Co-Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

GEORGE MCCULLOUGH, ET AL, Appellants,
v. COMMERCE BANK, N.A., Respondent

WD73219

Jackson County

Before Division Three Judges: Thomas H. Newton, P.J., James M. Smart, and Victor C. Howard, JJ.

George McCullough and James Cranston filed a petition for damages against Commerce Bank, N.A., and its employees alleging employment discrimination. After a jury found in favor of Commerce, McCullough and Cranston appealed. While the appeal was pending, McCullough and Cranston moved to set aside the underlying judgment for fraud pursuant to Rule 74.06(b). The trial court denied the motion. It found that their motion was an authorized post-trial motion, and was automatically denied pursuant to Rule 81.05(a) because the motion was filed more than 90 days after the judgment was entered. McCullough and Cranston appeal.

REVERSED AND REMANDED.

Division Three holds:

McCullough and Cranston argue that the trial court erred in applying Rule 81.05(a)(2) to deny their Rule 74.06(b) motion because the motion was filed after the judgment became final, and was an independent action that was not subject to Rule 81.05(a)(2)'s automatic denial.

The application of Rule 81.05(a)(2) deems any authorized post-trial motion not ruled upon after 90 days of its timely filing denied. Rule 81.05(a)(2) does not apply to independent actions. Precedent states that a Rule 74.06(b) motion filed after a judgment becomes final is an independent action requiring the trial court to enter a judgment separate from the underlying judgment. Because McCullough and Cranston's Rule 74.06(b) motion was filed after the judgment became final, it was not an authorized post-trial motion. The trial court abused its discretion in characterizing the motion as an authorized post-trial motion and in ruling that it lacked authority to grant relief based on the time bar of Rule 81.05(a)(2).

Opinion by: Thomas H. Newton, Judge

June 12, 2012

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