SUPREME COURT OF KENTUCKY
NO. 2008-SC-000163-D

DONALD E. JAMES — **APPELLANT**

VS.

BRIEF FOR APPELLANT

THOMAS L. JAMES — **APPELLEE**

ON REVIEW FROM
COURT OF APPEALS OF KENTUCKY
NO. 2007-CA-001837-MR

Taylor Circuit Court
Case No. 03-CI-00354

Submitted By:

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CERTIFICATE OF SERVICE

I hereby certify that I mailed the Original and Nine (9) copies of the foregoing via overnight mail, on this the 16th day of March, 2009 to: Clerk, Supreme Court of Kentucky, 209 Capitol Building, 700 Central Avenue, Frankfort, Kentucky 40601-3488; I further certify that a true and correct copy were sent on the same day via US Mail to the following: Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY, 40601; Hon. Scott Zoppoth, 1800 Kentucky Home Life Building, 239 S Fifth Street, Louisville, KY, 40202; Taylor Circuit Court Clerk, Taylor County Courthouse, 203 N. Court St., Campbellsville, Ky. 42718; and Hon. Doughlas M. George, Courthouse, 111 N. Cross Main Street, P.O. Box 328, Springfield, Kentucky 40069. Counsel further certifies that Appellant has not withdrawn the record on appeal.

C. Thomas Hectus

Counsel for Appellant

INTRODUCTION

This case was tried by a jury in the Taylor Circuit Court. After the trial court denied Appellant's request to have a jury instruction pertaining to the duties of a trustee (Defendant/Appellee herein), the jury returned a verdict in favor of Appellee. After Appellant's Motion for New Trial was denied, Appellant requested, and the trial court granted, a 10 day extension of time pursuant to CR 73.02(d), or in the alternative, vacated and re-entered the judgment, from which Appellant appealed. Notwithstanding the trial court's Order, the Court of Appeals dismissed the appeal, and this Court granted discretionary review.

POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT

Considering the issues presented, Appellant submits that oral argument will assist the Court in resolving this case.

STATEMENT OF THE CASE

This is a civil action arising from the actions of a trustee, Thomas L. James, an attorney and the Appellee herein (hereinafter Tom James). The beneficiary of the trust, Donald E. James (hereinafter Appellant), alleged that the trustee breached his fiduciary duties , thus causing economic loss to Appellant. [Complaint, Attached hereto as Exhibit 1].

In 1995, Appellant established the Donald E. James Trust with Donald E. James as the sole beneficiary of the Trust. The sole corpus of the trust was Appellant's business, James Medical Equipment, a corporation organized under the laws of the Commonwealth of Kentucky. James Medical Equipment was in the business of providing oxygen and durable medical equipment to patients in their homes in Central Kentucky. Tom James admitted that he had fiduciary duties in his management and control of the assets of the Trust, including the collection of revenues and disbursement of the income, for the sole benefit of Appellant.

The case proceeded to trial in the Taylor Circuit Court in March, 2007. Appellant's evidence demonstrated that Tom James hired his cousin, Sharon Morrison, to operate James Medical Equipment, despite her lack of qualifications or relevant work experience. There was ample evidence presented that Sharon Morrison was negligently negligently monitored by Tom James in the operation of Appellant's business.

In August, 1998, Morrison learned that the trust was going to be dissolved, and that she would shortly lose control of James Medical Equipment (and, her job as CEO). Beginning both August and September, 1998, Morrison assisted Rex and Loyie Allen in setting up a new company, "Breathe Easy," which would then compete with James Medical, even as Morrison continued as CEO of James Medical. Morrison's partner in this scheme, Loyie Allen, had a close personal relationship of approximately 35 years with Morrison.

Breathe Easy's address was 6524 Old Lebanon Road, whose offices were rented by Morrison prior to September 15, 1998, *while she was still CEO of James Medical Equipment.* Morrison paid the first month's rent for Breathe Easy's offices, while she was still CEO of James Medical Equipment, and Breathe Easy's phone was in Morrison's name at least until early October, 1998. Breathe Easy's Statement of Cash Flows for the period of September-December 1998 showed a note payable to Morrison in the amount of $26,437.85.

In addition, Morrison was seen working in the Breathe Easy offices by employees while she was still CEO of James Medical Equipment, and while James Medical Equipment's patients were being switched to Breathe Easy. Martha Mattingly, a former employee of James Medical Equipment was then an employee of Breathe Easy, was permitted by Morrison to come to James Medical Equipment's office prior to October 13, 1998 and copy certificates of medical necessity from patient files. Breathe Easy used these certificates of medical necessity to obtain payment for patients switched from James Medical Equipment.

Morrison also encouraged employees of James Medical Equipment to go to work for Breathe Easy while she was still the CEO of James Medical Equipment, and destroyed James Medical Equipment's covenants not to compete with it own employees, thus allowing James Medical Equipment employees to go to work for Breathe Easy.

The address of a Breathe Easy subsidiary, "Madison Home Health," was Morrison's home address, and her husband, William Copeland, was its agent for service of process. Within months, Breathe Easy's patient accounts consisted almost entirely of former James Medical Equipment patients.[1]

[1] Appellant obtained a substantial monetary judgment against Morrison in Jefferson Circuit Court, which was never paid, as she filed for bankruptcy and the debt was discharged.

With regard to Appellant's claim against Tom James, the jury heard Morrison's own testimony that "Thomas (James) was in charge...[and that] [e]verything was either passed through Thomas or the company attorney," and that they would then make a final decision. Essentially, Appellant argued that either with Tom James' authorization and/or ratification, Morrison negligently and fraudulently managed the company to the detriment of Appellant.

At the conclusion of the evidence, Appellant requested a jury instruction that Tom James, as Trustee, was liable for the acts and omissions of Sharon Morrison. In other words, liability could be imposed vicariously. Appellant argued that it was well established that "[a]" trustee is personally liable for torts committed by an agent or employee in the course of the administration of the trust." *Cook v. Holland*, 575 S.W.2d 468, 472 (Ky. 1978) ("... respondeat superior is applied to the trustee just as though he were the owner of the trust property free of the trust....[i]t is immaterial that the trustee receives no benefit from the trust." Nonetheless, the trial court denied the request for the instruction, and after deliberations, the jury returned a verdict for Tom James. A final judgment was entered in accordance with the jury verdict. [Exhibit 2].

Post-Judgment Proceedings in the Trial Court

Appellant file a timely Motion for New Trial, or in the alternative, for Judgment Notwithstanding the Verdict, arguing that the trial court erred in refusing to instruct the jury on the liability of a Trustee for the acts and omissions of his agent; that the court erred in allowing the Trustee to introduce irrelevant evidence that was unduly prejudicial (for example, prior unrelated lawsuits against the Appellant, and alleged underpayment or non-payment of tax liabilities); that the court erred in allowing hearsay; that the court erred in allowing evidence of Plaintiff's alleged "criminal history," even to the extent of an *arrest* for

terroristic threatening, despite the subsequent *dismissal* of that charge, in violation of KRE 404(b); that the court erred in allowing the defendant Tom James to testify as an "expert" in Medicare and/or Medicaid law;[2] that Appellant was unduly prejudiced when Tom James testified (in an *unresponsive* answer to a question put to him) that he had "no insurance" and would have to pay a judgment himself; and, that if any particular error did not warrant a new trial, then the cumulative effect of the errors taken together denied the Appellant a fair trial.

On August 1, 2007, the trial court entered an Order denying Appellant's Motion for New Trial or in the alternative, for Judgment Notwithstanding the Verdict. [Exhibit 3]. However, Appellant's counsel never received a copy of that Order. On September 6, 2007, Appellant's counsel contacted the clerk of the Taylor Circuit Court, and for the first time, learned that the Court had signed an Order on July 31, 2007 which was entered the next day, August 1, 2007, denying the Motion for New Trial or in the alternative, for Judgment Notwithstanding the Verdict. Appellant's counsel advised the court clerk he had never received a copy of the Order, and requested that a copy be mailed immediately. On September 10th, Appellant's counsel tendered the Notice of Appeal with the Circuit Court Clerk, and on the same day, filed a Motion to Extend Time for Appeal pursuant to CR 73.02(d), or in the alternative pursuant to CR 60.02. [Exhibit 4]. Of significance to the

[2] Tom James could not advise the court or the jury of any other case where he testified as an expert on Medicare, other than allegedly in a proceeding in Louisiana in which he *claimed* he testified as an expert. As it turned out, the Louisiana case in which he claimed he testified as an expert in health care law was initiated by Tom James' own law firm for unpaid legal fees in a proceeding involving a motgage on a horse racing track. *Foley & Lardner, L.L.P. v. Aldar Investments, Inc.*, United States District Court, Middle District of Louisiana, Civil Action No. 03-760-D (consolidated with Civil Action No. 04-866-D). Foley & Lardner's fees were secured in part by a mortgage on Aldar's real estate (the horse track in Livingston Parish, Louisiana). The case was tried in a non-jury proceeding in August, 2006. Foley and Lardner's Witness List included *only two experts*, Ben R. Miller, Jr. and Elizabeth A. Alston, and two "may call" experts, Randy P. Roussel and Al Ransome. Thomas James was listed as a *fact* witness. Foley & Lardner's Post-Trial brief made no mention of Thomas James alleged "expert" testimony, although it did recount the testimony of its authentic expert witnesses. Appellant submitted that the defendant's duplicity (or possibly, outright perjury) should be grounds to strike his "opinion" testimony and grant Appellant a new trial. The trial court overruled Appellant's Motion.

appeal herein, at the same time Appellant tendered for filing a Notice of Appeal from both the final judgment and the Order overruling the Motion for New Trial, and paid the requisite filing fee.

On October 22, 2007, the trial court granted the motion to extend the time to appeal for the 10 days permitted under CR 73.02(d), or in the alternative, the trial court vacated the August 1, 2007 order and re-entered it as of October 22, 2007, pursuant to CR 60.02. [Exhibit 5].

The trial court specifically found that Appellant had shown excusable neglect for failure to learn of the entry of judgment. Appellant's Notice of Appeal was tendered on September 10, 2007, *within the time permitted by CR 73.02(d)* (the final judgment on the jury verdict having only been made final by the trial court's Order denying Plaintiff's Motion for New Trial entered on August 1, 2007).

The Proceedings in the Court of Appeals

On appeal, the Court of Appeals dismissed the appeal, holding that after the trial court granted Appellant's request for an extension of time, Appellant was required to file a ***new*** Notice of Appeal within 10 days of **that** Order, i.e., within 10 days of October 22, 2007, notwithstanding the fact that Appellant had already tendered a Notice of Appeal on September 10, 2007, within the 10 days permitted by CR 73.02(d) and paid the filing fee. [Exhibit 6, Court of Appeals' Order dismissing Appellant's appeal]. According to the Court of Appeals, Appellant was required to file a Notice of Appeal by November 1, 2007, some 62 days after the expiration of the original appeal time, and 52 days after the time permitted by 73.02(d). Both CR 60.02 and 73.02(d) are silent as to this requirement announced by the Court of Appeals. Appellant could not have anticipated being required to file a new notice of

appeal. Moreover, Appellee was *already* on notice of Appellant's intention because of the previously filed notice. To deny Appellant an appeal based on a new requirement announced by the court of appeals unfairly denies Appellant his constitutional right to appeal.

ARGUMENTS

I. Appellant Substantially Complied with the Civil Rules for filing an Appeal

CR 73.02(d), specifically allows the court to extend the running of the time in which to take an appeal, not exceeding 10 days from the expiration of the original time, "upon a showing of excusable neglect based on the failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal..." In this case, the final order was entered on August 1, 2007. The original time to appeal would have run on August 31st. An extension of 10 days would have been sufficient time to file a Notice of Appeal. Appellant tendered his Notice of Appeal on September 10, 2007.

In the alternative to relief under CR 73.02(d), Appellant sought relief pursuant to CR 60.02. Under CR 60.02, the failure to receive notice can be deemed "excusable neglect." CR 60.02 states:

> [O]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect . . . The motion shall be made within a reasonable time . . . not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

The circuit court, in its Order granted Appellant's motion under CR 73.02(d), and also in the alternative, vacated and re-entered the Order denying Appellant's original motion for a new trial as of October 22, 2007, which is well within the circuit court's power.

In *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.2d 454, the Appellants did not receive notice of entry of that order. (Ky. 2002). The trial court, pursuant to CR 60.02, vacated the order and entered a new order. *Id.* at 455. This Court affirmed the trial court's actions and stated that rule CR 60.02 is designed "to allow trial courts a measure of flexibility to achieve just results and thereby provides the trial court with extensive power to correct a judgment." *Id.* at 456. This Court went on to say that there is "no doubt that a trial court has authority pursuant to CR 60.02 to grant such relief" when there is excusable neglect. *Id.* This Court reiterated the decision in *Kurtsinger* in *Fluor Construction International, Inc. v. Kirtley*, 103 S.W.3d 88 (Ky. 2003). Similar to *Kurtsinger*, a party did not receive notice of a final order. This Court upheld the trial court's decision to vacate the initial order and enter a new order to allow time for notice of appeal and said that CR 60.02 is "a mistake correcting rule that allows the trial judge broad discretion." *Id.* at 90.

More recently, this Court issued an opinion in *Board of Regents of Western Kentucky University v. Randall Bennett Clark, et al.*, 2008 WL 160587 (Ky. 2009) that has great relevance to this case. [See Exhibit 7, rendered January 22, 2009, and designated "To Be Published"]. In that case, Western Kentucky University (hereinafter "WKU") moved the court pursuant to CR 65.09 to vacate a June 10, 2008 order from the court of appeals that denied WKU's request to dismiss Bennett's appeal. The issue there was whether Clark, in appealing an interlocutory decision of the trial court in a condemnation action, should pursue relief pursuant to CR 65.07 or as an ordinary appellee under CR 73.02. Clark appealed under CR 73.02. The Court of Appeals held, and this Court agreed, that the appeal should be allowed to proceed. This Court reasoned that there was no authority that mandated that

Bennett had to proceed under CR 65.07, *and that a premature notice of appeal does not require that the appeal be dismissed.*

In *Board of Regents v. Clark*, this Court reiterated the substantial compliance rule set forth in *FirsTier Mtge. v. Investors Ins. Co.*, 498 U.S. 269, 275 (1991), that notices of appeal were not fatally defective because they were filed before the trial court ruled on a post judgment motion. Rather, the notice of the appeal filed would relate forward to the time the final judgment was entered. Here, even if the notice of appeal was premature, based on long-established Kentucky law, the notice should have related forward to October 22, 2007, the date of the final decision of the trial court. A new notice of appeal should not have been required as the Order of the Court of Appeals mandates.

What is more, the Court of Appeals in effect announced a "new" rule that Appellant was required to file a new notice of appeal after the October 22, 2007 trial court order. The civil rules are silent as to requiring a new notice of appeal, and there was not a clearly defined procedure for this situation. In *Board of Regents, supra,* the exact procedure for appeal in a condemnation action was not clear. WKU argued that the only means available was CR 65.07. This Court stated that its opinion in *Ratliff v. Fiscal Court of Caldwell County*, 617 SW2d 36 (Ky. 1981), did not mandate that CR 65.07 was the only means available for appeal. Here, there was no law or rule that mandated Appellant file a new notice of appeal. Thus, Appellant should not lose his right of appeal based on a previously unannounced rule.

II. The relation-forward doctrine applies to a previously tendered Notice of Appeal after a ruling under either CR 60.02 or 73.02(d)

As discussed above, this Court's decision in *Board of Regents v. Clark*, *supra*, reiterated the rule set forth in *FirsTier Mtge v. Investors*, *supra*, that the notice of appeal filed *relates forward to the time the final judgment was entered.* In *Board of Regents*, this Court also discussed and reiterated the holding *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994), where a notice of appeal was filed prematurely.

In *Johnson*, *supra*, this Court addressed the relation-forward doctrine and its applicability to notices of appeal. In that case, a notice of appeal was filed before post-judgment motions had been ruled upon and made final. This Court held that "there is no reason why, even assuming these appeals should be deemed "premature", this should require dismissal," since the premature notice of appeal put all parties on notice of the intent to appeal. While the facts are slightly different in this case, the same argument for the applicability of the relation-forward doctrine can be made. Here, the notice of appeal filed by Appellant, even if considered premature since the parties were waiting on a decision from the circuit court on Appellant's motion for extension of time. It clearly served as notice to Tom James of Appellant's intent to appeal. Thus, the relation-forward doctrine would make the premature Notice of Appeal filed in September effective as of the date of the final trial court decision, which in this case was October 22, 2007.

III. It is in the interests of justice, equity and fairness to grant Appellant an opportunity to appeal where the rules are silent as to requiring filing a new notice of appeal

In this case, the Court of Appeals held that after the Taylor Circuit Court granted relief, Appellant should have filed a new Notice of Appeal. However, Appellant could not have anticipated (nor should he be required to anticipate) that a new Notice of Appeal was required to filed when neither rule CR 60.02 nor CR 73.02(d) articulates that requirement. To deny Appellant an opportunity to appeal based on failing to file a new notice of appeal would be unfair and inequitable, especially when there are meritorious grounds upon which the case could be overturned on appeal.

In *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), this Court determined that dismissing an appeal was not an appropriate remedy for failure to properly identify the final judgment from which the appeal was taken because the judgment could have been ascertained with reasonable certainty from the record and no substantial harm or prejudice resulted to the opponent. This Court reasoned, "While our court continues to have a compelling interest in maintaining an orderly appellate process, **the penalty for 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.**" *Id* at 482, Emphasis added.

Although the facts in this case are distinguishable from *Ready*, the same reasonable relationship rationale can be applied. Here, there is no reasonable relationship between the harm caused and the alleged breach of the rule, nor is there a reasonable relationship between the sanction and the seriousness of the defect. The alleged breach, failing to file a new notice of appeal where one was previously tendered, is minor, and caused no harm to Tom James.

Tom James was put on notice of Appellant's intent to appeal when the notice of appeal was tendered in September. Conversely, the harm caused to Appellant by denying him the opportunity to appeal is vastly greater and more detrimental than any harm suffered by Tom James. Further, there is not a reasonable relationship between the penalty of denying Appellant an opportunity to appeal and the defect of not filing a new notice of appeal when neither CR 60.02 nor 73.02(d) expressly requires that step. In this case it seems clear that the punishment for the alleged breach does not have a reasonable relationship to the harm caused or to the seriousness of the defect.

Finally, the Order of the Court of Appeals violates Appellant's guarantee of one appeal as a matter of right pursuant to § 115 of the Kentucky Constitution, which is subject only to the provision that "[p]rocedural rules shall provide for expeditious and inexpensive appeals." The rule announced by the Court of Appeals requiring Appellant to file a *new* Notice of Appeal within 30 days of the October 22nd Order of the trial court was neither "expeditious," given that Appellant had already tendered a Notice of Appeal, nor would it be "inexpensive," given that Appellant would have to pay a second filing fee (in addition to attorney's fees for this redundant and superfluous activity). Appellant submits that the Notice of Appeal tendered on September 10, 2007 properly invoked his constitutional right to appeal.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate the Order of the Court of Appeals dismissing the appeal, to reinstate the appeal, and to remand this case to the Court of Appeals for further proceedings.

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