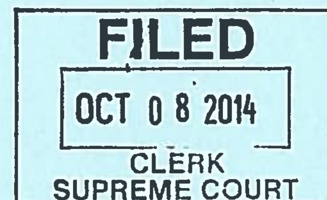


Kentucky Supreme Court

NO. 2013-SC-000653

Court of Appeals Case No. 2012-CA-001956

BRIDGETT WRIGHT, **APPELLANT,**

v. **On Appeal from the Kenton Circuit Court,**
Case No. 09-CI-03566

RUSSELL A. SWIGART, et al., **APPELLEES.**

BRIEF OF APPELLEES OR SOLUTIONS, INC. and ECOLAB and MEDICAL COMPANY, INC.

Richard S. Cleary
Griffin Terry Sumner
Kathleen B. Wright
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
Counsel for Appellees OR Solutions, Inc. and Ecolab and Medical Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief for Appellees, OR Solutions, Inc., Ecolab and Medical Company, Inc., was served by U.S. Mail on the 7th day of October, 2014 on:

Jon Alig
Elizabeth A. Bellamy
414 Licking Pike
Wilder, KY 41076

James W. Morgan, Jr.
Steven R. Dowell
421 Madison Avenue
Covington, KY 41011

Sam Givens, Clerk
Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

Hon. Patricia Summe, Judge
Kenton Circuit Court
236 Madison Avenue
Covington, KY 41011

Griffin Terry Sumner
Counsel for Appellees, OR Solutions, Inc. and Ecolab and Medical Company, Inc.

INTRODUCTION

The Court of Appeals properly dismissed Wright's premature appeal of an interlocutory order and properly recognized that a *nunc pro tunc* order cannot retroactively create appellate jurisdiction. That decision is required by this Court's prior precedents and should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

This case can be affirmed without oral argument, but Appellees welcome the opportunity to address these issues further with the Court.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT REGARDING ORAL ARGUMENT ii

STATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATMENT OF THE CASE 1

The circuit court's interlocutory ruling 1

Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012) 1

CR 54.01 2

CR 54.02 2

The premature appeal 2

CR 54.02 3

The Court of Appeals' dismissal 3

CR 73.02 4

ARGUMENT 5

I. The Court of Appeals properly dismissed the appeal because it did not arise from a valid final and appealable judgment 5

CR 54.01 5

CR 54.02 5

A. Wright's appeal was properly dismissed because the August 31 Order was not final and appealable 5

Wilson v. Russell, 162 S.W.3d 911 (Ky. 2005) 5

Webster County Soil Conservation Dist. v. Shelton, 437 S.W.2d 934 (Ky. 1969) 5

American Fidelity & Cas. Co. v. Patterson, 237 S.W.2d 57 (Ky. 1951) 6

Christman v. Chess, 102 Ky. 230, 43 S.W. 426 (1897) 6

CR 54.01 6

CR 54.02 6

B. Wright's appeal was properly dismissed because a "*nunc pro tunc*" order cannot retroactively create finality for purposes of appeal 6

Hankins v. Hankins' Adm'r, 173 Ky. 475, 191 S.W. 258 (1917) 6, 7

Copass v. Monroe County Medical Foundation, Inc., 900 S.W.2d 617 (Ky. App. 1995) 6, 7, 8

Carroll v. Carroll, 338 S.W.2d 694 (Ky. 1960)................................7

James v. Hillerich & Bradsby Co., 299 S.W.2d 92 (Ky. 1956) 7

Benton v. King, 199 Ky. 307, 250 S.W. 1002 (1923) 7

Phillips v. Highland Presbyterian Church, 2010 WL 2428091 (Ky. App. June 18, 2010) 7

Beatty v. Beatty, 2011 WL 1733552 (Ky. App. May 6, 2011)..................8

Stacy v. Allstate Ins. Co., 2008 WL 2219855 (Ky. App. May 30, 2008)..8

CR 54.02 8

C. Wright's appeal was properly dismissed because – once a notice of appeal had been filed – the trial court lost jurisdiction to modify the August 31 Order on appeal 9

James v. James, 313 S.W.3d 17 (Ky. 2010)..................................9

Monsour v. Humphrey, 324 S.W.2d 813 (Ky. 1959) 9

II. Even after an eventual final judgment, existing precedent and public policy considerations prohibit allowing the premature notice of appeal to "relate forward" to that judgment..........................9

A. Under this Court's precedents, the relation forward doctrine "does not permit a notice of appeal from a clearly interlocutory decision." 10

CR 73.02 ....10, 11

Johnson v. Smith, 885 S.W.2d 944 (Ky. 1994) 10, 12

CR 59......... 10

Whittaker v. Wright, 969 S.W.2d 209 (Ky. 1998) 10

James v. James, 313 S.W.3d 17 (Ky. 2010)...........................12, 14

N.L. v. W.F., 368 S.W.3d 136 (Ky. App. 2012) 11, 12

Bd. of Regents of Western Ky. Univ. v. Clark, 276 S.W.3d 819 (Ky. 2009) 11

Clark v. Commonwealth, Cab. for Health and Family Svcs., 170 S.W.3d 426 (Ky. App. 2005) 11

CR 54.02 11

Oakley v. Oakley, 391 S.W.3d 377 (Ky. App. 2012) 12, 13

Estate of Kelly ex rel. Kelly v. Beall, 2012 WL 3143873, *4 (Ky. App. Aug. 3, 2012), disc. rev. denied March 3, 2013 12

Beatty v. Beatty, 2011 WL 1733552 *2 (Ky. App. May 6, 2011) 12

CR 76.28(4)(c) 12

Audas v. Audas, 2005 WL 564102 (Ky. App. March 11, 2005) 13

B. Public policy considerations weigh against expansion of the relation forward doctrine to save Wright's premature appeal of the interlocutory ruling 14

Linkous v. Darch, 299 S.W.2d 120 (Ky. 1957) 15

CR 54.02 15

Watson v. Best Fin. Servs., 245 S.W.3d 722 (Ky. 2008) 15

Jackson v. Metcalf, 404 S.W.2d 793 (Ky. 1966) 15

CR 54.02 15

CONCLUSION 17

APPENDIX

COUNTERSTATMENT OF THE CASE

May it please the Court:

The Court of Appeals properly dismissed the premature appeal of a clearly interlocutory order that had resolved claims against some – but not all – defendants in this case. That dismissal should be affirmed.

The circuit court's interlocutory ruling

Based on the unfortunate criminal acts described in unnecessary detail in Appellant's Brief,[1] Plaintiff/Appellant Bridget Wright first filed suit against the perpetrator, Russell Swigart. R. 1-6, Complaint. Nineteen months later, Wright added employment-related claims against three corporate entities: Appellee OR Solutions; Appellee Ecolab, Inc. (subsequent purchaser of the assets of OR Solutions, Inc.) and Appellee Medical Company, Inc. (successor to OR Solutions)(collectively "ORS"). R. 23-32, Amended Complaint. While ORS employed both Wright and Swigart at one time, the criminal acts were committed by Swigart long after he left ORS' employment.

Wright's claims were filed several years after the events in question. R. 315-19, partial Judgment, August 31, 2012 ("August 31 Order"), at 317-18. The Kenton Circuit Court therefore properly held that Wright's claims against these Appellees were time barred under the applicable statute of limitations. *Id.*

---

[1] Appellant's lengthy recitation of the allegations from the Complaint – while shocking – are wholly irrelevant to the issues on appeal and, even, to the circuit court's original interlocutory ruling. The dissent's concerns about potential legal negligence claims arising from the appellate dismissal are therefore unfounded, because there could not be a successful case-within-a-case. *See, e.g.*, *Osborne v. Keeney,* 399 S.W.3d 1 (Ky. 2012).

The August 31 Order was a classic interlocutory order because it granted summary judgment to some – but not all – defendants in the case. *Id.* at 318. It did not address the claims against Russell Swigart, the perpetrator, which are still pending in the circuit court. *Cf.* CR 54.01. The order also did not include any of the requisite recitations to permit an interlocutory appeal. R. 315-19, August 31 Order; *cf.* CR 54.02.

The premature appeal

After denial of a motion to reconsider, Wright filed a Notice of Appeal from that order. R. 334-36. ORS moved to dismiss the appeal as premature because there had been no final and appealable order.

After the motion to dismiss, and apparently in response to it, Wright drafted and tendered a "*nunc pro tunc*" order to amend the August 31 Order and submitted it to the circuit court – with no notice or service to ORS. That order contained all of the language on which Wright now seeks to rely for finality or relation forward.

Wright insists this *nunc pro tunc* order was entered "*sua sponte"* by the circuit court. *See* Appellant's Brief at 6, 8, 14. But the record reveals that the document was drafted and tendered by Wright.

ORS was not notified of or served with a copy of the *nunc pro tunc* order. ORS only learned about the *nunc pro tunc* order when Wright attached a copy of the tendered **but unsigned draft order** to her response to ORS' motion to dismiss her appeal. *Compare* unsigned exhibit attached to Response to Mot. to

Dismiss Appeal *and* December 20 Judgment, Exhibit D to Appellant's Brief.[2] Wright's use of the unsigned *nunc pro tunc* draft confirmed that the ruling was not made "sua sponte" by the circuit court because Wright would not have an unsigned copy unless she had drafted it. In each of her appellate filings, including the brief to this Court, Appellant nonetheless continues to misrepresent that *nunc pro tunc* order as "*sua sponte*." *Cf.* Appellant's Brief at 6, 8, 14. Although the *nunc pro tunc* order contained CR 54.02 recitations, Wright did not file any amended or new Notice of Appeal after the *nunc pro tunc* order was entered.[3]

The Court of Appeals' dismissal

The Court of Appeals dismissed Wright's appeal. The court properly held that the *nunc pro tunc* order could not retroactively grant finality to the interlocutory August 31 Order. Opinion at 5.[4] But the Court of Appeals nonetheless analyzed application of the relation forward doctrine to the premature notice of appeal, presumably interpreting the *nunc pro tunc* order as a final judgment itself even though it was not effective to amend the August 31 Order. The majority opinion held that "in light of the limited application of the relation-forward rule under the existing Kentucky authority and the current

---

[2] Wright's inclusion of an unsigned draft illustrates the falsity of the "sua sponte" claim.

[3] The Court of Appeals' majority opinion infers that a second appeal – or at least a second motion to dismiss – was made. *Cf.* Opinion at 3. This is incorrect. Appellees only opportunities to address the *ex parte nunc pro tunc* order were in the context of responding to Appellant's motion to supplement the record with post-notice material and the Petition for Rehearing.

[4] The Court of Appeals' majority opinion was modified after a Petition for Rehearing.

version of CR 73.02(1)(e) … the rule is not currently applicable under the facts of this case." *Id.* at 9. In a dissenting opinion, Judge Thompson believed that the *nunc pro tunc* order was, indeed, a final judgment. Judge Thompson further wrote that this Court's decision in *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994), broadly "held that a notice of appeal relates forward to the time when a final judgment is entered." *Id.* at 10.

Wright sought, and this Court granted, discretionary review of that ruling.

ARGUMENT

Appellant's Brief and Judge Thompson's dissenting opinion urge this Court to expand the "relation forward" rule beyond current precedent to cover a premature attempt to appeal a clearly interlocutory ruling. But there is a threshold issue that must be addressed before this Court can even reach the relation forward question: was there ever a valid final and appealable judgment in this case? Contrary to what appears to be the analysis of even the Court of Appeals' majority, unless that question is answered in the affirmative, there is no eventual final judgment to which a premature notice can "relate forward" and this appeal must be dismissed.

I. The Court of Appeals properly dismissed the appeal because it did not arise from a valid final and appealable judgment.

This appeal was properly dismissed because the August 31 Order was not final and appealable under either CR 54.01 or CR 54.02. First, a subsequent *nunc pro tunc* order is invalid as an attempt to retroactively create finality for the prior judgment. Second, the trial court lacked jurisdiction to modify a prior ruling once a notice of appeal had been filed.

A. Wright's appeal was properly dismissed because the August 31 Order was not final and appealable.

Where no final judgment appears of record, appellate courts are without jurisdiction to consider the appeal. *See Wilson v. Russell,* 162 S.W.3d 911, 913 (Ky. 2005) ("Our rules require that there be a final order or judgment from which an appeal is taken."); *Webster County Soil Conservation Dist. v. Shelton*, 437

S.W.2d 934 (Ky. 1969); *American Fidelity & Cas. Co. v. Patterson, 237 S.W.2d 57* (Ky. 1951); *Christman v. Chess*, 102 Ky. 230, 43 S.W. 426 (1897)("If there was not a final judgment or order in this case, it follows that this court has no jurisdiction of the appeal.").

It cannot seriously be disputed that the Notice of Appeal attempted to appeal a non-final order. The August 31 Order did not resolve all claims among all parties because the claims against Respondent Swigart remained to be tried. CR 54.01. The order did not contain the recitations required by CR 54.02. It cannot, as a matter of law, be considered a final and appealable judgment and the appeal was properly dismissed.

B. Wright's appeal was properly dismissed because a "*nunc pro tunc*" order cannot retroactively create finality for purposes of appeal.

The Court of Appeals' majority properly applied precedent and recognized that the circuit court could not use a *nunc pro tunc* order to make a ruling that "it might or should have made" previously. Opinion at 4 (citing *Hankins v. Hankins' Adm'r,* 173 Ky. 475, 191 S.W. 258 (1917)). "[T]he *nunc pro tunc* rule cannot be used to retroactively grant finality to an order which was not originally designated as final." *Id.* at 4-5. (citing *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995)).

It is well settled that a *nunc pro tunc* order is limited to recording prior judicial actions, not correcting omissions or mistakes.

> The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial

> action that has actually been taken, and ***not to correct an error or supply an omission of judicial action***.

Carroll v. Carroll, 338 S.W.2d 694, 696 (Ky. 1960) (emphasis added). *Accord James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1956); *Benton v. King*, 199 Ky. 307, 250 S.W. 1002, 1003 (1923); *Hankins v. Hankins' Adm'r*, 173 Ky. 475, 191 S.W. 258 (1917). The *nunc pro tunc* order could therefore not retroactively add finality to a prior order:

> The power of the court to make such entries is restricted to placing into the record ***evidence of judicial action which has been actually taken***. It may be used to make the record speak the truth, but ***not to make it speak what it did not speak but ought to have spoken***.

Opinion at 4 (emphasis added); *see also Carroll v. Carroll*, 338 S.W.2d 694 (Ky. 1960).

"[A] *nunc pro tunc* order cannot retroactively vest finality upon a judgment which was interlocutory when the notice of appeal herein was filed." *See, e.g.*, *Copass* at 619. This rule has been consistently applied by Kentucky courts. In *Phillips v. Highland Presbyterian Church, 2010 WL 2428091* (Ky. App. June 18, 2010) (copy attached as Appendix A), the court squarely held:

> We view this reasoning as sound and likewise hold **that the** subsequent entry of a *nunc pro tunc* order adding CR 54.02 finality recitations ***will not retroactively vest finality upon a judgment which was interlocutory when the notice of appeal was filed.***

Phillips, at *2 (emphasis added) (citing *Copass v. Monroe Co. Medical Foundation, Inc.*, 900 S.W.2d 617, 619 (Ky. App. 1995)). *See also Beatty v. Beatty*, 2011 WL 1733552, *2 (Ky. App. May 6, 2011) (copy attached as Appendix B)(citing *Copass*, 900 S.W.2d at 619, and rejecting an appellant's attempt to avoid dismissal of her appeal by retroactively creating finality with a *nunc pro tunc* order by the trial court); *Stacy v. Allstate Ins. Co.*, 2008 WL 2219855, *2 (Ky. App. May 30, 2008)(copy attached as Appendix C)(citing *Copass,* 900 S.W.2d at 619, and noting that courts "look with displeasure" on this *nunc pro tunc* maneuver).

The prohibition against retroactive rulings makes even more sense in the context of this case. ORS – whose own cross-appeal rights were implicated by the new ruling – did not have any chance to be heard on the proposed finality, or even receive service of the order once entered. In typical practice, a party seeking to have the CR 54.02 recitations added to a prior ruling would make a motion to that effect. Other parties would have a chance to respond and be heard by the court before any modification of the prior judgment. For unknown reasons, that procedure was not followed in this case, with Appellant attempting to accomplish finality through these *ex parte* maneuvers. That practice should not be condoned or encouraged.

The *nunc pro tunc* order cannot retroactively create finality of the August 31 Order. The dismissal of the premature appeal of an interlocutory judgment should be affirmed.

C. Wright's appeal was properly dismissed because – once a notice of appeal had been filed – the trial court lost jurisdiction to modify the August 31 Order on appeal.

This Court has emphasized that a notice of appeal – proper or not – divests a trial court of jurisdiction to modify that ruling outside the CR 59 ten-day window, unless or until the appeal of that ruling is dismissed by the Court of Appeals. *See James v. James,* 313 S.W.3d 17, 22-23 (Ky. 2010). "Since the Court of Appeals alone can determine whether an attempted appeal is effective, it is our opinion that **when a notice of appeal has been filed, and until the Court of Appeals has dismissed the appeal for lack of jurisdiction, the circuit court is deprived of jurisdiction** of the case to the same extent as when a valid appeal is pending." *Id.* at 22-23 (citing *Monsour v. Humphrey*, 324 S.W.2d 813 (Ky. 1959) (emphasis supplied)).

Here, the attempted appeal of the interlocutory August 31 Order falls squarely within that holding. Once the notice of appeal was filed, the circuit court lacked jurisdiction to amend the ruling that had been appealed whether by *nunc pro tunc* order or otherwise. The appeal of the August 31 Order was therefore properly dismissed as arising from an interlocutory ruling.

II. Even after an eventual final judgment, existing precedent and public policy considerations prohibit allowing the premature notice of appeal to "relate forward" to that judgment.

If this Court holds either (1) that the *nunc pro tunc* order was itself a final judgment or (2) that a circuit court may amend a ruling outside the CR 59 ten day window and after a notice of appeal has been filed **and** that an *ex parte nunc pro*

tunc order may retroactively modify a prior ruling to create finality, Wright's appeal must nonetheless still be dismissed. Under current precedent, the "relation forward" doctrine is not broad enough to save this appeal. And public policy weighs heavily against expanding the doctrine to include the circumstances of this case and to effectively swallow the finality rule. This Court should decline Wright's request to dramatically extend the "relation forward" doctrine to the circumstances here – where a notice of appeal is filed from an order that, on its face, is plainly interlocutory.

A. Under this Court's precedents, the relation forward doctrine "does not permit a notice of appeal from a clearly interlocutory decision."[5]

The "relation forward" doctrine applies only when the order being prematurely appealed, on its face, is already final and appealable, but some other event suspends the time for filing a notice of appeal. The Kentucky cases (and now CR 73.02) applying the "relation forward" doctrine have appropriately limited this doctrine to those narrow circumstances, which are not present here.

Where an otherwise final judgment has been entered but a motion to reconsider or for a new trial is still pending, Kentucky courts have permitted a premature notice of appeal to relate forward to the time when those post-trial motions are ultimately ruled upon. *See, e.g., Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994)(notice of appeal filed after judgment and while *other parties'* CR 59 motions were pending); *Whittaker v. Wright,* 969 S.W.2d 209 (Ky. 1998)(notice of appeal filed after workers' compensation award and while motion to reconsider

---

[5] *Johnson, 885 S.W.2d at 950.*

was pending); *N.L. v. W.F.*, 368 S.W.3d 136 (Ky. App. 2012)(notice of appeal filed after custody decision and while CR 59 motions not fully resolved could relate forward). In fact, the civil rules have been amended to clarify that a premature notice of appeal may relate forward in that particular instance. *Cf.* CR 73.02(1).

Similarly, where a matter is fully litigated and a judgment resolving all issues has been entered but has delayed finality for a short time period, a premature notice of appeal has been allowed to relate forward. *See, e.g., Bd. of Regents of Western Ky. Univ. v. Clark*, 276 S.W.3d 819 (Ky. 2009)(notice of appeal filed after a condemnation ruling and after "parties had already litigated the contested issues" but before delayed effective date of ruling); *Clark v. Commonwealth, Cab. for Health and Family Svcs.*, 170 S.W.3d 426 (Ky. App. 2005) (notice of appeal filed after a post-trial ruling that made necessary substantive findings to resolve the case). But this exception cannot save Wright's appeal. This appeal does not involve that type of situation.

The August 31 Order is a "clearly interlocutory decision" – a partial summary judgment order that dismissed some, but not all, parties, and contemplated further action in the circuit court. *See* R. 315-19. While such an order could be certified for interlocutory appeal by the addition of the language set forth in CR 54.02, it is undisputed that the order appealed from here did not contain that language. It was facially interlocutory and clearly not appealable.

In *Johnson* – unlike here – the trial court's original ruling contained the CR 54.02 finality language. One defendant filed a timely motion to alter, amend or

vacate that judgment. Another defendant filed a notice of appeal before that post-judgment motion was decided. The question on appeal was whether that notice could "relate forward" to the time after the motion had been decided. Applying the same rationale, this court allowed the notice to relate forward in those limited circumstances. *Johnson*, 885 S.W.2d at 949-950 and 950 n.1.

A premature notice of appeal does not relate forward when it falls outside the limited circumstances of a fully litigated matter with an otherwise final judgment. This Court has expressly stated that the relation forward doctrine "***does not permit 'a notice of appeal from a clearly interlocutory decision*** – such as a discovery ruling or a sanction order.'" *Johnson*, 885 S.W.2d at 950 (emphasis added). The Court of Appeals has consistently followed the *Johnson* precedent and applied that rule. *See, e.g., Oakley v. Oakley,* 391 S.W.3d 377 (Ky. App. 2012) (dismissing premature appeal and distinguishing the *James v. James* and the *N.L. v. W.F.* cases);[6] *Estate of Kelly ex rel. Kelly v. Beall,* 2012 WL 3143873, *4 (Ky. App. Aug. 3, 2012), disc. rev. denied March 3, 2013 (copy attached as Appendix D) (despite prior premature notice of appeal, appellant's failure to file new or amended notice of appeal from subsequent final judgment was fatal to appeal); *Beatty v. Beatty,* 2011 WL 1733552 *2 (Ky. App. May 6, 2011)(copy attached as Appendix B).[7] In the *Oakley* case, the appellant filed a

[6] Appellant misreads or misrepresents the *Oakley* case. *Cf.* Appellant's Brief at 13. In *Oakley*, the Court of Appeals refused to allow a premature interlocutory appeal of a verbal ruling to proceed although the trial court had entered a written judgment one day later. *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012).

[7] Appellees are cognizant of the limitations of CR 76.28(4)(c) regarding unpublished decisions. Nonetheless, because these unpublished decisions were

premature notice of appeal after a verbal order by the trial court. *Oakley,* 391 S.W.3d at 378. A written judgment was subsequently entered. *Id.* at 378-79. As Judge Nickell explained, the *Oakley* appellant should have appealed from the final judgment or – at the very least – filed an amended Notice of Appeal after the entry of a final judgment. *Id.* at 379. Because the appellant did neither, "there is no order for this Court to review and the appeal must be dismissed for want of jurisdiction." *Id.*

Neither Wright nor Judge Thompson's dissent cite a single case where a premature notice of appeal after a "clearly interlocutory" partial summary judgment related forward to obviate a need for any prior final judgment. The unpublished decision in *Audas v. Audas*, 2005 WL 564102 (Ky. App. March 11, 2005) (copy attached as Appendix E), mistakenly relied upon by Appellant, does not so hold. Faced with the procedural quagmire in *Audas*, the Court of Appeals allowed an appeal to proceed that involved a *nunc pro tunc* order that purported to vacate an order which had itself purported to vacate a prior final judgment. Thus, the dispute had been fully litigated (more than once) and there had been a prior final judgment in *Audas* (actually multiple ones) – before the notice of appeal was filed. *Id. at* *2. The *Audas* ruling is consistent with this Court's precedents limiting the relation forward of premature notices of appeal and does not – in any way – stand for the proposition that the premature appeal of an obviously interlocutory partial summary judgment should proceed.

---

cited by the Court of Appeals and Appellant's Brief, Appellees feel compelled to address them here.

Wright's reliance upon *James v. James*, 313 S.W.3d 17 (Ky. 2010) is also wholly misplaced. The *James* case involved a failure by a party to learn of a trial court's final judgment within the thirty day period to appeal. Within the time for the permissible ten day extension of the appeal time, the appellant filed both a motion for extension of time to appeal and a notice of appeal. Even though the motion for extension was granted after that ten day window, this Court held that the notice of appeal (from the prior final judgment) would be valid. *Id.* at 24. This Court did not – as Wright appears to suggest – create a blanket approval for premature notices of appeal.[8]

B. Public policy considerations weigh against expansion of the relation forward doctrine to save Wright's premature appeal of the interlocutory ruling.

This Court has previously limited application of the "relation forward" rule to situations where there has been some type of final judgment, but the judgment has been divested of finality. The reason for this limitation is clear: without it, parties could simply file premature notices of appeal from clearly interlocutory orders throughout the course of litigation, expecting that they will "ripen" at some indeterminate future date. Cross-appeals could be required before actual finality.

Any expansion of the "relation forward" rule would eviscerate the finality requirement for appellate jurisdiction. Encouraging notices of appeal after obviously interlocutory rulings would create jurisdictional chaos, with uncertainty

---

[8] The *James* Court also did not hold that a new notice of appeal was not required. Rather, the court held that the lower court's alternate remedy of amending the judgment and the filing date of the notice of appeal was invalid. *Id.* at 25.

over whether appellate motion practice or circuit court proceedings could or should go forward. Trials will routinely be disrupted when litigants file premature notices of appeal mid-trial. This is an invitation to confusion and procedural quagmires about when appellate jurisdiction actually vests.

Expansion of the relation forward doctrine in this case would also contravene Kentucky's strong policy disfavoring "piecemeal appeals." *See, e.g., Linkous v. Darch*, 299 S.W.2d 120, 122 (Ky. 1957). This policy recognizes that piecemeal appeals typically work against, rather than in favor of, judicial economy and that the appellate process works best when appellate courts have the benefit of a complete record and the circuit court's full and complete resolution of all issues in a case before undertaking appellate review. Thus, the general rule is that no appeal may be taken until a final judgment is entered resolving all issues in the case.

CR 54.02 provides a limited exception to this well settled rule. But this Court has cautioned that, in exercising its discretion under CR 54.02, "the trial judge must balance this Court's historic policy against piecemeal appeals and the practical needs of the particular case...." *Watson v. Best Fin. Servs.*, 245 S.W.3d 722, 727 (Ky. 2008) (quoting *Jackson v. Metcalf*, 404 S.W.2d 793, 794-95 (Ky. 1966)). "A trial court should not grant CR 54.02 requests routinely or as a courtesy to counsel." *Watson,* 245 S.W.3d at 727.

Wright's argument that she intended – and that the trial court may have "envisioned" – this appeal to proceed does not provide any basis to contravene this strong policy. Appellant's argument is premised on faulty logic about

maximizing judicial economy. She argues that allowing this appeal to proceed to conclusion ***before*** a trial on the merits of the intentional infliction claim against the remaining individual Defendant, Russell Swigart, is desirable and efficient, because there is "no . . . legitimate reason for bifurcation." Appellant's Brief, p. 12. But this approach guarantees two or more appeals – not two trials.

Wright's judicial economy argument also completely ignores the Appellees' Motion to Sever, which was pending at the time of the trial court's summary judgment decision in favor of Appellees. R. 237-38, Motion to Sever filed May 16, 2012. Separate trials were appropriate for two reasons. First, the requirements for permissive joinder of defendants were not met in this case, primarily because the employment claims against Appellees did not arise from the same transaction or occurrence as Appellant's claim against Swigart. The sole claim against Swigart was "intentional infliction of emotional distress" and based exclusively on Swigart's criminal conduct long after he left Appellees' employment. Second, even if the requirements for permissive joinder were met, Appellees would suffer certain and substantial prejudice by having Swigart's ***post-employment*** criminal conduct admitted at a trial involving only employment claims against ORS.

Further, even if this Court were inclined to address the application of the "relation forward" doctrine to premature appeals, the weak merits arguments and procedural irregularities in this case make it an inappropriate vehicle to do so. Such changes would be better introduced through the rulemaking process,

permitting the bench and bar to make comments addressing the far-ranging litigation impacts of such a change.

CONCLUSION

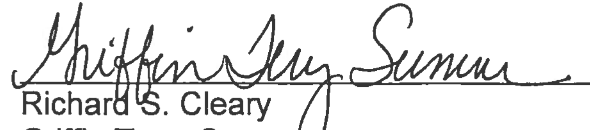
It is well settled that an order which does not resolve all claims among all parties is not final and appealable. CR 54.01. Absent the mandatory certification language under CR 54.02, a partial judgment is not appealable.

A subsequent *nunc pro tunc* Order – issued *ex parte* and after a notice of appeal had been filed – is not valid to retroactively modify a prior ruling to create finality. The Court of Appeals therefore correctly dismissed Appellant Bridgett Wright's attempt to appeal an interlocutory order granting summary judgment to some, but not all, of the defendants.

Even after a final judgment by the circuit court, a premature notice of appeal from a clearly interlocutory order should not, under this Court's precedents, relate forward to that judgment. Any other result would render meaningless the civil rules' requirements for finality of judgments and timely appeals. And expansion of the "relation forward" rule is simply not warranted under the facts and circumstances of this case. Expansion of the rule to cover this type of situation would wreak havoc on appellate procedure in future cases.

The Court of Appeals' dismissal of this appeal should be AFFIRMED.

Respectfully submitted,



Richard S. Cleary
Griffin Terry Sumner
Kathleen B. Wright
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, KY 40202
(502) 589-5400

Counsel for Appellees

0123930.0593067 4839-7639-9902v10

APPENDIX

A *Phillips v. Highland Presbyterian Church, Inc.*,
2010 WL 2428091 (Ky. App. June 18, 2010)

B *Beatty v. Beatty,*
2011 WL 1733552 (Ky. App. May 6, 2011)

C *Stacy v. Allstate Insurance Company*,
2008 WL 2219855 (Ky. App. May 30, 2008)

D *Estate of Kelly ex rel. Kelly v. Beall,*
2012 WL 3143873 (Ky. App. Mar. 13, 2013)

E *Audas v. Audas,*
2005 WL 564102 (Ky. App. Mar. 11, 2005)