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

DONALD E. JAMES — **APPELLANT**

VS.

REPLY 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 26th day of May, 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 Counsel further certifies that Appellant has not withdrawn the record on appeal.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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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.[1] 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[2] was negligently monitored by Tom James in the operation of Appellant's business.

ARGUMENTS

I. Jurisdiction and Authority of the Trial Court

The Taylor Circuit Court specifically found that Don James had shown excusable neglect for failure to learn of the entry of judgment, and extended the time to appeal for ten (10) days from the date of the original time, or in the alternative, the Taylor Circuit Court vacated the August 1, 2007 order and re-entered the Order as of October 22, 2007, pursuant to CR 60.02. 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**

[1] Tom James, an attorney, is Don James' nephew. As such, Don James felt Tom James would be a trustworthy and suitable person to act as the Trustee of the Donald E. James Trust. Don James only reward for trusting his nephew Tom to act as a competent and dutiful trustee was the near loss of his business, which was the sole corpus of the trust.

[2] 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.

> **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." (emphasis added).

In *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.2d 454, (Ky. 2002), the Appellants did not receive notice of entry of that order. 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 (emphasis added). 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* (emphasis added).

Even though the facts in *Kurtsinger, supra,* are different than the situation at hand, its holding still applies to this case. *Kurtsinger* stands for the proposition that trial courts have broad discretion in determining whether there has been "mistake, inadvertence, surprise or excusable neglect" under CR 60.02. If a trial court finds that there has been mistake, inadvertence, surprise or excusable neglect, it is in its discretion to vacate a previously entered order and re-enter it if. The trial court has the authority to look at a situation on a case-by-case basis and determine whether under those facts and circumstances, mistake, inadvertence, surprise or excusable neglect has occurred.

Appellant's counsel did not receive the Order, as attested to by every member of Appellant's counsel's staff. The only reason Appellant's counsel knew about the final order was another in a series of phone calls to the Taylor Circuit Clerk's office. Taking all of these

factors and efforts into consideration, it was well within the authority of the trial court to deem this excusable neglect under CR 60.02.

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)

This Court, following the United States Supreme Court and the federal rules of appellate procedure, has held that premature notice of appeal in reasonable circumstances is deemed "simply to **relate forward and become effective on the date the trial court tenders its final judgment.**" *Johnson v. Smith*, 885, S.W.2d 944, 947 (Ky. 1994).[3] (emphasis added). This Court went on to say that this rule "permits a premature notice to be effective to invoke jurisdiction of the appellate court **upon final judgment** where . . . the **circumstances suggest a filing a notice of appeal would not be unreasonable.**" *Id.* (emphasis added). In this case, it was not unreasonable for Appellant to tender his Notice of Appeal while he was awaiting a decision from the trial court. Appellant's Notice of Appeal was timely pursuant to CR 60.02, the trial court's final order vacated the August 1, 2007 and re-entered it as of October 22, 2007. Thus, using the relation forward concept, the Notice of Appeal would become effective as of that date.[4]

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 of Appellant's Brief]. In that case, Western Kentucky University

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[3] In *Clark v. Com., Cabinet for Health and Family Services*, the Court of Appeals addressed the issue of a prematurely filed notice and reiterated this Court's interpretation of the "relation forward" concept even though it was procedurally different than *Johnson v. Smith*. *Clark*, 170 S.W.2d 426 (Ky.App.2005).

[4] "A premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the Rule treats the premature notice of appeal as 'filed after such entry.' ... it [FRAP 4(a)(2)] permits a premature notice of appeal ... to relate forward to judgment and serve as an effective notice of appeal *from the final judgment.*" *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 275 (1991). Emphasis Original.

(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.

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 his brief, Tom James does not specifically address the equitable arguments raised by Appellant. However, the equitable arguments are significant and warrant examination. In *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), the Court of Appeals 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. The Appeals 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 prior to the trial court re-entering the final order on October 22, 2008, is minor, and caused no prejudice 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 no 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 required 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.

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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